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## Arbitrating Ballot Battles

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# Arbitrating Ballot Battles?

Rebecca Green<sup>1</sup>

## INTRODUCTION

This short article posits that arbitration is an under-explored mechanism for resolving post-election disputes. As Professor Edward Foley documents in *Ballot Battles: The History of Disputed Elections in the United States* (“Ballot Battles”), post-election disputes have brought state and federal government to a political precipice numerous times in our history.<sup>2</sup> A comprehensive, transparent, and fair arbitration process could well save us from another.

In 2011, the *Ohio State Journal of Dispute Resolution* published papers from a symposium on the use of Alternative Dispute Resolution (ADR) in election disputes.<sup>3</sup> At the symposium, eminent ADR scholars such as Carrie Menkel Meadow—a vocal proponent of expanded remedial imagination in designing dispute resolution mechanisms—and prominent election attorneys like Marc Elias and Ben Ginsberg argued that the binary, “win-lose”<sup>4</sup> nature of election disputes raised significant barriers to using techniques like mediation to resolve them. Several symposium papers (including my own) detailed these challenges but tried to suggest ways in which ADR principles and processes might help improve the resolution of election disputes.<sup>5</sup>

The present effort elaborates on this previous work, written with the benefit of *Ballot Battles* to provide historical sweep to the argument. Professor Foley’s history reveals that the judiciary has often proven poorly suited to resolve disputed elections.<sup>6</sup> Here I will argue that Foley’s solution, a more structured approach of specialized election courts,<sup>7</sup> may be augmented by pre-election arbitration

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<sup>2</sup> EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016).

<sup>3</sup> Symposium, *Talking the Vote: Facilitating Disputed Election Processes Through ADR*, 27 OHIO ST. J. ON DISP. RESOL. 281, 281–442 (2012).

<sup>4</sup> Carrie Menkel Meadow, *Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 LAW & CONTEMP. PROBS 2, 6 (2011).

<sup>5</sup> Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325, 325–26, 341–52 (2012) (arguing that procedural, as opposed to outcome-determinative, disputes in the post-election context might usefully be mediated); see also Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO STATE J. OF DISP. RESOL. 291, 292–93, 308–19 (2012).

<sup>6</sup> See generally FOLEY, *supra* note 2.

<sup>7</sup> Professor Foley has been working with the American Law Institute to put his solution into practice. For a concrete example of his solution, see PRINCIPLES OF THE LAW OF ELECTION

agreements that could infuse greater fairness, predictability, and finality when election outcomes are uncertain.

This article proceeds in four parts. First is a review of the shortcomings of the judiciary in resolving ballot-counting disputes. Second is a brief description of the main features of modern arbitration. Third is a discussion of how arbitration might be used to resolve ballot-counting disputes. And last is a review of a few possible critiques of the proposal to arbitrate ballot battles.

### I. THE PROBLEM WITH COURTS RESOLVING BALLOT COUNTING DISPUTES

We need look no further than the taint on the U.S. Supreme Court after its decision in *Bush v. Gore* to see the risk of embroiling the judiciary in ballot-counting disputes.<sup>8</sup> For good reason, the U.S. Constitution established an independent judiciary to ensure the public perception of a judicial system free from partisan tilt. The potential of embroiling the judiciary in political mire is arguably at its peak when election outcomes are in dispute.

These fears drove the Supreme Court to deem non-justiciable election-related battles in cases ranging from redistricting<sup>9</sup> to post-election disputes<sup>10</sup> throughout most of this country's history. For ballot-counting disputes specifically, the Supreme Court case *Taylor v. Beckham* established in 1900 the principle that federal courts lacked power to address state ballot-counting disputes.<sup>11</sup> As Foley documents, it was not until the Warren Court in the 1960s that the federal judiciary entered the political thicket.<sup>12</sup>

For their part, state courts, when called upon to resolve post-election controversies, very often emerged with partisan stain, particularly in cases in which rulings fell along partisan lines.<sup>13</sup> Indeed, state court outcomes have too often

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ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304 (AM. LAW INST., Council Draft No. 2, 2015).

<sup>8</sup> See *Bush v. Gore*, 531 U.S. 98, 157 (2000) (“[A]bove all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure....”); See also, Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002) (discussing the taint on the judiciary wrought by *Bush v. Gore*); Christopher S. Elmendorf, Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 535 (2008) (noting the threat to the Court's impartiality resulting from *Bush v. Gore*).

<sup>9</sup> *Colegrove v. Green*, 328 U.S. 549 (1946).

<sup>10</sup> *Taylor v. Beckham*, 178 U.S. 548 (1900).

<sup>11</sup> *Id.* at 580–81.

<sup>12</sup> See FOLEY, *supra* note 2, at 233–37 (stating that courts began to apply this judicial philosophy in the post-election ballot counting context in the following cases: *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995)).

<sup>13</sup> See, e.g., *id.* at 122 (providing that the 2-1 determinations of the Florida Canvassing Board in 1876, and, much more recently, the 5-4 ruling of the U.S. Supreme Court in *Bush*, 531 U.S. 98, show

exposed partisan preference at the cost of neutrality and sound judicial reasoning. Examples include New York's "Stolen Senate" in 1891, embroiling the state's judiciary in manipulating electoral results;<sup>14</sup> the all-Democrat Rhode Island Supreme Court's perpetration of a partisan denial of the majority of Rhode Island voters' will in its 1956 gubernatorial election;<sup>15</sup> and the 1994 election for the Alabama Chief Justice wherein "renegade jurists even had the chutzpah to proclaim the ballots valid despite the explicit language of state law that provided otherwise."<sup>16</sup> As Professor Foley shows us, American history is replete with examples of partisan state courts acting in a partisan manner, despite evidence and law pointing to the contrary.

Despite this troubling history, state and federal judiciaries are the current go-to institutions for resolving election disputes. Yet the temptation for judges to advance political interests has often proved too great. There have, of course, been many examples of pivotally neutral judges in election disputes.<sup>17</sup> Carefully selected judicial panels have at times produced legitimate and admirable outcomes, as in the case of the 2008 Minnesota U.S. Senate recount discussed below.<sup>18</sup>

The core problem with delegating post-election dispute resolutions to courts, however, is that we cannot know in advance whether particular judges will act in a partisan or neutral manner. Judges—with their experiences and stature—may make the obvious best choice as a category to resolve election disputes. But individual judges are not always well suited to the task of resolving election-related disputes. Judges develop reputations based on who appointed them or behavior and statements during judicial campaigns (in states with judicial elections). Judges' political leanings are often discernable from decisions they issue from the bench.

Post-election litigation is like lightning; you never know where or when it is going to strike. Because of the impossibility of prediction, it is difficult to know in advance whether judges hearing post-election disputes will be impartial and—most critically—be someone the public *perceives* as politically neutral and fair-minded. Widely respected and impartial judges exist at the federal and state level, of course.<sup>19</sup> Yet it is difficult *ex ante* to choose an appropriate judicial institution or officer to resolve an election dispute if the goal is to ensure a result the public does not perceive as partisan.

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the result of state court rulings concerning post-election controversies).

<sup>14</sup> *Id.* at 188–90.

<sup>15</sup> *Id.* at 230–31.

<sup>16</sup> *Id.* at 258.

<sup>17</sup> *Id.* at 228–29 (providing numerous examples of "partisan" courts delivering decidedly non-partisan rulings throughout; for example, the Missouri Supreme Court's refusal to delay the inauguration of a Republican Governor after a close election showed the Democrat trailing by only 4,000 votes, despite the all-Democrat slate of judges on the court at the time).

<sup>18</sup> *Id.* at 242, 325–27, 333.

<sup>19</sup> *See id.* at 233–34, 236, 242, 325–27, 333.

Furthermore, candidates challenging the outcome of an election can make the problem worse by looking to the partisan makeup of institutions in the path to resolution and hopscotching to ones most likely to lean in their political favor. Professor Foley recounts numerous examples of forum shopping in *Ballot Battles* where savvy candidates looked for decision makers already on their side to resolve disputed elections.<sup>20</sup> To the extent courts then became involved, left in the wake is a judiciary mired in the thicket.

In *Ballot Battles*, Professor Foley nevertheless suggests that the judiciary is the best home for post-election dispute resolution.<sup>21</sup> He bases this claim largely on disqualifying the obvious alternatives. He carefully documents, for example, how sending post-election disputes into the political den of wolves that is a state or federal legislature for resolution has throughout U.S. history proven calamitous.<sup>22</sup> The other alternative Foley recounts, violence, is similarly far from attractive.<sup>23</sup> For Foley, this leaves the courts—and in his view particularly the federal courts—as the “least-worst” alternative. While federal courts are likely the “least-worst” option, Foley acknowledges that better than bad should never be the goal. As such, he advocates in *Ballot Battles* and elsewhere for the establishment of a quasi-judicial impartial tribunal that would either be a creature of state statute, federal statute, or even constitutional amendment to resolve post-election ballot battles.<sup>24</sup>

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<sup>20</sup> See, e.g., *id.* at 206–17 (explaining the Ballot Box 13 controversy during future President Lyndon Johnson’s 87-vote electoral win over Coke Stevenson in the primary election for the U.S. Senate in 1948, and describing the legal strategy necessitating candidates choosing forums that might hear their side favorably); *id.* at 217 (explaining Nixon’s strategy in 1960, where despite a close outcome in Texas Nixon chose not to pursue a recount in Texas because of, *inter alia*, Johnson’s control of the state judiciary at the time); *id.* at 267–68 (giving another example occurred in the 1994 Alabama Chief Justice election where both candidates looked for favorable judges to hear their claims); see also *id.* at 313 (accounting of the 2004 Washington gubernatorial election dispute); *id.* at 293–98 (providing that the litigation strategy for both sides in *Bush v. Gore* provides a modern example).

<sup>21</sup> *Id.* at 97 (discussing historian Tracy Campbell’s praise of using the judiciary to resolve election disputes in *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567 (1856)).

<sup>22</sup> *Id.* at 249–51 (comparing U.S. Senate battles settled by states to those settled by the U.S. Senate concluding that “[s]imply put, the step of taking a dispute to the Senate escalated the contentiousness and prolonged the controversy.”).

<sup>23</sup> *Id.* at 112–13 (explaining that U.S. history reveals multiple instances in which electoral disputes were resolved with violence (or threat of violence) including, for example, the Colfax Massacre in 1872 in Louisiana (in which a Reconstruction-era ballot dispute led to the slaughter of more than a hundred African Americans who had sought refuge from violence in a local courthouse)).

<sup>24</sup> PRINCIPLES OF THE LAW OF ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304, at 33–47 (AM. LAW INST., Council Draft No. 2, 2015); see also Steven F. Huefner & Edward B. Foley, *The Judicialization of Politics*, 79 BROOK. L. REV. 551, 551 (2014) (describing the ALI Project approach); Edward B. Foley, *How Fair Can be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187, 190 (2011) (proposing the creation of State Election Review Tribunals); Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Dispute Presidential Elections*, N.Y.U. J. LEGIS. & PUB. POL’Y 471, 477–78 (2010) [hereinafter Foley, *McCain v. Obama Simulation*] (describing the creation of a special tribunal for a mock disputed presidential election exercise). See generally Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013). Note that several state statutes require convening specialized

To further this idea, Professor Foley has been working with the American Law Institute (ALI) to develop model rules for the resolution of disputed presidential elections (hereinafter the “ALI Project”).<sup>25</sup> On the question of forum selection, the ALI Project proposes that the chief justice of the state supreme court in the state with a disputed outcome appoint a three-judge tribunal to hear the dispute.<sup>26</sup> Under this model, the state vests this “Presidential Election Court” with the power to enter orders like any other court and set subsidiary deadlines and rules to govern the process.<sup>27</sup> Professor Foley’s ideas represent a giant and important step forward. As he counsels, resorting to blind hope that a given court will handle ballot disputes effectively should not be the continued course. The next section reviews features of arbitration suggesting it might offer helpful embellishments to the model Foley proposes.

## II. ARBITRATION: ATTRACTIVE FEATURES

As many in the business world can attest, arbitration is often preferable to litigation. In the case of a pre-dispute agreement to arbitrate, agreement is reached when temperaments are calm and, critically, when parties have no way of knowing which procedural decisions will benefit which party. Below is a description of some of the advantages of arbitration, with an emphasis on those that might be of particular benefit in ballot-counting disputes.

### A. Contractual Flexibility

The single biggest advantage of arbitration and the reason it is used so often is flexibility.<sup>28</sup> Arbitration is a creature of contract.<sup>29</sup> There are therefore as many ways

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courts to resolve election disputes. *See, e.g.*, IOWA CODE ANN. §60.1 (West, Westlaw through end of the 2015 Reg. Sess.); KAN. STAT. ANN. §§ 25-1437, 25-1443 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., ELEC. LAW § 12-203 (West, Westlaw through ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. 16.1-14-07 (West, Westlaw through ch. 484 (end) of the 2015 Reg. Sess. of the 64th Legis. Assemb.); VA. CODE ANN. § 24.2-805 (West, Westlaw through 2015 Reg. Sess.).

<sup>25</sup> PRINCIPLES OF THE LAW OF ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304 (AM. LAW INST., Council Draft No. 2, 2015).

<sup>26</sup> *Id.* cmt b.

<sup>27</sup> *Id.* cmts.

<sup>28</sup> The Consumer Financial Protection Bureau recently issued a report including data on the prevalence of arbitration clauses in consumer contracts. The document reports that “[t]ens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.” CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>29</sup> *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 561, 570–71 (1960) (“To be

to structure arbitration as are within the imagination of the parties drawing up the agreement to arbitrate. Arbitration agreements can range from deciding to resolve any future dispute with the flip a coin<sup>30</sup> to complex hundred-page arbitration clauses addressing every possible contingency.

Parties can draft an arbitration contract well in advance of a dispute arising or they can write an agreement to arbitrate after a dispute has arisen. Parties can agree upon who they would like to resolve their dispute or they can agree on a process by which an arbitrator (or a panel of arbitrators) will be selected if a dispute arises. Parties can map out the scope of the dispute to be resolved in the arbitral forum, leaving other parts to courts. Or, parties can require that all related matters be heard in a single arbitral forum. Parties can stipulate in their agreement to arbitrate rules governing discovery and procedure to suit their needs. Parties can require that disputes be submitted to binding arbitration (meaning appeal is not possible) or non-binding arbitration (leaving avenues of appeal open).<sup>31</sup>

A fundamental underpinning of arbitration is freedom of contract. Thanks to the Federal Arbitration Act (FAA), passed in 1925, state governments and courts must respect this freedom of contract by honoring the parties' chosen means of resolving their dispute.<sup>32</sup>

### *B. Selection of Neutrals*

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sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.”); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 194 (3d Cir. 2010) (“As we have stressed, [a]rbitration is fundamentally a creature of contract, and an arbitrator’s authority is derived from an agreement to arbitrate.” (quoting *Allstate Settlement Corp. v. Rapid Settlements, Ltd.*, 559 F.3d 164, 169 (3d Cir. 2009))).

<sup>30</sup> *Cf.* Russell Berman, *Was the Iowa Caucus Decided by Coin Flips?*, ATLANTIC (Feb. 2, 2016) <http://www.theatlantic.com/politics/archive/2016/02/hillary-clinton-bernie-sanders-coin-flips-iowa-caucus/459429/> (noting that coin flips are no stranger in election dispute resolution describing dead-heat Iowa caucus outcomes decided by coin flips).

<sup>31</sup> *See, e.g.*, Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, DISP. RESOL. J., May-July 2006, at 22, 24 (discussing the benefits of non-binding arbitration including providing “the parties with important information about how a knowledgeable fact finder might decide the case”).

<sup>32</sup> Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2011). The period before Congress passed the FAA was marked by a judicial reluctance to honor arbitrated outcomes. The judiciary was suspicious that arbitrators could mete out justice fairly, and protective of courts’ role in protecting litigants’ rights. Congress passed the FAA at the behest of business interests anxious to enjoy the many benefits of arbitration (efficiency, cost, control, and the ability to pick neutrals familiar with industry norms) without the judiciary stepping in to undercut its effectiveness. *See* William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2187 (1995) (asserting that by enacting the FAA, Congress intended “to override a longstanding judicial hostility to arbitration agreements,” “to place agreements to arbitrate on an equal footing with other contract provisions,” and “to provide for more speedy and cost-effective adjudication”); *see also* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and A Proposal for Change*, 53 ALA. L. REV. 789, 796–97, 799–800 (2002).

Another attractive feature of arbitration is that disputing parties control who will arbitrate their dispute. Disputing parties may agree on arbitrator(s) by name or a process of selection. Giving disputants the ability to select arbitrators—whether sitting or retired judges or individuals who are not members of the judiciary but command the requisite respect or expertise—offers flexibility and the nimble approach many disputes require.

As the use of arbitration has expanded in the United States and internationally, associations of arbitrators have developed, such as the American Arbitration Association (AAA)<sup>33</sup> and the Judicial Arbitration and Medication Service (JAMS).<sup>34</sup> Both organizations refer parties to lists of qualified arbitration professionals (many of whom are retired judges). Such organizations also offer industry-specific form arbitration clauses drawn from the experience of arbitrating thousands of disputes.<sup>35</sup> Arbitration entities have even developed their own set of procedural rules contracting parties can choose to adopt in their arbitration agreements.<sup>36</sup> Such arbitration organizations base their model on achieving a strong reputation; they maintain a strong interest in carefully vetting arbitrators they refer and procedural rules they use.<sup>37</sup> Parties who turn to organizations like the AAA have the benefit of the legitimacy these organizations have built, lending credibility to their choice of arbitrator and the ensuing arbitration itself.

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<sup>33</sup> *About the JAMS Name*, JAMS: RESOLVING DISPUTES WORLDWIDE, <https://www.jamsadr.com/about-the-jams-name/> (last visited Nov. 28, 2016).

<sup>34</sup> *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARBITRATION ASS'N, [https://www.adr.org/aaa/faces/s/about.jsessionid=Pr31SI-Nb8pZbVeBIRYDteaXms-felqQFeUMP1QeSatXt7WIYG!1802314859?\\_afLoop=557799250948298&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D557799250948298%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dop2375euk\\_4](https://www.adr.org/aaa/faces/s/about.jsessionid=Pr31SI-Nb8pZbVeBIRYDteaXms-felqQFeUMP1QeSatXt7WIYG!1802314859?_afLoop=557799250948298&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D557799250948298%26_afWindowMode%3D0%26_adf.ctrl-state%3Dop2375euk_4) (last visited Nov. 28, 2016). At one point in *Ballot Battles*, Professor Foley suggests that “a neutral body chosen from a panel recommended by the American Arbitration Association” might make sense in post-election cases. FOLEY, *supra* note 2, at 252.

<sup>35</sup> *Drafting Dispute Resolution Clauses: A Practical Guide*, AM. ARB. ASS'N (Oct. 1, 2013), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540) [hereinafter *Drafting Dispute Resolution Clauses*].

<sup>36</sup> *See, e.g., Most Commonly Viewed Rules*, AM. ARB. ASS'N, [https://www.adr.org/aaa/faces/rules/searchrules?\\_afLoop=2089530886743069&\\_afWindowMode=0&\\_afWindowId=14v4wumyrm\\_1#%40%3F\\_afWindowId%3D14v4wumyrm\\_1%26\\_afLoop%3D2089530886743069%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D14v4wumyrm\\_55](https://www.adr.org/aaa/faces/rules/searchrules?_afLoop=2089530886743069&_afWindowMode=0&_afWindowId=14v4wumyrm_1#%40%3F_afWindowId%3D14v4wumyrm_1%26_afLoop%3D2089530886743069%26_afWindowMode%3D0%26_adf.ctrl-state%3D14v4wumyrm_55) (last visited Nov. 28, 2016).

<sup>37</sup> *See Qualification Criteria of the AAA/ICDR Rosters and Panels*, AM. ARBITRATION ASS'N, [https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/qualifications?\\_afLoop=559390262288235&\\_afWindowMode=0&\\_afWindowId=op2375euk\\_77#%40%3F\\_afWindowId%3Dop2375euk\\_77%26\\_afLoop%3D559390262288235%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dop2375euk\\_149](https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/qualifications?_afLoop=559390262288235&_afWindowMode=0&_afWindowId=op2375euk_77#%40%3F_afWindowId%3Dop2375euk_77%26_afLoop%3D559390262288235%26_afWindowMode%3D0%26_adf.ctrl-state%3Dop2375euk_149) (last visited Nov. 28, 2016).



### C. Finality

Another enormous benefit of arbitration is finality. Especially in commercial disputes, agreeing to arbitrate saves businesses time and money and avoids the uncertainty of protracted litigation.<sup>38</sup> Thanks to the FAA and Supreme Court jurisprudence since its passage, arbitral awards command the respect of courts. Citing the FAA, courts almost never pierce the arbitration veil to review arbitral decisions.<sup>39</sup> The finality of arbitration helps businesses keep dispute resolution costs manageable and infinitely more predictable. Even though arbitration has come under fire recently in the consumer and employment contexts, courts regularly cite the congressional imperative that arbitral decisions be final, allowing very limited grounds for overturning an arbitrated result.<sup>40</sup>

But finality need not necessarily be a feature of arbitration. Contracting parties are free to elect non-binding arbitration allowing the losing party to seek appeal or resort to filing a claim in court. Contracting parties can and often do contract for a dispute resolution process that includes a series of steps.<sup>41</sup> Parties might, for example, agree to mediate their claim first before turning to arbitration. Parties

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<sup>38</sup> *Cf. Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (holding that a provision of employment agreement delegating exclusive authority to resolve any dispute relating to the agreement's enforceability to an arbitrator was a valid delegation under the FAA); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 447 (2006) (holding that claim that purportedly usurious contract containing an arbitration provision was void for illegality was to be determined by arbitrator, not court). Section 2 of the Federal Arbitration Act requires courts to uphold agreements to arbitrate ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). 9 U.S.C. § 2 (2014). Arbitration can lead to litigation when the agreement to arbitrate is challenged. However, the Supreme Court has held that so-called "gateway" issue of contract formation must be decided within the arbitral forum. *See Rent-A-Ctr., W., Inc.*, 561 U.S. at 68–72. Because of the FAA, a carefully crafted agreement to arbitrate is less prone to wind up in protracted litigation than a dispute in court, supplying the reason that it is the favored option of efficiency-craving actors in the commercial context.

<sup>39</sup> *But see* Roger B. Jacobs, *Examining the Elusiveness of Finality in Arbitration, and the New Avenues of Appeal*, 33 ALTERNATIVES TO HIGH COST LITIG. 1, 4 (2015) (arguing that arbitration associations like AAA and JAMS are incorporating appellate processes into their procedural rules that are doing harm to the finality principle in arbitration).

<sup>40</sup> *See* 9 U.S.C. § 10(a)(1)–(4) (2014) (permitting a court to vacate an arbitral award upon finding of corruption, fraud, or impartiality of arbitrators, arbitrator misconduct, or instances where arbitrators have exceeded the scope of the authority given them under the agreement to arbitrate); *see also* *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005) (noting that there is a "strong federal policy favoring certainty and finality in arbitration"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 246 (6th Cir. 2004) ("It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration . . ."); Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT'L BUS. LAW 203, 204 (2002) (noting that 32% of arbitration participants surveyed cited "finality" as one of their top three reasons for arbitrating their dispute).

<sup>41</sup> *See Drafting Dispute Resolution Clauses*, *supra* note 34, at 13.

might contract for a “mini-trial,” or document exchange before proceeding to a formalized procedure. Parties can also contract to have arbitrated outcomes reviewed by a court.<sup>42</sup>

In sum, arbitration finality is defined by its lack of definition—parties can create a process designed to resolve the dispute as efficiently and with as much finality as desired.

#### *D. Confidentiality*

A further reason why arbitration is often an attractive option for would-be litigants is confidentiality. Unlike resolving disputes in open court, arbitration allows parties to contract for the confidential resolution of their dispute. In the age of the Internet when jammy-surfers can call up the most salacious details of a court case from their living rooms, the attractiveness of confidential arbitration proceeding cannot be understated.<sup>43</sup>

Still, just because most arbitration is conducted confidentially, it need not be so. Because arbitration is a creature of contract, parties can contract for as transparent a process as they would like. If they choose, parties are free to bake in transparency protections to ensure that the public has a means of assessing arbitration processes and outcomes.<sup>44</sup>

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<sup>42</sup> Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 455, 455–56 n.95 (2010) (describing how “sophisticated parties have . . . tried to mitigate the problem of uncorrectable errors in high-dollar cases by using arbitration clauses that require courts to review arbitration awards much the way appellate courts review trial courts”); see also Carroll E. Neeseemann, *Contracting for Judicial Review: Party-Chosen Arbitral Review Standards Can Inspire Confidence in the Profess, and is Good for Arbitration*, DISP. RESOL. MAG., Fall 1998, at 18, 18–19. *But see* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008) (holding that the FAA grounds for vacatur or modification are exclusive and cannot be expanded by the parties’ agreement); Michael S. Oberman, *‘The Other Shoe’: Are Agreements Narrowing Judicial Review Enforceable?*, 31 ALTERNATIVES TO HIGH COST LITIG. 65, 65 (2013) (explaining that in *Hall Street* the Court “held open the possibility that broader review might be available under state law”).

<sup>43</sup> See generally Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 22–23 (2013) (explaining the heightened privacy interests at stake when case records are available in a searchable computer database). *But see* Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 312–13 (2013) (noting that, particularly in the consumer arbitration context, unless the parties sign a confidentiality agreement or language is included in the agreement to arbitrate, arbitration is not necessarily confidential). See also Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 314–15 (2004) (“[A]s our legal system undergoes the transformation to a system of electronic judicial records—with all its substantial benefits—it is critical to ask how the advantages of public access are to be balanced against the other competing policies that have served to limit access in the past, such as . . . protecting individuals from invasion of their privacy and misuse of their personal information.”).

<sup>44</sup> Cole, *supra* note 42, at 313.

## III. ARBITRATING POST-ELECTION DISPUTES

Imagine this: after candidates have qualified for a state ballot in an upcoming election, the state requires the candidates to sign an agreement to submit any disputes arising from the counting of ballots in that election to arbitration. The state might structure such a contract to allow the candidates to negotiate the specific terms of the agreement,<sup>45</sup> or the terms might be set by state statute or by the state's elections board. As another alternative, the agreement might include a combination: portions that the candidates can negotiate and portions they cannot.<sup>46</sup> For example, the structure might permit candidates to negotiate only the process for forming the arbitral panel or list names of arbitrators the candidates agree upon in advance. The agreement to arbitrate might also include language that binds the candidates to certain timelines, cost structures, ballot-counting standards, and/or procedural rules. The agreement might be mandatory, imposed on all candidates as a condition of access to the ballot; or it might be voluntary and aspirational in nature.<sup>47</sup> The agreement might contemplate that the arbitral decision be judicially reviewable; or the parties could agree that all decisions emanating from the arbitral forum are final and non-reviewable. The discussion that follows elaborates on some of the key features such an agreement might include.

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<sup>45</sup> Any agreement to arbitrate must comport with the U.S. Constitution and with federal and state statutory provisions regarding the resolution of election disputes. The arbitration scheme proposed herein could therefore only function if Congress and state legislatures delegated authority to arbitrate election disputes via statute. Such a scheme is not without precedent. For example, Virginia delegates authority to resolve certain election disputes to an appointed Election Court. *See* VA. CODE ANN. § 24.2-801.1 (LEXIS through 2016 Reg. Sess. of the Gen. Assembly) ("As soon as a petition [for recount of presidential electors] is filed, the chief judge of the Circuit Court shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under § 24.2-805.").

<sup>46</sup> Anyone who is familiar with candidate negotiations over debate rules may wonder whether it is feasible/possible for adversarial candidates to agree on a dispute resolution process during the course of a heated political campaign. Still when faced with the uncertainties of (1) a post-election dispute arising at all and (2) what unknown processes they might be subject to should they arise, candidates might be sufficiently motivated to set procedures and rules in advance. In addition, once arbitral agreements become the norm, a set agreement might emerge that would reduce the need for negotiation of every aspect.

<sup>47</sup> It is possible that a candidate could challenge conditioning access to the ballot on signing an agreement to arbitrate. Given that many public sector employees are bound by arbitration clauses in their employment contracts, it is hard to see how a state could lack the power to bind candidates in this context. Laura J. Cooper, *Discipline and Discharge of Public-Sector Employees: An Empirical Study of Arbitration Awards*, 27 ABA J. LAB. & EMP. L. 195, 201 (2012) (evaluating the use of arbitration in public sector employee contracts). To the degree that candidates are able to negotiate *ex ante* for desired features of the arbitral forum, conditioning access seems reasonable.

*A. Parties to a Pre-Election Agreement to Arbitrate*

A threshold question is who exactly the parties to the agreement to arbitrate should be. Although the candidates are obvious signatories, many others are impacted by the outcome of a contested election including state and national political parties and, to an even greater extent, voters. Would an agreement among the candidates to arbitrate post-election disputes adequately represent the public interest?<sup>48</sup> Would candidates' interests substantially diverge from voters' interests?

In some respects candidate and voter interests are one and the same. To the extent that candidates advocate for their own voters and against their opponents', the interests of all voters are represented. This is the model that post-election litigation largely relies upon. Would an arbitral forum provide the same voter representation? There is no reason to think it would not. And indeed, there is every hope that a pre-election agreement to arbitrate would improve upon the litigation model. First, unlike a post-election litigated process, an agreement to arbitrate could affirmatively incorporate protections for voter and other stakeholder interests well before Election Day when all sides are committed to a fair outcome. Further, arbitration is not limited to including only dueling candidates. Agreements to arbitrate could also include state officials, such as the state's chief election officer and/or attorney general. State and local party representatives could also sign the agreement. A potential downside is that more contracting parties are added, the more complicated arbitral contract negotiations might become. But, the resulting agreement to arbitrate would—if well crafted—arguably subject any future dispute to greater buy-in than a litigated process.

A benefit of arbitration is that a one-size-fits all solution is not required. States could decide which parties should enter the agreement depending on the type of election at issue and the players involved. This approach could complement the Presidential Election Court model Professor Foley proposes.<sup>49</sup>

*B. Choice of Arbitrator(s)*

Choosing an arbitrator or panel of arbitrators to hear post-election ballot-counting disputes presents a difficult challenge. Even a panel designed to prevent partisan leaning can wind up politically lopsided. A perfect example is the commission established to resolve the Tilden-Hayes ballot battle in 1876.<sup>50</sup> The panel delegated authority to resolve the dispute consisted of fifteen individuals: five senators, five representatives, and five members of the Supreme Court.<sup>51</sup> The ten

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<sup>48</sup> See Green, *supra* note 5, at 360–62 (discussing incorporating public interest in dispute resolution contexts).

<sup>49</sup> Foley, *McCain v. Obama Simulation*, *supra* note 24, at 479–80.

<sup>50</sup> FOLEY, *supra* note 2, at 125–31.

<sup>51</sup> *Id.* at 130.

members from Congress were known to split evenly along partisan lines.<sup>52</sup> Of the five U.S. Supreme Court justices on commission, two were Republican-appointed and two were Democrat-appointed. Those four justices were to choose a fifth justice, ideally seen as impartial, to act in the tiebreaker role for the whole otherwise evenly-divided commission.<sup>53</sup> The chosen justice, Justice David Davis (widely regarded as an impartial voice on the Court), however, declined to serve.<sup>54</sup> Instead, the four justices opted for a second choice, Justice Joseph Bradley, whom Foley describes as holding widely acknowledged Republican leanings.<sup>55</sup> This example suggests caution, as it illustrates how difficult it can be to appoint a true neutral.

As Professor Foley suggests, certain people throughout history have been invested with the gravitas and public trust to resolve election disputes in a manner the public is prepared to accept. Ballot battles have very often been resolved not due to institutional fortitude or the rule of law, but because the right person at the right time stepped up to help bring disputes to resolution. Famous examples include Senator Thomas Ferry of Michigan and Speaker Samuel Randall in the Hayes-Tilden recount, Joshua Chamberlain's work to resolve Maine elections in 1879, and the many other examples peppered throughout Professor Foley's book.<sup>56</sup>

It is virtually impossible to identify such a person in the abstract, or indeed, for a legislature to craft a post-election dispute resolution process via statute that could identify the right people willing and available at some future possible point down the road. History shows us that it is not impossible to find such people, however, when a specific election dispute is at hand.

In 1962, Minnesota's gubernatorial race came down to a victory of only 91 votes, a .0073% lead.<sup>57</sup> To resolve the outcome of the election, the Minnesota Supreme Court put in place a special election tribunal—with agreement from both candidates—to adjudicate the contest.<sup>58</sup> The Chief Justice of the Minnesota Supreme Court “let it be known that he wanted the two candidates to agree on a neutral judge to hear the contest.”<sup>59</sup> As Foley describes it:

The attorneys for the two candidates then developed a plan whereby the contest would be considered by a three-judge trial court. The attorneys picked the three

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 130–31.

<sup>54</sup> *Id.* at 131–32.

<sup>55</sup> *Id.* at 132.

<sup>56</sup> *Id.* at 317–18 (describing how “Secretary of State Sam Reed had behaved impartially, and admirably, throughout” the 2004 Washington gubernatorial recount); *id.* at 167 (“Chamberlin was revered throughout the state—and the nation—for heroism during the Civil War . . . . Although he had been a Republican governor in the state, he was one man capable of standing above the partisan fray.”)

<sup>57</sup> *Id.* at 238.

<sup>58</sup> *See id.* at 240–242.

<sup>59</sup> *Id.* (quoting RONALD F. STINNETT & CHARLES H. BACKSTROM, RECOUNT 95 (Washington, DC: Document Publishers, 1964).

judges they wanted for this panel: one appointed by a Democrat . . . another appointed by a Republican . . . , and a third who had been originally appointed by a Democrat but who had been elevated to a higher court by a Republican. By choosing these three judges, both sides thought that they had adequate representation on the panel and, at the same time, that the panel was evenhanded and balanced despite having an odd number of members. The chief justice readily signed an order giving jurisdiction over the contest case to the three-judge panel and the two sides had selected.<sup>60</sup>

In *Ballot Battles* and elsewhere, the Minnesota solution has been widely praised as a model approach to resolving post-election disputes.<sup>61</sup> In ceding authority to the parties to select arbiters, the model closely resembles a form of post-dispute agreement to arbitrate, here blessed by the state's highest judicial official.<sup>62</sup> Foley also describes other instances in which states employed creative approaches to resolve election disputes.<sup>63</sup>

Can such an approach be planned ahead of time, before ballots have even been cast? The ALI Project endeavors to achieve this end in the case of a disputed presidential election by vesting authority in the chief justice of the state supreme court to identify three individuals to serve on the tribunal the Project proposes.<sup>64</sup> Within the Reporter's Note, the ALI expresses hope that the "basic idea of 'fair play' imbedded in American culture would cause the Chief Justice to exercise this appointment authority in a[n] . . . evenhanded manner."<sup>65</sup> The ALI model thus engages in a bit of wishful thinking that such an approach would most likely play out in favor of fairness.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 333. Observers widely praised the recount outcome as "determined according to impartial law, not partisan favor." *Id.* (quoting a *Minneapolis Star Tribune* article).

<sup>62</sup> *See id.* at 242. Note that Minnesota followed its model again successfully in the 2008 Coleman-Franken recount where Justice Page (acting for the recused Chief Justice according to Minnesota law) carefully empaneled a "tripartisan" panel to hear the recount. *Id.* at 325-27. In ceding authority to the parties, the model closely resembles a form of post-dispute agreement to arbitrate, which had been blessed by the state's highest judicial official. However, that official still retained the right to select a panel of judges if the situation made it necessary for the judge to choose.

<sup>63</sup> *See id.* at 247, 253, 270. (Foley explains how a number of states' have resolved election disputes in similar ways). For example, Foley includes a description of a New Jersey recount in 1981 that employed method similar to Minnesota's using recount rules jointly drafted by attorneys from both campaigns. *Id.* at 247. Oklahoma law required the two candidates to agree upon a judge to adjudicate a dispute in a U.S. Senate election in 1974 with review by the Oklahoma Supreme Court. *Id.* at 253. Future U.S. Senator Jeff Sessions who, while serving as Alabama Attorney General, proposed the creation of a "special 'bipartisan court' to hear [an election dispute in that state]." *Id.* at 270.

<sup>64</sup> PRINCIPLES OF THE LAW OF ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304(a) (AM. LAW INST., Council Draft No. 2, 2015). ("Within 24 hours of the Chief Election Officer's declaration pursuant to §303 [Declaration of Expedited Presidential Recount] the Chief Justice publicly shall either (1) announce the appointment of three judges to serve as the Presidential Election Court; or (2) if before the election three judges were contingently appointed to serve in this capacity, confirm the prior appointment."). Note that this mechanism could work equally well if the prior appointment arises from an agreement to arbitrate.

<sup>65</sup> *Id.* Reporter's Note at 40.

An arbitration approach would allow a more calibrated approach to identifying individuals with the right temperament and reputation to serve as arbitrators of ballot-counting disputes.<sup>66</sup> A number of different models could be used. Parties might decide that each side would submit lists and engage in a process of striking names, similar to selection of juries. Or, parties could each be tasked with choosing an arbitrator with loyalties to the opposing party (such that moderate individuals are chosen) with those two chosen arbitrators choosing a third.<sup>67</sup> Or, parties could agree that once the dispute arose, they would follow the Minnesota models of each choosing one person affiliated with their own party and a third chosen for his or her neutral reputation and widespread respect. Parties would not be limited to selecting judges (though they could assume judicial rules regarding participation as arbitrators allowed it).<sup>68</sup> There are a number of interesting options parties could exercise.<sup>69</sup> In addition, just as the American Arbitration Association has developed a list of respected and trusted arbitrators, one could imagine a list of expert election dispute arbitrators developing. The point: arbitration offers a process by which creative options for arbitrator selection can be built into an arbitration agreement well before a dispute arises.

### C. Finality

There can be little doubt that finality, achieved as soon as possible, is favorable in post-election disputes. Uncertainty in electoral outcomes has left seats vacant well into official terms in examples throughout U.S. history.<sup>70</sup> In many cases, the failure of an election to seat officials has stalled the legislative process or otherwise inhibited government functioning (not to mention the toll it takes on public confidence in government).<sup>71</sup> As discussed herein, pre-election arbitration agreements have the advantage of allowing parties to set procedural deadlines, limit opportunities for appeal, consolidate types of disputes into a single arbitral forum, and potentially leverage the unwillingness of courts to vacate arbitral awards to solidify and finalize arbitration outcomes.

But finality in election arbitration would be limited in one important respect. Namely, arbitrated outcomes only bind the parties that contracted to arbitrate. An

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<sup>66</sup> See Foley, *The McCain v. Obama Simulation*, *supra* note 24, at 488–89 (discussing the considerations behind the choice of judges for the judicial panel, including their qualifications). The merits of established arbitrators can be seen by glancing into the complex process required to determine a judicial panel.

<sup>67</sup> *Id.*

<sup>68</sup> Jacobs, *supra* note 38, at 5.

<sup>69</sup> See Foley, *McCain v. Obama Simulation*, *supra* note 24, at 488–89. Professor Foley has addressed the selection of appropriate arbiters of election disputes elsewhere. *Id.*

<sup>70</sup> See FOLEY, *supra* note 2, at 334 (noting that Senator Al Franken was not seated in the U.S. Senate until eight months after election day).

<sup>71</sup> *Id.*

individual voter (or group of voters) is not bound by an arbitration agreement and may elect to pursue claims in court.<sup>72</sup> Parties in election disputes regularly use this tactic to evade an unfavorable state court ruling.<sup>73</sup>

Such end-runs around arbitral forums could be avoided by ensuring that procedural protections afforded in the forum are strong. The court-appointed tribunal the ALI Project proposes faces a similar challenge. The authors suggest that the stronger the protections built into the process, the less vulnerable it is to attack under federal law:

[A]n essential component of [the procedures proposed in the ALI Project] is that they are designed with the aim of satisfying applicable Fourteenth Amendment standards. Thus, if a state employs these Procedures and adheres to them in their implementation, the state reasonably should be able to expect that the federal judiciary will not interfere with their operation.<sup>74</sup>

A federal court's motivation to interfere with a state court outcome on behalf of a voter or group of voters is only strong when the state court outcome is perceived to lack procedural fairness. As the Reporter's Note puts it: "[T]he occasion for the exercise of those federal powers may diminish, as a state amends its law to put its own ballot-counting house in order (so to speak)."<sup>75</sup> If the tribunal is a creature borne of a thorough and fair agreement to arbitrate, protections against federal meddling is arguably heightened.<sup>76</sup>

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<sup>72</sup> See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075–76 (1984) (arguing that a disparity in resources among parties can result in unfair settlement outcomes); James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469 (2004). This question brings up a related critique of the ADR model in general. Some argue the ADR model lacks due process protections for litigants, which are particularly important when litigation is marked by extreme power imbalances. See *id.* In the case of campaigns, candidates often have war chests of different sizes and costs of recounts and other post-election procedures can prove prohibitive. Arbitration agreements can and should seek to reduce the problem of disparate resources in election cases in pursuit of a fair outcome.

<sup>73</sup> PRINCIPLES OF THE LAW OF ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304, Reporter's Note at 44 (AM. LAW INST., Council Draft No. 2, 2015) (citing *Roe v. Alabama*, 43 F.2d at 580) (noting the defeat of an attempted end-run around a state court outcome accomplished by filing a federal court suit in the name of voters who were not parties to the state court proceeding at issue).

<sup>74</sup> *Id.* § 304, cmt. f, at 38.

<sup>75</sup> *Id.* § 304, Reporter's Note at 43.

<sup>76</sup> The Supreme Court has on numerous occasions rejected the argument that arbitral forums leave federal statutory and constitutional rights unprotected. Citing the national policy favoring arbitration, the Supreme Court has regularly blessed arbitration as an adequate means of vindicating such claims. Carrie Menkel-Meadow, *The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?*, 26 ABA J. LAB. & EMP. L. 249, 259 (2011) (citing *de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (describing the Court's acceptance of the arbitral forum to protect statutory claims)).



As arbitration has evolved, parties have developed mechanisms to incorporate due process protections into the arbitral forum. For example, individuals regularly involved in the employment dispute arena came together to develop a set of contractual norms to ensure that arbitration agreements protected the due process rights of parties to arbitration, culminating in the development of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.<sup>77</sup> Industry-specific procedural rules developed by the American Arbitration Association provide another example of the standard-setting function arbitration can play.<sup>78</sup> Especially in the pre-dispute context, both sides have a vested interest in the perceived fairness of the arbitration process. Customized and well-regarded standards evolve when arbitration becomes the norm.

The best approach, as the ALI Project concludes, is to craft a process that candidates *and* voters believe to be a fair forum to achieve a just electoral outcome. Over time, as states and negotiating parties improve standard agreements to arbitrate post-election disputes, one can imagine courts' increasing confidence in the mechanism and concurrent reluctance to entertain related suits.

#### *D. Transparency*

In most arbitration disputes, as described above, confidentiality is an attractive feature. Arbitration provides parties with the ability to retain their reputation without airing the details of the dispute in open court. Litigants are often willing to forgo procedural fairness guarantees built into litigation for gains associated with a confidential process.

In the context of ballot battles, confidentiality is most-assuredly *not* appropriate. Any sense that recounts or reexaminations of ballots are being conducted behind closed doors will drastically reduce the public's willingness to accept the outcome. This truth has driven most states to require careful and structured public oversight of post-election ballot counting, and has compelled

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<sup>77</sup> JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 171–78 (1997) (stating the Employment Protocol in Appendix B). Consumer Protocol and Healthcare Protocol models have also been developed. *See generally* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 369 (2004).

<sup>78</sup> *See AAA Court- and Time-Tested Rules and Procedures*, AM. ARB. ASS'N, [https://www.adr.org/aaa/faces/rules.jsessionid=ICDhIUDMUQID\\_xE6C2s7Dr-WuXnPX7OJuamiMFeUI2g1DxCqEk-p!2038387979?\\_afLoop=141047276088379&\\_afWindowMode=0&\\_afWindowId=bTrqQy18#%40%3F\\_afWindowId%3DbTrqQy18%26\\_afLoop%3D141047276088379%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Da5k3c18ur\\_4](https://www.adr.org/aaa/faces/rules.jsessionid=ICDhIUDMUQID_xE6C2s7Dr-WuXnPX7OJuamiMFeUI2g1DxCqEk-p!2038387979?_afLoop=141047276088379&_afWindowMode=0&_afWindowId=bTrqQy18#%40%3F_afWindowId%3DbTrqQy18%26_afLoop%3D141047276088379%26_afWindowMode%3D0%26_adf.ctrl-state%3Da5k3c18ur_4) (last visited Nov. 28, 2016) (“Since our founding, the AAA has been at the forefront of the development and refinement of the court-tested rules and procedures that are the bedrock of any successful alternative dispute resolution process. When used in conjunction with our neutrals and AAA-administered case management, they provide cost-effective and tangible value to users across a wide variety of industries and cases.”).

extraordinary efforts to include members of the public in the oversight process as well. For example, in the U.S. Senate recount in 2008, disputed ballots were live-streamed over the Internet as election judges evaluated them.<sup>79</sup>

In short, the more transparency mechanisms built into agreements to arbitrate ballot-counting disputes, the better. Courts and election administrators have been experimenting with ways that technology can dramatically increase opportunities for transparency in post-election processes. Because of the flexibility arbitration permits, arbitral forums could (and should) innovate to an even greater extent.

### *E. Standards*

Arbitrating ballot-counting disputes holds benefit in the election context where standards applied can be outcome determinative. One has only to look at the Florida controversy of 2000, for example, where the standard of voter intent in marking a ballot had not been clearly enshrined prior to the election, to see how important standard setting can be.<sup>80</sup> Advocates have long urged states to set clear standards in state election statutes. All too often, legislators neglect to fix problems with election mechanics once in office,<sup>81</sup> or write statutes that fail to anticipate standards questions.

Requiring parties to negotiate the precise standards and procedural rules that will govern a future ballot-counting dispute as part of an arbitration agreement would enable negotiators to design rules ahead of time to fill in whatever gaps statutes or regulations have left open. With no dispute on the table, negotiators will look for rules that are clear and simple to follow, reducing partisan posturing once election disputes are underway.<sup>82</sup>

The process of negotiating standards could even serve the purpose of alerting the legislature of gaps in the code. As arbitral norms develop, legislatures could adopt standards candidates routinely include to in pre-election arbitration

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<sup>79</sup> FOLEY, *supra* note 2, at 320 (“[T]he [B]oard permitted its review of the challenged ballots to be televised over the Internet, with a screen that enabled citizens watching the proceedings to see each ballot that the board was evaluating. This transparency engendered public trust in the board’s rulings. Citizens could see for themselves that the board was reviewing each ballot deliberately and fairly.”).

<sup>80</sup> See generally *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>81</sup> HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 8 (2009) (“As one reform advocate ruefully told me, ‘Process is not sexy.’”). Once elections are over and the legislative session begins, they are often “out of sight out of mind.” *Id.* The notable exception, of course, are issues like voter eligibility and redistricting where legislators’ stake arguably remains heavily in play throughout their terms.

<sup>82</sup> The *Bush v. Gore* standards battle provides a prime example of the partisan arguments over ballot counting standards once recounts are underway. See CHARLES L. ZELDON, *BUSH V. GORE: EXPOSING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY* (2008) at 19-26 (describing the standards battles Bush and Gore’s attorneys engaged in since Florida law fell silent on whether or not specific ballots should be counted); see also JAY WEINER, *THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT*, 91-3 (2010)(describing standards battles in the 2008 Minnesota U.S. Senate recount).

agreements. In this way, negotiation over standards could help states develop uniform and non-partisan agreement on how to count ballots fairly.

The discussion above suggests several ways in which arbitration holds the potential to improve ballot battle resolution. The section that follows looks at some potential criticism of the arbitration model in resolving post-election disputes.

#### IV. CRITIQUES OF ARBITRATING BALLOT BATTLES

Arbitration is hardly a darling of current public opinion. Its use in the consumer and employment contexts is under fire from many quarters.<sup>83</sup> Indeed, there are many reasons to question whether its injection into the voting process is wise. This section addresses several potential challenges to arbitrating ballot-counting disputes.

One critique of arbitrating ballot disputes is the problem of precedent. A common criticism of arbitration generally is that non-judicial settlement of disputes deprives future litigants of the precedential value of outcomes. The law, the argument goes, cannot develop when disputes are resolved out of court.<sup>84</sup> But just because precedent does not develop in many arbitral contexts does not mean it need be so here. As noted above, a critical feature of any contract to arbitrate ballot-counting disputes must be that the process be done in public and that arbitral decisions be fully reasoned and documented. Arbitration does not require secrecy just because most arbitration contracts choose it. In fact, some of the most innovative arbitration schemes build openness of outcomes and even the use of precedents into the arbitral structure. For example, the Israeli “Benoam” arbitration model for resolving insurance subrogation claims relies on a series of published “landmark decisions” by arbitrators upon which future arbitrators rely in resolving subsequent claims.<sup>85</sup> The beauty of arbitration, as described above, is its flexibility and capacity to bend to the specific needs of the dispute environment.

Another potential hurdle to arbitrating ballot-counting disputes is whether or not, in the case of candidates for Congress, states have the authority to impose arbitration as a condition of ballot access. In *United States Term Limits, Inc. v. Thornton*, the Supreme Court held that states cannot impose additional qualifications for candidates for Congress beyond what the U.S. Constitution

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<sup>83</sup> See generally CONSUMER FIN. PROT. BUREAU, *supra* note 28. For a general critique of mandatory binding arbitration in the consumer and employment context, see generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

<sup>84</sup> Fiss, *supra* note 70, at 1085 (“[A court’s] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”).

<sup>85</sup> Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 183–90 (2012) (describing the Benoam arbitration process and its incorporation of precedential outcomes into its structure).

requires.<sup>86</sup> In that case, the Court found unconstitutional a provision in the Arkansas state constitution that refused ballot access to individuals who had served either three terms in the U.S. House of Representatives or two terms in the U.S. Senate.<sup>87</sup> The question of whether this case would preclude states from requiring congressional candidates to sign a contract to arbitrate ballot-counting disputes would thus depend on whether or not such a condition of access would be considered a “qualification.” Based on the Court’s reasoning in *Term Limits*, there is a strong argument that an arbitration condition is not a qualification. In that case, the Court’s concern was that allowing states to impose their own “patchwork” of qualifications for federal representatives would frustrate the Framers’ design of a uniform national legislature.<sup>88</sup> Imposing an arbitration condition would not impact the uniformity of the federal body. Rather, such a condition would constitute the state simply requiring candidates to agree to its manner of election process—a power clearly delegated to states in Article I Section 4’s “Time, Place and Manner of Holding Elections” clause.<sup>89</sup>

A final hurdle to arbitrating post-election disputes is the question of legitimacy of the arbitral forum. Would members of the public accept an arbitrated outcome? Would voters feel cheated out of their day in court? Would the arbitrated outcome be the subject of countless lawsuits decrying arbitrators’ decisions? Answers to these questions would most likely rest on whether or not the public perceived the process as fair and transparent. For this reason any agreement to arbitrate ballot-counting disputes must be comprehensive, transparent, and include process protections that ensure public buy-in. Based on Professor Foley’s history of disputed election, there is every reason to believe the public will accept a non-traditional approach to resolving election disputes if the public believes fundamental fairness has been served.

#### CONCLUSION

This discussion comprises a thought experiment. Much more work would be required to flesh out what a model pre-dispute agreement to arbitrate ballot-counting disputes might look like, who would negotiate and sign it, whether it would be subject to judicial review, what due process protections should be built in, and what procedures and remedies it would require.

Should candidates, parties, and state governments start experimenting with this idea, one can imagine that contracting norms might evolve and agreements to

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<sup>86</sup> U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 780 (1995) (concluding that “the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby ‘divested’ States of any power to add qualifications”).

<sup>87</sup> *Id.* at 783.

<sup>88</sup> *See id.* at 780.

<sup>89</sup> U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

arbitrate would take on increased legitimacy over time. What works well in one post-election dispute context might be refined and used in another, building towards arbitral norms that reduce uncertainty in post-election disputes.

With the sweeping record of post-election disputes Professor Foley has compiled, we are hardly starting from scratch. We can use his careful history to learn lessons from the past about how to resolve ballot-counting disputes creatively and flexibly, prizing the legitimacy of the process as the foremost goal.