9-2005

The Suits That Counted: The Judicialization of Presidential Elections After Bush v. Gore

Charles Anthony Smith
University of Miami

Christopher Shortell
Portland State University

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Charles Anthony Smith
Department of Political Science
University of Miami
tonysmith@miami.edu

Christopher Shortell
Department of Political Science
California State University, Northridge
cshortell@csun.edu

Abstract
After the litigation of the 2000 presidential election are parties, candidates, and interest groups more likely to utilize pre-election litigation as a part of the normal election strategy? Our findings suggest this is the case, at least when a close election is anticipated. The difference in the political landscape and logic after the 2000 litigation is that the political players now perceive the judiciary as a venue of first rather than last recourse. Using data from all fifty states and the District of Columbia, we show that courts are seen as one of the primary arenas for challenging the rules of the game before the election and that litigation by parties is used in a coordinated strategic manner. The political lesson from the 2000 election litigation is that restorative litigation, an attempt to right a wrong or return something to the status quo ante, is more uncertain than preventative litigation, an attempt to alter the course of events before they have occurred. That is, pre-election litigation with potential for actually altering the outcome (preventative litigation) is a better strategy than post-election litigation that at some level seeks to change what has already occurred (restorative litigation).

Prepared for presentation at the
American Political Science Association
Annual Meeting
September 1-4, 2005
Washington, D.C.

Conference draft, please contact the authors with comments and insight

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Introduction

After the United States Supreme Court issued its final opinion in *Bush v. Gore* on December 12, 2000, most attention to the case focused on its outcome – George W. Bush became president. Subsequently, scholarly attention focused on whether the decision would have any wide-ranging effects on the law or on the Court's standing. In the ensuing years, numerous articles and books addressed the decision's implications for the doctrine of equal protection, public support of the Court, and the political preferences of the justices. A neglected area that has received little scholarly attention is the question of

whether the decision and the other election litigation from 2000 would expand the roles of litigation and the judiciary in future presidential elections.[1]

An expansion of the role of litigation in presidential elections would be consistent with the broader trend of increased involvement by the judiciary in spheres formerly reserved to legislatures and executives. This phenomenon has received substantial notice in the academic literature, especially in the study of comparative politics.[2] Judicialization is the term most commonly used to describe this shift, highlighting the involvement of courts in ever increasing areas of policy and politics.

In a 2002 article, Ran Hirschl argued that *Bush v. Gore* should be understood in the context of judicialization. This, he argues, is a decision that increases judicial involvement in the areas of "political transformation, regime change, and electoral disputes."[3] Certainly, the Court has received substantial criticism for its involvement in the 2000 election dispute in the first place.[4] Hirschl's article presents an intriguing claim, but one that has been difficult to test. The Court itself was careful to identify the *Bush v. Gore* decision as unique and "limited to the present circumstances."[5] The majority gave no sign that the reasoning in the decision should or would apply to situations other than the one immediately before them. Of course, as many scholars have subsequently

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[1] A notable exception to this is Hirschl, Ran (2002) "Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend." 15 *Canadian Journal of Law and Jurisprudence* 191-218.

[2] Some of the most prominent recent examples of this are Shapiro, Martin and Alec Stone Sweet (2002) *On Law, Politics, and Judicialization*. (New York: Oxford University Press); Hirschl, Ran (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. (Cambridge, MA: Harvard University Press); and Pildes, Richard H. (2004) "The Constitutionalization of Democratic Politics." 118 *Harvard Law Review* 28-154.

[3] Hirschl, 192.

[4] See, for example, Garrett, Elizabeth (2001) "Leaving the Decision to Congress." in *The Vote: Bush, Gore, and the Supreme Court*., Cass Sunstein and Richard Epstein, eds. (Chicago: University of Chicago Press): 38-54; and Balkin, Jack (2001) "Bush v. Gore and the Boundary Between Law and Politics." 110 *Yale Law Journal* 1407-1458.

[5] *Bush v. Gore*, 531 U.S. 98, 109 (2000)

pointed out, legal decisions tend to take on a life of their own and can be difficult to limit as the Court wishes.[6]

The 2004 presidential election provides us with a useful set of comparative data to consider whether the events of 2000 increased the likelihood that parties, candidates, and interest groups litigate to gain electoral advantage and solve potential electoral disputes. There is no question that litigation has always played some role in elections. Our interest is whether that role has changed and, if so, in what ways. We attempt to answer this question by comparing the pre-election litigation from both 2000 and 2004 for all fifty states and the District of Columbia. By considering both the quantitative and qualitative shifts in litigation strategy, we are able to conclude that after 2000, pre-election litigation has become an increasingly central part of the normal presidential election strategy at least when a close election is anticipated. We can also conclude that the parties will litigate in predictable ways. Parties are, to anthropomorphize and paraphrase, single-minded seekers of electoral victory.[7] In short, litigation as an election strategy is likely to play a far more prominent role in elections so long as there are prospectively close elections.

The difference in the political landscape and logic after *Bush v. Gore* and the other 2000 election litigation is that the political players now perceive the judiciary as a venue of *first* rather than *last* recourse. The strategic political lesson from the 2000 election litigation is that preventative (pre-election) litigation is a strategy far more likely

[6] See, for example, *Rossello v. Calderon*, 2004 U.S. Dist. LEXIS 27216 (D.P.R. 2004) (a vote dilution case from Puerto Rico), *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D.Mich 2004) (a case challenging ballot tabulation procedures in Michigan), and *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003) (a challenge to the use of different voting systems by different counties in California during the recall election), all of which explicitly rely on *Bush v. Gore*.

[7] We anthropomorphize the parties and paraphrase David Mayhew *Congress: The Electoral Connection* (Yale UP, 1974) where he suggests we can understand politicians as single minded seekers of re-election.

to be successful than restorative (post-election) litigation. That is, courts are seen as one of the primary arenas for challenging the rules of the game before the election. At a minimum, the costs of failing to anticipate problems before election day are substantial enough that parties are unlikely to risk a more passive strategy.

In light of the events following the 2000 presidential election, there is significant reason to believe that courts would be more involved in future electoral disputes. The recently completed 2004 presidential election offers a great opportunity to test whether the events of 2000 did, in fact, increase the judicialization of presidential elections. We expect to find a change in the raw number of suits filed, a shift in the substance of the suits from local concerns to those that might alter the presidential election outcome, and an increased involvement of national political actors in the initiation of litigation. An absence of any meaningful difference in these dimensions of litigation from 2000 to 2004 would suggest that no increase in judicialization has occurred. As we will discuss, our findings confirm that litigation as a campaign and electoral strategy now holds a far more prominent place for political parties. This finding suggests that the judicialization of the presidential elections has indeed occurred.

Methodology

To address the question of whether there was a change in the election strategy between the 2000 and 2004 presidential elections, we collected data on election-related cases filed in each state and the District of Columbia in both years. We used the calendar year through election day as our time parameter.[8] In order to collect the data, we relied

[8] It is possible that some cases were filed the year before, but it is unlikely that it was a significant number. Any action filed after the election would be geared towards restorative justice rather than electoral strategy.

upon a combination of Lexis-Nexis searches, a review of daily newspaper accounts, and a review of state circuit court filings.[9] We feel this process generated a reasonably comprehensive set of relevant cases.

Of the cases collected, we included only those cases filed before the close of election-day.[10] The filing of suits after an election is dependant almost entirely on whether the suits have any likelihood of changing the outcome of the race. Where the election-day results are close, as in 2000, there will be more post-election lawsuits. Where the election-day results are not as close, as in 2004, post-election lawsuits are unlikely. As a result, any differences in the number of lawsuits filed after an election tell us little about whether relevant parties are more inclined to use the courts as part of their election strategy. In addition, the Court granted certiorari in *Bush v. Palm Beach County Canvassing Board* to address concerns about trying to change the rules after the election.[11] This signals potential litigants that it is better to file suits before the election rather than after. Further, a more complete picture of the strategic calculations of political parties, candidates, and interest groups can be determined by a study of cases filed prior to elections. These actors would not be expected to commit scarce resources before an election without a reasonable belief that the commitment of the resources necessary to litigate would result in some pay-off.

[9] Lexis-Nexis provides access to all opinions of appellate level courts and state supreme court opinions as well as written opinions from all federal courts. Search terms included "election," "candidate," and "voting." Data collected from Lexis-Nexis was supplemented by news accounts of the filing of cases. Based on both news accounts and per curiam appellate opinions that seemed promising, we pulled filings from trial level courts for further information. Any specific case that may have been overlooked would be unlikely to alter our findings in any significant way.

[10] We also excluded cases during the relevant years that addressed previous elections or elections that were not held on the same days as the primary or general elections.

[11] 531 U.S. 70 (2000)

As a result, we concluded that focusing on pre-election suits would provide a better measure of change. Accordingly, we consider prospective lawsuits, those filed before an election, to be a reasonable measure of differences in strategy between 2000 and 2004. States that are expected to be close should attract more litigation. States that are expected to be close and also are rich in electoral value should attract the most litigation. Conversely, states that are not close should have little litigation and states that are not close and have little electoral value should have virtually no litigation. While states that are both closely contested and rich in electoral votes have always drawn the most attention from campaigns, pre-election litigation previously has not been an important element of this attention.

We collected summaries of the facts for each case. The data include the legal basis of the claims as plead by the parties as well as the outcomes for each case. We then sorted the cases into three categories based on subject area. The first category is Ballot Access. Ballot Access includes any case addressing the inclusion of a candidate, party, or election oriented initiative on a ballot. For example, there were a number of challenges alleging that parties or candidates either failed to comply with qualifying rules or were being improperly denied a place on a ballot. The second category is Voter Access and Registration. This category includes any case dealing with the act of voting including cases about absentee ballots, pre-election day voter harassment, felony purge lists, or registration requirements. Our third and final category is Ballot Counting. This group of cases includes challenges to canvassing board standards, ballot design, voting machine technology, and recount procedures.

These categories provided a mechanism to sort the cases in order to detect changes in the substantive nature of the litigation. We also split the categories between federal and state jurisdiction in order to assess whether litigants demonstrated a preference for one specific forum. These procedures generated comparable data sets from the 2000 and 2004 election cycles.

We first consider the quantitative data from all the states and the District of Columbia and then follow the overall discussion with a consideration of the data from the "battleground" states. We categorized a state as a battleground state if the final margin of victory was 5 points or less between the two major party candidates. While daily internal party polls would be the best source of determination for which states the parties considered to be battleground states, the final tally is a reasonable surrogate for the expectation of closeness. Moreover, little controversy exists as to which states were indeed battleground states for either 2000 or 2004.

After consideration of the battleground states, we present an in-depth case study of one state. Our intent with the specific state case study is to unpack the substantial qualitative differences in litigation between 2000 and 2004. We selected Florida as our in-depth case study because of its status as a highly contested battleground state in both elections. In 2000 and 2004, each presidential candidate had a realistic chance of winning the state and each campaign committed significant resources in Florida. Moreover, Florida was a natural choice for the in-depth case study as the 2000 litigation there was the catalyst that we assert led to the changes we observe.

After we examine the data, we consider its implications, draw some general conclusions, and make some suggestions for additional research.

Cases Prior to the 2000 Presidential Election

By collecting data from the 2000 election cycle, we established a baseline for comparison with events in 2004. We determined the number of suits filed, the jurisdiction of those suits, as well as the substantive issues addressed by each case. By reviewing this information, we are able to get a clear picture of the legal landscape prior to the election of 2000. For all fifty states and the District of Columbia, parties, candidates, and interest groups filed the following numbers and types of actions prior to the 2000 election:

Table 1: Total Election Cases Filed During 2000 Cycle

	State Courts	Federal Courts
Ballot Access	9	15
Voter Access & Registration	6	14
Ballot Counting	2	2

In 2000, state courts entertained a total of 17 cases while 31 federal suits were filed for a total of 48 cases across the country. Several states had multiple suits in 2000. Pennsylvania had the most with 7 cases. New Mexico had the second most with 5. Michigan, North Carolina, and Washington each had 4 cases. Florida, Illinois, and New York each had 3 cases. California, Connecticut, Ohio, and Oregon each had 2 cases. Seven states had one case and thirty-one states and the District of Columbia had no pre-election litigation at all in 2000.

Most of the Ballot Access cases in 2000 involved third parties such as the Green Party or the Libertarian Party or third party candidates. Connecticut, for example, saw actions to secure a spot on the ballot by both Pat Buchanan and Lyndon LaRouche. In Florida, Buchanan and Hagelin litigated over who could claim ballot access as the Reform Party candidate. Buchanan sued for inclusion on the Michigan ballot. Ralph

Nader or the Green Party filed similar suits in Illinois, New York, North Carolina, Ohio, and West Virginia.

Most of the Voter Access and Registration cases involved issues such as the right of felons' to vote or the ease with which registration could be accomplished. Litigation in Florida sought to restore felons' rights to vote, although all parties acknowledged the matter would not be resolved before the 2000 election. In Georgia, the United Nuwabian Nation of Moors sought to replace members of their group that had been purged from the voting rolls for a variety of different reasons. A case in Illinois sought to permit late registration for a group of teenagers whose original registrations were ruled invalid because of technical deficiencies. A Maryland case sought to allow students to register to vote where they were enrolled rather than at their home addresses.

The four Ballot Counting cases were limited to questions about absentee ballots or the handling of ballots. For instance, the Republican Party sued in New Mexico to stop a mass mailing of absentee ballots and in Oregon where it claimed a county failed to secure ballots after a primary.

Cases Prior to the 2004 Presidential Election

We used the same method of collection and categorization for the presidential election of 2004 as for 2000. The litigation of 2004 stands in stark contrast to that of 2000. The difference between the election cycle litigation of 2000 and 2004 is dramatic in both volume and subject matter. For all fifty states and the District of Columbia, parties, candidates, and interest groups filed the following numbers and types of actions prior to the 2004 election:

Table 2: Total Election Cases Filed During 2004 Cycle

	State Courts	Federal Courts
Ballot Access	27	14
Voter Access & Registration	24	27
Ballot Counting	14	8

In 2004, state courts entertained a total of 65 cases while 49 federal suits were filed for a total of 114 cases across the country. While the litigants somewhat favored state courts over federal courts, both state and federal venues were active locales for litigation. While this undercuts the notion of a federalization of election disputes, it underscores the judicialization of elections. Parties, candidates, and interest groups availed themselves of both avenues of judicial involvement. Indeed, since election rules are grounded in state law bounded by the federal requirements, it is not a surprise that litigants turned to both venues. Presumably, litigants chose venues in part based upon where they believed they could most likely prevail.

Ballot Access litigation emerged as a specific party strategy in 2004 as the 41 Ballot Access cases were almost exclusively efforts to secure or deny a place on the ballot for Ralph Nader whether through the Green Party or the Reform Party. In Arizona, for example, one suit sought to force Nader's inclusion on the ballot while one suit sought to force his exclusion from the ballot.

Indeed, with the exception of one case in Kansas that sought an order allowing only Republicans to vote in the Republican primary, one case in Washington seeking to put the Libertarian Party on the ballot, and one case in Utah seeking to put a different Green Party candidate (Cobb) on the ballot, all of the Ballot Access cases in 2004 involved Nader. The assumption was that Nader on the ballot would help Bush and hurt

Kerry. The premise underlying this assumption is that some Nader voters would vote for Kerry as an alternative if Nader was unavailable. Thus, Kerry loses votes if Nader is on the ballot – helping Bush – and Kerry gains votes if Nader is not on the ballot – helping Kerry. The Nader litigation increased in number and in nature from 2000 to 2004. The overt involvement of the Democrats and the Republicans in the Nader litigation in 2004 increased dramatically. That is, in 2000, the litigation was driven by a sincere effort by Nader and the Green Party to secure a spot on the ballot with little involvement from outside parties, while the litigation in 2004 was driven by the two major parties to strategically secure or deprive Nader a spot on the ballot.

The question of whether the presence or absence of Nader on ballots across the country actually changed the outcome of the presidential election speaks past the scope of this project. Indeed, given the general animus directed by Democrats at Nader after the 2000 election as well as the diminished vote share by Nader in 2004, his presence or absence may have been inconsequential.[12] Still, the concern about Nader on the ballot by both the Democrats and Republicans inexorably led to the use of pre-election litigation to exclude or include him. Moreover, even if the Nader vote was inconsequential in the 2004 presidential vote distribution, given the closeness of the 2000 election and the vigorous attention paid to Nader by the parties in 2004, each party should aggressively litigate when any third-party has some realistic chance of attracting enough votes to alter a race. In future close elections with a competitive third party, the two major parties will litigate to keep ideologically close third parties off the ballot and third parties that are ideologically close to the opposition on the ballots.

[12] For example, according to the Florida Department of State, Division of Elections, in 2004, Nader received 32,971 votes or .4% of the total presidential vote. In 2000 Nader received 97,488 votes or 1.6% of the total presidential vote. http://election.dos.state.fl.us/elections/resultsarchive/Index.asp

Voter Access and Registration was also a heavily litigated area in 2004. A total of 51 cases sought primarily to expand or restrict the ability of citizens to vote. Many of the cases sought to repeal the ban on felons voting or simplify the process for the restoration of civil rights. For instance, Ohio and Florida saw litigation aimed at creating an automatic restoration of felons' rights to vote. Many suits sought to make the rules for registration or voting more or less restrictive. In Colorado, for example, an action was brought to eliminate the requirement that first time voters present photographic identification at the polls. An action in Nevada sought to extend the deadline for registration. Actions in Pennsylvania sought to prohibit felons from absentee voting and to allow additional time for overseas soldiers to vote. An action in Illinois sought to allow "stay-at-home-moms" to vote by absentee ballot.

Perhaps not surprisingly, given the litigation after the 2000 election regarding how votes would be counted or recounted, by 2004, the parties, candidates, and interest groups fully incorporated Ballot Counting into their electoral litigation strategy. This category of suits increased from 4 in 2000 to 22 in 2004. The 22 Ballot Counting suits in 2004 addressed issues arising out of the switch to electronic voting, provisional ballots, and technically defective absentee and early voting ballots. For instance, cases in Ohio sought to prohibit the use of punch card voting, allow voters to cast provisional ballots in the event of registration errors, and sought access to paper ballots in precincts where long lines created lengthy waiting times to cast electronic votes. In Iowa and Florida, among others states, suits were filed to force the inclusion of provisional ballots even if those ballots were cast in the wrong precincts. Litigation was filed in Maryland, Florida, and

New Jersey seeking some sort of physical recount capacity where electronic voting systems left no paper-trail.

The increase in litigation across these three subject areas was not idiosyncratic or random. Indeed, the new litigiousness of the presidential election was demonstrably strategic. A narrow vote margin was not sufficient to cause a dramatic increase in litigation. A rich electoral college pay-off was also insufficient to attract litigation resources before the election. However, a close race in an electorally rich state provided the necessary and sufficient conditions for the parties, candidates, and interest groups to commit to litigation.

A Graphic Comparison of 2000 and 2004

We plotted the data in a three dimensional representation in order to show that states with a close vote spread and relatively rich electoral value saw the greatest increase in litigation. In Chart I (2000) and Chart II (2004) below, each state and the District of Columbia are represented by the yellow balls. The vote spread, the percentile difference between the two major candidates, is plotted on the Y axis while the electoral value, the number of electoral votes, is plotted on X axis. The number of lawsuits is plotted on the Z axis. For ease of interpretation, color bands have been employed to illustrate the number of lawsuits. Each color band represents one lawsuit. In representing the data, each Chart uses the same scale, orientation, color scheme, and lighting. Selected states are labeled for ease of comparison.

The first observation to be gleaned from the charts is that litigation dramatically increased from the 2000 election to the 2004 election. Further, because we would expect

those states with both close elections and rich electoral values (close/rich states) to have more litigation, we would expect those portions of the "blanket" of the three dimensional representation to be more peaked. A comparison of Chart I (2000) with Chart II (2004) shows an expansion of litigation not only across the board, but more dramatically in those close/rich states. Accordingly, we can conclude that since the close/rich states did indeed attract more litigation, the litigation was strategically utilized.

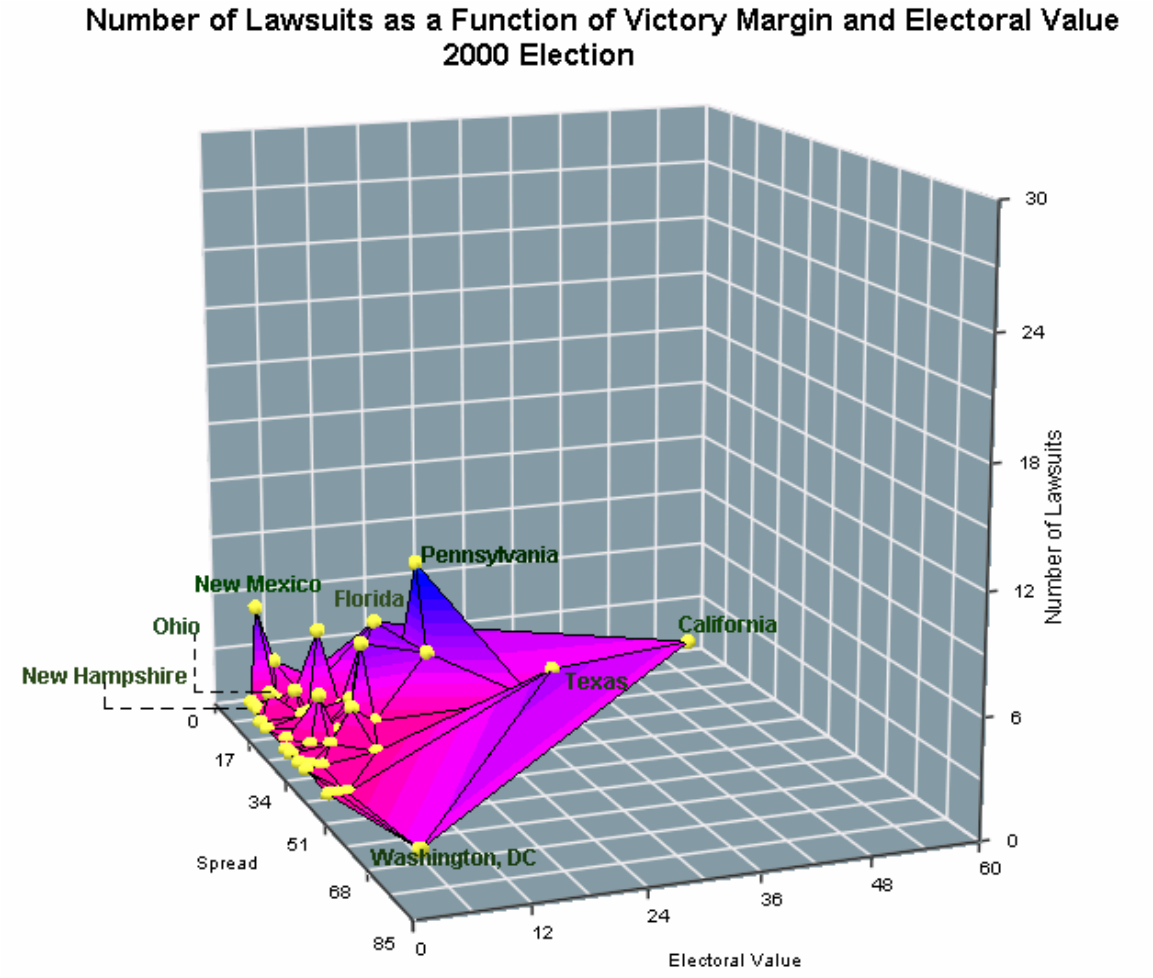

Chart I (2000)

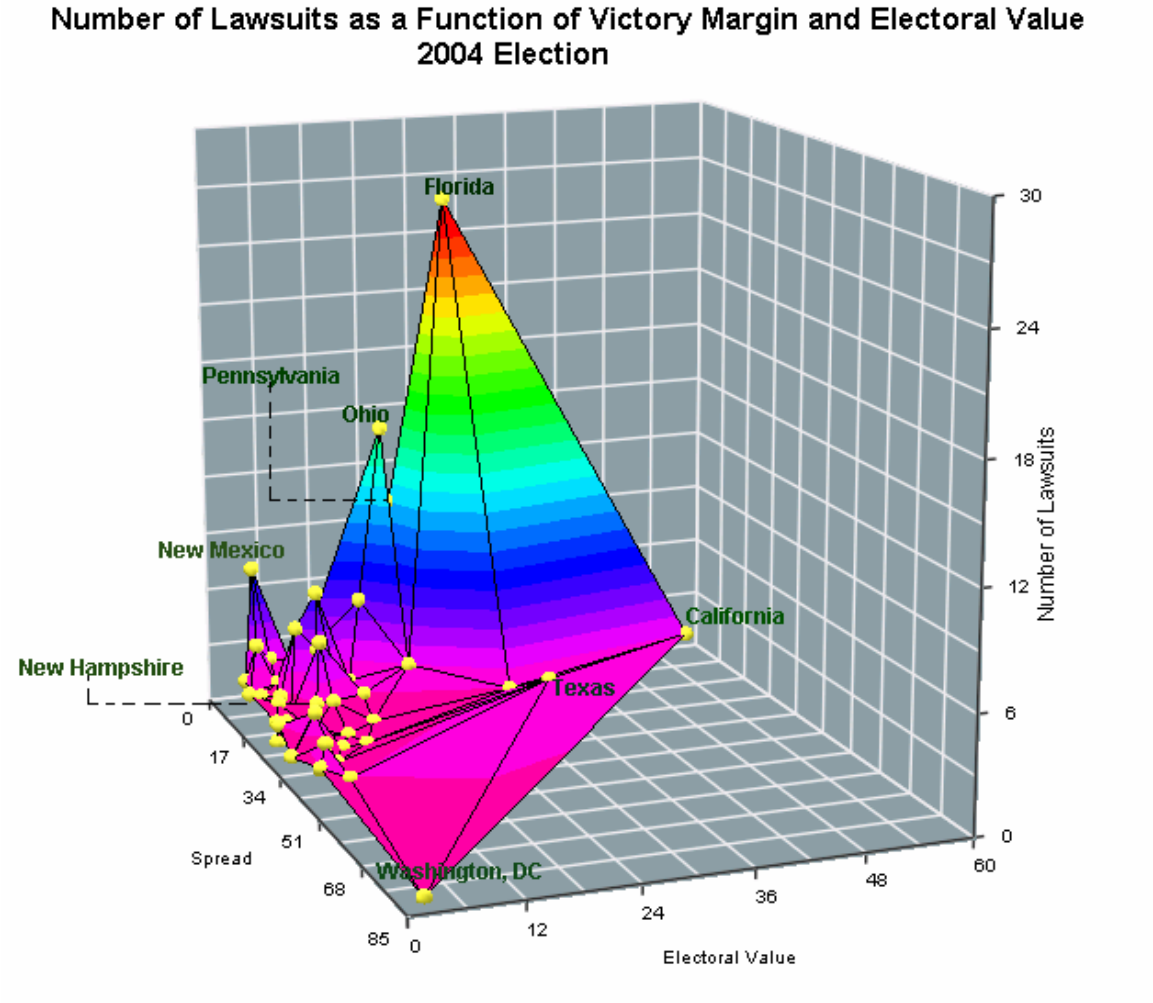

Chart II (2004)

A comparison of the charts shows that non-competitive states such as California and Texas showed little movement in litigation rates despite rich electoral values. States with little electoral value, such as New Hampshire, also showed little change in litigant activity despite relatively close elections. As expected, states like Florida, Ohio, and Pennsylvania, all rich in electoral votes with competitive elections, drew dramatic

increases in the volume of litigation brought by the parties, candidates and interest groups.

To determine whether we were capturing something other than a random distribution of litigation across the states, we ran a negative binomial regression using vote spread ("Spread") and electoral votes ("Electoral Votes") as independent variables with the number of lawsuits as the dependent variable ("Lawsuits").[13] As shown below, both Spread (z = -4.40) and Electoral Votes (z = 4.15) are highly significant in the expected directions. That is, the closer the race and the greater the electoral value, the more likely litigation will happen. These directionally significant results are what we would expect if the litigation was strategic – that is, resources were utilized where the pay-off could be maximized rather than in a random or idiosyncratic manner. The year (2000 or 2004) was used as a dummy variable and, as shown, because there were more suits, the intercept shifted significantly from 2000 to 2004 (z = 3.18).

Table 3: Negative Binomial Regression Analysis of Litigation, Vote Spread and Electoral Votes

Lawsuits	Coef.	Std. Err.	z	P>|z|
Spread	-.0691631	.016	-4.40	0.000
Electoral Votes	.0615946	.015	4.15	0.000
Year dummy	.8596208	.270	3.18	0.001
Constant	-.2007113	.337	-0.60	0.552

Number of obs = 102
LR chi2(3) = 50.35
Prob > chi2 = 0.000
Log likelihood = -143.57833
Likelihood-ratio test of alpha=0: chibar2(01) = 59.63 Prob>=chibar2 = 0.000

[13] We first ran a Poisson regression because like many incidents of counting events, the data follows a Poisson distribution. That is, the distribution is skewed, non-negative, and the variance likely increases as the mean increases. The Poisson model also assumes an equality of mean and variance. However, testing the Poisson regression, the large value of the Pearson Chi-sq (goodness of fit chi-sq was 277.34) indicated over-dispersion. Although the statistical and substantive results are virtually identical, we present the results of the negative binomial regression in the text in order to account for over-dispersion.

An additional consideration of only the battleground states was consistent with our observations. In Chart III (Battleground States), we show the magnitude of change in litigation rates for the eleven states we identified as battleground states. Predictably, the states that were both close and rich in electoral votes had the greatest magnitude of change in litigation rates. Note that Florida and Ohio had the greatest increases.

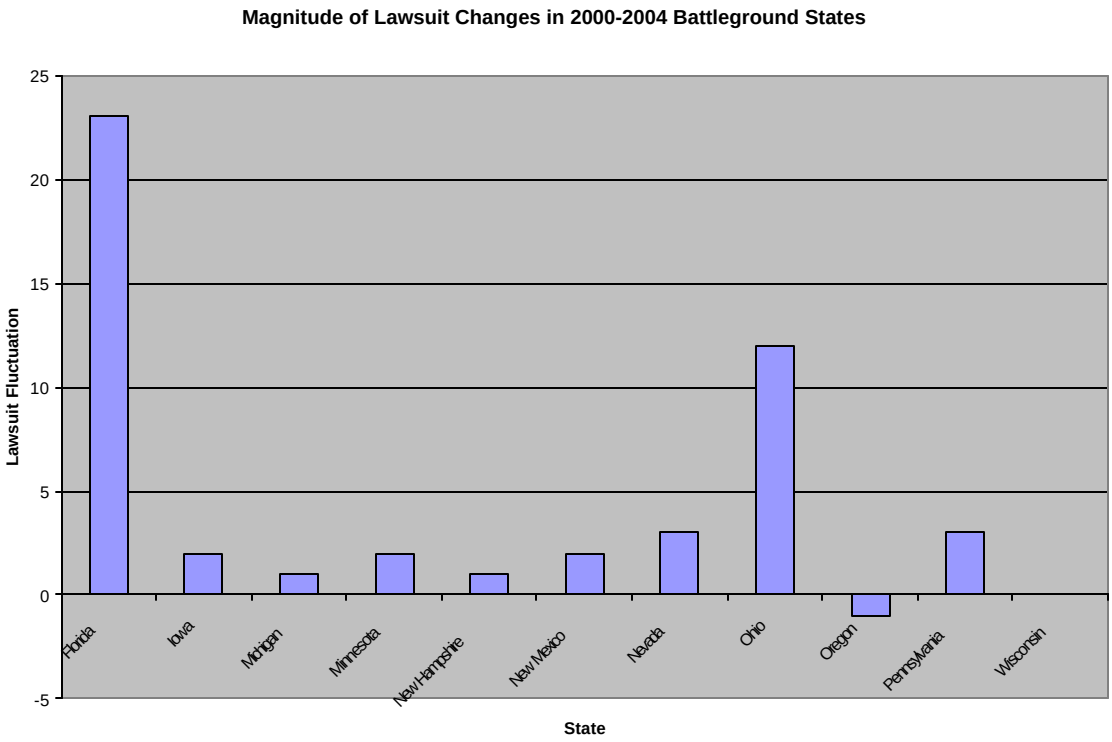

Chart III (Battleground States)

The aggregate data suggest that strategic litigation has become a prospective campaign tool at the presidential level. Moreover, this shift to a pre-election litigation strategy rather than post-election litigation strategy has also been accompanied by a dramatic quantitative increase in the litigation. However, the quantitative increase alone does not resolve any questions about whether there has been a qualitative change in the

litigation strategy. To answer those questions, we consider one state in-depth. We chose Florida as our in-depth case study because of its status as a highly contested battleground state in both elections.

The Case of Florida

By July of 2000, it was clear that Florida was going to be a key battleground in the presidential election. While earlier in the year, Republicans felt reasonably confident that Florida would be securely in Bush's column, polls showing a closing race in the state changed the conventional wisdom. Bush's first ad buy in the state came in July and the barrage of ads and visits from both candidates continued apace until election day.[14] Turnout was a major concern and each campaign brought in up to 10,000 volunteers to assist their get-out-the-vote efforts.[15] Both campaigns invested significant resources in the state and viewed Florida's electoral votes as critical. In the midst of this conflict, pre-election litigation was scarce.

As our findings show, litigation was only a marginal element of the election strategies of the parties prior to election day. The minimal role of the judiciary in the pre-election presidential contest is illustrated by Table 4.

Table 4: National Election Cases Filed in Florida During 2000 Cycle

	State Courts	Federal Courts
Ballot Access	1	0
Voter Access & Registration	0	1
Ballot Counting	1	0

[14] March, William (2000) "Bush Presidential Campaign Launches Fla. Ads." *Tampa Tribune*, July 20: A10.
[15] Adair, Bill and Tim Nickens (2000) "Florida May Be Key To Vote: High Turnout Expected." *St. Petersburg Times*, November 7, 2000: 1A.

The only Ballot Access case related to the presidential election was a suit between Reform Party supporters of Pat Buchanan and John Hagelin over who should appear on the ballot as the Reform Party candidate.[16]

The single Voter Access and Registration case that was filed involved a challenge to Florida's lifetime ban on voting by convicted felons. As became clear after the election, this issue was quite possibly decisive in the election outcome. However, there was little urgency surrounding the issue in the lead-up to the election. The lawsuit was filed on September 21 and the registration deadline for voters was October 10. Because of the proximity in dates, the lawsuit had almost no likelihood of impacting the 2000 election, something that even the civil liberties groups bringing the lawsuit seemed to acknowledge.[17]

The final suit, filed by the Florida Democratic Party in late October, challenged the use of the state seal on a letter from the Republican Party soliciting absentee ballot requests.[18] The suit sought to not only enjoin the mailing of any further letters, but also asked the court to order a return of all absentee ballots sent out in response to the mailing without counting them. This was the only case prior to Election Day that involved any issue about the handling of ballots once they were received.

We can conclude from these findings that recourse to pre-election litigation was not a prominent strategy for either presidential campaign. The two major national parties were also largely silent in court, although the state Democratic Party did challenge what

[16] The case was settled before it reached trial. Saunders, Jim (2000) "Buchanan Gets Spot on Florida's Ballot, Reform Party Rivals Reach Peace Accord." *Florida Times-Union*, October 3: B6. The other ballot access cases included four reviews of initiatives, three challenges to a candidate's qualifications, and a challenge of the secretary of state's decision to permit a judicial position to be filled by appointment rather than election.
[17] (2000) "Suit Challenges Vote Ban For Felons." *St. Petersburg Times*, September 22: 5B.
[18] (2000) "Florida Political Highlights." *Associated Press*, October 27.

it perceived as an abuse in soliciting absentee ballots. In one of the most contested and electoral vote rich states in what was projected as an extremely close national election, the minimal number of cases suggests that courts were not viewed as a primary forum for resolving conflicts or gaining a strategic advantage before the election.

The 2000 Election in the Courts

The litigation that followed the 2000 presidential election ultimately resolved the election in favor of Bush. The major litigation after the 2000 election focused in a variety of dimensions on how votes were counted. For instance, *Fladell v. Palm Beach County Canvassing Board* raised the question of whether the now infamous "butterfly ballots" were so confusing to voters that the county should "re-vote."[19] *Florida Democratic Party v. Palm Beach Canvassing Board* addressed whether the intent of the voter could be discerned from "dimpled" chads.[20] *Bush v. Palm Beach County Canvassing Board*, *Gore v. Miami-Dade County Canvassing Board*, and *Harris v. Florida Elections Canvassing Board* all addressed whether and how recounts should be conducted and counted.[21] *Taylor v. Martin County Canvassing Board* and *Jacobs v. Seminole County Canvassing Board* addressed the validity of absentee ballots.[22]

In all, twelve major suits were filed after the election in an effort to affect the outcome. *Bush v. Gore*, which challenged the authority of the Florida Supreme Court to order a state-wide recount of un-inspected undervote ballots, proved dispositive when the

[19] 772 So. 2d 1240 (Fla. 2000) A re-vote as contemplated by the suit would have meant any registered voter in Palm Beach County could have voted again on a day to be determined by the court and the new vote tallies would be used by the Secretary of State.
[20] Declaratory Order, Nov. 15, 2000 A dimpled chad is a square on a vote card by a candidate's name that has been depressed or "dimpled." The argument was that the depression must have represented the intent of the voter because it could only be made by contact with the voting stylus under the control of the voter.
[21] 531 U.S. 70 (2000); 780 So. 2d 913 (Fla. 2000); and 235 F.3d 578 (11th Cir. 2000).
[22] 773 So. 2d 517 (Fla. 2000) and 773 So. 2d 519 (Fla. 2000).

federal Supreme Court issued an injunction halting the recount. Although Gore conceded the election to Bush the day after the Supreme Court ruled, questions remained as to whether the Gore campaign's legal strategy had been the most effective. Specifically, at the outset of the post-election contest, the Gore campaign sought recounts only in selected counties. Had the campaign sought a statewide recount from the initiation of litigation, the outcome may have been different. That is, had the Florida Supreme Court had more time before the electoral college safe-harbor date passed, perhaps the federal Supreme Court would not have stopped the state-wide recount.[23] Whether any of the five justices that voted to halt the recount would have ruled differently had the Gore campaign used a different strategy is of course open to considerable question and doubt.

The strategic political lesson from the 2000 election, however, is not driven by a choice regarding which post-election option shows greater promise. Rather, the parties may have learned that restorative litigation, an attempt to right a wrong or return something to the status quo ante, is more uncertain than preventative litigation, an attempt to alter the course of events before they have occurred. That is, pre-election litigation with potential for actually altering the outcome (preventative litigation) may be a better strategy than post-election litigation that at some level seeks to change what has already occurred (restorative litigation).[24]

[23] The safe-harbor date is the deadline for states to submit their electoral votes and be insulated from challenges to those votes.

[24] A better strategy in this context simply means a more efficient strategy with a greater likelihood of clarity and predictability of results.

Cases Prior to the 2004 Election

The 2004 pre-election litigation in Florida was aimed squarely at affecting the national race. In stark contrast to the three national election cases filed in 2000, twenty-six national election suits were filed in Florida between January 1 and November 2, 2004. The areas encompassed by the litigation were who would get to vote, how votes would be cast and counted, and who would be on the ballot. Table 5 summarizes our findings from the 2004 election cycle.

Table 5: National Election Cases Filed in Florida During 2004 Cycle

	State Courts	Federal Courts
Ballot Access	4	1
Voter Access & Registration	6	6
Ballot Counting	7	2

All but one of these cases were direct attempts to influence national races.[25] The ballot access cases were dominated by attempts to either secure or deny a spot on the presidential ballot for Ralph Nader as the Reform Party candidate. The lone exception came about after a Democratic candidate for Congress in Florida's 22nd district withdrew from the race after being diagnosed with a health problem. The director of Florida elections determined Jim Stork's notification to the Secretary of State of his withdrawal from the race was three days past the deadline for the Democratic Party to replace him on the ballot. This ruling came from the director despite the explicit authority to allow later withdrawals.

[25] The one exception, *Lischin and No Casinos Inc. v. Broward County Canvassing Board*, involved a limitation on recounting votes that came about because of election related litigation but also affected the vote counts of an initiative about slot machines. This case could have indirectly affected the national race since it sought a broad ruling on the re-count of votes.

Other than the Stork case, all the state ballot access cases and the one federal ballot access case focused on Nader. As discussed earlier, the assumption was that Nader on the ballot would help Bush and hurt Kerry. This assumption prompted vigorous efforts by both parties to either exclude or include Nader.

In 2004, Ballot Access litigation emerged as a specific party strategy in Florida. Compared to 2000, where the only ballot access case was an internecine squabble between competing Reform Party candidates, both the Democratic and Republican parties sought to allow or prohibit Nader and the Green Party based on a perceived advantage. The concern about Nader and the Green Party presence on the ballot by both the Democrats and Republicans inexorably led to the use of pre-election litigation.[26]

The most litigated category in 2004 was Voter Access and Registration. In 2000, only one case was filed and the parties had no expectation that it would be resolved prior to the election. By contrast, in 2004, 12 cases were initiated and all sought relief prior to the election. Most of the cases in this category involved the felony voter purge list. This was a list compiled by the state that claimed to list convicted felons who had not yet obtained a restoration of their civil rights and were thus ineligible to vote. Florida's election officials took the position that the list should not be made public. The decision to provide the list of citizens excluded from voting to county election supervisors and registrars but not to the public prompted CNN and a group of other media outlets to sue for access to the list. The State abruptly dropped the use of the voter purge list after the media groups prevailed and conducted some analysis of the claimed ineligible voters.

[26] According to the Florida Department of State, Division of Elections, in 2004, Nader received 32,971 votes or .4% of the total presidential vote. In 2000 Nader received 97,488 votes or 1.6% of the total presidential vote. http://election.dos.state.fl.us/elections/resultsarchive/Index.asp

The problems with the voter purge list were widespread. There were a series of problems associated with computer programming failures and missed deadlines by the state contractor Accenture. Moreover, there were problems that seemed nefarious. For instance, the *Miami Herald*'s first analysis of the list indicated over 2100 felons were listed who had actually already had their civil rights restored and were thus eligible to vote. The paper reported that of those wrongly listed on the voter purge list, "[m]ost were Democrats and many were black."[27] Additionally, Hispanics, who in Florida tend to vote Republican, "were largely excluded from the list" because the database used to compile the voter purge list did not reference Hispanic as a racial category.[28] That is, felons identified as "Hispanic" were by and large not in the database at all.

As further embarrassment to the state, a May 2, 2004 memo ordered by Republican Secretary of State Glenda Hood identified the many problems with the voter purge list well before the litigation ensued. Hood intended to use the voter purge list despite its many failings. Whether the voter purge list was manipulated by the office of the Republican Secretary of State or not, the list was plagued by significant problems that tended to benefit Republicans and harm Democrats. The success of the litigation in preventing the use of felony purge lists almost certainly ensures future litigation in response to efforts by either party to purge voters.

The final category of cases, Ballot Counting, became an active arena in 2004. Given the importance of ballot counting after the 2000 election, this focus before the

[27] Kidwell, David (2004) "Florida Knew Of Voter List Problems." *The Miami Herald*, August 1, 1A.
[28] Ibid.

2004 election is not a surprise.[29] In 2000, the pre-election litigation about ballot counting was limited to one case where the Democratic Party objected to the state seal on a letter soliciting absentee ballots on behalf of the Republican Party. In 2004, the 9 ballot counting cases included those arising out of the switch to electronic voting, those addressing provisional ballots, and those concerned with absentee ballots. One case, *Republican Party of Florida v. Snipes,* was filed on the eve of the election. That suit claimed Broward County Supervisor Brenda Snipes was summarily dismissing Republican poll watcher challenges to voters during early voting. The case was dismissed on the same day it was filed with an admonition from Broward Circuit Judge Daniel Krathen that he would not micromanage the election.

Arguably the most high profile of the Ballot Counting cases was the dual-venue actions brought by Congressman Robert Wexler. Congressman Wexler and others initiated nearly identical suits in both state and federal court. The plaintiffs argued that because the electronic touch-screen voting system used in 15 counties lacked any mechanism for a hand recount while the optical scanner voting system used in the other 52 counties provided a paper ballot that could be hand counted, the state had a "non-uniform, differential standard" for vote recounts. Accordingly, under *Bush v. Gore,* this disparity violated voters' rights to due process and equal protection under the 5th and 14th amendments to the United States Constitution. Although the Wexler litigation explicitly relied on *Bush v. Gore,* even parroting the language of the opinion, both the state and federal actions eventually were dismissed. A similar action filed by the ACLU and

[29] For an in depth discussion of the post-election litigation in 2000, see Howard Gillman (2001) *The Votes That Counted, How The Supreme Court Decided The 2000 Presidential Election* (Chicago: University of Chicago Press).

others resulted in a ruling that the state election rules prohibited requiring recounts of touch-screen votes.

Absentee ballots were another hotly contested area of ballot counting litigation in 2004. The 2000 election results shed a great deal of light on the reason absentee ballots became an arena for contestation. In the final official Florida vote tally for president in 2000, Bush won by a margin of 537 votes out of almost 6 million cast.[30] This 537 vote margin of victory for Bush is completely subsumed by the *overseas* absentee ballot spread alone. In other words, the victory by Bush is attributable to his 729 vote advantage in overseas absentee ballots. Because the narrow margin of victory fell well within even this tiny sub-set of absentee ballots, after 2000, the parties cannot afford to ignore any avenue of potential votes if the election is expected to be close. Moreover, in the wake of the extensive post-election litigation in 2000, the battle over these issues is likely to be waged in the courts rather than the offices of various election supervisors.

After the 2000 election, Florida adopted a series of early voting rules that provided for a dramatic expansion of the opportunity to use absentee ballots.[31] Some of the absentee ballot litigation involved the state's failure to deliver absentee ballots in a timely fashion. For instance, *Fay Friedman at al v. Brenda Snipes et al* was a suit filed by registered voters who claimed that, despite several attempts to obtain absentee ballots, the state failed to provide them in a timely fashion. Much of the absentee voting litigation clustered around provisional ballots. For instance, in a suit filed by the AFL-

[30] Data from Florida Department of State, Election Division
http://election.dos.state.fl.us/elections/resultsarchive/Index.asp
Bush received 1,575 overseas absentee ballots and Gore received 836 overseas absentee ballots.

[31] By absentee ballots, we simply mean a vote provided for prior to the day of election, including early voting. Because the voter is absent from the polls on election day, we consider it absentee voting even if the voter went to the polls for early voting. For the purposes of our analysis, any theoretical or practical difference between "early voting" and "absentee voting" is irrelevant.

CIO and others, the plaintiffs argued that because of precinct changes caused by four hurricanes as well as re-districting, voters might be unaware of their assigned precincts. State rules require a voter to vote in their assigned precinct. The action sought to allow provisional ballots if voters were attempting to vote early and were not on the voter roll as well as to allow votes cast in the wrong precinct nonetheless to count.

Other ballot counting litigation focused on provisional ballots actually cast on election day. While some actions challenged strict compliance with some of the technical requirements of registration (e.g., asserting citizenship as well as checking a box that asserts citizenship), others challenged the acceptance of provisional ballots cast in the wrong precinct. Given the wide range and variety of avenues for litigation that can alter the rules for vote counting, it seems inevitable that from 2000 forward, major political parties will develop litigation strategies well before close elections.

Implications, Conclusions, and Additional Research

From this investigation, we can conclude that pre-election litigation has assumed a far more prominent role in standard election strategy at least when a close election is anticipated. We can also conclude that the parties will litigate in predictable strategic ways. Rather than merely filing suits wherever a potential problem may arise, they are going to dedicate litigation resources to states where the resources are likely to have the greatest impact on the outcome of the election. We can also conclude that, while state courts remain the primary site for election related litigation, the noticeable increase in federal litigation suggests a growing willingness by litigants and courts to use the federal system for resolving these disputes.

The most obvious implication from this research is that parties, interest groups, and candidates now view the judiciary as a major factor in campaign strategies so long as races are close. This judicialization of elections has profound implications at both the state and federal level. First, since the federal courts have not only signaled a willingness to engage, but also in fact have engaged in election dispute resolution, the stakes for the parties over federal judicial appointments could increase. That is, as the potential for a juridical resolution of elections increases, so does the import for the parties of who actually gets confirmed to the federal judiciary. This enhanced pay-off potential for appointing only strict loyalists to the bench may lead to even greater political conflict in judicial confirmations. Thus, as elections become judicialized, the judiciary becomes increasingly politicized. At the state level, where the judiciary is more commonly filled through elections, we could see the potential for court elections to become clones of other partisan office contests. As in the federal system, the judicialization of elections may lead to an increase in the open the politicization of the judiciary.

A more nuanced implication from this research relates to the shift in responsibility away from electoral boards and secretaries of state and to the judiciary. There are at least two potential outcomes from this shift. The first is that the courts could act less as partisans and more as "responsible" keepers of the law. The potential for partisan abuses of authority by electoral boards and secretaries of state abounds. Certainly in Florida, there were many accusations of partisanship against Republican Secretary of State Glenda Hood for her intent to use the felony purge list despite its many shortcomings. Courts, assuming they are more removed from electoral pressures, may serve as a more stable and reliable institution for resolving contentious political disputes. This potential

benefit may be mitigated or subsumed by the likely increase in the politicization of the judiciary. There also is some reason for concern to the extent the running of elections is taken away from those most knowledgeable about them and given instead to generalist judges.

In a broader context, there is also the potential for the erosion of democratic foundations. The greater the role of the judiciary in elections, the greater the potential gap between the desiderata of democracy and electoral outcomes. That is, having appointed judges decide who wins elections has the potential to move the electoral outcome further from the collective democratic preference. However, concerns over the "democratic deficit" may be overblown. In a two-party system, so long as the judicial arbiter chooses between the two major parties, the outcome cannot diverge too dramatically from the preferences of the populace. After *Bush v. Gore*, few would argue that roughly half the population was satisfied with the outcome.[32] In short, a greater role for the judiciary in the contestation of the rules of the game before an election seems unlikely to substantially erode democratic institutions.

A more practical implication that bears additional consideration is that efforts to reform campaign contribution laws may fall far short of their goals unless the role of litigation and litigation funds is acknowledged by the policy-makers. While constraints on donations for party and candidate advocacy have been constructed, legal advocacy remains an unregulated frontier. Access and influence could be acquired simply through funding legal teams. Recent campaign finance reform efforts such as the McCain Feingold Act may ultimately prove toothless if contributors have the unlimited avenue of

[32] That is, since roughly half the population supported Bush, presumably that constituency would not be upset with the outcome.

litigation funds through which to seek access. Finally, these developments suggest that the role of the parties in elections will continue to increase as they coordinate the litigation efforts and resources across the electoral college landscape.

We can conclude that other closely contested states, indeed, any state that is neither clearly red nor clearly blue – the purple ones, as it were—should show similar litigation emerging throughout the year before any close election. This is an emerging trend and one that bears close attention. Additional research that illuminates the source of the funds for litigation, the degree of coordination across venues, and the expected overlap of the legal elites across litigation forums may solidify our conception of the scope and importance of the judicialization of elections.

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