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The Judicialization of Politics

THE CHALLENGE OF THE ALI *PRINCIPLES OF ELECTION LAW* PROJECT

Steven F. Huefner[†] & *Edward B. Foley*^{††}

INTRODUCTION

Our contribution to this symposium reflects almost a decade of collaborative work thinking about the general topic of election law and its improvement. In the specific context of this symposium's focus on the role of the American Law Institute (ALI), our academic work could perhaps be characterized as an effort at a "reformulation" of certain aspects of election law, though not a "restatement." Specifically, much of our recent work has focused on strengthening the processes of election administration, from voter registration to the resolution of post-election disputes.¹

However, one feature of the field of election law has greatly complicated our efforts—as well as the efforts of numerous other practitioners, legislators, and academics—to enhance these foundational processes of representative democracy. That feature is the uniquely politically charged nature of election law. As we will describe in more detail below,² this political valance renders many issues of election administration highly resistant to neutral solutions. In particular, the fact that election law is in an important sense the "meta-law" of

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¹ See, e.g., STEVEN F. HUEFNER, EDWARD B. FOLEY & DANIEL P. TOKAJI, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007); STEVEN F. HUEFNER, NATHAN A. CEMENSKA, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2011).

² See *infra* text accompanying notes 6-30.

representative democracy means that more is often at stake in battles over how to structure this field of law than in battles over principles in other fields of law. Partly as a result, for most of our country's history, courts have treated many of these issues of election law as political questions not suited for judicial supervision.

Perhaps it is therefore not surprising that until 2010, the ALI had not undertaken any projects focused on election law. But that year, almost 50 years after *Baker v. Carr*³ and a decade after *Bush v. Gore*,⁴ the ALI decided to explore whether at least some areas of election law were amenable to the formulation or reformulation of neutral (or impartial) principles. Two areas in particular rapidly emerged as fruitful areas for the ALI's initial consideration: The ideal institutions and processes for resolving election disputes, and the best practices for states to deploy in connection with the recent widespread adoption of non-precinct voting.

As we describe in this article, the ALI's *Principles of Election Law* Project is a clear example of the ALI tackling a new and perhaps difficult field. In the discussion to follow, we will elaborate on the main challenges and opportunities that this project presents. We will begin in Part I with a brief overview of what we view as some of the unique features of election law as a field of American law. In light of these features, Part II then will discuss the Project's work on the subject of resolving disputed elections. Next, Part III will turn to a consideration of the Project's work to develop best practices concerning non-precinct voting. Finally, Part IV will offer a few concluding thoughts about both the work already done and the work ahead for the ALI *Principles of Election Law* Project.

I. THE UNIQUENESS OF ELECTION LAW

As a field of American law, election law is unique. Unlike other laws, election law sets the conditions under which all the other democratic decisions about the structure of government and society will be made. Questions concerning election law and process therefore can be the most hotly contested of issues. In addition, and no doubt substantially as a result of these heavy political overtones, many matters of election law have historically been treated as political questions not amenable to

³ 369 U.S. 186 (1962).

⁴ 531 U.S. 98 (2000).

judicial supervision. Nevertheless, the time is ripe for an ALI effort with respect to select matters of election law.

A. *Election Law as “Meta-Law”*

In all representative democracies, elections determine who will make government policy. Election law thus functions as a sort of meta-law by setting the conditions for selecting those government officials who will determine society’s other legal rules.⁵ Establishing the “rules of the game,” therefore, can be critical to the results of the game, or, in other words, to the eventual outputs of the political process.

It thus is not surprising that politicians and political parties often argue vigorously over such basic structural questions as whether to permit Election Day registration, who should draw legislative district boundaries, what identification voters must present at the polling place, or how many days or hours to allow early or absentee voting.⁶ Nevertheless, it can be discouraging that these fundamental issues about process are often resolved by partisans, and primarily on the basis of the anticipated effects on partisan interests or desired policy outcomes, rather than by neutral arbiters based on essential notions of representational fairness and democratic participation.

Ideally, these questions of the meta-law of representative democracy should be decided behind a veil of ignorance, without awareness of their resulting impact on other fields of law and policy. We should structure the best electoral processes we can and let the chips, in terms of electoral (and policy) outcomes, fall where they may. But, in fact, these choices about the meta-law typically are made with full awareness of their likely impacts, and by individuals who deliberately seek to capitalize on these impacts.

⁵ See, e.g., Richard H. Pildes, *What Kind of Right Is “The Right to Vote”?*, 93 VA. L. REV. IN BRIEF 45 (2007) (describing right to vote as “the foundational right of democratic self-governance”); Adam Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 362 (2007) (noting accepted view that right to vote is important because of opportunity to affect political process); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing right to vote as “preservative of all rights”); cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-88 (1980) (describing importance of fair political process, through which society’s fundamental value choices can be made); LOUIS MASSICOTTE ET AL., *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* (2004) (comparing key features of election laws in democracies around the world).

⁶ See, e.g., RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (describing many contemporary political battles concerning the law of politics); WENDY R. WEISER & LAWRENCE NORDEN, *VOTING LAW CHANGES IN 2012*, at 2-3 (2011) (describing recent state legislative battles over many of these issues), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

Moreover, it can be especially troubling, and in a way that may not be true in other fields of law,⁷ when the judiciary resolves an election law controversy with a split decision along ideological lines. Here too, given election law's character as meta-law, we might hope that a fair result—-independent of specific political outcome—ought to be universally or at least widely agreed upon by fair-minded individuals or institutions. Courts in particular are presumed to function as neutral arbiters of fairness. So when judges themselves are deeply divided along ideological lines over matters of election law,⁸ the difficulty of identifying, or at least agreeing upon, neutral principles becomes apparent.

B. Election Law and the Political Question Doctrine

The difficulty that even fair-minded jurists can have in resolving an election law issue provides arguable justification for the reluctance that courts traditionally have shown when asked to intervene in certain aspects of the law of the political process. Historically, such central election issues as how district lines were drawn or who was the victor of a contested election have been treated as “political questions” to be resolved by the political branches of government.⁹ Under the political question doctrine, American courts have left many aspects of election law unexamined and unsupervised for most of the country's history.¹⁰ While this article is not the place to examine the full history of the deployment of the political question doctrine to avoid judicial incursions into election law, a few observations may be relevant.

⁷ For instance, when an issue of tort law divides a high court on apparently ideological grounds, observers may justifiably be concerned that politics is influencing the court and compromising our aspirations for neutral adjudication in that field. But that is a different concern than the sense, which may well accompany split judicial decisions concerning questions of the law of the political process, that the entire political process is not subject to neutral oversight. See Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139, 140-41 (2013).

⁸ See, e.g., *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (5-4 decision striking down portion of Voting Rights Act); *Bush v. Gore*, 531 U.S. 98 (2000) (5-4 decision determining 2000 presidential election); see generally Foley, *The Separation of Electoral Powers*, *supra* note 7, at 143-44; HASEN, *supra* note 6; Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L. J. 1407 (2001).

⁹ See *Colegrove v. Green*, 328 U.S. 549 (1946); *Luther v. Borden*, 48 U.S. 1 (1849).

¹⁰ For one account of the increasing role federal courts have recently played in matters of election law, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003); see also Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

The Founders were already quite experienced with legislative elections when they created American democracy.¹¹ Perhaps because elections were familiar, the Founders did not give much thought to how to structure them.¹² Furthermore, legislatures were expected to be the judges of the elections of their own members.¹³ Accordingly, even though election controversies have occasionally dogged democracy from the beginning,¹⁴ the Founders likely did not anticipate that courts would come to play a significant role in overseeing elections.¹⁵ Instead, in the country's formative years, election controversies played out in legislatures, in election canvassing commissions, or even in the streets—but not ordinarily in the courts.¹⁶

Over the years, opportunities and pressures for judicial involvement in election matters have grown. The fitful moves toward near-universal suffrage, the adoption of the secret ballot, and the country's significant population growth and accompanying urbanization all contributed much greater complexity to our voting processes.¹⁷ The arrival of new technologies designed to improve the mechanics of voting has only compounded this complexity. Meanwhile, the entrenchment of a two-party political dynamic, not

¹¹ Most of the founding fathers were elected members of their respective colonial congresses. For instance, George Washington, Thomas Jefferson, Richard Henry Lee, Patrick Henry, and Peyton Randolph were elected to the House of Burgesses in Virginia; John Adams and Samuel Adams were elected to the Massachusetts Assembly; Benjamin Franklin and John Dickinson were elected to the Pennsylvania Assembly. See *America's Founding Fathers: Delegates to the Constitutional Convention*, NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html (last visited Oct. 21, 2013).

¹² The only Federalist paper directly to address colonial elections does little to elaborate on these elections, other than to state that the example of these elections “is so well known as to require little to be said on it.” THE FEDERALIST NO. 52 (James Madison).

¹³ See U.S. CONST. art. I, § 5.

¹⁴ See, e.g., Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23 (2010) (describing late eighteenth century dispute over outcome of New York gubernatorial election).

¹⁵ Moreover, in the late eighteenth century courts were generally less involved in supervising the activities of a much smaller government, and before the Civil War the role of the federal courts in particular was inherently limited by federalism. As of 1900 (shortly before the founding of the American Law Institute), the settled law was that federal courts would not supervise state electoral processes. See, e.g., *Taylor v. Beckham*, 178 U.S. 548, 580 (1900) (“The Commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the General Government to enforce the guarantees of the Constitution, or to repel invasion, or to put down domestic violence.”).

¹⁶ See, e.g., Foley, *The Founders' Bush v. Gore*, *supra* note 14, at 30-51.

¹⁷ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

anticipated by the Founders, added an ongoing partisan overlay to the country's electoral processes.¹⁸

Yet until 1962, the courts continued to play a limited role in supervising these increasingly complex processes. The Supreme Court's decision that year in *Baker v. Carr*¹⁹ was a watershed event, introducing courts deeply into the "political thicket" that Justice Frankfurter had warned the Court to avoid just 16 years earlier.²⁰ *Baker v. Carr*, of course, opened the floodgates for judicial review of the drawing of legislative district lines under the equal protection clause. Ensuing cases firmly established the principle of one person, one vote, and the requirement that legislative districts therefore contain equal populations.²¹

Still, courts played relatively little role in the supervision of the day-to-day administration of election mechanics,²² so much so that in 2000 most observers anticipated that the Supreme Court would not have a basis for reviewing the results of Florida's razor-thin and contested voting in that year's presidential election.²³ Many observers instead anticipated that, under the Electoral Count Act and Article II and Amendment XII of the Constitution, Congress would determine the outcome of the 2000 presidential election.²⁴ Indeed, the settled law with respect to Congressional elections, as was also true of many state legislatures, was that Congress was the ultimate judge of the elections of its members.²⁵

The Court's surprising deployment of a new instantiation of the equal protection doctrine in *Bush v. Gore*²⁶ represented another watershed for judicial involvement in matters of election

¹⁸ See Foley, *The Founders' Bush v. Gore*, *supra* note 14, at 25, 27-28; see also BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 5-6 (2005); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 53 (1969).

¹⁹ 369 U.S. 186 (1962).

²⁰ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²¹ See *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²² See generally Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013).

²³ See Laurence Tribe, *eroG .v hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 299 (2001); see also Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849 (2001).

²⁴ See Tribe, *supra* note 23, at 275-92; Adam Clymer, *The 2000 Election: The Timetable; President Could Be Picked Without Florida*, N.Y. TIMES, Nov. 10, 2000, at A30; Stephen Gillers, *Who Says the Election Has a Dec. 12 Deadline?*, N.Y. TIMES, Dec. 2, 2000, at A19; Sean Scully & Audrey Hudson, *House Leadership Quietly Prepares to Choose a President; Congress Studies Constitutional Role*, WASH. TIMES, Dec. 04, 2000, at A10.

²⁵ See *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 321-22 (2007).

²⁶ 531 U.S. 98, 104-09 (2000) (per curiam).

administration.²⁷ The full impact of this decision on the field of election law remains unsettled (notwithstanding the Supreme Court's own apparent effort to limit the decision's precedential impact²⁸). Depending on how broadly the decision is deployed in the future, the effects could be substantial.²⁹ The decision is already featured in several appellate court decisions examining various state election practices under the equal protection doctrine,³⁰ and eventually could be used to review a host of local variations in how elections are conducted within a particular state.

C. *Contemporary Interest in Matters of Election Law and Administration*

Beyond the impact of the decision in *Bush v. Gore*, the 2000 election also marked a watershed event because of the newfound attention it brought to election processes. As a result, state and federal courts have now been asked to become deeply involved in many matters of election administration.³¹ Moreover, in the past decade, Congress and most state legislatures have adopted a variety of new laws governing the conduct of elections.³²

The dramatic increase in judicial and legislative attention, however, has not necessarily produced greater fairness in our electoral processes. Instead, legislators remain under

²⁷ David G. Savage & Henry Weinstein, *Equal Rights Surprise Basis for this Court*, PITTSBURGH POST-GAZETTE, Dec. 16, 2000, at A8; Margaret Warner, *Bush v. Gore: Legal Scholars Examine the Arguments Before the Supreme Court that Could Decide the Presidency*, PBS ONLINE NEWS HOUR (Dec. 11, 2000), http://www.pbs.org/newshour/bb/election/july-dec00/legal_12-11.html.

²⁸ See *Bush*, 531 U.S. at 109 (“[o]ur consideration is limited to the present circumstances”).

²⁹ See Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. (forthcoming 2013); Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 929-30 (2007); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 391 (2001); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1027-32 (2007).

³⁰ See, e.g., *Obama for America v. Husted*, 697 F.3d 423, 428-36 (6th Cir. 2012); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591-97 (6th Cir. 2012); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234-38 (6th Cir. 2011); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476-78 (6th Cir. 2008); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894-901 (9th Cir. 2003); see Foley, *Voting Rules and Constitutional Law*, *supra* note 29.

³¹ See 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); see also Foley, *Voting Rules and Constitutional Law*, *supra* note 29.

³² See, e.g., HASEN, *supra* note 6 (chronicling the substantial changes in election laws since 2000); WEISER & NORDEN, *supra* note 6 (summarizing most recent set of election law changes); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 693-701 (2006) (describing election reform efforts in aftermath of 2000 election).

immense pressure to enact meta-laws that will favor their party.³³ Moreover, elected officials can frequently be swayed by their own electoral experience. They understandably feel that they know first-hand how to reform the electoral process, regardless of what empirical analysis and more rigorous attention to systematic planning and design would recommend. Meanwhile, judges and courts have often not fared much better in identifying neutral principles to resolve matters brought before them. And local political cultures inevitably complicate the prospects for developing widely accepted principles of neutral election administration.

Into this setting, the ALI introduced its *Principles of Election Law* Project in 2010.³⁴ This move reflected a cautious but deliberate decision to explore a field that, because of its political valence, the ALI had previously left unexplored. But a decade after *Bush v. Gore*, and in light of the continuing efforts to revise electoral practices around the country,³⁵ the time seemed ripe to see whether individuals and groups from across the political spectrum could collaborate in good faith to identify neutral law reforms for at least some aspects of twenty-first century election administration.³⁶

In undertaking the Project, the ALI sought to focus on those areas where no candidate or political party was likely to have a settled view *ex ante* about the procedures and institutions that would best serve a partisan or parochial interest. Post-election dispute resolution processes seemed to be one candidate for consideration. Before Election Day, neither party knows

³³ Cf. Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139, 141-43 (2013) (describing problem of partisanship in adoption of election laws).

³⁴ See ALI Council Approves New Project on Election Law, 33 A.L.I. REP. 1, 4 (Fall 2010), available at http://www.ali.org/_news/reporter/fall2010/default.htm.

³⁵ Among some observers there also was a sense that perhaps other democracies growing out of the British tradition—particularly Canada, Australia, and Britain itself—were doing a better job administering elections fairly and independently. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 425-27 (2006); Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 406-08 (2004); Kenneth R. Mayer, *Comparative Election Administration: Can We Learn Anything from the Australian Electoral Commission?* (Aug. 30, 2007) (unpublished remarks prepared for the annual meeting of the American Political Science Association), available at <http://works.bepress.com/mayer/17>.

³⁶ Commencement of the ALI project followed closely on the heels of the Uniform Law Commission's successful effort from 2008 to 2010 to produce the Uniform Military and Overseas Voters Act, a project targeted at improving the voting options and experience of military and overseas voters. See NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM MILITARY AND OVERSEAS VOTERS ACT 1-2 (2010), available at http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova_final_10.pdf. Professor Huefner served as the Reporter on this ULC project as well.

whether it will be ahead or behind (and thus does not know whether it would benefit from more lenient or stricter ballot-counting rules and procedures). Similarly, the development of best practices for implementing expanded voting opportunities beyond precinct-based voting on Election Day seemed to be another worthwhile area of focus. Here, the terrain was new enough that the parties might not yet have developed settled views. But many other questions, including highly controversial topics such as voter identification requirements, redistricting practices, campaign finance regulations, or even the advisability of electronic voting methods, were not included in the Project because they did not seem to lend themselves to the development of a broad consensus. What follows below is a brief account of the work now underway on the areas of current focus of the ALI *Principles of Election Law* Project: post-election dispute resolution processes (Part II), and non-precinct voting methods (Part III).

II. DEVELOPING NEUTRAL LEGAL PRINCIPLES FOR RESOLVING DISPUTED ELECTIONS

The fact that American courts are now deeply involved in almost all matters of election administration reflects a dramatic change of affairs over the past half century. Yet even today, judicial involvement in election matters—what sometimes is described as a “judicialization” of politics³⁷—still does not occur without some controversy. Fundamental questions include: When should courts get involved? What are the possible roles of alternative institutions? What standards should apply? How can courts best be insulated from the appearance of partisanship in electoral matters? The ALI Project is working to address these and other issues.

A. *Neutral Principles for Resolving Election Disputes*

The first aspiration of the ALI *Principles of Election Law* Project was to identify or develop a widely shared or emerging sense of what should be in a code of fair elections, particularly because a set of such principles might offer courts neutral

³⁷ See, e.g., John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 66 (2002); Russell A. Miller, *Lords of Democracy: The Judicialization of “Pure Politics” in the United States and Germany*, 61 WASH. & LEE L. REV. 587, 599 (2004); cf. Richard H. Pildes, *Foreword, The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28-32 (2004) (describing how design of democratic institutions has increasingly become subject of constitutional law and litigation).

guidance for resolving election issues. Thought of in more practical terms, the Project sought to facilitate a bipartisan agreement on certain election law fundamentals. Here, perhaps more than in other frontier areas that the ALI has explored or is exploring, it was important from the outset that the Project keep political realities in mind and seek a product that was both rigorously reasoned and practical.

From the early stages, the Project was buoyed by the participation of many of the country's best election law attorneys as either Advisers³⁸ or as informal consultants.³⁹ These experienced lawyers candidly observed that where post-election disputes are concerned, the set of arguments that can be made by a contestant is largely independent of the contestant's party or ideology. Instead, the contestant's argument depends on the particulars of what happened in the election. Thus, on an *ex ante* basis, partisans may have little reason to favor one set of electoral dispute resolution rules or institutions over another.

For instance, one overarching issue courts face in election disputes is whether to require strict compliance with the electoral code to ensure the election's integrity or instead accept substantial compliance if doing so would enfranchise more voters and protect their rights to vote.⁴⁰ This issue can be found in some variation in many election disputes tracing all the way back to the time of the founding,⁴¹ and it continues to dominate many contemporary controversies. Moreover, it is an issue that does not seem to have much of a partisan or ideological cast to it. For instance, Republican candidate George Bush argued for a strict application of Florida law during the 2000 presidential contest,⁴² whereas Democratic candidate Al Franken argued for a strict construction of Minnesota law during his 2008 senate race.⁴³

Of course, once a particular dispute comes before a court, the choice between strict versus substantial compliance may have an obvious and known impact on the outcome of the

³⁸ For a list of Advisers, see *Current Projects: Principles of Election Law*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=24> (last visited Oct. 25, 2013).

³⁹ These informal consultants include a number of election administrators, as well as additional election lawyers, who have offered input to the project at various working group meetings or in response to specific requests for advice from the Reporters.

⁴⁰ See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 75-76 n.24 (2009).

⁴¹ See Foley, *The Founders' Bush v. Gore*, *supra* note 14.

⁴² See *id.* at 45.

⁴³ See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, 142 (2011).

dispute. But before any given controversy arises, the choice between strict and substantial compliance could be made neutrally, with an eye only to promoting a system of election administration that is fair and reliable. The ALI Project thus is in a position to recommend, on an *ex ante* basis that draws upon input from the election law community, the circumstances in which strict compliance is appropriate and those in which substantial compliance instead is preferable.

The answer to this question sometimes may vary depending on the nature of the noncompliance. In particular, while some requirements may always be necessary, others may be desirable but not necessary, especially if the noncompliance results from the error of a voting official rather than an individual voter. Here, a concept of “constructive compliance” might play a role. This concept would be applicable in circumstances in which voters who follow official direction are led into some degree of noncompliance with a formal requirement, as when poll workers, for instance, erroneously direct a voter to cast a wrong precinct ballot.

Obviously, developing rules or principles for determining what requirements can be complied with “constructively,” rather than strictly, is a complex enterprise. So too is the task of deciding *ex ante* how to distinguish between those aspects of election administration that do and do not require strict compliance to ensure the integrity of the electoral process. But Project efforts to date suggest that these undertakings have promise.

One complication has emerged, however, in the effort to develop neutral principles for resolving disputed elections. As noted above, a predicate of our work in this area has been the assumption, reinforced by the experience of many election lawyers, that candidates and parties had little reason in advance of a particular election controversy to favor one set of dispute-resolution principles over another. Any candidate, the assumption held, could end up slightly behind in the preliminary count and seek to reverse that count through a judicial contest. But some recent empirical work now suggests that in an era of widespread provisional balloting this traditional view may no longer be accurate.⁴⁴

The dramatic increase in the use of provisional ballots occasioned by the Help America Vote Act of 2002⁴⁵ now means that there are many more ballots for candidates to fight over as part of an election contest. Furthermore, for reasons better

⁴⁴ See Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J. L. & POL. 501 (2013).

⁴⁵ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

explored elsewhere, provisional ballots as a rule have tended to favor Democratic candidates.⁴⁶ Today, a Democratic candidate may expect to make up much more ground than a Republican candidate during the period between Election Day and the completion of the official canvass.⁴⁷ Although it is still too early to know how this dynamic may affect the way that election contests play out, it is certainly possible that this phenomenon may cause the two major political parties to consistently deploy different sets of arguments during election contests. This asymmetry would mark a departure from the two parties' historical practice of relying equally on whichever argument best fit their need in a particular case.

If political parties begin to consistently favor certain arguments in contested elections, it perhaps could complicate the Project's ability to develop a widespread *ex ante* consensus about the appropriate principles for resolving these cases. On the other hand, it is also conceivable that concern about how provisional ballots may cause a disequilibrium in the canvassing process might cause both sides, perhaps for different reasons, to seek reforms that could reduce the potential "wild card" effect of provisional ballots.⁴⁸ In any event, we remain hopeful that individuals working together in good faith will still be able to agree upon some core set of neutral principles. And even if the apparent Democratic advantage in provisional ballots complicates the effort to develop neutral principles for resolving disputed elections *ex ante*,⁴⁹ several other avenues for improving dispute resolution processes also are under consideration by the ALI Project.

⁴⁶ See Edward B. Foley, *Thinking about Some Possible Ohio Numbers*, ELECTION LAW @ MORITZ (Nov. 6, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=10135>.

⁴⁷ See Foley, *A Big Blue Shift*, *supra* note 44.

⁴⁸ Republicans might seek to reduce the role of provisional ballots because of a concern that Democrats may net extra votes from these ballots. Democrats, conversely, might wish for changes in the electoral system that would convert countable provisional ballots into counted regular ballots, so that they do not need to rely on come-from-behind strategies during the canvassing process. Thus, it is possible that even if provisional ballots have an asymmetrical effect, the two parties might see a win-win solution to reducing their role. (We are grateful to Rick Hasen for suggesting a point along these lines.)

⁴⁹ The provisional ballot "blue shift" problem could be reduced by improved voter registration databases, which would reduce the need to rely on provisional ballots. Therefore, there may be other ways to tackle the apparent asymmetry that has emerged with the increased use of provisional ballots in the wake of HAVA.

B. Institutions for Resolving Election Disputes

In addition to determining what principles should govern the resolution of disputed elections, another fundamental task before the ALI Project is to determine what institutions are best suited to perform this function. As noted above, at this country's founding, it was far from accepted that this role would devolve upon courts.⁵⁰ Instead, legislative institutions had traditionally played the central role in resolving election disputes.⁵¹ But reliance on an elected body hardly seems to be a "neutral" approach. Indeed, the Supreme Court's intervention in the 2000 presidential election is sometimes defended as having been preferable to leaving it to Congress to decide the winner.⁵²

Yet judicial resolution has also sometimes been problematic. As courts have become increasingly involved in adjudicating election contests, the result has not always been that their decisions have inspired public confidence in the fairness of the result. Instead, courts have been sullied as another "political" institution.⁵³ It has become all too common in elections for the winners and their supporters to believe that the election was the result of a fair process while the losers and their supporters grouse that the system was rigged or at least biased. This grouching can extend to federal and state courts adjudicating election controversies, and it is only fueled when appellate courts decide an election law matter along partisan or ideological lines.⁵⁴

It is not a healthy thing for a democracy when its courts are seen as biased toward a political party or ideology. Accordingly, the ALI Project is seeking to identify the best tribunals for resolving election disputes and how they can be shaped to minimize even the appearance of bias and maximize the public acceptance of their decisions. This undertaking is primarily an institutional *design* project, but, to a lesser extent, it is also an institutional *culture* project.

As a matter of institutional design, the primary question is whether to use regular courts or instead turn to special courts to handle election contests. The involvement of regular courts in election matters may be most familiar to many Americans. This

⁵⁰ See *supra* notes 12-16 and accompanying text.

⁵¹ See Huefner, *Remedying Election Wrongs*, *supra* note 25, at 321-22.

⁵² See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 92-149 (2001).

⁵³ See Steven F. Huefner, *What Can the United States Learn from Abroad about Resolving Disputed Elections?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 543-44 (2010); Ferejohn, *supra* note 37, at 66.

⁵⁴ See *supra* note 8 and accompanying text.

familiarity primarily stems from the 2000 presidential election, in which the Florida judiciary, including its Supreme Court,⁵⁵ and the federal judiciary, including the U.S. Supreme Court,⁵⁶ played determinative roles. But many other examples also exist, including the resolution of the Washington State 2004 gubernatorial election by a state trial court.⁵⁷

Special election courts may be less familiar to many Americans, even though they already exist in many states. The 2008 Minnesota Senate election stands as the most prominent recent example of a special court handling an election dispute. There, a three-judge trial court appointed from within the state's existing judiciary resolved the contested Senate election.⁵⁸ Notably, Minnesota had paved the way for its 2008 contest through its use of a special tribunal appointed to resolve a contested gubernatorial election in 1962.⁵⁹

Of course, many variations could exist in the manner of appointing or empaneling a special election court.⁶⁰ Depending on this selection mechanism, a special court may be better able to avoid the appearance of judicial politicization of the election outcome. This biased appearance can be avoided, for instance, if the members of the tribunal are already highly respected for their fairness and impartiality and are able to agree upon a unanimous resolution of the contest.⁶¹ As a matter of institutional design, the challenge for the ALI Project therefore is to develop acceptable models of special tribunals that will promote both fairness and impartiality. The costs and benefits of these models can then also be compared with regular courts.

The effort to design a special election court may also produce insights into how regular courts might be best deployed to handle election disputes. For instance, if certain procedural requirements or constraints on the conduct of a special court are thought to facilitate unanimous decisions, similar requirements or constraints might be adopted for regular courts in election contests. Moreover, the simple recognition of the tremendous

⁵⁵ See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

⁵⁶ See *Bush v. Gore*, 531 U.S. 98 (2000).

⁵⁷ See Transcript of Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/washington.php>.

⁵⁸ See Foley, *The Lake Wobegone Recount*, *supra* note 43, at 146-47.

⁵⁹ See RONALD F. STINNETT & CHARLES H. BECKSTROM, *RECOUNT 1* (1964).

⁶⁰ See Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POLY 471, 488-91, 508-09 (2010); Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POLY REV. 350, 378-80 (2007).

⁶¹ See Foley, *The McCain v. Obama Simulation*, *supra* note 60, at 488-91.

significance of reaching a unanimous decision in an election contest may itself help promote an institutional culture of working assiduously to reach unanimity whenever possible.

In that regard, it bears noting that the National Center for State Courts, in conjunction with the Election Law Program at William and Mary Law School, now has its own project underway to encourage members of each state's judiciary to consider the challenges of resolving election issues in court.⁶² The Center is conducting this project primarily through a series of "war game" scenarios at state judiciary conferences in which a hypothetical election contest is argued before a panel of judges in front of an audience of other judges. After the panel announces its decision, a moderated discussion then explores the hypothetical problem as well as larger issues that may arise in handling election disputes.⁶³ By increasing awareness and inviting judges to think ahead about some of the particular challenges inherent in election contests, these and comparable exercises also have the potential to change institutional culture with respect to the adjudication of election law matters.

C. *Timeframe for Resolving Election Disputes*

One discrete but thorny challenge in most post-election disputes is how to resolve the dispute expeditiously. The political calendar inevitably imposes some deadline, usually a quick one. Meeting this deadline can be a problem in an election contest.

Famously, the 2000 presidential election ended after five weeks of wrangling because the U.S. Supreme Court, holding that Florida's ballot recounting processes violated the equal protection clause, also presumed that Florida did not intend for its state election contest process to extend beyond the "safe harbor" deadline under the federal Electoral Count Act.⁶⁴ The Supreme Court therefore ruled that the election was over because, by the time the Court reached its final decision, that safe harbor deadline had arrived.⁶⁵ In contrast, the 2008 Minnesota Senate contest did not officially end until July 2009,

⁶² See Brian Kelley, *May 16 Court Simulation to Test Principles of Election Law*, WM. & MARY L. SCH. NEWS (May 2, 2012), <http://law.wm.edu/news/stories/2012/election-litigation.php>.

⁶³ Each of the authors of this essay has served as an advisor and commentator on these "war game" exercises.

⁶⁴ See 3 U.S.C. § 5 (2012).

⁶⁵ See *Bush v. Gore*, 531 U.S. 98, 110 (2000).

some eight months after Election Day and six months after the winning senator should have taken his seat in Congress.⁶⁶

The timeframe problem also may merit attention as a matter of both institutional design and institutional culture. As a matter of culture, it is important to alert institutions to the need for expedition and to invite them to think ahead about how to manage this problem. Successful management likely will require both advance planning and some multitasking of judicial processes and issues, potentially including having multiple bodies or tribunals working concurrently.⁶⁷

Unfortunately, in many states the existing post-election calendar simply will not permit timely resolution of a complicated electoral dispute, typically because the canvassing process is structured over several weeks or more.⁶⁸ As a result, no amount of advance planning or multitasking in these states will facilitate the timely resolution of a presidential election dispute before the safe harbor deadline. This is a nightmare waiting to happen.

Of course, the timeframe problem also can be addressed as a matter of institutional design (or re-design). To this end, the ALI Project has already developed a set of draft model calendars—a shorter one for a disputed presidential election and a slightly longer one for other races.⁶⁹ The presidential election calendar compresses the post-election steps of canvass, recount, contest, and appeal into the five weeks between Election Day and the safe harbor date. For non-presidential races, a nine-week version schedules these steps to all occur before early January, when the terms of most offices on the November ballot are scheduled to begin. (The nine-week calendar could also be used in future presidential elections, provided Congress adjusted the dates associated with the Electoral College.)

These are incredibly tight calendars that cannot be effectively followed without substantial advance planning and multitasking. Moreover, some states will not be able to adhere to these expedited calendars without adjusting their existing deadlines for their regular post-election canvassing processes.

⁶⁶ See *Coleman v. Franken (In re Contest of General Election)*, 767 N.W.2d 453, 456 (Minn. 2009).

⁶⁷ See A.L.I., PRINCIPLES OF ELECTION LAW: RESOLUTION OF ELECTION DISPUTES 1-12 (Discussion Draft Apr. 16, 2012), available at http://www.ali.org/00021333/Election_Law_report%20-%20online.pdf.

⁶⁸ See Edward B. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187, 196-98 & n.31 (2011).

⁶⁹ See PRINCIPLES OF ELECTION LAW, *supra* note 67, at 1, 7.

But the ALI *Principles of Election Law* Project has developed these calendars as a guide for how best to use the limited time available to resolve an election dispute and generate a fair and expedited result. Absent the unlikely addition of more time between Election Day and the date when a final result should be in hand (at least not beyond the nine-weeks from Election Day in early November to the beginning of most terms of office in early January), the ALI's proposal presents the optimal response to the timeframe problem.

However, the prospects for the model calendars may be affected by the possibility that Democratic candidates stand to gain more from provisional ballots.⁷⁰ To the extent that a post-election dispute is primarily over the counting of provisional ballots, Democrats may be more likely to benefit from—and thus to support—the development of a calendar better suited to a fair and expeditious resolution of election contests.⁷¹ Nevertheless, in the abstract, a well-designed process for expediting the resolution of an election dispute can be politically neutral and capable of promoting the fair adjudication of whatever issues happen to be at stake in any given election. It therefore will certainly be disappointing if partisan calculations interfere with the adoption of the best timetable for handling a post-election contest.

III. WIDESPREAD IMPLEMENTATION OF NON-PRECINCT VOTING METHODS

Inevitably, the effort to improve the resolution of post-election disputes appropriately leads to considering ideas for reducing the number and complexity of issues that could be fought over post-election. Among other issues, these “pressure points” include not only provisional balloting (as previously noted⁷²), but also absentee balloting (which was the focus of the 2008 Minnesota Senate contest⁷³). More generally, to the extent that the pre-election and Election Day processes can be made to run more

⁷⁰ See *supra* notes 45-47 and accompanying text.

⁷¹ In both Washington in 2004 and Minnesota in 2008, however, it was the Democrat who received the certification of electoral victory after the completion of an administrative recount, and thus it was the Republican who went to court in January with the clock ticking while the dispute remained pending. In Minnesota, the office remained vacant, so both sides had an incentive to complete the litigation quickly—although the incentive was complicated by the political makeup of the U.S. Senate: The Republicans wanted to prevent the Democrats from getting one more vote for a filibuster-proof 60 members, whereas adding one more Republican compared to keeping the seat vacant arguably did not make a difference.

⁷² See *supra* notes 45-47 and accompanying text.

⁷³ See Foley, *The Lake Wobegone Recount*, *supra* note 43, at 147-55.

smoothly, it will also be easier to determine the winners, and post-election disputes can be minimized or eliminated.

Of course, some reform ideas, like permitting Election Day registration or imposing a mandatory photo identification requirement on voters, are contentious and tend to divide proponents and opponents along party lines.⁷⁴ In contrast, one recent trend with bipartisan support has been the rapid expansion in both early in-person voting and no-excuse absentee voting.⁷⁵ This trend is the result of efforts to increase voter convenience and to ease Election Day burdens on election administrators, for instance by reducing the long lines of voters at some polling locations in recent presidential elections.⁷⁶ But the advent and growth of “convenience voting” also has introduced new potential concerns.

With an eye toward helping election jurisdictions best capitalize on the recent dramatic increases in early and absentee voting, the ALI *Principles of Election Law* Project has undertaken a second area of focus, apart from the processes for resolving a disputed election. In this second area, the Project seeks to serve voters and election administrators alike, as well as candidates in close or disputed races, by identifying best practices for non-precinct-based voting methods.⁷⁷ After briefly describing the nature of the trend toward convenience voting and its primary impacts on voters, this part discusses some of the responses to this trend that the ALI Project is developing.

A. *The Recent Expansion of Non-Precinct Voting*

Until recently, for most Americans the act of voting occurred on Election Day in a voter’s assigned home precinct. Voters with disabilities or who knew in advance that they would be absent from their home precinct on Election Day could request an absentee ballot, which they might either return by mail or drop off in person at election headquarters. As of 20 years ago, the percentage of voters casting a ballot before

⁷⁴ See *supra* note 6 and accompanying text.

⁷⁵ See Paul Gronke & Daniel P. Tokaji, *The Party Line*, 10 ELECTION L.J. 71, 71 (2011). However, as discussed below, see *infra* notes 96-102 and accompanying text, the extent of the availability of early voting is now under some partisan pressure.

⁷⁶ See, e.g., Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331, 333 (2012) (describing Florida’s 2004 early voting legislation as “viewed by Republican and Democratic lawmakers alike as a practical way to reduce Election Day mishaps at the polls”).

⁷⁷ See ALI Council Approves New Project on Election Law, *supra* note 34.

Election Day remained in the single digits.⁷⁸ Today, however, more than 30% of all votes in a presidential election are cast outside the precinct polling place before Election Day.⁷⁹

In part, this shift reflects the decisions of states like Washington and Oregon to conduct their elections entirely by mail.⁸⁰ Of course, in these jurisdictions 100% of the voters now vote without going to their precinct on Election Day. But the national figures are driven much more by the decisions of other states to permit any voter, not just the disabled and those who will be absent on Election Day, to either cast an absentee ballot by mail or to visit a voting center in the days or weeks before Election Day. Thirty-four states and the District of Columbia now give voters at least one of these options, and many of these states offer voters both choices.⁸¹

These two options are not equal, however, in terms of their convenience to voters, their reduction of the burdens on election administrators, or their potential impact on election disputes. For instance, mail-in absentee voting arguably provides voters the most convenience,⁸² but it creates greater vulnerabilities, as discussed below.⁸³ Meanwhile, early in-person voting is generally more secure, but at least in some locations it may impose greater public expense or may generate long lines.⁸⁴ Moreover, if these alternative voting options are perceived as having disparate impacts on partisan interests, then efforts to establish best practices will inevitably be more complicated. Finally, once these options have been made available to voters, it

⁷⁸ See Michael P. McDonald, *Early Voting in 2012: What to Expect*, HUFFINGTON POST (Aug. 13, 2012), http://www.huffingtonpost.com/michael-p-mcdonald/early-voting-in-2012-what_b_1773768.html.

⁷⁹ See Michael P. McDonald, *A Modest Early Voting Rise in 2012*, HUFFINGTON POST (June 12, 2013), http://www.huffingtonpost.com/michael-p-mcdonald/a-modest-early-voting-ris_b_3430379.html.

⁸⁰ See *Absentee and Early Voting*, NAT'L CONF. ST. LEGISLATURES (May 28, 2013), www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (last visited Aug. 16, 2013).

⁸¹ See *id.*

⁸² See, e.g., WASH. SEC'Y OF STATE, WASHINGTON STATE'S VOTE-BY-MAIL EXPERIENCE (2007), available at <http://www.sos.wa.gov/documentvault/WashingtonStatesVotebyMailExperienceOctober2007-2066.pdf>.

⁸³ See *infra* notes 85-90 and accompanying text.

⁸⁴ See Luke Johnson, *Ohio Early Voting: Long Lines Reported Outside Polling Places*, HUFFINGTON POST (Nov. 4, 2012), http://www.huffingtonpost.com/2012/11/04/ohio-early-voting_n_2073287.html; *Long Lines for Early Voting Before Tuesday's Election*, CNN (Nov. 6, 2012), <http://www.cnn.com/2012/11/05/politics/election-voting>; see also ADAM HARVELL & EDWARD EDNEY, AN EXAMINATION OF EARLY VOTING IN WISCONSIN 1, 6 (Jan. 4, 2010), available at http://gab.wi.gov/sites/default/files/publication/65/early_voting_report_final_pdf_25757.pdf.

may be hard to scale them back, even if doing so might improve the overall system of election administration.

From the standpoint of sound election administration, early in-person voting is vastly preferable to mail-in absentee voting for at least four reasons, all related to the integrity of the election. First, because mail-in absentee ballots are cast outside the presence of official election workers, the potential for outright fraud is significantly greater than with in-person voting. In theory, this fraud could include individual voters selling their ballots to others. An additional risk is that a group of absentee ballots is deliberately misdirected or intercepted.⁸⁵

Second, because absentee ballots are cast outside the presence of election officials, it also is not only possible but almost inevitable that some voters will mark their ballots in the presence *and therefore under the influence* of family, friends, or others whose wishes or expectations a voter may desire to accommodate, even subconsciously.⁸⁶ Voting at the voting booth on Election Day, done privately and in secret, does not permit this. The risk of outside influence on the absentee voter exists whether the improper influence is deliberate or inadvertent, coercive or voluntary. Avoiding these risks was one of the reasons that the United States adopted a secret ballot for most voters in the late nineteenth century.⁸⁷

Third, voters casting a mail-in ballot generally will not be notified if they have spoiled their ballot by voting for too many candidates in a given race. Nor will they be alerted if they inadvertently neglected to make a choice in a particular race. These “residual votes”⁸⁸ often may be enough to affect the outcome of a close election, and their existence means that some voters are effectively disenfranchised. In contrast, voters casting a ballot at a polling place can be notified of residual vote issues, and, if they wish, they may be able to correct their ballot. As a

⁸⁵ See, e.g., *In re* Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for Miami, Fla., 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998) (disqualifying all absentee ballots in mayoral election because of demonstrated fraud concerning some of the ballots).

⁸⁶ For instance, in the 2005 Detroit mayoral election, some absentee voters were “advised” how to vote by paid ambassadors of the city clerk. See HUEFNER, FOLEY & TOKAJI, *supra* note 1, at 96-97.

⁸⁷ See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 486-91 (2003).

⁸⁸ See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1755 (2005).

result, the residual vote rate for in-person voting is significantly lower than it is for mail-in voting.⁸⁹

Fourth, voters casting a mail-in ballot may be entirely disenfranchised, not by a residual voting problem, but by a mistake or error in completing their ballot transmission envelope or accompanying affidavit. If election officials conclude that a ballot does not satisfy the authentication requirements of the jurisdiction's mail-in voting process, the entire ballot may be rejected.⁹⁰ Ideally, jurisdictions should have some error correction process for this circumstance. But many do not, and even those that do likely will not see all affected voters properly correct their mail-in ballots. Voting in person eliminates this problem (except for voters required to cast a provisional ballot) because the authentication processes are all conducted in real time between the voter and the election official. Once the voter is given the ballot (or escorted to a voting machine), the voter can be confident that the voter's marked ballot will be counted.

Of course, mail-in voting offers voters significant convenience, both in terms of the ability to vote from home and the ability to ponder the ballot over an extended period before making a final decision.⁹¹ Voting by mail also may provide election jurisdictions with real cost savings, whereas in-person early voting may add costs, depending on how much it reduces the expense of running Election Day operations.⁹² Moreover, the fact that Washington and Oregon now vote entirely by mail may lead many people to view mail-in voting as relatively secure. But the reality may be that mail-in voting is more convenient and inexpensive than it is secure. Nevertheless, it may not be realistic

⁸⁹ See *Voting By Mail: An Examination of State and Local Experiences: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 11-12 (May 5, 2010) (Prepared statement of John C. Fortier, Dir. of the Democracy Project, Bipartisan Policy Ctr.), available at <http://www.aei.org/files/2010/05/05/FortierTestimony051010.pdf>; Charles Stewart III, *Adding Up the Costs and Benefits of Voting by Mail*, 10 ELECTION L.J. 297, 300 (2011); Daniel Tokaji, *Voting Technology: The Way Forward*, AM. U. CENTER FOR DEMOCRACY & ELECTION MGMT. (2006), http://www.american.edu/spa/cdem/upload/6-Voting_Technology_Dan_Tokaji.pdf.

⁹⁰ That is what happened in the Minnesota 2008 Senate contest. See Foley, *The Lake Wobegone Recount*, *supra* note 43, at 147-50.

⁹¹ Voters of course can do this with any voting method by reviewing a sample ballot at leisure before marking their actual ballot, but the lived experience of many voters is that having the absentee ballot in hand facilitates this in a meaningful way. See WASH. SEC'Y OF STATE, *supra* note 82, at 1-3.

⁹² Determining the cost implications is complicated, making it hard to generalize. See *Voting By Mail: An Examination of State and Local Experiences*, *supra* note 89, at 8-9.

to expect states that already offer no-excuse absentee voting to eliminate this option now that voters are using it extensively.

The ALI *Principles of Election Law* Project thus is in a prime position to make a contribution with respect to non-precinct voting. In some states, ALI principles can influence substantive choices that have yet to be made. Meanwhile, in those states where some of the substantive choices have already been made, there is still some momentum to be harnessed or directed to shape future refinements, particularly in light of additional information about various means of non-precinct voting. The challenge for the Project is to identify the most helpful principles in light of empirical data, sound administration, existing practice, and political realities.

B. *Some Potential Responses*

In the face of the dramatic increase in non-precinct “convenience” voting options over the past decade, one threshold question for the ALI Project is whether to advocate for any particular method of non-precinct voting. Given the extent to which many states have already committed to one or more types of non-precinct voting, the Project has contemplated remaining neutral with respect to the various alternatives while simultaneously working to develop principles for the best deployment of each of them.

At the same time, in-person voting offers substantial advantages, as discussed above.⁹³ It seems valuable to go on record about these advantages, even if primarily for the benefit of only those jurisdictions that have yet to move to some non-precinct alternative. Moreover, alerting the legal and legislative communities to the advantages of in-person voting also could influence the development of refinements to mail-in voting processes, such as the incorporation of opportunities for voters to correct errors in their ballot transmission materials, or the deployment of new measures to discourage or detect mail-in ballot fraud.

Beyond merely describing the comparative advantages of mail-in and early in-person voting, the ALI *Principles of Election Law* Project can also be helpful by identifying best practices for both absentee voting and early in-person voting. The final product of the Project, therefore, is likely to address a number of elements of these processes, including such topics as:

⁹³ See *supra* notes 85-90 and accompanying text.

the appropriate duration of early voting or mail-in voting periods, where and how to site early voting centers, the authentication requirements for absentee ballots, and the methods for voters to correct deficiencies in their ballot transmission materials. But for present purposes, this article will describe in greater detail only the effort to develop a response to the question of whether to permit early in-person voting on the final weekend before Election Day.

Specifying the ideal period of early in-person voting turns out to be complicated. It is influenced by a variety of demographic and other factors, including the number of registered voters, population density, availability of suitable early voting locations, transportation options, local economic conditions and work routines, and other norms of behavior. That said, the ALI Project has identified two critical principles to help establish the duration of early in-person voting.

First, a jurisdiction that chooses to offer early in-person voting should make sure that the option is conveniently available to the vast majority of voters on an equal basis. Thus, for instance, it would not be appropriate to offer early voting only during the lunch hour on weekdays. Instead, a variety of times and days, including evenings and weekends, should be part of the early voting regimen. Furthermore, to best serve the most voters, it would seem important to include more than one weekend in the early voting period.

Second, in establishing a variety of early voting opportunities, a jurisdiction should be careful not to begin the early voting window too soon. A relatively short voting window will ensure that voters cast their ballots on the basis of common knowledge, including even last-minute changes in candidacies or other late-breaking news. Although many jurisdictions have a practice of allowing mail-in voting to begin a month or more before Election Day,⁹⁴ and although federal law now requires overseas and military voters' ballots to be mailed 45 days in advance,⁹⁵ it is not generally advisable to allow voters to vote across a wide time gap except for purposes of mail delivery to remote voters. Instead, voting across a relatively short period better promotes collective decision making on the basis of shared information.

⁹⁴ *Early Voting Calendar, 2012*, EARLY VOTING INFO. CTR., <http://reed.edu/earlyvoting/calendar/> (last visited Nov. 21, 2013).

⁹⁵ 42 U.S.C. § 1973ff-1(a)(8) (2012).

In combination, these two principles lead naturally to the conclusion that the period of early in-person voting should include the final weekend before Election Day. In the 2008 presidential election, a number of jurisdictions agreed and permitted early in-person voting on both the final Saturday and Sunday.⁹⁶ However, some of these jurisdictions then decided to eliminate this final weekend of voting in the 2012 presidential election.⁹⁷ The primary justification for this change was to permit election officials to devote these days to Election Day preparation.⁹⁸ But the extent to which this was a true priority for election officials was never clear, and some observers saw an ulterior, partisan motive.⁹⁹

Specifically, many perceived that the final weekend of early voting in the 2012 national election would favor Democratic candidates—at least in some (swing) states—because Democratic turnout on the final Sunday of the 2008 presidential election had been heavy in those states.¹⁰⁰ Prior to the 2008 election, the accepted wisdom had been that providing voters with additional absentee or early voting opportunities did not increase voter turnout but rather only provided increased convenience to voters who would have otherwise voted anyway.¹⁰¹ Some data from 2008 seemed to suggest otherwise, however, and so some saw the elimination of early voting on the final weekend of the 2012 election as an effort to shape *who* voted, not just how they voted.¹⁰²

The bottom line is that even with respect to an issue like the appropriate days of early in-person voting, the

⁹⁶ See, e.g., Steven F. Huefner, *Why the Ohio Early Voting Case is Not a Threat to Military Voting Accommodations*, 74 OHIO ST. L.J. FURTHERMORE 1, 3-5 & n.11 (2013) (describing Ohio's 2008 early voting options), available at <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/04/Furthermore.Huefner.pdf>; see also Herron & Smith, *supra* note 76, at 333-34 (describing Florida's 2008 early voting options).

⁹⁷ See, e.g., Herron & Smith, *supra* note 76, at 334-35 (describing the Florida legislature's elimination of final Sunday voting in 2012); Huefner, *Why the Ohio Early Voting Case is Not a Threat to Military Voting Accommodations*, *supra* note 96, at 3-5 (describing the Ohio legislature's elimination of final weekend voting in 2012); WEISER & NORDEN, *supra* note 6, at 29-30 (summarizing early voting changes around the country for 2012).

⁹⁸ See Herron & Smith, *supra* note 76, at 334-35.

⁹⁹ See Dan Froomkin, *Republican Voter Suppression Campaign Rolls Back Early Voting*, HUFFINGTON POST (Aug. 18, 2012), www.huffingtonpost.com/2012/08/18/republican-voter-suppression-early-voting_n_1766172.html; Herron & Smith, *supra* note 76, at 335.

¹⁰⁰ See WEISER & NORDEN, *supra* note 6, at 33.

¹⁰¹ See *id.* at 29; see also R. Michael Alvarez et al., *Making Voting Easier: Convenience Voting in the 2008 Presidential Election*, 65 POL. RES. Q. 248 (2012).

¹⁰² See Froomkin, *supra* note 99; Herron & Smith, *supra* note 76, at 346.

Principles of Election Law Project must be aware of potential partisan effects and concerns. How these concerns will ultimately be resolved remains to be seen. Nevertheless, a few concluding observations are in order about how the Project is proceeding, particularly in light of these kinds of challenges.

IV. PROSPECTS FOR THE ALI *PRINCIPLES OF ELECTION LAW* PROJECT

The ALI launched the non-precinct voting and post-election dispute resolution components of its *Principles of Election Law* Project with the expectation that these two areas would more easily lend themselves to the development of (and agreement about) impartial principles than would other areas of election law. This expectation remains true, even though, as suggested above, neither one of these areas has proven completely free from potential partisan interests. As a result, even in these relatively less controversial areas, one challenge for the Project is to promote the establishment of a meta-law that is predicated exclusively on principles of fundamental fairness and sound administration, derived without regard to anticipated partisan impact.

The extent to which the Project can do so will depend on the collective effort of its Reporters, Advisers, and many other interested observers. To date, these contributors have all been working in good faith to develop neutral principles, notwithstanding the fact that potential partisan effects lurk in the background. Although the Project is not yet at the point of having any official output, the draft dispute resolution calendars previously described,¹⁰³ which incorporate input from many quarters, offer evidence that agreement on at least some significant issues of election administration can be reached. And even if the field of election law does not yet have a complete body of law to “restate,” the ALI Project might yet be able to contribute to something like a “Code of Fair Competition” or “Code of Fair Elections.”

But now that the Project is fully underway, some additional questions and considerations have emerged. Indeed, one foundational question is just what “neutrality” even means with respect to principles of election law. Is it fundamentally different than, say, neutrality with respect to the development of principles of tort law or of contract law? Might neutrality simply be whatever would result after granting the major

¹⁰³ See *supra* note 69 and accompanying text.

political parties equal status and bargaining power in a process of seeking principles to which the parties could agree? Or is neutrality something more than that, something derivable from basic notions of representational fairness and due process?

This central question of what constitutes neutrality for purposes of election law exists in the shadow of the fact that the Fourteenth Amendment's electoral due process and equal protection standards are themselves still quite woolly. Neglected for years as a result of the invocation of the political question doctrine, these constitutional standards remain relatively unelaborated where electoral processes are concerned.¹⁰⁴ There simply is not an established measure of what is fair or neutral with respect to matters of election law.¹⁰⁵ The ALI Project labors within this nebulous domain. Hopefully, the Project's contributions can add clarity to this underdeveloped area of the law.

Furthermore, even if there were an established measure of electoral fairness, the subsidiary question of how to achieve it would remain. Thus, a second crucial consideration for the ALI Project is what its real-world impact should be. One key issue is how to balance the potentially competing values of the normative fairness of a principle with its practical acceptance or enactability. Indeed, a full-blown Code of Fair Elections would likely stand little chance of being adopted in most state legislatures.

Here, it would seem worth sacrificing some degree of normative perfection in order to actually get something adopted. As Larry Zelenak, elsewhere in this symposium, aptly quoted ALI President Tweed concerning the ALI's 1954 Tax project, "[a]nything that is accomplished will be worthwhile" given the starting point.¹⁰⁶ The critical thing is to advance the ball by getting something done. Accordingly, the enactability or acceptability of various potential electoral reforms will inevitably influence the output of the Project. But just how much normative fairness is worth trading in order to achieve a practical impact is a highly subjective question.

Finally, a third issue for the ALI Project is whether to seek some additional federalization of election law. Given the likely difficulty of getting individual states to enact what could be a relatively cerebral, normatively heavy Code of Fair Elections, it

¹⁰⁴ See Foley, *Voting Rules and Constitutional Law*, *supra* note 29.

¹⁰⁵ Cf. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004) (describing doctrinal difficulties in field of election law).

¹⁰⁶ See Lawrence Zelenak, *The Almost-Restatement of Income Tax of 1954: When Tax Giants Roamed the Earth*, 79 BROOK. L. REV. 709, 714 (2014).

is worth seriously considering what elements of such a Code might generate a favorable response in Congress, especially in discrete components.¹⁰⁷ If state legislatures were encouraged to adopt whatever more practical (and politically agreeable) compromises the state's political leaders would embrace, a targeted congressional enactment of certain other principles might fill in some of the gaps separating the more pragmatic state-level reforms and a more idealized Code of Fair Elections (assuming, of course, that Congress could be moved to act).

CONCLUSION

In short, in addition to its two-fold effort to improve the resolution of post-election disputes and propound best practices for non-precinct voting, the ALI *Principles of Election Law* Project also wrestles with several additional interesting issues. These additional issues include: How to identify and promote fair election principles in the face of partisan interests? What is “neutrality” in this context? How much relative weight should the Project give to the goal of enactability versus the ideal of normative fairness? And should some components of what might be in a Code of Fair Elections be pursued as a matter of federal rather than state law? The Project will continue exploring these issues as it moves forward.

Meanwhile, the problem of partisanship in structuring election laws remains a real concern. Indeed, excessive partisanship may be the primary obstacle to fair elections. But if so, what is to be done? One parting suggestion (in addition to continuing to stress to those in power the critical importance of setting aside partisan concerns and making meta-law decisions on the basis of fundamental fairness rather than anticipated political effects) is more broadly to consider the efficacy of developing new institutions—not just new rules or principles of election law—for all or many aspects of structuring and conducting elections. The discussion above has already briefly mentioned the possibility of developing new institutions for resolving disputed elections.¹⁰⁸ As an extension of that idea, and in a way that could be uniquely possible in the field of election law (as contrasted with the fields of torts or contracts, for example, where the roles of courts and

¹⁰⁷ For instance, one discrete federal measure could be an amendment targeted solely at adjusting the timeline of the Electoral Count Act. See Steven F. Huefner, *Reforming the Timetable for the Electoral College Process*, ELECTION LAW @ MORITZ (Nov. 30, 2004), <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

¹⁰⁸ See *supra* notes 50-61 and accompanying text.

legislatures are relatively fixed), it may be that the institutions responsible for developing and implementing the rules and principles of election law could also be reimagined.¹⁰⁹ Both for the ALI *Principles of Election Law* Project, and for reformers generally, it is worthwhile to remain open to the potential of this more substantial approach to reform.

¹⁰⁹ See, e.g., Foley, *The Separation of Electoral Powers*, *supra* note 7 (exploring the possibility of separate electoral institutions); Huefner, *What Can the United States Learn From Abroad About Resolving Disputed Elections?*, *supra* note 53 at 536-37 (describing “electoral commission” structure used in many other countries for overseeing elections).-