A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation

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INTRODUCTION: INITIAL THOUGHTS ON THE MARGIN OF LITIGATION IN 2004

Ever since 2000, there has been the concern that another presidential election would go into "overtime," mired in a ballot-counting dispute comparable to the one that led to *Bush v. Gore*.[1] The fight next time might be over absentee ballots, as occurred in Minnesota's protracted litigation over its 2008 U.S. Senate election, which ended on June 30, 2009, when Al Franken prevailed over the previous incumbent, Norm Coleman.[2] Or, perhaps somewhat more probable, the next fight might involve provisional ballots, which has caused lengthy vote-counting disputes in Ohio over a congressional race in 2008[3] and a local judicial election in 2010.[4]

Recognizing this risk, election law scholars since 2004 have asked: How close does a presidential election need to be in order to trigger an "extra innings" ballot-counting fight? Obviously, winning a majority of Electoral College votes must depend on the outcome of an unsettled popular vote in one or more pivotal states, in the same way that Florida determined the Electoral College winner in 2000. On Election Night in 2004, as the nation watched the initial returns come in, it looked as if Ohio was shaping up to be in this same position. Thus, with each passing hour,

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[1] See, e.g., Richard L. Hasen, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTORAL MELTDOWN (2012); Edward B. Foley, *Recounts: Elections in Overtime,* in Matthew J. Streb (ed.), LAW AND ELECTION POLITICS: THE RULES OF THE GAME (2d ed. 2013); Edward B. Foley, *How Fair Can Be Faster: The Lessons of* Coleman v. Franken, 10 ELECTION L. J. 187 (2011); Edward B. Foley, *The* McCain v. Obama *Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEG. & PUB. POL. 471-509 (2010).

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

[3] State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982 (Ohio 2008).

[4] Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219 (6th Cir. 2011).

the question was asked ever more persistently: How close does the vote in Ohio need to be to trigger a Florida-like fight over who won the presidency? Or, putting the same question in terms of the language that was coined that year, how far ahead must one candidate be over the other in order for the trailing candidate to concede defeat and thus put the election outside "the margin of litigation"?[5]

At 2:00 a.m., as Election Night 2004 turned into Wednesday morning, George W. Bush held a lead in Ohio of 121,012 votes.[6] John Kerry went to bed without conceding in order to avoid making a precipitous decision that he would later regret. (Memories of Al Gore's premature congratulatory phone call to Bush at 3:00 a.m. four years before, which Gore had to retract in a second call within the same hour, were still vivid within the Kerry campaign.) But when Kerry awoke at 7:00 a.m., he took another hard look at the numbers and before noon had called Bush with his own concession.[7] By that time, Bush's lead in Ohio had grown to about 135,000 votes, and it had become clear that there would not be enough provisional ballots in the state for Kerry to surmount this lead.[8] Analysts that morning were expecting about 150,000 provisional ballots statewide[9]—an accurate estimate, as it turned out, with the final number being 158,642[10]—but even if there had been as many as 250,000 provisional ballots (a wildly optimistic number), and even if all of them had eventually been counted (an altogether unrealistic assumption), Kerry would have needed to win more than three-quarters of the provisional ballots in order to pull ahead of Bush.[11] Thus, being behind as much as he was, Kerry quickly concluded that it just was not worth trying to fight on.

Kerry was correct to concede. When Ohio eventually certified its 2004 presidential election—after all the provisional ballots had been evaluated to determine their eligibility and after all the canvassing of returns and recounting of ballots had been complete—Bush won the state by 118,599

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[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 (2005).

[6] Adam Nagourney, *The 2004 Elections: The Presidency -- The Contest; Bush Holds Lead*, N.Y. TIMES, Nov. 3, 2004, at A1, *available at* 2004 WLNR 6562107.

[7] Jodi Wilogren, *The 2004 Elections: The Presidency -- The Democratic Nominee; At Finish Line, a Bit Late, Kerry Bows to Cold Numbers*, N.Y. TIMES, Nov. 4, 2004, at P3, *available at* 2004 WLNR 6562423.

[8] Adam Liptak, *The 2004 Elections: Issues – Ohio; In Making His Decision on Ohio, Kerry Did the Math*, N.Y. TIMES, Nov. 4, 2004, at P10, *available at* 2004 WLNR 6562405.

[9] *Id*.

[10] *Provisional Ballots: November 2, 2004*, OHIO SEC'Y OF STATE http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102ProvisionalBallots.aspx.

[11] Liptak, *supra* note 8.

votes.[12] Bush's lead, between the time of Kerry's concession and the final certification, had shrunk by almost 18,000 votes. But 18,000 votes was only a small percentage of the 135,000 gap Kerry had needed to close—about thirteen percent. Indeed, this 18,000-vote figure suggested that the margin of litigation in Ohio might be significantly smaller than what some might have anticipated: A trailing candidate on the morning after Election Day might have a reasonable chance of overturning a 20,000-vote deficit, or maybe even a 30,000-vote deficit if the candidate's lawyers could think of some additional strategies to harvest more votes than what came to Kerry during the canvass in 2004, but it would seem unrealistic to think that a trailing candidate could overcome a 50,000-vote deficit.

I. OHIO'S APPARENTLY EXPANDING MARGIN OF LITIGATION IN 2008 AND 2012

In 2008, Barack Obama won an Electoral College landslide, 365 to 173,[13] and so that year there was no need to worry about the potential margin of litigation in any particular state. But in the fall of 2012, there were predictions that Obama-Romney would be much closer than Obama-McCain and, indeed, that Ohio might be the pivotal state in 2012 as it had been in 2004. Therefore, while waiting for returns on Election Night in 2012, I attempted to calculate the margin of litigation that might apply in Ohio that year, and in doing so I observed that Obama in 2008 had added much more to his lead between initial returns and final certification than the roughly 18,000-vote "bump" that Kerry had managed to receive

[12] This number is derived from the vote total submitted by Ohio's governor to the National Archives in the state's Amended Certificate of Ascertainment. State of Ohio Amended Certificate of Ascertainment, NATIONAL ARCHIVES, Jan. 4, 2005, *available at* http://www.archives.gov/federal-register/electoral-college/2004_certificates/ascertainment_ohio_amended_01.html. On December 6, 2004, Ohio's governor submitted to the National Archives its original Certificate of Ascertainment, which contained vote totals that reflected a margin of 118,775 between Bush and Kerry. State of Ohio Certificate of Ascertainment, NATIONAL ARCHIVES, Dec. 6, 2004, *available at* http://www.archives.gov/federal-register/electoral-college/2004_certificates/ascertainment_ohio_01.html. Even after Kerry conceded, the results of the presidential election in Ohio were hotly contested by activists right up to the acceptance of the state's certification in Congress on January 6, 2005, and a recount held at the behest of minor-party candidates yielded the 176-vote difference between the original and amended certificates. *See* Mark Niquette, *Critics Drop Lawsuits Challenging Election of Bush, Moyer*, COLUMBUS DISPATCH, Jan. 12, 2005, at 7B, *available at* 2005 WLNR 24955379; *see also* Jonathan Riskind, *Electoral College Challenge Quashed*, COLUMBUS DISPATCH, Jan. 7, 2005, at 1A (describing unsuccessful congressional protest of Ohio's vote).

[13] *2008 Electoral College Results*, NATIONAL ARCHIVES, http://www.archives.gov/federal-register/electoral-college/2008/election-results.html.

between initial returns and final certification in 2004.[14] On the morning after Election Night in 2008, once all the initial returns were in—and thus at the comparable moment four years after Kerry's look at the numbers forced him to concede—Obama was ahead of McCain by about 205,000 votes.[15] When Ohio later certified its 2008 election, Obama's margin over McCain had grown to 258,897.[16] Thus, during the canvassing process, including the evaluation of provisional ballots, Obama had managed to extend his lead over McCain by more than 50,000 votes, whereas Kerry had only narrowed the gap between him and Bush by less than 20,000 votes. Although Kerry needed to come from behind, while Obama was padding his lead, the comparison of the two numbers was relevant to assessing the margin of litigation. The over-50,000 vote *increase* in Obama's lead from initial returns to final certification suggested that, if Obama had been behind McCain by 50,000 votes on the morning after Election Night, then he could have made up that difference and pulled ahead by the end of the canvass. That calculation thus indicated that the margin of litigation in Ohio in 2008 actually would have been 50,000 votes or even more—maybe Obama could have rustled up some extra votes from fighting for them during the canvass, something he obviously did not actually have to do in 2008. In any event, the margin of litigation seemed to have expanded in Ohio from 2004 to 2008, since there was no way that Kerry could have made up a 50,000-vote deficit in 2004.

2012, however, turned out to be not so close after all. Rather, Obama achieved another decisive Electoral College victory, 332 to 206.[17] Thus, once again, there was no need to make a decisive judgment about how close Ohio would have had to be on the morning after Election Night to make the state worth fighting for and thus take the presidential race into extra innings. Still, I wanted to see how Obama's final margin of victory in Ohio compared to his early lead in the state. Thus, after waiting for final certification of the election, I was surprised to learn that Obama did even better during the canvass in 2012 than he had in 2008. Obama's lead over

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[14] Edward B. Foley, *Thinking About Some Possible Ohio Numbers*, ELECTION LAW @ MORITZ (Nov. 6, 2012), http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=10135.

[15] This number is derived from the vote totals reported in the *New York Times* on Thursday, November 6 (and thus are the best available historical evidence of the numbers available to the candidates on Wednesday, November 5). *See Ohio: Obama*, N.Y. TIMES, Nov. 6, 2008, at P13, *available at* 2008 WLNR 21173708.

[16] State of Ohio Certificate of Ascertainment, NATIONAL ARCHIVES, Dec. 11, 2008, *available at* http://www.archives.gov/federal-register/electoral-college/2008-certificates/ascertainment-ohio-01.html.

[17] *2012 Electoral College Results*, NATIONAL ARCHIVES, http://www.archives.gov/federal-register/electoral-college/2012/election-results.html.

Romney the morning after Election Night was around 100,000 votes, whereas his final certified margin of victory was 166,214,[18] for an increase of over 65,000 votes. Thus, Obama's increase in 2012 was almost 15,000 votes more than his equivalent increase in 2008. This improvement was surprising in part because the presidential election in Ohio was much tighter in 2012 than it had been in 2008. Obama's initial lead over Romney was only 100,000 votes, whereas his initial lead over McCain had been twice as large. In percentage terms, adding 65,000 more votes to a base of 100,000 was much larger gain than Obama's addition of 50,000 votes to a base of 200,000 in 2008. Consequently, it seemed as if Obama was making much more efficient use of the canvass in 2012 than he had in 2008, just as he had been much more efficient with the canvass in 2008 than Kerry had been in 2004. In other words, it seemed as if with each election cycle the Democratic presidential candidate was able to extract greater and greater yields in harvesting votes during the canvass—thereby suggesting that the margin of litigation was significantly growing, not shrinking, with each election cycle.

This situation seemed odd, even perverse. One would think that Ohio, the quintessential presidential "swing state," would want to make it less likely—not more likely—that it would take the nation into overtime in a presidential election. Yet looking at these numbers made one think that just the opposite was occurring. Ohio seemed to be acting as though it was expanding the opportunity for a trailing presidential candidate, or at least a Democrat, to decide the morning after Election Night that that the race was still not finished.[19]

II. THE QUEST FOR A BROADER ANALYSIS

These Ohio numbers prompted questions. Was Ohio unique in apparently expanding its margin of litigation, or were other presidential battleground states similar in this regard? What was the margin of litigation prior to 2004, both in Ohio and in other battleground states? Was there, in other words, a fundamental shift in the canvassing process that

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[18] *See* State of Ohio Certificate of Ascertainment, NATIONAL ARCHIVES, Dec. 7, 2012, *available at* http://www.archives.gov/federal-register/electoral-college/2012-certificates/pdfs/ascertainment-ohio.pdf. For the reported margin of victory in the hours after the election, see Lily Sieradzki, *Six Swing States Go Blue to Guarantee Obama's Victory*, THE TUFTS DAILY, Nov. 7, 2012 ("CNN reported that Obama took 50 percent of the vote in Ohio with Romney trailing close behind at 48 percent, a margin of roughly 100,000 votes.").

[19] Edward B. Foley, *Numbers Show Ohio at Unique Risk of Disputed Presidential Votes*, ELECTION LAW @ MORITZ (Dec. 17, 2012), http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=10289.

caused much greater Democratic gains during the canvass in 2008 and 2012 than previously, and was this trend accelerating? And how did the presidential battleground states compare to the rest of the nation in this regard?

To address these questions, I decided to calculate, for each state in every presidential election going back to 1960, the difference between the initial lead and the final certified victory. To determine the initial lead, for each year I used the vote totals for each candidate as reported by the *New York Times* in its print edition on Thursday morning immediately following Election Day. As the nation's newspaper of record, the *New York Times* in every presidential election year reports the available initial returns from all fifty states in that Thursday morning paper. These returns are thus the best available evidence of the lead as it stood on Wednesday, the day after Election Day, at the moment most comparable to when Kerry in 2004 made his decision to concede rather than fight on. For the final certified results, I used the popular vote totals available on the National Archives website for the years 2000 to 2012, as these numbers are the official submissions from the states contained in their Certificates of Ascertainment. For previous years, I used the popular vote totals contained in the *Congressional Quarterly's Guide to U.S. Elections*.

For sake of definitional simplicity, I call the difference between the initial lead and the final margin *the gain*. This gain can be either a positive or negative number, as can be both the initial lead and the final margin. Because I am trying to assess the extent to which the canvassing process currently and historically favors Democrats, I use positive numbers to indicate when Democrats hold the initial lead, or win the final margin, or gain during the canvass. Conversely, I use negative numbers to indicate when Republicans hold the initial lead, or win the final margin, or gain during the canvass. (These positive and negative numbers can be expressed visually. In this article, Republican gains will be represented by bolded italics, and Democratic gains will be kept in plaintext. The article has also been posted online at www.lawandpolitics.org, where the charts are included with the iconic red and blue coloring. Red represents Republican gains while blue represents Democratic gains.) Obviously, it is possible for a Democrat to gain during the canvass, even when both starting behind and ending up behind, as Kerry did in 2004. Likewise, it is possible for a Republican to gain during the canvass (a negative or red number), whether or not the Republican started out ahead (a negative or red number) or behind (a positive or blue number). Theoretically, it is possible for a candidate, either Democrat or Republican, to gain enough during the

canvass to end up winning the particular state even after starting out behind, although this outcome is rare (as we shall discuss later on).

All of these *gains*, for all states in all years going back to 1960, are contained in Appendix A to this article. These gains are expressed as a percentage of the final certified vote totals for both the Democrat and Republican candidates in Appendix B. The average gain for all states each year is calculated two different ways. First, treating Republican gains as negative numbers and Democrat gains as positive numbers, the *regular average* (or just *average*) sums these numbers for 50 states, and then divides by 50. Using this method, a Republican gain of 100 votes cancels out a 100-vote Democrat gain in another state. Second, an *absolute value average* is computed by treating both Democrat and Republican gains as positive numbers and summing all 50 of these numbers before dividing by 50. Both methods are reported in Appendix A for the gains measured in terms of the actual number of votes gained during the canvass. Both methods of computing the average are reported in Appendix B for these gains expressed as a percentage of the final certified total vote for the two candidates for each state in each year.

It is possible for the average gain, expressed as actual votes, to be a positive number, while the average gain, expressed as a percentage of total votes, is negative. This happened in both 2000 and 2004, which were particularly close years. The best way to understand this phenomenon is to understand that a large Democrat gain in a particular state, measured as total votes, might not be as large expressed as a percentage of total votes. Therefore, when averages are computed for all 50 states, the average gain slightly favors the Republican candidate when the gain is viewed as a percentage. At the same time, in these years the ability of a candidate to gain during the canvass slightly favors the Democrat when that ability is measured by the actual number of votes the candidates are able to yield during the canvass. Which perspective is more important may depend on the purpose of looking at the data. If the goal is to see how vulnerable a state may be to a vote-shift during the canvass, the percentage perspective may be more useful, since it takes into account the size of a state. Conversely, if the goal is to see how many votes there might be in a canvass that would enable a candidate to come from behind, looking at the average of actual votes gained during the canvass might sometimes be more useful.

III. FIVE BATTLEGROUND STATES

A. 2008 & 2012

When examining the data in Appendices A and B, one sees immediately that Ohio is not unique among major battleground states in having rather large Democratic gains during the canvass in 2008 and 2012, with these Democratic gains being significantly larger than in previous years. Consider the battleground states of Colorado, Florida, Pennsylvania, and Virginia in comparison to Ohio. In 2008, Obama's gains (as indicated in Appendix A) from his initial lead to final victory were:

Virginia	79,363
Colorado	72,791
Florida	42,277
Pennsylvania	23,863

Obama's gain in Ohio that year was 52,627, a number that falls in the middle of these five swing states. Indeed, if one takes the average of these five numbers, the average is almost identical to the Ohio number: 54,184.

To be sure, these five states differ in the total number of votes cast for both candidates. Therefore, it is worth considering Obama's gain over McCain during the canvass as a percentage of the total votes cast for these two candidates at the time of final certification. In 2008, these percentages (taken from Appendix B) were:

Colorado	3.08
Virginia	2.15
Ohio	0.94
Florida	0.51
Pennsylvania	0.40

Again, the Ohio number is right in the middle of these five numbers, although this time the average of these five states (1.42)[20] is a bit higher than the Ohio number.

[20] This average for the five battleground states is computed using the same methodology as in Appendix B, just for these five states rather than all fifty. Because Obama was the one who gained in all five of these states, the *absolute value average* for these five states is the same as the *regular average.*

It is in 2012 that Ohio began to distance itself somewhat from these other battleground states. Obama's gain during the canvass that year was largest in Ohio among these five states, both in absolute and percentage terms:

State	Gain	%
Ohio	65,459	1.19
Virginia	40,659	1.07
Colorado	26,884	1.07
Pennsylvania	26,146	0.46
Florida	27,281	0.32

Moreover, Ohio is the only one of these five states in which Obama's gain during the canvass was significantly larger in 2012 than in 2008:

State	2012 Gain	2012 %	2008 Gain	2008 %
Ohio	65,459	1.19	52,627	0.94
Virginia	40,659	1.07	79,363	2.15
Colorado	26,884	1.07	72,791	3.08
Pennsylvania	26,146	0.46	23,863	0.40
Florida	27,281	0.32	42,277	0.51

Pennsylvania had a small increase in the size of Obama's gain from 2008 to 2012, a 26,146-vote gain in 2012 compared to 23,863 four years earlier. In percentage terms, this small increase is almost negligible: 0.06% (a rise to 0.46% from 0.40%). In contrast, Obama's gain in Ohio jumped from 52,627 in 2008 to 65,459 in 2012, which in percentage terms was a quarter-percent jump (to 1.19% from 0.94%). In the three other states, Obama's gain decreased significantly from 2008 to 2012, whether measured in absolute or percentage terms.

Still, in 2012 Ohio was not so much of an outlier compared to the four other battleground states to suggest that an altogether different phenomenon was operating there during the canvass. Rather, based on the 2012 numbers from all five states, there is reason to be concerned about the possibility of a future presidential election going into overtime in several battleground states, not just one. Imagine, on the Wednesday morning after Election Night in 2016, the Democratic presidential candidate is behind the Republican by 30,000 votes in Colorado, 50,000 votes in Virginia, and 70,000 in Ohio—with those three states being crucial to determining the

Electoral College winner. Based on Obama's gains in those three states in 2012 (without even considering his much larger gains in Colorado and Virginia four years earlier), the Democrat in 2016 would refuse to concede and instead consider it very much worth fighting on, since there would be a very reasonable chance of overtaking the Republican's lead in all three states. And if ballot-counting litigation occurred in several swing states simultaneously, rather than just one, it would make the fight for the White House much more like the Hayes-Tilden dispute over the 1876 election than the Bush-Gore dispute in 2000.[21] The Hayes-Tilden dispute, which involved a deadlocked Congress and threatened a far graver constitutional crisis than anything that happened in 2000, is a situation that should not be repeated. Thus, it is worth examining more closely the magnitude of Obama's swing-state gains during the canvass in 2012, as well as his even larger gains (on average) among these five swing states in 2008.

B. Five Battleground States: Historical Comparisons

Obama's gains during the canvass in these five battleground states were much greater than what other Democrats were able to achieve in previous presidential elections. Going back to 1960, in these five states, the Republican candidate is often the one to gain during the canvass. In addition, prior to 2008, even when the Democrat gains during the canvass, the amount of gain has not been nearly as large as any of Obama's gains in these five states, except for Pennsylvania in 1964 and 1968. All the gains in these five states, going back to 1960, are contained in Table A, expressed first in absolute number of votes and then parenthetically as a percentage of the final certified total number cast for the Democrat and Republican combined. (These numbers are taken from Appendices A & B, but focusing solely on the numbers from these five battleground states enables one to make more direct comparisons among these specific states.)

[21] *See* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 502-16 (2010); Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043 (2010).

TABLE A: Battleground State Gains, 1960-2012

Year	Colorado	Florida	Ohio	Pennsylvania	Virginia
1960	3,238 (0.44)	18,455 (1.20)	1,481 (0.04)	14,927 (0.30)	1,696 (0.22)
1964	3,373 (0.44)	7,486 (0.40)	10,251 (0.26)	79,486 (1.65)	299 (0.03)
1968	377 (0.05)	44,697 (2.86)	15,180 (0.43)	52,417 (1.21)	2,287 (0.22)
1972	17,627 (1.90)	77,958 (3.03)	47,134 (1.18)	1,629 (0.04)	6,360 (0.45)
1976	4,656 (0.45)	19,618 (0.63)	3,530 (0.09)	5,383 (0.12)	1,248 (0.08)
1980	1,471 (0.14)	52,607 (1.52)	3,904 (0.10)	4,408 (0.10)	2,762 (0.16)
1984	32,691 (2.56)	95,651 (2.29)	3,570 (0.08)	2,851 (0.06)	750 (0.04)
1988	184 (0.01)	55,276 (1.29)	123 (0.003)	2,226 (0.05)	4,999 (0.23)
1992	1,570 (0.13)	14,705 (0.35)	1,873 (0.05)	647 (0.02)	578 (0.03)
1996	259 (0.02)	5,051 (0.11)	11,508 (0.29)	1,977 (0.05)	1,694 (0.08)
2000	166 (0.01)	1,247 (0.02)	6,039 (0.13)	4,489 (0.09)	11,380 (0.43)
2004	32,704 (1.56)	4,060 (0.05)	17,884 (0.32)	22,790 (0.40)	9,556 (0.30)
2008	72,791 (3.08)	42,277 (0.51)	52,627 (0.94)	23,863 (0.40)	79,363 (2.15)
2012	26,884 (1.07)	27,281 (0.32)	65,459 (1.19)	26,146 (0.46)	40,659 (1.07)

In Colorado, from 1960 to 2004 the Democrat gained during the canvass only twice, in 1964 and 2004. For that same period, the Democrat similarly gained in Florida during the canvass only twice, in 1964 and 2000. In Virginia, it was thrice that the Democrat gained during the canvass during these years: 1976, 1992, and 1996. Even in Pennsylvania, which is historically bluer than the four other battlegrounds, the Republican gained during the canvass four times: 1960, 1972, 1976, and 1980. Finally, in Ohio, although the Democrat has tended to do better

during the canvass, it was the Republican who gained during the canvass there three times: 1972, 1984, and 1988. Thus, prior to 2008, for none of these battleground states could the candidates automatically assume that the Democrat would be the one to gain during the canvass.

Moreover, where they occurred, the magnitudes of Democratic gains during the canvass were typically much smaller prior to 2008. Consider gains made by Democrats in Ohio before 2004:

Year	**Gain**	**%**
1960	1,481	0.04
1964	10,251	0.26
1968	15,181	0.43
1976	3,530	0.09
1980	3,904	0.10
1992	1,873	0.05
1996	11,509	0.29
2000	6,039	0.13

In the elections that followed, John Kerry managed to gain 17,884 votes (0.32%) in 2004, and then Obama gained 52,627 (0.94%) in 2008 and 65,459 (1.19%) in 2012. Especially when one considers the percentages, the real dramatic shift in the ability of a Democratic candidate to gain during the canvass appears to have occurred between 2004 and 2008. After all, Kerry's gain in 2004, measured as a percent of all votes cast that year (0.32%), is in line with Clinton's gain in 1996 (0.29%) and even lower than Humphrey's gain in 1968 (0.43%). The average of all Democratic gains in Ohio from 1960 to 2004 is 0.19%, whereas the average of Obama's gains in Ohio is 1.07%—a big difference, almost a full percent.

One might wonder if the best explanation for this difference is simply the fact that Obama won decisive national victories in 2008 and 2012, and thus his ability to pick up lots of votes during the canvass in swing states was merely a reflection of his general ability to attract popular votes nationwide. Yet this explanation cannot withstand analysis when one considers Clinton's victories in 1992 and 1996, which were as comparably impressive as Obama's—especially when one views Clinton's margins over his two Republican opponents as a percentage of the total votes that he and his opponents received each year.

Democratic Candidate	Year	States Won	National Popular Margin	NPM as % of Final D+R Total Votes
Clinton	1992	32	5,805,444	6.91
Clinton	1996	31	8,203,602	9.47
Obama	2008	28	9,700,477	7.52
Obama	2012	26	4,856,948	3.85

If Obama's ability to gain during the canvass were merely a reflection of his more general ability to attract votes, then we would expect that Clinton would have shown something of the same ability to gain during the canvass in 1992 and 1996. But nothing of the sort occurred those two years in these five states:

Year	Colorado	Florida	Ohio	Pennsylvania	Virginia
1992	1,570 (0.13)	14,705 (0.35)	1,873 (0.05)	647 (0.02)	578 (0.03)
1996	259 (0.02)	5,051 (0.11)	11,508 (0.29)	1,977 (0.05)	1,694 (0.08)

In Colorado and Florida, it was Clinton's Republican opponents who gained during the canvass both those years, and this was so even though Clinton ended up winning Colorado in 1992 by 66,831 votes and winning Florida in 1996 by 302,334 votes. (See Table B, which for these five states, going back to 1960, shows side-by-side the final margin of victory and the gain during the canvass.) And in the other three states, where Clinton did gain during the canvass in both 1992 and 1996, his gains there were miniscule compared to Obama's gains in those states in 2008 and 2012. In percentage terms, the average of Clinton's gains in the three states was 0.09%, whereas the average of Obama's gains in these three states was 1.00%—a whole tenfold, or order of magnitude, larger.

Table B: Final Margin of Victory/Gain During Canvass (Battleground States)

Year	Colorado	Florida	Ohio	Pennsylvania	Virginia
1960	71,613/3,238	46,776/18,455	273,363/1,481	116,326/14,927	42,257/1,696
1964	179,257/3,373	42,599/7,486	1,027,466/10,251	1,457,297/79,486	76,704/299
1968	74,171/377	210,010/44,697	90,428/15,180	169,388/52,417	147,932/2,287
1972	267,209/17,627	1,139,642/77,958	882,938/47,134	917,570/1,629	549,606/6,360
1976	124,014/4,656	166,469/19,618	11,116/3,530	123,073/5,383	22,658/1,248
1980	284,291/1,471	627,476/52,607	454,131/3,904	324,332/4,408	237,435/2,762
1984	366,842/32,691	1,281,534/95,651	853,120/3,570	356,192/2,851	540,828/750
1988	106,724/184	962,184/55,276	476,920/123	105,143/2,226	449,363/4,999
1992	66,831/1,570	100,612/14,705	90,632/1,873	447,323/647	111,867/578
1996	20,696/259	302,334/5,051	288,339/11,508	414,650/1,977	47,290/1,694
2000	145,521/166	537/1,247	166,735/6,039	204,840/4,489	138,788/11,380
2004	99,523/32,704	380,978/4,060	118,599/17,884	144,248/22,790	262,217/9,556
2008	214,987/72,791	236,450/42,277	258,897/52,627	624,551/23,863	234,527/79,363
2012	137,948/26,884	74,309/27,281	166,214/65,459	309,840/26,146	149,298/40,659

Table B1: Final Margin as Percentage of Final Vote/Gain as Percentage of Final Vote (Battleground States)

Year	Colorado	Florida	Ohio	Pennsylvania	Virginia
1960	9.77%/0.44%	3.03%/1.20%	6.57%/0.04%	2.33%/0.30%	5.50%/0.22%
1964	23.20%/0.44%	2.30%/0.40%	25.89%/0.26%	30.33%/1.65%	7.38%/0.03%
1968	9.96%/0.05%	13.43%/2.86%	2.59%/0.43%	3.89%/1.21%	14.32%/0.22%
1972	28.82%/1.90%	44.24%/3.03%	22.07%/1.18%	20.34%/0.04%	38.50%/0.45%
1976	11.87%/0.45%	5.36%/0.63%	0.28%/0.09%	2.71%/0.12%	1.37%/0.08%
1980	27.87%/0.14%	18.10%/1.52%	11.47%/0.10%	7.72%/0.10%	13.63%/0.16%
1984	28.73%/2.56%	30.66%/2.29%	18.94%/0.08%	7.40%/0.06%	25.35%/0.04%
1988	7.91%/0.01%	22.50%/1.29%	10.95%/0.003%	2.34%/0.05%	20.72%/0.23%
1992	5.60%/0.13%	2.37%/0.35%	2.34%/0.05%	11.10%/0.02%	5.11%/0.03%
1996	1.52%/0.02%	6.31%/0.11%	7.19%/0.29%	10.32%/0.05%	2.12%/0.08%
2000	8.97%/0.01%	0.01%/0.02%	3.68%/0.13%	4.30%/0.09%	8.29%/0.43%
2004	4.73%/1.56%	5.05%/0.05%	2.12%/0.32%	2.52%/0.40%	8.27%/0.30%
2008	9.10%/3.08%	2.84%/0.51%	4.62%/0.94%	10.54%/0.40%	6.37%/2.15%
2012	5.50%/1.07%	0.88%/0.32%	3.03%/1.19%	5.46%/0.46%	3.93%/1.07%

Even in 1964, the year of Johnson's monumental landslide over Goldwater, Johnson's gains during the canvass in these five states were not

as dramatic as Obama's gains in 2008 and 2012. Only in Pennsylvania did Johnson pick up votes during the canvass to the same eye-popping extent as Obama did in these battleground states. Johnson's 79,486-vote gain in Pennsylvania, which was 1.65% of the final total for both Johnson and Goldwater in the state, was comparable to Obama's 2008 gains in Colorado (72,791, or 3.08%) and Virginia (79,363, or 2.15%). In percentage terms, Johnson's gain in Florida, 0.40%, was in the same range as Obama's gains in the state: 0.51% in 2008 and 0.31% in 2012. But, even as percentages, Johnson's gains in Colorado and Ohio were modest compared to Obama's gains in those two states:

Year	**Colorado**	**Ohio**
1964	0.44	0.26
2008	3.08	0.94
2012	1.07	1.19

And in Virginia, Goldwater gained during the canvass (albeit by an infinitesimal 299 votes, or 0.03% of the total for both candidates), even though Johnson won the state by 76,704 votes. By contrast, Obama gained large amounts during the canvass in Virginia—79,363, or 2.15%, in 2008 and 40,659, or 0.88%, in 2012—on his way to winning the state both times.

Indeed, looking at these five states, one could claim that before 2000 the canvass tended to favor the Republican candidate, although not to the same extent that the canvass favored Obama in 2008 and 2012. In the years of Republican landslides—1972, 1980, 1984, and 1988—the Republican often did extremely well during the canvass, sometimes as well as Obama. In Florida, Nixon gained 77,958 votes (3.03%) during the 1972 canvass, Reagan gained 52,607 (1.52%) in 1980 and 95,651 (2.29%) in 1984, and George H.W. Bush gained 55,276 (1.29%) in 1988. In 1972, Nixon's average gain in these five states, expressed as percentages, was 1.32%, comparable to Obama's 1.42% in 2008; and Reagan's average gain of 0.98% in 1984 for these five states was even higher than Obama's 0.82% in 2012.

Still, the Republican gains during the canvass in these landslide years were not across-the-board large for all five states, whereas Obama's were. The Democrat gained in Pennsylvania in 1984 and 1988, and Carter gained in Ohio in 1980. Moreover, some of the Republican gains were rather paltry:

Year	State	% Gain
1972	Pennsylvania	0.04
1980	Pennsylvania	0.10
1980	Colorado	0.14
1980	Virginia	0.16
1984	Virginia	0.04
1984	Ohio	0.08
1988	Ohio	0.003
1988	Colorado	0.01
1988	Virginia	0.23

Based on these numbers, it would be hard to say that, even in their landslide years, Republicans did as well during the canvass as Obama did.

More interestingly, in the two years when Democrats won narrow presidential victories, 1960 and 1976, the Republican candidate did better during the canvass in these five states. Nixon gained ground against Kennedy during the canvass in four of the five states: Colorado, Florida, Pennsylvania, and Virginia, but not Ohio. Ford gained ground against Carter in three of the five: Colorado, Florida, and Pennsylvania, but not Ohio or Virginia. Moreover, given the relative difficulty Clinton (and, to some extent, even Johnson) had in gaining during the canvass, compared to Obama, one might surmise that Republicans held a modest advantage in the canvassing process prior to 2000.

Starting in 2000, this arguable Republican advantage seems to disappear, as the story becomes more complicated. That election was, of course, exceptionally close, with Florida's vote becoming mired in overtime litigation. Bush gained during the canvass in both Colorado (by a tiny amount) and Virginia (by a more substantial 11,380 votes, or 0.43%)—both states he won by over 100,000 votes. Gore modestly gained during the canvass in Pennsylvania, a state he won by over 200,000 votes, and in Ohio, where he lost by over 160,000. And in the all-important state of Florida, Gore did manage to pick up more than one-thousand votes during the recounts that occurred in the state, but it was not enough to overcome the 1,784-vote deficit that triggered the initial automatic recount.[22] All in all, when looking at these five states, one might say that the time between the morning after Election Day and the final certification

[22] JEFFREY TOOBIN, TOO CLOSE TO CALL xv, 29, 63 (2002).

was essentially a statistical wash for the two sides in 2000. The average vote gain in these five states, treating a Democratic gain as positive and a Republican gain as negative, was a measly 46 more votes for Gore. Taking the gains in these five states as percentages, however, yields an average of 0.04% in favor of Bush. Both these averages, tiny as they are, confirm just how closely competitive the 2000 election was, even after Election Day during the canvassing and recounting phase of the process.

To be sure, since Gore won the national popular vote, one might argue that the "draw" between him and Bush during the canvassing and recounting in these five states shows that he faced something of a Republican headwind in this aftermath part of the process. But Bush did not do nearly as well during the canvass as Nixon in 1960 or Ford in 1976—two years in which the Democrat did as well as Gore, if not significantly better, at least in the case of Carter.[23] Therefore, whatever advantage Republicans had held during the canvass in earlier years, which had enabled Nixon and Ford to do as well as they did, had largely dissipated by 2000.

By 2004, moreover, it was the Democrat who had the advantage during the canvass in these five battleground states. To be sure, during the canvass that year Bush was able to extend his leads in Florida and Virginia, but only by very modest amounts. Kerry extended his lead in Pennsylvania by a larger amount than had any previous Democrat. More significantly, Kerry was able to cut into Bush's lead in Ohio. As we have seen, Kerry's almost 18,000-vote gain during the canvass and recount in Ohio was not nearly enough to overcome Bush's 135,000-vote margin on the Wednesday morning after Election Night, but by historical standards this 18,000-vote gain for a Democrat trailing a Republican was still significant. It certainly was much more than what Gore was able to pick up during the canvass in Ohio or Florida four years earlier.[24]

Even more significant, although previously overlooked, is Kerry's gain in Colorado. On the Wednesday after Election Day, he was behind Bush in the state by 132,227 votes, almost the same amount as he was behind in

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[23] Kennedy, although he won the White House based on an Electoral College majority, barely won the national popular vote, if indeed he won it at all. His claim to a national popular vote plurality depends on a choice for how to calculate Alabama's complicated combination of electors some of which were loyal to Kennedy and others who were not; the calculation that puts Kennedy ahead of Nixon in the overall popular vote nationwide has been somewhat controversial. *See* Sean Trende, *Did JFK Lose the Popular Vote?*, REALCLEARPOLITICS (Oct. 19, 2012), http://www.realclearpolitics.com/articles/2012/10/19/did_jfk_lose_the_popular_vote_115833.html; *see also* Edmund Kallina, KENNEDY V. NIXON: THE PRESIDENTIAL ELECTION OF 1960 192-93 & accompanying notes (2010).

[24] Only Humphrey's gain during the 1968 canvass in Ohio, a state he lost to Nixon, is comparable to Kerry's Ohio gain.

Ohio at the same moment. But by the time of final certification, Kerry had cut Bush's lead in Colorado by 32,702—still not enough to overtake Bush, but almost twice as much as his improvement in Ohio. Indeed, as a percentage of the total votes for the two candidates, Kerry's gain during the canvass in Colorado was much more impressive than what he was able to accomplish in Ohio: 1.56%, compared to 0.32%. More than anything else, it is Colorado in 2004 that signals a shift that now favors the Democrats during the canvass.

Whether Obama's dramatically large advantage during the canvasses in 2008 and 2012 is merely an extension of the trend that started in 2004 or instead amounts to an acceleration so powerful as to be a qualitatively new phenomenon cannot be answered by looking at these five battleground states alone. In other words, it is possible to conjecture that the significant shift occurred after the enactment of the Help America Vote Act (HAVA) in 2002,[25] with the advent of provisional ballots as a national requirement, and 2004 shows this effect even in a year that the Democrat lost. On this hypothesis, what distinguishes 2008 and 2012 from 2004 is simply that Obama won big in the two later elections, and thus if there is another close election in which the Republican is slightly ahead of the Democrat in the national popular vote, then we should expect the Democrat to gain during the canvass in battleground states in roughly the same way that Kerry gained in 2004—significantly more than previously, but not so dramatically as to overtake solid Republican leads in those swing states. On the other hand, if the hypothesis is that 2008 and 2012 demonstrate that something new is afoot during the canvass, even compared to 2004, then the possibility arises that in a close election a Democrat could come from behind much more strongly than Kerry did in 2004. What that something new might be, whether a rise in late-arriving absentee ballots that now favor Democrats or an even greater reliance on provisional voting than in 2004, remains unclear (even assuming that there is something new at work starting in 2008).

Since examining just these numbers from these five states cannot shed additional light on the matter, we should look at the numbers from other states.

[25] Pub. L. No. 107-252, 116 Stat. 1666 (2002).

IV. NATIONWIDE NUMBERS

Netting the gains in all fifty states (so that Republican gains offset Democratic ones), Obama gained an average of 43,911 votes in 2008 and 40,648 in 2012 during the canvasses. In percentage terms, the average gain in a state was Obama gaining 1.04% of the total final votes for both him and his Republican opponent in 2008, with 0.58% the comparable figure for 2008. These numbers, particularly the percentages, are a little lower than the corresponding averages for just the five battleground states already analyzed, but they certainly indicate that Obama's gains during the canvass in the battleground states were no fluke; rather, they are consistent with what generally was happening during the canvass nationally in these two elections:

Year	**Nationwide Ave. (Votes)**	**Battleground Ave. (Votes)**	**Nationwide Ave. (%)**	**Battleground Ave. (%)**
2008	43,911	54,184	1.04	1.42
2012	40,648	37,286	0.58	0.82

If anything, there may be reason to be concerned that these numbers are somewhat higher in the battleground states than nationally. It suggests that there is a greater chance that a future presidential election remains unsettled during the canvass in one of the five battleground states than in the nation as a whole. Missouri remained too close to call during the canvass in 2008 (before McCain held on to enough of his 5,868-vote initial lead, despite Obama gaining almost two-thousand votes during the canvass). The nation could comfortably ignore this uncertainty in Missouri because Obama already had locked up his Electoral College victory. But there obviously would not be the same complacency in the future if Colorado, Ohio, and Virginia are all too close to call before completion of the canvass, and knowing the outcome of those three battleground states is essential to identifying the Electoral College winner.

The national numbers also confirm that Obama's gains during the canvass in 2008 and 2012 indicate an expanding margin of litigation. Nationally, Clinton did not do nearly was well during the canvass as Obama did, and indeed since 1960 no Democrat except Johnson in 1964 has come close to doing as well during the canvass as Obama did in both 2008 and 2012. Here are the head-to-head numbers for Clinton and Obama:

	1992	**1996**	**2008**	**2012**
National Ave. (Votes)	4,666	8,670	43,911	40,648
National Ave. (%)	0.12	0.25	1.04	0.58

Nationally, Nixon did better than Kennedy during the canvass in 1960 (in terms of votes, gaining 4,123 on average, and in terms of percent, 0.35% on average), and Ford did better than Carter in 1976 (an average gain of 1,353 votes and an average percent of 0.26%). Thus, there is little doubt that the nature of the canvass changed by 2008—and in a way that asymmetrically now favors the Democrat much more than before.

Looking at national averages, however, it is still unclear whether this shift occurred in 2008 or earlier. The national averages do not show the canvass decisively favoring either Republicans or Democrats in 2000 and 2004, two years with very close elections. In both years, the Democrats gained more votes on average (8,230 in 2000 and 10,035 in 2004), but as a percentage of the total vote in each state, on average the Republicans gained very slightly (0.02% in 2000 and 0.07% in 2004). Still, one could view these numbers as indicating that nationally the Democrats at least held their own during the canvasses in 2000 and 2004. Moreover, since doing so was better than Democrats did in 1960 and 1976—years when they won the White House—these national numbers from 2000 and 2004 suggest that those years were a transitional period in which the canvass was starting to favor the Democrats, at least relative to previous elections. On this view, this blue shift (the trend of the canvass becoming more to the Democrats' advantage) was already underway before starting to accelerate in 2008.

Table C: Largest Gain States, 1960-2012

Year	California	Maryland	New Jersey	New York	Oregon	Washington
1960	72,174	2,113	1,388	20,870	3,139	11,973
	(1.11)	(0.20)	(0.05)	(0.29)	(0.4)	(0.97)
1964	131,232	13,768	12,113	111,095	6,948	627,052
	(1.86)	(1.23)	(0.43)	(1.55)	(0.89)	(50.15)
1968	1,765	2,577	7,544	107,287	11,339	9,560
	(0.03)	(0.24)	(0.29)	(1.68)	(1.48)	(0.79)
1972	14,640	14,361	32,683	22,809	1,564	65,356
	(0.18)	(1.08)	(1.11)	(0.32)	(0.18)	(4.65)
1976	12,573	313	7,845	12,797	1,501	24,111
	(0.16)	(0.02)	(0.27)	(0.20)	(0.15)	(1.61)
1980	34,531	4,517	12,332	126	3,494	34,254
	(0.45)	(0.32)	(0.46)	(0.002)	(0.34)	(2.26)
1984	55,048	14,793	12,480	11,058	15,993	35,526
	(0.59)	(0.89)	(0.39)	(0.16)	(1.31)	(1.91)
1988	44,587	9,600	1,731	12,683	1,260	14,691
	(0.46)	(0.56)	(0.06)	(0.20)	(0.11)	(0.80)
1992	17,572	11,107	22,456	92,297	14,446	16,005
	(0.20)	(0.66)	(0.80)	(1.59)	(1.32)	(0.93)
1996	64,083	12,075	29,360	170,002	41,490	22,709
	(0.72)	(0.73)	(1.07)	(2.99)	(3.49)	(1.16)
2000	94,168	4,545	92,023	178,412	32,624	50,104
	(0.90)	(0.23)	(2.99)	(2.76)	(2.28)	(2.13)
2004	215,820	36,468	29,601	169,787	5,618	85,899
	(1.76)	(1.55)	(0.83)	(2.33)	(0.31)	(3.05)
2008	820,883	133,753	69,188	417,740	116,366	210,565
	(6.18)	(5.17)	(1.81)	(5.95)	(6.55)	(7.07)
2012	1,076,448	85,500	81,523	222,427	62,532	224,776
	(8.48)	(3.23)	(2.26)	(3.61)	(3.63)	(7.38)

Looking at the states in which Obama had his largest gains during the canvass seems to confirm a big blue shift was already occurring before 2008, although it certainly has been accelerating since then. In 2012, the six states in which Obama had his biggest gains, measured as a percentage of total votes cast for him and Romney in the state, were California (8.48%, a huge number—almost ten percent of all the ballots cast for the two candidates was the amount by which Obama increased his lead over Romney in the state during the canvass), Washington (7.38%), Oregon

(3.63%), New York (3.61%), Maryland (3.23%), and New Jersey (2.26%).[26] Table C contains the gains during the canvass in each of these states going back to 1960, measured both in actual votes gains and as a percentage of the total votes for the Democrat and Republican candidates. When one looks at these numbers, one immediately sees that in 2000 and 2004 the gains during the canvass in these states solidly and substantially favored the Democrats, whereas that was not true in those years either for the nation as a whole or for the five battleground states initially examined.

In California, Gore's gain during the 2000 canvass was 0.90% of all ballots cast for him and Bush (94,168 actual votes), and Kerry's gain during the 2004 canvass was 1.76% of all votes in the state cast for him and Bush (215,820 actual votes). These Democratic gains in 2000 and 2004 were much better than the gains Clinton made during California's canvass in either 1992 (0.20%, or 17,572 ballots) or 1996 (0.72%, or 64,083 ballots). Likewise, in Washington, Gore's gain in 2000 was 2.13%, and Kerry's was 3.05%, both much better than Clinton did during Washington's canvass in either 1992 (0.93%) or 1996 (1.16%).

In the other four of these states showing a big blue shift, the gains for Gore and Kerry were not necessarily better than Clinton's, but they were still very sizable and much larger than the national average, or even the average for the five battleground states, in 2000 and 2004. The average gain for Gore in these four states was 2.07%, whereas the national average in 2000 was a gain for Bush (albeit a miniscule one) by 0.02%. The same was true of the average gain for the five battleground states in 2004: a miniscule gain for Bush, 0.04%. In 2004, Kerry's average gain in these four states was 1.26%, whereas the national average again was a tiny gain for Bush: 0.07%. The average gain in the five battleground states in 2004 was a modest gain for Kerry: 0.38%, which was still considerably less than his average gain in these four states, although it shows that by 2004 the battleground states were starting to perform during the canvass more like the states showing the biggest blue shifts.

In thinking about possible explanations for why the canvass from 2000 onward is becoming increasingly more favorable to Democrats, one notices immediately that the three states where Obama had his largest gains in both 2008 and 2012 were the three Pacific coast states known for being

[26] In 2012, Obama's gain in Ohio was larger than in Oregon in terms of actual votes cast (65,459 compared to 62,352), but not in terms of the percentage of total votes for Obama and Romney in the two states (1.19% compared to 3.63%). Otherwise, these six states were also where Obama had his largest gains measured in actual votes cast. In California alone, Obama increased his lead over Romney by over one million votes!

especially reliant on voting by mail. Oregon first and now Washington are exclusively vote-by-mail states, and the percentage of California voters who cast their ballots by mail has doubled from about one-quarter of the electorate in 2000 (24.53%) to about half in 2012 (51.16%).[27] If one examines side-by-side the percentage of absentee voters and the Democrat's gain during the canvass in California since 1992, one cannot help but think that the increased reliance on absentee voting is at least part of the reason for the increasingly large Democrat gain during the canvass, and the same analysis for Washington points to the same conclusion:

	California		**Washington**[28]	
Year	**% absentee ballots**	**gain as % final D+R**	**% absentee ballots**	**gain as % final D+R**
1992	17.15	0.20	18.0	0.93
1996	20.25	0.72	35.6	1.16
2000	24.53	0.90	54.2	2.13
2004	32.61	1.76	68.4	3.05
2008	41.64	6.18	88.7	7.07
2012	51.16	8.48	96.4	7.38

[*Note: all gains in this chart were Democratic gains*.]

Rates of absentee voting are also rising dramatically in battleground states,[29] including Florida[30] and Ohio,[31] and Colorado already had a higher rate of absentee voting than California in 2008.[32] Therefore, it stands to

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[27] Historical Vote-By-Mail (Absentee) Ballot Use in California, CAL. SEC'Y OF STATE, http://www.sos.ca.gov/elections/hist_absentee.htm.

[28] Washington data compiled from documents contained on the Washington Secretary of State website, available at Vote by Mail and Absentee Documents, WASH. SEC'Y OF STATE, https://wei.sos.wa.gov/agency/osos/en/press_and_research/ElectionStatistics/VBM/pages/documents.aspx

[29] *See* Charles Stewart, *Losing Votes By Mail*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 573 (2010).

[30] Florida's rate of absentee voting rose from 17.7% in 2004 to 21.9% in 2008, and then increased again to 287.8% in 2012. Amy Sherman, *Florida Elections Chief Says We Had "Record" Turnout*, POLITIFACT (Dec. 7, 2012, 1:55 PM), http://www.politifact.com/florida/statements/2012/dec/07/ken-detzner/florida-elections-chief-says-we-had-record-turnout/.

[31] In 2008, almost double the number of Ohioans voted by absentee ballot than previous (although this number includes so-called "in-person absentee voting," which is Ohio's version of early voting). Mark Niquette, *Absentee Balloting Breaks Ohio Record*, COLUMBUS DISPATCH, Jan. 9, 2009. There needs to be more systematic examination of just vote-by-mail statistics in Ohio.

[32] According to EAC's Election Day Survey for 2008, almost two-thirds of all ballots cast in Colorado that year were absentee ballots (62.3% were domestic absentee ballots, with another 0.5% military and overseas ballots), in contrast to California, where the rate was about two-fifths (41.7% were domestic and another 0.4% military and overseas). U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY 24 (2009), *available at* http://www.eac.gov/assets/

reason that some of the significant blue shift that is occurring in the canvass in battleground states is due to the increased reliance on absentee voting there, and this blue shift is likely to intensify to the extent that states continue to have increasingly higher percentages of absentee voting.

But increased rates of absentee voting are unlikely to be the only explanation for why the canvass is increasingly favoring Democrats since 2000. New York, New Jersey, and Maryland are three of the six states in which Obama had his largest gains during the canvass, and yet these three states have relatively low rates of absentee voting. According to statistics compiled by the U.S. Election Assistance Commission, the rates of domestic absentee voting for these three states in 2008 were:[33]

New York	4.1%
New Jersey	3.8%
Maryland	7.4%

These rates are nothing like those in Oregon and Washington (both now virtually 100%) or even California (now above 50%).[34] Therefore, something else besides high rates of absentee voting must explain the big blue shift that has occurred in the canvass of the Atlantic states of New York, New Jersey, and Maryland, as well as Pacific states of California, Oregon, and Washington.

All six of these states are currently considered solidly blue and increasingly so. Therefore, we can return to our previous conjecture that perhaps what best explains the increased ability of Democrats to gain during the canvass is simply the degree to which a state is becoming bluer in its presidential voting. While this factor no doubt accounts for some of the big blue shift that we see in the canvass since 2000, it also cannot explain this big blue shift entirely. We have seen that this big blue shift is at work in the battleground states, which by definition are not solidly blue. In this regard, again, the most strikingly statistic is the gain that Kerry made in Colorado: he improved his position during the canvass by over 30,000 votes, even though Bush still won the state by almost 100,000 votes. That fact alone, occurring in a pre-Obama year, means that something else is at work in explaining a Democrat's ability to gain ground

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1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf.

[33] *Id.* at 24-25.

[34] *Id.*

during the canvass than the hypothesis that a blue state is simply getting bluer.

Ultimately, more sophisticated statistical analysis is needed to explain the big blue shift that we can observe in the canvass in recent elections. Multiple factors may be at work. The increased use of provisional ballots since the Help America Vote Act of 2002 is likely to be a significant part of the story, as is the increased reliance on voting by mail. At this point, we cannot predict the blue shift will continue to intensify even in a year in which the overall election is much closer than Obama's victories in 2008 and 2012. In other words, from this examination of the numbers alone, we cannot tell whether the degree that the canvass favors the Democrat in battleground states will be comparable to 2004 in a future close election, or instead will have shifted even further in the Democrat's favor as suggested by 2008 and 2012. In any event, until we can get a better handle on what is going on with this observable big blue shift, it would be prudent for potential battleground states to prepare for the possibility that they might face an increased risk of sending a presidential election into overtime.

V. THE ABILITY TO COME FROM BEHIND

There is one additional statistic that indicates that Republicans increasingly are having great difficulty, and much more so than Democrats, coming from behind during the canvass. Table D shows, for each year since 1960, the number of states in which the Democrat gained during the canvass and the number of states in which the Republican gained during the canvass. Each of these numbers in turn is separated into the number of states in which the gaining candidate either won or lost the state. For sake of convenience, the table also shows the total number of states each candidate won.

This table reveals that since 2004 it has become almost impossibly hard for a Republican candidate to gain any ground during the canvass in a state where that candidate was initially behind. In 2004, there was only one state that Bush lost in which he gained ground during the canvass against Kerry, and that was Wisconsin, where Bush netted a measly 429 votes between the day after Election Day and final certification. He started out over 11,000 votes behind and also ended over 11,000 votes behind. In 2008, there was not a single state that Obama won in which his opponent was able to make up any ground during the canvass. And, again in 2012, there was only one such state. This time it was New Hampshire, where Romney

cut into Obama's lead by 373 votes, on his way to a defeat there of almost 40,000 votes.

Table D: Blue Gain States & Red Gain States

	Democratic Gain			Republican Gain			Dem.	Rep.
	Total	Winner	Loser	Total	Winner	Loser	States	States
1960	18	13 (1)	5	31	21 (2)	10	23	26
1964	38	35 (1)	3	12	4	8	44	6
1968	11	7	4	31	25	6	13	32
1972	7	1	6	43	43	0	1	49
1976	25	17	8	24	19	5	23	27
1980	13	3	10	36	34	2	6	44
1984	11	0	11	39	38	1	1	49
1988	12	4	8	37	32	5	10	40
1992	29	25	4	20	13	7	32	18
1996	30	22	8	19	11	8	31	19
2000	23	14 (1)	9	27	21	6	20	30
2004	27	18	9	23	22	1	19	31
2008	36	28	8	14	14	0	28	22
2012	31	25	6	19	18	1	26	24

Notes: (1) Hawaii reported no change in 76, 80, 88, 96; Oklahoma reported no change in 92;

(2) In 60 & 68, gains were not counted as Democratic or Republican if a third-party candidate won the state;

(3) Parenthesis indicate a state where candidate came from behind to win.

This recent inability of Republicans to reduce a Democrat's lead is in sharp contrast to the ability of Democrats to reduce a Republican's lead. In 2004, there were nine states in which Kerry cut into Bush's lead during the canvass. In 2008, Obama reduced McCain's lead in eight states, and in 2012 he reduced Romney's lead in six. If the last three elections are any indication, Democrats have a far greater chance of coming from behind during the canvass to erase an initial deficit than Republicans do.

Yet this asymmetry did not always exist. As recently as 1996, Clinton and Dole were both able to reduce their opponent's lead in eight states each during the canvass. Moreover, in 1992, Bush gained ground in seven states that he lost, whereas Clinton reduced Bush's lead in only four states.

And Nixon was better than either Humphrey or especially Kennedy in using the canvass to cut a deficit.[35] In 1960, Nixon cut Kennedy's lead in twice as many states as Kennedy cut his (12 to 6)—including the two states, California and Alaska, in which Nixon was able to come from behind and overtake Kennedy.

To be sure, apart from the single state of Texas, Nixon was not able to come from behind during the canvass in any state in 1972. But that is because he started out ahead in 48 states, and in Massachusetts, McGovern managed to add an extra 929 votes to his lead. Similarly, in 1980 Reagan cut Carter's lead in only two states, and in 1984 he cut Mondale's lead in only one. But, like Nixon in 1972, Reagan did not start out behind in many states (only six in 1980, and only one in 1984).

By contrast, the Republicans in 2004, 2008, and 2012 had ample opportunities to come from behind—at least measured by the number of states in which they started out trailing. Bush was behind Kerry initially in 19 states. McCain trailed Obama at the start in 28 states, and Romney trailed in 26. The fact, then, that in these three years Bush and Romney made up some ground in only one state each, and McCain could not cut Obama's lead in any of the states in which he started out behind, is remarkable.

Indeed, this fact more than any other indicates just how much Republicans have become asymmetrically disadvantaged during the canvass since the enactment of HAVA in 2002—whether or not HAVA's enactment contributed to the onset of this asymmetrical disadvantage. Since HAVA, Democrats have had no difficulty trimming Republican leads during the canvass. Likewise, before HAVA, Republicans had little difficulty trimming Democratic leads, and sometimes they had equal or even greater lead-cutting ability than their opponents. Whatever the cause of this post-HAVA asymmetry, it is an unintended—and unwelcome—byproduct of the various electoral reforms adopted in the wake of the 2000 election. Surely, the goal after *Bush v. Gore* was to reduce the chances that a presidential election would end up in an ugly ballot-counting dispute. The goal hardly could have been to create a strategic imbalance where one side views taking the presidential election into overtime as a much more desirable option than the other side.

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[35] The 1968 election was complicated by being a three-way race. With respect to those states in which Nixon and Humphrey ran one and two (or vice versa), Nixon was able to cut Humphrey's deficit in six, whereas Humphrey was able to cut Nixon's lead in only four.

VI. A REALISTIC CHANCE TO OVERTAKE AN OPPONENT?

We should step back a moment and ask this question: Yes, the data may show that Democrats currently have an asymmetrical advantage in the ability to cut into an opponent's lead during the canvass, but do they ever have a genuine ability to use the canvass to overtake an opponent's lead and come out on top in the end?

In the fight for Florida in 2000, Gore was unable to overtake Bush, but we forget that Gore came from behind to pull ahead of Bush in Oregon that same year. Throughout Election Night and into the next morning, Oregon remained too close to call, with Bush holding a slim lead and *The Oregonian* hinting that his lead would likely hold up.[36] Then, in its Thursday morning paper, *The Oregonian* ran the headline "Bush Clings to Lead in Oregon, But It's Still Anyone's Guess." In the body of that story, the paper explained:

> Elections officials still needed to count a large number of ballots from Multnomah County, where Democrat Al Gore has run strong. And that's made everyone cautious about making the same kind of mistake that led the television networks to twice incorrectly call the race in Florida.[37]

The story went on to quote a local pollster predicting, "My guess is that Bush will squeeze it out."[38]

Yet by next day, the lead had already swung to Gore. Friday morning's paper reported:

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[36] "Oregon appeared to join Republican George W. Bush's narrow presidential win Tuesday after the state proved to be one of the hardest in the country to call. Bush held a narrow but steady lead over Democrat Al Gore in Oregon early Wednesday, and Republicans were confident that they would win the state's electoral votes." Jeff Mapes, *Oregon Undecided, But Leaning Bush*, THE OREGONIAN, Nov. 8, 2000, at A1. A later edition of the *Oregonian* that day pulled back from its earlier hint that the state would go for Bush: "Republican George W. Bush took a lead over Democrat Al Gore in partial Oregon returns as last-minute voters crammed drop-off sites in the belief the state's seven electoral votes could prove crucial." Jeff Mapes, *Bush Leads Oregon Early in Cruical Vote*, THE OREGONIAN, Nov. 8, 2000, at A1.

[37] Jeff Mapes, *Bush Clings to Lead in Oregon, But It's Still Anyone's Guess*, THE OREGONIAN, Nov. 9, 2000, at A1.

[38] *Id.*

> Democrat Al Gore surged ahead of Republican George W. Bush in the presidential race on Thursday as officials continued to count ballots and an automatic recount appeared to be a strong possibility.
>
> After almost all of the ballots from heavily Democratic Multnomah County were counted, Gore built a lead of about 7,900 votes. But it was expected to dwindle as more ballots were tallied in other counties where Bush was running strong.[39]

A recount, however, never materialized. By Friday afternoon, with an expected 25,000 additional ballots left to count, Gore's lead of 5,901 votes appeared firm enough for the paper to call the state for him.[40] Eighteen days later, on Tuesday, November 28 (exactly three weeks after Election Day), Gore's victory in Oregon became official, with a certified margin of 6,765 votes.[41]

Meanwhile, after Election Night, the national media largely ignored Oregon, given its all-consuming focus on Florida.[42] Electoral College math explained the apparent irrelevance of Oregon: Whichever candidate won Florida would win the constitutionally necessary Electoral College majority whether or not that candidate also won Oregon. (New Mexico was also potentially in play, but even Oregon and New Mexico combined could not bring the winner of Florida below the magic number of 270 Electoral Votes.) Still, Oregon was not entirely inconsequential. Winning Florida would have given Bush only one more Electoral Vote than the bare minimum for an Electoral College victory, and he would have preferred a cushion against the possibility that a couple of faithless electors might defect in the wake of Gore's national popular majority as well as all the complaints about the voting process in Florida. Moreover, even if Gore won Florida, Oregon potentially would make a difference if Bush could dislodge Wisconsin and Iowa from Gore's column through litigation in both those states.[43] Thus, the Bush campaign sent a contingent to Oregon

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[39] Jeff Mapes, *Lead Swings to Gore in Oregon*, THE OREGONIAN, Nov. 10, 2000, at A1.

[40] Jeff Mapes, *More Counting -- and Politics Oregon: Vice President Will Pick Up 7*, THE OREGONIAN, Nov. 11, 2000, at A1.

[41] Jeff Mapes, *Quietly, Oregon Certifies Gore Vote*, THE OREGONIAN, Nov. 29, 2000, at D1.

[42] See CHARLES L. ZELDEN, BUSH V. GORE 3 (2010).

[43] Jeff Mapes, *Oregon Electors Could Make All the Difference*, THE OREGONIAN, Nov. 12, 2000, at A1.

to look into whether they could bring the state back around to Bush.[44] For several weeks, Republican lawyers threatened to sue over duplicate registrations, which apparently numbered in the thousands, thereby raising at least the theoretical risk that Gore's margin of victory might be tainted by unlawful double voting.[45] But by Wednesday, December 7, even with Florida's status still unsettled, the Bush campaign signaled that they would not challenge Gore's certified victory in Oregon. The problem of duplicate registrations had not surfaced anywhere near enough examples of actual double votes to undermine the validity of Gore's victory in the state.[46]

Oregon's experience in 2000 stands as an example of when a presidential candidate who is behind in a state over twenty-four hours after the polls close can later pull ahead and become the certified winner. Nor is it the only example, although this has been extremely rare in recent decades. One has to go all the way back to 1964 to find another example. That year, Johnson was initially behind in Washington by over 300,000 votes but then finished ahead by over 300,000 votes, a swing of more than 600,000 votes. But this other example, which occurred in a landslide year and reflected Johnson's ability as part of the landslide to pick up an extra state where he started behind, does not provide much guidance on the extent to which it is possible to flip a state during the canvass in an election that is close nationally. On that point, 1960 provides the more instructive example.

Many scholars of election law are aware that in 1960 Hawaii was initially certified for Nixon, but then Kennedy won a recount. When it came time for Congress to receive the Electoral Votes from the states, Nixon, as Vice President, was the presiding officer. Because Hawaii did not affect Kennedy's Electoral College majority, Nixon magnanimously declared that Hawaii should be awarded to Kennedy even though there was a strong constitutional argument—indeed, the one that proved decisive in the disputed Hayes-Tilden election of 1876—that the recount in favor of Kennedy came too late.[47] Thus, Hawaii in 1960 is another example of a state that started out in one column but ended up in another.

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[44] Jeff Mapes, *Gore Keeps Lead over Bush in Oregon Count*, THE OREGONIAN, Nov. 14, 2000, at A11.

[45] Jeff Mapes, *Bush Campaign Threatens to Sue Oregon for Vote-By-Mail Data*, THE OREGONIAN, Nov. 16, 2000, at A16; *see also* Mapes, *supra* note 41 (alluding to the possibility that the Bush campaign was still exploring the possibility of a fight in Oregon on November 28).

[46] Jeff Mapes, *Bush Staff Will Accept Oregon Vote*, The Oregonian, Dec. 7, 2000, at A14.

[47] *See* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 529-21 (2010).

What most people forget about 1960, however, is that in California and Alaska, Kennedy led in the initial returns available the morning after Election Day but Nixon ended up winning both after all the ballots were in and counted. Of these two, California, with its thirty-two electoral votes, was obviously the much more consequential of the two, and it factored into the efforts of some Republicans to dispute the outcome in Illinois and Texas. On Election Night, the national media reported that Kennedy would win California, and two days later he still led by more than 35,000 votes. But 250,000 absentee ballots still remained to be counted, and these proved decisive for Nixon. On November 16, over a week after Election Day, Nixon pulled ahead for the first time. His victory in the state—also over 35,000 votes, making it a swing of over 70,000—was certified on November 21. With California flipped in this way, Republican attacks on perceived fraud elsewhere intensified. On November 18, the RNC sent troops to eight states looking for ways to deprive Kennedy of an Electoral College majority, and while the results in Illinois and Texas looked the most dubious, there was no effective legal apparatus available in Texas to challenge the certification of Kennedy's victory there. Without overturning Texas, it would do Republicans no good to prevail in Illinois, and thus the energy to bring a formal challenge dissipated. But had California remained in Kennedy's column, the GOP's attack on Kennedy's victory never would have gotten off the ground in the first instance.[48]

CONCLUSION: PREPARING FOR AN UNCERTAIN FUTURE

The question for the future is whether, in close presidential elections, there will be a significant chance of the lead changing hands in several states, as in 1960—or instead whether the leads will stay with the same candidate throughout the canvass despite the inevitable adjustments in the vote totals during that period, as occurred in 1976 and 2004, when the presidential elections were also close. The answer depends on just how large the big blue shift in the canvass has become, and on the extent to which the extremely large gains that Obama made during the canvass in battleground states is a function of factors other than his overall national popularity. As I have indicated, further insight on just what is causing the observable big blue shift must await more sophisticated statistical analysis.

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[48] *See* EDMUND F. KALLINA, KENNEDY V. NIXON 180-184 (2010). *See generally* W.J. RORABAUGH, THE REAL MAKING OF THE PRESIDENT: KENNEDY, NIXON, AND THE 1960 ELECTION (2009).

Meanwhile, it is worth considering whether it would be possible for the media and the public to become comfortable with a new normal in presidential elections where there is a significant chance of leads in states changing from one candidate to another after Election Night and during the canvass. Perhaps it will be no big deal if, for example, on the morning after Election Night the Democrat is behind in California and Washington, by several hundred thousand votes in each, but everyone expects the Democrat easily to overcome this deficit during the canvass through the counting of as-yet-unprocessed absentee ballots. Indeed, the media might be prepared to call these states for the Democrat even as the official (albeit incomplete and uncertified) returns have the Republican in the lead. Moreover, in this situation there might be no threat of litigation because everyone would know that the anticipated flip in the lead is just a normal part of the vote-counting process with so many absentee ballots still uncounted. Even though the presidential election would technically remain unsettled in overtime, in a sense this situation is no different from any other: The election is always officially unsettled prior to certification, and if both candidates treat it as a foregone conclusion that the Democrat has won these states, then the race there will feel over just as much as any other called by the networks on Election Night.

But I surmise that solidly blue states like California and Washington are very different in this respect from battleground states like Ohio, Florida, and Colorado. If the Republican is ahead in these states by tens of thousands of votes on the morning after Election Day, the networks will not be so quick to call the states for the Democrat, even though it is anticipated that the Democrat is likely capable of making up most, if not all, of those deficits. Moreover, the Republican candidate will not quickly concede those states to the Democrat, and if these states are essential to winning an Electoral College majority, the threat of litigation will be very much in the air. Indeed, by the morning after Election Night, the litigation over as-yet-uncounted ballots in these crucial states might already be underway. When the election going into overtime is unsettled in battleground states, unlike in solidly blue or red states, overtime means litigation rather than waiting for the completion of the canvass in a harmonious manner.

Therefore, battleground states need to prepare themselves for the possibility that Election Night might come and go with the candidates realizing that it is very much worth fighting for votes during the canvass. The magnitude of this risk is the question addressed through the examination of the data presented here. At this point, it remains unclear

whether the margin of litigation for battleground states is closer to a 25,000-vote deficit for the Democrat, which is approximately the level of the 2004 election, or instead closer to 75,000-vote deficit, which is more like what we saw in 2008 and 2012. Further statistical analysis of the data may help refine the assessment of this risk. But in the absence of this additional information, it would be prudent for battleground states to consider changes to their voting rules and procedures that might help to reduce this risk. These states would also do well to specifically scrutinize their rules and procedures for the canvassing and recounting of ballots—their "overtime" processes, so to speak—to evaluate the extent to which they are ready to handle the intense pressure that will be put on these overtime processes if indeed one of their elections falls within what may well be a rapidly increasing margin of litigation.

APPENDIX A:
Gains during Canvass
(Republican gains in bold & italics; Democratic gains in regular font)

State	1960	1964	1968	1972	1976	1980	1984
Alabama	13,594			4,910	6,469	3,661	15,042
Alaska	1,611	5,955	1,281	4,935	11,483	8,804	11,445
Arizona	6,308	1,201	15,919	11,632	295	3,219	2,395
Arkansas	1,340	7,073		12,233	1,505	838	961
California	72,174	131,232	1,765	14,640	12,573	34,531	55,048
Colorado	3,238	3,373	377	17,627	4,656	1,471	32,691
Connecticut	1,245	1,753	1,991	8,885	38	237	3,199
Delaware	199	267	47	185	81	517	328
Florida	18,455	7,486	44,697	77,958	19,618	52,607	95,651
Georgia	31,155	7,127		74,006	13,159	1,529	3,460
Hawaii	232	1,957	526	659	0	0	500
Idaho	10,171	224	3,837	8,325	97	128	773
Illinois	3,853	9,132	542	9,454	8,143	8,097	594
Indiana	7,561	5,492	6,801	1,940	5,510	10,908	17,727
Iowa	745	5,158	5,369	610	163	467	499
Kansas	12,380	17,066	8,349	9,051	425	2,788	1,257
Kentucky	23,890	1,085	10,623	3,140	1,374	1,339	6
Louisiana	5,945	6,423		1,564	3,389	3,859	3,662
Maine	19	1,377	51	5,392	890	221	1,938
Maryland	2,113	13,768	2,577	14,361	313	4,517	14,793
Massachusetts	12,171	70,778	26,176	929	12,596	371	83
Michigan	1,963	8,024	6,953	27,546	8,104	1,658	3,433
Minnesota	5,262	48,620	10,386	4,287	858	595	11,512
Mississippi		1,205		5,419	2,926	1,049	3,190
Missouri	24,101	16,269	12,866	10,109	3,434	5,307	4,204
Montana	1,973	3,505	15,266	2,373	1,427	5,646	6,498
Nebraska	17,226	459	15,454	15,318	6,429	3,961	8,436
Nevada	114	813	2,719	91	31	249	25
New Hampshire	41	383	1,911	551	446	150	3,406
New Jersey	1,388	12,113	7,544	32,683	7,845	12,332	12,480
New Mexico	661	2,840	2,099	242	1,778	2,574	865
New York	20,870	111,095	107,287	22,809	12,797	126	11,058

State	1988	1992	1996	2000	2004	2008	2012
Alabama	3,754	2,335	6,320	4,222	1,527	836	2,168
Alaska	6,491	8,706	7,640	17,933	14,185	14,239	12,450
Arizona	2,634	6,896	5,071	32,784	37,553	34,115	19,449
Arkansas	1,242	3,860	5,489	1,515	8,719	1,084	3,505
California	44,587	17,572	64,083	94,168	215,820	820,883	1,076,448
Colorado	184	1,570	259	166	32,704	72,791	26,884
Connecticut	1,448	493	21,075	10,093	2,919	30,784	11,628
Delaware	110	180	10	777	1,429	7,366	29
Florida	55,276	14,705	5,051	1,247	4,060	42,277	27,281
Georgia	12,085	2,371	4,701	1,891	691	6,604	4,229
Hawaii	0	25	0	17	308	17,532	2,047
Idaho	562	94	291	621	810	183	66
Illinois	22,992	57,934	33,177	9,397	17,399	70,607	57,601
Indiana	7,679	326	1,145	343	1,540	2,228	5,237
Iowa	343	870	2,831	810	3,191	5,829	3,298
Kansas	810	1,750	1,568	22,757	7,285	489	2,749
Kentucky	1,544	197	134	1,590	1,601	277	165
Louisiana	1,024	2,840	3,492	196	1,629	1,336	843
Maine	17		472	1,857	19,029	8,379	7,653
Maryland	9,600	11,107	12,075	4,545	36,468	133,753	85,500
Massachusetts	3,705	3,131	4,055	28,862	6,187	9,146	8,806
Michigan	19,146	45,072	8,292	9,145	21,401	665	60,695
Minnesota	1,642	12,253	9,578	79	33	353	4,097
Mississippi	3,116	1,119	998	34	12,598	3,359	7,241
Missouri	6,211	731	791	91	2,294	1,965	5,286
Montana	2	223	58	212	14,530	5,016	6,469
Nebraska	3,753	1,770	2,947	9,403	26,484	3,848	835
Nevada	76	703	523	193	995	1,013	1,427
New Hampshire	406	1,085	1,162	71	103	2,147	373
New Jersey	1,731	22,456	29,360	92,023	29,601	69,188	81,523
New Mexico	1,580	1,686	680	4,647	6,268	6,531	3,325
New York	12,683	92,297	170,002	179,412	169,787	417,740	222,427

State	1960	1964	1968	1972	1976	1980	1984
North Carolina	8,376	1,419		1,788	897	1,261	3,284
North Dakota	3,443	5,137	10,897	3,739	1,158	3,576	364
Ohio	1,481	10,251	15,180	47,134	3,530	3,904	3,570
Oklahoma	2,656	1,874	21,466	9,025	2,079	9,029	389
Oregon	3,139	6,948	11,339	1,564	1,501	3,494	15,993
Pennsylvania	14,927	79,486	52,417	1,629	5,383	4,408	2,851
Rhode Island	1,675	8,162	591	1,997	1,534	3,806	2,438
South Carolina	403	1,794		13,141	3,166	7,972	26,641
South Dakota	3,286	254	3,443	4,779	1,029	295	81
Tennessee	2,051	362		813	3,047	1,022	18,404
Texas	3,891	36,576	1,530	175,394	26,227		12,064
Utah	340	112	498	4,630	1,628	3,029	1,620
Vermont	169	63	1,666	1,030	105	543	401
Virginia	1,696	299	2,287	6,360	1,248	2,762	750
Washington	11,973	627,052	9,560	65,356	24,111	34,254	35,526
West Virginia	796	6,652	1,123	10,357	1,762	6,393	1,170
Wisconsin	10,139	2,518	940	1,769	1,228	5,766	2,728
Wyoming	1,147	1,236	5,198	145	86	300	1,070
Average	4,123	24,947	5,492	13,108	1,353	4,135	7,724
Abs. Value Avg.	7,472	25,869	9,031	15,090	4,571	5,311	9,130

State	1988	1992	1996	2000	2004	2008	2012
North Carolina	4,993	11,727	1,084	12,258	2,218	2,014	5,359
North Dakota	384	505	47	1,693	983	87	258
Ohio	123	1,873	11,508	6,039	17,884	52,627	65,459
Oklahoma	73	0	2	52	222	310	1,053
Oregon	1,260	14,446	41,490	32,624	5,618	116,366	62,532
Pennsylvania	2,226	647	1,977	4,489	22,790	23,863	26,146
Rhode Island	652	4,690	7,170	1,679	4,988	8,349	6,092
South Carolina	3,529	1,388	1,658		1,892	6,161	1,063
South Dakota	29	20	3	131	20	8	15
Tennessee	5,720	500	826	740	550	2,655	2,432
Texas	1,360	33,191	221	818	14,917	4,111	360
Utah	1,094		1,081	1,614	46,827	14,634	46,503
Vermont	1,809	5,179	815	5,381	631	14,611	3,796
Virginia	4,999	578	1,694	11,380	9,556	79,363	40,659
Washington	14,691	16,005	22,709	50,104	85,899	210,565	224,776
West Virginia	52	1,194	1,380	311	727	769	1,933
Wisconsin	789	513	255	391	429	33,354	8,814
Wyoming	17	468	4	433	343	1,947	191
Average	3,558	4,666	8,670	8,230	10,035	43,911	40,648
Abs. Value Avg.	5,405	8,166	9,945	13,225	18,313	47,287	44,984

NOTES:

(1) States were excluded if a third party candidate was either the winner or runner-up in the initial or final returns. These states by year are: 1960 (MS), 1968 (AL, AR, GA, LA, MS, NC, SC, TN), 1992 (ME, UT)

(2) Texas was excluded from 1980 because the final returns showed the Republican having over 28,000 less votes than in the initial returns.

(3) South Carolina was excluded from 2000 because the final returns showed the Republican candidate having over 270,000 less votes than in the initial returns.

APPENDIX B:
Gains during Canvass in Percentages

State	1960	1964	1968	1972	1976	1980	1984
Alabama	2.42			0.50	0.56	0.28	1.06
Alaska	2.65	8.85	1.75	5.59	9.93	6.88	5.71
Arizona	1.58	0.25	3.64	1.93	0.04	0.41	0.24
Arkansas	0.34	1.27		1.89	0.20	0.10	0.11
California	1.11	1.86	0.03	0.18	0.16	0.45	0.59
Colorado	0.44	0.44	0.05	1.90	0.45	0.14	2.56
Connecticut	0.10	0.14	0.17	0.65	0.00	0.02	0.22
Delaware	0.10	0.13	0.03	0.08	0.03	0.24	0.13
Florida	1.20	0.40	2.86	3.03	0.63	1.52	2.29
Georgia	4.25	0.63		6.32	0.90	0.10	0.19
Hawaii	0.13	0.94	0.23	0.24	N/C	N/C	0.15
Idaho	3.39	0.08	1.51	2.97	0.03	0.03	0.19
Illinois	0.08	0.19	0.01	0.20	0.18	0.19	0.01
Indiana	0.36	0.26	0.36	0.09	0.25	0.52	0.80
Iowa	0.06	0.44	0.49	0.05	0.01	0.04	0.04
Kansas	1.34	2.01	1.07	1.02	0.05	0.31	0.12
Kentucky	2.12	0.10	1.24	0.30	0.12	0.11	0.00
Louisiana	0.93	0.72		0.16	0.27	0.26	0.22
Maine	0.00	0.36	0.01	1.29	0.19	0.05	0.35
Maryland	0.20	1.23	0.24	1.08	0.02	0.32	0.89
Massachusetts	0.49	3.03	1.17	0.04	0.51	0.02	0.00
Michigan	0.06	0.25	0.23	0.81	0.23	0.05	0.09
Minnesota	0.34	3.14	0.68	0.25	0.05	0.03	0.56
Mississippi		0.29		0.86	0.39	0.12	0.34
Missouri	1.25	0.89	0.80	0.55	0.18	0.26	0.20
Montana	0.71	1.26	6.04	0.78	0.44	1.74	1.71
Nebraska	2.81	0.08	3.14	2.66	1.08	0.68	1.30
Nevada	0.11	0.60	2.03	0.05	0.02	0.11	0.01
New Hampshire	0.01	0.13	0.67	0.17	0.13	0.05	0.88
New Jersey	0.05	0.43	0.29	1.11	0.27	0.46	0.39
New Mexico	0.21	0.87	0.70	0.06	0.43	0.61	0.17
New York	0.29	1.55	1.68	0.32	0.20	0.00	0.16

State	1988	1992	1996	2000	2004	2008	2012
Alabama	0.28	0.16	0.44	0.26	0.08	0.04	0.11
Alaska	3.38	4.83	3.76	7.28	4.70	4.49	4.33
Arizona	0.23	0.62	0.40	2.23	1.88	1.51	0.86
Arkansas	0.15	0.46	0.69	0.17	0.84	0.10	0.34
California	0.46	0.20	0.72	0.90	1.76	6.18	8.48
Colorado	0.01	0.13	0.02	0.01	1.56	3.08	1.07
Connecticut	0.10	0.04	1.73	0.73	0.19	1.89	0.76
Delaware	0.04	0.08	0.00	0.24	0.38	1.81	0.01
Florida	1.29	0.35	0.11	0.02	0.05	0.51	0.32
Georgia	0.67	0.12	0.22	0.07	0.02	0.17	0.11
Hawaii	N/C	0.01	N/C	0.00	0.07	3.93	0.48
Idaho	0.14	0.03	0.07	0.13	0.14	0.03	0.01
Illinois	0.51	1.38	0.84	0.20	0.33	1.30	1.12
Indiana	0.36	0.02	0.06	0.02	0.06	0.08	0.20
Iowa	0.03	0.08	0.25	0.06	0.21	0.39	0.21
Kansas	0.08	0.21	0.16	2.23	0.62	0.04	0.24
Kentucky	0.12	0.02	0.01	0.11	0.09	0.02	0.01
Louisiana	0.06	0.18	0.21	0.01	0.08	0.07	0.04
Maine	0.00		0.09	0.31	2.62	1.17	1.10
Maryland	0.56	0.66	0.73	0.23	1.55	5.17	3.23
Massachusetts	0.14	0.15	0.18	1.16	0.22	0.30	0.28
Michigan	0.53	1.32	0.24	0.22	0.45	0.01	1.30
Minnesota	0.08	0.69	0.51	0.00	0.00	0.01	0.14
Mississippi	0.34	0.13	0.12	0.00	1.10	0.26	0.57
Missouri	0.30	0.04	0.04	0.00	0.08	0.07	0.20
Montana	0.00	0.07	0.02	0.06	3.30	1.06	1.38
Nebraska	0.57	0.32	0.49	1.41	3.45	0.49	0.11
Nevada	0.02	0.19	0.13	0.03	0.12	0.11	0.14
New Hampshire	0.09	0.26	0.26	0.01	0.02	0.31	0.05
New Jersey	0.06	0.80	1.07	2.99	0.83	1.81	2.26
New Mexico	0.31	0.36	0.13	0.81	0.84	0.80	0.44
New York	0.20	1.59	2.99	2.76	2.33	5.95	3.61

State	1960	1964	1968	1972	1976	1980	1984
North Carolina	0.61	0.10		0.12	0.05	0.07	0.15
North Dakota	1.24	1.99	4.67	1.36	0.40	1.31	0.12
Ohio	0.04	0.26	0.43	1.18	0.09	0.10	0.08
Oklahoma	0.29	0.20	2.86	0.90	0.19	0.82	0.03
Oregon	0.40	0.89	1.48	0.18	0.15	0.34	1.31
Pennsylvania	0.30	1.65	1.21	0.04	0.12	0.10	0.06
Rhode Island	0.41	2.09	0.16	0.48	0.38	1.08	0.60
South Carolina	0.10	0.34		1.98	0.40	0.91	2.78
South Dakota	1.07	0.09	1.29	1.56	0.34	0.10	0.03
Tennessee	0.20	0.03		0.07	0.21	0.07	1.08
Texas	0.17	1.40	0.06	3.54	0.65		0.22
Utah	0.09	0.03	0.13	1.03	0.31	0.54	0.26
Vermont	0.10	0.04	1.07	0.56	0.06	0.31	0.17
Virginia	0.22	0.03	0.22	0.45	0.08	0.16	0.04
Washington	0.97	50.15	0.79	4.65	1.61	2.26	1.91
West Virginia	0.10	0.84	0.16	1.36	0.23	0.91	0.16
Wisconsin	0.59	0.15	0.06	0.10	0.06	0.28	0.12
Wyoming	0.81	0.87	4.48	0.10	0.06	0.19	0.57
Average	0.35	1.74	1.00	1.06	0.26	0.41	0.53
Abs. Value Avg.	0.73	1.88	1.00	1.13	0.46	0.51	0.63

State	1988	1992	1996	2000	2004	2008	2012
North Carolina	0.23	0.52	0.05	0.42	0.06	0.05	0.12
North Dakota	0.13	0.21	0.02	0.63	0.32	0.03	0.08
Ohio	0.00	0.05	0.29	0.13	0.32	0.94	1.19
Oklahoma	0.01	N/C	0.00	0.00	0.02	0.02	0.08
Oregon	0.11	1.32	3.49	2.28	0.31	6.55	3.63
Pennsylvania	0.05	0.02	0.05	0.09	0.40	0.40	0.46
Rhode Island	0.16	1.36	2.12	0.44	1.16	1.81	1.39
South Carolina	0.36	0.13	0.15		0.12	0.32	0.05
South Dakota	0.01	0.01	0.00	0.04	0.01	0.00	0.00
Tennessee	0.35	0.03	0.05	0.04	0.02	0.10	0.10
Texas	0.03	0.69	0.00	0.01	0.20	0.05	0.00
Utah	0.17		0.19	0.22	5.17	1.58	4.69
Vermont	0.75	2.34	0.37	2.00	0.21	4.59	1.30
Virginia	0.23	0.03	0.08	0.43	0.30	2.15	1.07
Washington	0.80	0.93	1.16	2.13	3.05	7.07	7.38
West Virginia	0.01	0.21	0.25	0.05	0.10	0.11	0.29
Wisconsin	0.04	0.03	0.01	0.02	0.01	1.13	0.29
Wyoming	0.01	0.32	0.00	0.21	0.14	0.79	0.08
Average	0.24	0.12	0.25	0.02	0.07	1.04	0.58
Abs. Value Avg.	0.29	0.47	0.49	0.66	0.82	1.41	1.10

NOTES:

(1) N/C denotes no change

(2) Several data points were excluded for the reasons described in Appendix A

APPENDIX C:
Summary of Average Gains

	Averages			Absolute Value Averages		
Year	**All States**	**Battleground States**	**Big Gain States**	**All States**	**Battleground States**	**Big Gain States**
1960	4,123 (0.35)	7,367 (0.42)	18,147 (0.49)	7,472 (0.73)	7,959 (0.44)	18,610 (0.51)
1964	24,947 (1.74)	20,059 (0.54)	145,779 (8.94)	25,869 (1.88)	20,179 (0.56)	150,368 (9.35)
1968	5,492 (1.00)	4,047 (0.30)	22,486 (0.67)	9,031 (1.00)	22,992 (0.95)	23,345 (0.75)
1972	13,108 (1.06)	30,142 (1.32)	17,633 (1.15)	15,090 (1.13)	30,142 (1.32)	25,236 (1.25)
1976	1,353 (0.26)	4,976 (0.21)	5,487 (0.33)	4,571 (0.46)	6,887 (0.27)	9,857 (0.40)
1980	4,135 (0.41)	11,469 (0.37)	14,834 (0.64)	5,311 (0.51)	13,030 (0.40)	14,876 (0.64)
1984	7,724 (0.53)	25,962 (0.98)	24,150 (0.87)	9,130 (0.63)	27,103 (1.00)	24,150 (0.87)
1988	3,558 (0.24)	11,671 (0.30)	9,287 (0.28)	5,405 (0.29)	12,562 (0.32)	14,092 (0.36)
1992	4,666 (0.12)	2,635 (0.08)	28,981 (0.92)	8,186 (0.47)	3,875 (0.11)	28,981 (0.92)
1996	8,670 (0.25)	1,974 (0.06)	56,620 (1.69)	9,945 (0.49)	4,098 (0.11)	56,620 (1.69)
2000	8,230 (0.02)	46 (0.04)	75,479 (1.88)	13,225 (0.66)	4,664 (0.14)	75,479 (1.88)
2004	10,035 (0.07)	11,952 (0.38)	90,532 (1.64)	18,313 (0.82)	17,399 (0.53)	90,532 (1.64)
2008	43,911 (1.04)	54,184 (1.42)	294,749 (5.45)	47,287 (1.41)	54,184 (1.42)	294,749 (5.45)
2012	40,648 (0.58)	37,286 (0.82)	292,201 (4.76)	44,984 (1.10)	37,286 (0.82)	292,201 (4.76)

APPENDIX D:
Recent examples of the degree to which a candidate cut into an opponent's lead

State/Year	Initial Lead	Final Margin	Gain	% of initial lead overcome
Missouri/2008	5,868	3,903	1,965	33.49%
New Mexico/2004	12,256	5,988	6,268	51.14%
Iowa/2004	13,250	10,059	3,191	24.08%
Wisconsin/2004	11,813	11,384	429	3.64%
New Mexico/2000	5,013	366	4,647	92.70%
Iowa/2000	4,954	4,144	810	16.35%
Wisconsin/2000	6,099	5,708	391	6.41%
Florida/2000*	1,784	537	1,247	69.90%
New Hampshire/2000	7,282	7,211	71	0.98%
Nevada/1996	5,253	4,730	523	9.96%
Kentucky/1996	13,465	13,331	134	1.0%
New Hampshire/1992	7,641	6,556	1,085	14.20%
Wyoming/1992	11,655	11,187	468	4.02%
Nevada/1992	14,023	13,320	703	5.01%
Ohio/2004	136,483	118,599	17,884	13.10%
Colorado/2004	132,227	99,523	32,704	24.73%

APPENDIX E:
A Closer Look at 1960

State	Initial Lead	Final Margin	Gain	% of initial lead overcome
Hawaii	117	115	232	198.29%
California	36,551	35,623	72,174	197.46%
Alaska	467	1,144	1,611	344.97%
Missouri	34,081	9,980	24,101	70.72%
Minnesota	27,280	22,018	5,262	19.29%
Texas	50,148	46,257	3,891	7.76%
Pennsylvania	131,253	116,326	14,927	11.37%
Illinois	5,005	8,858	3,853	
New Mexico	1,633	2,294	661	
Nevada	2,379	2,493	114	
National Avg:			4,123	
National Abs Val Avg:			7,472	

APPENDIX F:
Final Margin of Victory/Gain During Canvass
(Large Gain States)

Year	California	Maryland	New Jersey	New York	Oregon	Washington
1960	35,623/ 72,174	76,270/ 2,113	22,091/ 1,388	383,666/ 20,870	40,658/ 3,139	29,975/ 11,973
1964	1,292,769/ 131,232	345,417/ 13,768	904,057/ 12,113	2,669,543/ 111,095	218,238/ 6,948	309,515/ 627,052
1968	223,346/ 1,765	20,315/ 2,577	61,261/ 7,544	370,538/ 107,287	49,567/ 11,339	27,527/ 9,560
1972	1,126,249/ 14,640	323,524/ 14,361	743,291/ 32,683	1,241,694/ 22,809	93,926/ 1,564	207,529/ 65,356
1976	139,960/ 12,573	86,951/ 313	65,035/ 7,845	288,767/ 12,797	1,713/ 1,501	60,409/ 24,111
1980	1,441,197/ 34,531	45,555/ 4,517	399,193/ 12,332	165,459/ 126	114,154/ 3,494	215,051/ 34,254
1984	1,544,490/ 55,048	91,983/ 14,793	672,307/ 12,480	545,154/ 11,058	149,221/ 15,993	244,318/ 35,526
1988	352,684/ 44,587	49,863/ 9,600	422,840/ 1,731	266,011/ 12,683	56,080/ 1,260	29,681/ 14,691
1992	1,490,751/ 17,572	281,477/ 11,107	79,341/ 22,456	1,097,801/ 92,297	145,557/ 14,446	261,803/ 16,005
1996	1,291,455/ 64,083	284,677/ 12,075	549,251/ 29,360	1,822,685/ 170,002	111,489/ 41,490	282,611/ 22,709
2000	1,293,774/ 94,168	326,985/ 4,545	504,677/ 92,023	1,704,323/ 179,412	6,765/ 32,624	138,788/ 50,104
2004	1,235,659/ 215,820	309,790/ 36,468	241,427/ 29,601	1,351,713/ 169,787	76,332/ 5,618	205,307/ 85,899
2008	3,262,692/ 820,883	669,605/ 133,753	602,215/ 69,188	2,201,732/ 417,740	298,816/ 116,366	521,632/ 210,565
2012	3,014,327/ 1,076,448	705,975/ 85,500	644,698/ 81,523	1,872,757/ 222,427	216,313/ 62,532	464,726/ 224,776

APPENDIX F1:
Final Margin as Percentage of Final Vote/Gain as Percentage of Final Vote (Large Gain States)

Year	California	Maryland	New Jersey	New York	Oregon	Washington
1960	0.55%/1.11%	7.23%/0.20%	0.80%/0.05%	5.27%/0.29%	5.24%/0.4%	2.44%/0.97%
1964	18.33%/1.86%	30.94%/1.23%	31.92%/0.43%	37.30%/1.55%	27.84%/0.89%	24.76%/50.15%
1968	3.33%/0.03%	1.92%/0.24%	2.37%/0.29%	5.80%/1.68%	6.46%/1.48%	2.29%/0.79%
1972	13.94%/0.18%	24.23%/1.08%	25.22%/1.11%	17.38%/0.32%	10.68%/0.18%	19.13%/4.65%
1976	1.84%/0.16%	6.07%/0.02%	2.20%/0.27%	4.45%/0.20%	0.17%/0.15%	4.04%/1.61%
1980	18.94%/0.45%	3.24%/0.32%	14.82%/0.46%	2.94%/.002%	11.11%/0.34%	14.19%/2.26%
1984	16.45%/0.59%	5.52%/0.89%	21.04%/0.39%	8.04%/0.16%	12.21%/1.31%	13.14%/1.91%
1988	3.61%/0.46%	2.93%/0.56%	13.80%/0.06%	4.14%/0.20%	4.77%/0.11%	1.62%/0.80%
1992	17.03%/0.20%	16.60%/0.66%	2.84%/0.80%	18.96%/1.59%	13.27%/1.32%	15.18%/0.93%
1996	14.43%/0.72%	17.28%/0.73%	19.93%/1.07%	32.03%/2.99%	9.39%/3.49%	14.39%/1.16%
2000	12.41%/0.90%	16.73%/0.23%	16.42%/2.99%	26.18%/2.76%	0.47%/2.28%	5.90%/2.13%
2004	10.08%/1.76%	13.13%/1.55%	6.74%/0.83%	18.58%/2.33%	4.22%/0.31%	7.29%/3.05%
2008	24.56%/6.18%	25.86%/5.17%	15.73%/1.81%	31.36%/5.95%	16.83%/6.55%	17.50%/7.07%
2012	23.75%/ 8.48%	26.64%/3.23%	17.90%/ 2.26%	30.38%/3.61%	12.54%/3.63%	15.26%/7.38%