

IV. DEDUCTING ILLEGAL VOTES IN CONTESTED ELECTIONS

The 2004 governor's race in Washington was the closest gubernatorial election in American history.¹ When the ballots were first counted, Republican Dino Rossi led Democrat Christine Gregoire by just 261 votes out of the more than 2.8 million cast.² A mandatory machine recount brought the race even closer, with Rossi leading by just forty-two votes.³ A final recount, done by hand and incorporating ballots that had mistakenly been rejected in the first two counts,⁴ showed that Gregoire had won the election by 129 votes.⁵ On January 12, 2005, Gregoire was sworn in as Governor.⁶

While the election may have been over, the legal battle was just beginning. On January 7, Rossi and his supporters filed *Borders v. King County*,⁷ asking the court to invalidate the election and order a new one.⁸ Discovery in the case combined with intense media scrutiny demonstrated that over 1600 voters had voted illegally, mostly disenfranchised felons.⁹ Rossi argued that these illegal votes made it unclear who had won, so a new election was needed.¹⁰

The judge in *Borders* faced a number of difficult questions,¹¹ but one is particularly noteworthy. In attempting to determine the outcome of the election, he had to decide which of the available methods he should use to eliminate illegal votes so that the candidates' vote totals would reflect only the legal votes they had received. Should he order a new election because the number of illegal votes exceeded Gregoire's margin of victory (the "elimination of uncertainty" approach)? Should he require Rossi to prove by direct evidence that he received

¹ David Postman, *Calculating Illegal Votes' Impact Could Be Key to Election Lawsuit*, SEATTLE TIMES, May 1, 2005, at B1.

² *Borders v. King County*, No. 05-2-00027-3, slip op. at 4 (Wash. Super. Ct. June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf>.

³ *Id.* at 5.

⁴ King County rejected 735 valid ballots in the first two counts because of mistakes by election workers. See Susan Gilmore & Ralph Thomas, *Judge Blocks Count of Disputed Ballots*, SEATTLE TIMES, Dec. 18, 2004, at A1.

⁵ See *Borders*, No. 05-2-00027-3, slip op. at 5.

⁶ Andrew Garber & Ralph Thomas, *Gregoire Sworn In; GOP Holds Applause*, SEATTLE TIMES, Jan. 13, 2005, at A1.

⁷ No. 05-2-00027-3.

⁸ See Election Contest Petition at 4, *Borders*, No. 05-2-00027-3, available at <http://www.secstate.wa.gov/documentvault/6.pdf>.

⁹ Of the 1678 known illegal votes cast, 1401 were cast by felons. Most of the rest were provisional ballots that were counted without the voter's eligibility first being verified. See *Borders*, No. 05-2-00027-3, slip op. at 19.

¹⁰ See Election Contest Petition, *supra* note 8, at 4.

¹¹ For a discussion of the difficult questions raised by election contests, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001).

more legal votes than Gregoire by calling each illegal voter into court to testify whom he voted for (the “direct evidence” approach)? Or should he estimate whom each illegal voter voted for based on the precinct where the voter lived (the “proportional deduction” approach)?

In *Borders* and cases like it the choice of method is hugely important because it often determines the outcome of the election challenge.¹² While a number of states have adopted the proportional deduction approach,¹³ *Borders* and other recent cases illustrate that the assumptions underlying that approach may not be valid in modern elections. Proportional deduction assumes that a voter’s precinct provides an accurate estimate of her vote, but social science evidence suggests that ignoring race, gender, and other “group voting behavior” might make such estimates seriously flawed.¹⁴ This problem with proportional deduction, as well as its benefits and drawbacks more generally, has received virtually no academic commentary.¹⁵ As this Part demonstrates, proportional deduction deserves far more scrutiny than it has received.

This Part first describes the different approaches courts have adopted in attempting to determine which candidate won a contested election, including the arguments for and against each approach. It then discusses the *Borders* case, examining the problem of group voting behavior that case highlighted and explaining why this problem raises questions about the continued viability of proportional deduction.

¹² See, e.g., *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1205–07 (Ill. App. Ct. 2004) (recognizing that the choice of method would determine the election outcome).

¹³ See cases cited *infra* note 38.

¹⁴ See *Easley v. Cromartie*, 532 U.S. 234, 245 (2001) (noting that between ninety-five and ninety-seven percent of African American registered voters in North Carolina vote as Democrats); *Old Person v. Cooney*, 230 F.3d 1113, 1124 tbl.2 (9th Cir. 2000) (noting that in the ten election contests between white candidates and American Indian candidates in Montana in 1994 and 1996, at least sixty-nine percent of American Indian voters voted for the American Indian candidate in each election, and in some elections as many as ninety-nine percent of American Indian voters voted for the American Indian candidate); *Nipper v. Smith*, 39 F.3d 1494, 1505–06 (11th Cir. 1994) (en banc) (finding that voting in judicial elections in parts of Florida was extremely racially polarized). See generally Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1362–76 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

¹⁵ See ISSACHAROFF, KARLAN & PILDES, *supra* note 11, at 134 (“The role of statistical evidence in election challenges is an interesting, and perhaps underanalyzed question.”); E-mail from David J. Burman, Counsel to the Wash. State Democratic Party in *Borders*, to the Harvard Law Review (Aug. 25, 2005, 09:29:56 EDT) (on file with the Harvard Law School Library) (noting that there has been little academic commentary on this issue and that few cases have discussed it closely); *infra* note 64; see also 26 AM. JUR. 2D *Elections* § 357 (2004) (stating perfunctorily that proportional deduction should be used in election contests without acknowledging the disagreement on this issue).

A. Methods Courts Use To Determine Who Won a Contested Election

Close elections often end up in court, and when they do, alleged illegal votes are usually a central issue.¹⁶ Illegal voting comes in many forms, from unintentional technical violations like a voter forgetting to check a box on his absentee ballot,¹⁷ to intentional wrongdoing such as a candidate's campaign manager filling out absentee ballots for disabled voters.¹⁸ A common source of illegal voting is mistakes by election workers that allow ineligible voters, such as felons who have not had their voting rights restored, to vote.¹⁹

In contested elections, courts can frequently determine with some certainty how many illegal votes were cast,²⁰ and the number of illegal votes often exceeds the winner's margin of victory.²¹ However, courts are rarely able to determine precisely how many illegal votes each candidate received.²² In such situations, courts generally agree about what to do when the winning candidate has encouraged the illegal voting: if the number of illegal votes exceeds the winner's margin of victory, they install the other candidate in office;²³ even if it does not, many courts still order a new election to punish the wrongdoer and deter future fraud.²⁴ When neither candidate has engaged in fraud, however, courts disagree vigorously about how to deduct illegal votes, and have developed three quite different approaches.²⁵

1. *The Elimination of Uncertainty Approach.* — Some courts will order a new election if the total number of illegal votes exceeds the winner's margin of victory, without requiring any proof as to which candidate received the illegal votes. Four state supreme courts have

¹⁶ See cases cited *infra* notes 26, 31 & 38.

¹⁷ See *In re Durkin*, 700 N.E.2d 1089, 1093 (Ill. App. Ct. 1998) (holding that seventy-one absentee ballots were illegally cast because voters failed to check any of seven available boxes specifying why they could not vote at the polls).

¹⁸ See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1189–90 (Ill. App. Ct. 2004).

¹⁹ See, e.g., *Huggins v. Superior Court of Navajo County*, 788 P.2d 81, 82 (Ariz. 1990).

²⁰ See *Application of Moffat*, 361 A.2d 74, 78 (N.J. Super. Ct. App. Div. 1976) (“Illegal votes are generally identifiable, and the number can usually be fixed without undue difficulty.”).

²¹ See, e.g., *Akizaki v. Fong*, 461 P.2d 221, 222 (Haw. 1969).

²² See, e.g., *id.* at 224 (“Because of the commingling of the valid and invalid absentee ballots, there is simply no way to determine what the actual result of the election was . . .”).

²³ See, e.g., *Qualkinbush*, 826 N.E.2d at 1207.

²⁴ See *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1328–30 (1975).

²⁵ States that do not use any of the approaches described in this Part either have not considered this issue at the appellate court level, or have developed idiosyncratic approaches that have not been copied elsewhere. See, e.g., *Harpole v. Kemper County Democratic Executive Comm.*, 908 So. 2d 129, 137–39 (Miss. 2005) (explaining Mississippi's rule of requiring a new election only if fraud or willful violations of election law took place, or if the illegal votes cast amount to more than thirty percent of the total votes cast).

adopted this approach,²⁶ arguing that it is the only way to maintain voter trust in the electoral system because it ensures that illegal voters do not thwart the will of legal voters.²⁷

However, this approach has been criticized for unfairly penalizing winning candidates who have done nothing wrong, because it can lead to elections being overturned even when the illegal voting was not encouraged by the winner, and when it is highly doubtful that the apparently losing candidate in fact won among legal voters.²⁸ For example, if a candidate won an election by 499 votes and a lawsuit later demonstrated that 500 people voted illegally, it is extraordinarily unlikely that the losing candidate won. Nevertheless, the elimination of uncertainty approach would require a new election.

This result is problematic for two reasons. First, a second election can never perfectly replicate the first (while eliminating the illegal voting),²⁹ so it could lead to the candidate who received fewer legal votes in the first election ultimately being declared the winner. Second, this approach ignores the important goal of achieving finality in election outcomes. Quickly achieving a final result in election contests is important because it allows the winning candidate to focus on governing, rather than constantly having to worry about a possible new election. For these reasons, many courts have been reluctant to adopt the elimination of uncertainty approach,³⁰ and instead have turned to the direct evidence or proportional deduction method.

2. *The Direct Evidence Approach.* — Some courts require the candidate challenging the election to present direct evidence that he won,

²⁶ See *Crow v. Bryan*, 113 S.E.2d 104, 106–07 (Ga. 1960); *Akizaki*, 461 P.2d at 224; *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 631 (Mass. 1982); *Creamer v. City of Anderson*, 124 S.E.2d 788, 790 (S.C. 1962) (citing *Johnston v. Corp. of City of Charleston*, 1 S.C.L. (1 Bay) 441 (1795)).

²⁷ See *Creamer*, 124 S.E.2d at 790 (“As to the mode adopted by the council in deducting the bad votes from the highest candidate, it was perhaps the best general rule that could be adopted; for if after such deduction he had still a majority then his election would stand unimpeached; but if after the deduction the next candidate had an equal or greater number of votes than the other, . . . then, according to the principles of a free government and the rights of the people, it ought to be sent back to the people at large to determine finally on the point.” (quoting *Johnston*, 1 S.C.L. (1 Bay) at 442)).

²⁸ See, e.g., *Huggins v. Superior Court of Navajo County*, 788 P.2d 81, 83–84 (Ariz. 1990); *Developments in the Law—Elections*, *supra* note 24, at 1315–17.

²⁹ See *Huggins*, 788 P.2d at 84; *Developments in the Law—Elections*, *supra* note 24, at 1315 (“[T]here is no assurance that [a second election] will replicate the results that the first election would have produced had it been free from violations. Indeed, there may even be identifiable biases in second elections. Candidates with ready access to financing and with strong and continuing party organizations will be able to mobilize a second campaign in the short time available much more effectively than opponents who lack such advantages. Candidates with support concentrated among less active voters may be disadvantaged in a second election if such supporters do not turn out to cast ballots when only one office is at stake.” (footnotes omitted)).

³⁰ See, e.g., *Huggins*, 788 P.2d at 84, 86.

usually by calling illegal voters to testify and showing that enough of them voted for his opponent that he should be declared the winner. Five state supreme courts have adopted this approach,³¹ saying it is the fairest and most accurate way to determine the outcome of an election in which illegal voting has occurred.³² It is fair because, unlike the elimination of uncertainty approach, it should never lead to an election being overturned when the apparent winner was also the winner among legal voters. It is accurate because, unlike the proportional deduction approach discussed below, it does not rely on imperfect estimation — only direct evidence as to how a person voted is allowed.

However, a number of courts have rejected the direct evidence approach, saying it effectively makes it impossible to overturn an election in which illegal voting has occurred.³³ These courts cite a number of obstacles to obtaining direct proof of how illegal voters voted.³⁴

First, in some cases it may be virtually impossible to find all the illegal voters in an election and bring them into court. Especially when a large number of people voted illegally, the court and the parties may not have the time or resources to find and subpoena all of them, hear testimony, and track down witnesses who fail to appear. Even if the court can find all the illegal voters, state-created rights to ballot secrecy may make it impossible to compel those voters to say for whom they voted.³⁵

Second, even if illegal voters say for whom they voted, there is reason to doubt their testimony.³⁶ If an illegal voter actually voted for candidate *A*, and candidate *A* ended up losing by one vote, the voter could make the election a tie by testifying that he voted for candidate *B* and thereby deducting one vote from *B*. Thus, illegal voters whose preferred candidate lost by a small margin may have a strong incentive to lie about how they voted.³⁷ For these reasons, some courts

³¹ See *State ex rel. Wahl v. Richards*, 64 A.2d 400, 407 (Del. 1949); *Jaycox v. Varum*, 226 P. 285, 289 (Idaho 1924); *Brown v. Grzeskowiak*, 101 N.E.2d 639, 656 (Ind. 1951); *Wilkinson v. McGill*, 64 A.2d 266, 274 (Md. 1949); *State ex rel. Brogan v. Boehner*, 119 N.W.2d 147, 151–53 (Neb. 1963).

³² See, e.g., *Brogan*, 119 N.W.2d at 153.

³³ See, e.g., *Huggins*, 788 P.2d at 86 (“The practical impact of the [direct evidence] rule, with its virtually impossible burden on the challenger, is to let illegal votes count.”).

³⁴ See, e.g., *id.* at 83–84 (citing cases from a number of other states).

³⁵ See, e.g., *Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964) (noting that ballot secrecy is guaranteed by the Colorado Constitution and Colorado statutes). However, some states say that if a person voted illegally, he has no right to ballot secrecy and can be compelled to testify as to how he voted. See, e.g., N.J. STAT. ANN. § 19:29-7 (West 2000); *Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957).

³⁶ See *Huggins*, 788 P.2d at 83.

³⁷ There are several other reasons to distrust testimony by illegal voters as to how they voted. First, if the voter intentionally voted illegally to help one candidate, he is particularly likely to lie

have been reluctant to demand direct evidence of how illegal voters voted before overturning an election.

3. *The Proportional Deduction Approach.* — In considering election challenges, eight state supreme courts have used statistical methods, often called “proportional deduction,” to estimate which candidate received which illegal votes.³⁸ Many of these courts adopted proportional deduction over a century ago, often based on an influential election law treatise.³⁹ Proportional deduction involves subtracting illegal votes from the candidates’ totals based on which precinct the vote was cast in and the percentage of the vote each candidate received in that precinct.⁴⁰ For example, if ten illegal ballots were cast in a precinct, and candidate *A* received seventy percent of the vote in that precinct while candidate *B* received thirty percent, the court would deduct seven votes from candidate *A* and three votes from candidate *B*.

Some courts that have allowed proportional deduction have restricted its use in important ways. Courts in two states have authorized proportional deduction only to confirm that the candidate who was initially declared the winner of the election actually won; they have reserved the more difficult question of whether proportional deduction could be used to overturn an election.⁴¹ Courts in several other states will not apply proportional deduction unless the party re-

about how he voted to continue helping that candidate. Second, once it becomes clear that an illegal voter is going to have to testify about how he voted, he may be pressured to lie by friends, family, and associates. See *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630–31 (Mass. 1982) (citing *Major v. Barker*, 35 S.W. 543, 544 (Ky. 1896)). He may even be bribed to testify one way or the other, because unlike his original vote, his testimony will be easily verifiable by those who care about the outcome. See *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895).

³⁸ See *Hammond v. Hickel*, 588 P.2d 256, 260 (Alaska 1978); *Grounds v. Lawe*, 193 P.2d 447, 453 (Ariz. 1948); *Choisser v. York*, 71 N.E. 940, 941 (Ill. 1904); *Parker v. Hughes*, 67 P. 637, 640 (Kan. 1902); *Ellis ex rel. Reynolds v. May*, 58 N.W. 483, 488–89 (Mich. 1894); *Heyfron v. Mahony*, 24 P. 93, 95–96 (Mont. 1890); *Drinkwater v. Nelson*, 187 N.W. 152, 154 (N.D. 1922); *Briggs v. Ghrist*, 134 N.W. 321, 322–24 (S.D. 1912); cf. *Russell v. McDowell*, 23 P. 183, 184 (Cal. 1890) (deducting illegal votes from each candidate based on the proportion of the total vote each candidate received, not the vote broken down by precinct; this method can never overturn an election because it will always leave the winner with more votes than the loser); *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897) (allowing proportional deduction when both parties agreed to it).

³⁹ GEO. W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 460–462 (Chi., Callaghan 3d ed. 1887). For examples of courts citing McCrary’s treatise, see *Ellis*, 58 N.W. at 488; and *Heyfron*, 24 P. at 95. Courts that rejected proportional deduction sometimes relied on a treatise by Halbert Paine from the same era. See, e.g., *State ex rel. Brogan v. Boehner*, 119 N.W.2d 147, 152–53 (Neb. 1963) (citing HALBERT E. PAINE, A TREATISE ON THE LAW OF ELECTIONS TO PUBLIC OFFICES (Wash., Wm. H. Morrison 1888)).

⁴⁰ See, e.g., *Hammond*, 588 P.2d at 260.

⁴¹ See *Fischer v. Stout*, 741 P.2d 217, 226 n.15 (Alaska 1987); *Huggins*, 788 P.2d at 86.

questing it can prove that it would be impossible to provide direct evidence as to who received which illegal votes.⁴²

These restrictions reflect that even courts that have adopted proportional deduction are uncomfortable with it. Courts are always wary of overturning elections, largely because they do not want to appear to be substituting their will for the will of the people. This wariness is particularly acute when a court uses proportional deduction because the court would be overturning an election without knowing for sure that illegal voters had altered the result. Thus, the public may suspect that the court is helping its favored candidate rather than correcting a flawed outcome. This concern has prompted many courts to reject proportional deduction, arguing that elections should never be overturned based on estimates.⁴³

B. *New Concerns About Proportional Deduction*

Most courts that unqualifiedly adopted proportional deduction did so over a century ago,⁴⁴ when voters and political candidates were almost exclusively white males, and social science research was far less developed than it is today. Recent cases have recognized that race and gender can be powerful predictors of voting behavior,⁴⁵ and this recognition may lead to a new wariness among courts regarding the use of proportional deduction. *Borders* was the first case to demonstrate this wariness.

In *Borders*, Rossi initially argued for the elimination of uncertainty approach, which would have required a new election.⁴⁶ The judge, however, deemed that approach prohibited by Washington law.⁴⁷

⁴² See *Napier v. Cornett*, 68 S.W. 1076, 1077–78 (Ky. 1902); *Berg v. Veit*, 162 N.W. 522, 523 (Minn. 1917); *Potter v. Robbins*, 290 S.W. 396, 398–99 (Tenn. 1926) (“It seems obvious that the rule of apportionment of the illegal votes between the candidates in proportion to their total votes in the precinct is a rule of expediency, for the application of which there can be no reason when evidence is available to prove for whom the illegal votes were actually cast. Proof of the ballot cast by the disqualified voter produces a certain result, while the rule of apportionment can, at best, produce only an approximate result.”).

⁴³ See, e.g., *Brogan*, 119 N.W.2d at 153 (“We do not believe that courts should adopt and apply arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be.”).

⁴⁴ See cases cited *supra* note 38. Alaska, the only state to adopt proportional deduction in the last thirty years, has allowed it only to confirm election results, not to overturn them. See *Fischer*, 741 P.2d at 226 n.15.

⁴⁵ See *Borders v. King County*, No. 05-2-00027-3, slip op. at 17 (Wash. Super. Ct. June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf> (discussing gender); cases cited *supra* note 14 (discussing race).

⁴⁶ See *Election Contest Petition*, *supra* note 8, at 2–4.

⁴⁷ See *Borders*, No. 05-2-00027-3, slip op. at 21–22.

Rossi then argued for proportional deduction,⁴⁸ while the Democrats argued for the direct evidence rule.⁴⁹ Rossi claimed he could not possibly get all the illegal voters to testify as to how they had voted, and that even if he could, proportional deduction would be more accurate because many of them might lie.⁵⁰ The Democrats responded that proportional deduction was “based on chance” and could not accurately show who had won the election.⁵¹

Interestingly, the judge considered the possibility of using proportional deduction in a different way than previous courts had. While every court that has allowed proportional deduction has conducted the necessary calculations itself,⁵² in *Borders* the Republicans sought to introduce expert testimony to show what the results of proportional deduction would be.⁵³ The Democrats then challenged this evidence for failing to satisfy Washington rules regarding expert testimony.⁵⁴ These rules required the judge to decide whether proportional deduction was “[generally accepted] in the appropriate scientific community”⁵⁵ and whether it was reliable enough to assist the trier of fact.⁵⁶

The judge reviewed proportional deduction under this standard and found it wanting. He identified two serious but previously ignored problems with proportional deduction, which ultimately led him to dismiss the Republicans’ case. First, he found that proportional de-

⁴⁸ See Petitioners’ Opposition to Wash. State Democratic Cent. Comm.’s Motion To Exclude Expert Testimony of Anthony M. Gill and Jonathan N. Katz at 2, *Borders*, No. 05-2-00027-3, available at <http://www.secstate.wa.gov/documentvault/552.pdf>.

⁴⁹ See Wash. State Democratic Cent. Comm.’s Motion in Limine To Exclude Petitioners’ Proposed Speculative Attribution of Illegal Votes at 6, *Borders*, No. 05-2-00027-3.

⁵⁰ See Petitioners’ Opposition to Wash. State Democratic Cent. Comm.’s Motion in Limine To Exclude Petitioners’ Proposed Attribution of Illegal Votes at 13–14, *Borders*, No. 05-2-00027-3, available at <http://www.secstate.wa.gov/documentvault/306.pdf>; Postman, *supra* note 1 (“‘You’re going to trust thieves, child molesters, embezzlers, rapists, murderers? That isn’t going to work,’ [Rossi’s spokeswoman] said.”).

⁵¹ See Wash. State Democratic Cent. Comm.’s Motion in Limine To Exclude Petitioners’ Proposed Speculative Attribution of Illegal Votes, *supra* note 49, at 4. In the alternative, the Democrats claimed that even if proportional deduction were used, Gregoire would still win. See Mike Carter, *Dems Do the Math, Say Rossi Still Loses*, SEATTLE TIMES, May 11, 2005, at B1.

⁵² See Wash. State Democratic Cent. Comm.’s Reply in Support of Its Motion in Limine To Exclude Petitioners’ Proposed Speculative Attribution of Illegal Votes at 19 & n.15, *Borders*, No. 05-2-00027-3 (“In every proportionate reduction case cited by Petitioners, the judge or the relevant election official performed the math without the aid of ‘expert’ testimony.” (citing numerous cases)).

⁵³ See Petitioners’ Opposition to Wash. State Democratic Cent. Comm.’s Motion in Limine To Exclude Petitioners’ Proposed Attribution of Illegal Votes, *supra* note 50, at 1–3.

⁵⁴ See Wash. State Democratic Cent. Comm.’s Reply in Support of Its Motion To Exclude Expert Testimony of Anthony M. Gill and Jonathan N. Katz at 1, *Borders*, No. 05-2-00027-3.

⁵⁵ *State v. Cauthron*, 846 P.2d 502, 505 (Wash. 1993) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

⁵⁶ See *State v. Russell*, 882 P.2d 747, 766 (Wash. 1994).

duction was not generally accepted in the scientific community.⁵⁷ In particular, he found that experts had not endorsed the idea that illegal voters in a precinct could be expected to vote in the same way as legal voters in the same precinct.⁵⁸ While the judge was correct that no study has shown that legal and illegal voters tend to vote alike,⁵⁹ this objection will play little role in future cases if the party requesting proportional deduction simply asks the court to conduct the calculations rather than attempting to introduce expert testimony for that purpose.

In contrast, the second concern the judge raised regarding proportional deduction may have a greater impact. He pointed out that even if legal and illegal voters did normally vote alike, that assumption might not hold true in a particular election because of group voting behavior.⁶⁰ For example, in *Borders*, most of the illegal votes were cast by felons who had not had their voting rights restored. The judge noted that felons are overwhelmingly male,⁶¹ and that in this election, gender was likely a strong predictor of voter choice because the Democratic candidate was a woman while her opponent was a man.⁶² Thus, a woman who lived in a precinct that voted seventy percent for Rossi probably had a less than seventy percent likelihood of having voted for Rossi, while a man who lived in a precinct that voted sixty percent for Gregoire probably had a less than sixty percent likelihood of having voted for Gregoire.

The judge's second concern in *Borders* highlights a broader problem with proportional deduction: group voting behavior can often confound estimates of which candidate received which illegal votes. For example, if an illegal voter were African American, a party could argue that he probably voted for the Democrat, given that the vast majority of African Americans typically vote Democratic.⁶³ But if the

⁵⁷ *Borders*, No. 05-2-00027-3, slip op. at 20.

⁵⁸ *See id.* at 16.

⁵⁹ Some studies have, in fact, suggested that felons are more likely than the population as a whole to vote Democratic. *See, e.g.*, Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 780–81 (2002).

⁶⁰ *See Borders*, No. 05-2-00027-3, slip op. at 17.

⁶¹ *See id.*

⁶² *See id.* (“The Court finds that the statistical methods used in the reports of [the Republican experts] ignore other significant factors in determining how a person is likely to vote. In this case, in light of the candidates, gender may be as significant or a more significant factor than others.”).

⁶³ *See Easley v. Cromartie*, 532 U.S. 234, 245 (2001) (noting that between ninety-five and ninety-seven percent of African American registered voters in North Carolina vote as Democrats); Louis Bolce et al., *The 1992 Republican “Tent”: No Blacks Walked In*, 108 POL. SCI. Q. 255 (1993); CNN U.S. National Presidential Election Exit Poll (2004), <http://www.cnn.com/>

voter lived in a heavily Republican precinct, standard proportional deduction would subtract his vote mostly from the Republican candidate.

The seemingly obvious insight that group voting behavior could confound estimates of voter choices has been ignored by virtually every court that has considered proportional deduction.⁶⁴ One possible reason for this oversight is that at the time when many states first adopted proportional deduction, women and racial minorities were largely excluded from the political process, so race- and gender-based group voting behaviors were largely nonexistent. Another possible explanation is that while some group voting behavior must have been taking place at the time when proportional deduction was adopted (for example, along class or ethnic lines), social-scientific methods were not advanced enough to track this behavior, so courts could not evaluate its impact with any confidence.⁶⁵

Now that Democrats have successfully invoked group voting behavior to block a call for proportional deduction in Washington, it would not be surprising if parties began citing such behavior more and more in challenging proportional deduction. Although *Borders* was decided at the state trial court level and thus has little precedential value, the high profile of the case nationally⁶⁶ and the increased recognition by courts that demographic characteristics are powerful predictors of how people vote may mean that *Borders* is a sign of things to come.

C. Conclusion

In deciding among the available methods of deducting illegal votes, courts are making a policy choice among imperfect options. The elimination of uncertainty approach will sometimes force a new election even when the original outcome accurately reflected the will of le-

ELECTION/2004/pages/results/states/US/P/00/epolls.o.html (last visited Jan. 15, 2006) (showing that eighty-eight percent of African American voters voted for Democrat John Kerry in 2004).

⁶⁴ Of the dozens of cases that consider whether to apply proportional deduction, *Borders* is the only one to discuss this issue explicitly. In *Drinkwater v. Nelson*, 187 N.W. 152 (N.D. 1922), however, the court modified proportional deduction based on gender, without explaining its reasoning. Men's and women's ballots were kept separate in that race, and when the court concluded that women in two precincts had voted illegally, it estimated how they had voted based on the percentage of women in each precinct who had voted for each candidate. *See id.* at 154.

⁶⁵ *See* E-mail from Richard H. Pildes, Professor of Law, N.Y. Univ. Sch. of Law, to the Harvard Law Review (Oct. 30, 2005, 15:09:12 EST) (on file with the Harvard Law School Library) (suggesting this possibility).

⁶⁶ The national media covered this case extensively. *See, e.g.*, Sarah Kershaw, *Trial Begins in Washington over Election for Governor*, N.Y. TIMES, May 24, 2005, at A13; Sarah Kershaw, *Washington State Governor's Race Is Still Squeaking*, N.Y. TIMES, Nov. 5, 2004, at A18; Eli Sanders, *Judge Dismisses Lawsuit over Washington Election*, N.Y. TIMES, June 7, 2005, at A16.

gal voters. The direct evidence rule will mean that some challengers who actually won will not be able to prevail in court. And proportional deduction will give some challengers who did not actually win an unfair shot at another election. In choosing which approach to adopt, courts not only have to weigh the public perceptions and practical consequences of each one, but also have to ask how often each method will achieve the wrong result.

Courts have long understood why the elimination of uncertainty and direct evidence approaches might achieve the wrong result. In contrast, although courts have often objected to proportional deduction, they are just beginning to understand that group voting behavior may cause proportional deduction to get the wrong result more often than they had realized.

How will and should courts respond to this new development? One possibility is that courts will try to modify proportional deduction by incorporating demographic data. This would be difficult for courts though, because parties would likely present conflicting evidence about which characteristics could best estimate how a person voted. Given the paucity of these cases, judges would have little experience to guide them in applying such data. Furthermore, judges would and should be wary of developing ad hoc formulas for allocating illegal votes, because doing so could give voters the impression that courts are crafting systems to help their favored candidates win.

The more likely result of this new development is that courts will be less willing to apply proportional deduction when there is reason to believe that group voting behavior played a significant role in an election — for example, if women and men had substantially different voting patterns and the illegal voters were heavily male or female. In such cases, courts may demand direct evidence, or impose a higher burden of proof, overturning an election only if taking demographic data into account would not change the outcome of proportional deduction. None of these solutions is perfect, which highlights that the best way to ensure that elections accurately reflect the will of the voters is to strengthen and modernize state election systems so that illegal voting does not occur in the first place.

V. TRENDS IN STATE SELF-REGULATION OF THE REDISTRICTING PROCESS

Every ten years, the release of the national census results stimulates a flurry of state political activity as governments redraw congressional and legislative district lines. This political activity is typically followed by an equally hectic cycle of legal and regulatory activity, as