2012

Resolving Disputed Elections through Negotiation

Rishi Batra
St. Mary's University School of Law, rbatra@stmarytx.edu

Resolving Disputed Elections Through Negotiation

RISHI BATRA*

"Normally in a lawsuit, you say, 'This is what it is worth to me. If it gets too expensive, settle the damn thing.' You can't settle this thing."
- Chris Vance, Republican Party Chairman, regarding the 2004 Washington governor's election[1]

I. INTRODUCTION

Could a disputed election—one in which the winner is not clear and the result is within the "margin of litigation"[2]—be resolved through a negotiated result? Given the "winner take all" nature of these elections, where one candidate ends up holding the office, and all others do not, it would seem that negotiated solutions and other alternative dispute resolution techniques would have no application. This article explores why self-interested candidates and their associated parties may be interested in a negotiated outcome, what the scope of such an agreement could look like, and how to overcome barriers to such a negotiated result.

Disputed elections have occurred throughout American history, including the Hayes-Tilden election of 1876,[3] the U.S. presidential election of 1960,[4] and numerous local elections as well. Arguably the most famous disputed election in U.S. political history is, of course, the 2000 presidential election, between George W. Bush and Al Gore.[5] In response to the *Bush v. Gore* election irregularities in 2000, Congress passed the Help America Vote Act

---

* Langdon Fellow in Dispute Resolution, The Ohio State University Moritz College of Law. The author thanks Michael Moffitt for his guidance, and Nancy Rogers, Josh Stulberg, Amy Cohen, Sarah Cole, Ned Foley, Dan Tokaji, Steven Huefner, Terri Enns, Donald Tobin, and Stephanie Hoffer for wonderful advice and feedback.

[1] David Postman, *Lawsuit Buries Parties in Debt*, SEATTLE TIMES (Apr. 22, 2005), at B1.

[2] Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 946 (2005).

[3] *See generally* PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1966).

[4] *See generally* DAVID PIETRUSZA, 1960: LBJ VS. JFK VS. NIXON: THE EPIC CAMPAIGN THAT FORGED THREE PRESIDENCIES (2008).

[5] *See generally, e.g.*, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001).

(HAVA) in 2002.[6] This authorized monies to be used in election improvements[7] as well as created new requirements in the areas of voting equipment, registration databases, voter identification, and provisional voting.[8] These reforms, as implemented, have not ended disputed elections, and have also, in some cases, made election disputes more likely.[9] Thus, we continue to see elections such as the 2004 Washington governor's race[10] and the 2008 senatorial election between Norm Coleman and Al Franken[11] that result in post-election litigation.

What should be done to resolve situations such as these, where the outcome of the election is in dispute? Current remedial schemes that exist include recounts, adjustment to vote totals and election outcomes, new elections, criminal penalties and damage awards, and other injunctive relief.[12] These remedies are almost all awarded through the mechanism of litigation, with courts overseeing this process. This mechanism imposes costs, both on the parties themselves, and on society through public dollars and decrease in democratic legitimacy.[13] Proposals for reform have focused on changing the post-election process of determining the procedures for recounts, including the addition of arbitration[14] or a non-partisan tribunal.[15]

The idea of having the candidates themselves negotiate the ultimate outcome of such a dispute—with the candidates determining who takes

---

[6] Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (West Supp. 2004).

[7] Daniel Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214 (2005).

[8] *Id.*

[9] *Id.* at 1214–18. *See also* Hasen, *supra* note 2, at 939.

[10] *See* WASH. SEC'Y OF STATE, *2004 Governor's Race* (2004), http://www.secstate.wa.gov/elections/2004gov_race.aspx (providing complete election returns from the Washington gubernatorial race); *see also* Symposium, *Where's My Vote? Lessons Learned from Washington State's Gubernatorial Election*, 29 SEATTLE U. L. REV. 313 (2005).

[11] Sheehan v. Franken, 767 N.W.2d 453, 456 (Minn. 2009) (detailing the disputed 2008 Minnesota Senate race between Al Franken, Norm Coleman, and Cullen Sheehan).

[12] Steven Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 277–87 (2007).

[13] *Id.* at 294.

[14] Erin Butcher-Lyden, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531, 547–51 (2010).

[15] Edward Foley, *The Need for a Structurally Nonpartisan Tribunal*, ELECTION LAW AT MORITZ (Oct. 5, 2008), http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=2631.

office and who concedes the race—has not been explored in detail.[16] Part II of this article explores why this might be, given how a familiar vision of democracy precludes this idea. This vision of democracy, known as the majoritarian vision, views elections themselves as a dispute resolution mechanism in which the majority of voters serve as the deciding criteria. I discuss how disputed elections challenge this vision, both by not providing a clear mandate on the winner of the election, and also by not linking the preferences of the citizens to the government. I discuss another widespread vision of democracy, the proportional representation vision, which views elections as a way of choosing representatives to be negotiators of policy, and suggests a negotiated solution is more closely aligned with the democratic process in this situation.

Even if our vision of democracy suggests a negotiated solution to be proper in the case of a disputed election, the idea would be moot if such a solution was impossible. Part III examines the election context and explores why both candidates in an election might prefer a negotiated solution for reasons in their own self-interest. It discusses how a leading candidate might prefer the result of a negotiated outcome, even to a potential win in court, because it offers the possibility of greater legitimacy and governability, promptness of resolution, reduction of uncertainty, and preservation of funds. This part also explores why a candidate who concedes the race might also prefer a negotiated solution, because it allows the preservation of reputational interests, policy goals, and also funds.

Part IV of this article delineates potential areas for agreement in a negotiated solution. Other than just the ultimate "winner" of an election, candidates have many other areas where agreements and tradeoffs are possible. These include agreements on appointments, policy, campaign funding, length of term, and, importantly, the terms of the concession. By delineating these possible agreements, we can see how the terms of the agreement can satisfy the interests that we identified in Part III.

Part V of the article discusses potential roadblocks to negotiated solutions, and considers whether they are fatal to the idea of a negotiated outcome. These include tribalism and the associated cognitive traps, irrational escalation by the parties, equality and justice seeking, multiple parties in interest, principal-agent issues, and lack of negotiable tradeoffs. These barriers are important to consider, because despite the potential advantages that a negotiated solution has for the candidates themselves as seen in Part III, a candidate might not be able to take advantage of them due

---

[16] *But see* Lawrence Susskind, *Could Florida Election Dispute have been Mediated?*, 8 DISP. RESOL. MAG. 8 (2001–2002) (focusing mostly on mediating the election recount procedure).

to these factors. Part VI then briefly examines two potential solutions to many of these barriers, in the form of either legislatively mandated mediation of disputed elections, or judicially encouraged settlement of the dispute. Part VII offers a brief conclusion.

Importantly, this article limits its scope to the negotiation of the ultimate result—actually determining who takes office and who concedes the race, not the dispute over the election procedures.[17] This is a solution to an election dispute that has not been explored in great detail. In the very rare case where negotiation[18] has been proposed,[19] the focus has been on negotiating the procedures for a post-election recount or resolution of other voting irregularities. The exploration of negotiating recount procedures, although it touches on similar concerns, is left for a future article.

II. ELECTIONS AS A DISPUTE RESOLUTION MECHANISM

The idea of using an alternative dispute resolution mechanism, such as negotiation, to resolve an election might seem strange. This is because elections themselves function as a particular type of dispute resolution mechanism by their very nature. In general, they attempt to answer the question, "[T]o whose interest should the government be responsive when the people are in disagreement . . . ?"[20] The mechanism to answer this question, by one vision, is that government should be responsible to the majority of people[21] (or at least the voting citizens). By this vision, citizens use elections to choose between competing teams of policymakers.[22] These policymakers have concentrated policy making power, and so are controlled by the citizens through the domination of the majority.[23] This vision of democracy is known as the *majoritarian vision*,[24] and is best summed up by

---

[17] Of course, election irregularities, both the type and scope, will play a role in the negotiating positions of the candidates. *See infra* Part III.

[18] In this article, I am including the idea of a negotiated solution to encompass one that is also mediated. *See infra* Part VI. The criteria here is that the ultimate officeholder is decided by the agreement of the candidates themselves, rather than an outside party.

[19] Susskind, *supra* note 16.

[20] AREND J. LIJPHART, DEMOCRACIES 4 (1984). *See also* G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 21 (2000).

[21] *Id.*

[22] *See* POWELL, *supra* note 20, at 5.

[23] *Id.*

[24] *Id.* Also sometimes referred to as the Westminster model. LIJPHART, *supra* note 20, at 4.

Alexis de Tocqueville: "The very essence of democratic government consists in the absolute sovereignty of the majority."[25]

Under the majoritarian vision of democracy, one reason the decisive choice of the majority is important is because of the mandate that it provides.[26] The voters, in choosing a candidate during an election, ensure that the candidate or party will take power, and will have a concentrated power to have a dominant role in policymaking as part of their position.[27] If these conditions are not met, there would be little reason for the voters to support any particular candidate or party during an election, nor would the candidate be considered to represent "the will of the people."[28]

However, disputed elections, one in which the result is "within the margin of litigation,"[29] provide a challenge to the majoritarian vision of democracy.[30] By not providing a clear determination of which candidate has gained the majority of voters, either through fraud, mistake, non-fraudulent misconduct, or acts of God,[31] a disputed election leaves any putative winner without a true mandate from the people to govern. In these cases, much of the efforts in recount and election contest procedures focus on remedying the cause of the dispute to determine the "true" winner of the election.

However, although some of the conditions that cause an election to be disputed might be remedied through a post-election recount process, often at considerable time or expense, others may not. Professor Steven Huefner has outlined examples of irreversible mistakes that can throw an election into question and prevent knowledge of the true majority of votes.[32] These may be as simple as the loss of a precinct's paper ballots or the failure of a voting machine.[33] Confusing, misleading, or defective ballots or equipment can also lead to a dispute over an election where the true majoritarian preference of the voters cannot be known. For example, in the 2006 congressional race for District 13 in Sarasota County, Florida, there were a high number of undervotes in that tight congressional race, leading to the conclusion of

---

[25] *Id.* (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 235 (1835)).

[26] *See* POWELL, *supra* note 20, at 10–13, 26.

[27] *Id.*

[28] *See id.*

[29] Hasen, *supra* note 2.

[30] There is doubt whether, even in the case of a non-disputed election, elections really achieve the mandate for candidates that the majoritarian vision promises. *See* POWELL, *supra* note 20, at 70–71.

[31] *See* Huefner, *supra* note 12, at 271–77 (describing typical types of election miscues).

[32] *See id.* at 298–99.

[33] *Id.*

several experts that poor ballot design made that race hard to find on the ballot.[34] In a famous example, the design of the butterfly ballot in Palm Beach County, Florida in the presidential race in 2000 inflated the votes officially cast for Patrick Buchannan.[35]

In these and other cases, even if all expense and time were spent in determining how each vote was cast, it would still not give candidates the mandate that would be required. In these cases of confusing ballot design, the cause of the dispute impeded each election's ability to determine voters' true preferences,[36] and no amount of post-election effort can determine who would hold a majority of the vote. In this case, we can say that an election has failed to produce a resolution to the dispute of which preferences officeholders should be accountable to.[37]

Disputed elections also challenge to the majoritarian vision for another reason. If an ideal democratic government is one whose actions are always in perfect correspondence with the preferences of all its citizens,[38] the majoritarian vision tries to approach this ideal by aligning itself with the majority. But in the case of a disputed election, the preferences of the citizens are divided, and the actions of either party will not be responsive to a large majority of the citizens.[39] In this case, even if a winner can be determined,

---

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] The view of disputed elections mentioned above presumes that the reason that the result of the election is disputed is because the preferences of the citizenry are indeed close. There is another type of disputed election, such as the presidential elections in Afghanistan in 2009 (Huefner, *What Can the United States Learn from Abroad About Resolving Disputed Elections?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 528–29 (2010)) or the presidential election in Ukraine in 2004 (*id.* at 533–34), where the election results are presumably not close, but are seen as close because of widespread fraud or misconduct. These disputed elections still provide a challenge to the majoritarian vision, since the true winner is not known, although it might be suspected. Negotiated solutions have taken place in these type of elections as well, such as in Kenya in 2007. In this country, although there has been widespread reporting of election fraud, the actual incidences of voter fraud are relatively rare. (Huefner, *supra* note 12, at 272). However, accusations of fraud might pose a challenge to coming up with a negotiated solution in these cases, as I detail later in this piece. (*See infra* Part V).

[38] LIJPHART, *supra* note 20, at 1.

[39] *See* POWELL, *supra* note 20, at 163–69 (explaining how the "median citizen" is a normatively privileged citizen whose preferences, if diverged from in either direction, will satisfy less voters overall. In a majoritarian vision, the majority will contain the median citizen. However, in a divided election, the median citizen might be on the edge of, or outside of, the vision of either party, and so cannot be satisfied through the election process.).

having one party control the policymaking in a way that is not preferred by a very large minority of citizens does not seem to align with Abraham Lincoln's formulation, that of a government not just by, but for the people.[40] Thus, we must turn to another vision of democracy, the *proportional vision*,[41] or consensus model, which answers the question of to "who the government should be responsible to when citizens disagree," with "as many people as possible."[42] In this vision, elected representatives are not given a mandate to enact policies, but are seen as agents in a post-election bargaining process[43] who are able to come to agreements on polices that represent the most citizens.

Using this vision of democracy, we can see how in the case of a disputed election, a post-election negotiation by the candidates could be a remedy to an election that has failed to produce a result. The majority rule in this case, with a non-homogenous electorate and divided political parties, will not provide a close approximation to a government responsive to the preferences of all its citizens.[44] A proportional representation, or consensus, model of democracy envisions that representatives will already be engaged in a series of post-election compromises in order to best represent the will of the people.[45] What's more, empirical work in the field of democratic institutions has already shown how the United States is a special case among democracies, having both the majoritarian and consensus ideals and mechanisms built into the functional design of our government.[46]

In the case of a disputed election, a negotiated solution which represents the preferences of many of the citizens may come closer to the ideals of democratic requirements than the election itself. This is particularly true if a negotiated solution avoids a decision by an unelected or seemingly biased judge on who is the winner of the election. Having representatives chosen by the people themselves decide the direction of the office will be more likely to represent the preferences of the citizenry.[47]

---

[40] LIJPHART, *supra* note 20, at 1.

[41] POWELL, *supra* note 20, at 6.

[42] LIJPHART, *supra* note 20, at 4.

[43] *See* POWELL, *supra* note 20, at 6–10.

[44] *See* LIJPHART, *supra* note 20, at 22.

[45] POWELL, *supra* note 20, at 6–10.

[46] LIJPHART, *supra* note 20, at 32–36, 217–18.

[47] Legitimacy for the entire election process is unlikely to be harmed by a negotiated solution, because it is only when a very close election is already threating the legitimacy of the process that this procedure will come in to play.

Both the lack of a mandate from a disputed election and its failure to elect a government close to the ideal of representing the preferences of all the citizenry opens up the door to an alternative solution, such as a negotiated agreement. In the next sections, we can see if the candidates would have any incentive to participate in a negotiation process.

III. UNDERSTANDING PARTIES' INTERESTS

Negotiating a disputed election between the parties might be seen as difficult due to the winner-take-all nature of the election. The outcome of an election can be considered an "indivisible" good, and indivisibles create a serious stumbling block to negotiations.[48] Indivisibles can cause negotiations to break down entirely, since when a good is seen as indivisible, it causes the parties to think in zero-sum terms.[49] From this reasoning it has been suggested that a candidate, particularly a candidate leading in the recount process, should have no incentive to negotiate an election dispute.[50]

After a voting and a recount process, if an election has produced a result within the margin of litigation,[51] an election contest can result.[52] During this contest, each side must make a realistic assessment of their case, and what will happen if they do not win.[53] If a negotiated agreement is to be reached, it must provide a better personal outcome for each candidate than what they estimate their outcome to be in front of the decision-making body.[54] In a situation where the outcome by the decisionmaker is uncertain, parties will only reach a negotiated agreement that meets their interests better than the predicted outcome of the decision-making body.

To then understand if a negotiated solution is possible, we must consider what incentives the parties have to come to a negotiated solution, and how

---

[48] H. Peyton Young, *Dividing the Indivisible*, 38 AM. BEHAVIORAL SCIENTIST 904, 904–05 (1995).

[49] *Id.*

[50] E. J. Dionne, Jr., *Could Florida Election Dispute have been Mediated?*, 8 DISP. RESOL. MAG. 8, 13 (2001–2002).

[51] Hasen, *supra* note 2.

[52] *See generally* Huefner, *supra* note 12, at 278–79 (explaining the difference between a recount and an election contest). This paper will use the term election contest to refer to any procedure post-recount. These procedures vary widely. *See* JOSHUA DOUGLAS, PROCEDURAL FAIRNESS IN ELECTION CONTESTS (forthcoming 2012) (outlining the different procedures for election contests across different states and different types of elections) (copy on file with author).

[53] Susskind, *supra* note 16, at 11.

[54] *See id.*

those interests could be met by such a negotiated solution. I first consider the incentives from the perspective of the party taking office, who presumably (but not always) will be the leader in the election recount process, and then from a party conceding from an election contest. Once these are understood, I outline the idea of what potential tradeoffs are possible in Part IV, *infra.*

A. *Interests of Party Gaining Office*

1. *Legitimacy and Governability*

If the leader of a recount in a disputed election is able to gain office through a court process, they still might not gain the legitimacy that would lead to effective governance of the population. Even if the winner is able, through recount or election contest, to gain office, there are several issues that could prevent the officeholder from being accepted as a legitimate government official. In many cases, the winner of a disputed election may face accusations of "stealing" the election, and so be seen as illegitimate.[55] This is particularly possible in an election contest where his or her opponent will, by definition, raise issues that cast doubt on the results of the election. These accusations could include cases of election fraud, such as tampering with electronic voting equipment, ineligible voting, or false reporting of precinct tallies.[56] Even if these accusations are disputed or disproved during the election challenge, [57] having these issues raised in a public forum and in the press will create doubt about the legitimacy of the officeholder, particularly in the minds of those who are opposed to the winner's election.

Even if there are no accusations of outright fraud, there could be legitimate accidental errors in the election process that the leader in an election recount would not want scrutinized. These could include electioneering at the polls, failure to file required campaign finance reports, or violating campaign-spending limits.[58] These errors, although technical violations of election laws, may not have had an impact on the election, and will likely not have an impact on the resolution of any election contest.

---

[55] JEFFREY TOOBIN, TOO CLOSE TO CALL 44 (2002) (describing the election of Frank McKloskey as "outright theft"). *See also* ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN AND THE STOLEN ELECTION OF 1876 (2004).

[56] *See* Huefner, *supra* note 12, at 272–73 (outlining different types of voting fraud).

[57] Of course, the better that a candidate who is not taking office can prove fraud or misconduct, the better the "deal" they are likely to receive. *See* Huefner, *supra* note 12, at 272–73.

[58] *Id.* at 276.

Nevertheless, they could raise doubts about the reliability of the election outcome,[59] and any officeholder would not want these accusations tainting his or her time in office.

In the absence of any accusations of stealing the vote or being elected through flawed election procedures, given that the idea of democratic legitimacy rests on "the will of the people," serving as a representative of a populace where nearly 50% of the people did not vote for an officeholder could still cast inherent doubt on the officeholder's legitimacy. These effects could even be exacerbated by the election procedure itself, which may allow a candidate to be elected without the support of a majority of the voters. In one of the most famous examples, George W. Bush had a minority of the "popular vote" of the country, even as he had the most electoral votes.[60]

The lack of legitimacy for a candidate could lead to issues of governability for a candidate who takes office. An officeholder without the backing of the populace may not be able to muster popular support for their agenda.[61] The lack of perceived legitimacy might also lead to stonewalling or sabotage by the other party until the term of office has ended.

In the most extreme case, a lack of acceptance of the candidacy by the populace might lead to violence. Citizens supporting the other party might feel so excluded by the party in power that they resort to fighting to make their political demands heard, as fighting and voting often serve as substitutes in the political arena.[62] In a close, disputed election, this is a particularly salient risk, as very close support by both sides is a condition that is closely correlated with violent outcomes, since a large minority has the ability to effectively gain political objectives through violence.[63]

Although, with the exception of the so-called "Brooks Brothers Riot"[64] in 2000, political violence in this country is rare, negotiation has been used in other countries to quell the possibility of violence after disputed elections. The December 2007 presidential election in Kenya resulted in widespread

---

[59] *Id.*

[60] TOOBIN, *supra* note 55, at 16–25.

[61] *See* Dóra Györffy, *Governance in a Low-Trust Environment: The Difficulties of Fiscal Adjustment in Hungary*, 58 EUR-ASIA STUDIES 239 (2006).

[62] Thad Dunning, *Fighting and Voting: Violent Conflict and Electoral Politics*, 55 J. OF CONFLICT RESOL. 327, 329 (2011).

[63] *See* Mario Chacon, et al., *When is Democracy an Equilibrium? Theory and Evidence from Columbia's La Violencia*, 55 J. OF CONFLICT RESOL. 367–68 (2011).

[64] Dexter Filkins & Dana Canedy, *Protest Influenced Miami-Dade's Decision to Stop Recount*, N.Y. TIMES, Nov. 24, 2000, at A41, *available at* http://www.nytimes.com/2000/11/24/us/counting-vote-miami-dade-county-protest-influenced-miami-dade-s-decision-stop.html.

violence and the deaths of 1,500 people after an election process that was seen as flawed.[65] As part of a negotiated solution, the two parties agreed to a power sharing agreement and jointly encouraged the populace to put violence behind them.[66]

By agreeing to a negotiated settlement of the election, an officeholder taking power can gain more legitimacy for their time in office. By coming to a shared agreement with the other party where the opponent concedes, instead of winning an election contest, the officeholder can be seen as taking the office with the consent of the opposing party, rather than through a possibly illegitimate election contest. This consent by the representative of the other party can mollify those partisans who might strongly object to the candidate's tenure in office, either through political or violent means. In addition, the officeholder can improve their ability to govern by agreeing to some of the demands of the other side.[67] These agreements will increase the chance of governability as a greater majority of citizens feel that their political concerns are being addressed, thereby ensuring they have some say in their governance.

2. *Promptness of Resolution*

Even if one side is likely to prevail in an election contest, there is still value in having the result concluded earlier through negotiation. A candidate who is no longer conducting an election contest can better prepare for their upcoming term of office through activities such as interviewing and hiring staff, considering appointments, and meeting with future colleagues. They can also start the process of paying back campaign debts, as necessary.[68] A prolonged election contest can derail this preparation. If the election contest is for a primary election, the candidate will want to start preparing for the general election. Even for an incumbent politician, a prolonged election contest is a distraction from their current position.

A prolonged election contest might also prevent the candidate from being seated in a timely manner. In the 2008 Minnesota Senate race, eventual winner Al Franken did not finally prevail in the election contest until June

---

[65] *Kenya Rivals Agree to Share Power*, BBC NEWS (Feb. 28, 2008), http://news.bbc.co.uk/2/hi/africa/7268903.stm.

[66] *Id.*

[67] *See infra* Part IV.

[68] *See infra* discussion of preservation of funds.

30, 2009,[69] and was not seated until July 7, 2009,[70] nearly eight months after the election. In extreme cases, protracted election disputes have become moot when the terms of office have expired before the litigation has concluded.[71]

Resolving an election swiftly is also important to maintain the authority of the winner. "In addition to expecting fair elections with accurate results, the public also expects to have these election results shortly before the office becomes vacant, rather than long . . . after the vacancy."[72] A protracted election battle can have an impact on the authority and respect awarded the winner, even if he or she does take office.[73]

In order to better prepare for office, actually take the office promptly, and ensure that they are afforded authority and respect, a candidate could choose to resolve the election through negotiation. One of the advantages, generally, of a negotiated solution is that it can often be faster than a court resolved solution. If the rules in an election contest allow a candidate's opponent to delay the result for an extended period of time through protracted litigation, it can be in that candidate's interest to attempt a negotiated solution that provides a result in a more prompt manner.

3. *Reduction of Uncertainty*

Although a candidate with a lead in a recount might believe that he or she will prevail in an election contest, victory in any court setting is far from certain. This is particularly true in the election contest setting, as "election contest provisions often provide courts with little substantive guidance for determining whether a remedial election failure in fact has occurred, and if so, how to remedy it."[74] Courts presented with an election contest face difficult issues in making determinations of which votes to count.[75] A number of factual and legal questions underlie these determinations,

---

[69] STEVEN HUEFNER, ET AL., FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ECOSYSTEMS OF FIVE MIDWESTERN STATES 16 (2011).

[70] *Franken Sworn in as Minnesota Senator*, WASH. TIMES (July 7, 2009), http://www.washingtontimes.com/news/2009/jul/07/franken-sworn-minnesota-senator.

[71] *See, e.g.*, Gunaji v. Macias, 31 P.3d 1008, 1011 (N.M. 2001) (noting terms of office had expired by the time court had resolved the underlying remedial issue).

[72] Huefner, *supra* note 12, at 292.

[73] *See id.* at 293. For this reason, some states have expedited their election contests, providing for a short timeline for filing contests and limiting some appeal. But many treat these contests like other cases, and so these election contests are prolonged.

[74] *Id.* at 270.

[75] *Id.* at 279.

including the eligibility of voters who cast disputed ballots and the sufficiency of ballots or voting equipment.[76] The standards that exist in many state statutes to determine individually disputed votes in many cases do not provide strict guidance, and specify only the "intent of the voter" is to be adhered to.[77]

Even if a candidate is able to provide evidence in an election contest that there were not enough election irregularities such that he or she should be the putative winner, they may not get the outcome that they seek. "Many states' election contest statutes do little to constrain a court's choice when some election irregularity is proven. A typical contest statute provides that only the finder of fact is to determine who received the majority of votes, or otherwise declare the result."[78] This could lead to a court determining that the proper remedy for election irregularities is to declare the election void,[79] try to attempt a proportional adjustment to vote totals,[80] or even order a new election.[81]

Finally, a candidate could feel that there is uncertainty in the outcome of the election content process due to biased decisionmakers. In election law cases, either by outcome or design, impartiality of the decisionmaker is not guaranteed. Many states leave the decisions of how to resolve election contests for members of a legislative chamber up to the chamber itself.[82] These chambers, of course, could be dominated by one party or the other. Even in election contests for governor or lieutenant governor, although many states use the courts (including the supreme court of the state) as the decisionmaker, some states use the legislature.[83] However, using the judiciary as a decisionmaker still does not guarantee impartiality. Research has shown that judges as a whole might act in inherently partisan ways when resolving election disputes,[84] and where laws regarding disputed elections are unclear, judges might decide the case in accordance with their political preferences if they are so inclined.[85]

---

[76] *Id.*

[77] *See* Huefner, *supra* note 12, at 287, and accompanying notes at n.132.

[78] *Id.*

[79] TEX. ELEC. CODE ANN. § 221.012 (West 2006).

[80] Huefner, *supra* note 12, at 279.

[81] *Id.* at 283.

[82] DOUGLAS, *supra* note 52, at 5.

[83] *Id.* at 20.

[84] Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 378 (2007).

[85] *Id.*

In order to reduce the uncertainty that is present in election contest cases, a candidate, even if leading after an initial recount, would be served by a negotiated outcome. A negotiated outcome that declares the candidate the decisive winner would eliminate the need for a decisionmaker that might rule against him or her, because of the decisionmaker's interpretation of the law or due to bias. And it would result in an outcome that is in the control of the candidate, presumably putting them in to office, rather than creating additional uncertainties around new elections or other potential resolution mechanisms.

4. *Preservation of Funds*

The monetary cost of running for office is significant, and is increasing.[86] In the 2010 U.S. Senate races, the *average* winner spent nearly $10 million to contest the race, and the average loser spent around $6.5 million.[87] This money must be raised by the candidate through significant fundraising efforts,[88] and almost all of these funds are exhausted by election day.[89] In fact, hundreds of candidates for federal office end the campaign in debt,[90] and many of these are personal debts, in the form of large loans to themselves.[91]

Any money spent on a post-election contest in the courts requires additional funding that must be raised from campaign funds or borrowed and paid back. The costs of contesting an election can be significant, particularly if it involves protracted litigation, and can approach the cost of the contest

---

[86] *See Midterm Elections Will Cost at Least $3.7 Billion, Center for Responsive Politics Estimates*, CTR. FOR RESPONSIVE POLITICS (Feb. 23, 2010), http://www.opensecrets.org/news/2010/02/midterm-elections-will-cost-at.html.

[87] *Election Stats*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2010.

[88] Megan R. Wilson, *Campaign Debt Dogs Many Congressional Candidates*, OPENSECRETS.ORG (Oct. 8, 2010), http://www.opensecrets.org/news/2010/10/campaign-debt-hinders-some-from-off.html (noting that "unless candidates have a tremendous amount of personal wealth to spend on campaigning . . . they stand to spend at least 80 percent of their time fund-raising to stay competitive.").

[89] *Leftover Campaign Funds*, FACTCHECK.ORG (Feb. 15, 2008), http://www.factcheck.org/2008/02/leftover-campaign-funds ("As Bob Biersack from the Federal Election Commission points out, most candidates don't have much left over to begin with.").

[90] Deirdre Shesgreen, *Blumenthal Ends Campaign in Debt to Himself*, THE CT MIRROR (Nov. 5, 2010), http://ctmirror.org/story/8366/blumenthal.

[91] Wilson, *supra* note 88.

itself. In the 2004 Washington governor's election, the Democratic party chair estimated costs of the post-election contest of up to $3.5 million,[92] compared to approximately $6.3 million that was spent on the campaign itself.[93]

Even if a side believes that it will prevail in an election contest, a campaign that has already spent significant money on a campaign, or that has fewer financial resources, may be interested in a negotiated solution. This could be particularly true for candidates that have less financial resources, such as challengers and political newcomers,[94] who wish to avoid the significant legal cost of an election contest. A negotiated settlement can end a dispute for a candidate at a significantly lower cost.

A campaign with a significant financial advantage could *still* be interested in a negotiated solution, as it would preserve campaign funds for a future date. Although federal election guidelines prevent candidates for federal office from using leftover campaign funds for "personal use,"[95] candidates still have numerous options on spending unused campaign money. A candidate might be interested in preserving funds for use in a future campaign.[96] In addition, they might donate to other campaigns, or give to charities, even charities they create.[97] Furthermore, campaigns with associated PAC money have almost no restrictions on how they may use their campaign funds.[98] Candidates for state offices can have even less restrictions on how preserved funds are used, in some cases with almost no auditing or oversight at all.[99] Preventing these funds from being depleted in a

---

[92] *See* Postman, *supra* note 1 (noting that approximately $2 million had already been spent, and estimating another $1.5 million in costs).

[93] *Id.*

[94] *Incumbent Advantage*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/overview/incumbs.php (showing the incredible financial advantage of incumbents).

[95] FED. ELECTION COMM'N, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE 53, *available at* http://www.fec.gov/pdf/candgui.pdf. *See also* 11 C.F.R. § 113.2,; 2 U.S.C. § 439a.

[96] 11 C.F.R. § 113.2.

[97] Rich Blake, *Senators and House Members Can Keep Campaign Funds on the Way Out*, ABC NEWS (Mar. 26, 2010), http://abcnews.go.com/Business/campaign-finance-senators-house-members-campaign-funds-retire/story?id=10203316 ("For example, it is perfectly legal for leftover war chest money to be donated to a charity, including, say, a brand new charity a politician may be moved to create.").

[98] *Id.*

[99] Mike McIntire, *Retired Politicians Spend Unused Campaign Funds*, N.Y. TIMES (Feb. 24, 2007), at B1 ("A review of campaign expenditures at the State Board of Elections found other former officeholders whose unused campaign cash has been put to

protracted legal battle can be a significant incentive to end an election with a negotiated solution.

B. *Interests of Parties Conceding*

A candidate who concedes the election will obviously not gain the power that the office provides. However, for a candidate who either does not think they can win a protracted election contest or is not interested in engaging in one, there are good reasons to pursue a negotiated agreement as a solution to a disputed election. For all the reasons above, even the threat of a protracted legal contest, with the associated political and financial costs to the winner, could encourage a candidate taking office to make some compromises. The candidate who concedes the race might do so for some or all of the reasons outlined below.

1. *Preservation of Reputational Interests*

A consideration that a candidate must weigh is his or her viability in a future election if they decide to contest the current one. "Unless a candidate can foresee a strong chance of succeeding in a contest, political calculations about the potential reputational harm of appearing to be a sore loser might on occasion dissuade the candidate from commencing an election contest, even where genuine grounds for a contest exist."[100] In order to preserve their viability in a future election, a candidate who is seen as a gracious loser, or in the case of a negotiated settlement, a shrewd negotiator, might be able to bide their time and be successful in a future contest. This is particularly true in the case of a disputed election, where, as long as the political climate remains similar until the next election, the candidate will start off with a strong base of support.

In the U.S. presidential election of 1960 between Richard Nixon and John F. Kennedy, many Republicans believed that Kennedy had benefited from voter fraud, especially in Texas where Lyndon B. Johnson was a senator, and in Illinois, home of Mayor Richard Daley's powerful Chicago political machine.[101] Although there were legal challenges, Nixon did not put

---

uses that their contributors probably never envisioned—and with little or no scrutiny from state regulators.").

[100] Huefner, *supra* note 12, at 312.

[101] Peter Carlson, *Another Race to the Finish*, WASH. POST (Nov. 17, 2000), at A1.

his imprimatur on any of them,[102] and conceded the contest three days after the election.[103] In his memoir, *RN*, written after he resigned the presidency in disgrace, Nixon gave his reasons for not challenging the election: "Charges of 'sore loser' would follow me through history and remove any possibility of a further political career."[104] Of course, Nixon was able to run again in 1968, and win the presidency.

In the 2000 U.S. presidential election, concern with not being seen as a "sore loser" also motivated members of Al Gore's campaign staff.[105] They were aware of another political example, in which Ellen Sauerbrey was mocked as a "sore loser" after resorting to litigation in the 1994 Maryland gubernatorial race.[106] Although this did not cause Gore to withdraw from the race, it did have an impact on the messaging that the campaign used during the subsequent litigation and recount.[107] And at least one of his staffers, Warren Christopher, explicitly raised the possibility of Gore running again as a reason to concede.[108]

A negotiated solution preserves a candidate's reputational interests in a number of ways. First, like concession, it can be seen as a move that benefits the citizens by ending the contest early without the uncertainty and cost to the courts of litigation. Second, by holding the negotiations outside of the public forum of the courtroom, a candidate can forcefully make the case, if necessary, for why they might be entitled to the office, without the observation of the voters seeing him or her as complaining and being a "sore loser." In primary contests, which also result in election litigation,[109] a candidate could have an interest in preserving his or her reputational interest and status within the party, in order to increase the chances that the party will support them in future elections.

Even in a case where the candidate is unlikely to run again, there might be a reputational interest in preserving the appearance of being gracious. Several candidates have gone on to post-election careers after losses. Any

---

[102] Gerald Posner, *The Fallacy of Nixon's Graceful Exit*, SALON (Nov. 10, 2000), http://www.salon.com/news/politics/feature/2000/11/10/nixon/index.html.

[103] Carlson, *supra* note 101.

[104] *Id.*

[105] TOOBIN, *supra* note 55, at 28–29, 56–57.

[106] *Id.* at 28–29.

[107] *Id.* at 31.

[108] *Id.* at 56–57.

[109] See, e.g.,. Ex parte Baxley, 496 So.2d 688 (Ala. 1986); Hammond v. Hickel, 588 P.2d 256 (Alaska 1978).

loss of "statesmanlike" qualities might hurt these careers, and so a negotiated agreement might be the best solution in these cases as well.

2. *Enact Policy Goals*

By participating in a negotiated solution, the party who decides to concede as a result of a negotiated outcome can still ensure that some of their policy objectives are met. Although strategic considerations[110] and political ambition[111] do influence whether a candidate chooses to run for office, many candidates are motivated by ideological motivations or a passion for an issue or policy in their political campaign.[112] This might be particularly true for political newcomers,[113] or single-issue candidates. For these political actors, although a win in the political arena would have allowed them to have greater control of their agenda, a negotiated solution would still allow some control over policy, without the associated costs of an election contest or even the downsides of holding a political office.[114] Policy goals can be enacted in several ways in a negotiated solution, including straight agreements on policy[115] or appointments of likeminded individuals.[116] Regardless of the method, for the candidate that ultimately concedes, they will have a larger influence on policy than they would without the negotiated solution.

3. *Preservation of Funds*

As mentioned above, for the candidate who is likely to prevail in an election contest, the cost of a post-election contest can be extremely significant. A challenger who is unlikely to prevail in such a contest may

---

[110] Richard Fox & Jennifer Lawless, *To Run or Not to Run for Office: Explaining Nascent Political Ambition*, 49 AM. J. POL. SCI. 642, 644–45 (2005).

[111] LINDA L. FOWLER & ROBERT D. MCCLURE, POLITICAL AMBITION: WHO DECIDES TO RUN FOR CONGRESS (1989).

[112] *See, e.g.*, Fox & Lawless at 645, *supra* note 110, and associated notes. *See also* FOWLER & MCCLURE, 154–55 ("Everyone knew Eckhart was in politics to advance his issues.").

[113] Fox & Lawless, *supra* note 110, at 645.

[114] FOWLER & MCCLURE, *supra* note 111, at 133–44 (discussing the high cost to ordinary people of running for and holding a political office such as in the House of Representatives. These costs include loss of ties to home, impact on existing business, being in the public eye, among others.).

[115] *See infra* Part IV.

[116] *Id.*

choose, in order to preserve funds or not incur additional cost, to end the election through negotiation. Even if there are funds to conduct such a contest, these funds might be better spent elsewhere, such as on future campaigns, or other permissible uses of leftover funds. Here, the interests of both the candidate who takes office and the candidate who is conceding are in alignment.

IV. DEFINING POTENTIAL AGREEMENTS

As the section above has attempted to show, candidates could choose a negotiated solution that meets their interests better than pursuing an election contest. If they do attempt a negotiation, what compromises become possible? What would this look like in practice? This section outlines a non-exhaustive list of potential agreements.

A. *Agreements on Appointments*

One area in which compromise is possible is having a winning candidate appoint members of the other party to particular positions within the administration.[117] In the case of the presidency or a governorship, a candidate could agree to appoint a particular person to the cabinet who was recommended by the other side. The idea of a candidate appointing a member of a rival party to the cabinet is not unprecedented. Most recently, President Obama kept Defense Secretary Robert Gates on during his administration, despite his nomination by George W. Bush under the previous administration. He also appointed Ray LaHood, a Republican, as Secretary of Transportation. Republican George W. Bush also had members of the Democratic Party in his Cabinet, including Norman Mineta as Secretary of Transportation.

Even if a candidate would not agree to nominate a specific person to his cabinet, alternate compromises on appointments are possible. A proposal could be made for a slate of possible nominees for a cabinet post, with the officeholder having the final pick from among those on the slate.[118] For certain positions, such as judicial nominees, the candidates could nominate equal numbers of people to a committee, and any candidate nominated would need to be approved by a majority of this committee before being sent to the

---

[117] Obviously, this does require the elected position that is filled to have some sort of appointment power.

[118] *See* Susskind, *supra* note 16, at 10.

legislature for approval.[119] Another possibility would be to agree to a nominating committee that was a non-partisan tribunal made up of experts in the area of whatever subject the nominated post would be responsible for.

It is also possible that as a compromise, the candidate giving up vying for office is himself nominated for a position. These types of power-sharing agreements are seen in the international context. After the presidential elections in Kenya in 2007 resulted in a flawed election, the challenger, Raila Odinga, took on the newly created post of Prime Minister while Mwai Kibaki retained the post of President.[120] That agreement also split cabinet posts between the two parties.[121] Similarly, in Zimbabwe in 2008, the opposition candidate Morgan Tsvangirai took a post of Prime Minister, sharing power with President Robert Mugabe.[122] In the U.S., power sharing with former opponents is seen in primary races, where a candidate nominates a former opponent for a position in the administration. After the 2008 Democratic primary, then candidate Obama nominated Joe Biden to be his running mate on the Democratic ticket,[123] and later nominated Hillary Clinton to the post of Secretary of State.[124]

B. *Agreements On Policy Goals*

Another area of potential agreement would be for the candidate agreeing to leave the race to exact policy accords from the other side.[125] This could take the form of direct action from the other side, such as an agreement for the candidate taking office to put in place a particular policy favored by the other side, like the signing of a treaty or the enactment of a particular program. For example, in the 2000 presidential race, Al Gore might have exacted a promise that George W. Bush sign the Kyoto Protocol, not borrow from the Social Security Trust Fund, or further any other campaign issue that was at the top of his agenda.[126]

---

[119] *See id.*

[120] *Kenya Rivals Agree to Share Power*, *supra* note 65.

[121] *Id.*

[122] *Mugabe: Power-Sharing Deal Humiliating*, UPI (Sept. 19, 2008), http://www.upi.com/Top_News/2008/09/19/Mugabe_Power-sharing_deal_humiliating/UPI-13791221847489.

[123] Adam Nagourne & Jeff Zeleny, *Obama Chooses Biden as Running Mate,* N.Y. TIMES (Aug. 23, 2008), http://www.nytimes.com/2008/08/24/us/politics/24biden.html.

[124] Peter Baker & Helene Cooper, *Clinton Set for State Dept., Fed Official for Treasury: Ex-Rivals Uniting*, N.Y. TIMES (Nov. 21, 2008), at A1.

[125] *See* Susskind, *supra* note 16, at 10.

[126] *See id.*

Even if straight policy goals cannot be agreed upon, other possible compromises on policy exist. Instead of pursuing enactment of a direct policy goal, the conceding candidate could ensure that any policy developed must have some influence from their party. One example in a presidential context might be that on Social Security reform, any proposal must come from a bipartisan task force, with equal numbers of representatives from either party, before the proposals could be sent to Congress.[127] Not only would this ensure some amount of policy direction by the candidate's party, it would also greatly increase the policy's chance of passage.

C. *Agreements Regarding Campaign Funding*

As mentioned above,[128] elections are expensive affairs, and candidates can incur large amounts of debt in the course of the campaigns.[129] At the conclusion of the race, these debts need to be repaid, usually from donor funds or from the candidate's own personal wealth. In the case of a candidate with more funds, they might offer to pay the campaign debts of the other side, as part of a negotiated solution for office.

In a recent example, after winning the Democratic nomination for President, then candidate Barack Obama asked his donors to help pay off the campaign debts of Hillary Clinton, whose campaign was in debt more than $20 million, the majority of which was in the form of a personal loan from then-Senator Clinton herself.[130] A similar arrangement could be proposed as part of a negotiated solution to a disputed election, with the winner who takes office either directly using his or her campaign funds to donate to the campaign fund of the other candidate (which would be allowed under federal campaign guidelines for leftover campaign funds),[131] or by encouraging their own donors to contribute to the funds of the other side. Because of the impropriety that a payment to one candidate suggests, this type of agreement might be more palatable either in a primary contest, or as one part of a larger negotiated solution.

Obviously, for the candidate who is being paid, this meets the interest of preserving campaign funds and reducing campaign expenditures. For the candidate paying these funds, in addition to gaining the office, it might still

---

[127] *Id.*

[128] *See infra* Part III.

[129] *Id.*

[130] *Obama Asks Donors to Help Clinton with Debt*, MSNBC (June 24, 2008), http://www.msnbc.msn.com/id/25357545.

[131] *See infra* Part III.

be less expensive than a protracted legal contest, and so might meet this interest also. As part of a larger negotiated solution, this is another possible area of agreement.

D. *Agreements Regarding Length of Term*

Another possible compromise is one in which the winner of the election voluntarily agrees to run for only one term. This could be a possibility where the term of office is shorter, such as a one- or two-year appointment. For the candidate who does not take office, this would be an advantage since it would allow him or her to run in the future election, without the downside of challenging an incumbent.[132]

In the case of a longer term, agreeing to resign after less than the term of office, in some cases, would force a special election.[133] This would be a chance for the incumbent candidate to run again, which would serve as a chance for the voters to express confidence in his or her performance, while allowing the initially unsuccessful candidate another chance to make their case to the public. For the winning candidate, this would allow them a chance to prove their candidacy during their time in office.

E. *Agreements Regarding the Terms of Concession*

Obviously, one of the interests of both sides is to have a conclusion to the race, where one party takes office. Negotiated agreements will therefore result in one candidate leaving the race. This will require tradeoffs from the other side, but it is important to remember that the withdrawal is a tradeoff on one party's part, as it offers the other side many of the advantages mentioned above, including finality, reduction of uncertainty, and preservation of funds. Regardless of the substantive agreements, the terms of the concession itself, such as what is said, who is present when the announcement is made, and how explicit the provisions of the agreement are, will also be an important term in the negotiated agreement.

In many cases following a close election, trust between the candidates will be low. In such low-trust environments, any terms agreed to as part of a negotiated agreement would have to be made publicly, most likely as part of a joint press conference. We can imagine a scenario where the two

---

[132] *See infra* Part III (discussing the huge financial advantages that incumbents have).

[133] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 4; Fox v. Paterson, 715 F. Supp. 2d 431 (W.D.N.Y. 2010).

candidates, or their representatives, negotiate a deal in confidence, but then in a joint press conference announce that one party is conceding and giving the terms of the negotiated outcome. If a third-party neutral is involved, they can provide a public account of the discussion, which would make it easier for the party that concedes to explain what was agreed to and why. As part of the concession, the conceding party may encourage the electorate to support the candidate taking office, and encourage them to be civil. The candidate taking office would promise to enact the terms agreed to in a joint session.

This explicit outlining of the agreement for the public would be necessary to ensure compliance. Ultimately, it will be the voters and other elected officials that will be able to hold the candidate taking office to the promises that he or she has made in taking office. An explicit rendition of the promises that the candidate has made will allow members of the other party to exert pressure on the candidate to uphold them. A candidate who breaks these promises will face all of the legitimacy issues outlined in Part III, *supra*, and could even lose members of his or her own support base, and so be easily voted out of office.

In an environment where trust between the candidates is high, such an explicit agreement might not be necessary. One could imagine a scenario where the candidates implicitly or confidentially agree to terms, and one party concedes unilaterally, with the media or other spokespeople left to explain to the electorate what they have just seen.[134] In this case, a candidate might still make promises to the electorate that are compromises, but not acknowledge that this is an explicit provision of an agreement that is worked out with the other side. It might be framed as an acknowledgement of the will of many of the voters, or as a magnanimous gesture acknowledging the narrowness of a hard-fought election and a "bow to national unity."[135]

V. CONSIDERING POTENTIAL BARRIERS TO NEGOTIATED AGREEMENTS

Although the above sections attempt to show that a negotiated solution in many cases can be preferable to an election contest for both parties, and attempt to outline what sort of solution may be possible in many cases, it is also important to recognize that barriers to agreement do exist. Although barriers to negotiation exist in all conflicts,[136] including tactical,

---

[134] My thanks to Professor Ned Foley for suggesting this possibility.

[135] *See* Dionne, *supra* note 50, at 14.

[136] Robert Mnookin & Lee Ross, *Introduction, in* BARRIERS TO CONFLICT RESOLUTION, 7–22 (Kenneth Arrow, et al. eds., 1999).

psychological, and structural barriers,[137] a few seem particularly salient in the election context. Below, I attempt to analyze these, and consider how they might not be insurmountable in every case.

A. *Tribalism / Demonization / Dehumanization*

After a hard-fought campaign, candidates, and their respective campaign staffs, might see each other not just as rivals in a political campaign, but as actual enemies. This could be due to perceived wrongdoing by either side, or even just a consequence of the competitive nature of campaigns. When we are in conflict with perceived enemies, we can fall into what Robert Mnookin, in his book *Bargaining with the Devil*, calls cognitive distortions, or "traps."[138] Chief among these traps in a political campaign are *demonization*, the tendency to view the other side as "evil;" *tribalism*, where anyone outside the favored "in-group" (here the political party) is not to be trusted; or even *dehumanization*, where the other side is perceived as being outside the moral order and less than human.[139] These effects could be exacerbated by the presence of campaign staffers or supporters that are subject to these same traps. Obviously in these cases it is difficult for a negotiation to take place, since by seeing the other side in this way, parties exaggerate the costs of negotiation and underestimate the benefits.[140]

This enmity and distrust can even extend to where the agreements sought or proposed cease to matter.[141] The two candidates might fall victim to "zero-sum thinking," or the "fixed-pie bias," where any gain for the other side is perceived as a loss for their own.[142] In this case, the idea of mutually beneficial trades becomes a psychological impossibility.[143] A related problem in the case of negotiations with a perceived enemy is that of "reactive devaluation," where even if there is an offer from the other side, if it comes from someone perceived as an adversary, the value or attractiveness is diminished in the eyes of the recipient.[144]

---

[137] *Id.*

[138] ROBERT MNOOKIN, BARGAINING WITH THE DEVIL 18 (2010).

[139] *Id.* at 18–19.

[140] *Id.* at 21.

[141] Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution, in* BARRIERS TO CONFLICT RESOLUTION 27–28 (Kenneth Arrow et al. eds., 1999).

[142] *Id.*

[143] *Id.*

[144] *Id.*

These psychological barriers might be so strong for a particular candidate that there is no chance of a negotiated solution. However, there are a few ways that these cognitive phenomena can be overcome. First, it is important to note that a candidate will have a campaign staff that will allow him or her to get advice evaluating the alternatives. This, Mnookin tells us, is one way to overcome the cognitive traps involved in conflict situations.[145] The potential benefits of a negotiated solution could be considered along with any potential litigation strategy. Second, candidates could be forced to overcome this reluctance to negotiate either through a statutory regime that mandates negotiation,[146] or through urging by the decisionmaker of an election contest.[147] If a mediator is used in these situations, they can also do much to help overcome these cognitive traps.[148] Finally, as an election contest continues, either the cost of the contest or public unhappiness with the continued litigation[149] might cause a candidate to ultimately consider the benefits of negotiation over continuing conflict.

B. *Irrational Escalation*

It is a well-known phenomenon in negotiation that when one has spent a large amount of time and money on a goal, the spending of these "sunk costs" compel continued funding of even losing struggles.[150] As we have seen above, campaigns are expensive, and candidates can go in to personal debt contesting them.[151] In practice, then, we can imagine that a candidate having spent considerable funds, and the time and effort of campaigning, will be unwilling to "give all that up" and not contest an election, even with only a slim chance of winning. This seems to be the motivation behind the quote at the beginning of this article, where party chair Chris Vance suggests that you "can't settle this thing" regardless of cost to you.[152] The party chair went

---

[145] MNOOKIN, *supra* note 138, at 21.

[146] *See infra* Part VI.

[147] *See id.*

[148] Mnookin & Ross, *supra* note 136, at 22.

[149] *See* Justin Horwath, *Coleman vs. Franken: Minnesotans Say Enough Already!*, TIME MAG. (Jan. 7, 2009), http://www.time.com/time/politics/article/0,8599,1870054,00.html.

[150] Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Applications and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 495 (2010); *see also* Richard Birke & Craig Fox, *Psychological Principals in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 23–24 (1999).

[151] *See infra* Part III.

[152] Postman, *supra* note 1.

on to say, "The governorship is worth it. It's worth every penny."[153] Taken at face value, the statement suggests that there are no monetary costs he would not be willing to incur to have his candidate obtain the office.

Because this is a psychological phenomenon, candidates will have different levels of personal motivation to resolve the election contest, and will place different amount of value on the sunk cost of the election. This motivation will also vary with how much has been invested in terms of time, money, and effort in to the campaign, and the candidate's perception of these amounts. However, again one presumes that a candidate with multiple advisors in a political campaign will have at least some that counsel against greater investment. In addition, the economic situation of a candidate could prevent them from continuing an election contest, and dwindling funds may prompt candidates to consider settlement, regardless of their desire to continue. Finally, it is possible that even if only one candidate is willing to leave the race for certain negotiated tradeoffs, the other candidate would be less likely to unilaterally try to continue the election contest solely to get a win without a concession.

C. *Equity and Justice Seeking*

In some cases, the goal for one party might not be to actually try to win an election contest, but rather to expose the other side's wrongdoing in the public eye. This could be the case where a party feels there has been fraudulent activity that has had an impact on votes, but is reasonably certain that even correcting these errors will not result in a win for that party. They may also be interested in exposing violations of election law that have little impact or uncertain impact on the outcome of the election, such as violations of campaign finance laws or electioneering near the polls. In these cases, a negotiated outcome for the winner of the election might not be possible because the party in the lead is not able to offer any settlements that would satisfy the needs of the party to expose this wrongdoing.

However, even in these cases, a negotiated solution can be in the best interests of both parties. As mentioned above, contesting an election is an expensive proposition, costing funds that may be used for future elections.[154] In addition, courts are reluctant to take on election contests that will not have an impact on the eventual winner,[155] so the party looking to bring attention to

---

[153] *Id.*

[154] *See infra* Part III.

[155] *See, e.g.*, Middleton v. Smith, 539 S.E.2d 163 (2000); Barger v. Ward, 407 S.W.2d 397 (Ky. 1966); Application of Wene, 97 A.2d 748 (Law Div. 1953), aff'd, 98

any wrongdoing might be frustrated by a court that is unwilling to take on the case. A possible solution in this case could be to have both parties save their funds, and have the eventual winner acknowledge that some violations have taken place without having an impact on the election, while the other side concedes once this admission has taken place. This serves the needs of both parties and avoids a costly election contest on both sides, with all of the disadvantages that entails.

D. *Multiple Parties in Interest*

Another suggested barrier to a negotiated solution to an election dispute would be the large number of parties with an interest in the solution to the dispute. Although voters are deciding between two (or more) candidates for an election, other parties have a stake in the outcome of an election dispute.[156] In particular, representatives of the parties the candidates belong to, along with members of the campaign staff, and even individual voters could feel that a negotiated solution that does not take into account their interests is not legitimate. All of these people could feel that they have a "place at the table" in a negotiated dispute.

This problem could be exacerbated by the laws relating to election challenges in many states. In particular, in certain states, election laws allow individual voters to bring election challenges, independent of the candidates themselves.[157] In addition, the parties might bring challenges, even if the candidate does not, considering that they would want their candidate in office regardless of the candidate's preference. Not taking into account their interests could decrease the legitimacy of a negotiated solution, and would not provide finality if they choose to bring suits.

However, this concern is tempered somewhat by the nature of the election process. The candidate becomes the representative of the party, and ultimately his or her individual choices will guide the party and his or her supporters in the outcome of that office. Choosing to concede the contest is a political act, but also has legal ramifications. In many cases, when a candidate concedes, the legal challenges become moot, and it is unlikely that any court will consider ordering a candidate to take office once a concession has occurred, even if it is discovered that a party might be the ultimate winner of the election. Also, as the representative of the party, the candidate

---

A.2d 573 (1953); Hamilton v. Marshall, 41 Wyo. 157, 282 P. 1058 (1929); 26 AM. JUR. 2D ELECTIONS § 389.

[156] Butcher-Lyden, *supra* note 14, at 542; *see also* Dionne, *supra* note 50, at 13.

[157] Huefner, *supra* note 12, at 311.

has some influence over their supporters, and so can exert pressure to stop any suits on their behalf.

Finally, even if multiple parties in interest choose to have a place at the table, work in dealing with public disputes that have multiple parties can provide guidance in how to conduct this negotiation process.[158] In particular, the work of Larry Susskind regarding deliberative democracy and bringing large number of parties to the table can guide a negotiated process that results in an outcome that will satisfy many competing parties.

E. *Principal / Agent Issues*

It has also been suggested that candidates might not attempt this solution because election lawyers, who are only interested in "mak[ing] sure all your side's votes are counted . . . and try[ing] to get as many of the other side's votes thrown out as possible" would not be interested in such a solution, partly because it would put them out of a job.[159]

It is undoubtedly true that some lawyers, focused primarily on election recount procedures and perhaps their own jobs, might not be interested in such a solution. However, it is important to recognize first that campaigns are advised by more than just election lawyers, and it is possible that a candidate could be persuaded to negotiate with the other side by other members of the campaign staff. Second, it is important to note that that the negotiation process can go on in parallel with the election contest procedure, much as settlement talks can proceed during the preparation for a civil trial. Suggesting a negotiated solution is possible does not prevent election lawyers from going forward with a parallel lawsuit, and bargaining in the shadow of the election contest will undoubtedly play a role in the negotiations.

F. *Lack of Negotiable Tradeoffs*

As mentioned above, there are several areas in an election where tradeoffs could be made. However, other elections, such as those for judicial positions, might present more of a problem. In offices where there are less policy judgments to be made, or staff to employ, there might be less of an incentive for a party to concede from the contest. In the case of a judicial election, for example, our system of justice would not be served by one

---

[158] *See, e.g.*, Lawrence Susskind, *Barriers to Effective Treaty Making, in* BARRIERS TO CONFLICT RESOLUTION 292 (Kenneth Arrow, et al. eds., 1999).

[159] Dionne, *supra* note 50, at 13.

candidate promising to rule a certain way on an upcoming case. Indeed, in some jurisdictions, this might be illegal. In addition, the small amount of staff employed by judges (usually a few clerks), the relatively small influence on policy, and indeed, the small amount of policy represented in a campaign, might result in having no tradeoffs to be made for that position at all.

The smaller the influence of the office, then, the smaller number of negotiable issues will exist, and the less likely the parties are to come to the table. Of course, a candidate might still choose to concede to maintain the appearance of statesmanship and preserve their viability for a future election, or preserve funds (or not expend extra funds) on post-election litigation. Just the amount of time required for an election contest might cause a person to concede. In exchange for an early withdrawal, they might perhaps exact a promise from the other side not to run again, or to shorten the term. However, there may not be enough tradeoffs to ensure a negotiated solution that is satisfactory to both sides.

VI. PROPOSALS FOR CHANGE

A. *Mandatory Negotiation or Mediation*

One potential solution to overcome reluctance of parties to negotiate is to require, by statute, mandatory negotiation or mediation of electoral disputes when the margin of victory is small.[160] This would have a number of positive impacts. Mediation helps overcome many of the barriers that are mentioned above.[161] A skilled mediator can help manage the number of parties at the table, and help the parties deal with psychological issues such as reactive devaluation that can occur when dealing with a party in conflict.[162] By mandating an attempt at a negotiated or mediated solution, it would also reduce the stigma of proposing negotiations, since the side that comes to the table first might be considered less confident in their legal outcome. Mandating an attempt at mediation or negotiation can also help to overcome the demonization of the other side that might keep one or both parties from coming to the table due to the belief that the other side cannot be bargained with.

A required mediation statute would require a number of important considerations. Chief among these would be choosing a mediator or a

---

[160] *See* Dionne, *supra* note 50, at 13.

[161] Mnookin & Ross, *supra* note 136, at 22.

[162] *Id.*

mediation panel that is amenable to both parties.[163] The choice of an unbiased mediator would be crucial for ensuring the legitimacy of the process, although if the mediator is not allowed any decisionmaking authority, this might be not be as important a consideration. What could be more acceptable to both the parties and the public is a system where each side picks a mediator, and the mediators themselves pick a third mediator that is acceptable to both of them. This would do more to ensure the appearance of neutrality than a single mediator. Many other details would need to be spelled out by a mediation statute, such as the scope of the mediator's authority to choose items like the location and time of sessions. Requiring negotiation or mediation by statute also involves a problem of one party negotiating in "bad faith"—coming to the table merely as a formality, and without any real interest in coming to an agreement. Although courts have struggled with ways to police negotiation in bad faith, and this is not a problem with an easy solution, creating mandatory negotiation sessions in parallel with a court process can lead to greater interest in settlement discussions. Although no mediation statute for election disputes has been enacted in any jurisdiction, at least one scholar has proposed a mediation statute for pre-election disputes that might be considered.[164]

B. *Judicially Enforced Negotiation*

Although statutorily mandated negotiation or mediation might be a long-term solution that will require the consent of the legislature, in many cases mediation or negotiation could be coordinated by a group that has a vested stake in having these situations resolved outside of the courts—the judicial officials themselves.

Courts have a particular interest in having the parties themselves resolve an election contest, namely preserving their own legitimacy as decisionmakers. Scholars have noted that "putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts. Moreover, when judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer."[165] Judges

---

[163] Susskind, *supra* note 16, at 11.

[164] Butcher-Lyden, *supra* note 14, at 544.

[165] Hasen, *supra* note 2, at 993; *see also* Joshua Douglas, *The Procedure of Election Law in Federal Courts* 8 (forthcoming 2012).

themselves have noted the impact to legitimacy in deciding election law cases.[166]

Because of their interest in removing themselves from the "political thicket" of election law cases,[167] judges can use a variety of strategies to encourage candidates to engage in a negotiation process. There is little question that federal judges have the legal authority to compel parties to participate in a negotiation process through non-binding mediation through a private mediator[168] under their authority through the Alternative Dispute Resolution Act,[169] civil rules,[170] or even inherent powers.[171] There are also many analogous state rules.[172] However, assigning the parties to a mediator runs into the difficulties of finding a mediator that is seen as impartial. What might be more acceptable to all parties and the public is the use of the judge as the neutral, through judicial settlement conferences. The use of judicial settlement conferences to resolve cases, although debated,[173] is here to stay,[174] and judges have wide discretion to conduct the conferences how they see fit.[175]

Having a judge conduct a judicial settlement conference, with the goal of encouraging the parties to negotiate a solution, has the large advantage of using an already accepted facilitator, the judge, to help the parties conduct their negotiations. It also helps to overcome the risk of one party negotiating in bad faith, as they know that their conduct will be scrutinized by the decisionmaker if the situation is not resolved through negotiation.

Of course, by having a judge be the entity that encourages negotiation among the parties, it does not remove the judge entirely from the election

---

[166] Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.").

[167] *See generally* Pamela Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667 (2002).

[168] *In re* Atlantic Pipe Corp., 304 F.3d 135, 136 (1st Cir. 2002).

[169] *Id.* at 141 (citing 28 U.S.C. §§ 651–58).

[170] *Id.* at 142 (citing FED. R. CIV. P. 16).

[171] *Id.* at 143.

[172] *See, e.g.*, D.N.H. Local R. 53.1.

[173] *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1986).

[174] Jeffrey Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891 (2006).

[175] *See id.* at 1894.

contest process. However, by removing the judge as the ultimate decisionmaker of winner and loser, it should have a lesser impact on the legitimacy of the judicial branch. Encouraging the parties to negotiate over the issues outlined above will "limit the judiciary's discretionary judgments in election contests," and begin to disentangle the court from the political process, thereby lessening the "uncomfortable pressures" on that branch.[176] Gains made will not just benefit the parties, but the judge as well.

It has been suggested that any negotiated or mediated solution might run afoul of laws such as those that prohibit changes to a state's election law after a presidential election,[177] or raise constitutional issues with election laws. The concern here is that by using negotiation or mediation to resolve an election dispute, a court might be accused of rewriting election law. However, there is a strong presumption that courts are able to manage and control their calendars, including requiring pretrial settlement conferences.[178] Election law is generally silent on the techniques that courts can use to resolve these disputes.[179] In addition, if the parties come to an agreement under this system, one party would be deciding for himself or herself to leave the race. Any constitutional challenge to the actions of a candidate conceding the race would have to pass serious standing and remedy hurdles. Given these facts, it is unlikely that a challenge to the process could be raised by anyone that would ultimately compel a party to remain in the race, contest the election, or take office after conceding.

---

[176] *See* Huefner, *supra* note 12, at 296.

[177] Dionne, *supra* note 50, at 12.

[178] *In re* Atlantic Pipe Corp. 304 F.3d 135, 143 (2002):

> Even apart from positive law, district courts have substantial inherent power to manage and control their calendars. *See Link*, 370 U.S. at 630–31, 82 S.Ct. 1386; *see generally Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st Cir.1985) (explaining that "the rules of civil procedure do not completely describe and limit the power of district courts"). This inherent power takes many forms. *See* Fed. R. Civ. P. 83(b) (providing that judges might regulate practice in any manner consistent with federal law and applicable rules). By way of illustration, a district court might use its inherent power to compel represented clients to attend pretrial settlement conferences, even though such a practice is not specifically authorized in the Civil Rules. *See Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 650 (7th Cir. 1989) (en banc).

[179] Huefner, *supra* note 12, at 277.

VII. CONCLUSION

Close elections resulting in election disputes will continue in our democracy, whether at the federal, state, or local level. Disputes over these elections pose a challenge to our majoritarian vision of democracy, and they exact a cost both in time and money, and also in democratic and judicial legitimacy. Although the courts and other decisionmakers will continue to be involved in election contests, this article has provided one other mechanism for resolving these elections, which is consistent with our proportional vision of democracy and which involves the most interested and representative parties in the dispute—the candidates themselves. A negotiated solution to disputed elections can better meet the interests of society and the candidates themselves, and can be encouraged even if a negotiated solution seems unlikely.

Although there are challenges to encouraging candidates to negotiate their own election disputes, I have tried to provide an understanding of what might motivate rational, but still self-interested, candidates to attempt a negotiated solution, and outline possibilities for what they might agree on. If we consider a negotiated solution a possible outcome, rather than an impossible one, it is in the interest of legislatures, and more importantly judges, to consider how it can be used on a more frequent basis.