

## NOTES

# ACCURACY COUNTS: ILLEGAL VOTES IN CONTESTED ELECTIONS AND THE CASE FOR COMPLETE PROPORTIONATE DEDUCTION

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*Contested elections in which the number of illegal votes exceeds the purported winner's margin of victory present courts with difficult choices. Simply certifying the result risks denying the true winner his victory, while ordering a new election leaves the choice to a changed electorate. Adjusting the results is also problematic, as it may create a perception that judges, and not voters, have decided the election. This Note argues that courts should be more willing to use statistical techniques to resolve this type of election dispute. It critiques the various remedial measures that courts have employed, as well as the rejection of statistical methods in existing case law and legal commentary. The author concludes that a statistics-based remedy—termed “complete proportionate deduction”—best balances the values of accuracy, finality, and public faith in the democratic process.*

### INTRODUCTION

The 2004 race for governor in Washington was the closest gubernatorial election in American history,<sup>1</sup> with the eventual winner, Democrat Christine Gregoire, prevailing over Republican Dino Rossi by only 129 votes out of 2.8 million votes cast.<sup>2</sup> Such a staggeringly

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<sup>1</sup> David Postman, *Felon-Voter Evidence Allowed*, SEATTLE TIMES, May 27, 2005, at B1; Wendy Kaufman, *Democrat Leads in Latest Washington State Gubernatorial Recount* (NPR radio broadcast Dec. 22, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4241110>.

<sup>2</sup> SAM REED, WASH. SEC'Y OF STATE, ELECTIONS: 2004 GOVERNOR'S RACE, [http://www.secstate.wa.gov/elections/2004gov\\_race.aspx](http://www.secstate.wa.gov/elections/2004gov_race.aspx) (select “Election Results”; then “Second Recount”; then “Statewide”; then “Governor”) [hereinafter OFFICIAL RESULTS]. A later judicial adjustment to these totals increased Gregoire's final margin of victory to 133 votes. *Borders v. King County*, No. 05-2-00027-3, slip op. at 9 (Wash. Super. Ct. June 24, 2005).

close result—in a race for an office as critical as the chief executive of more than six million citizens<sup>3</sup>—raises difficult questions about how a democracy should balance the values of accuracy, finality, and public faith in the electoral process when such razor-thin margins are disputed in court.<sup>4</sup>

Many of the legal challenges that followed the Washington election concerned the proper role of statistical analysis in determining the victor.<sup>5</sup> Of particular interest is the decision in *Borders v. King County*,<sup>6</sup> in which Rossi's attorneys and experts advanced—unsuccessfully—an argument for “proportionate deduction.”<sup>7</sup> Proportionate deduction is a remedy for disputed elections in which the number of illegal votes<sup>8</sup> counted is greater than the purported winner's margin of victory, but it is not known for whom these illegal votes were cast. In its traditional formulation, proportionate deduction subtracts the illegal votes from each candidate's total based on the overall results in the precincts in which the illegal votes were cast.<sup>9</sup> As a simple example, if ten illegal votes were cast in a precinct that

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available at <http://www.secstate.wa.gov/elections/recount.aspx> (select “Final Judgment” under heading “Court Orders”).

<sup>3</sup> U.S. CENSUS BUREAU, WASHINGTON STATE QUICKFACTS, <http://quickfacts.census.gov/qfd/states/53000.html> (last visited Oct. 18, 2007).

<sup>4</sup> See generally SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 961–1015 (3d ed. 2007) (discussing remedial possibilities for defective elections); Sarah E. LeCloux, *Too Close to Call? Remedying Reasonably Uncertain Ballot Results with New Elections*, 2001 WIS. L. REV. 1541, 1549–54 (discussing competing policies of achieving finality and enacting will of electorate). See also *infra* Part I.A (discussing values at stake in contested elections).

<sup>5</sup> See *In re Election Contest of Coday*, 130 P.3d 809, 815–16 (Wash. 2006) (en banc) (rejecting claims that results of multiple recounts should be averaged, or that revote must be ordered when margin of victory is within tally's margin of error); *Borders*, No. 05-2-00027-3, at 16–18 (rejecting use of statistical techniques to adjust vote totals in light of known numbers of illegal votes).

<sup>6</sup> *Borders*, No. 05-2-00027-3.

<sup>7</sup> *Id.* at 15–18; see also Petitioners' Trial Brief at 37–42, *Borders*, No. 05-2-00027-3, available at <http://www.secstate.wa.gov/elections/recount.aspx> (select “Petitioners' Trial Brief” under heading “Republican Party Pleadings & Documents”) [hereinafter Petitioners' Trial Brief] (presenting Rossi's proportionate deduction argument).

<sup>8</sup> I use the term “illegal votes” to mean votes cast by people not eligible to vote under the applicable election law. Votes cast by disenfranchised felons or unregistered voters are typical examples. In the case of election fraud, votes “cast” by nonextant voters are also included in this definition. This definition does not include votes invalidated due to mechanical error (e.g., indeterminate punch card) or voter mistake (e.g., a ballot marking two candidates for the same race), as the solutions discussed in this Note, see *infra* Part I.B, have little relevance to such disputes.

<sup>9</sup> See ISSACHAROFF ET AL., *supra* note 4, at 990 (describing proportionate deduction as advocated by Rossi in *Borders*).

went 60%/40% for Rossi over Gregoire, six votes would be subtracted from Rossi's total and four from Gregoire's.<sup>10</sup>

This Note advocates that courts should be more willing to use statistical techniques to resolve this type of election dispute. I first examine and critique courts' and commentators' rejection of statistical methods in existing case law and commentary, focusing on proportionate deduction and the *Borders* case. After analyzing the problem and the various remedial options available to courts in such circumstances, I propose that a broadly conceived form of proportionate deduction—which I term “complete proportionate deduction” (CPD)—will be the best solution for cases in which the statistical tendencies of the illegal votes can be ascertained with reasonable certainty. CPD is similar to traditional proportionate deduction in that it uses statistical methods to deduct illegal votes from each candidate's total: It differs by accounting for all known and relevant characteristics of the illegal votes in its statistical models, rather than relying solely on the precincts' election results. In this way, CPD provides a more demanding and comprehensive analysis. This Note argues that CPD is often better than any other alternative at balancing the values of accuracy, finality, and legitimacy when illegal votes are disputed.

In advocating for CPD as a solution to the problem of illegal votes in election challenges, this Note does not contend that remedial measures seeking to prevent the problem *ex ante*—for instance, by more stringently monitoring voter registration rolls to prevent illegal votes from being cast in the first place<sup>11</sup>—should not be taken. Preventing these difficult disputes from ever arising would be preferable to any of the methods of *ex post* judicial resolution that this Note evaluates. My advocacy of CPD is thus limited to cases in which preventive measures have failed and judges are left to rule on these chal-

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<sup>10</sup> This example is derived from David Postman, *Calculating Illegal Votes' Impact Could Be Key to Election Lawsuit*, SEATTLE TIMES, May 1, 2005, at B1.

<sup>11</sup> For examples of such remedial measures, see Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313, 349–51 (2005), which discusses the various reform measures proposed in the aftermath of the 2004 Washington gubernatorial election. Since many of the illegal votes in these cases are cast by disenfranchised felons, *see infra* note 75 and accompanying text, the enfranchisement of former felons may prevent a number of these cases from arising. Though this may offer a compelling reason to support felon enfranchisement, serious consideration of the larger felon disenfranchisement debate is beyond the scope of this Note and has been treated extensively elsewhere. *See, e.g.*, Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150–64 (2004) (reviewing historical development of felon disenfranchisement debate); *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939–57 (2002) (discussing legislative and judicial responses to felon disenfranchisement debate).

lenges.<sup>12</sup> In this (admittedly nonideal) situation, I maintain that CPD is superior to any other available remedy.

My argument will proceed as follows: Part I describes the basic problem faced by courts in resolving close elections with known quantities of illegal votes and presents the various solutions that courts and commentators have employed or advocated. Part II first outlines the history of the 2004 Washington gubernatorial election and the ensuing legal battle, focusing on the *Borders* decision. It then critiques the rationales of that decision and the academic commentary that has supported it, proposing that CPD is a more appropriate solution under certain conditions. Part III examines this proposal in greater detail, outlining CPD's advantages, answering potential objections, and exploring issues regarding the practical implementation of CPD.

## I

### THE PROBLEM OF ILLEGAL VOTES IN CLOSE ELECTIONS

In a seminal 1973 law review article, Michael Finkelstein and Herbert Robbins described the basic problem faced by courts resolving close elections in which the number of illegal votes exceeds the purported winning candidate's margin of victory.<sup>13</sup> When the final tally places one candidate ahead by ten votes, but it is shown that 200 voters cast ballots illegally (though not for whom they voted), courts are faced with difficult choices: Should a new election be ordered? Should the original result stand and the purported winner be installed in office? Should the vote tally be adjusted in some way, and if so, how? What if the number of illegal votes is 500, 1000, or 5000?

This problem of illegal votes in close elections—which is distinct from the issues presented in the most prominent of recent close races, the 2000 presidential election<sup>14</sup>—does not lend itself to an easy solu-

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<sup>12</sup> It is also possible that the means of resolving these disputes could be decided *ex ante* by the legislature. See *infra* Part III.D.2 (discussing advantages and disadvantages of this possibility).

<sup>13</sup> Michael O. Finkelstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241 (1973).

<sup>14</sup> Legal challenges to the 2000 presidential election, where the result depended on hundreds of votes in Florida, were concerned mainly with which votes should be recounted and under what standard. See, e.g., *Bush v. Gore*, 531 U.S. 98, 100–03 (2000) (finding that “standardless” manual recounts ordered by Florida Supreme Court violated Equal Protection Clause of Constitution), *rev'g* *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000) (ordering manual recounts in counties where machine tally indicated undervote); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289–90 (Fla. 2000) (holding that statutory recount deadline may be extended to preserve right to vote and that Secretary of State may ignore late recount returns only in limited circumstances). These challenges were not concerned with issues involving illegal votes or statistical methods like proportionate deduction. The 2000 election was further complicated by federal constitutional

tion and different courts have taken different approaches. This Part describes and evaluates these solutions.

### A. *Competing Values at Stake in Contested Elections*

Election disputes are often said to present situations of “competing values,” in which conflicting concerns must be balanced and any solution necessarily will be less than perfect.<sup>15</sup> Commentators have identified these values as accuracy, finality, and legitimacy,<sup>16</sup> and this Section reviews each in turn.

#### 1. *Accuracy*

The value of accuracy embodies the simple principle that “the man actually elected should be seated”<sup>17</sup>—that is, the candidate who received the most votes should be declared the winner. As the right

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issues and the electoral college system (but for which the result would not have been close), see U.S. FED. ELECTION COMM’N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited Oct. 18, 2007) (showing that Gore had popular vote lead of 543,895 votes); however, these issues are beyond the scope of this Note. For background on the 2000 presidential election, see generally N.Y. TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001). For discussions concerning statistical issues in the 2000 presidential election, see, for example, Michael O. Finkelstein & Bruce Levin, *Bush v. Gore: Two Neglected Lessons from a Statistical Perspective*, 44 JURIMETRICS J. 181, 182 (2004), arguing that the analysis by both the Florida and the U.S. supreme courts in *Bush v. Gore* election dispute suffered from unfounded statistical assumptions, and Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 795–96 (2001), arguing that statistical analysis shows that unexpectedly large Pat Buchanan vote tally in Palm Beach County was due to errors by voters intending to vote for Al Gore.

<sup>15</sup> See Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 354 (2006) (discussing conflicting goals in context of election procedure and reform).

<sup>16</sup> See Avila, *supra* note 11, at 315 (noting that electoral process should “accurately reflect the will of the people,” lest “the legitimacy of our governments and the public confidence in our public institutions [be] seriously undermined”); LeCloux, *supra* note 4, at 1543–44 (describing importance of “achiev[ing] accurate results,” “bringing finality to elections,” and “sustain[ing] the democratic belief in the validity of elections” in election disputes); Wang, *supra* note 15, at 354 (describing goal of “counting . . . every valid vote . . . versus the desire for finality”). Though other values—like efficient administration of elections and expanded voter access—are often mentioned as goals of election law generally, see, e.g., Wang, *supra* note 15, at 354, these concerns are not directly applicable to the various ex post judicial solutions that this Note evaluates. See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 288–96 (2007) (listing—in addition to legitimacy, accuracy, and finality—efficiency, voter anonymity, and separation of powers as values underlying election law).

<sup>17</sup> LeCloux, *supra* note 4, at 1541 (quoting *State v. Widule*, 157 N.W. 769, 771 (Wis. 1916) (Winslow, C.J., dissenting)).

to vote is among the most fundamental<sup>18</sup> in democratic society—indeed, it underlies the social contract of our democracy<sup>19</sup>—it follows that, in order to give that right practical force, government should provide an electoral process that counts those votes as perfectly as is reasonably possible.<sup>20</sup> In short, the value of accuracy counsels that the final tally should reflect the will of the electorate.

## 2. *Finality*

A second value at issue in contested elections—and one that often conflicts with the others<sup>21</sup>—is the desire for finality. The value of finality lies in resolving election disputes quickly, since lengthy judicial battles are costly, create uncertainty, and undermine continuity in government.<sup>22</sup> It would be an empty achievement, after all, if “perfect” accuracy came at the cost of extreme delay. For a democracy to continue functioning, there must (at least typically) be someone to swear in on Inauguration Day.<sup>23</sup> While any type of judicial review of election contests will raise significant finality concerns, swift resolutions should be favored over those that cause undue delay.

## 3. *Legitimacy*

Legitimacy—the desire that public confidence in the electoral process be maintained—is perhaps the most elusive of the values at stake in contested elections. Most commentators agree that sustaining public faith in the functioning of our democratic machinery is essential,<sup>24</sup> but they disagree on how to accomplish this goal. In the illegal

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<sup>18</sup> The Supreme Court has long held that the right to vote is a fundamental right mandating strict scrutiny. *E.g.*, *Bush*, 531 U.S. at 104 (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . .”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding poll tax unconstitutional as violative of fundamental right to vote); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society. [It] is preservative of other basic civil and political rights . . . .”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>19</sup> See Avila, *supra* note 11, at 315 (“[T]he continued legitimacy of our form of government rest[s] upon the understanding that the electoral process will accurately reflect the will of the people.”).

<sup>20</sup> See Akizaki v. Fong, 461 P.2d 221, 223 (Haw. 1969) (“Implicit in [the right to vote] is . . . the right to have as nearly perfect an election proceeding as can be provided.”).

<sup>21</sup> See, *e.g.*, Wang, *supra* note 15, at 354 (describing tension between “the goal of making voting rights and the counting of every valid vote paramount, versus the desire for finality—having elections decided at the ballot box, not in the courtroom”).

<sup>22</sup> See LeCloux, *supra* note 4, at 1550–53 (listing these and other practical reasons for encouraging finality).

<sup>23</sup> See Huefner, *supra* note 16, at 292–93 (making this point and discussing value of finality in general).

<sup>24</sup> See, *e.g.*, Avila, *supra* note 11, at 349–52 (arguing that, in aftermath of disputed Washington gubernatorial election, reform measures should be taken to “restor[e] and

votes context, for example, some argue that increased judicial review undermines legitimacy by creating an impression that judges, rather than voters, are deciding elections,<sup>25</sup> while others maintain that active judicial oversight is essential to preserving legitimacy.<sup>26</sup> Despite this elusiveness, it is clear that those resolving election disputes—which are often highly visible, highly public controversies—should avoid creating perceptions that erode public faith in the democratic process.

### B. *Solutions to the Problem of Illegal Votes in Close Elections*

With these values in mind, we turn to potential solutions to the problem of illegal votes in close elections. In this Section, I survey the four approaches that courts have generally taken in these cases and then offer an outline of a fifth approach—complete proportionate deduction—for which this Note advocates.

#### 1. *The “Intuitive” Approach*

The first approach taken by courts is likely the least systematic. Essentially, the judge eyeballs the margin of victory, compares it to the number of illegal votes, and orders a new election when the latter is significantly larger than the former. New York State has followed this approach: In *Ippolito v. Power*, the Court of Appeals ordered a new election in a case with 101 invalid votes and a seventeen-vote margin of victory,<sup>27</sup> while in *DeMartini v. Power*, it denied an order for a new election where there were 136 invalid votes and a sixty-two-vote margin of victory.<sup>28</sup> Finkelstein and Robbins have derided this method of “intuitive assessment[ ],”<sup>29</sup> arguing that it is unprincipled and leads to inconsistent results.<sup>30</sup> The inconsistency stems from the failure of judges to take into account the total number of votes cast, leading to a misestimation of the true likelihood that the illegal votes influenced the result.<sup>31</sup>

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preserv[e] the public’s confidence in the conduct of elections”); LeCloux, *supra* note 4, at 1542–43 (disapproving of failure to order new election in disputed election, as it “risks that the public will lose faith in the legitimacy of government and fair elections”).

<sup>25</sup> See, e.g., William C. Rava & Rebecca S. Engrav, *No Guessing Allowed: Washington Rejects Proportionate Deduction in Election Contests*, 69 ALB. L. REV. 561, 564 (2006) (noting expectation that single judge’s decision should not be determinative).

<sup>26</sup> See, e.g., LeCloux, *supra* note 4, at 1543 (arguing that judicial ordering of new elections when result is uncertain “will sustain the democratic belief in the validity of elections”).

<sup>27</sup> 241 N.E.2d 232, 233–34 (N.Y. 1968).

<sup>28</sup> 262 N.E.2d 857, 857–58 (N.Y. 1970).

<sup>29</sup> Finkelstein & Robbins, *supra* note 13, at 241.

<sup>30</sup> *Id.* at 243–45.

<sup>31</sup> *Id.* To illustrate this point, Finkelstein and Robbins note that a new election was ordered in *Santucci v. Power*, 252 N.E.2d 128 (N.Y. 1969), which involved 698 invalid votes

In an attempt to make the intuitive approach more rigorous, Finkelstein and Robbins offer a formula that, assuming that the illegal votes are not biased in any particular way and the count is otherwise reliable, gives the probability that the illegal votes changed the result—i.e., that the challenger is actually the true winner.<sup>32</sup> Their formula, however, while preferable to unguided intuition, has never—as far as my research has found—been employed in actual litigation.<sup>33</sup>

The intuitive approach, perhaps due to the critique offered above, has fallen from favor in recent years, and courts today more typically take one of three other approaches to the problem of illegal votes in close elections.<sup>34</sup> These three methods—the elimination of uncertainty, direct evidence, and traditional proportionate deduction approaches—are described next.

## 2. The “Elimination of Uncertainty” Approach

The “elimination of uncertainty” approach<sup>35</sup> is often the least burdensome for the challenger. If she can show that the number of

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and a ninety-five-vote margin of victory. Though the judge in that case held that the probability of reversal was substantial, the true probability was in fact miniscule. Finkelstein & Robbins, *supra* note 13, at 244. In *Ippolito* and *DeMartini*, Finkelstein and Robbins calculated the chances of reversal as five percent and less than one in a million, respectively. *Id.* at 243–44.

<sup>32</sup> Finkelstein & Robbins, *supra* note 13, at 242–43. The formula is  $Z = d \cdot ((s - k) / (s \cdot k))^{1/2}$  where  $d$  is the winner’s margin of victory,  $s$  is the combined number of votes cast for the winner and the challenger, and  $k$  is the number of invalid votes. *Id.* at 243. The output,  $Z$ , is a standard normal variate, which can be translated into a probability that the purported winner is the true winner by consulting a table of the cumulative normal probability distribution, available online and in many statistics textbooks. See, e.g., Cumulative Normal Probability Tables (Z-Values), <http://www.osat.umich.edu/sixsigma/Reference/norm-tables.PDF> (last visited Nov. 14, 2007). To be precise, I should note that I am using the term “true winner” to denote the individual who received the greatest number of legal votes in the election. Other statisticians prefer a more complex “mixture model” for calculating these probabilities in certain cases, but the results generally are not materially different. Compare Dennis C. Gilliland & Paul Meier, *The Probability of Reversal in Contested Elections*, in *STATISTICS AND THE LAW* 391, 398–400 (Morris H. DeGroot et al. eds., 2d ed. 1994) (advancing mixture model) with Herbert Robbins, *Comment*, in *STATISTICS AND THE LAW*, *supra*, at 412, 412–14 (arguing for variation on above formula).

<sup>33</sup> A Westlaw search for case law citations to the Finkelstein and Robbins article returns no instances in which calculations using the formula were actually employed in a judicial decision (from [www.westlaw.com](http://www.westlaw.com), search the database ALLCASES for “Mathematical Probability in Election Challenges”).

<sup>34</sup> See generally *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1157–61 (2006) [hereinafter *Voting and Democracy*] (collecting cases confronting problem of illegal votes in close elections where fraud is absent, and classifying these cases as following “elimination of uncertainty,” “direct evidence,” or “proportional deduction” approaches).

<sup>35</sup> Several of the terms used in this Section (namely, “elimination of uncertainty” and “direct evidence”) are drawn from *Voting and Democracy*, *supra* note 34, at 1157–61.



illegal votes is greater than the purported winner's margin of victory—i.e., that there is at least some uncertainty as to the outcome—a judge will order a new election.<sup>36</sup> Were the *DeMartini* case decided under this rule, for example, a new election would have been ordered, as there were 136 invalid votes and a sixty-two-vote margin of victory.<sup>37</sup> The elimination of uncertainty approach has the advantage of maintaining voter trust by never certifying an election in which there is any chance that the purported winner is not the winner in fact. It ignores, however, the important goal of achieving finality in election results,<sup>38</sup> while creating costs in ordering new elections and leaving the ultimate decision to an inevitably changed electorate.<sup>39</sup>

Further, a strict elimination of uncertainty approach yields troubling results: In an election with a 499-vote margin of victory and 500 invalid votes, elimination of uncertainty would order a new election despite the near-impossibility that the illegal votes made a difference.<sup>40</sup> A more nuanced version of the approach might employ Finkelstein and Robbins's formula and only order a new election when the "uncertainty" rises above a particular threshold, like five percent.<sup>41</sup> Under such a test, in a two-candidate election with 5000 voters and a margin of victory of 20 votes, a new election would be ordered only when the number of illegal votes exceeded 102.<sup>42</sup> One

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<sup>36</sup> For cases in which courts have employed the elimination of uncertainty standard, see, for example, *Akizaki v. Fong*, 461 P.2d 221, 222, 224–25 (Haw. 1969), ordering a new election when the number of invalid votes exceeded the margin of victory, and *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 623 (Mass. 1982).

<sup>37</sup> *DeMartini v. Power*, 262 N.E.2d 857, 857 (N.Y. 1970). I use *DeMartini* as an example throughout this Part due to its straightforward facts and status in the literature as a paradigmatic example of this type of election dispute. See Gilliland & Meier, *supra* note 32, at 396 (noting *DeMartini*'s status as paradigm case of illegal votes' situation).

<sup>38</sup> *Voting and Democracy*, *supra* note 34, at 1158.

<sup>39</sup> *Huggins v. Superior Court*, 788 P.2d 81, 84 (Ariz. 1990).

<sup>40</sup> This example is borrowed from *Voting and Democracy*, *supra* note 34, at 1158.

<sup>41</sup> Gilliland & Meier, *supra* note 32, at 396 (suggesting decision rule under which new election would be ordered if probability of reversal is greater than five percent). Five percent is a natural choice, as it is the level of certainty required for statistical significance in social science and in many legal contexts. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 124 (Fed. Judicial Ctr. ed., 2d ed. 2000) ("The [five percent] level is the most common in social science, and an analyst who speaks of 'significant' results without specifying the threshold probably is using this figure."); see also *Castaneda v. Partida*, 430 U.S. 482, 496–97 n.17 (1977) (noting that result greater than two or three standard deviations from mean—roughly equivalent to one to five percent uncertainty—would be significant); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977) (same). Some commentators have criticized this fixed five-percent benchmark. See Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1050–54 (1985) (arguing that significance level should be tailored to underlying nature of litigation).

<sup>42</sup> Applying the Finkelstein and Robbins formula, *supra* note 13, at 243, we have  $1.96 \cdot 20 \cdot ((5000 - 102) / (5000 \cdot 102))^{1/2}$  and  $Z = 1.96$  corresponds to a 95% chance that the

legal commentator has advanced a less rigorous version of this idea, arguing that new elections should be ordered whenever the level of uncertainty is “unreasonable.”<sup>43</sup>

### 3. *The Direct Evidence Approach*

A third approach employed by courts, the “direct evidence” standard, is typically the most burdensome for challengers.<sup>44</sup> Courts employing this rule will deduct votes from a candidate’s total only if it is shown by direct testimony that an illegal vote was cast for that candidate<sup>45</sup>—meaning that, for a challenge to be successful, a sufficient number of illegal voters must be brought into court to testify that they voted for the purported winning candidate. As an example, consider again the facts of *DeMartini*, where the margin of victory was sixty-two.<sup>46</sup> To succeed, DeMartini (the challenger) would need to call at least sixty-three illegal voters to testify that they had voted for the purported winner. If his opponent responded with testimony from ten illegal voters who claimed to have voted for DeMartini, DeMartini would then have to call ten additional illegal voters to testify that they had voted for his opponent to make up the difference.<sup>47</sup>

The direct evidence approach may have some advantages with respect to finality, in that rarely will a new election be ordered or a result be overturned. The finality gained will be especially significant if challengers, knowing that they face a nearly insurmountable eviden-

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illegal votes did not disturb the election result. Cumulative Normal Probability Tables (Z-Values), *supra* note 32.

<sup>43</sup> LeCloux, *supra* note 4, at 1541–45. LeCloux offers no precise definition of “reasonable” in this context, noting only that 1000 illegal votes relative to a one hundred-vote margin of victory would be enough for “reasonable uncertainty” and acknowledging that there will be a “gray area.” *Id.* at 1547.

<sup>44</sup> See *Huggins*, 788 P.2d at 83 (describing “pernicious” and “onerous[ ]” burden of direct evidence standard). Cases in which courts have employed a direct evidence standard include, for example, *State ex rel. Brogan v. Boehner*, 119 N.W.2d 147, 151 (Neb. 1963), requiring direct proof of the nature of an illegal vote before deducting from the candidate’s total, and *Borders v. King County*, No. 05-2-00027-3, slip op. at 15–18 (Wash. Super. Ct. June 24, 2005).

<sup>45</sup> *Voting and Democracy*, *supra* note 34, at 1159. It is also possible to show for whom the illegal votes were cast by means of direct evidence other than voter testimony (e.g., if a copy existed of the absentee ballot at issue), but the usual means is voter testimony. *Id.* at 1158–59.

<sup>46</sup> *DeMartini v. Power*, 262 N.E.2d 857, 857 (N.Y. 1970).

<sup>47</sup> To put this a bit more precisely: For a challenge to succeed under the direct evidence rule, the number of illegal voters testifying that they voted for the purported winning candidate must exceed the number of illegal voters testifying that they voted for the challenger by a number greater than the winner’s margin of victory.

tiary burden, decline to sue altogether.<sup>48</sup> Nevertheless, the method raises serious concerns about the integrity of the secret ballot, the Fifth Amendment right against self-incrimination, and the potential for lying by illegal voters in their testimony.<sup>49</sup> Since such a demanding standard will only rarely alter a challenged election result, the direct evidence approach also calls into question the judiciary's commitment to accuracy and to installing into office the candidate who received the greatest number of legal votes.<sup>50</sup>

#### 4. *Traditional Proportionate Deduction*

The last approach used by the courts in these cases is traditional proportionate deduction, where illegal votes are subtracted from each candidate's total based on the results in the precinct in which each illegal vote was cast.<sup>51</sup> For example, consider a variation on the facts of *DeMartini*, in which the 136 illegal votes are split evenly between two precincts (i.e., sixty-eight illegal votes in each precinct). Assume the overall vote in the first precinct was 75%/25% in favor of the purported winner, while the vote was split evenly (50%/50%) in the second precinct. In a jurisdiction in which traditional proportionate deduction was the rule, the sixty-eight illegal votes in the first precinct would be deducted as follows: Fifty-one votes ( $75\% \cdot 68 = 51$ ) would be subtracted from the purported winner's total and seventeen votes ( $25\% \cdot 68 = 17$ ) would be subtracted from DeMartini's total. The illegal votes cast in the second precinct would have no effect: Since the vote was split evenly there, the illegal votes are assumed to have followed the same pattern.<sup>52</sup> In the end, DeMartini's challenge would fail, since the thirty-four votes ( $51 - 17 = 34$ ) he would have gained in

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<sup>48</sup> Of course, if challengers instead opt to sue and bring forth the necessary parade of illegal voter witnesses, the direct evidence approach will have quite significant costs with respect to finality.

<sup>49</sup> *Huggins*, 788 P.2d at 83–84; see also *Voting and Democracy*, *supra* note 34, at 1159 (discussing concerns of ballot secrecy and potential for false testimony). However, since the ballots at issue were cast illegally, concerns regarding ballot secrecy may be less significant in this context.

<sup>50</sup> *Cf. Huggins*, 788 P.2d at 86 (“The practical impact of the [direct evidence standard] is to let illegal votes’ count.”).

<sup>51</sup> See *supra* notes 7–10 and accompanying text (introducing traditional proportionate deduction method). For cases in which courts have employed traditional proportionate deduction, see, for example, *Hammond v. Hickel*, 588 P.2d 256, 260 (Alaska 1978), deducting the illegal votes from the candidates' totals based on precincts in which they were cast, *Huggins*, 788 P.2d at 86, deciding to resolve the election contest with proportionate deduction, and *In re Durkin*, 700 N.E.2d 1089, 1095 (Ill. 1998), stating that the proportionate deduction method is “well established” law in Illinois.

<sup>52</sup> More precisely, thirty-four votes ( $50\% \cdot 68 = 34$ ) would be subtracted from the totals of both DeMartini and the purported winner. The outcome of the election would thus not be affected.

the proportionate deduction analysis would not be enough to overcome his opponent's initial sixty-two-vote margin of victory.

If the illegal votes indeed mostly follow the larger tendencies of other voters in the precinct, the traditional proportionate deduction approach has the advantage of producing an accurate result that most effectively reflects the democratically expressed will of the people. It raises concerns, however, about courts altering election results based on what the public might perceive to be mere "estimates."<sup>53</sup>

### 5. *Complete Proportionate Deduction*

Though courts have traditionally only taken into account precinct election results in their use of proportionate deduction, it is not difficult to imagine a more nuanced approach that considers a wider array of factors (if they are known)—for example, the race, gender, or party affiliation of the illegal voters, or an illegal voter's status as a disenfranchised felon—in determining the candidates for whom the illegal votes were cast.<sup>54</sup> This change would correct a serious flaw in the traditional proportionate deduction method: namely, that it may not be true in all cases that illegal voters will vote like the average voters in their precinct. If information is available showing that the illegal votes are biased in some systematic way, then this information should be used to refine the proportionate deduction analysis.

This approach—which I call "complete proportionate deduction" (CPD)—is less a rigid method than it is an openness to the use of statistical evidence to resolve illegal vote disputes. Under the CPD approach, a challenger would be allowed to present a statistical model analyzing the illegal votes based on all available and relevant information, like precinct or party affiliation, that deducts votes from each candidate's total accordingly. If the model is admitted into evidence, the purported winner will be able to contest its accuracy and reliability, challenge the credibility of the expert who produced it, and propose his own model as a response.

A proposal like CPD raises immediate concerns about judicial tampering with election results based on potentially unreliable models, but these concerns are better answered through the demanding standards of evidence and the adversary process than

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<sup>53</sup> See *Borders v. King County*, No. 05-2-00027-3, slip op. at 17–18, 25 (Wash. Super. Ct. June 24, 2005) (describing concerns over courts altering election results); *Voting and Democracy*, *supra* note 34, at 1160–61 (same). For a response to these arguments, see *infra* Parts II.B.1 and II.B.2.

<sup>54</sup> See *Voting and Democracy*, *supra* note 34, at 1164 (noting that using demographic information to predict voting behavior was suggested in *Borders* and that this suggestion may be "a sign of things to come").

through rejection of statistical techniques altogether. Any CPD model will be subject to the usual heightened standards for admissibility of scientific evidence and will be admitted only if shown to be methodologically valid and reliable.<sup>55</sup> In this sense, CPD is hardly a radical idea—it simply seeks to treat statistical evidence in this context as it is treated generally.<sup>56</sup> The CPD approach is the focus of this Note and will be discussed at length in Part III.

Having reviewed the possible solutions to the problem of illegal votes in close elections, it is instructive to consider them in light of a real-world example. With its high stakes and memorable facts, the 2004 gubernatorial election in Washington presents a vivid context in which to examine the advantages and disadvantages of each of these approaches.

## II

### THE WASHINGTON GUBERNATORIAL ELECTION OF 2004: BUILDING AN INITIAL CASE FOR COMPLETE PROPORTIONATE DEDUCTION

#### A. *General Background and the Borders Decision*

A full review of the “roller coaster ride” that was the 2004 Washington gubernatorial race<sup>57</sup>—with its multiple recounts, discovered ballots, and myriad legal challenges—is beyond the scope of this Note,<sup>58</sup> but a brief summary of the events from election day to the legal challenges mounted in *Borders* is in order. Preliminary results on the day after the election placed Christine Gregoire ahead by

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<sup>55</sup> This standard—requiring that scientific evidence be both methodologically valid and reasonably reliable—was famously articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–95 (1993). The *Daubert* test applies in federal courts and is the law in twenty-five states. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:6, at 17 & n.8 (2006 ed.). Other jurisdictions require that the scientific evidence be “general[ly] accept[ed] in the particular field,” a standard most famously articulated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Though overruled by *Daubert* in federal courts, *Frye* remains the law in many state jurisdictions. FAIGMAN ET AL., *supra*, at 17 n.8. Since statistics is a fairly settled field, there is unlikely to be much practical distinction between *Daubert* and *Frye* in this context. See Kaye & Freedman, *supra* note 41, at 86 (equating determination as to whether statistics used are “of the type not reasonably relied on by statisticians” with determination of admissibility under *Daubert*).

<sup>56</sup> See *infra* notes 99–101 and accompanying text (giving examples of areas of law that employ statistical evidence). While election disputes are of course a unique context, strong analogies exist between this area and other areas of law currently using statistics. See *infra* notes 163–71 and accompanying text (explaining analogy between use of demographic information in vote-dilution cases and in CPD cases).

<sup>57</sup> Sarah Kershaw, *Democrat Wins by 130 in Latest Washington Count*, N.Y. TIMES, Dec. 24, 2004, at A14.

<sup>58</sup> For a complete but concise overview, see Avila, *supra* note 11, at 335–44.

thirty-two votes,<sup>59</sup> though many absentee ballots were yet to be counted.<sup>60</sup> As these ballots were counted over the following days, Gregoire's lead fluctuated, growing as large as nearly 18,000 votes.<sup>61</sup> Soon, however, Dino Rossi assumed a lead of more than 3000 votes.<sup>62</sup> The first certified results had Rossi the victor by just 261 votes out of more than 2.8 million cast,<sup>63</sup> a margin of less than one-hundredth of one percent.<sup>64</sup>

Washington state law requires an automatic recount whenever the margin of victory is less than both 2000 votes and one-half of one percent.<sup>65</sup> So, on November 17th, the Secretary of State tallied the first result and ordered a machine recount<sup>66</sup> that, at its conclusion, again showed Rossi as the victor, though this time by only forty-two votes.<sup>67</sup> Gregoire, represented by the Washington State Democratic Central Committee, then exercised the final option available to her under state law:<sup>68</sup> She requested a statewide manual recount,<sup>69</sup> which she won by 129 votes.<sup>70</sup> Having won the final recount, Gregoire was sworn in as governor on January 12, 2005.<sup>71</sup>

Unsurprisingly, such an extraordinarily small margin of victory inspired a host of legal challenges to the election.<sup>72</sup> Among them was

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<sup>59</sup> *State Election Results*, SEATTLE TIMES, Nov. 3, 2004, at B14.

<sup>60</sup> Since every Washington voter is permitted to vote by absentee ballot, WASH. REV. CODE § 29A.40.010 (2006), this was a significant number of votes. Absentee ballots constituted more than two-thirds of the total number of votes cast. SAM REED, WASH. SEC'Y OF STATE, ABSENTEE STATISTICS FOR THE 2004 GENERAL ELECTION, [http://www.secstate.wa.gov/elections/absentee\\_stats.aspx?y=2004](http://www.secstate.wa.gov/elections/absentee_stats.aspx?y=2004) (last visited Jan. 10, 2008).

<sup>61</sup> Ralph Thomas & Andrew Garber, *King County Absentees Widen Lead of Gregoire*, SEATTLE TIMES, Nov. 5, 2004, at B1.

<sup>62</sup> Ralph Thomas & Keith Ervin, *Rossi Maintains Lead; Gregoire Holds Out Hope*, SEATTLE TIMES, Nov. 11, 2004, at B1.

<sup>63</sup> OFFICIAL RESULTS, *supra* note 2 (select "Election Results"; then "Statewide"; then "Governor").

<sup>64</sup>  $261 / 2,805,913 \cdot .0093\%$ . See *id.* (indicating initial vote tallies and percentage vote distributions for candidates).

<sup>65</sup> WASH. REV. CODE § 29A.64.021(1) (2006).

<sup>66</sup> *Borders v. King County*, No. 05-2-00027-3, slip op. at 4-5 (Wash. Super. Ct. June 24, 2005).

<sup>67</sup> OFFICIAL RESULTS, *supra* note 2 (select "Election Results"; then "First Recount"; then "Statewide"; then "Governor").

<sup>68</sup> See WASH. REV. CODE § 29A.64.011 (2006) (providing manual recount option).

<sup>69</sup> *Borders*, No. 05-2-00027-3, at 5.

<sup>70</sup> OFFICIAL RESULTS, *supra* note 2 (select "Election Results"; then "Second Recount"; then "Statewide"; then "Governor").

<sup>71</sup> Andrew Garber & Ralph Thomas, *Gregoire Sworn In; GOP Holds Applause*, SEATTLE TIMES, Jan. 13, 2005, at A1.

<sup>72</sup> In addition to *Borders*, see *In re Election Contest of Coday*, 130 P.3d 809, 810 (Wash. 2006) (en banc), rejecting several challenges by voters to the validity of the election; *Wash. State Republican Party v. King County Division of Records*, 103 P.3d 725, 728 (Wash. 2004), allowing King County to recanvass certain challenged ballots; and *McDonald v. Reed*, 103

the *Borders* suit, which the Rossi camp filed in state court shortly after the manual recount result was certified.<sup>73</sup> Rossi alleged, *inter alia*, that it was impossible to determine which candidate had received the greatest number of legal votes, and that therefore the election should be declared null and void.<sup>74</sup> It was eventually proven to the court's satisfaction that 1678 illegal votes were cast in the contest, the vast majority (1401) by disenfranchised felons.<sup>75</sup> Rossi's attorneys advanced several arguments in favor of a new election or an adjustment of the final tally,<sup>76</sup> but their argument for the use of proportionate deduction<sup>77</sup> is of particular interest.

As outlined above,<sup>78</sup> traditional proportionate deduction deducts votes from each candidate's total based on the results in the precincts where the illegal votes were cast. In the *Borders* case, Rossi argued that since approximately half of the votes determined to be illegal came from Democratic-leaning King County,<sup>79</sup> a proportionate deduction analysis demonstrated that he would have prevailed "but for" the illegal votes. He urged that this evidence was sufficient to justify a new election.<sup>80</sup> At trial, Rossi presented expert testimony to support his proportionate deduction argument.<sup>81</sup> Gregoire's attorneys, for their part, argued that the use of proportionate deduction was inconsistent with Washington law<sup>82</sup> and that, in any event, Rossi's proportionate deduction evidence was unreliable.<sup>83</sup>

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P.3d 722, 723 (Wash. 2004), rejecting the "uniform standards" proposed by the Democrats for a manual recount.

<sup>73</sup> *Borders*, No. 05-2-00027-3, at 5–6.

<sup>74</sup> *Id.* at 6.

<sup>75</sup> *Id.* at 19. Other illegal votes included 19 votes by deceased voters, 6 double votes, 175 invalid provisional ballots, and 77 votes by unregistered individuals. *Id.*

<sup>76</sup> See, e.g., Petitioners' Trial Brief, *supra* note 7, at 33–35 (arguing that new election should be ordered whenever number of illegal votes exceeds margin of victory and that adjustment to vote totals would be "second best" option).

<sup>77</sup> *Id.* at 37–42.

<sup>78</sup> See *supra* notes 7–10, 51–53 and accompanying text.

<sup>79</sup> *Borders*, No. 05-2-00027-3, at 19 (finding 1678 illegal votes in total); Petitioners' Trial Brief, *supra* note 7, at 3 (alleging over 700 illegal votes from disenfranchised felons in King County).

<sup>80</sup> Petitioners' Trial Brief, *supra* note 7, at 39–42. Gregoire's attorneys offered a proportionate deduction analysis of their own, arguing that even if proportionate deduction were used, the difference would not be enough to change the result. Mike Carter, *Dems Do the Math, Say Rossi Still Loses*, SEATTLE TIMES, May 11, 2005, at B1.

<sup>81</sup> See *Borders*, No. 05-2-00027-3, at 9, 15–16 (referring to petitioner's expert witnesses Dr. Anthony Gill and Dr. Jonathan Katz as supporting deduction method).

<sup>82</sup> Washington State Democratic Central Committee's Reply in Support of Its Motion *In Limine* to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes, at 1–12, *Borders*, No. 05-2-00027-3, available at <http://www.secstate.wa.gov/elections/recount.aspx> (select "Reply in Support of the Motion *In Limine* . . ." under heading "Democratic Party Pleadings & Documents").

<sup>83</sup> *Id.* at 20–21.

Judge Bridges, in his decision in *Borders*, ruled for Gregoire and disregarded the expert evidence that Rossi had offered in support of proportionate deduction.<sup>84</sup> Bridges gave three rationales for his decision that parallel the arguments offered in academic commentary opposing the use of proportionate deduction.<sup>85</sup> First, he suggested that the use of proportionate deduction would be arbitrary.<sup>86</sup> Second, he invoked the principle of judicial restraint,<sup>87</sup> a value intertwined in this context with concerns that judicial intervention would undermine finality and the legitimacy of the electoral system.<sup>88</sup> Third, he questioned the validity of the statistical analysis on two grounds: (1) It rests on the assumption that illegal voters necessarily will act like others in their precinct;<sup>89</sup> and (2) the data available represents neither a “random or scientific” sampling nor a complete count of all the illegal votes cast.<sup>90</sup>

Though *Borders* was not the only statistics-based challenge to the Washington election,<sup>91</sup> it raised fundamental questions about the proper role of statistical analysis in close elections and has received considerable attention in the mainstream media and in academia.<sup>92</sup> The next Section more closely examines and critiques the rationales

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<sup>84</sup> *Borders*, No. 05-2-00027-3, at 20, 25.

<sup>85</sup> See *infra* notes 97, 110, 128 and accompanying text (referring to and citing commentary criticizing proportionate deduction on these grounds).

<sup>86</sup> See *Borders*, No. 05-2-00027-3, at 25 (“[A]n election such as this should not be overturned because one judge picks a number and applies a proportional deduction analysis.”).

<sup>87</sup> *Id.* at 17–18 (“[T]he judiciary should exercise restraint in interfering with the elective process . . .”).

<sup>88</sup> See *id.* at 18 (“Unless an election is clearly invalid, when the people have spoken their verdict should not be disturbed by the courts.”).

<sup>89</sup> *Id.* at 16.

<sup>90</sup> *Id.* at 15. This is a result of how the data used were acquired: Quite naturally, Rossi’s attorneys looked to find illegal votes in Gregoire-leaning precincts, like King County. See *id.* at 9; Petitioners’ Trial Brief, *supra* note 7, at 3. Gregoire’s attorneys, in turn, sought out illegal votes in Rossi-leaning precincts. *Borders*, No. 05-2-00027-3, at 9–10.

<sup>91</sup> Another case raised two novel statistical arguments. See *In re Election Contest of Coday*, 130 P.3d 809, 812, 815 (Wash. 2006) (en banc) (rejecting voter arguments that election result should be determined by averaging all three tallies); *id.* at 816 (rejecting voter argument that election result was within “margin of error” and so must be invalidated).

<sup>92</sup> See generally, e.g., Avila, *supra* note 11 (discussing election contest and reform efforts after 2004 gubernatorial election in Washington was marred by allegations of impropriety); Wang, *supra* note 15 (comparing Washington election contest to other election problems and role of *Borders* in that contest); *Figuring Out the ‘Felon Vote,’* NEWSWEEK, June 6, 2005, at 29 (discussing early *Borders* court proceeding as evidence of “bumpy” election); Eli Sanders, *Judge Dismisses Lawsuit Over Washington Election*, N.Y. TIMES, June 7, 2005, at A16 (noting that, after repeated recounts gave victory to Christine Gregoire, judge dismissed lawsuit brought by her opponent, finding insufficient proof of illegal votes).



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offered by the *Borders* court and by commentators in rejecting proportionate deduction.

*B. Critiquing the Rejection of Proportionate Deduction in Borders and the Current Legal Commentary*

The reaction to the *Borders* decision in published legal commentary has been almost universally supportive.<sup>93</sup> The rationales advanced typically trace the three concerns in the *Borders* opinion—namely, that proportionate deduction is (1) arbitrary and based on “chance” estimates; (2) an undue judicial intervention that undermines public confidence in elections; and (3) based on an incomplete statistical model.<sup>94</sup> This section takes up each of these rationales, contending that the first two are based on a misunderstanding of the situation and that the third, while persuasive, actually supports the use of CPD rather than a wholesale rejection of statistical techniques.

*1. Proportionate Deduction and “Arbitrariness”*

Arbitrariness is the first rationale that Judge Bridges offered for his decision: “[A]n election such as this should not be overturned because one judge *picks a number* and applies a proportional deduction analysis.”<sup>95</sup> Gregoire’s attorneys made the same point with different language, claiming that proportionate deduction is “speculative” and “based on chance.”<sup>96</sup> One law review article has even suggested that proportionate deduction is a form of inappropriate judicial “[g]uessing.”<sup>97</sup> There are two responses to this argument. First, while it is technically true that any statistical method will be based on some assessment of probabilities, these choices are hardly arbitrary—rather, they typically are (and are certainly meant to be)

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<sup>93</sup> See Rava & Engrav, *supra* note 25, at 564 (arguing that *Borders* properly rejected proportionate deduction as “Washingtonians’ political preferences are anything but predictable” and “Washingtonians expect that their votes, rather than a single judge’s decision, will determine electoral outcomes”); *Voting and Democracy*, *supra* note 34, at 1163–65 (acknowledging that courts, including one in *Borders*, face choice between “imperfect options,” but noting that proportionate deduction has serious problems not easily solved by incorporating demographic data); Election Law, <http://electionlawblog.org/archives/003298.html> (Apr. 20, 2005 09:56 PST) (arguing that use of statistics to reverse election would set “terrible precedent”). *But see* Huefner, *supra* note 16, at 302, 316–17 (suggesting that statistical and demographic adjustments to vote tallies “may yet hold promise”).

<sup>94</sup> See *supra* notes 85–90 and accompanying text.

<sup>95</sup> *Borders*, No. 05-2-00027-3, at 25 (emphasis added).

<sup>96</sup> Postman, *supra* note 10.

<sup>97</sup> Rava & Engrav, *supra* note 25, at 561.

made and evaluated with great care and precision.<sup>98</sup> Second, the “based on chance” argument applies equally to the use of *any* statistical method in the law, thus ignoring the fact that statistics are used as evidence in a wide variety of legal contexts,<sup>99</sup> from antitrust litigation<sup>100</sup> to voting rights cases.<sup>101</sup>

The arbitrariness argument, then, would seem to advocate that statistics (proportionate deduction or otherwise) have no place in resolving election disputes—or in any other area of the law. This “no-statistics-allowed” approach may be intuitively appealing at first glance, as it avoids any appearance that courts are tinkering with the will of the people through statistical techniques that are not fully understood by the public. Further, by leaving initial results unaltered, it may better respond to concerns about disrupting electoral finality. However, a well-known case involving the disputed 1997 Miami may-

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<sup>98</sup> See generally Kaye & Freedman, *supra* note 41, at 90–150 (discussing proper procedures and methods that statisticians should follow to ensure that statistical evidence is reliable).

<sup>99</sup> Two areas of law that often rely on statistical methods—in particular, multiple regression—are antitrust litigation and race or sex discrimination cases. See generally Michael O. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980) (surveying use of statistical evidence such as multiple regression in race and sex discrimination cases); Daniel L. Rubinfeld & Peter O. Steiner, *Quantitative Methods in Antitrust Litigation*, LAW & CONTEMP. PROBS., Autumn 1983, at 69 (analyzing courts’ use of statistical evidence in antitrust cases). For examples of antitrust cases that rely on statistical evidence, see *infra* note 100. For examples of the use of multiple regression in discrimination cases see *Hazelwood School District v. United States*, 433 U.S. 299, 307–08 (1977), noting, in a case alleging racially discriminatory hiring practices, that statistics are “an important source of proof” that “[may alone] constitute prima facie proof of a pattern or practice of discrimination,” and *Valentino v. U.S. Postal Service*, 674 F.2d 56, 70 (D.C. Cir. 1982), finding, in a sex discrimination case, that regression analysis is frequently used to “estimat[e] the discrete influence factors such as sex, experience, and education have had on determining salary level.” The use of multiple regression in discrimination cases was first suggested in a student Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 394–400 (1975).

<sup>100</sup> See, e.g., *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 564–67 (11th Cir. 1998) (finding multiple regression and other statistical techniques reliable as circumstantial evidence of price-fixing conspiracy); *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1236–38 (3d Cir. 1993) (same).

<sup>101</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 52–54, 61 (1986) (endorsing statistical analysis to prove racially polarized voting in Voting Rights Act claims); *Romero v. City of Pomona*, 883 F.2d 1418, 1423 (9th Cir. 1989) (noting that statistical methods like “exit polls, ecological regression and homogeneous precinct analysis” are acceptable means to prove existence of polarized voting in Voting Rights Act claims); *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (noting that statistical regression analyses are “clearly acceptable” means of proving racially polarized voting); see also David A. Freedman et al., *Ecological Regression and Voting Rights*, 15 EVALUATION REV. 673, 673 (1991) (analyzing “use of ecological regression in voting rights cases” in context of Los Angeles redistricting case); *infra* notes 163–71 and accompanying text (discussing use of ecological regression in voting rights cases).

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oral election shows the failings of this absolutist view. In *In re Protest of Election Returns*,<sup>102</sup> Joe Carollo challenged the results of an election in which he narrowly failed to secure a majority over his chief rival, Xavier Suarez, in a run-off election.<sup>103</sup> Carollo fell just 160 votes short of outright victory,<sup>104</sup> but there were suspiciously unfavorable results in the absentee ballots: Though Suarez won only 46.8% of the total vote, he managed to win almost 61.5% of the absentee votes cast.<sup>105</sup> Relying on “uncontradicted statistical evidence” that fraud was the only conceivable explanation for the sharp deviation between the absentee ballots and the other votes, the court determined that Carollo had won the election.<sup>106</sup> Without the aid of statistical analysis, the court would have been unable to prove any wrongdoing and thereby ensure that Carollo received his deserved victory.<sup>107</sup> The “no statistics allowed” approach would thus have resulted in an obvious fraud being perpetrated on the people of Miami. *In re Protest of Election Returns*, then, is powerful support for the notion that statistics should have some role in election disputes and that sometimes the only way for a court to achieve an accurate result is to rely on statis-

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<sup>102</sup> *In re Protest of Election Returns & Absentee Ballots in Nov. 4, 1997 Election*, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) [hereinafter *In re Protest of Election Returns*].

<sup>103</sup> *Id.* at 1171–72.

<sup>104</sup> *Id.* at 1172 n.2.

<sup>105</sup> *Id.* at 1171–72. The composite results had 21,854 votes for Carollo and 20,602 for Suarez. *Dade Results*, MIAMI HERALD, NOV. 5, 1997, at 1B. Among absentee ballots, 2914 went for Suarez, while 1660 went for Carollo. Rosa Townsend, *Undaunted, Carollo on Quest to Prove Miami Vote Fraud*, MIAMI HERALD, NOV. 18, 1997, at 28A.

<sup>106</sup> *In re Protest of Election Returns*, 707 So. 2d at 1172, 1175. There was also some direct evidence of fraud among absentee ballots, such as falsely witnessed ballots. *Id.* at 1172. The means that the judge chose to achieve this goal—invalidating all the absentee ballots and determining the winner based solely on the machine vote, *id.* at 1174—are troubling. If instead the judge had been open to the use of statistical techniques like CPD to adjust the tally, a more equitable result could have been reached without resort to a blanket invalidation that surely disenfranchised legitimate voters. See *infra* Part III.D.3 for application of CPD to *In re Protest of Election Returns*.

<sup>107</sup> It is true that the court might have relied on the direct evidence of fraud to show that hundreds of illegal absentee ballots were cast, *id.* at 1172, but then it would have been faced with a situation like that in *Borders*, where there was a known number of illegal votes, greater than the margin needed to secure a different result, but no direct proof of for whom these illegal votes were cast. If the court took a “no statistics allowed” approach, it would have been unable to use proportionate deduction to award the election to Carollo. In a direct evidence jurisdiction, Carollo would have needed 160 illegal voters (who, given the fraud, likely did not even exist) to testify that they had voted for Suarez; in an elimination of uncertainty jurisdiction, the court would have had to order a new election. Neither of these possibilities would have awarded the election to Carollo, as the court ultimately did in *In re Protest of Election Returns*.

tics, despite judicial fear of appearing to alter results “based on chance.”<sup>108</sup>

## 2. *Proportionate Deduction and Judicial Restraint*

Judge Bridges’s second rationale sounds in the traditional virtue of judicial restraint: “Unless an election is clearly invalid, when the people have spoken their verdict should not be disturbed by the courts.”<sup>109</sup> Some commentators, too, have opposed proportionate deduction on judicial activism grounds, arguing that voters, and not judges, should decide elections.<sup>110</sup> This argument misses the point. Both detractors and supporters of proportionate deduction agree that the voters should decide the election—what they disagree on is *how* the courts should ascertain who has in fact received the most votes. A careful use of proportionate deduction is an honest attempt by a judge to determine the will of the people as accurately as possible *for the very purpose* of effectuating the democratic mandate. It is not a judicial fiat overruling the voters.<sup>111</sup> For a judge simply to “throw up [her] hands”<sup>112</sup> and let the original result stand is no less an act of judicial activism—indeed, it arbitrarily gives the election to the candidate who was lucky enough to be ahead in the first final count, regardless of who the true winner might be.<sup>113</sup> The failings of this approach are especially apparent in a case like the 2004 Washington gubernatorial election, where the two counts prior to the final count had Rossi, not Gregoire, as the victor.<sup>114</sup>

A second response to the judicial restraint argument notes that proportionate deduction has a long history of being used by courts<sup>115</sup>

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<sup>108</sup> See also *infra* Parts III.A, III.C.1 (explaining existing procedural protections against use of unreliable statistical evidence).

<sup>109</sup> *Borders v. King County*, No. 05-2-00027-3, slip op. at 18 (Wash. Super. Ct. June 24, 2005).

<sup>110</sup> *E.g.*, Rava & Engrav, *supra* note 25, at 564 (“[Washington voters] expect that their votes, rather than a single judge’s decision, will determine electoral outcomes.”).

<sup>111</sup> *Cf.* Wang, *supra* note 15, at 404–05 (arguing that judges in election disputes should seek “to ensure that the will of the people is accurately and fairly reflected, not to decide the election themselves”).

<sup>112</sup> *Id.* at 404.

<sup>113</sup> *Cf.* Dalton Conley, Op-Ed., *The Deciding Vote*, N.Y. TIMES, Nov. 6, 2006, at A21 (“[In extremely close elections,] we could count and recount, we could examine every ballot four times over and we’d get—you guessed it—four different results. . . . Ever count out a large jar of pennies? And then do it again? And then have a friend do it?”).

<sup>114</sup> See *supra* notes 63–70 and accompanying text.

<sup>115</sup> See, *e.g.*, *Ellis ex rel. Reynolds v. May*, 58 N.W. 483, 488 (Mich. 1894) (approving deduction of illegal votes from candidates’ totals based on results in precinct in which they were cast); *Heyfron v. Mahony*, 24 P. 93, 95–96 (Mont. 1890) (same).

and continues to be used in several jurisdictions.<sup>116</sup> It is thus difficult to characterize proportionate deduction as an unprecedented act of judicial interference. A recent Arizona Supreme Court case, *Huggins v. Superior Court*,<sup>117</sup> underlines this point and offers a model of how judges, by carefully articulating their rationales, can employ proportionate deduction without appearing to be “activist.”<sup>118</sup>

The dispute in *Huggins* arose in the context of a Democratic primary for Navajo County Attorney, in which the final tally placed the purported winner ahead of his challenger by eight votes out of 7178 cast.<sup>119</sup> At trial it was determined that at least sixteen illegal votes had been cast, mostly by registered independents who were not entitled to vote in a Democratic Party primary.<sup>120</sup> Presented with this now-familiar situation, the court in *Huggins* first dismissed the direct evidence approach, arguing that forcing Huggins to prove how the illegal votes were cast by direct testimony would encourage fraud, create unfairness to the challenger,<sup>121</sup> and potentially violate the commitment to ballot secrecy;<sup>122</sup> in addition, it noted that the testimony of illegal voters would be “highly suspect.”<sup>123</sup> Next, the court considered the elimination of uncertainty approach, but concluded that a second election would be costly in both administrative expense and—given that the electorate in the second election would be different from the first—in the unfairness it could create for particular candidates (e.g., those with support among less active voters who would be unlikely to turn out in a special election).<sup>124</sup>

Finally, while recognizing that proportionate deduction may not always lead to the correct result, the court chose to apply it as the best available option:

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<sup>116</sup> At least eight state supreme courts have approved some form of proportionate deduction to subtract illegal votes. *Voting and Democracy*, *supra* note 34, at 1160.

<sup>117</sup> 788 P.2d 81 (Ariz. 1990).

<sup>118</sup> The charge of judicial “activism,” of course, is often believed to be little more than a conclusory label for judicial decisions that one dislikes. See Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275–76 (2002) (noting that charge of judicial activism, “while clearly pejorative, is generally empty”); Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1444 (2004) (“[B]y itself, the label [of judicial activism] carries little more than a pejorative connotation.”).

<sup>119</sup> *Huggins*, 788 P.2d at 82.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 83 (noting that, under direct evidence standard, “as the amount of illegal voting escalates, the likelihood of redressing the wrong diminishes”). This burden on the challenger is compounded by the fact that illegal voters may choose to assert their Fifth Amendment right against self-incrimination and thereby refuse to testify at all. *Id.*

<sup>122</sup> *Id.* at 84.

<sup>123</sup> *Id.* at 83.

<sup>124</sup> *Id.* at 84.

The problem we confront is practical; the solution we choose is “workable.” . . . While proration is imperfect, we lack the luxury of perfection, and proration strikes us as a sensible [choice] . . . .

[T]hough proration leaves some doubt that we have discovered the true winner, the other options fail to bring us nearer to that mark. The practical impact of [the direct evidence rule], with its virtually impossible burden on the challenger, is to let illegal votes count. The [elimination of uncertainty approach] invalidates a multitude of first election legal votes, [and] passes the choice to the inevitably different electorate . . . . Proration, by comparison, has the virtue of neutrality; and in election contests, neutrality is a major constituent of fairness.<sup>125</sup>

Such a careful and pragmatic approach hardly smacks of judicial activism; rather, it seems the picture of a court attempting to promote fairness and to enact the will of the people.<sup>126</sup>

### 3. *Proportionate Deduction and Incomplete Statistical Models*

Judge Bridges’s final rationale attacked proportionate deduction on its own terms: “[Proportionate deduction] depend[s] on the assumption, without any collateral indication of validity, that illegal voters in a precinct vote for a candidate with a probability equal to the overall distribution of votes in the precinct . . . .”<sup>127</sup> Legal commentators have concurred with this sentiment, noting that “group voting behavior can often confound [the proportionate deduction results].”<sup>128</sup> This objection, often overlooked by courts applying proportionate deduction,<sup>129</sup> will be quite powerful if the facts of the case give reason to believe that illegal voters behave differently, on average, than typical voters in their districts.

Even in such a case, however, the fact that the illegal votes may be systematically biased does not mean that a court must resort to simply approving the original result. Often, the same factors that give

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<sup>125</sup> *Id.* at 86.

<sup>126</sup> It should be noted that the court in *Huggins* was presented with a less controversial case than *Borders* in that the proportionate deduction analysis, after it was applied, did not alter the winner of the race. *Id.* at 86. In *Borders*, should the judge have accepted proportionate deduction as a valid method, he would have had to consider competing models by the plaintiff and defendant, one of which could have potentially changed the result. See *supra* note 80 and accompanying text. In dicta, Judge Bridges suggested that in the hypothetical case that proportionate deduction was “an accepted theory or a valid technique”—which he believed it was not—he would be inclined to find Gregoire’s model more convincing. *Borders v. King County*, No. 05-2-00027-3, slip op. at 20–21 (Wash. Super. Ct. June 24, 2005).

<sup>127</sup> *Id.* at 16.

<sup>128</sup> *Voting and Democracy*, *supra* note 34, at 1163.

<sup>129</sup> *Id.* at 1164.

rise to the concern of bias provide information that a statistician can employ to deduce more accurately how the illegal votes were cast. While traditional proportionate deduction allows only a single factor (precinct) to be considered, complete proportionate deduction can incorporate many confounding factors into its statistical models. In *Borders*, for example, the vast majority of illegal votes were cast by disenfranchised felons;<sup>130</sup> given information about the typical voting preferences of disenfranchised felons in Washington,<sup>131</sup> a statistician would be able to improve upon a model based simply on precinct data and thereby enhance the power of the proportionate deduction technique. Similarly, in *Huggins*, the fact that the illegal votes were cast by registered independents might suggest that they would disproportionately favor the more moderate candidate.<sup>132</sup>

In a related attack, Judge Bridges raised concerns about the data set that the Rossi camp used, noting it was neither a “complete census” of all the illegal votes nor a “random or scientific sample of illegal votes.”<sup>133</sup> Though this point is a persuasive reason to reject the particular model advanced by Rossi in *Borders*, it does not provide a rationale for rejecting the proportionate deduction method itself.<sup>134</sup> Rather, it is easy to imagine that a challenger could either attempt to survey all the illegal votes cast, as will be possible in many cases,<sup>135</sup> or,

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<sup>130</sup> See *supra* note 75 and accompanying text (stating that 1401 out of at least 1678 illegal votes were cast by disenfranchised felons). Washington’s constitution disenfranchises “all persons convicted of infamous crime.” WASH. CONST. art. VI, § 3. An “infamous crime” is statutorily defined as any act punishable by death or imprisonment in a state penitentiary. *Id.* § 29A.04.079. The denied franchise, as one of many suspended civil rights, can only be restored under certain conditions. WASH. REV. CODE §§ 9.94A.637, 9.92.066, 9.96.050 (2006). Many former felons, presumably, were unaware of this legislative scheme and assumed that they could vote. Others may have mistakenly believed that their franchise had been restored under one of the various statutory exceptions.

<sup>131</sup> Current data suggest that disenfranchised felons are more likely to vote Democratic, which would strengthen Rossi’s arguments. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 786–87 (2002) (finding that disenfranchised felons show “strong Democratic preferences” in elections studied).

<sup>132</sup> This is, of course, an assumption. To rely upon this fact in a model used at trial, the proponent would have to show—e.g., through polling data—that independent voters indeed typically favored the moderate candidate. This would be a prerequisite to attain the reliability that standards of evidentiary admissibility require. See *supra* note 55 and accompanying text (describing standards for admissibility of scientific evidence).

<sup>133</sup> *Borders v. King County*, No. 05-2-00027-3, slip op. at 15 (Wash. Super. Ct. June 24, 2005).

<sup>134</sup> Though one might try to read Judge Bridges’s opinion as simply rejecting Rossi’s particular model as unreliable—and not as rejecting the method of proportionate deduction itself—he explicitly reaches the legal conclusion that proportionate deduction is neither “an accepted theory [n]or a valid technique.” *Id.* at 20.

<sup>135</sup> A complete survey will be particularly easy in elections with a relatively small number of illegal votes (e.g., fewer than a couple hundred) and total voters (e.g., fewer

if necessary, to consider the characteristics of a representative sample of illegal votes. Since a representative sample is a standard element of statistical methodology,<sup>136</sup> it will be a minimum requirement for any CPD model that is admitted into evidence.<sup>137</sup>

Thus, the claim that the statistical models employed must be complete—though it may justify the result in *Borders*—does not offer a compelling reason to reject proportionate deduction altogether. Instead, this third rationale leads naturally to the solution of complete proportionate deduction, which employs statistical techniques only if they are methodologically valid; it thereby effectively updates traditional proportionate deduction for a more statistically sophisticated era.

### III

#### THE SOLUTION OF COMPLETE PROPORTIONATE DEDUCTION

This Part more fully fleshes out the proposal that courts accept complete proportionate deduction as a valuable tool in solving election disputes. After first noting some caveats of the CPD approach, I provide an overview of the advantages of CPD relative to other solutions, arguing that CPD is able to balance the competing concerns of accuracy, finality, and legitimacy better than any of its competitors. I next anticipate and answer several potential objections to my proposal. Lastly, I explore several issues relating to the practical implementation of CPD.

##### A. *Caveats Associated with Complete Proportionate Deduction*

At the outset, it is important to note a few caveats concerning the CPD method. First, CPD will be of minimal value when so little information is known about the illegal voters that their voting tendencies

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than ten thousand). These sorts of elections appear to constitute the majority of cases in which the proportionate deduction issue arises. *See, e.g.*, *Huggins v. Superior Court*, 788 P.2d 81, 82 (Ariz. 1990) (involving sixteen illegal votes and about 7178 total votes); *DeMartini v. Power*, 262 N.E.2d 857, 857 (N.Y. 1970) (involving 136 invalid votes and 5250 total votes); *Ippolito v. Power*, 241 N.E.2d 232, 233 (N.Y. 1968) (involving 101 invalid votes and 2827 total votes). A case like *Borders*—involving thousands of illegal votes and millions of total votes—is quite exceptional; proportionate deduction was only an issue in that case due to the uncannily small (less than 0.0093%) margin of victory. *See supra* notes 63–64 and accompanying text.

<sup>136</sup> *See* Kaye & Freedman, *supra* note 41, at 90 (noting, in judicial reference manual for scientific evidence, basic statistical principle that “[i]nferences from the part to the whole are justified only when the sample is representative”).

<sup>137</sup> Since representativeness is necessary both for general acceptance in the field and reliability, it will be required under both *Daubert* and *Frye*. *See supra* note 55 (explaining standards for admissibility of scientific evidence).



cannot be determined with reasonable accuracy.<sup>138</sup> In such a case, CPD models offered into evidence can and should be rejected by a judge as unreliable.<sup>139</sup> Whether the model proposed by the challenger is reliable will be a factual question, taking into account a variety of factors—for example, the existence of bias-creating variables that are not accounted for in the model, reliance on statistically insignificant results, or conclusions based on an incomplete survey or an unrepresentative sample of the illegal votes.<sup>140</sup> If information is too scant or uncertain, any CPD model will be rejected as unreliable, and judges can rely instead on other methods for resolving the dispute.

Second, CPD may be inappropriate in cases involving fraud or the suspicion of fraud, unless a model is able to take this factor into account. Certainly, when one candidate has manufactured the illegal votes to steal an election, it would be absurd to deduct the illegal votes based on simple precinct or demographic data without factoring in the effect of the fraud.<sup>141</sup> Of course, a sufficiently sophisticated use of CPD will account for this,<sup>142</sup> but it should be noted that the fraud situation is distinct from a case like *Borders* or *Huggins*, where there is no reason to suspect willful manipulation as a source of bias.<sup>143</sup>

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<sup>138</sup> By “reasonable accuracy,” I simply mean sufficient certainty that a statistical model may be admitted as reliable under the *Daubert* standard. Models will be rejected as unreliable when the data on which the model rests have been collected improperly, *see generally* Kaye & Freedman, *supra* note 41, at 90–104 (discussing ways in which data collection or survey design can taint statistical models), the conclusions are statistically insignificant, *see generally id.* at 115–33 (discussing concepts of standard error and statistical significance as applied in legal context), or there is some reason to believe that the illegal votes are biased in a way that is not or cannot be accounted for in the model, *see generally* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra* note 41, at 179, 191–200 (discussing proper interpretation of multiple regression models).

<sup>139</sup> *See supra* note 55 and accompanying text (outlining the modern *Daubert* standard for scientific evidence). Typically, the judge will conduct the reliability inquiry pursuant to her *Daubert* “gatekeeping” function, which determines admissibility. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (discussing judge’s “gatekeeping” role). Once the model is admitted into evidence, the trier of fact, as part of the broader factual inquiry, will determine how much weight to accord it and may consider other factors, in addition to simple reliability, such as the credibility of the experts or the statistical model’s consistency with other evidence. *See generally* Kaye & Freedman, *supra* note 41, at 86 (discussing distinction between weight and admissibility).

<sup>140</sup> *See supra* note 138 and accompanying text (discussing potential ways that statistical models can be unreliable).

<sup>141</sup> Evidence of fraud would imply that a greater-than-expected percentage of the illegal votes were cast for the candidate suspected of fraud, leading (properly) to the deduction of a greater number of votes from that candidate’s total in the CPD analysis.

<sup>142</sup> *See infra* Part III.D.3 (applying CPD to *In re* Protest of Election Returns, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998)).

<sup>143</sup> *See supra* notes 72–83, 117–26 and accompanying text (discussing *Borders* and *Huggins*).

### B. *The Advantages of Complete Proportionate Deduction*

If neither of the above caveats applies, CPD offers an appealing solution to the problem of illegal votes in contested elections. First, and most importantly, it avoids many of the serious pitfalls of other approaches. The direct evidence approach operates, in effect, to deny the challenger any meaningful remedy—despite the real possibility that he may have lost due to illegal votes<sup>144</sup>—while raising thorny questions concerning the Fifth Amendment and the integrity of the secret ballot.<sup>145</sup> The elimination of uncertainty approach needlessly orders costly new elections—even when there can be no real doubt about the outcome<sup>146</sup>—that unfairly place the decision in the hands of changed electorates.<sup>147</sup>

If, as is often said, this type of election dispute involves a choice between the competing policy objectives of achieving finality, accurately reflecting the will of the electorate, and protecting the legitimacy of the electoral system,<sup>148</sup> I would argue that CPD strikes the most moderate and appropriate balance of those values. Direct evidence, at one extreme, forcefully advances the policy of finality in elections, but at a high cost: It sacrifices the goal of enacting the people's will, the integrity of the secret ballot, and the fundamental legal principle that a party who has suffered a wrong deserves a remedy. The elimination of uncertainty approach—though it promotes legitimacy in the electoral process by never installing a suspect “winner”—unjustifiably disregards the concern of finality. Ordering a new election has significant costs of delay and interim uncertainty, and there is no guarantee that a second election will yield a conclusive result. For this reason, new elections should not be ordered in every case involving a number of illegal votes that exceeds the margin of

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<sup>144</sup> As an example, consider a variation on the facts of *Huggins*, in which the purported winner was ahead by only 8 votes out of 7178 cast. *Huggins v. Superior Court*, 788 P.2d 81, 82 (Ariz. 1990). Assume that 200 illegal votes were uncovered—not an unusual number for an election of that size. *Cf. DeMartini v. Power*, 262 N.E.2d 857, 857 (N.Y. 1970) (involving 136 invalid votes out of 5250 cast). In such a case, the Finkelstein and Robbins formula (itself a conservative estimate) yields nearly a 30% chance that the challenger was the true victor:  $8 \cdot ((7178 - 200) / (5000 \cdot 200))^{1/2} \cdot 0.56$ , translating to 29% uncertainty. See Cumulative Normal Probability Tables (Z-Values), *supra* note 32 (describing translation of “Z-Values” using probability tables); see also Finkelstein & Robbins, *supra* note 13, at 242–43 (deriving and stating formula applied in this example).

<sup>145</sup> See *supra* note 49 and accompanying text.

<sup>146</sup> See *supra* note 40 and accompanying text.

<sup>147</sup> See *Huggins*, 788 P.2d at 84 (explaining why electorate will be different). I have excluded the “intuitive assessment” from this discussion, since it is no longer common and suffers from troubling inconsistencies. See *supra* Part I.B.1 (discussing “intuitive” approach).

<sup>148</sup> See *supra* Part I.A (explaining values of accuracy, finality, and legitimacy).

victory. Moreover, elimination of uncertainty does not operate to enact the expressed will of the electorate, since a second election invariably involves a changed set of voters.

CPD falls comfortably between these two extremes. It promotes accuracy foremost, seeking, through all available evidence, to reach a final tally that most nearly reflects the intention of legal voters on Election Day.<sup>149</sup> But CPD does not completely sacrifice finality or legitimacy to achieve this objective. Indeed, it promotes finality far more effectively than the elimination of uncertainty approach, in that the dispute will be conclusively resolved at the end of the legal challenge. Furthermore, in the majority of cases, an application of CPD will not overturn the prior election result,<sup>150</sup> and concerns about endless legal battles can be answered through procedural means, such as statutes of limitations or expedited trials.<sup>151</sup> CPD may promote legitimacy less effectively than would elimination of uncertainty—though this may be a matter more of misperception than of substance<sup>152</sup>—but it is surely more effective, and arguably more legitimate, than a method (like direct evidence) that merely codifies the challenged result and denies any meaningful remedy.<sup>153</sup>

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<sup>149</sup> Indeed, if one believes that the role of the courts in election disputes is to award the election to the person who actually received the most votes, CPD will, in theory, reach the correct result more often than its competitors. The elimination of uncertainty approach leaves the result to a changed electorate, introducing many new factors (e.g., which candidate has the most support among more active voters) that, especially in a close election, might make the second election's result different from the first's. Direct evidence, in codifying the original tally, will do better, but will reach an incorrect result in the small number of cases where illegal votes actually made the difference. CPD, by accounting for this final possibility, should most nearly trace the actual result. Of course, this will not be true if courts apply an inaccurate model in the course of applying the CPD analysis. *See supra* notes 138–40 and accompanying text (discussing dangers of unreliable CPD models).

<sup>150</sup> This will be the case since the challenger, having lost in the initial count, will always face an uphill battle when a CPD model is used. In order to win, he must show that the illegal votes went disproportionately for the purported winner to an extent severe enough to overcome the initial deficit. Since the illegal votes will on average follow the same trend as the overall tally (in which the challenger lost), in most cases this will not be possible.

<sup>151</sup> *See infra* Part III.C.2 (discussing these methods as ways to achieve finality while using CPD).

<sup>152</sup> If the public learns that CPD involves judges carefully ascertaining who actually won the most votes—rather than judges overruling voters' democratically expressed preferences—CPD may actually increase public faith in the electoral process. *See supra* notes 109–14 and accompanying text (arguing that viewing proportionate deduction as judicial activism misunderstands its purpose).

<sup>153</sup> *See supra* note 50 and accompanying text (discussing practical impact of direct evidence standard). As one would expect, the *Borders* result, and the 2004 Washington gubernatorial election in general, inspired much despair and cynicism about the electoral process. *See, e.g.*, Editorial, *Best Opportunity for Election Reforms Is Now*, NEWS TRIBUNE (Tacoma, Wash.), Feb. 24, 2005, at B6 (arguing for reform in light of “public outcry” over election “debacle”); Stuart Pennington, Letter to the Editor, *Incompetence*

In sum, CPD, while avoiding the problems of the direct evidence and elimination of uncertainty approaches, strikes an advantageous balance that promotes accuracy—along with finality and legitimacy—in election results. The next Section answers some potential objections to the CPD proposal.

### C. *Objections to Complete Proportionate Deduction*

There are several objections to CPD that should be addressed before implementation of the proposal can be seriously considered. In my critique of the *Borders* decision, I have already addressed two objections: arbitrariness and judicial activism.<sup>154</sup> Though this analysis was done in the context of traditional proportionate deduction, it is transferable to CPD and I will not repeat it here. This Section anticipates and answers some additional objections that are particular to CPD.

#### 1. *Haphazard Uses of CPD and Judicial Expertise*

One potential objection is that CPD's assumptions will not be satisfied in many cases—i.e., there may not be enough information known about the illegal voters to determine their average preferences with reasonable certainty. In such a case, CPD's advantage in accuracy may be lost, and application of a strict standard like the direct evidence rule may lead to the correct result more often than the use of an ill-informed and haphazard CPD analysis. I have already explained how typical standards for the admissibility of scientific evidence should prevent such models from being considered,<sup>155</sup> but it is also worth noting that the adversarial process will provide additional protection. In the first instance, an opponent of a CPD model may challenge its reliability at a preliminary hearing conducted to determine the model's admissibility.<sup>156</sup> If the challenger's model is admitted as evidence, the purported winner will then have the opportunity to attack the model's veracity at trial or to present his own competing statistical model. Thus, both judges and the adversarial process will provide checks against unreliable CPD models.

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*Justifies Calls for New Election*, SEATTLE POST-INTELLIGENCER, Jan. 2, 2005, at F3 (“I just don't have any faith in the process [after the 2004 election].”).

<sup>154</sup> See *supra* Parts II.A, II.B.

<sup>155</sup> See *supra* note 55 and accompanying text (explaining that scientific evidence is subject to heightened standards of admissibility and must be methodologically valid and reliable to be admitted).

<sup>156</sup> See Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133, 1135–70 (1999) (describing mechanics of “*Daubert* hearings” used to determine admissibility).

A related concern is that, given the considerable statistical nuance involved, judges will be ill-equipped to decide between the competing models advanced by a challenger and his adversary.<sup>157</sup> This concern—common to almost any case involving scientific evidence—is mitigated by the use of expert testimony, or even neutral court experts,<sup>158</sup> to sort out the statistical battles.<sup>159</sup> In any event, the problem of judicial expertise is no more serious in election disputes than in any of the myriad other contexts—including the closely analogous case of voting rights disputes—in which courts regularly allow complicated forms of statistical evidence to be presented.<sup>160</sup>

## 2. *Finality Concerns*

A second objection notes that CPD undermines the important virtue of finality in election results. Clearly, allowing drawn-out legal battles to continue months after the purported winner has been installed into office is not ideal—the uncertainty that surrounds the installed winner may cast a pall over the legitimacy of government, inhibiting its efficient functioning. It is also possible that a losing candidate may use the threat of spurious election challenges to extract political concessions. These concerns, though serious, can be answered through narrower remedies than the wholesale rejection of CPD—for example, a statute of limitations for bringing and resolving election challenges or severe sanctions for nonmeritorious claims. Moreover, CPD will often be more time-efficient than the alternative options: Elimination of uncertainty requires the time-consuming process of a new election, while the direct evidence standard (at least in theory) potentially requires hundreds of witnesses to appear in court to testify about their invalid votes.

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<sup>157</sup> *Voting and Democracy*, *supra* note 34, at 1165 (explaining that proportionate deduction incorporating demographic data “would be difficult for courts . . . because parties would likely present conflicting evidence” and “judges would have little experience to guide them in applying such data”).

<sup>158</sup> See FED. R. EVID. 706 (providing for use of court-appointed experts).

<sup>159</sup> The Supreme Court, in articulating the *Daubert* standard, recognized and dismissed the concern that judges lacked expertise to perform their gatekeeping function. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993) (“[Our test] entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid . . . . We are confident that federal judges possess the capacity to undertake this review.”).

<sup>160</sup> See *supra* notes 99–101 (reviewing use of statistical evidence in antitrust, employment discrimination, and voting rights cases).

### 3. Normative Issues

Despite the real possibility that statistical methods like CPD can improve the accuracy of election results, some may consider such methods suspect on normative grounds. Supporters of this view find it troubling to make any inferences about voter behavior based on aggregate group voting data; it should be impermissible, it is argued, for a judge to infer anything about my vote based on the votes of my neighbors or those who share my party affiliation, or any other similar characteristic.<sup>161</sup> In particular, the use of race and gender in such models may be suspect for normative or constitutional reasons.<sup>162</sup>

An initial response to this argument notes that a CPD model, by its statistical nature, never makes any conclusions about the votes of a particular individual. Definitive conclusions about a single voter's behavior based on that of similarly situated voters is neither statistically legitimate nor politically tolerable. Instead, CPD reaches conclusions about *groups* of voters based on the behavior of members of those groups. In other words, CPD does not claim that any illegal voter in particular voted for the Democrat (because, for example, he is a disenfranchised felon). Instead, it reasons that of a certain set of illegal votes cast by disenfranchised felons, a large proportion, in all likelihood, went Democratic.

Moreover, the allegedly impermissible inference used in CPD is exactly the type of inference that is routinely made in Voting Rights

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<sup>161</sup> Cf. Rava & Engrav, *supra* note 25, at 564 (“[T]he popular will resists easy categorization and uniform allegiance to any particular political grouping.”).

<sup>162</sup> On the normative side, some legal scholars have argued that government should eschew using any racial distinction in favor of “colorblindness.” See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (arguing that any discrimination, including efforts to benefit disadvantaged groups, is immoral and inherently wrong); cf. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”). Others maintain that race-conscious methods are appropriate in certain situations, as when alleviating prior discrimination. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 *STAN. L. REV.* 1, 16 (1991) (arguing that nonrecognition of race by government is inadequate response to racism and perpetuates racial subordination).

As a legal matter, race-based redistricting plans have received considerable scrutiny from the Supreme Court. See *Shaw v. Reno*, 509 U.S. 630, 644, 647 (1993) (applying strict scrutiny to allegedly race-based gerrymandering scheme and noting that state should not assume that voters of same race “think alike, share the same political interests, and will prefer the same candidates at the polls”); see also *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2618 (2006) [hereinafter *LULAC*] (noting that state cannot assume that members of single race will vote alike and must “account for the differences between people of the same race”). But see *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 161 (1977) (holding that racial criteria may be used in redistricting plan). Full consideration of these issues, which overlap with the extensive literature on the appropriateness of affirmative action and other race-conscious government programs, is beyond the scope of this Note.

Act cases—specifically in vote-dilution claims.<sup>163</sup> In such cases, a group of minority voters makes a claim that it has a decreased opportunity to participate in the political process<sup>164</sup> due to, for example, discriminatory districting. The remedy typically sought is a redrawing of district lines to ensure minority representation.<sup>165</sup> Under the standard set forth by the Supreme Court in *Thornburg v. Gingles*,<sup>166</sup> the plaintiff group must demonstrate that it is “politically cohesive” in order to succeed on a vote-dilution claim.<sup>167</sup> This requirement raises an evidentiary problem for the plaintiff: Though it can show that minority candidates have not been successful vis-à-vis white candidates in districts dominated by whites, how can it show that the result was due to racially polarized voting rather than other factors, such as political ideology?<sup>168</sup> Typically, plaintiffs in this situation rely on a statistical technique known as “ecological regression,” which assumes that voting preferences within a district are determined by race and which models the intensity of this racial preference against the available data (e.g., how the results in each district vary based on the percentage of minority voters).<sup>169</sup> Such models are commonly accepted as evidence in these voting rights cases<sup>170</sup> even though their explicit purpose is “to make inferences about individual voting behavior . . . from aggregated voter precinct data.”<sup>171</sup> Though CPD arises in a dif-

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<sup>163</sup> See generally Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–53 (1992) (discussing development of racially-polarized voting dilution inquiry); Daniel L. Rubinfeld, *Statistical and Demographic Issues Underlying Voting Rights Cases*, 15 EVALUATION REV. 659 (1991) (surveying issues arising in use of ecological regression in voting rights cases).

<sup>164</sup> See 42 U.S.C. § 1973(b) (2000) (“A violation . . . is established if, based on the totality of circumstances, it is shown that . . . members [of a protected group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”).

<sup>165</sup> See, e.g., *LULAC*, 126 S. Ct. at 2614–19 (involving vote-dilution challenge to congressional redistricting in Texas); *Garza v. County of L.A.*, 918 F.2d 763, 765–66 (9th Cir. 1990) (involving vote-dilution claim seeking to redistrict Los Angeles County Board of Supervisors to ensure Hispanic representation).

<sup>166</sup> 478 U.S. 30 (1986).

<sup>167</sup> *Id.* at 51. This is one element of the Court’s three-part test. The minority group must also show that it is sufficiently numerous and geographically cohesive to constitute the majority of some possible district and that the majority community votes as a bloc to prevent the election of minority candidates. *Id.* at 50–51.

<sup>168</sup> For example, imagine that in a district that is 80% white and 20% black, the white candidate received 80% of the vote and the black candidate 20%. How can one show that this result is due to people voting along racial lines (whites voting 100% for the white candidate, blacks voting 100% for the black candidate), and not due to each group in the district voting 80%/20% in favor of the white candidate?

<sup>169</sup> See Rubinfeld, *supra* note 163, at 665–66 (detailing use of ecological regression to show political cohesion of racial groups).

<sup>170</sup> *Id.* at 659, 662.

<sup>171</sup> *Id.* at 665.

ferent context, the analogy to voting rights cases suggests that the inferences that CPD makes should not be considered per se impermissible—especially when they are supported by rigorous statistical evidence.

#### 4. *Gaming Incentives*

Some may worry that CPD could create ex ante incentives for illegal voters to game the system and “vote twice.” For example, a Republican-supporting disenfranchised felon, aware that the data suggest that former felons lean Democratic on average,<sup>172</sup> may choose to vote illegally, hoping that his action will not only count as one Republican vote, but also, in the event that CPD is applied, cause a deduction to be taken from the Democrat’s total. Though possible, this scenario is unlikely: Given that extremely close elections like the 2004 Washington gubernatorial election are rare events, the incentive (especially if paired with penalties for illegal voting and mechanisms that prevent illegal votes from being cast in the first place) is likely to be weak. Further, such “gaming” incentives are more readily available under a direct evidence standard, where a devious voter may choose to lie under oath about his vote.<sup>173</sup>

#### 5. *Too Little Benefit for the Cost?*

Lastly, one may argue that the accuracy gained by the use of CPD is not enough to justify judicial intervention and the associated cost of decreased finality. This critique accepts the inadequacy of the direct evidence and elimination of uncertainty approaches, but argues against judicial intervention altogether. Since these close elections are essentially “toss-ups,” the argument goes, they should be permitted to stand, free of any judicial involvement. Thus, the uncertainty and delay created by even a principled judicial resolution like CPD outweigh the benefits of providing a more accurate result.

The first response to this argument, alluded to above, is that judicial abdication carries its own serious costs.<sup>174</sup> Letting the initial result stand finalizes a result that may or may not be the correct one, potentially leading to decreased governmental legitimacy if the public perceives an unfair result or an indifferent judiciary. A second response appeals to one of the basic principles underlying the American legal

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<sup>172</sup> See Uggen & Manza, *supra* note 131, at 786–87 (suggesting that disenfranchised felons lean Democratic politically).

<sup>173</sup> See Huggins v. Superior Court, 788 P.2d 81, 83 (Ariz. 1990) (discussing incentives for illegal voters to lie if called to testify).

<sup>174</sup> See *supra* text accompanying notes 112–14 (arguing that judicial abdication is inadequate response to cases like *Borders*).



system: A wrong suffered should have a remedy.<sup>175</sup> In many of these cases, there is a significant possibility that the challenger is the true winner.<sup>176</sup> To deny the challenger any opportunity to state and prove his case is more than simply unfair; in the election context, it also seems undemocratic.

Notwithstanding these arguments, if one believes finality to be the paramount concern in election disputes, the costs of CPD may not be worthwhile. CPD undoubtedly places a high value on accuracy, which may be justified by the fundamental nature of the right to vote and to have one's vote counted.<sup>177</sup> Ultimately, choosing a remedy for the problem of illegal votes in contested elections is a policy choice among competing values<sup>178</sup> and reasonable people may disagree on the appropriate balance.

#### D. Complete Proportionate Deduction in Practice

The goal of this Note has been to make a sustained legal and policy-oriented argument for CPD as a solution to disputes about illegal votes. As a result, I have largely avoided issues of practical implementation. Though I do not attempt to treat all potential pragmatic concerns here, this final Section explores a few broad issues related to how CPD might be applied in practice.

##### 1. Sources of Data for CPD

An initial practical question regarding the implementation of CPD asks where litigants might find the data to be used in CPD models. The available information about illegal voters, of course, is likely to vary significantly from case to case. In some situations, such as where the illegal votes were cast by disenfranchised felons,<sup>179</sup> absentee voters,<sup>180</sup> or incorrectly registered individuals,<sup>181</sup> the very

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<sup>175</sup> This is a classic maxim of equity. See, e.g., 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 10, at 185 (Spencer W. Symons ed., 5th ed. 1941) (discussing legal maxim “*Ubi jus ibi remedium*”); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

<sup>176</sup> See *supra* note 144 for an example of such a case.

<sup>177</sup> See *supra* notes 17–20 and accompanying text (discussing fundamental nature of right to vote and value of counting votes accurately).

<sup>178</sup> *Voting and Democracy*, *supra* note 34, at 1164 (“In deciding among the available methods of deducting illegal votes, courts are making a policy choice among imperfect options.”); see also *supra* Part I.A (discussing competing values at stake in close elections).

<sup>179</sup> See, e.g., *Borders v. King County*, No. 05-2-00027-3, slip op. at 19 (Wash. Super. Ct. June 24, 2005) (involving illegal votes cast primarily by disenfranchised felons).

<sup>180</sup> See, e.g., *In re Protest of Election Returns*, 707 So. 2d 1170, 1171 (Fla. Dist. Ct. App. 1998) (involving illegal absentee votes).

characteristic that made the votes illegal can be employed in a CPD model to predict the likely distribution of illegal votes. In other situations, where the illegal votes lack such distinguishing characteristics, good information may not be available, and it is likely that any CPD model offered as evidence will be rejected as unreliable.<sup>182</sup>

## 2. *Legislative Versus Judicial Approaches*

Though this Note has focused on the potential use of CPD by the judiciary in resolving election disputes, the solution might also be legislatively implemented before a dispute arises. Such a solution has several potential advantages over a judicially imposed CPD regime. First, it insulates CPD against the charge of “judicial activism,”<sup>183</sup> thereby promoting the values of public legitimacy and faith in the electoral process.<sup>184</sup> Second, the decision about which factors—from the less-controversial use of absentee-voter or disenfranchised-felon status to the potentially more troubling uses of race and gender<sup>185</sup>—should be incorporated into CPD models could be made *ex ante* by a deliberative body, which may ease normative concerns about the use of such classifications.

The advantage of a judicial solution, by contrast, is flexibility. Depending on a case’s circumstances, some factors may be more or less important in a CPD model, and a one-size-fits-all legislative solution could not be tailored to the individual facts of each case. The judiciary may also be more flexible with regard to the method of resolution it applies: It may choose to employ CPD in a case where the available data are very reliable but use a stricter method, like direct evidence, in cases where the data are not as reliable. Even if CPD were implemented legislatively, the gatekeeping role of the judge likely should be preserved as a means of screening out inaccurate CPD models.<sup>186</sup>

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<sup>181</sup> See, e.g., *Huggins v. Superior Court*, 788 P.2d 81, 82 (Ariz. 1990) (involving illegal votes by independents in Democratic primary).

<sup>182</sup> See *supra* Part III.C.1 and note 55 and accompanying text (discussing how standards of evidence prohibit admission of CPD models based on uncertain or unreliable data).

<sup>183</sup> See *supra* Part II.B.2 (defending use of proportionate deduction against charge of judicial activism).

<sup>184</sup> See *supra* Part I.A.3 (discussing importance of legitimacy in election disputes).

<sup>185</sup> See *supra* Part III.C.3 (discussing normative objections to CPD proposal); *supra* note 162 and accompanying text (discussing possible objection to CPD as improper use of race and gender classifications).

<sup>186</sup> See *supra* note 139 and accompanying text (explaining judge’s role as “gatekeeper” against admission of unreliable scientific evidence).

### 3. *An Example: CPD as Applied to In re Protest of Election Returns*

Finally, it may be instructive to provide a simple example of how CPD might be employed in an actual case. Recall the facts of *In re Protest of Election Returns*,<sup>187</sup> in which Xavier Suarez nearly prevented a deserved victory by Joe Carollo through suspiciously favorable returns in the absentee ballots. The judge in that case, rather than allowing Suarez to benefit from what statistical evidence demonstrated to be fraud, determined the winner by considering only the results of the untainted machine vote. In other words, he invalidated all the absentee ballots in order to award Carollo the election.<sup>188</sup> This remedy is disconcerting because it disenfranchised a large number of legal voters—those who cast legitimate absentee ballots—along with the fraudulent voters.

If, on the other hand, CPD models were allowed to be considered as evidence, Carollo could have introduced a model that relied on the fact that the illegal votes were absentee ballots, using the following reasoning: (1) There is proof that there were 972 illegal absentee ballots;<sup>189</sup> (2) these particular ballots, based on the available information, will be *at least* as skewed as the general results among absentee ballots (which went 61.5% for Suarez);<sup>190</sup> (3) therefore, at least 61.5% of these 972 illegal votes were cast for Suarez, so 598 votes ( $972 \cdot 61.5\% \cdot 598$ ) would be deducted from his total, and the remaining 374 illegal votes ( $972 - 598 = 374$ ) would be deducted from Carollo's total.<sup>191</sup> As the 224 votes ( $598 - 374 = 224$ ) Carollo will have gained exceeds the 160 votes he needed, the election would go to him. *In re Protest of Election Returns* thus presents a case where CPD is able to obtain the

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<sup>187</sup> 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998). See *supra* text accompanying notes 102–07 for a full discussion of the facts of the case.

<sup>188</sup> *Id.* at 1174.

<sup>189</sup> *Id.* at 1172 (representing sum total of listed illegal ballots).

<sup>190</sup> *Id.* at 1171. Given the facts, there is reason to believe they were almost entirely for Suarez.

<sup>191</sup> This is a somewhat novel use of CPD in that the distinguishing factor relied upon is the illegal votes' absentee nature—as opposed to, for example, the demographics of the illegal voters or their status as disenfranchised felons. CPD, being more a general approach than a rigid method, embraces the use of any distinguishing characteristic of the illegal votes that is relevant in the particular case. See *supra* Part I.B.5 (describing CPD approach). Traditional proportionate deduction, in contrast, would look only to the precinct in which the illegal ballot was cast, thus ignoring a highly important factor (absentee ballot status) in its analysis. An even more complete CPD model might be constructed by incorporating both precinct information and absentee ballot status: If Suarez had concentrated his fraud in a particular precinct's absentee ballots, for example, then an even higher percentage of those illegal votes would be deducted from his total.

just result without resorting to the troubling extreme of blanket invalidation.

#### CONCLUSION

Courts hearing challenges to election results in which the number of illegal votes exceeds the margin of victory face difficult choices. Simply certifying the result risks improperly denying victory to the true winner; ordering a new election invalidates all the legal votes cast and leaves the choice to a changed electorate; and adjusting the results mathematically may create a perception that judges, and not the voters, have decided the election. This Note advocates that complete proportionate deduction is the best solution to this problem in cases where the tendencies of the illegal votes can be ascertained with reasonable certainty. A careful application of CPD has the important virtue of installing the true winner in office more often than any alternative, while also effectively balancing the important values of accuracy, finality, and legitimacy, and avoiding the serious flaws of the direct evidence and elimination of uncertainty approaches. Most of the concerns regarding CPD can be answered through the use of statistical models that are admitted into evidence only when they are scientifically and methodologically valid. Complete proportionate deduction seeks to enact the will of voters as best as it can be ascertained, which, in the end, should be the goal of courts hearing election disputes.