

Electoral Dispute Resolution: The Need for a New Sub-Specialty

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A focus of my current scholarship is the effort to design the optimal tribunal for the adjudication of disputes over the counting of ballots in presidential or other high-stakes elections.¹ Having already determined that the most important attribute for this tribunal is its evenhanded impartiality toward both sides of the dispute, I am exploring alternative mechanisms for incorporating this attribute into the structure of the tribunal. One possibility would be to give each of the majority and minority leaders in the legislature the power to appoint one member of the tribunal, and then this even number of members—balanced equally between the two major political parties—would have the collective authority to appoint one potential tie-breaking member. This appointment mechanism would guarantee the overall neutral impartiality of the institution as a whole: it could not rule in favor of either side without support from the mutually acceptable tie-breaking member or, perhaps less likely, from members appointed by both parties.

But what if one of the two candidates involved in the disputed election is an independent or from a third party? It would be unlikely, but not inconceivable. After all, a century ago Theodore Roosevelt ran for president as the Progressive Party (or “Bull Moose”) candidate when he came in second to Woodrow Wilson, the Democrat. The Republican Party candidate, the incumbent President William Taft, finished third. Suppose the Republican Party fractures itself again in 2012. Perhaps Mitt Romney is the nominee and, being unacceptably moderate to conservatives, Sarah Palin runs as the Tea Party candidate. Like Roosevelt, Palin might actually do better than the official GOP candidate. Imagine the possibility that deciding whether she or Obama won depended on disputed ballots from Florida (as in 2000). In this situation, would a tribunal designed to be evenly balanced between Democrats and Republicans be equally fair to the Tea Party

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¹ See, e.g., Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 471 (2010); see also Edward B. Foley, *How Fair Can Be Faster*, 10 ELECTION L.J. 187 (2011).

candidate and her supporters, or could they reasonably complain that this tribunal was skewed too much to the left of contemporary American politics? Assuming one wanted to design a tribunal to avoid this concern, how would one do so? That task, as I see it, is a challenge for specialists in the newly emerging field of electoral dispute resolution.

There are other attributes of the tribunal that I would want these specialists to consider. How many members should it have? My judgment is that the 15-member Electoral Commission that resolved the disputed presidential election of 1876 was too large: the single member who was supposed to be neutral between the two political parties was overwhelmed by seven Democrats on one side and seven Republicans on the other. My conjecture is that it would be much easier for the single tie-breaking member to remain genuinely neutral if the tribunal had a total of only three members and thus the tie-breaking member was not outnumbered by either side. But with only three members, it would be impossible for the tribunal to reflect the democratic diversity of the United States, and it would be desirable for the tribunal to do so (in the same way, perhaps, that we want juries to reflect a fair cross-section of their communities).² Specialists in Electoral Dispute Resolution could help identify the optimal size of the tribunal in order to balance the goals of impartial deliberation and demographic diversity.

Similarly, if we desire that the tribunal act judicially rather than politically—resolving the dispute, in other words, according to the law and evidence, and not based on political considerations—then we might wish to impose some further constraints on who may serve or on how they are appointed. Should only individuals who already serve on conventional courts be eligible to sit on this special electoral tribunal? Or should membership be open to any individual deemed worthy to adjudicate the electoral dispute? Perhaps the best way to reduce the role that politics plays in the tribunal's deliberations would be to create a kind of buffer between politicians and the tribunal's members in the appointment process. Suppose, for example, that the politicians selected not the tribunal itself but an intermediary agency, which in turn would appoint the tribunal. Imagine, moreover, that the politicians were constrained on whom they could select for this intermediary agency: for example, retired federal judges, who are told that they should pick for the tribunal itself only individuals of the highest judicial integrity. That extra buffer in the appointment process might help to assure that the individuals actually appointed to the tribunal would approach their task of resolving the electoral dispute with the desired temperament of judicial

² I am indebted to Kevin Oles for emphasizing this important point. See [Kevin's paper, on file and available upon request].

impartiality (rather than with a partisan zeal to resolve the dispute in a way that will help the party's candidate to win).

Specialists in electoral dispute resolution could use their expertise to develop the best possible buffering device, given the various normative factors to consider. They could calibrate the details of this buffering device in connection with all the other parameters that go into the design of the optimal tribunal (size, remuneration, and length of service, as well the potential for the removal or replacement of the tribunal's members). There are enough details of this sort to keep these specialists busy for a while.

In this short essay, however, I wish to leave aside further pursuit of these details and explore instead the general concept of electoral dispute resolution as a newly emerging field. More precisely, I should describe it as the previously uncharted intersection of two existing fields: election law and dispute resolution (sometimes called alternative dispute resolution, although for reasons that I shall explain it should not be conceived as focusing narrowly on mediation, arbitration, and other nonjudicial mechanisms for the resolution of private-sector disputes). The guiding premise here is that election law is a substantive area of law that could benefit from the procedural wisdom and methodologies developed in recent decades by the dispute resolution experts.

There is also a corollary to this guiding premise: election law requires not merely the mechanical application of existing dispute resolution knowledge to election law disputes. Instead, election law disputes have a distinctive character, which requires the field of dispute resolution to push beyond its existing base of knowledge and methodologies and, most likely, develop new paradigms and techniques for these distinctive election law disputes. To be somewhat more concrete, while the knowledge that the field of dispute resolution has gained in the resolution of labor-management disputes is surely relevant in thinking how best to tackle election law disputes—after all, a two-party democracy historically has been seen (somewhat crudely) as involving electoral competition between a labor party (Democrats) and a management party (Republicans)—election law disputes inevitably are different from labor-management disputes insofar as they involve fights about the rules that determine who holds the sovereign power of political office, rather than the wages or working conditions of private-sector employees. There may be room for bargaining over wages and working conditions, because of the potential for win-win solutions when both the workers and managers of a particular firm unite to battle their economic competitors. Conversely, the battle between Democrats and Republicans over the outcome of disputed elections, or even over the rules for conducting elections, may be much more of a zero-sum game, leaving little room for the

kind of bargaining techniques that might work in labor-management negotiations.

The point here is that the field of electoral dispute resolution calls for a marriage between election law and dispute resolution. Neither existing discipline will be able to develop the new field solely on its own. Instead, success will require a genuine partnership between the two.

It is too early to tell whether there will emerge some form of intellectual coherence to developing optimal methodologies for resolving various kinds of electoral disputes. Although my own work has focused mostly on the adjudication of ballot-counting disputes, I have some experience with redistricting disputes, with pre-voting litigation over the rules for casting ballots, and with fights over legislation to reform the ballot-casting or ballot-counting rules. I have not attempted any systematic analysis of what all these various kinds of election disputes share in common, but intuitively they all have as their most salient feature the fact that the institutions of government with the power to resolve these disputes are supposed to act in the public interest and yet those institutions are populated with individuals who hold their positions of power as a result of their partisan allegiances and activities—and therefore are very unlikely to act with regard to the electoral dispute in a way that contradicts their own party's interest. Officially charged with acting in the public interest, these individuals are not permitted to acknowledge that they actually act for the benefit of their own particular party, and thus much dissembling occurs.

These political pathologies make the resolution of electoral disputes particularly challenging. They certainly do not seem easily susceptible to conventional techniques of so-called alternative dispute resolution, like mediation. The effort of Warren Christopher to mediate the ballot-counting dispute that led to *Bush v. Gore* famously failed when James Baker bluntly told his counterpart that Bush had won, Gore had lost, and there was nothing to discuss.³ Much more modest efforts in 2008 to develop any procedural mechanisms to make voting-related litigation more orderly were similarly unsuccessful.

Perhaps still more discouraging is the fact that, even when there is institutional deadlock and it is highly uncertain which side will benefit from maintaining the status quo, it remains impossible, or at least extraordinarily difficult, for the two parties to negotiate a compromise that would benefit the public. Two recent examples from Ohio illustrate this problem. First, in

³ The scene in *RECOUNT*, a dramatization of the entire dispute over the outcome of the 2000 presidential election, is particularly effective in making this point. *RECOUNT* (HBO Films 2008).

2009, neither party had complete control of the state's legislature (one house was in the hands of Republicans, the other in the control of Democrats), and it was unclear which political party would have the advantage when it came time for redistricting after the 2010 census. In the previous decades, both parties had professed to support redistricting reform that would eliminate egregious partisan gerrymanders that hurt the ability of the legislature to represent the public as a whole fairly and effectively. Although the two parties harbored somewhat different visions of redistricting reform—Democrats emphasized the value of competitive districts, whereas Republicans emphasized compactness and other geographical factors—it seemed that a compromise that at least would eliminate the evil of egregious gerrymandering should have been within reach. Yet, despite the conditions of political uncertainty at the time, and notwithstanding some vigorous efforts to broker a deal, the parties were unable to agree.⁴

Similarly, in the aftermath of the 2008 election, it was obvious that Ohio needed to reform its rules for provisional voting: the state used provisional ballots more heavily than most other states and exposed itself to catastrophic risks if the 2012 presidential election turned on the counting of disputed provisional ballots in Ohio. Recognizing this problem, each chamber of the state's legislature enacted its own version of provisional voting reform. But the two chambers, being controlled by different parties, were unable to compromise between their two alternative reforms. The dispute still rages: although Republicans gained control of both chambers after the 2010 elections and proceeded to enact their own reform bill, Democrats have invoked the mechanism of the referendum to put the issue before the voters and, if they raise enough signatures, prevent the Republican bill from becoming operational until after the 2012 elections.⁵ Consequently, if a bipartisan compromise cannot be reached, Ohio potentially still faces the same risk of catastrophic litigation over provisional ballots in 2012 that was recognized immediately after the 2008 election.

To be sure, the inability of the Ohio legislature to compromise over redistricting or provisional voting seems somewhat similar to the inability of Congress and the President to reach a "Grand Bargain" over taxes and spending in order to solve the nation's dire fiscal problems. Maybe the pathologies that afflict electoral disputes are just the same that seem to afflict contemporary politics generally. If this is true, then insofar as the field of

⁴ Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. OF CONST. L. & PUB. POL'Y 37, 45 (2010).

⁵ Jim Siegel, *House Approves Election Overhaul Bill*, THE COLUMBUS DISPATCH, June 29, 2011, available at <http://www.dispatch.com/content/stories/local/2011/06/29/house-approves-election-bill.html>.

dispute resolution can develop a solution to the polarized gridlock over fiscal policy, it can tweak that same solution to overcome the obstacles to resolution of electoral disputes.

But I doubt that the two situations, despite their superficial similarities, are identical. For one thing, the bipartisan bargaining over fiscal policy has not yet completely run its course. As anemic and last minute as it was, the parties did enact a mini-solution to get the nation past the deadline over the debt-ceiling limit. Moreover, built into that partial compromise was the creation of the bipartisan Supercommittee, with its triggering mechanisms, which will force the two sides to continue their negotiations. By contrast, in Ohio, the window of opportunity for compromise over this round of redistricting slammed completely shut after the 2010 elections. Likewise, the parties have been unable to develop even a temporary stopgap compromise over provisional voting that will protect the system from potential chaos in the 2012 elections.

I make these observations not to despair over the possibility of any success ever in the resolution of electoral disputes from the perspective of the public interest. On the contrary, there have been successes at other times, in other places.⁶ Instead, I wish only to underscore the distinctiveness of electoral disputes and thus the need for the field of dispute resolution to partner with election law to develop new strategies for analyzing and addressing electoral disputes.

It may be necessary, or at least fruitful, for the emerging field of electoral dispute resolution to draw upon another growing sub-specialty under the dispute resolution umbrella; what I call “Democratic Proceduralism.” This adjacent sub-specialty ambitiously attempts to develop new and better procedures for operating a democratic society. One version of this movement, often associated with James Fishkin, emphasizes the value of deliberative processes and thus designs new institutions like Fishkin’s own “deliberative poll” to promote deliberation that is perceived lacking in existing institutions.⁷ Another version focuses on the processes of

⁶ For example, Minnesota’s disputed gubernatorial election of 1962 involved a successful mediation of the type that Warren Christopher sought for the 2000 presidential election. See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 140 (The Ohio State University Michael E. Moritz College of Law 2007).

⁷ See JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM (Yale University Press 1993).

constitutional reform, including the optimal procedures for selecting delegates to a new constitutional convention.⁸

Without delving too deeply into the alternative versions of democratic proceduralism, it is worth observing that strategies for the design and implementation of fair procedures for constitutional reform—if successful—would also be potentially successful with respect to disputes over electoral rules. There is, of course, a close affinity between constitutional law and election law.⁹ To be sure, constitutional law addresses many subjects other than the operation of the electoral process (like criminal procedure), and election rules are more often spelled out in statutory or administrative, rather than constitutional, provisions. Nonetheless, a key function to a polity's constitution is setting forth the basic rules for organizing the legislature, and thus the constitution necessarily touches on the rules for electing the members of the legislature. Therefore, if there is a way for the field of dispute resolution to chart a path on how best to achieve constitutional reform in the public interest, that path potentially can be pursued to implement electoral reform as part of constitutional reform.

To illustrate this point with a specific example, Ohio has a requirement that every twenty years the electorate must vote on whether to hold a new constitutional convention.¹⁰ This issue comes before the voters again in 2012. There are those in Ohio who would prefer to conduct constitutional reform by means of a bipartisan and consensual “constitutional revision commission,” rather than a potentially unruly (even chaotic) convention process.¹¹ Advocates of the commission approach observe that it was used successfully in the 1970s, whereas voters usually reject the opportunity of holding a new constitutional convention for fear of opening Pandora's Box. Whatever the merits of each side to this debate, an issue on which I am agnostic in this essay, the key point here is if the field of dispute resolution could guide a state like Ohio through the constitutional revision process, then election reform could be part of that process. Indeed, one would expect either a constitutional convention or a constitutional revision commission to address key electoral issues like redistricting.

⁸ Cf. Richard Briffault, *Electing Delegates to a State Constitutional Convention*, 36 RUTGERS L. J. 1125 (2005).

⁹ Cf. Heather K. Gerken, *What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010).

¹⁰ See OHIO CONST. art. XVI, § 3.

¹¹ See Mike Curtin, Editorial, *Ohio Constitution Could Use Some Tweaking*, THE COLUMBUS DISPATCH, Nov. 11, 2010, available at <http://www.dispatch.com/content/stories/editorials/2010/11/14/ohio-constitution-could-use-some-tweaking.html>.

The lessons of the last decade indicate that also on the constitutional revision agenda should be the resolution of other significant electoral disputes, like the rules for provisional voting or even voter identification requirements. Previously, most scholars and public officials would have thought that these details of the vote-casting process were better left to ordinary legislation rather than imbedded into less changeable provisions of the constitution. But given the way in which the rules of the vote-casting process have themselves become an object of partisan advantage to be changed through ordinary legislation when it advantages the narrow interests of one party to do so, one cannot help but conclude that these rules should be put into the constitution where they would be better protected from the partisan manipulation of the ordinary legislative process.¹² The constitution, in other words, should set forth some basic ground rules concerning the casting and counting of ballots, in the same way that it should set forth the basic ground rules concerning redistricting. Indeed, one can even argue that the constitution should set forth the procedural mechanism for adjudicating disputes over the counting of ballots that arise in particular elections, so that neither party can manipulate this aspect of the vote-counting process in the context of a specific dispute.

I am not saying that it will be easy for the field of dispute resolution to identify and implement a fair process for constitutional reform. Any process that is proposed is likely to be attacked as biased in favor of one political party, even if this attack is leveled disingenuously for strategic reasons. Moreover, assuming that it would be possible to get over this hurdle, and it could be recognized that there is some objectively fair method of constitutional reform, one party might still be able to block its implementation for purely self-interested reasons. The obstacles to implementing sound electoral or other constitutional reforms are so deeply entrenched that Professor Heather Gerken has urged scholars to devote substantial attention to just the issue of how to implement good ideas, what she calls the “from here to there” problem.¹³

¹² Interestingly, according to important new scholarship, this view would actually be a throwback to a prevailing view at the time of the Founding. See Kirsten Nussbaumer, *Republic Election Reform and the American Montesquieu* (June 28, 2011), (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898406).

¹³ See Heather K. Gerken, *Getting from Here to There in Election Reform*, 346 FACULTY SCHOLARSHIP SERIES (2009), available at http://digitalcommons.law.yale.edu/fss_paper/346.

Ultimately, it may take a whole new form of political science—what I have termed neo-Madisonianism—in order to tackle these obstacles.¹⁴ The idea behind neo-Madisonianism is that James Madison, in *The Federalist Papers* correctly identified the problem that confronts the design of democratic, or what he called republican, institutions. But he did not provide a sufficient solution to the problem. To oversimplify, the problem is the self-interested motivation of politicians and even the citizens who elect them. It is the problem of insufficient political virtue. But of course, if citizens were sufficiently virtuous, government would be unnecessary.¹⁵ Yet a lack of sufficient virtue means that the institutions of government will be become corrupted by the pursuit of narrow partisan interest, and the citizens who are advantaged by this corruption have no incentive to correct it. Madison thought he could solve the problem of insufficient virtue through the separation of powers: ambition must counteract ambition. But at least in the field of election law, we have seen that separation of powers is inadequate to secure the fair operation of the electoral process, which puts into office the politicians who will counteract each other's ambitions.¹⁶

My hope is that the newly emerging field of electoral dispute resolution can pursue the development of neo-Madisonian solutions to the original Madisonian problem. With two centuries of additional experience—and all the advancement of science since the late eighteenth century, including in the fields of psychology, game theory, group dynamics, as well as in the discipline of dispute resolution itself—one can only hope that new wisdom can be brought to bear on the design of institutions and procedures that economize the limited amount of virtue that exists among politics and citizens. If new dispute resolution methodologies can harness and make the most efficient use of what political virtue there is, as well as perhaps develop techniques that can augment the amount of available virtue, at least marginally, then perhaps it can produce new avenues for achieving impartial electoral reforms in the public interest.

This project will take time, perhaps several generations. It may be necessary to harness the instrument of civic education in order to improve the

¹⁴ See Edward B. Foley, *Democracy in the United States, 2020 and Beyond*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 209–26, (Guy-Uriel E. Charles et al. eds., Cambridge University Press 2011).

¹⁵ See THE FEDERALIST NO. 51 (James Madison) (“[i]f men were angels, no government would be necessary.”).

¹⁶ For a more detailed examination of this point, see Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and its Continuing Relevance*, 44 IND. L. REV. 23, 78–79 (2010).

economy of political virtue. Indeed, the discipline of Dispute Resolution may need to devote as much attention to disputes over the content of civics education in the public schools as to electoral rules. Nonetheless, the project remains worthwhile since, after all, the original Madisonian goal of designing a fair system of government for all members of society remains.

Finally, I close with an observation about the relationship of law and politics, and in doing so return to the specific topic with which I began: the resolution of disputes over the counting of ballots in presidential and other high-stakes elections. In a constitutional democracy, or at least our constitutional democracy in the United States, there is a strong, and appropriate, impulse to have these disputes decided pursuant to the rule of law. There is a sense that the resolution can be legitimate only if it was achieved through the law. As desirable as the lawfulness of the dispute resolution process is, it remains also true that the resolution must be politically acceptable. The losing side must acquiesce, even to the operation of the law. Otherwise, there is civil war. And if the losing side perceives that the resolution is sufficiently unjust even if pursuant to the law, it will not acquiesce despite the resolution's mere legality.

This last point is important. It requires the emerging field of electoral dispute resolution to attend, not merely to the law that governs these disputes, but to the sense of justice that will guide the losing side's reaction to any resolution. This point does not make the law subservient to politics, and it certainly does not mean that the law should accommodate the narrow partisan self-interest of the losing side. But it does mean that the art, as well as science, of electoral dispute resolution must marry considerations of law and justice, just as it must marry the wisdom of its two originating fields.