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# ESSAYS

## DISCOURAGING ELECTION CONTESTS

*Joshua A. Douglas* \*

A news article that appeared shortly after the 2012 election on the National Public Radio website asked, “Why Have There Been So Many Contested Elections?”<sup>1</sup> After the 2000 presidential election debacle and *Bush v. Gore*,<sup>2</sup> candidates who lose by a small margin seem more willing to take the election into overtime and ask courts to resolve disputes on ballot counting issues or to declare who won. Each election cycle candidates see various errors that occur in our election system, some of which they believe could change the outcome in a close race. As a result, preparing for post-election litigation is now a routine part of campaign strategy.<sup>3</sup>

This is not a positive development. Today’s elections are infused with hyperpolarization and election contests only increase

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1. *Why Have There Been So Many Contested Elections?*, NPR, Nov. 21, 2012, <http://www.npr.org/blogs/itsallpolitics/2012/11/21/165665600/why-have-there-been-so-many-contested-elections>.

2. 531 U.S. 98 (2000).

3. See Deborah Charles, *U.S. Campaigns Prepare for Post-Election Court Fights on Voting Laws*, REUTERS, Sept. 12, 2012, [www.reuters.com/article/2012/09/12/usa-campaign-vote-laws-idUSL1E8kBCO620120912](http://www.reuters.com/article/2012/09/12/usa-campaign-vote-laws-idUSL1E8kBCO620120912) (noting that “challenging the rules governing elections has become a key part of any major candidate’s political strategy”); Bill Turque, *Election Lawyers Ready to Challenge Alleged Illegal Voting Activity*, WASH. POST, Oct. 29, 2012, [http://articles.washingtonpost.com/2012-10-29/politics/35500652\\_1\\_election-results-elected-votes-popular-vote](http://articles.washingtonpost.com/2012-10-29/politics/35500652_1_election-results-elected-votes-popular-vote) (explaining that “[e]lection litigation has become an institutionalized part of campaigns since the 2000 presidential race”).

that partisanship.<sup>4</sup> As campaigns have become more partisan, candidates continue to ask courts to decide election disputes. When elections are razor thin, partisan discourse becomes even more acute. Elections that go into overtime, when the winner is unclear and a court is asked to step in, pose the greatest risk of suffering from the taint—or at least the appearance—of ideology infusing a judicial decision, especially because judges are not immune from ideological decision making.<sup>5</sup>

Much of today's judicial polarization surrounding election cases and the rise of election-related litigation is traceable to a single United States Supreme Court decision: *Bush v. Gore*.<sup>6</sup> That case, which effectively decided the 2000 Presidential election, signaled that courts were open for business for election-related claims. Candidates heeded the message; as Professor Rick Hasen demonstrates, the sheer amount of election litigation has increased dramatically in the last decade.<sup>7</sup>

The most high-profile cases, of course, are those that come after Election Day and in effect decide who wins a high-level office. In the years following *Bush v. Gore*, courts or other tribunals resolved election contests involving, among others, the Washington gubernatorial election in 2004,<sup>8</sup> a 2006 congressional election in Florida,<sup>9</sup> Minnesota's U.S. Senate election in 2008,<sup>10</sup> and Alaska's

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4. See Ethan Bronner, *Partisan Rifts Hinder Efforts to Improve U.S. Voting System*, N.Y. TIMES, July 31, 2012, <http://www.nytimes.com/2012/08/01/us/voting-systems-plagues-go-far-beyond-identification.html> (describing the increasing amount of partisanship in crafting rules for our elections).

5. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005) ("A court asked to decide a question of statutory or constitutional law that affects the outcome of an already held election is injected in the worst way into the political thicket. Journalists immediately question the partisan background of the judges, and partisan motives are immediately questioned and dissected no matter what the judges do.").

6. 531 U.S. 98 (2000).

7. See Hasen, *supra* note 5, at 957–58; Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 327 (2011); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, \_\_\_ GEO. WASH. L. REV. (forthcoming 2013).

8. See *In re Coday*, 130 P.3d 809 (Wash. 2006).

9. See *Jennings v. Elections Canvassing Comm'n*, No. 2006-CA-2973, 2006 WL 4404531 (Fla. Cir. Ct. Nov. 21, 2006); see also Jessica Ring Amunson & Sam Hirsch, *The Case of the Disappearing Votes: Lessons from the Jennings v. Buchanan Congressional Election Contest*, 17 WM. & MARY BILL RTS. J. 397 (2008).

10. See *In re Contest of Gen. Election*, 767 N.W.2d 453 (Minn. 2009) (per curiam).

U.S. Senate election in 2010.<sup>11</sup> Importantly, however, none of these post-election disputes resulted in a change of the certified winner. In fact, there have been no successful election contests for federal office (either House of Congress or President) or governor in recent memory.<sup>12</sup>

In a previous article, I outlined the various procedural mechanisms available in all fifty states through which candidates may contest an election.<sup>13</sup> An “election contest,” which is subsequent to an administrative recount, is an adjudicatory procedure that occurs after the election officials certify a winner.<sup>14</sup> States have widely differing and highly detailed procedures for losing candidates to challenge the certified result.<sup>15</sup> I also suggested the creation of a fairer mechanism to achieve impartiality in determining who decides these disputes.<sup>16</sup>

But having a better process for resolving the election contests that inevitably will arise does not go to the heart of the problem: candidates using courts or other tribunals to place elections into overtime after the state certifies someone as the winner. That is, creating a better procedural mechanism for election contests is helpful when an election *must* go to the courts after Election Day, but it does not address how to limit unmeritorious post-election litigation. And yet, if the last decade is any indication, most election contests are unsuccessful—at least for federal and statewide offices.<sup>17</sup>

This essay offers a few proposals for discouraging losing candidates from contesting the certified result of an election. The ultimate goal in any election, of course, is to ensure that a state de-

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11. See *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

12. See L. PAIGE WHITAKER, CONG. RESEARCH SERV., *CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES 1–2* (2010), available at [http://assets.opencrs.com/rpts/98-194\\_20101102.pdf](http://assets.opencrs.com/rpts/98-194_20101102.pdf) (noting that challengers in U.S. House election contests rarely succeed); *Senate Procedures in Contested Elections*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/contested\\_elections/procedures\\_contested\\_elections.htm](http://www.senate.gov/artandhistory/history/common/contested_elections/procedures_contested_elections.htm) (last visited Feb. 18, 2013). Although I have not conducted a thorough empirical analysis, my reading of recent election contest cases suggests that victories for those challenging the certified results are few and far between, especially in high-profile cases for higher offices. See, e.g., *Contested Senate Elections*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/contested\\_elections/intro.htm](http://www.senate.gov/artandhistory/history/common/contested_elections/intro.htm).

13. Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013).

14. *Id.* at 4. The focus of this essay is on election contests themselves.

15. See *id.* at 5–34.

16. *Id.* at 44–56.

17. See *supra* notes 8–12 and accompanying text.

clares as the winner the person who actually received the most votes. But when an election is close, a candidate on the losing side might see an incentive to continue the fight in the courts on the off-chance that it would change the outcome. The candidate could challenge, for example, certain provisional or absentee ballots—even if the likelihood that the candidate will win is slim (but still theoretically present). This type of contest has the potential to damage the integrity and perceived legitimacy of both the election system and the ultimate winner.<sup>18</sup> What can we do procedurally to counteract this incentive?

I suggest three initial proposals, ranging from the boldest—an outright ban on election contests—to more modest hurdles for candidates who wish to pursue a post-election challenge. First, recognizing the importance of finality, we could simply dictate that the certification of the winner is final and that there is no way to contest the election further. Second, we could raise filing fees for initiating an election contest or force the losing party to pay the victor's costs and attorney's fees, such as by requiring the posting of a bond. Finally, we could create a public stigma of sorts for "sore loser" candidates by restricting their future ballot access or giving these candidates a disfavored ballot placement in a subsequent election. Or we could impose a requirement that the candidate's advertisements in the next election include a disclaimer—along with approving the message—that the candidate unsuccessfully litigated a post-election dispute in a previous election. To start, we could introduce these disincentives for federal and statewide elections, which would limit election contests that affect the most people, are the highest-profile, and have the least chance of success.<sup>19</sup> States could then decide whether to expand these rules to all elections.

The purpose of this essay is to foster a conversation of how to limit post-election litigation, with these three broad ideas providing a starting place for the discussion. There are, of course, hurdles to any reforms; some of these proposals might even raise constitutional concerns. But the unfortunate reality is that preparing for post-election lawsuits has become normal operating

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18. See, e.g., Nathaniel Persily, *Foreword: The Legacy of Bush v. Gore in Public Opinion and American Law*, 23 ST. THOMAS L. REV. 325, 326 (2011) (noting that *Bush v. Gore* remains a "charged" decision for many people).

19. See *supra* note 12 and accompanying text.

procedure for campaigns. By thinking of creative ways to discourage the filing of election contests that have little chance of success, we can limit the uncertainty, turmoil, and partisanship that accompanies the judicial resolution of an election.

This essay proceeds in three sections. Section I lays the foundation for why our system encourages—or at least does not dissuade—the filing of post-election contests in close races. Section II posits that election contests are often bad for our democracy, explaining why post-election litigation might harm the ideals of finality, certainty, and legitimacy in the election process. Section III sets out three structural reforms that might make losing candidates think twice before initiating an election contest. Ultimately, the goal of this essay is to promote a broader discussion of the propriety of post-election litigation and what we can do to curtail it.

## I. STRUCTURAL ASPECTS OF OUR ELECTION SYSTEM ENCOURAGE POST-ELECTION CONTESTS

Losing candidates in any close race must consider whether they should use a post-election procedure to contest the certified result, such as litigation. There are several features of election mechanics that promote this strategy.

First, American elections are simply more polarized than they have been in years.<sup>20</sup> The stakes seem higher with each successive election, especially on the national stage. The political parties do not work together as easily as they once did.<sup>21</sup> The electorate is fairly evenly split.<sup>22</sup> Therefore, winning has become perhaps even more important than it used to be. Add to that the media saturation and increased “horse race” coverage of campaigns—especially

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20. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275–81 (2011).

21. See generally Alan Abramowitz & Kyle L. Sanders, *Why Can't We All Just Get Along? The Reality of a Polarized America* 9 (THE FORUM, Manuscript No. 1076, 2005), available at <http://www.dartmouth.edu/~govt/docs/Abramowitz.pdf> (“Differences between Democratic and Republican [citizens] on a wide range of issues have increased substantially over the past three decades.”).

22. See MORRIS P. FIORINA, ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 12–15 (2d ed. 2006).

in the age of social media<sup>23</sup>—and it is no wonder candidates and political parties fight to the bitter end in a close election.<sup>24</sup>

Second, election administrators—who are often partisan themselves—have a lot of discretion in how to run an election. They must make on-the-ground decisions about whether to allow certain voters to cast a ballot, whether a ballot indicates a clear vote for a candidate, and whether to count certain provisional or absentee ballots. With this robust discretion comes the opportunity for errors in the vote casting and counting process. Accordingly, there is more opportunity for a candidate in a close election to challenge the result based on the way local election officials administered the election. Administrators' vote counting determinations have been the main basis of recent election contests. For instance, in Washington State in the 2004 gubernatorial election, supporters of Republican Dino Rossi challenged the inclusion of certain absentee ballots in the count.<sup>25</sup> In Minnesota in 2008, the dispute over the U.S. Senate election was also about local administrators' handling of absentee ballots.<sup>26</sup> And the 2010 election contest for Alaska's U.S. Senate seat involved local election administrators' decision to count write-in ballots that had misspelled candidate Lisa Murkowski's name.<sup>27</sup>

Some of this added discretion—and the corresponding increased ability of a candidate to find a basis for a post-election challenge—is an unintended consequence of reforms that are supposed to protect voters' rights. The Help America Vote Act of 2002 mandates that states allow voters who show up to the polls, but who are not listed in the poll books, to cast a provisional ballot.<sup>28</sup> But the statute is silent on whether the states must count those provisional ballots. Further, whether someone may cast a regular ballot or must instead vote provisionally can be a matter

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23. See Richard L. Hasen, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 193 (Yale Univ. Press, 2012).

24. See Richard L. Hasen, *How Many More Near-Election Disasters Before Congress Wakes Up?*, *THE DAILY BEAST*, Oct. 30, 2012, <http://www.thedailybeast.com/articles/2012/10/30/how-many-more-near-election-disasters-before-congress-wakes-up.html> ("Those on the losing end of a close election are more likely than they were before 2000 to demand a recount and go to postelection litigation.")

25. *In re Coday*, 130 P.3d 809, 812 (Wash. 2006).

26. *In re Contest of Gen. Election*, 767 N.W. 2d 453, 458 (Minn. 2009) (per curiam).

27. *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010).

28. 42 U.S.C. § 15482(a) (2006).

of poll worker discretion amidst confusing standards.<sup>29</sup> Whether the voter complied precisely with all requirements of filling out the provisional ballot envelope entails a fact-specific inquiry. Not surprisingly, these provisional ballots become the main point of contention in a close election.<sup>30</sup>

Similarly, courts or other tribunals have little guidance on how to resolve the dispute, meaning that they often have great discretion. A candidate who is behind in the vote count thus loses little by filing an election contest. For example, in most jurisdictions, statutory guidance or judicial precedent allow a court to void an election when the errors “are ‘so pervasive as to undermine the integrity of the vote,’” but fail to say what circumstances meet that standard.<sup>31</sup> Although election contests do not often succeed, that fact alone will probably not stop a losing candidate from bringing a challenge on the off-chance that a court will exercise its discretion and vacate the certified result. To be sure, there might be political reasons for not contesting an election, especially if the candidate plans to run again in future years.<sup>32</sup> But the lack of guidance on the types of electoral errors that should lead to a reversal of the certified result leaves the courthouse door open to candidates who lost by only a few votes, as there is always a chance that a sympathetic judge might overturn the outcome. So long as there are few meaningful constraints on judges’ discretion in deciding post-election disputes, losing candidates in close races will continue to initiate election contests—unless there are other structural impediments to post-election litigation.

States have not formulated clear pleading or evidentiary standards for election contests. Some states stipulate the appropriate standard of review of a lower tribunal’s findings of fact in post-election litigation.<sup>33</sup> But few states constrain judges in any

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29. See, e.g., Joshua Douglas, *One Voter’s Tale Tells It All*, CINCINNATI ENQUIRER, Nov. 12, 2012, at A11 (recounting the story of one voter who was not initially offered a provisional ballot even though he was entitled to one).

30. See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011).

31. Edward B. Foley, *The Analysis and Mitigation of Electoral Errors*, 18 STAN. L. & POL’Y REV. 350, 371 (citing *Andrews v. Powell*, 848 N.E.2d 243, 252 (Ill. App. Ct. 2002)).

32. See Edward B. Foley, *The Founders’ Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 61 (2010) (“Richard Nixon refused to challenge John F. Kennedy’s victory in 1960 for fear of being labeled a sore loser, and he won the 1968 presidential election.”).

33. See BARRY H. WEINBERG, *THE RESOLUTION OF ELECTION DISPUTES: LEGAL*



meaningful way.<sup>34</sup> Only a handful of states delineate the proper evidentiary burden on those challenging a contest.<sup>35</sup> In regular civil litigation the new heightened pleading standard from *Bell Atlantic Corp. v. Twombly*<sup>36</sup> and *Ashcroft v. Iqbal*<sup>37</sup> in theory poses a procedural hurdle for some plaintiffs, who may choose not to initiate a case because they fear they cannot meet the court's plausibility standard. It is not clear, however, that these Supreme Court decisions apply well in the election setting, especially for a post-election dispute.<sup>38</sup> Moreover, there appears to be little, if any, enforcement of Federal Rule of Civil Procedure 11 or its state counterparts in election cases that might preclude the filing of even frivolous election contests.<sup>39</sup> That is, there is little in the way of procedural mechanisms that might make a losing candidate choose not to initiate an election contest if the result is close, even if it is unlikely to change in litigation.

Third, the process of contesting an election is not that onerous. Many states treat election contests like regular civil litigation.<sup>40</sup>

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PRINCIPLES THAT CONTROL ELECTION CHALLENGES 121 (2d ed. 2008); *see, e.g.*, LA. REV. STAT. ANN. § 18:1409(I) (2012) (providing that in an election contest "a court, upon its own motion, may correct manifest error to which its attention is called").

34. *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 287 (2007) ("Given the preceding range of available remedies, most states' existing election contest statutes do little to constrain a court's choice when some election irregularity is proven."); *see also id.* at 296 (noting that limiting judicial discretion in election contests also helps to promote separation of powers because it removes a court from the political process as much as possible).

35. *Cf.* ALA. CODE § 17-16-41 (2006) (providing that a court should not overturn the result, even if misconduct occurred, if that misconduct would not alter the outcome of the election); WASH. REV. CODE. § 29A.68.110 (2005) (same).

36. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

37. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

38. *See* Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. (forthcoming 2013).

39. *See* FED. R. CIV. PRO. 11. A search for cases invoking Federal Rule of Civil Procedure 11 or its state counterparts and election issues produced few relevant hits. In one case involving an election contest, the Indiana Supreme Court determined that the contestee had sufficiently verified her complaint to allow her contest to move forward under the state's counterpart to Federal Rule of Civil Procedure 11. *See* *Austin v. Sanders*, 492 N.E.2d 8, 9–10 (Ind. 1986). The Mississippi Supreme Court denied sanctions regarding a mayoral election contest after finding that the suit was not frivolous. *See* *Stringer v. Lucas*, 608 So.2d 1351, 1359 (Miss. 1992). In a more recent case, a Utah appeals court reversed the imposition of sanctions in a contest involving a municipal election due to the party's failure to comply with the strict procedural requirements of the state's Rule 11. *See* *Barnard v. Mansell*, 221 P.3d 874, 875–77 (Utah Ct. App. 2009).

40. *See, e.g.*, IDAHO CODE ANN. § 34-2013 (2012) (stating that election contests "shall be held according to the Idaho Rules of Civil Procedure so far as practicable"); N.J. STAT. ANN. § 19:29-5 (West 2012) ("The proceedings shall be similar to those in a civil action so far as practicable, but shall be under the control and direction of the court . . .").

Accordingly, the filing fees are the same as in any other case. For instance, to contest the result in Florida during the 2000 presidential election, Al Gore simply filed a regular election contest lawsuit in Leon County, which cost him, under the governing statute at the time, at most \$210.<sup>41</sup> Even when states have different procedures for election contests, the barrier to entry is usually quite minimal. A few states require those contesting an election to post a bond to cover the costs of the contest, but these costs are typically small and do not pose much of a deterrent.<sup>42</sup>

What is needed is a thumb on the scale to discourage candidates from continuing the fight when there is little chance of success. Of course, the ultimate goal is accuracy: the candidate who received the most votes should be declared the winner. But election contests rarely change the certified result.<sup>43</sup> The state's initial declaration and certification of the winner usually carries the day. That fact, however, has not stopped losing candidates from pursuing post-election remedies. Although the way we run our elections might open the door to post-election litigation, the reality that election contests rarely succeed—combined with the negative aspects of election contests discussed below—counsel toward

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41. See *Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000) (unpublished) (subsequent appellate history omitted); see also FLA. STAT. § 28.241(1) (1998).

42. See *infra* notes 73–88 and accompanying text.

43. The only recent post-election litigation that actually changed the outcome was not an “election contest” per se, because the county did not certify a winner until *after* the litigation concluded. See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011) (ruling that the county must count certain provisional ballots, which when counted resulted in a change in the candidate who received the most votes). This raises the question of whether, in addition to discouraging election contests, we should limit post-Election Day pre-certification litigation. This essay focuses on post-certification election contests because every state has specific statutory procedures in place for challenging the certified winner of an election, meaning there is a losing candidate who is invoking the state's processes to continue the fight. See Douglas, *supra* note 13, at 58–81. That is, “election contests” are a defined category of post-election litigation in which a candidate who is *not* declared the winner still challenges the result. *Id.*

Focusing on discouraging adjudicatory election contests does not preclude administrative recounts, during which the state has not yet officially declared one candidate the winner. Recounts also are more likely to change the vote totals. See, e.g., *In re Contest of Gen. Election*, 767 N.W.2d 453, 457 (Minn. 2009) (per curiam) (noting that the statewide recount changed the result from Coleman ahead by 206 votes to Franken winning by 225 votes). Limiting *all* post-election pre-certification litigation presents a more vexing line-drawing problem. But it might make sense to impose the same hurdles on post-Election Day pre-certification “adjudicatory-type” litigation, such as the *Hunter* case. See Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1017 (2007); see also Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035, 1037 (2007) (responding to Lowenstein and distinguishing “adjudicatory-type” actions from “regulatory-type” actions).

making it a little harder for a losing candidate to continue the election in a post-certification lawsuit.

## II. WHY ELECTION CONTESTS MAY BE BAD FOR OUR SYSTEM

Drawn out election disputes hurt the smooth running of our democracy. The system craves finality, particularly on election night. In this day of increased social media, campaigns and elections move at ultra-fast speed.<sup>44</sup> For better or worse, Americans have become accustomed to instant, or at least near-instant, results. When the electorate does not know which candidate won an election, it becomes weary of the political process. If it is a high-profile election, the public knows that lawyers will swoop in and the courts will be called upon to decide the result. An election that is “too close to call” raises heightened awareness and exposes the various flaws in the system. Of course, that might be a good thing if we correct bad election processes; for instance, almost all jurisdictions have modernized their voting equipment based on the problems stemming from *Bush v. Gore*.<sup>45</sup> But election contests become problematic when political actors exploit these flaws for their own political gain.

Election contests also can negatively affect the legitimacy of the ultimate winner.<sup>46</sup> Even long after the 2000 presidential election, many people still believe that the Supreme Court unfairly decided *Bush v. Gore*, which resulted in George W. Bush becoming President.<sup>47</sup> A contested election undermines the notion that the winner has an electoral mandate. Although any close election might suggest that the winner’s legitimacy is quite thin, this sen-

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44. See Jessica Gwynn & Dawn C. Chmielewski, *Election 2012; Social Media Conversations the Real Show*, L.A. TIMES, Nov. 8, 2012, at AA3; Bianca Bosker, *One Election Night Seen 31 Million Ways, Thanks to Social Media*, HUFFINGTON POST, Nov. 7, 2012, [http://www.huffingtonpost.com/bianca-bosker/social-media-election-night\\_b\\_2090211.html](http://www.huffingtonpost.com/bianca-bosker/social-media-election-night_b_2090211.html).

45. See MARTHA KROPF AND DAVID C. KIMBALL, HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM 25–26 (2012) (outlining how the Help America Vote Act encouraged changes in voting equipment).

46. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 37 (2007) (“When courts get involved in election disputes . . . they run a risk of undermining the public’s faith in the electoral process and in the fairness of the courts.”); Huefner, *supra* note 34, at 293 (noting that “it is important that representatives serve with full authority and respect, rather than with unresolved questions about their legitimacy”).

47. See, e.g., Persily, *supra* note 18, at 326 (reporting that in a telephone survey ten years after *Bush v. Gore* about one-third of respondents believe the Court decided the case fairly while about one-third of respondents think the Court did not decide the case fairly).

timent becomes heightened when an election goes beyond Election Day into overtime in the courts.

Moreover, post-election contests—at least for federal and statewide offices—rarely succeed.<sup>48</sup> States spend a lot of money and resources shepherding an election contest through the judicial system, with very little payoff most of the time. States must devote judges and their litigation structures to hear the case in a timely fashion, meaning that other cases on the docket must wait.<sup>49</sup> Including *Bush v. Gore*, since 2000 several high-profile post-election disputes have ended in the courts,<sup>50</sup> only one, *Hunter*, changed the result, and that was not even an election contest but a pre-certification challenge over the counting of provisional ballots.<sup>51</sup> That is, once the state certifies the result (often after an administrative recount), there is only a very small chance that a court or other tribunal will declare the losing candidate the winner. This makes sense: courts usually will not want to reverse the outcome of a final, certified count for fear of being seen as thwarting the will of the people. Even in the *Hunter* case, which did change the outcome, the court did not declare the challenging candidate the winner. The court instead required the counting of certain sealed provisional ballots, and those ballots tipped the vote count to Hunter.<sup>52</sup>

Recounts are more likely to change the initial outcome of the election in a close race.<sup>53</sup> But once there is a certified result, election contests usually do not alter who won. This does not mean, however, that candidates will not try; the lack of success for previous losing candidates has not seemed to provide much of a deterrent effect, as we continue to see post-election litigation. This suggests that the system should discourage election contests unless there is a strong chance that the losing candidate will ulti-

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48. See *supra* notes 8–12 and accompanying text.

49. Many states require a court to place an election contest at the top of its docket. See Douglas, *supra* note 13, at 34–36.

50. See *supra* notes 8–12 and accompanying text.

51. See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 222, 245 (6th Cir. 2011).

52. See Dan Horn, *Longest Election in County History Finally Decided*, CINCINNATI ENQUIRER, May 18, 2012, <http://news.cincinnati.com/article/20120517/NEWS0106/305170102/Longest-election-county-history-finally-decided>.

53. See, e.g., *In re Contest of Gen. Election*, 767 N.W. 2d 453, 457 (Minn. 2009) (per curiam) (noting that the statewide recount changed the result from Coleman ahead by 206 votes to Franken winning by 225 votes).

mately prevail. The focus should be on eliminating post-election litigation that is, more likely than not, going to fail—which, as the past decade demonstrates, has included all federal and statewide election contests.<sup>54</sup> If more election contests succeed, then it will be apparent that post-election litigation is serving the valuable role of providing a fail-safe mechanism to correct election irregularities or ward off partisan manipulation of the vote casting and counting process. But the fact that hardly any recent election contests have changed the result suggests that too many candidates are unnecessarily bringing their campaigns to the courts. We should minimize election contests that have a very small chance of success because they clog up the system, thwart finality, and produce little benefit.

Finally, drawn-out election disputes harm citizens' ability to have continued representation as the contest plays out. For example, the citizens of Minnesota suffered from having only one U.S. Senator for almost six months until the Minnesota Supreme Court finally decided the case in favor of Al Franken, prompting Norm Coleman to concede.<sup>55</sup> The Hamilton County judiciary might have been short one Juvenile Court Judge for a year-and-a-half during the *Hunter* litigation had another judge not stepped in to fill the seat temporarily.<sup>56</sup> We must try to avoid situations in which citizens have less than full representation because an election remains unresolved. The purpose of electing representatives is to have them serve in public positions, and that service should start when their terms are set to begin. As discussed below, Michigan and New York do not allow any vacancy during the pendency of an election contest: those states do not have specific statutory

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54. See *supra* notes 8–12 and accompanying text.

55. See Monica Davey, *Sole Minnesota Senator Has Problems Built for 2*, N.Y. TIMES, Apr. 8, 2009, at A20; P.J. Huffstutter & James Oliphant, *Franken Win Alters Power Equation*, L.A. TIMES, July 1, 2009, at A1.

56. A retired judge filled the seat until the case was resolved. See Kimball Perry, *Juvenile Court Sees Exits*, CINCINNATI ENQUIRER, Nov. 17, 2011, at A1. There are two judicial positions in the Hamilton County Juvenile Court, and when the other juvenile court judge resigned in November 2011, the Ohio Governor appointed one of the candidates from the 2010 election, John Williams, to that seat to serve alongside the retired judge who was filling in during the pendency of the *Hunter* litigation. Had Williams ultimately won the *Hunter* contest, he would have replaced the retired judge and assumed the position in dispute, leaving another vacancy. See Kimball Perry, *Ruling: Williams Sits Above Hunter*, CINCINNATI ENQUIRER, Nov. 10, 2012, at C1; Kimball Perry, *Williams Expected to Become Juvenile Court Judge*, CINCINNATI ENQUIRER, Oct. 19, 2011, at A1. *Hunter* ultimately prevailed in the post-election litigation over the 2010 election, however, so she and Williams are now the duly elected judges on that court.

guidance for contesting an election, instead permitting *quo warranto* actions that seek to oust an officeholder who has “usurped” an office.<sup>57</sup> This means that there will always be someone in office during an election challenge, as the very nature of a *quo warranto* case is that a current officeholder is improperly serving because, for example, of problems in the election that gave the person the position. But for all other states, there remains the possibility of a vacancy while the election contest proceeds.<sup>58</sup> We should discourage the filing of post-election disputes unless there is a genuine question about who won and the outcome is very likely to change. Otherwise, a candidate might too easily continue the election in the courts, thereby depriving the jurisdiction’s citizens of representation as the case is decided. This is a negative consequence of an election contest that is not worth the benefit of prolonged election litigation.

### III. IDEAS FOR DISINCENTIVIZING POST-ELECTION LITIGATION

The current system is set up to welcome, or at least not discourage, the filing of a post-election challenge. Drawn out elections, when the winner is unknown for weeks or months after Election Day, are bad for the electoral process—especially, as noted above, because they usually do not succeed. This fact, however, has not stopped candidates from trying. Accordingly, procedural or structural mechanisms are necessary to counterbalance the ease and incentives of filing an election contest. This section suggests three such reforms. Because post-recount adjudication hardly ever changes the result, we should consider mechanisms to discourage candidates or their supporters from filing an election contest except in the most limited of circumstances—when they actually have a good chance of prevailing. But perhaps more importantly, the goal of this essay is to start a conversation of how we can appropriately limit unmeritorious post-election lawsuits. That is, these ideas are just that—ideas to spur a closer inquiry into ways to curtail elections from going into overtime.

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57. See Douglas, *supra* note 13, at 10–11.

58. A vacancy, however, is not the inevitable result of an election contest: Christine Gregoire began serving as Washington State Governor even as Dino Rossi and his supporters initiated an election contest. See David Postman, Susan Gilmore, & Keith Ervin, *GOP Suit Doesn't Ask to Prevent Swearing-in*, SEATTLE TIMES, Jan. 8, 2005, at A1.

### A. *Banning All Election Contests*

The simplest idea is to preclude a losing candidate from initiating any post-election litigation.<sup>59</sup> If election contests are bad for our democratic system, then why allow them in the first place? A state could have a rule that a candidate may not bring any litigation whatsoever about the counting of ballots or after the certification of the result.

Two states, Michigan and New York, effectively preclude election contests.<sup>60</sup> Instead, they allow only for *quo warranto* actions, which are suits against the officeholder for “usurping” the office.<sup>61</sup> The certified winner thus assumes the elected position, but a losing candidate can petition the attorney general to bring a *quo warranto* suit against the official.<sup>62</sup> The benefit of this structure is that there is always someone in office. In addition, at least in New York, the attorney general has the sole discretion as to whether to initiate the *quo warranto* suit, thereby limiting post-election litigation to the most extreme cases in which a third party believes there is a reason to question the winner’s election.<sup>63</sup> Further, if the *quo warranto* action is successful and the official is ousted from office, that person must pay a \$2000 fine.<sup>64</sup>

Thus, the best solution to the problem of post-election litigation may be to eliminate it entirely. Election contests place the winner in doubt, sometimes leaving citizens without representation. They also cost the state money and resources in exchange for little tangible benefit. Of course, election contests may reveal flaws in our election system, but this is possible even without post-election litigation when scholars and others study previous elections. Finality is important to elections, and perhaps it makes

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59. Some states channel election contests for certain races to the legislature, thereby prohibiting the judiciary from hearing these post-election disputes. See Douglas, *supra* note 13, at 5–8, 12–17. Although this eliminates the possibility of judicial involvement in an election contest, it still comes with the same problems of a drawn-out affair that precludes finality in the result. Moreover, a candidate deciding whether to initiate an election contest in the legislature might have other considerations, such as the political ramifications of pursuing the case.

60. See Douglas, *supra* note 13, at 10–11.

61. MICH. COMP. LAWS § 600.4501 (2000); N.Y. EXEC. LAW § 63-b (McKinney 2010).

62. MICH. COMP. LAWS § 600.4501; N.Y. EXEC. LAW § 63-b.

63. See, e.g., Delgado v. Sunderland, 767 N.E.2d 662, 665 (N.Y. 2002) (per curiam).

64. MICH. COMP. LAWS § 600.4515; N.Y. EXEC. LAW § 63-b(2).

sense simply to move on once the state's electoral mechanism has certified a candidate as the winner.

But accuracy is also important. Part of an elected official's legitimacy stems from the belief that the winning candidate received the most votes.<sup>65</sup> Perhaps, then, we need to leave the door just slightly open for election contests to ensure there is a way to dispute an election if something does go wrong. Moreover, every state besides Michigan and New York has detailed provisions on how to contest an election.<sup>66</sup> Therefore, it may be better to acknowledge the reality of election contests and instead impose hurdles on losing candidates who wish to invoke these processes unless the candidate truly believes the election contest will succeed.

#### B. *Monetary Hurdles: Imposing a High Filing Fee or Shifting Costs and Attorney's Fees*

Assuming we are not going to ban election contests entirely, perhaps there are mechanisms to discourage them except when absolutely necessary. One idea is to demand a high filing fee for those who wish to contest an election. A willingness to pay a hefty sum can serve as a proxy that a candidate or his or her supporters actually believe the certified winner did not receive the most votes because of some election irregularity. Most states do not require anything of those contesting an election beyond the typical filing fee for a civil case. Republican Dino Rossi's supporters spent \$110 as a filing fee to contest the Washington gubernatorial election in 2004.<sup>67</sup> To initiate the election contest for U.S. Senate in 2008, Norm Coleman and his co-plaintiff (a voter) had to pay only \$305 to the Minnesota District Court as the regular administrative filing fee for civil cases.<sup>68</sup> Coleman spent a total of \$1,185 in court costs and his co-plaintiff spent a total of \$630 to contest

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65. See Douglas, *supra* note 13, at 44–46 (discussing goals for resolving disputed elections, including “correctly and accurately determining the winner”); Huefner, *supra* note 34, at 288 (listing several values that an election system should reflect when remedying an election irregularity).

66. See Douglas, *supra* note 13, at 58–81 (listing each state's procedures).

67. Docket Entry, *Borders v. King Cnty.*, No. 05-2-00027-3 (Wash. Super. Ct. 2005); WASH. REV. CODE § 36.18.020(2)(c) (2005) (setting the filing fee at \$110).

68. See Register of Actions, *In re Contest of Gen. Election*, No. 62-cv-09-56 (Minn. Dist. Ct. 2009). Coleman and his co-plaintiffs avoided paying an additional \$305 in fees by filing jointly. *Id.*



the election.<sup>69</sup> Similarly, Joe Miller was required to pay merely \$150 as a filing fee for a civil action in the Alaska Superior Court to contest the 2010 election of Lisa Murkowski for the U.S. Senate.<sup>70</sup> Tracie Hunter went to federal court to object to the Hamilton County Board of Election's decision not to count certain provisional ballots in her Juvenile Court Judge race, costing her a \$350 filing fee.<sup>71</sup>

What if filing fees for election contests were higher, so that candidates had to stop and decide whether pursuing the contest was worth the monetary cost? A filing fee of \$350 is paltry and provides almost no barrier to entry for a candidate or his or her supporters who may want to continue the fight, even if the outcome is unlikely to change. A higher filing fee (tens of thousands of dollars, for example) presents a much more painful hurdle, which should dissuade some candidates unless there is a fairly decent chance of success. A much higher monetary barrier could have, for example, dissuaded Joe Miller from continuing to challenge Lisa Murkowski's election. Or at least he would have had to clear an additional hurdle, requiring him to think carefully about whether litigation was worth it. There would be a little more "skin in the game."

Of course, a wealthy candidate in a significant campaign might see no barrier from a high filing fee, or the political party may step in to pay the candidate's expenses. In addition, the real price of an election contest comes from attorney's fees, not court costs. But a state that seeks to elevate the goal of finality in elections might choose to impose a high filing fee outright on a candidate who is down after the final canvass and recount of the votes but still wants to contest the election. At a minimum, there should be some barrier to entry that is more significant than a nominal filing fee.

Suppose there is weariness, however, of forcing losing candidates or their supporters to shell out a large filing fee ahead of time, as that may deter too many valid election contests, especially for less wealthy individuals. Another idea is to impose a fee on

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69. *Id.* Franken, too, spent \$1185 in filing fees to the district court in defending against the election contest. *Id.*

70. See Alaska R. Admin. Rule 9.1(b).

71. Docket at 1, *Hunter v. Hamilton Cnty. Bd. of Elections*, Case No. 1:10-CV820 (S.D. Ohio 2010).

the back-end for candidates who unsuccessfully challenge the election's result in post-election litigation. This fee could compensate the state for its costs, pay for the other side's attorney's fees, or even be penal in nature for dragging out the election. For example, some states require a party seeking a recount to cover the costs of the recount should the result not change.<sup>72</sup> Why not impose a similar cost to a party contesting an election even after a recount?

Currently, a few states require a plaintiff in a post-election dispute to post a bond to contest the election, but the practice is not widespread. For example, in Iowa, a candidate who wishes to contest an election for the state's presidential electors or for the U.S. House of Representatives or U.S. Senate must file a bond "in such amount as shall be set by the presiding judge of the court, conditional to pay all costs in case the election be confirmed or the contest dismissed."<sup>73</sup> There is no guidance, however, on how high the bond should be to pay the opposing side's costs. Similarly, Colorado requires the contesting party to file a bond, with sureties, that runs to the winning candidate that will cover "all costs" of the contest.<sup>74</sup> It is unlikely that a court would set the bond at a level that would actually deter the filing of a case with a slim chance of success. In a case from Ohio, for example, the county clerk set the bond for an election contest for city council at \$100, which the clerk determined was "adequate and in full compliance with the statutory requirements" that the bond must be a "sum sufficient . . . to pay all the costs of the contest."<sup>75</sup> The Ohio Supreme Court did not question this conclusion, finding the bond to be in "substantial compliance" with the statute.<sup>76</sup> Other states place the bond at a fairly low level, such as \$500.<sup>77</sup> Posting a bond with a surety may not be a strict prerequisite to filing an election contest even in those states that have a bond requirement. New

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72. See, e.g., *In re Coday*, 130 P.3d 809, 811 (Wash. 2006) (explaining that a Democratic representative initially sought a recount of the 2004 gubernatorial election and deposited \$730,000—the amount required under the then-applicable statute—to cover the cost of the recount should the result come out the same in favor of Republican Dino Rossi).

73. IOWA CODE § 60.7 (2012).

74. COLO. REV. STAT. § 1-11-205 (2012); see also IDAHO CODE ANN. § 34-2008 (2008) (requiring a bond to cover costs in the event the contest fails); OHIO REV. CODE ANN. § 3515.09 (West 2012) (same); 25 PA. CONS. STAT. § 3459 (1978) (same);

75. See *Taft v. Cuyahoga Cty. Bd. of Elections*, 854 N.E.2d 472, 475–76 (Ohio 2006) (citing OHIO REV. CODE ANN. § 3515.09).

76. *Id.* at 476.

77. See, e.g., N.J. STAT. ANN. § 19:29-2 (West 2012).

Jersey, for example, explicitly states that “[n]o petition heretofore filed pursuant to this section shall be dismissed or the prosecution fail because the petitioner shall not have filed a bond with sureties as required herein.”<sup>78</sup> Instead, the contesting party can file the bond without sureties, along with a cash deposit of \$500 as security.<sup>79</sup>

Some states require a bond only for the inspection of ballots prior to trial, not for the overall election contest.<sup>80</sup> Although this may protect the disputed ballots or machines, it does not deter the contest itself. Another approach is to require a bond if the party that lost before the initial trial court wants to appeal, which must cover the appellee’s costs should the appeal fail.<sup>81</sup> This, of course, deters further appeals, but it does nothing to limit the filing of the initial action. Moreover, the amount of the bond is often quite low. Minnesota, for example, requires a bond of only \$500 to appeal a lower court’s decision on an election contest.<sup>82</sup>

Virginia’s bond requirement appears to be the most stringent and actually could deter unmeritorious post-election litigation: a challenging party must file a bond with surety set at \$100 per precinct in the contested district for a legislative election and \$10 per precinct for a gubernatorial election.<sup>83</sup> Virginia had 2,588 precincts in 2012, meaning that a losing candidate who wants to contest a statewide election must post a bond with surety of over \$25,000, which the party forfeits if he or she loses the contest.<sup>84</sup> This might provide some deterrent to the filing of a post-election challenge that the contesting party realizes is a long shot—which includes most election contests. Curiously, however, Virginia’s statutes do not impose the same bond requirement on contests

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78. *Id.*

79. *Id.*

80. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-677 (1980); 10 ILL. COMP. STAT. ANN. 5/23-1.6a (2010); KAN. STAT. ANN. § 25-1447 (2010); MINN. STAT. § 209.06 (2012).

81. *See, e.g.*, KAN. STAT. ANN. § 25-1450; LA. REV. STAT. ANN. § 18:1409(D) (2011).

82. MINN. STAT. § 209.09 (1990).

83. VA. CODE ANN. § 24.2-803(B) (2011) (requiring a bond with surety of \$100 “per precinct contained in whole or in part in the district being contested” for legislative elections to pay for the costs of the contest if the contesting party does not prevail); *id.* § 24.2-804 (requiring a bond with surety of \$10 per precinct in the state to contest elections for governor, lieutenant governor, or attorney general).

84. *See November 6, 2012 General Election Official Results*, VA. STATE BD. OF ELECTIONS, [https://www.voterinfo.sbe.virginia.gov/election/DATA/2012/68C30477-AAF2-46DD-994E-5D3BE8A89C9B/Official/6\\_s.shtml](https://www.voterinfo.sbe.virginia.gov/election/DATA/2012/68C30477-AAF2-46DD-994E-5D3BE8A89C9B/Official/6_s.shtml) (last visited Feb. 18, 2013).

regarding the state's presidential electors.<sup>85</sup> Alabama also comes closer to a standard that could actually deter some election contests, particularly for lower profile, less costly races, by requiring anyone contesting the election to file a bond in the amount of \$5,000 to cover the costs that will accrue in the proceeding.<sup>86</sup> The challenger forfeits the bond only if the initial election result stands.<sup>87</sup> Oklahoma also sets the bond requirement higher, but only for election contests alleging fraud; in that instance the contesting party must post a cash bond of \$5,000 for each county in which the fraud allegedly occurred.<sup>88</sup>

Accordingly, more states could adopt Virginia's, Alabama's, or Oklahoma's method and impose a fairly high bond requirement or monetary sanction on losing candidates who wish to contest an election. Finding \$25,000 or another high amount, after a drawn out and close campaign, presents at least a modest hurdle on continuing the fight. Furthermore, a losing candidate who is unsuccessful in an election contest should have to pay the other side's attorney's fees, even if it is more than the initial bond. Securing this amount is not impossible, and the candidate's wealthy supporters or the political party will likely foot the bill. If the state crafts its rule as a bond requirement, then the initial outlay of money is not too high, and it at least imposes some additional barrier to entry by requiring the candidate and his or her supporters to think twice before filing the challenge. The candidate must consider whether the chance of success in the courts is worth \$25,000, or whatever other high number a state chooses to impose, plus the shifting of attorneys' fees and costs.

Only a handful of states pose any barrier at the courthouse door to contest an election, either at the front end through a filing fee or the back end through forfeiting a bond or imposing a monetary fine. At a minimum, states should follow the lead of other states that require at least the posting of a bond to cover the state's and other sides' costs and attorney's fees in the event that the contest fails.

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85. See VA. CODE ANN. § 24.2-805 (setting out procedures for contesting an election for presidential electors).

86. See ALA. CODE. § 17-16-63 (2006).

87. See *id.*

88. See OKLA. STAT. tit. 26, § 8-119 (1977).

### C. *Penalties on Future Candidacies*

Perhaps a monetary sanction or hurdle is not enough to actually deter election contests, especially because wealthy candidates or political parties will pay the fee or post the bond without problem. A fee-based deterrent also could fall disproportionately and unfairly on less wealthy individuals. A harsher, yet non-monetary, penalty for an unsuccessful challenge may be necessary.

One idea is to create a public stigma against those candidates who unsuccessfully challenge the election results. For example, states could deem a previous candidate who lost an election contest ineligible for the ballot in a subsequent election. That is, the state could limit ballot access for previous "sore loser" candidates. Presumably, many candidates plan to run again, so they might think twice before contesting the current election for fear of jeopardizing future electoral prospects. Indeed, Richard Nixon chose not to contest the close 1960 presidential election likely because he planned to run for president again in the future.<sup>89</sup>

A similar but milder approach is to provide these candidates unfavorable ballot placement (such as at the bottom of the list of candidates) in a subsequent election. Alternatively, much like we force candidates to "approve this message" for political advertisements, we could also require candidates to say that they "unsuccessfully challenged the results in a previous election" in any political ad.

These proposals might raise constitutional concerns, but there are good arguments for why courts could sustain them. Limiting eligibility for office or ballot access to certain candidates because of their previous contestation of an election is obviously quite harsh and potentially infringes the rights of those voters who would otherwise support the candidate.<sup>90</sup> As the Supreme Court has explained, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on

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89. See Foley, *supra* note 32, at 61.

90. Cf. Anderson v. Celebrezze, 460 U.S. 780, 792-94 (1983) (explaining that a law that unfairly limits ballot access for independent candidates infringes the rights of independent-minded voters).

voters.”<sup>91</sup> But states impose various eligibility requirements on candidates to serve legitimate state interests. Some states require candidates to reside in the electoral district for a certain amount of time, which presumably helps to ensure that candidates understand local concerns.<sup>92</sup> Other candidates are ineligible if they have served the maximum number of allowable terms,<sup>93</sup> which fosters the state’s goals of increasing the number of people involved in a state’s representative democracy.<sup>94</sup> Almost all states prohibit a “sore loser” candidate who lost in a party primary to appear on the general election ballot as the nominee of a different political party so as to protect the election process.<sup>95</sup>

Similarly, a state would have a sufficiently important interest in prohibiting a previous general election “sore loser” candidate from running again. A state could conclude that one aspect of serving in a representative capacity is an acquiescence to the certified election result. A candidate who unsuccessfully challenged a previous election fails to prove a willingness to honor the result, thwarting the state’s goal of having certainty and finality in its elections. That is, a state legitimately can seek representatives who will accept certified election results as a virtue of protecting the election process.

A milder ballot access regulation would be to relegate candidates who challenged a previous election to a disfavored ballot spot, such as last on the list of candidates for that office. Ballot order matters: research demonstrates that candidates listed at the top of the ballot often receive more votes than they might otherwise if they were listed lower.<sup>96</sup> Many states have recognized

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91. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

92. *See, e.g.*, N.J. CONST. Art. 4, § 1, ¶ 2 (providing that members of the Senate must have been a citizen and resident of the state for at least four years and of the district for at least one year preceding the election). A recent high-profile dispute concerned whether a candidate, Rahm Emanuel, satisfied the residency requirements for the Chicago mayoral election. *See Maksym v. Bd. of Election Comm’rs*, 950 N.E.2d 1051 (Ill. 2011).

93. For example, several state legislatures impose term limits on their members. *See The Term Limited States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legisdata/chart-of-term-limits-states.aspx> (last visited Feb. 18, 2013) (current through Jan. 2013).

94. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (noting that term limits might “provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents”).

95. *See* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1042 (2011).

96. *See* R. Michael Alvarez et al., *How Much Is Enough? The “Ballot Order Effect” and*

the significance of the “ballot order effect” by requiring randomization of candidates’ names on the ballot and rotation of the order among precincts.<sup>97</sup> Other states explicitly give ballot order preference to incumbents or to the major political party who received the highest number of votes in the previous election, placing that party’s nominee first.<sup>98</sup> Candidates care about trying to be listed first on the ballot.<sup>99</sup>

A state could use the ballot order effect as a disincentive to election challenges: a candidate who chooses to contest an election and loses suffers the disadvantage of poor ballot placement in the next election, thus providing a deterrent to election contests that are unlikely to succeed.

Courts have generally rejected constitutional challenges to preferential ballot order.<sup>100</sup> For example, a New Jersey court turned away a minor political party’s objection to the placement of the major parties’ nominees at the top of the ballot, stating that there was no constitutional right to “an equal opportunity for candidates for office to obtain the votes of those citizens who would cast those votes in an unconscious manner.”<sup>101</sup> But we could turn this proposition on its head: if states are allowed to favor the major political parties or incumbents in ballot placement, it follows that states also could *disfavor* certain candidates for legitimate means—such as to discourage election contests in previous elections. The actual effects might be small; research differs on

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*the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L.J. 40, 41–43 (2006).

97. See, e.g., CAL. ELEC. CODE § 13112 (West 2003); OHIO REV. CODE ANN. § 3505.03 (West 2012).

98. See, e.g., IND. CODE § 3-11-2-6 (2012) (providing that the nominee of the party who received the most votes in the county for secretary of state in the last election must appear in the first column or row on the left side of all ballots). For a discussion of the ballot order practices in all fifty states, see Laura Miller, Note, *Election By Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 373, 380–82 (2010).

99. See, e.g., Abdon M. Pallasch & Steve Patterson, *Obama, Clinton Try for Top Spot on State Ballot*, CHI. SUN-TIMES, Oct. 30, 2007, at 15 (noting that both the Hillary Clinton and Barack Obama campaigns camped out at county clerk offices to file first and therefore be eligible for the lottery to determine the top placement on the primary election ballot).

100. See Miller, *supra* note 98, at 390 (“State and federal courts have been dealing with challenges to ballot positioning for several decades, but relatively few courts have invalidated state statutes relating to ballot order.”).

101. *New Jersey Conservative Party v. Farmer*, 753 A.2d 192, 200 (N.J. Super. Ct. 1999).

the significance of the ballot order phenomenon.<sup>102</sup> But a candidate who has further political aspirations will think carefully about the potential negative effects in a subsequent election before contesting a current election's results. Even if the ballot order effect is small as an empirical matter, a politician will not want to take the risk unless there is a really good chance of winning the current election contest.

Finally, states might require candidates who unsuccessfully contested a previous election to say so in a political advertisement in a future campaign. Federal law already requires candidates to state both their name and that they approve the advertisement.<sup>103</sup> The Supreme Court rejected a constitutional challenge to this provision, holding that the law "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing."<sup>104</sup> Similarly, a requirement that candidates explicitly state that they contested a previous election and lost might bear a sufficient relationship with a state's goal of fostering certainty and finality in its election, shedding publicity on the manner in which the candidate interacted with the state's election process.

To be sure, all three proposals approach the line of constitutionality quite closely. A law that prohibits ballot access for a candidate based on the candidate's conduct in a previous election might violate that candidate's First Amendment rights and infringe on the rights of voters to cast a meaningful vote for that person. A law that explicitly disfavors certain candidates in ballot order could raise equal protection concerns because the state is favoring some candidates over others. And a court might view a law that compels a candidate's speech about the candidate's previous activities in contesting an election as not being sufficiently related to the state's goals of discouraging unmeritorious election contests. But whether any of these proposals are constitutional is a close case, and a state that wants to be aggressive in deterring

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102. See Alvarez, *supra* note 96, at 43; Miller, *supra* note 98, at 388 ("In sum, ballot order matters. The effect is likely relatively small for major party candidates in general elections, but the effect is substantial for minor party candidates in the same races. In primary and non-partisan elections, the effect is larger both in magnitude and statistical significance for all types of candidates.").

103. 2 U.S.C. § 441d (2006).

104. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003) (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 81 (1976)).



election contests might try them, even if that might invite litigation on their constitutionality. The ideas at least provide an avenue for achieving a more vigorous deterrent to post-election litigation. However, one flaw is that none of these methods are effective if the candidate has no intention of running for any office again.

This section was necessarily provocative, and the suggestions are certainly harsh on candidates who unsuccessfully challenge an election's result. Post-election litigation, however, should be rare as compared to the likelihood of success, not frequent. Eliminating all post-election litigation is perhaps not the best strategy because something can always go awry in the election process, and we need a safety valve to deal with that scenario. But there ought to be some mechanism to dissuade losing candidates from bringing the election to the courts except in limited situations. Finality in the result is more important. I therefore raise these ideas not to suggest that they are the *best* means of providing a deterrent but to open the discussion of creative ways to achieve finality after a state certifies a winner.

#### IV. CONCLUSION

Post-election disputes about the winner are sometimes necessary when there are true questions about the validity of certain ballots and the victor is unclear. Moreover, the main goal of election administration should be to determine accurately who received the most votes. But sometimes election contests are not necessary, especially because they do not often change the result. The several-month litigation in Minnesota confirming Al Franken as the winner of the U.S. Senate election did not add much to the election process; maybe Norm Coleman would have conceded earlier had he faced more severe consequences for bringing the contest. Perhaps Joe Miller sees a future for himself in Alaska politics, and he might not have brought the 2010 Alaska U.S. Senate race to the courts had he faced a penalty for initiating post-election litigation. Election contests can undermine the goals of finality, certainty, and legitimacy of the democratic process. The system, particularly after *Bush v. Gore* signaled courts' open door to election litigation, provides few disincentives to losing candidates filing an election contest. One way to discourage post-election litigation is to push litigants to resolve challenges before

the election.<sup>105</sup> But if it is a close race, many losing candidates will not give up the fight.

Therefore, we need structural or procedural mechanisms that discourage unmeritorious election contests. This essay is meant to start a conversation of how best to place a reasonable deterrent on post-election litigation. The goal is to make the candidate and his or her supporters decide, *ex ante*, whether contesting the result and losing is worth the penalties a state would impose. The ideas in this essay range from the most practical to the most controversial. It does not seem unreasonable to require a high filing fee or a bond and to shift costs to losing candidates who unsuccessfully contest the result. Indeed, because several states already do so, forcing candidates to post a bond that will cover the other sides' attorney's fees is probably the proposal that has the most likely chance of adoption. Or maybe we need harsher consequences on candidates themselves, especially if they plan to run again. We could start by imposing these disincentives on federal and statewide races, as these are the costliest, highest-profile disputes, and—based on recent data—are the least likely to change the outcome. Either way, the point is to think critically about what we can do to limit courts or other tribunals from having the final say in who won an election unless absolutely necessary. We should discourage those election contests that, in the losing candidate's calculation, either have little chance of success or are not worth the strings the state attaches to its election contest provisions.

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105. See Hasen, *supra* note 46, at 37.

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