

NO GUESSING ALLOWED: WASHINGTON REJECTS PROPORTIONATE DEDUCTION IN ELECTION CONTESTS

*William C. Rava & Rebecca S. Engrav**

Eight months after the votes had been cast, and after two recounts¹ and no fewer than nine lawsuits,² the 2004 Washington

* Mr. Rava is a partner and Ms. Engrav is an associate at Perkins Coie LLP in Seattle. A team of lawyers, including Mr. Rava, Ms. Engrav, and others, represented the Washington State Democratic Central Committee in all of the litigation regarding the 2004 general election, including the election contest described in this essay.

¹ Republican Dino Rossi won the initial count by 261 votes over Democrat Christine Gregoire, triggering an automatic machine recount pursuant to section 29A.64.021(1) of the Revised Code of Washington Annotated. *See In re Election Contest of Coday*, 2006 WL 572831, at *1 (Wash. Mar. 9, 2006). After the machine recount narrowed Rossi's lead to only forty-two votes, the Washington State Democratic Central Committee requested a second manual recount of all votes cast in the governor's race pursuant to section 29A.64.011 of the Revised Code of Washington Annotated. *See Coday*, 2006 WL 572831, at *1; News Release, Wash. Sec'y of State, Reed to Issue Recount Order Monday (Dec. 3, 2004), http://www.secstate.wa.gov/office/osos_news.aspx?i=1h0146bKPVHBqzrKlJtzCg%3D%3D. Gregoire won the manual recount by 129 votes. *See Coday*, 2006 WL 572831, at *2. For more information about the two recounts and the history of recounts in Washington, see Washington Secretary of State, Washington State 2004 General Elections, <http://vote.wa.gov/general> (last visited Jan. 12, 2006).

² Four cases were filed during the initial count or the recounts. Three of those cases were filed in state court. *Wash. State Republican Party v. King County Div. of Records, Elections & Licensing Servs.*, 103 P.3d 725 (Wash. 2004); *McDonald v. Sec'y of State*, 103 P.3d 722 (Wash. 2004); *Wash. State Democratic Cent. Comm. v. King County Records, Elections & Licensing Servs. Div.*, No. 04-2-36048-0SEA (Wash. Super. Ct. King County Nov. 16, 2004). The Washington State Republican Party (WSRP) also sued in federal court, seeking, among other things, an order prohibiting election officials from duplicating and enhancing ballots in a certain manner. Transcript of Oral Argument at 6, *Wash. State Republican Party v. Reed*, No. C04-2350RSM (W.D. Wash. Nov. 21, 2004). The WSRP voluntarily dismissed this action shortly after United States District Court Judge Marsha J. Pechman denied its motion for a temporary restraining order. *Wash. State Republican Party v. Reed*, No. C04-2350RSM (W.D. Wash. Nov. 22, 2004) (Doc. No. 5); *Wash. State Republican Party v. Reed*, No. C04-2350RSM (W.D. Wash. Nov. 24, 2004) (Doc. No. 22). In addition to these cases, and excluding the election contest that went to trial, five other voters contested the election of Governor Gregoire—four by direct petition to the Washington Supreme Court and one in Kitsap County Superior Court. *In re Election Contest of Goodall*, No. 76541-3 (Wash. Jan. 31, 2005); *In re Election Contest of Karr*, No. 76500-6 (Wash. Jan. 10, 2005); *In re Election Contest of Stevens*, No. 76479-49 (Wash. Jan. 3, 2005); *In re Election Contest of Coday*, No. 76480-8 (Wash. Dec. 29, 2004). The Kitsap County action was voluntarily dismissed. All four of the Supreme Court petitions were dismissed on March 9, 2006. *Coday*, 2006 WL 572831, at *9. The election contest described in this essay was not appealed.

State gubernatorial election came down to this: Would Chelan County Superior Court Judge John Bridges assume that Washingtonians always vote like their neighbors?³

The Washington State Republican Party contested the election of Democrat Christine Gregoire on the ground, among others, that there had been more illegal votes cast than her 129-vote margin of victory (out of close to three million votes cast).⁴ Investigations and discovery revealed that many illegal votes were in fact cast and counted in Washington's 2004 general election—many more than Gregoire's 129-vote margin.⁵ Ballots were cast in the name of dead voters and convicted felons who had not had their civil rights restored, and some voters were credited with voting more than once.⁶

Judge Bridges, in one of a series of pre-trial rulings, required any party asserting illegal votes to show for whom each such illegal vote had been cast.⁷ Attempting to meet that burden at trial, the Republicans relied on the so-called "ecological inference," which posits that a court can determine how a voter voted by looking at electoral returns from that voter's precinct.⁸ If the court accepted the ecological inference, for every illegal vote cast in a Gregoire 60%-40% precinct, it would subtract 0.2 votes from her total. If Gregoire carried a precinct 80%-20%, she would lose 0.6 votes for

³ The media coverage of the election and the resulting election contest was extensive. Searches of the archives of the SEATTLE TIMES (<http://seattletimes.nwsource.com/html/home>), the SEATTLE POST-INTELLIGENCER (<http://seattlepi.nwsource.com>), and the SEATTLE WEEKLY (<http://www.seattleweekly.com>) yield numerous articles discussing the governor's race, the election, the recounts, and the election contest. Also, the Washington Secretary of State's website has a section devoted to the 2004 Governor's Race, including many of the various court opinions and several of the court documents filed in the election contest. See Wash. Sec'y of State, 2004 Governor's Race, http://www.secstate.wa.gov/elections/2004gov_race.aspx (last visited Jan. 12, 2006).

⁴ Transcript of Oral Decision at 5–6, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005), available at <http://www.secstate.wa.gov/documentvault/Final%20Judgement-694.pdf>.

⁵ *Id.* at 19.

⁶ *Id.*

⁷ In particular, for every alleged illegal ballot cast in the 2004 general election, Judge Bridges required a showing (1) that the voter did not have the right to vote; (2) that the voter voted in the governor's race; and (3) for whom the voter voted. Transcript of Oral Decision on Motion in Limine at 10, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County May 2, 2005) (on file with authors). Judge Bridges referred to *Hill v. Howell*, in which the Supreme Court of Washington stated, "[i]f this was an illegal vote, it was proper to show for whom the elector voted, and, since the fact is not shown, it must be treated between the parties as a legitimate vote." *Hill v. Howell*, 127 P. 211, 214 (Wash. 1912).

⁸ Generally, an ecological inference is the process of inferring individual behavior from aggregate data. Transcript of Trial at 765–66, 875–77, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County May 26, 2005).

every illegal vote from that precinct. The Republicans presented their theory through expert testimony.⁹ Adding up the illegal votes they identified in Gregoire precincts, the Republicans' experts concluded that the Republican candidate, Dino Rossi, had received more legal votes than had Gregoire.¹⁰

Judge Bridges did not need to delve into the math, however. He simply rejected the underlying theory. Judge Bridges rejected the ecological inference method as scientifically unsound and the proffered testimony of the Republicans' experts as not proper expert testimony under *Frye*¹¹:

The Court finds that the statistical methods used in the reports of Professors Gill and Katz depend on an assumption that determines the outcome they obtain. In particular, they depend 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 among candidates. . . .

The Court finds that the method of proportionate deduction and the assumption relied upon by Professors Gill and Katz are a scientifically unaccepted use of the method of ecological inference. In particular, Professors Gill and Katz committed what is referred to as the ecological fallacy in making inferences about a particular individual's voting behavior using only information about the average behavior of groups; in this case, voters assigned to a particular precinct.¹²

This result should not surprise anyone familiar with Washington's unique political customs and culture. Washington

⁹ The Republicans presented testimony from two putative experts—Professor Anthony Gill from the University of Washington and Professor Jonathan N. Katz from the California Institute of Technology. *See id.* at 733–34, 897–922. In opposition, the Washington State Democratic Central Committee presented expert testimony from Professors Christopher Adolph and Mark S. Hancock from the University of Washington, who contested the basis of the Republicans' experts' conclusion.

¹⁰ *See id.* at 908–12.

¹¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *see also State v. Riker*, 869 P.2d 43, 47 (Wash. 1994) (following *Frye*). The *Frye* test is whether the methods underlying the expert opinion have gained general acceptance within the relevant scientific community. *Frye*, 293 F. at 1014.

¹² Transcript of Oral Decision at 16–17, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005), available at <http://www.secstate.wa.gov/documentvault/Final%20Judgement-694.pdf>; *see also Voting and Democracy: Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155 (2006) (discussing Judge Bridges's ruling).

and its voters take the franchise seriously. Washington's political institutions are designed to maximize voter participation in all areas and at all levels of government.¹³ The intent—and usually the result—is that public policy closely tracks the popular will. But the popular will resists easy categorization and uniform allegiance to any particular political grouping. Washingtonians have a long and storied history of splitting their vote between political parties, and in recent years no party has dominated Washington politics across all levels.¹⁴ Judge Bridges's rejection of the ecological inference is consistent with this history, as it recognizes both that Washingtonians' political preferences are anything but predictable and that Washingtonians expect that their votes, rather than a single judge's decision, will determine electoral outcomes.

Washington's political institutions are designed to foster popular participation.¹⁵ Like other progressive-era constitutions, Washington's constitution provides for "democratic checks on all three branches."¹⁶ Through the initiative process, Washington voters can collect signatures to put proposed laws to vote of the people.¹⁷ On the November 8, 2005 ballot alone, there were five statewide initiatives on topics ranging from transportation funding to public smoking.¹⁸ Under the constitution, voters can and have recalled elected officials.¹⁹ The Republican Mayor of Washington's second-largest city, Spokane, recently lost a recall petition catalyzed by allegations that he provided city jobs in exchange for sexual favors.²⁰ Furthermore, the constitution requires that constitutional amendments be submitted to the voters for approval.²¹ Over the years, various elected officials have also formed constitutional advisory committees in order to further expand participatory

¹³ See *infra* notes 15–26 and accompanying text.

¹⁴ See *infra* notes 33–39 and accompanying text.

¹⁵ THE GOVERNMENT AND POLITICS OF WASHINGTON STATE 60 (W. Frank Mullen et al. eds., 1978) ("Major governmental programs have been designed to promote linkage."). Linkage is the "relationship between the public's preferences and the nature of public policy." *Id.* at 43.

¹⁶ Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 69 (2001/02).

¹⁷ WASH. CONST. art. II, § 1.

¹⁸ Wash. Sec'y of State, 2005 General Election, Measures, <http://vote.wa.gov/measures.aspx> (last visited Jan. 12, 2006).

¹⁹ WASH. CONST. art. I, §§ 33–34; WASH. REV. CODE ANN. §§ 29A.56.110–.270 (West 2005); see also HUGH A. BONE ET AL., PUBLIC POLICYMAKING, WASHINGTON STYLE 24 (Susie Anshell ed., 1980) (discussing examples of voters using recall powers).

²⁰ Associated Press, *Spokane Mayor Raises \$4,000 to Fight Recall*, SEATTLE TIMES, Oct. 20, 2005, at B5.

²¹ WASH. CONST. art. XXIII, § 1.

opportunities for Washington's voters.²²

Washington's electoral systems similarly promote participation. For example, ongoing absentee ballots can be requested by any voter for any reason; there is no requirement that a voter actually be absent.²³ Additionally, absentee ballots can be postmarked through Election Day.²⁴ If an absentee or provisional ballot voter fails to sign the outside envelope, election officials must contact the voter after Election Day to provide an opportunity for the voter to sign.²⁵ These are but a small handful of ways in which Washington's election laws encourage voters to vote. Further, voters go to the polls fully informed; Washington's public disclosure laws, passed by popular initiative in 1972, have become a model for other states seeking electoral and governmental transparency.²⁶

These and other "democratizing characteristics of [Washington's] institutions and culture" result in policies and politicians that are "responsive to the public's preferences."²⁷ Indeed, "[p]olitical linkage, the impact of the public on public policy, has been a central theme in Washington politics and in its political institutions."²⁸ In short, as reflected in the structures and processes created by Washington's constitution and statutes, Washington's voters are accustomed to having, and demand that, their voices be heard.

Figuring out what those voices are saying can be difficult, however. Washington has a fractured and fractious political history. In the period between the First and Second World Wars, politically active (and sometimes violent) labor unions and organized unemployed workers gave Washington enough of a radical leftist reputation for a Democratic National Chairman to refer to "the forty-seven states and the Soviet of Washington."²⁹ At the other extreme, following World War II and in a move similar to Senator McCarthy's efforts on the national stage, the Washington Legislature convened a commission to investigate "un-American" activities by state employees and passed a law (later overturned)

²² See BONE ET AL., *supra* note 19, at 40 (indicating that Washington has a reputation for being reformist and is the only state to have used its initiative process "extensively to bring about political change").

²³ WASH. REV. CODE ANN. § 29A.40.040 (West 2005).

²⁴ *Id.* § 29A.40.091.

²⁵ *Id.* § 29A.60.165 (West Supp. 2005).

²⁶ BONE ET AL., *supra* note 19, at 25, 27–32.

²⁷ THE GOVERNMENT AND POLITICS OF WASHINGTON STATE, *supra* note 15, at 60.

²⁸ *Id.*

²⁹ *Id.* at 7.

requiring strong loyalty oaths.³⁰ And Washington elections were marked by “redbaiting” from the 1940s through the 1960s.³¹ As this sort of “zealous warfare between extremists of the left and the right continued, . . . mainstream Washington politics settled near the center of the ideological spectrum.”³²

Washington’s centrism has not translated into consistent party loyalty. “Split-ticket voting . . . was fashionable in Washington well before splitting became so widespread throughout most of the country. Classic examples are abundant.”³³ Republican Governor Dan Evans held forth in Washington’s capitol, Olympia, while Democratic Senator Henry M. “Scoop” Jackson made a name for himself in the other Washington.³⁴ In the 2004 general election, for example, while the governor’s race was extremely close, Democrat John Kerry carried Washington by more than seven percentage points, and incumbent Democratic Senator Patty Murray defeated her challenger by more than twelve percentage points in the Senate race.³⁵ In 2000, Washingtonians gave incumbent Democratic Governor Gary Locke 462,000 more votes than his challenger in the governor’s race, gave Democrat Al Gore 139,000 more votes than George W. Bush, but gave Democratic challenger Maria Cantwell only 2,229 more votes than incumbent Republican Senator Slade Gordon.³⁶ Finally, Washingtonians’ dislike for traditional party allegiance is vividly captured by the state’s ongoing struggles over blanket primaries, which had been in place since 1935 but which were recently struck down by the federal courts.³⁷ Whether in fact “[p]ersonality [is] more important than . . . party label,”³⁸ Washington voters do not want to and do not frequently toe the

³⁰ BONE ET AL., *supra* note 19, at 15; THE GOVERNMENT AND POLITICS OF WASHINGTON STATE, *supra* note 15, at 7.

³¹ ROBERT E. FICKEN & CHARLES P. LEWARNE, WASHINGTON: A CENTENNIAL HISTORY 153 (1988).

³² *Id.*

³³ THE GOVERNMENT AND POLITICS OF WASHINGTON STATE, *supra* note 15, at 12.

³⁴ FICKEN & LEWARNE, *supra* note 31, at 164.

³⁵ Wash. Sec’y of State, Washington State 2004 General Elections, <http://vote.wa.gov/general/federal.aspx> (follow “President/Vice President” and “U.S. Senator” links) (last visited Jan. 12, 2006).

³⁶ These and other election results are readily available from the Washington Secretary of State’s Election Results Search website at http://www.secstate.wa.gov/elections/results_search.aspx (last visited Jan. 12, 2006).

³⁷ See Wash. State Grange v. Locke, 105 P.3d 9, 12 (Wash. 2005).

³⁸ THE GOVERNMENT AND POLITICS OF WASHINGTON STATE, *supra* note 15, at 17; see also FICKEN & LEWARNE, *supra* note 31, at 164 (“Washingtonians boast that they vote for the candidate rather than the party . . .”).

party line.³⁹

While Judge Bridges's final rulings were based on statutes and the rules of evidence, the premise for his rulings was a recognition that if Washington's courts have any power to hear an election contest of a governor—a task which the Washington Constitution assigns to the legislature, but which Judge Bridges held had been delegated by the legislature to the courts—the applicable statutes must be strictly construed.⁴⁰ Against this constitutional and historical backdrop, then, it is no wonder that Judge Bridges refused to assume that all Washingtonians vote like their neighbors.

In fact, the election contest only changed votes cast by four illegal voters, each of whom testified that they voted for Mr. Rossi.⁴¹ So, when the contest was finally dismissed, Democrat Gregoire finished with four more votes than she had when it started, winning the election by 133 votes. And Judge Bridges added yet another layer to Washington's rich and deep political history and culture.

³⁹ THE GOVERNMENT AND POLITICS OF WASHINGTON STATE, *supra* note 15, at 17 (“Although both major parties represent vague coalitions, factionalism dilutes the importance and blurs the distinction.”).

⁴⁰ WASH. CONST. art. III, § 4; Transcript of Oral Decision at 17–25, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005), available at <http://www.secstate.wa.gov/documentvault/Final%20Judgement-694.pdf>. In its decision on the separate pro se election contests, the Washington Supreme Court specifically noted that it reserved for another day the question of courts' jurisdiction to hear election contests for statewide offices such as governor. See *In re Election Contest of Coday*, 2006 WL 572831, at *9 (Wash. Mar. 9, 2006).

⁴¹ Transcript of Oral Decision at 21, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005), available at <http://www.secstate.wa.gov/documentvault/Final%20Judgement-694.pdf>.