

ARTICLES

The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process

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I. INTRODUCTION

For the November 2, 2004 general election, Mr. and Mrs. Henning drove over 700 miles to cast their votes. Unfortunately, their votes were not counted.¹

The Hennings' experience with Washington State's election machinery began when they moved from Klickitat County to Clallam County. Having moved, the Hennings changed their voter registration at a local office of the Department of Motor Vehicles (DMV) during the summer of 2004.² Not having received previously requested absentee ballots, the Hennings inquired about their registration status in Clallam County.³ The Hennings were informed that they were not registered voters in Clallam County because the facility at the DMV was not authorized to re-register voters.⁴ The only alternative was to drive to Klickitat County and cast their ballots at their old polling place.⁵ At the polling

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1. Declaration of Donald Henning in Support of Petition for Writ of Mandamus at ¶ 6, *McDonald v. Reed*, 153 Wash. 2d 201, 103 P.3d 722 (2004) (No. 76321-6) [hereinafter Declaration of Donald Henning].

2. *Id.* ¶ 4.

3. *Id.* ¶ 5.

4. *Id.*

5. *See id.* ¶ 6.

place in Klickitat County, the Hennings were informed that they were not registered voters in that county either.⁶ In order to preserve their votes, the Hennings requested and received a provisional ballot.⁷ After casting their ballots and following the instructions of local polling officials, the Hennings placed their provisional ballots into sealed envelopes and handed the envelopes to election officials.⁸ On November 19th, the Hennings received a letter from the Klickitat County Auditor's Office,⁹ stating that their provisional ballots would not be counted.¹⁰ Apparently, the County Auditor's Office had received a notice from the Hennings indicating that they were moving to another county,¹¹ though the Hennings could not recall giving the Auditor any such notice.¹²

So, after driving over 700 miles to cast their votes, the Hennings' effort to exercise that fundamental right was for naught. The Hennings' experience set a new benchmark for assessing the impact of bureaucratic procedures on stifling and, in some instances, preventing the counting of a ballot cast in accordance with those procedures. Clearly the Hennings believed that their right to vote was fundamental. The Hennings' beliefs were in accord with existing law.

The right to vote is fundamental¹³ and is at the core of our representative democracy.¹⁴ In our system of government, citizens have the final say in the selection of governmental officials who, through their political

6. *Id.*

7. *Id.* As a result of the 2000 presidential elections, Congress enacted the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.). Under HAVA, an eligible voter who does not appear on the list of registered voters at the time of an election for federal officials must be offered a provisional ballot after the voter declares his or her eligibility to vote. 42 U.S.C. § 15482(a) (2002).

8. Declaration of Donald Henning at ¶ 6, *McDonald*, 153 Wash. 2d 201, 103 P.3d 722.

9. "'County auditor' means the county auditor in a noncharter county or the officer, irrespective of title, having the overall responsibility to maintain voter registration and to conduct state and local elections in a charter county." WASH. REV. CODE § 29A.04.025 (2003). "The county auditor of each county shall be ex officio the supervisor of all primaries and elections, general or special, and it shall be the county auditor's duty to provide places for holding such primaries and elections." *Id.* § 29A.04.216 (2004).

10. Declaration of Donald Henning at ¶ 7, *McDonald*, 153 Wash. 2d 201, 103 P.3d 722; see also Nicole Brodeur, *Silenced Voices Are Heard*, SEATTLE TIMES, Dec. 9, 2004, at B1.

11. Declaration of Donald Henning at ¶ 7, *McDonald*, 153 Wash. 2d 201, 103 P.3d 722.

12. *Id.* ¶ 7.

13. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); see also *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wash. 2d 395, 404, 687 P.2d 841, 846 (1984) ("The right to vote is fundamental under both the United States and Washington Constitutions.").

14. *Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); see also U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, at iv (2001) ("Voting is the language of our democracy.").

leadership, guide our country, state, and local communities.¹⁵ In their assigned roles, these elected officials weigh competing social, economic, and political interests and make a calibrated assessment of how these interests are incorporated into public policy and legislative action. If the balance struck by these elected officials is not reflective of the interests valued by the community at large, the electoral process provides the ultimate form of accountability—the officials are not re-elected. Thus, the vibrancy of our body politic and the continued legitimacy of our form of government rest upon the understanding that the electoral process will accurately reflect the will of the people. When the integrity of that process is compromised, the legitimacy of our governments and the public confidence in our public institutions is seriously undermined.¹⁶

The recent 2004 Washington state gubernatorial election, pitting Democratic Party nominee Christine Gregoire against Republican Party nominee Dino Rossi, exposed deficiencies in the administration of elections in the State of Washington and thereby created a major political crisis. The various machine and hand recounts produced different electoral outcomes.¹⁷ Because the vote margin between the two major candi-

15. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”); U.S. COMM’N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: UNFULFILLED GOALS* 1 (1981) (“The right to vote is central to full political participation of all citizens of this Nation. It grants to all citizens the power to elect those persons who make decisions affecting their lives.”). For a history of the right to vote in the United States see generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

16. In the aftermath of the 2004 gubernatorial election, many irate voters expressed their disenchantment with the electoral process. See, e.g., Andrew Garber, *State Task Force Gets Earful over Gubernatorial Election*, SEATTLE TIMES, Feb. 11, 2005, at B4 (“‘This election has been a farce,’ Dawn Courtney, of Castle Rock, told the panel; ‘Because of this botched election, voters have lost confidence in the election system.’”); Dave Burns, Letter to the Editor, SEATTLE TIMES, Jan. 14, 2005, at B7 (“Well, now that Christine Gregoire (with the help of King County elections office) has stolen the election and has been sworn in, maybe we can all get on with our lives. Even if that means having little to no faith in the democratic process.”); Garry Gracey, Letter to the Editor, SEATTLE TIMES, Jan. 14, 2005, at B7 (“By accepting office [Governor] Gregoire has made a mockery of Washington’s state’s election process and, unless this injustice is corrected, the voters in this state may never trust the election process again.”); MariLyn Sabo, Letter to the Editor, SEATTLE TIMES, Jan. 11, 2005, at B7 (“The irregularities of changing the rules after the election has taken place and the mysterious discovery of ballots after the first (and second) recounts put a taint on the process. Now that some of the ballots have been altered by elections officials, another recount would be meaningless.”); Bernice Whitney, Letter to the Editor, SEATTLE TIMES, Jan. 11, 2005, at B7 (“Is democracy failing? Are we going the way of other less-than-free societies?”); Kate Cummins, Letter to the Editor, SEATTLE TIMES, Dec. 31, 2004, at B7 (“The only thing that is crystal-clear in all of this is that the real loser is the voter. As long as the party has its chosen winner, who cares about the voter?”); Chuck Hastings, Letter to the Editor, SEATTLE TIMES, Dec. 21, 2004, at B7 (“The voters of this state basically did not make their choice. The courts will now be picking the next governor. Half of Washington’s voters are going to feel cheated, no matter what happens next.”).

17. The original vote count showed Rossi ahead of the Gregoire by 261 votes. Wash. Sec’y of State, <http://vote.wa.gov/general/> (click on “Statewide” tab; then follow “Governor” hyperlink) (last

dates was miniscule,¹⁸ changes in the electoral outcomes and subsequent litigation were inevitable. After two state supreme court rulings¹⁹ and an election contest filed under state law, Christine Gregoire became the state's twenty-second governor.²⁰

This Article details the plethora of problems associated with Washington State's 2004 gubernatorial election and explores the proposed electoral reforms in light of prior threats to the electoral process. The Article postulates that electoral reforms in the administration of elections also present an important opportunity to provide minority communities with greater access to the political process. In an effort to address the concerns arising from the election, Seattle University School of Law and the Seattle University Law Review sponsored a symposium entitled: "Where's My Vote? Lessons Learned from Washington State's Gubernatorial Election." The symposium was held on April 16, 2005, and included presentations on the election and the corresponding litigation, the importance of the right to vote, the efforts of national civil rights organizations to protect minority voting rights, and a discussion of possible legislative solutions for improving the administration of elections.

The results of this symposium are now incorporated within this issue of the Law Review. Part II of this Article begins with a history of

visited Nov. 14, 2005). Because the vote margin was within the margin triggering an automatic recount, a machine recount was conducted. See WASH. REV. CODE § 29A.64.021(1)(a) (2005) (recount is triggered if vote margin is less than 2000 votes between the two front-runners and less than 0.5% of votes cast for both front-runners). After the machine recount, Rossi was ahead by 42 votes. Wash. Sec'y of State, <http://vote.wa.gov/general/recount.htm> (last visited Nov. 14, 2005). Thereafter, the Democratic Party requested a manual recount of all ballots cast pursuant to WASH. REV. CODE § 29A.64.011 (2004). After the manual recount, Gregoire was ahead by 129 votes. Wash. Sec'y of State, <http://vote.wa.gov/general/recount.aspx> (last visited Nov. 14, 2005).

18. The Washington 2004 gubernatorial election is not the only election in the state's history where the margin of victory was narrow and a mandatory recount was undertaken. For example, in the 2000 United States Senate contest, the original margin of victory was only 1953 votes and the final margin of victory was 2229 votes. Wash. Sec'y of State—History of Recounts, http://www.secstate.wa.gov/office/osos_news.aspx?i=TjrRx9TQ4Kv037C9GJJtuw%3d%3d (last visited Nov. 14, 2005). In the 2000 Secretary of State contest, the final margin of victory was 10,222 votes. *Id.* In other elections similar final margins were reported (1991—Initiative 120 (involving abortion rights)—4222 votes; 1990—SJR 8212 (involving taxation of low-income housing)—1540 votes; 1977—Initiative 348 (involving repeal of gas tax)—884 votes; 1968—State Attorney General contest—5368 votes). *Id.*

19. Wash. State Republican Party v. King County, 153 Wash. 2d 220, 103 P.3d 725 (2004) (rejecting challenge by Republican Party to the authority of the vote canvassing authority in a manual recount to recanvass ballots in order to correct previous errors); McDonald v. Reed, 153 Wash. 2d 201, 103 P.3d 722 (2004) (rejecting petition filed by Democratic Party to require Secretary of State to promulgate uniform standards for recounting of votes).

20. For a complete listing of Washington's governors see HistoryLink Essay: Governors of Wash. Territory and Wash. State, http://www.historylink.org/essays/output.cfm?file_id=5454 (last visited Nov. 14, 2005).

voting discrimination in the United States. This history provides a context to the 2004 gubernatorial election in Washington. In addition, this history provides an important background context for assessing whether reforms in the administration of elections will have a corresponding impact on the political integration of minority communities. Part II closes with a brief discussion of the possible convergence of efforts to reform the electoral process and to incorporate minority communities into the body politic. Part III discusses the events that unfolded in the 2004 gubernatorial election and describes the crisis that ensued. Finally, Part IV provides a brief overview of legislation enacted in the Washington State 2005 Regular Legislative Session in order to assess whether all of the major problems identified in the 2004 gubernatorial election have been addressed. In publishing this Symposium Issue, the School of Law and the Law Review seek to contribute to the ongoing discourse regarding efforts to restore public confidence in the integrity of the electoral process. Through this discourse, and through actions by legislative and county election officials to improve the administration of elections, public confidence in this important process can be restored.

II. CONTEXT

The political crisis created by the 2004 gubernatorial election has historical roots extending to the founding of our country. This Part will highlight the voting discrimination that was enshrined within our Constitution, the failure of post-Civil War efforts to expand the right to vote to African Americans, the continued efforts to suppress minority voting strength in the latter part of the nineteenth century, the renewed movement after World War II to enfranchise African Americans, and the federal response that culminated in the adoption of the federal Voting Rights Act.²¹

Unfortunately, in our nation's history voting was not viewed as a right, but as a privilege—a privilege that was expanded only after the Civil War. Initially, the right to vote was primarily limited to white males with property.²² Upon adoption and ratification, the United States Constitution deferred to the election laws and practices of the states by not

21. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

22. KEYSSAR, *supra* note 15, at 5 (“The lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property.”); *id.* at 6 (“Freedmen of African or Amerindian descent were denied the ballot in much of the South.”).

enunciating a specific right to vote. However, the right to vote was indirectly affected by the Constitution's Three-Fifths Clause.²³

With respect to African Americans, the right to vote did not materially advance until the end of the Civil War and the adoption and ratification of the Thirteenth Amendment, which declared slavery illegal.²⁴ During the early phases of the Reconstruction Era, statutes authorizing a re-admission of states of the former Confederacy into the Union included provisions for expanding suffrage to the newly freed slaves.²⁵ However, due to the necessity of providing a constitutional basis for preventing the states from discriminating on the basis of race in granting the right to vote, the Fifteenth Amendment was ratified in 1870.²⁶ Shortly thereafter, Congress enacted two statutes that provided, for a brief period of time from 1870 to 1873, an aggressive federal enforcement of the right to vote.²⁷ A mixture of national presidential politics in the 1872 presidential election, increased violence of the Ku Klux Klan, and a lack of national resolve to continue to provide federal protection to the newly freed slaves contributed to the lack of federal enforcement.²⁸ This lack of federal enforcement was reflected in two United States Supreme Court deci-

23. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 & amend. XV. The Three-fifths Clause provided that persons who were not free would only be counted as three-fifths of a person in determining the population base for apportioning congressional seats among the various states. Most of the persons who were not free at the time the Constitution became effective on March 4, 1789, were African American slaves. The Clause has been identified as the first major compromise between the slaveholding southern agricultural interests and the northern commercial interests which assured that the southern states would ratify the Constitution. As a result of this Clause, southern states were over-represented in Congress and exercised considerable influence in the appointment of chairs to important congressional committees. In fact, the election of Thomas Jefferson to the Presidency in 1800 is attributable to the increased congressional representation of southern states in the Electoral College. *See* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 428, 433–50 (1999); GARRY WILLS, *NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER* 51–61 (2003).

24. U.S. CONST. amend. XIII.

25. Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004) (The Military Reconstruction Act, Act of March 2, 1867, ch. 163 14 Stat. 428, provided a framework for the readmission of states into the Union: "All Southern states complied with the Act's requirements, adopting new constitutions with broad suffrage." (footnote omitted)).

26. U.S. CONST. amend. XV; *see also* Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985) (arguing a conceptual failure of the United States Supreme Court and commentators to fulfill the promise of fair representation due to the refusal to fully embrace rights protected under the Fifteenth Amendment).

27. Act of February 28, 1871, 16 Stat. 433 (amending the Act of May 31, 1870); Act of May 31, 1870, 16 Stat. 140 (enforcing the right of citizens of the United States to vote in the several states of the union, and for other purposes); *see* ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876*, at 62–92 (2005).

28. *See generally* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877* (1988).

sions that severely restricted the reach of the 1870 and 1871 federal acts.²⁹ Finally, the official end of Reconstruction occurred with the Compromise of 1877, which resulted in a decreased military presence in the South and the selection of Rutherford B. Hayes as the nineteenth President.³⁰

A. Limiting Minorities' Right to Vote

The end of Reconstruction heralded a new era of minority disenfranchisement. This era continued, with some notable exceptions, well into the end of the nineteenth century and the middle of the twentieth century until the commencement of what has been termed the Second Reconstruction.³¹ During the latter part of the nineteenth century, southern states adopted a variety of procedures that had the effect of preventing African Americans from registering to vote and from voting.³² These devices included literacy tests requiring a potential voter registrant to read, write, or interpret a provision of a state constitution to the satisfaction of a voter registration official or clerk.³³ These devices were not just limited to the southern states. In fact, the State of Washington had such a requirement in its constitution: "The legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this sec-

29. *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that Constitution does not grant or secure the right to vote in the states); *United States v. Reese*, 92 U.S. 214 (1875) (holding that Congress has not as of yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment). See generally ROBERT M. GOLDMAN, *RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK* (2001).

30. C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 2, 5-7 (1951); see also ROY MORRIS, JR., *FRAUD OF THE CENTURY, RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 246 (2003).

31. The term "Second Reconstruction" refers to that period of time after World War II where civil rights activities within minority communities resulted in changes in governmental policies and laws that were enacted to improve the political, economic, and educational status of minority communities. See *infra* note 39.

32. KEYSSAR, *supra* note 15, at 111-16.

33. Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 537 (1973). In order to prevent the disenfranchisement of illiterate whites, "most states established a number of alternatives to the literacy test: an 'understanding' test, property qualification, a good character requirement, or most transparent of all, a 'grandfather clause' [permitting an exemption from the literacy test if the potential registrant either served and fought honorably in the armed services of the United States or the Confederacy]." *Id.* As noted by the author, these provisions "were designed to give the registrar an elastic standard to implement the avowed intention of disenfranchising blacks but not whites" *Id.* at 538.

tion.”³⁴ Other devices included limiting voter participation in political party primaries to whites³⁵ and imposing a poll tax.³⁶ The impact of these devices in suppressing minority participation in voting cannot be over-emphasized.

However, perhaps the most significant obstacle to minority voter registration and voting was the violence perpetrated by white supremacist terrorist groups and racist individuals:

The reign of terror inaugurated by the Ku Klux Klan and other terrorist groups has been well documented Terrorism became a concern of the federal government because local law enforcement agencies and officers were utterly unable or unwilling to deal with it. Whole sections of Southern states experienced breakdowns in law and order. Their populations were subjected to the mercy of organized bands of criminals who attacked them with impunity. While whipping was the most common form of violence, shooting, beating, murder, rape, and various forms of torture were not infrequent. Further, these criminals destroyed property and stole weapons. Economic intimidation and social ostracism were also included in the arsenal of the Ku Klux Klan.³⁷

The cumulative impact of this systematic campaign of terror, the absence of federal enforcement, and the hostility of local officials to African American political participation had a very predictable outcome. In some parts of the country, most notably in the southern states, there were very severely depressed levels of African American voter registration

34. WASH. CONST. amend. II (1896) (amending WASH. CONST. art. VI, § 1), *amended by* WASH. CONST. amends. X & LXIII; *see also* FRANK PIERCE, PIERCE'S CODE: A COMPILATION OF ALL THE LAWS IN FORCE IN THE STATE OF WASHINGTON 39 (1905).

35. These were known as white primaries. Derfner, *supra* note 33, at 538.

36. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A STUDY OF THE PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESS IN SOUTHERN STATES SINCE PASSAGE OF THE VOTING RIGHTS ACT OF 1965, at 6 (1968) [hereinafter POLITICAL PARTICIPATION].

37. KACZOROWSKI, *supra* note 27, at 43 (footnote omitted); *id.* at 43 (“The brutality and savagery of these crimes made them distinctive. United States circuit judge High L. Bond was appalled when he learned that a North Carolina woman was dragged from her cabin, beaten, and then ‘her hair burned off her privates.’”); *id.* at 43–44 (“With membership rolls numbering into the hundreds in some counties, the Klan effectively paralyzed local government agencies and officers.”); *id.* at 44 (“Local officials and agencies were overwhelmed by the magnitude of such criminality.”). Lynching also continued to be a tool for terrorizing the African American community. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 51 (2004) (“In the 1890s, the number of southern blacks lynched each year was usually one hundred or more”) (footnote omitted); *see also* TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 21 (1947) (table showing the number of lynchings for both whites and African Americans from 1882 to 1946). *See generally* DANIEL LEVITAS, THE TERRORIST NEXT DOOR (2002) (for a review of modern domestic terrorist groups, both racial and political).

and voter participation rates.³⁸ Efforts to reverse this trend began after the end of World War II and the commencement of the Second Reconstruction.

B. Protecting Voting Rights During the Second Reconstruction

President Harry Truman's presidency was integral in commencing the Second Reconstruction. Although there is no fixed date as to the official commencement of the Second Reconstruction,³⁹ a defensible argument attributes the beginning of this era to the Truman presidency.

38. From 1876 to the 1950s there were some notable exceptions to this sordid history of minority political oppression. For example, the United States Supreme Court in *Guinn v. United States*, 238 U.S. 347 (1915), outlawed the use of grandfather clauses. In addition, the Court, in a series of cases, effectively limited the use of the white primary as a tool for disenfranchising African Americans. See *Terry v. Adams*, 345 U.S. 461 (1953) (all white private association which conducted a pre-primary selection ruled unconstitutional); *Grove v. Townsend*, 295 U.S. 45 (1935) (approving Democratic Party convention resolution limiting party membership to whites), *overruled by Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932) (Court removed discretion of party executive committee to establish membership qualifications which limited membership to whites only); *Nixon v. Herndon*, 273 U.S. 536 (1927) (African Americans permitted to vote in Democratic Party primary). However, during this same time period, the Court reached a nadir with *Plessy v. Ferguson*, 163 U.S. 537 (1896) (established separate but equal doctrine) and with *Giles v. Harris*, 189 U.S. 475 (1903), where Justice Holmes, in a case involving the repeated unsuccessful efforts of an African American to register to vote, made a remarkable admission regarding the reality of a racist political environment and the powerlessness of the federal judiciary to provide any redress to limit this abuse of political power:

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.

Giles, 189 U.S. at 488.

39. Although there is no exact date for the official beginning of the Second Reconstruction, the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that racial segregation in public school systems is unconstitutional) has been viewed as the beginning of the Second Reconstruction. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 14 (1999) (noting that Professor C. Vann Woodward coined the term Second Reconstruction as referring to time period after the *Brown* decision). Such a birth date would seem appropriate because of *Brown*'s indisputable place as the harbinger of the modern civil rights movement. See CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED, REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 13–14 (2004) (*Brown* viewed "as perhaps the most significant case on race in America's history" which led to more than a dozen unanimous decisions eliminating barriers to racial equality). Another possible date is April 25, 1938, when the Court decided *United States v. Carolene Products*, 304 U.S. 144 (1938), and intimated that a "searching judicial inquiry" may be appropriate in reviewing state action that serves to "prejudice against discrete and insular minorities." *Id.* at 153 n.4; KOUSSER, *supra*, at 68 ("If [Justice] Bradley's pronouncement in *The Civil Rights Cases* [109 U.S. 3 (1883)] helped to

In a dramatic move several months before the presidential election of 1948, President Truman issued a series of historic Executive Orders that resulted in a substantial improvement on employment and contracting opportunities for African Americans.⁴⁰ President Truman's December 5, 1946 Executive Order 9808 was particularly noteworthy. This order created the first ever presidential Committee on Civil Rights.⁴¹ On October 29, 1947, the Committee issued a historic report recommending a variety of actions to address issues related to racial discrimination.⁴² Pursuant to these recommendations, President Truman announced that civil rights reforms were a top priority in his January 7, 1948 State of the Union address.⁴³

President Truman also sought the passage of comprehensive civil rights legislation to implement the recommendations of the Committee on Civil Rights.⁴⁴ Moreover, he made four critical appointments to the Supreme Court.⁴⁵ These Justices were in the majority on major civil

usher out the First Reconstruction, Justice Harlan Fiske Stone's famous footnote 4 in *U.S. v. Carolene Products Co.* was both a precursor and precondition of the Second [Reconstruction].").

40. On July 26, 1948, President Truman issued Executive Order No. 9980, 13 Fed. Reg. 4311 (July 26, 1948) and Executive Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). "Executive Order No. 9980 not only mandated the immediate elimination of race-based discrimination in the federal bureaucracy, but also established the specific procedures for blacks to follow to gain fair and open access to jobs long denied them" MICHAEL R. GARDNER, *HARRY TRUMAN AND CIVIL RIGHTS: MORAL COURAGE AND POLITICAL RISKS* 111 (2002). Executive Order 9981 integrated the armed services and "represented the most significant institutional advance for the civil rights of black Americans since President Lincoln issued the Emancipation Proclamation." *Id.* at 112. Additional executive orders provided minorities with greater employment protections and greater access to government contracts. *Id.* at 158, 160; Exec. Order No. 10,210, 16 Fed. Reg. 1049 (Feb. 2, 1951); Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951).

41. Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 7, 1946); see also GARDNER, *supra* note 40, at 14–19.

42. The Committee issued 35 recommendations ranging from employment opportunities in the federal government to the elimination of obstacles that hindered minority political participation. *Id.* at 58–61.

43. GARDNER, *supra* note 40, at 65–70 (emphasizing urgency in the enforcement of civil rights).

44. On April 28, 1949, in response to President Truman's request, Senator J. Howard McGrath introduced Senate Bill 1725, 81st Cong. (1949) ("To provide a means of further securing and protecting the civil rights of persons within the jurisdiction of the United States"), Senate Bill 1726, 81st Cong. (1949) ("To provide protection of persons from lynching, and for other purposes"), Senate Bill 1727, 81st Cong. (1949) ("Making unlawful the requirement for the payment of a poll tax as a prerequisite to voting in a primary or other election for national officers"), and Senate Bill 1728, 81st Cong. (1949) ("To prohibit discrimination in employment because of race, color, religion, or national origin" and proposing the establishment of a Fair Employment Practices Commission). Congress did not adopt this proposed legislation.

45. The four Justices he appointed were Chief Justice Fred Moore Vinson, Justice Harold Hitz Burton, Justice Tom Campbell Clark, and Justice Sherman Minton. GARDNER, *supra* note 40, at 167–173.

rights decisions involving racially restrictive real estate covenants,⁴⁶ segregated railroad passenger cars,⁴⁷ and segregated educational institutions.⁴⁸ And, most significantly, Justices Clark, Minton, and Burton were part of the Supreme Court's unanimous opinion in *Brown v. Board of Education*.⁴⁹

In summary, President Truman's aggressive support of civil rights for racial minorities provided an important endorsement for the increased efforts of minority communities to desegregate public facilities and secure equal rights in the areas of housing, voting, and employment. Such an endorsement provided strong support for the increased civil rights activities within the African American community, which ultimately culminated in the demonstrations of the 1950s and 1960s. Until Truman's presidency, no president since Lincoln had demonstrated leadership that even approached the leadership exemplified by President Truman in enforcing civil rights for minorities.⁵⁰

46. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Vinson and Burton in the majority); *Hurd v. Hodge*, 334 U.S. 24 (1948) (Vinson and Burton, JJ., in the majority).

47. *Henderson v. United States*, 339 U.S. 816 (1950) (Vinson, Burton, and Minton, JJ., in the majority).

48. *Sweatt v. Painter*, 339 U.S. 629 (1950) (Vinson, Burton, Clark, and Minton, JJ., in the majority); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (Vinson, Burton, Clark, and Minton, JJ., in the majority).

49. 347 U.S. 483 (1954); MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 2 (2005), <http://www.supremecourtus.gov/about/members.pdf>.

50. See, e.g., FONER, *supra* note 28, at 178–180, 276 (Andrew Johnson (1865–1869)—held racist views and generally opposed congressional efforts to improve the condition of the newly freed slaves); *id.* at 528, 577 (Ulysses S. Grant (1869–1877)—“In retrospect, however, it is clear that, partly due to events outside his own control, Grant in his second term presided over a broad retreat from the policies of Reconstruction . . .” and privately viewed the passage of the Fifteenth Amendment prohibiting racial discrimination in the area of voting as a mistake as being “no good” to African Americans and “a hindrance to the South . . .”); RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO* 23, 45 (New, Enlarged ed., Collier Books, 1969) (1965) (Rutherford B. Hayes (1877–1881)—described as “the principal presidential architect of the consolidation of white supremacy in the South, during the post-Reconstruction period” resulting in a greater entrenchment of white supremacy—“[w]hite supremacy was more securely entrenched in the South when he left the White House than it had been when he had entered it.”); *id.* at 54 (James A. Garfield (1881—assassination in 1881)—during his short Presidency, Garfield did appoint several African Americans to prominent positions); *id.* at 55 (Chester A. Arthur (1881–1885)—also appointed several African Americans to senior government positions, but was also criticized for his political alignment with Southern Democrats); *id.* at 60, 89–92 (Grover Cleveland (1885–1889 & 1893–1897)—continued with practice of appointing African Americans to certain jobs, noted progress of African Americans in messages and statements, but did not undertake actions to improve the condition of African Americans); *id.* at 64–67, 85–87 (Benjamin Harrison (1889–1893)—Harrison did provide support for the protection of the African American voting rights in his annual messages to Congress, which ultimately led to unsuccessful congressional efforts to enact a voting rights act); *id.* at 97 (William McKinley (1897–1901 & 1901—assassination in 1901)—continued the practice of appointing a few African Americans to certain federal positions, but “[o]n the vitally more important question of Negro suffrage, McKinley remained silent, until the party in 1900 made its usual appeal for Negro votes.”); KLARMAN, *supra* note 37, at 24, 41 (Theodore Roosevelt (1901–1909)—initially followed practice

President Truman's leadership in the area of civil rights—demonstrated through the promulgation of Executive Orders, appointments to the United States Supreme Court, and themes in his State of the Union address—provided important support to a burgeoning national civil rights movement. This movement received an important boost with the Warren Court's landmark school desegregation case in *Brown v. Board of Education*, which heralded a new era of civil rights activism in a variety of areas.⁵¹ This activism culminated in the enactment of the 1957, 1960, and 1964 Civil Rights Acts.⁵² These acts depended upon enforcement by the federal government. Since the scope and extent of African American disenfranchisement throughout the south reached substantial proportions, these acts were not effective in increasing African American voter registration.⁵³ During the 1950s and 1960s, apart from the continued violence perpetrated against civil rights activists,⁵⁴ the

of appointing African Americans to selected federal posts; however, after public criticism discontinued the practice while proclaiming "in 1905 that 'racial purity must be maintained'"); *id.* at 67 (William Howard Taft (1909–1913)—"Republican racial policy continued to deteriorate . . .," eliminated federal patronage for African Americans, and "supported lily-white factions within southern Republican parties . . ."); *id.* at 68 (Woodrow Wilson (1913–1921)—although initially promising to improve the conditions of African Americans, under Wilson's administration, the federal workforce became segregated, including the armed forces); *id.* at 123, 147 (Warren G. Harding (1921–1923)—Harding did support a federal anti-lynching statute and "[i]n 1921, President Harding criticized race discrimination in the political and economic spheres but firmly rejected 'every suggestion of social equality' and insisted that 'racial amalgamation there cannot be.'"); *id.* at 107 (Calvin Coolidge (1923–1929)—Coolidge was not cordial to African American leaders and in the 1924 presidential election, was the only candidate who "declined to repudiate the Ku Klux Klan."); *id.* at 108 (Herbert Hoover (1929–1933)—Hoover continued to bolster "the lily-white factions of southern Republican parties in an effort to exclude blacks" and was a silent voice for civil rights reforms: "During his presidency, Hoover never spoke out against disfranchisement, peonage, or lynching."); *id.* at 115, 168 (Franklin D. Roosevelt (1933–1945)—Roosevelt could not endorse a civil rights bill, a federal anti-lynching bill, or a bill to outlaw the poll tax because of anticipated Southern opposition); see also RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 153, 154–56 (2004) (Although receiving substantial voter support from the African American community, "Roosevelt never made an open effort to address disenfranchisement. Indeed, he committed himself to postponing any attempt at such a program.").

51. See generally OGLETREE, *supra* note 39.

52. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 20, and 42 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered portions of 28 and 42 U.S.C.). For an excellent summary of these acts as they relate to the right to vote see Derfner, *supra* note 33, at 544–550.

53. POLITICAL PARTICIPATION, *supra* note 36, at 10 ("These Acts . . . did not produce a significant rise in Negro voter registration except in limited areas.").

54. The most notable incidents of racial violence were the bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, resulting in the deaths of four African American girls; the Bloody Sunday march on Selma, Alabama; and the murder of three civil rights workers near Philadelphia, Mississippi. KLARMAN, *supra* note 37, at 437–40.

most significant obstacle preventing African Americans from registering to vote was the implementation of literacy tests.⁵⁵

During the 1950s, voter registration by African Americans was indeed a long hard “slog.” In 1956, Mrs. Melanie Dunham, an African American, applied to register to vote in Walthall County, Mississippi.⁵⁶ She was not successful because the clerk deemed Mrs. Dunham’s explanation of the terms “ex post facto law” and “impeachment” as “inadequate.”⁵⁷ In sharp contrast, in 1955, in the same county, Mr. Alton Ard, a white applicant for voter registration, was asked to “copy and interpret ‘There shall be no imprisonment for debt.’”⁵⁸ Mr. Ard’s application was accepted.⁵⁹

*C. Voting Rights Act of 1965: Elimination of Literacy Tests
and Discriminatory Methods of Election,
and the Implementation of Bilingual Elections*

As a result of heightened awareness of the discriminatory impact of these literacy tests on minority voter registration, increased civil rights activism, and public outrage over the ongoing violence in the south, Congress enacted the landmark Voting Rights Act of 1965 (1965 Act).⁶⁰ For those selected jurisdictions covered by the 1965 Act, which included most of the southern states, there was a five-year suspension on the use of literacy tests.⁶¹ The impact on African American voter registration was dramatic. According to the United States Commission on Civil Rights, there was a substantial increase in voter registration rates among African Americans.⁶² In Alabama, the percent of African Americans who were registered voters in comparison to the voting age population prior to the 1965 Act was 19.3%, compared with the comparable figure for whites at 69.2%.⁶³ After the 1965 Act, the African American voter registration rate

55. As noted by the United States Commission on Civil Rights:

The chief means of limiting the franchise in the 1950s and early 1960s was the literacy test. State laws vested wide discretion in local registrars in administering these and other qualification tests. Although the Department of Justice had a right to sue, litigation was protracted and successfully reached only a small percentage of counties where Negro registration was being limited.

POLITICAL PARTICIPATION, *supra* note 36, at 10.

56. Copy of Melanie Dunham’s Voter Registration Application on file with author.

57. *Id.*

58. Copy of Alton Ard’s Voter Registration Application on file with author.

59. *Id.*

60. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2000)).

61. *Id.* at § 4(a) (codified as amended at 42 U.S.C. § 1971(a)(2)(C) (2003)).

62. POLITICAL PARTICIPATION, *supra* note 36, at 12–13.

63. *Id.* at 12.

for Alabama rose to an astonishing 51.6%.⁶⁴ In Georgia, the pre-1965 Act voter registration rate for African Americans was 27.4%, compared with the comparable figure for whites at 62.6%.⁶⁵ After the 1965 Act, the African American voter registration rate for Georgia nearly doubled to 52.6%.⁶⁶ Perhaps the most dramatic figure of all is the pre-1965 Act voter registration rate for African Americans in Mississippi which was a remarkable 6.7%—the comparable figure for whites was 69.9%.⁶⁷ After the 1965 Act, the figure for African American voter registration rate rose to 59.8%.⁶⁸ The ban on literacy tests was extended nationally in the 1970 amendments⁶⁹ to the 1965 Act and was made permanent with the 1975 amendments.⁷⁰

There were several other important sections of the 1965 Act and its amendments that substantially increased access to the political process for African Americans and other language minority groups.⁷¹ One of these sections, Section 2 of the 1965 Act (Section 2),⁷² would play a critical role in dismantling discriminatory methods of election during the 1980s.

Under Section 2, minorities can institute an action against a political subdivision for implementing a voting qualification, or a prerequisite to voting, or for implementing any standard, practice, or procedure that has the effect of denying minority voters an equal opportunity to participate in the political process and elect candidates of their choice.⁷³ Pursuant to Section 2, minority communities can challenge discriminatory at-large methods of elections.⁷⁴ An at-large method of election refers to an election where all of the voters can vote for candidates to a political subdivision's governing board.⁷⁵ There are no regional election districts.⁷⁶ In

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 13.

68. *Id.*

69. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 U.S.C.).

70. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

71. The term "language minority group" as defined in the Act "means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 19731(c)(3) (2005).

72. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973(a) (2003)).

73. *Id.*

74. *See, e.g.,* Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988).

75. BLACK'S LAW DICTIONARY 136 (8th ed. 2004) (definition of "at large"); *see also* CAL. ELEC. CODE § 14026(a) (2003) (definition of "at-large method of election"); *id.* at § 14026(b) ("district-based elections").

76. BLACK'S LAW DICTIONARY, *supra* note 75.

an at-large or multimember election district, candidates for office are not required to live in particular areas of the jurisdiction.⁷⁷ In jurisdictions conducting at-large elections, minority communities—groups that are also numerical minorities—are at a disadvantage if elections are characterized by racially polarized voting.⁷⁸ Racially polarized voting occurs when racial and ethnic groups vote differently.⁷⁹ Section 2 has been an effective tool against the implementation of election districts that either fragment or over-concentrate politically cohesive minority communities in an effort to minimize their impact on the political process.⁸⁰ As a result of amendments to Section 2 in 1982, minority voters need only demonstrate that the challenged election structure or procedure has a discriminatory effect on minority voting strength in order to prevail.⁸¹

77. *Id.*

78. *See, e.g., Gomez*, 863 F.2d at 1411–13.

79. *See Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986) (“[R]acial polarization’ exists where there is ‘a consistent relationship between [the] race of the voter and the way in which the voter votes,’” (quoting Transcript of Record at 160, *Gingles v. Edmisten*, 590 F. Supp. 345 (D.N.C. 1984)); “or to put it differently, [racial polarization exists] where ‘black voters and white voters vote differently.’” (quoting Transcript of Record at 203, *Gingles*, 590 F. Supp. 345)). If the white community does not support the candidates preferred by the minority community, and the white community is a numerical majority, the minority preferred candidates will consistently be defeated. *See id.* at 56.

80. *See, e.g., Jose Garza, History, Latinos, and Redistricting*, 6 TEX. HISP. J.L. & POL’Y 125, 130 (2001) (“Litigation based on the 1982 amendments to Section 2 of the Voting Rights Act and the ‘one person, one vote’ rule had a critical impact for Mexican American voting rights and electoral success in the 1980s and 1990s These legal actions were at least in part responsible for a dramatic increase in Mexican American representation at various levels of governance.” (footnote omitted)).

81. Prior to the 1982 Amendments, voting rights practitioners were utilizing the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to challenge at-large methods of election having a discriminatory effect on minority voting strength. *See, e.g., White v. Regester*, 412 U.S. 755 (1973). In 1973, the United States Supreme Court, for the first time, held an at-large method of election unconstitutional. *Id.* The case involved a challenge to at-large or multimember legislative districts in Texas. *Id.* The Court held that an at-large method of election was unconstitutional if it denied minorities an equal opportunity to participate in the political process and elect candidates of their choice. *Id.* at 766. After *White*, cases challenging discriminatory at-large methods of election were filed throughout the country. The Court of Appeals for the Fifth Circuit established a series of evidentiary factors to guide courts in evaluating the constitutionality of an at-large method of election. *Zimmer v. McKeithen*, 485 F.2d 1297 (1973), *aff’d sub nom. E. Carroll Parish Sch. Bd. v. Marshall* 424 U.S. 636 (1976). These factors included, among others, the history of minority electoral success and the history of discrimination which precluded effective participation in the political process. *Id.* at 1305. These *Zimmer* factors became the evidentiary basis for at-large election challenges. The dismantling of discriminatory at-large elections came to an abrupt halt when the United States Supreme Court in 1980 imposed another onerous evidentiary requirement. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that proof of a discriminatory intent in either establishing or maintaining an at-large method of election must be proved before such an election method could be declared unconstitutional. Apart from the Court’s constitutional interpretation of the Fourteenth Amendment, the Court also held that there was nothing in the legislative record of the 1965 Voting Rights Act indicating that Section 2 adopted a burden of proof based solely on establishing a discriminatory effect on minority voting strength. *Id.* at 61. Accordingly, after *City*

During the drafting of the 1975 Amendments, Congress also examined the impact of English-only elections on language minority groups who were eligible to vote but could not participate in elections because of their inability to understand English. As stated in the 1965 Act:

The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.⁸²

Accordingly, political subdivisions subject to the Act's bilingual election provisions have to provide both written and oral assistance at the polls to persons who are not proficient in English. This assistance must be provided in the language of the applicable language minority group.⁸³

In summary, the sections of the 1965 Act that prohibited the use of literacy tests and other devices that physically prevented African Americans from registering to vote and voting, that provided an avenue for challenging methods of election that discriminated against minority voting strength, and that eliminated an English-only election process for eligible voters who were not proficient in English, resulted in significantly changing election practices and procedures throughout the country in a manner not seen since the First Reconstruction after the Civil War.⁸⁴ Yet, while the gains attributable to these sections are substantial, the

of *Mobile*, Section 2 actions also required proof of a discriminatory intent. *Id.* Shortly thereafter, Congress amended Section 2 in 1982. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134. As a result of these amendments, minority voters challenging at-large methods of elections are not required to establish a discriminatory intent. *Id.* The challengers must demonstrate that, based upon a totality of circumstances, minority communities do not have an equal opportunity to participate in the political process and to elect candidates of their choice. *Id.*

82. 42 U.S.C. § 1973b(f)(1) (2003).

83. *Id.*

84. See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994).

most dramatic changes in the administration of elections occurred with the enforcement of another key provision of the 1965 Act: Section 5.

D. Section 5 of the Voting Rights Act

Perhaps the most significant provision of the 1965 Voting Rights Act is Section 5.⁸⁵ Section 5 only applies to certain jurisdictions, including many southern states, Texas and Arizona, and four counties in California.⁸⁶ A jurisdiction covered by Section 5 must submit any change affecting voting to the United States Attorney General or the United States District Court for the District of Columbia for a determination that the proposed change does not result in a retrogression of minority voting strength and was not adopted pursuant to an intent to retrogress minority voting strength.⁸⁷ Absent such approval, the voting change cannot be implemented in any election.⁸⁸ Attempts to implement a voting change without the requisite Section 5 approval will result in an injunction preventing the jurisdiction from conducting an election incorporating the voting change.⁸⁹ The most significant feature of Section 5 is its reversal of the burden of proof. A jurisdiction submitting a voting change for approval has the burden of proving non-retrogression of minority voting strength.⁹⁰

Since the Section 5 administrative procedure is less expensive and less time-consuming than litigation, most jurisdictions submit their voting changes to the United States Attorney General for Section 5 approval.⁹¹ If the Attorney General concludes that the submitting jurisdiction has not met its Section 5 burden, a letter of objection is issued,⁹²

85. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c).

86. 28 C.F.R. pt. 51 app. (2005).

87. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997).

88. *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996).

89. *Id.* at 20 (“If a voting change subject to § 5 has not been pre-cleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.”).

90. 42 U.S.C. § 1973c (2003); *see also* 28 C.F.R. § 51.52(a) (2005).

91. U.S. DEP’T OF JUSTICE, ABOUT SECTION 5 OF THE VOTING RIGHTS ACT, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Nov. 13, 2005) (“Well over 99 percent of the changes affecting voting are reviewed administratively, no doubt because of the relative simplicity of the process, the significant cost savings over litigation, and the presence of specific deadlines governing the Attorney General’s issuance of a determination letter.”). *Compare id.* (In a given year, the Attorney General reviews between “14,000 and 20,000 voting changes.”) *with* U.S. DEP’T OF JUSTICE, SECTION 5 DECLARATORY JUDGMENT ACTIONS, http://www.usdoj.gov/crt/voting/sec_5/caselist_ddc.pdf (last visited Nov. 13, 2005) (listing a total of sixty-nine judicial actions filed to secure Section 5 approval since 1965).

92. U.S. DEP’T OF JUSTICE, ABOUT SECTION 5 OF THE VOTING RIGHTS ACT, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Nov. 13, 2005) (“If the jurisdiction is unable to prove the absence of such discrimination, the District Court denies the requested judgment, or in

which is the equivalent of a federal court order.⁹³ Upon receipt of this letter, the jurisdiction is precluded from implementing the voting change in any elections.⁹⁴ From June 19, 1968 to June 25, 2004, the Attorney General issued 1027 letters of objection.⁹⁵ If these letters had not been issued, the filing of at least 1027 lawsuits would have been necessary to achieve the same result.

The positive impact on increasing minority political empowerment, the result of preventing the implementation of voting changes that had the potential for discriminating against minority voting strength, cannot be over-emphasized. For example, in reviewing 222 letters (6 California letters, 21 Arizona letters, and 195 Texas letters), one can readily ascertain that Latinas/os have experienced significant obstacles having a discriminatory effect on minority voting strength. These obstacles included a discriminatory statewide purging of voter registration rolls in Texas;⁹⁶ annexations that diminished the voting strength of Latinos in San Antonio, Texas⁹⁷ and Hanford, California;⁹⁸ county supervisor redistricting plans that fragmented politically cohesive Latino communities in Monterey County, California;⁹⁹ congressional and legislative districts that discriminated against Latino voting strength in Texas;¹⁰⁰ and legislative districts that fragmented Latino communities in Arizona.¹⁰¹

the case of administrative submissions, the Attorney General objects to the change, and it remains legally unenforceable.”); *see also* 28 C.F.R. § 51.52(c) (2005).

93. *See* 28 C.F.R. § 51.10(b) (2005) (“It is unlawful to enforce a change affecting voting without obtaining preclearance under section 5.”).

94. *See* 28 C.F.R. § 51.48(d) (2005) (“An objection remains in effect until either it is withdrawn by the Attorney General or a declaratory judgment with respect to the change in question is entered by the U.S. District Court for the District of Columbia.”).

95. Study done by, and on file with, author.

96. Letter from J. Stanley Pottinger, Assistant Attorney Gen., U.S. Dep’t of Justice, to Mark White, Tex. Sec’y of State (Dec. 10, 1975) (on file with author).

97. Letter from J. Stanley Pottinger, Assistant Attorney Gen., U.S. Dep’t of Justice, to James M. Parker, City Attorney, City of San Antonio (Apr. 2, 1976) (on file with author).

98. Letter from James P. Turner, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Michael J. Noland (Apr. 5, 1993) (on file with author).

99. Letter from James P. Turner, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Leroy W. Blankenship, Senior Deputy Counsel, Monterey County (Feb. 26, 1993) (on file with author).

100. Letter from William Bradford Reynolds, Assistant Attorney Gen., U.S. Dep’t of Justice, to David Dean, Tex. Sec’y of State (Jan. 29, 1982) (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., U.S. Dep’t of Justice, to David Dean, Tex. Sec’y of State (Jan. 25, 1982) (on file with author).

101. Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., U.S. Dep’t of Justice, to Lisa T. Hauser & José de Jesús Rivera (May 20, 2002) (on file with author).

E. Impact of the Voting Rights Act

The cumulative impact of enforcing the Voting Rights Act of 1965, coupled with the demographic growth of minority communities in various parts of this country, has produced significant increases in minority political representation. For example, from 1970 to 2000, African American elected officials increased from 1469 to 9001.¹⁰² For Latina/o elected officials, a study found that there were 1280 Spanish-surnamed elected officials in 1973 in six states.¹⁰³ In a 2004 survey of elected officials, there were about 4800 Latina/o elected officials.¹⁰⁴ Yet despite this advancement in minority political representation, problems involving the denial of access to the political process persist.

The use of at-large elections and their potential dilutive effect on minority voting strength has been well documented.¹⁰⁵ For example, in California, since the at-large method of election is utilized by ninety percent of about 3,000 local governmental entities to elect their governing boards, the number of jurisdictions implementing at-large elections is substantial.¹⁰⁶ In California, this potential dilutive effect may be reflected

102. Carol Hardy-Fanta et al., *Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States*, Address at the 2005 Annual Meeting of the American Political Science Association 3 (Sept. 4, 2005).

103. *Id.*

104. *Id.* This trend for Latinas/os in Texas is evident in school board officials. In 1985, Latina/o representation on school boards was 564. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND, 1985 NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS, at xi (1985). In 2002, the figure was 733. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND, 2002 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS 114 (2002). In 2004, the figure was 759. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS, 2004 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS 116 (2004).

105. See *Thornburg v. Gingles*, 478 U.S. 30, 47 n.13 (1986).

106. As of April 2005, there are a total of 478 municipalities, 108 chartered cities, and 370 general law cities. League of Cal. Cities, *Facts at a Glance*, <http://www.cacities.org/index.jsp?zone=locc&previewStory=53> (last visited Nov. 13, 2005). Out of the total number of cities, only 27, or 5.6%, conduct elections by districts. LEAGUE OF CALIFORNIA CITIES, COUNCIL ELECTIONS (2005), http://www.cacities.org/resource_files/23513.DISTELEC.doc (last visited Nov. 13, 2005) (The City of Coachella is erroneously listed as conducting district elections.). As of July 1, 2004, there were 979 elementary to high school public school districts. Based upon a 1995 survey, 65% of these districts conduct at-large elections, 20% have candidate residency districts and at-large voting, and 15% have district elections. Email from Susan Swigart, Director of Member Services, California School Boards Association, to Joaquin G. Avila, Assistant Professor of Law, Seattle University School of Law (May 17, 2005, 12:27 PST) (on file with author). In a 1987 survey of school districts, it was estimated that over 95% of school districts conducted their elections on an at-large election basis. See Bob Johnson, *Watsonville's New Crop*, GOLDEN STATE REPORT, Sept. 1989, at 27. Recently, the preliminary results of a survey conducted for a project sponsored by the California Research Policy Center entitled "Systems of Election, Latino Representation, and Student Outcomes in California Schools" shows that in fourteen California counties containing significant Latina/o populations (Tulare (50.8%), San Benito (47.9%), Monterey (46.8), Merced (45.3%), Madera (44.3%), Fresno (44.0%), Kings (43.6%), Kern (38.4%), Santa Barbara (34.2%), Ventura (33.4%), Stanislaus (31.7%), San Joaquin (30.5%), Santa Cruz (26.8%) and San Luis Obispo (16.3%)) there

in the low levels of Latina/o representation on elected governing boards. Although Latinas/os in 2000 comprised 32.4% of the state's population,¹⁰⁷ in 2004 there were 535 Latinas/os,¹⁰⁸ or eleven percent of 4850 elected officials, serving on local school boards¹⁰⁹ and there were 357 Latinas/os,¹¹⁰ or 14.2% of 2512 elected officials,¹¹¹ serving on city councils. Such underrepresentation suggests that many of these at-large methods of election may have a dilutive effect on minority voting strength.

To summarize, early historical efforts to expand the right to vote sought to provide physical access to the political process. There were registration and voting barriers, violence, and devices that prevented and discouraged African Americans and other minorities from registering to vote and casting a ballot in support of their preferred candidates. After the more blatant obstacles were removed, the focus shifted to the impact of election structures and features that served to discriminate against minority voting strength. These election structures and features both facilitated and magnified the impact of racially polarized voting in determining the outcome of an election.¹¹²

are 170 school districts ranging from a 10% Latina/o population concentration to an 86% concentration that did not have a single Latina/o school board member in 2004. At-large elections were conducted in 168 of those school districts. It is also estimated that there are over 1000 water districts and over 500 special election districts. Although there are no exact numbers, most of these water districts and special election districts conduct their elections on an at-large basis.

107. U.S. Census Bureau, 2000 Census State & County QuickFacts, California (2000), <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Nov. 13, 2005).

108. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS, 2004 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS 22 (2004).

109. Email from Susan Swigart, Director of Member Services, California School Boards Association, to Joaquin G. Avila, Assistant Professor of Law, Seattle University School of Law (May 17, 2005, 12:27 PST) (on file with author) (total number of school board members).

110. See 2004 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS, *supra* note 108, at 22.

111. Cal. Sec'y of State—2005 Cal. Roster, http://www.ss.ca.gov/executive/ca_roster/ (last visited Nov. 18, 2005).

112. Voting rights cases have been described in terms of generations. *Voting Rights Extension Act of 1993: Hearing on H.R. 174 Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 5–8 (1994) (statement of Dayna L. Cunningham, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.). The first generation of cases involved the removal of obstacles that prevented eligible voters from physical access to the voter registration process. *Id.* at 5. The second generation of cases targeted the operation of election structures and features on minority voting strength. *Id.* at 6. This second generation of cases focused on minority vote dilution issues. *Id.* The third generation of voting rights cases involves issues of governance. *Id.* When a minority is elected to a governing board for the first time, usually there is a change in the decision-making process that works to the disadvantage of the minority officeholder. *Id.* For example, the placement of items on the agenda may become more burdensome. *Id.* Thus, if the new procedure requires a second vote in support of a motion to place an item on the agenda and there is only one minority elected official, then issues of great concern to the minority community may never be placed on the agenda for consideration by the governing body. *Id.* "In *Rojas v. Victoria Indep. Sch. Dist.*, No. V-87-16, 1988 U.S. Dist. LEXIS 11049 (S.D. Tex. Mar. 29, 1998), *aff'd*, 490 U.S. 1001 (1989)], the first Latino is elected to the school board, and suddenly it requires two votes to get an

The ongoing efforts to enforce the 1965 Act seek to minimize the impact of racially polarized voting on the electoral process. Doing so highlights the importance of having election machinery that does not operate in a discriminatory manner, and thus an inquiry into whether an at-large election system dilutes minority voting strength, by necessity, will result in inquiries related to the administration of elections. For example, if a discriminatory at-large method of election is eliminated, the next logical inquiry will focus on whether there will be adequate resources and facilities in minority polling places. The inquiry does not end just because a given political subdivision now has district elections. Election districts without adequate polling facilities will discourage voter participation and turnout.¹¹³ Such low voter participation can have an impact on elections other than those concerned with the selection of a representative for that particular election district.

Presently, as a result of the 2000 and 2004 presidential elections, there is a major election reform movement underway.¹¹⁴ This movement seeks to identify problems in the administration of elections that discour-

item on the agenda. So unless one of the white members of the school board consents, the minority member can not even put on the agenda for discussion the issues of greatest concern to constituents.” *Id.* The fourth generation of voting rights cases will deal with issues of election administration and the minority vote dilution. *Id.* at 7–8. The fifth generation of voting rights cases will involve restoring the rights of non-citizens to vote in state and local elections. *See generally* Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000); *see also* Joaquin G. Avila, *Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population*, LATINO POL’Y & ISSUES BRIEF (UCLA Chicano Studies Research Ctr.), Dec. 2003. This issue of noncitizen voting is also pertinent to the State of Washington. For example, in Royal City located in Grant County, about 56.3% of the total number of persons who are eighteen years and older are noncitizens. JOAQUIN G. AVILA, WASHINGTON CITIES WITH 10% OR MORE 18 YEARS OLD AND OVER NON-CITIZENS 1 (2004) (Source: U.S. Census Bureau, Census 2000, Summary File 4, Table: GCT-P-16, Citizenship Status for the Population 18 Years and Over—2000) (study on file with author). The issue of noncitizen voting at the turn of the century captured the attention of Congress because some states permitted noncitizens to vote upon a declaration of an intent to become a citizen. *See Limiting Right to Vote to Citizens of the United States: Hearing on H.J. Res. 270 before the House Subcommittee No. 1- Civil and Criminal Law of Committee on the Judiciary*, 65th Cong. 4 (Statement of Hon. Andrew J. Montague, Representative from the State of Virginia).

113. Letter from James P. Turner, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Frank McCreary (June 5, 1981) (on file with author) (Letter of Objection issued against the Burleson County Hospital District in Texas for reducing the number of polling places from thirteen polling places to one resulting in a drop from about “2,300 voters participating in the 1977 election to approximately 300 voters participating in [the] 1979 and 1980 elections.”).

114. *See generally* U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 2001) (2000 presidential elections); HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (2005) (2004 presidential elections) [hereinafter PRESERVING DEMOCRACY]; FED. COMM’N ON ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005) (87 recommendations for election reform).

age and prevent eligible voters from exercising their vote.¹¹⁵ By addressing these maladministration issues, the electoral process will become more accessible.¹¹⁶ In a similar fashion, addressing issues of minority access to the political process will inevitably lead to an inquiry regarding the administration of elections.¹¹⁷ As a result of this congruence in objectives, there is a historic opportunity to significantly improve minority access to the political process and at the same time improve the administration of elections.

Thus, the 2004 gubernatorial election presents an opportunity that can have far reaching effects in providing racial and ethnic minorities with greater access to the political process. By focusing on efforts to improve the administration of elections, inquiries regarding the fairness of certain election procedures and methods of election will inevitably arise. Only by addressing issues of minority access to the political process in conjunction with efforts to improve the administration of elections can we hope to strengthen the body politic.

This symposium issue will not only deal with the problems confronting election administrators in preparing and executing a flawless election, but also will highlight those areas where this convergence of reform interests—interests between those who seek an election system that does not discriminate and those who want an election machinery that restores public confidence in the electoral process—can synergistically produce a political environment that requires the election machinery not only to run well, but to encourage groups that heretofore have been ex-

115. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 14.

116. Improving the administration of elections will result in fewer obstacles that inhibit voter participation. For example, by streamlining the voting process and facilitating the use of voting by mail, voting participation rates can increase. In Oregon, all voting is conducted by mail. Voting in Oregon Guide, <http://www.uhavavote.org/votingguide/votebymail.html> (last visited Nov. 13, 2005). As noted on the Secretary of State's website: "All elections in Oregon are Vote by Mail. This means that registered voters receive their ballots in the mail and can vote in the comfort of their home." *Id.* As a result of this accessible voting process, voter turnout in Oregon elections is among the highest in the nation. During the 2004 general election, the percent of registered voters voting was 86.48%. STATISTICAL SUMMARY: 2004 GENERAL ELECTION 1 (2004), <http://www.sos.state.or.us/elections/nov22004/g04stats.pdf>. In comparison, for the same election in California, where voting is permitted by other means, the percent of registered voters voting was 76.04%. COMPARATIVE VOTER REGISTRATION AND VOTER PARTICIPATION STATISTICS FOR STATEWIDE GENERAL ELECTIONS—1910–2004, at 2, http://www.ss.ca.gov/elections/sov/2004_general/sov_pref_pgs9_10_compare_stats_1910_2004.pdf.

117. For example, in addressing issues of insufficient voting machines in minority neighborhoods, questions regarding election administration policies will arise. PRESERVING DEMOCRACY, *supra* note 114, at 24–31, 102. Inquiries will be directed toward assessing whether there are any valid criteria or standards in support of the present method of allocating voting machines. *Id.* at 24–31. A review of such policies will result in a more efficient Election Day operation. *Id.*; see also Count Every Vote Act of 2005, S. 450, 109th Cong. § 299 (2005) ("Standards for Establishing the Minimum Required Voting Systems and Poll Workers").

cluded from the political process to enter the political arena and become a vested stakeholder in their communities. It is in this context that the 2004 gubernatorial contest must be placed.

III. THE UNFOLDING OF AN ELECTORAL AND POLITICAL CRISIS

The 2004 presidential election was expected to be close.¹¹⁸ The State of Washington's gubernatorial election was also expected to be close¹¹⁹—but not this close. After the initial count on Election Day, November 2, 2004, Gregoire was ahead by 32 votes out of 1.8 million counted.¹²⁰ However, a significant number of absentee and provisional¹²¹ ballots remained to be counted.¹²² On November 3rd the lead widened to 14,300 votes out of 2 million votes counted,¹²³ and increased to about 18,000 votes the following day.¹²⁴ As the absentee balloting and provisional balloting commenced, the lead was reduced to about 4000 votes.¹²⁵ However, shortly thereafter, the lead was extended to 8700 votes.¹²⁶ A sharp reversal occurred the following week after additional absentee votes were counted: Rossi assumed close to a 3000 vote lead.¹²⁷ As the counting continued, Rossi's lead increased to about 3500 votes,¹²⁸ and

118. Adam Nagourney et al., *The 2004 Campaign: The Polls; In Final Days Before Vote, Divided Electorate Expresses Anxiety and Concern*, N.Y. TIMES, Nov. 1, 2004, at A16 ("The poll shows that Mr. Bush and his opponent, Senator John Kerry, remain locked in a statistical tie as they head into the final 48 hours of the race.").

119. Brad Knickerbocker, *Washington Among Tight Governor's Races*, CHRISTIAN SCI. MONITOR, Oct. 29, 2004, at 2 (Washington State gubernatorial election called toss-up); David Ammons, *Voter Turnout Could Set Washington Record*, THE COLUMBIAN, Oct. 31, 2004, at C (polls before election showed either a tie or a slight lead for each candidate).

120. *State Election Results*, SEATTLE TIMES, Nov. 3, 2004, at B14; Ralph Thomas, *Gregoire, Rossi Race Comes Down to Wire*, SEATTLE TIMES, Nov. 3, 2004, at B1.

121. See HAVA, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.).

122. *State Election Results*, *supra* note 120; Joni Balter, *Gregoire Campaigns Gives Dems Something to Chew on*, SEATTLE TIMES, Nov. 4, 2004, at B6 ("Gregoire's best hope lies with perhaps 100,000 provisional ballots statewide and other outstanding ballots in King, Whatcom and Thurston counties.").

123. David Postman, *Gregoire vs. Rossi: Why It's So Close*, SEATTLE TIMES, Nov. 4, 2004, at A1; Ralph Thomas, *Gregoire Edges Ahead of Rossi; Potential for Recount Looms*, SEATTLE TIMES, Nov. 4, 2004, at A12.

124. Ralph Thomas & Andrew Garber, *King County Absentees Widen Lead for Gregoire*, SEATTLE TIMES, Nov. 5, 2004, at B1.

125. Ralph Thomas, *Gregoire's Lead over Rossi Slips to 4,000*, SEATTLE TIMES, Nov. 6, 2004, at B4.

126. Ralph Thomas & Susan Gilmore, *King County Absentees Push Gregoire's Lead to 8,700 Votes*, SEATTLE TIMES, Nov. 9, 2004, at B1.

127. Ralph Thomas, *Rossi Ahead, Names Team for Possible Transition*, SEATTLE TIMES, Nov. 10, 2004, at A1.

128. Ralph Thomas & Keith Ervin, *Rossi Maintains Lead; Gregoire Holds Out Hope*, SEATTLE TIMES, Nov. 11, 2004, at B1.

then inched up to 3600 votes on November 11th.¹²⁹ Given the tightness of the contest, disputes over ballot counting were inevitable.

A. The Initial Disputes

The first major dispute concerned provisional ballots. King County found signature problems with about 900 provisional ballots.¹³⁰ Democratic Party officials had requested the names of the voters who had signed the provisional ballots in order to assist in correcting any problems identified by county officials.¹³¹ There were also charges of intimidation of election officials as they counted these provisional ballots, leveled against the representatives of the Republican Party.¹³²

The counting continued and the litigation commenced. Representatives of the Democratic Party initiated litigation in King County Superior Court to secure the names of the voters who voted on provisional ballots and whose ballots presented problems with election officials.¹³³ Although initially reluctant to provide the names of these voters on the grounds that HAVA¹³⁴ precluded such a disclosure, the county provided these names after the superior court granted a temporary restraining order requested by the Democratic Party officials.¹³⁵ The superior court concluded that there was no specific prohibition relating to the disclosure of the names of persons who voted with provisional ballots.¹³⁶ Moreover, it appeared that King County was the only major county which refused to disclose such names.¹³⁷ In other counties, such names were a matter of public record and were provided to both Democratic and Republican Party officials.¹³⁸ Accordingly, the superior court ordered county election officials to release these names to both parties.¹³⁹ After securing this court Order, the Democratic Party officials were hopeful of securing ad-

129. Keith Ervin, *Governor Race May End Up in Court*, SEATTLE TIMES, Nov. 12, 2004, at A1.

130. *Id.*

131. *Id.*

132. *Id.*

133. Wash. State Democratic Cent. Comm. v. King County Records, Elections & Licensing Servs. Div., No. 04-2-36048-0-SEA (King County Super. Ct., Wash. filed Nov. 12, 2004).

134. HAVA, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.).

135. Wash. State Democratic Cent. Comm., No. 04-2-36048-0-SEA (Nov. 12, 2004) (order granting Motion for Temporary Restraining Order and Other Relief); *id.* (Nov. 16, 2004) (order reaffirming previous order and denying other requested relief).

136. Memorandum Opinion and Order, *id.* at 3.

137. *Id.*

138. *Id.*

139. *Id.*

ditional votes for Gregoire.¹⁴⁰ As a result of the Order, Democratic Party officials and volunteers contacted voters across the county in an attempt to have their votes counted.¹⁴¹

As the counting continued, more ballots were found in King County. Initially projecting an uncounted ballot total of about 11,000, King County election officials stated that in fact the number of uncounted absentee and provisional ballots totaled about 21,000.¹⁴² The explanation given by county officials related to the higher than expected number of voters who voted by absentee ballots.¹⁴³ In addition there were more provisional ballots found to be valid.¹⁴⁴ These additional votes, which came from a county leaning in favor of the Democratic Party, served to eliminate the margin of victory that Rossi had maintained for a few days.¹⁴⁵ As a result of these ballots, Rossi was now trailing by 158 votes.¹⁴⁶ The Rossi campaign expressed major concerns regarding the discrepancy of 10,000 votes between projected estimates and the actual vote count, especially since the newly adjusted figures were released just two days before the official certification.¹⁴⁷ The counting of ballots continued. About two days before the election was scheduled to be certified, Rossi was leading by nineteen votes, with about 6000 ballots to be counted.¹⁴⁸ After the counting was completed, Rossi was ahead statewide by a mere 261 votes out of 2.8 million votes counted.¹⁴⁹

140. Susan Gilmore et al., *Rossi Leading; Gregoire Allies Win in Court*, SEATTLE TIMES, Nov. 13, 2004, at A1.

141. Judy Chia Hui Hsu, *Parties Chase After Every Vote*, SEATTLE TIMES, Nov. 14, 2004, at B1.

142. Ralph Thomas & Keith Ervin, *Governor's Race Going Back and Forth*, SEATTLE TIMES, Nov. 16, 2004, at B1.

143. *Id.* According to election officials, the higher number of returned absentee ballots was due to "late returns from voters overseas or serving in the armed forces." *Id.*

144. *Id.*

145. *Id.* In the interim, Democratic Party officials were securing affidavits from those voters identified by King County officials as having cast questionable provisional and absentee ballots. *Id.* On November 15th, Democratic Party officials handed in about 400 affidavits from these voters. *Id.* Such votes were deemed to favor Gregoire. *Id.*

146. *Id.*

147. *Id.* Apparently the discrepancy occurred as a result of a change in the pre-election projected voter turnout figure. The original pre-election projected voter turnout, as it turned out, was more accurate. Keith Ervin, *"Sudden" County Ballots Were There All Along*, SEATTLE TIMES, Nov. 17, 2004, at A13.

148. Ralph Thomas et al., *Governor's Race in Turmoil*, SEATTLE TIMES, Nov. 17, 2004, at A1. In addition, to add to the drama, "election officials in Grays Harbor County announced a recount of its ballots because some votes had been counted twice." *Id.* This particular recount resulted in hundreds of votes being taken away from Rossi. *Id.*

149. Ralph Thomas et al., *It's Rossi by 261; Recount Is Next*, SEATTLE TIMES, Nov. 18, 2004, at A1.

B. The First Recount

Due to the small vote margin, a mandatory machine recount was conducted.¹⁵⁰ The machine recount was closely monitored—just about every vote tally was scrutinized¹⁵¹—and resulted in the filing of the first lawsuit.¹⁵² The Republican Party filed a lawsuit in federal court challenging the recounting of votes in King County. The litigation sought an order preventing King County election officials from enhancing or duplicating a ballot when the optical scan vote counting machines rejected it.¹⁵³ When such an event occurs, election officials review the ballot and if the intent of the voter can be ascertained then the election officials prepare a duplicate ballot or enhance the ballot to reflect the voter's intent. Once completed, the enhanced or duplicate ballot is added to the vote tally.¹⁵⁴ The effort by the Republican Party to halt the counting of these challenged ballots was unsuccessful—the District Court Judge denied the requested relief. Since the ballots were being preserved, there were additional opportunities to review the validity of these ballots. A subsequent request for a preliminary injunction was also denied.¹⁵⁵

The machine recount also resulted in the additional votes being tallied that were not included in the initial count. For example, in Snohomish County, election officials “accidentally overlooked” 242 absentee ballots that had not been counted.¹⁵⁶ This oversight was due to the stacking of an empty tray on top of another tray containing ballots.¹⁵⁷

As the votes were received from the machine recount, on November 23rd Rossi's lead widened to 321 votes, with the vote tallying of two

150. *Id.* Lost in the ongoing gubernatorial election drama was the fact that the statewide voter turnout was 82.13%, a noteworthy accomplishment. *Id.* For the statutory authority for a recount see *supra* note 17.

151. Peggy Andersen, *Klickitat Finishes Recount; Rossi Picks Up a Vote*, SEATTLE TIMES, Nov. 21, 2004, at B2 (“Rossi added one [vote] in Klickitat County, the first of the 39 counties to report recount results.”).

152. *Wash. State Republican Party v. Reed*, No. C04-2350RSM (W.D. Wash. filed Nov. 11, 2004); see also Steve Miletich & Brier Dudley, *GOP Files Suit over Recount Governor's Race, King County Workers' Methods Called Improper*, SEATTLE TIMES, Nov. 21, 2004, at B1. The Republican Party did not file similar suits in other counties. *Id.*

153. Miletich & Dudley, *supra* note 152.

154. *Id.* Under former administrative code sections, election officials had the authority to enhance and duplicate ballots that reflected a voter's intent but were not clearly legible. WASH. ADMIN. CODE 434-261-080 to 090 (2004), *repealed by* 05-17 Wash. Reg. 199 (Aug. 19, 2005).

155. Ralph Thomas, *All Eyes on State Recount*, SEATTLE TIMES, Nov. 23, 2004, at A1; Lynn Thompson, *Judge Says No to GOP, Won't Halt Recount*, SEATTLE TIMES, Nov. 22, 2004, at B1. The case was subsequently dismissed voluntarily. *Wash. State Republican Party*, No. C04-2350RSM (Nov. 29, 2004) (order granting voluntary dismissal).

156. Thomas, *supra* note 155.

157. *Id.*

counties still outstanding.¹⁵⁸ One of the outstanding counties was King County, where Gregoire was expected to pick up votes.¹⁵⁹ However, ultimately the votes in King County were not enough for Gregoire. Rossi won the machine recount vote by forty-two votes.¹⁶⁰ In King County, the machine recount resulted in the counting of an additional 1000 ballots that were not counted before.¹⁶¹ On November 30th, the Secretary of State certified the results of the machine recount.¹⁶²

C. The Second Recount

After the certification of the machine recount, the Democratic Party exercised another procedure available in the election code. The Democratic Party sought a manual statewide recount.¹⁶³ This procedure was initiated by providing a check for \$730,000 to the Secretary of State's office on December 3, 2004.¹⁶⁴

In conjunction with the statewide hand recount, the Democratic Party and voters filed a writ of mandamus directly with the Washington State Supreme Court seeking the establishment of uniform standards for counting ballots during the recount.¹⁶⁵ The writ alleged that ballots rejected in the previous counts should be reviewed again utilizing uniform standards that would assure that all ballots validly cast were counted.¹⁶⁶ The supreme court rejected the argument and held that a manual recount

158. Ralph Thomas, *King County Holds Key as Tally Nears End*, SEATTLE TIMES, Nov. 24, 2004, at A1.

159. *Id.* With two counties' results outstanding, five counties had counted "100 additional votes or more compared with their initial tallies." *Id.*

160. Ralph Thomas, *A Governor by Christmas?*, SEATTLE TIMES, Nov. 25, 2004, at A1.

161. *Id.* These additional votes were "due to voter errors or ballot irregularities." *Id.*

162. Susan Gilmore & David Postman, *Rossi Named Governor-Elect; Funds Flowing to Democrats for New Count*, SEATTLE TIMES, Dec. 1, 2004, at A1.

163. WASH. REV. CODE § 29A.64.011 (2004).

164. WASH. REV. CODE § 29A.64.030 (2004) (manual recount requires a deposit based upon the votes cast in the election); see also Andrew Garber & David Postman, *Statewide Recount Next Week; Dems Sue over Rejected Ballots*, SEATTLE TIMES, Dec. 4, 2004, at A1.

165. Petitioners' Motion and Brief in Support of Emergency Partial Relief, *McDonald v. Reed*, 153 Wash. 2d 201, 103 P.3d 722 (2004) (No. 76321-6). Although at loggerheads during the litigation and hand recounts, there was at least one moment of agreement between the Democratic and Republican Parties, and election officials. As a result of reaching an agreement, the counties of Snohomish and Yakima would not be required to print out their ballots from computer tapes. Instead, the counties could use the computer tapes during the hand recount. Emily Heffter, *Two Counties to Use Tapes in Recount*, SEATTLE TIMES, Dec. 9, 2004, at B4.

166. Petitioners' Motion and Brief in Support of Emergency Partial Relief at 16-19, Petitioners' Motion and Brief in Support of Emergency Partial Relief, *McDonald*, 153 Wash. 2d 201, 103 P.3d 722.

involved a “retabulating” of ballots cast, and thus those ballots that were rejected would not be counted in the hand recount.¹⁶⁷

Predictably, as the hand recount unfolded, counties found ballots that had not been counted. In Whatcom County, seven ballots had been placed with a stack of empty envelopes.¹⁶⁸ In Skamania County, several ballots were discovered which were not properly read by optical scan equipment.¹⁶⁹ In Mason County, the specter of ballot chads appeared to play a role in the hand recount when ballots that were punched had not been counted.¹⁷⁰ And in Wahkiakum County, when asked to explain the discrepancy of one vote between the previous counts and the hand recount, the county auditor stated: “I don’t know.”¹⁷¹

And, predictably, the genesis of a second major state supreme court case began. Initially, the returns of the more populated counties were awaited with a collective anticipation that the results would bring an end to this ongoing political saga. However, such an expectation soon evaporated as voters noticed that their votes were not counted in King County. One of those voters was King County Councilman Larry Phillips. Councilman Phillips had voted absentee in the election. His ballot was rejected because there was no matching signature on file to verify his signature. Councilman Phillips’ discovery prompted election officials in King County to search for more ballots that were rejected on this ground.¹⁷² If there was no matching signature in the computer system, the appropriate course would have been to check the signatures on the voter registration cards.¹⁷³ The search found 561 ballots that had not been disqualified in accordance with this procedure. In essence, these voters were being pe-

167. *Id.* at 203–06, 103 P.3d at 723–24. The petitioners also challenged the absence of any standards for reviewing signatures on absentee ballots and provisional ballots consistent with “the more liberal standards applied in most counties” and the absence of “standards that allow party representatives to meaningfully witness the hand recount, by observing all actual ballots being counted.” *Id.* at 203, 103 P.3d at 723. Both of these requests for relief were denied. *Id.* at 206, 103 P.3d at 724; *see also* Jim Downing, *Party Faithful to Tally Ballots*, SEATTLE TIMES, Dec. 7, 2004, at A1 (discussing King County’s hand recount process and standards).

168. Andrew Garber, *New Votes Emerge in Recount*, SEATTLE TIMES, Dec. 10, 2004, at B1. In Kitsap County, the hand recount resulted in an additional 161 votes. Keith Ervin, *Rossi Keeps Slim Lead as Recount Crawls On; Extra Ballots Show Up*, SEATTLE TIMES, Dec. 11, 2004, at B1. The county auditor attributed the difference to the use of lightly colored ink in marking electoral preferences. *Id.*

169. *See* Garber, *supra* note 168. Apparently, voters used a pencil to mark their preferences, instead of a pen.

170. *Id.*

171. *Id.*

172. Jennifer Sullivan, *Councilman’s Ballot Among Those Rejected*, SEATTLE TIMES, Dec. 31, 2004, at B1.

173. WASH. REV. CODE § 29A.40.110(3) (2005); David Postman, *Error Discovery Could Give Gregoire Election*, SEATTLE TIMES, Dec. 14, 2004, at A1.

nalized because their signature had not been entered into the computer system.

Before a second state supreme court challenge was pursued, however, a “nuclear option” surfaced which threatened to completely bypass the electoral process.¹⁷⁴ Under a rarely used provision of the state’s constitution, the issue of selecting the next governor could be resolved by the legislature. Article III, Section 4 states: “Contested elections for such officers [governor and other state elected officials specified in Section 1] shall be decided by the legislature in such manner as shall be determined by law.”¹⁷⁵ Since both houses of the legislature would each consist of a majority of Democrats after newly elected members were sworn into the senate, Gregoire would likely benefit from the pursuit of such a legislative strategy.¹⁷⁶ For the moment, the nuclear option was not engaged and the hand recount continued. As of December 14th, the results of the hand recount provided Rossi with a 106 vote lead.¹⁷⁷

However, the Republican elation over Rossi’s sixty-four vote net increase over Gregoire in the hand recount was tempered by the continuing discovery of ballots that were not counted in King County. Election officials discovered twenty-two uncounted ballots located in pockets of voting machines placed in storage.¹⁷⁸ Since these ballots were not counted, the Republican Party contended that the ballots were not properly secured and thus should remain uncounted.¹⁷⁹ The discovery of these additional ballots added to the 561 ballots that were rejected because of the absence of a signature on the county’s computerized voting system.¹⁸⁰ On December 14th, the county revised the figure to 573.¹⁸¹ Thus, as of December 14th, the total number of ballots that were not initially counted in King County was 595.¹⁸² The following day, the county canvassing board¹⁸³ voted along party lines to permit election officials to

174. David Postman, *Will Legislature Pick Governor? It Could Happen*, SEATTLE TIMES, Dec. 15, 2004, at A1.

175. WASH. CONST. art. III, § 4.

176. Postman, *supra* note 173.

177. *Governor Recount*, SEATTLE TIMES, Dec. 15, 2004, at A1 (as of December 14th, Rossi had gained a net of 64 votes over Gregoire in the hand recount).

178. Ralph Thomas & Keith Ervin, *Rossi Gains a Few More Votes*, SEATTLE TIMES, Dec. 15, 2004, at A21.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. The county canvassing board consists of three members: the county auditor, the county prosecuting attorney, and the chair of the county’s legislative delegation. WASH. REV. CODE § 29A.60.140(1) (2004). The canvassing board has the authority to review challenges to registered voters and ballots cast and to certify the results of elections. WASH. REV. CODE § 29A.60.140(1), (3).

review the 573 ballots that were previously rejected because of the absence of a signature on the county's computer voting system.¹⁸⁴ The review would permit election officials to verify the signatures with those signatures located on the county's voter registration cards.¹⁸⁵ Such a decision would be of great significance since on the evening of December 15th, Rossi led Gregoire by 121 votes.¹⁸⁶

Accordingly, the Republican Party sought judicial review of King County's canvassing board's decision to permit review of the disputed 573 ballots.¹⁸⁷ The Superior Court for Pierce County issued a Temporary Restraining Order and Order to Show Cause on December 17, 2004, preventing King County election officials from proceeding with the canvassing of the previously rejected ballots.¹⁸⁸ At issue was whether state law permitted canvassing boards to count ballots that were previously rejected and, if so, under what circumstances such ballots could be counted.¹⁸⁹ In reversing the superior court, the state supreme court held that the canvassing board did have the authority to count ballots that had previously been rejected under a very limited set of circumstances.¹⁹⁰ According to the supreme court, the failure to count ballots on the basis of a mistake committed by election officials qualifies as an "apparent discrepancy or inconsistency that the board can correct through recanvassing."¹⁹¹ Election officials should have verified the signatures of the disputed ballots with the signatures on file on the voter registration cards.

184. David Postman, *Cascading Errors Shake Voter Confidence*, SEATTLE TIMES, Dec. 16, 2004, at A1; Keith Ervin & Susan Gilmore, *New Look at 573 Ballots May Close Gregoire Gap, 2-1 Splits King County Board, GOP Threatens Legal Action Over Decision on Rejected Ballots*, SEATTLE TIMES, Dec. 16, 2004, at A1.

185. As of December 15th, election officials had matched signatures for 245 of the disputed ballots. Moreover, 101 of the voters casting these disputed ballots had not responded to a previous letter requesting an updated signature. The canvassing board also withheld a decision on whether to count 22 ballots found in the pockets of voting machines and reviewed additional problem ballots identified by the hand recount officials. Ervin & Gilmore, *supra* note 184.

186. *Id.* As the recount continued, each ballot was carefully scrutinized. In at least one instance, the imprint of a squashed bug nearly derailed the counting of one ballot. Apparently the ballot had a filled-in oval for Rossi and a "smudge" in the oval for Gregoire. Upon close inspection, the smudge turned out to be a squashed bug. Danny Westneat, *Counter For a Day Finds Few Bugs in Recount Process*, SEATTLE TIMES, Dec. 18, 2004, at A1.

187. *Wash. State Republican Party v. King County Div. of Records*, No. 04-2-14599-1 (Pierce County Super. Ct., Wash. filed Dec. 16, 2004); *Wash. State Republican Party v. King County Div. of Records*, 153 Wash. 2d 220, 221-22, 103 P.3d 725, 726 (2004).

188. *Wash. State Republican Party*, No. 04-2-14599-1 (Dec. 17, 2004) (order granting temporary restraining order); *Wash. State Republican Party*, 153 Wash. 2d at 222, 103 P.3d at 726.

189. WASH. REV. CODE § 29A.60.210 (2004) ("Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county.").

190. *Wash. State Republican Party*, 153 Wash. 2d 220, 103 P.3d 725.

191. *Id.* at 225, 103 P.3d at 728.

As a result of the court's decision, King County could continue to review the disputed ballots. Without incorporating the results of the disputed ballots, the result of the manual recount resulted in a ten vote victory for Gregoire.¹⁹² After King County completed the recanvassing of the disputed ballots, Gregoire's lead increased to 130 votes.¹⁹³ The final tally was reduced by one vote to 129 votes.¹⁹⁴ The results of the hand recount were certified by the Secretary of State on December 30th.¹⁹⁵

In the meantime, the Republican Party continued its inquiry into voter irregularities in King County. The Republican Party pointed out that there were 3539 more ballots cast than there were registered voters.¹⁹⁶ In response, by way of explanation, King County's election superintendent stated that in some instances persons who were not eligible to vote may have cast a provisional ballot and inserted it into the vote counting machine instead of having the provisional ballot separated from the other ballots.¹⁹⁷ This would account for some of the discrepancy. However, there was no way of undoing the damage.¹⁹⁸

After the election was certified, the Secretary of State proposed a series of legislative reforms to restore public confidence in state elections.¹⁹⁹ His proposals requested that the state's primary election date be moved to June, rather than conducting the primary in early September.²⁰⁰ An earlier date for the primary election would provide sufficient time for election officials to prepare for the subsequent general election. The Secretary also proposed that absentee ballots should be either postmarked no later than the Friday preceding the election or be received no later than Election Day.²⁰¹ In an effort to ease the financial strain experienced by

192. David Postman & Ralph Thomas, *Gregoire Leads by 10*, SEATTLE TIMES, Dec. 23, 2004, at A1. The recanvassing by the county canvassing board includes additional ballots identified by election officials as eligible for consideration by the board. The total ballots to be reviewed now climbed to 735. *Id.*

193. David Postman, *It's Gregoire by 130; Is It Over?*, SEATTLE TIMES, Dec. 24, 2004, at A1. After the results were announced Republican Party officials called for a new election and sent inquiries to various county canvassing boards seeking information regarding problems associated with the counting of ballots. Editorial, *State Can't Handle a New Election*, SEATTLE TIMES, Dec. 30, 2004, at B6.

194. Ralph Thomas, *Rossi Urges Revote to Fix "Mess,"* SEATTLE TIMES, Dec. 30, 2004, at A1.

195. *A Look Back at 58-day Wait and 3 Counts*, SEATTLE TIMES, Dec. 31, 2004, at A18.

196. Keith Ervin, *Provisional-Vote Flaws Revealed, Some Ballots Bypassed Inspection*, SEATTLE TIMES, Jan. 5, 2005, at B1; Keith Ervin, *GOP: Hundreds of Ballots Suspect*, SEATTLE TIMES, Jan. 6, 2005, at B1. There were additional allegations of votes cast by persons who were dead. However, the number of such fraudulently cast votes was small. Jonathan Martin & David Heath, *Voting by Dead People Isn't Always a Scam*, SEATTLE TIMES, Jan. 7, 2005, at A1.

197. See Ervin, *Provisional-Vote Flaws Revealed*, *supra* note 196.

198. *Id.*

199. Susan Gilmore, *Reed Proposes Election Reform*, SEATTLE TIMES, Jan. 7, 2005, at B1.

200. *Id.*

201. *Id.*

counties, the Secretary proposed that the state finance the cost of re-counts conducted in even-numbered years and that funds be provided for training programs.²⁰² In addition, the proposed reforms would require county auditors to inform voters in writing that their ballots were not counted as a result of receiving the ballots after Election Day.²⁰³ However, these reforms were presented in a political climate where the outcome of the election was not officially over.

D. The Election Contest

The expected election contest by supporters of the Republican Party gubernatorial candidate, Dino Rossi, was filed on January 7, 2005.²⁰⁴ The election contest raised a variety of issues that included improper handling of provisional ballots, discrepancies between the voter lists and the number of ballots cast, illegal votes by convicted felons who had not had their right to vote restored, mishandling of overseas military ballots, and, most significantly, lack of uniform standards for counting and ballot verification among the counties.²⁰⁵ Although the election contest was filed against election officials,²⁰⁶ representatives of the Democratic and Libertarian Parties soon intervened.²⁰⁷

The filing of the election contest set the political tone for the drama unfolding in the state legislature. Rossi supporters sought to postpone any legislative imprimatur on the election of Gregoire as the governor.²⁰⁸ The legislative maneuvering was accompanied by dueling public rallies, each group supporting their preferred candidate with their respective slogans: “‘ILLEGAL VOTES = ILLEGITIMATE RESULTS’ and ‘This isn’t Ukraine, it’s Washington’” for the Republicans versus “‘We’ve had a close, but a fair election. It’s now time to move on’”²⁰⁹ for the Democrats. At the same time, election officials in King County were making

202. *Id.*

203. *Id.*

204. *Borders v. King County*, No. 05-2-00027-3 (Thurston County Super. Ct., Wash. filed Jan. 7, 2005); see also David Postman et al., *GOP Suit Doesn't Ask to Prevent Swearing-In*, SEATTLE TIMES, Jan. 8, 2005, at A1. According to the article, there had never been a successful election contest involving a statewide office. *Id.*

205. *Borders*, No. 05-2-00027-3. With respect to overseas military ballots, the federal government had applied pressure on the counties to send out the ballots in a timely manner. David Postman & Ralph Thomas, *Feds Threatened Suit over Military Ballots*, SEATTLE TIMES, Jan. 10, 2005, at A1.

206. See *Borders*, No. 05-2-00027-3.

207. Washington State Democratic Central Committee's Motion to Intervene, *Borders*, No. 05-2-00027-3; see also, David Postman, *Democrats Challenge GOP Lawsuit*, SEATTLE TIMES, Jan. 12, 2005, at B2; *Election-suit Judge Recuses Self*, SEATTLE TIMES, Jan. 13, 2005, at A13 (approval of Libertarian Party intervention).

208. David Postman & Andrew Garber, *Legislature Opens With a Battle, GOP Fails in Bid to Delay Declaring Gregoire Governor*, SEATTLE TIMES, Jan. 11, 2005, at B1.

209. *Id.*

adjustments to their ballot discrepancies, which only added ammunition to the efforts to invalidate the election.²¹⁰ Ultimately, the state legislature certified Christine Gregoire as the winner of the election,²¹¹ and she had her inaugural ball.²¹²

After the festivities subsided, attention returned to the election contest. Attention focused on allegations that there were a large number of illegal votes cast by felons, discrepancies between the number of ballots cast and the actual number of registered voters, and the mishandling of provisional ballots.²¹³ Initial discovery efforts were opposed by the Democratic Party representatives. The Democratic Party sought to have several jurisdictional questions addressed before any extensive discovery could be commenced. These questions included the following: whether (1) the state legislature was the appropriate governmental body to resolve this statewide office election dispute; (2) the state supreme court was the appropriate court to decide this election contest; (3) the petition's allegations were within the purview of the election contest statute; and (4) the request for a new election was authorized under state laws.²¹⁴ While these discovery and jurisdictional questions were being considered, attention continued to focus on the votes cast by felons whose right to vote had not been restored in accordance with applicable state law.²¹⁵ While

210. Keith Ervin, *New Error Found in Vote Tally*, SEATTLE TIMES, Jan. 11, 2005, at B1.

211. Ralph Thomas & Andrew Garber, *2 Sides Rally on Eve of Inaugural*, SEATTLE TIMES, Jan. 12, 2005, at B1.

212. Christina Siderius, *Turmoil Put Aside at Ball Honoring Governor*, SEATTLE TIMES, Jan. 13, 2005, at A13.

213. David Postman, *GOP Seeks Criminal Records*, SEATTLE TIMES, Jan. 14, 2005, at A1.

214. Washington State Democratic Central Committee's Opposition to Petitioners' Motion for Expedited Discovery, *Borders v. King County*, No. 05-2-00027-3 (Thurston County Super. Ct., Wash. filed Jan. 7, 2005). As additional support for staying discovery in the election contest, the Democratic Party representatives contended that the filing of four other separate election contests, three directly with the Washington Supreme Court and one in Kitsap County, required coordination in order to avoid burdensome discovery resulting from repeated requests for the same information. *Id.* In a subsequent ruling, the superior court denied the petitioners' request for expedited discovery and also denied the Democratic Party representatives' motion to suspend discovery until the jurisdictional questions were resolved. David Postman, *GOP Loses Round in Election Case, Judge Also Deals Democrats a Setback*, SEATTLE TIMES, Jan. 21, 2005, at B1.

215. See WASH. REV. CODE § 9.92.066 (2003). A newspaper study found that "scores" of ineligible felons voted in the contested gubernatorial election. *Scores of Felons Voted Illegally*, SEATTLE TIMES, Jan. 23, 2005, at A1. In response to this study, county prosecutors initially expressed reservations about initiating any criminal proceedings against these persons. Mike Carter, *Crackdown Unlikely on Felon Voters*, SEATTLE TIMES, Jan. 25, 2005, at A1. But as more reports surfaced, some county prosecutors began investigations. David Postman & Cheryl Phillips, *Probe of Felon Voters Not Yet Started*, SEATTLE TIMES, Feb. 25, 2005, at A1 ("Prosecutors in [counties other than King County] have begun investigations."). Finally prosecutors in King County sought to revoke the registration of those felons who were not eligible to vote. Mike Carter, *Voter-List Purge Targets 99 Felons*, SEATTLE TIMES, Mar. 9, 2005, at A1; see also Mike Carter, *99 Felons Purged From Voter Rolls*, SEATTLE TIMES, Mar. 25, 2005, at B5 (an additional 93 felons would be chal-

the legal questions were being debated and investigations into voting by ineligible felons continued, the public debate took a turn for the worse when the media reported that a person had been arrested for making a death threat against Governor Gregoire.²¹⁶ Despite this public controversy, the judicial proceedings continued.

On February 4th, the superior court issued a series of rulings which addressed the jurisdictional questions raised by the Democratic Party representatives and that served to limit the scope of relief to be provided by the court.²¹⁷ With respect to the issue of whether an election contest for an office elected on a statewide basis should be heard only by the state legislature, the court stated that superior courts also had jurisdiction to hear these actions.²¹⁸ The state legislature did have the authority to hear such election contests; however, such authority could be delegated, and in fact was delegated, to the state's courts.²¹⁹ With respect to the issue of whether the election contest should have been brought in the first instance with the state supreme court, the court concluded that superior courts have jurisdiction over these election contests.²²⁰ As to the claim that the petitioners' allegations were not within the purview of the election contest statutes, the court in effect ruled that the allegations could be maintained in this action and permitted the case to proceed to trial.²²¹ The court also ruled that petitioners' request for a new election, despite a state court's inherent equitable powers, was not authorized under either

lenged). As the discovery period progressed in the election contest, the Republican Party representatives found more votes cast by ineligible felons. David Postman, *Republicans Say They've Found 249 More Felons Who Voted*, SEATTLE TIMES, Jan. 29, 2005, at B2; see also Associated Press, *Republicans Allege 1,108 Felons Voted Illegally in Election*, SEATTLE TIMES, Feb. 23, 2005, at B2; *GOP Delivers "Felon Voters" List*, SEATTLE TIMES, Mar. 4, 2005, at A1. Later, the Republican Party representatives acknowledged that "perhaps hundreds" of the 1135 names on the list provided to the media and the parties in the election contest may have been improperly included. David Postman, *GOP's Felon List May Be Way Off*, SEATTLE TIMES, Mar. 17, 2005, at A1.

216. Ralph Thomas, *Threat to Gregoire Brings Arrest; State Guarding Rossi, Too*, SEATTLE TIMES, Feb. 4, 2005, at B1 ("[Gregoire] hinted some of the threats were being spawned by the controversy surrounding her election, which is still being contested by Rossi."). Unfortunately, the level of discourse can reach very shrill levels and has historically resulted in violence and death when controversies surrounding the right to vote arose. See sources *supra* note 37 and accompanying text; see also Paul Hendrickson, Editorial, *Mississippi Yearning*, N.Y. TIMES, Jan. 10, 2005, at A19 (describing the eventual state court criminal proceedings against Ku Klux Klan members who were involved in the murders of James Chaney, Andrew Goodman, and Michael Schwerner, three civil rights workers conducting voter registration activities in African American communities near Philadelphia, Mississippi).

217. Transcript of Court's Oral Decision, *Borders*, No. 05-2-00027-3 (Thurston County Super. Ct., Wash. Feb. 4, 2005); David Postman, *GOP Lawsuit Heads to Trial*, SEATTLE TIMES, Feb. 5, 2005, at A1.

218. Transcript of Court's Oral Decision at 4-9, *Borders*, No. 05-2-00027-3.

219. *Id.* at 9.

220. *Id.* at 10-12.

221. *Id.* at 18-29.

the state's constitution or its election contest statute.²²² In addition, the court dismissed the counties and the respective county auditors from the case.²²³

Following these rulings, preparations for trial continued. The major issue remaining for the court to address related to petitioners' burden of proof in demonstrating that the number of illegal votes would have affected the outcome of the election. An interpretation of a state statute governing election contests would be integral to the court's ruling. According to the statute:

No election may be set aside on account of illegal votes, unless it appears that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person.²²⁴

The key issue in interpreting the statute was whether the plain language of the statute required petitioners to prove that the challenged ballots would have changed the outcome of the election.²²⁵ Should that be the case, the Republican petitioners would first be required to show that a vote was cast illegally, and then prove that the illegal vote was cast for the certified winner, Christine Gregoire. The court invited further argument on this issue prior to the commencement of trial.²²⁶ In a later proceeding, the date for trial was set as May 23, 2005.²²⁷

222. *Id.* at 29–32. As a result of the court's ruling on this issue, there was confusion regarding the scope of the remedy available in this election contest. The issue was whether the court could simply install Rossi as the state's governor in the event that the petitioners prevailed, or whether the court could declare the election void, thereby creating a vacancy that the legislature could fill with a special election. See Postman, *supra* note 217; David Postman, *Rossi Declares Self Winner in Latest Round of Court Fight*, SEATTLE TIMES, Feb. 8, 2005, at B1.

223. Transcript of Court's Oral Decision at 14–16, *Borders*, No. 05-2-00027-3.

224. WASH. REV. CODE § 29A.68.110 (2004).

225. Transcript of Court's Oral Decision, *Borders*, No. 05-2-00027-3.

226. David Postman, *Judge Sides With GOP Over Election Lawsuit*, SEATTLE TIMES, Feb. 19, 2005, at B1. At the February 4th hearing, the court stated that such a literal interpretation would make the case more problematic for the petitioners. However, at this stage of the proceedings the court held that it was sufficient to allege that illegal votes were cast. Transcript of Court's Oral Decision at 23, *Borders*, No. 05-2-00027-3. As the pre-trial proceedings progressed, the Republican Party representative sought to counter the statutory interpretation that would require subpoenaing felons to testify about their candidate preference. Instead they sought to meet the statutory requirement through a statistical analysis that inferred a certain percentage of the illegal felon vote to be distributed in accordance with the percentage of votes received by Gregoire and Rossi. David Postman, *Calculating Illegal Votes' Impact Could be Key to Election Lawsuit, GOP Favors Prorating by Precinct, Democrats Demand Individual Accounting*, SEATTLE TIMES, May 1, 2005, at B1. In a subsequent hearing, the court stated that such statistical evidence would be permitted to be presented at trial. However, the court's ruling should not be interpreted as acceptance of the validity of the

The trial commenced with the Republican Party representatives claiming that King County election officials engaged in fraud.²²⁸ However, the court stated that such an argument could not be made since fraud allegations were not part of the case.²²⁹ The court did permit the Republican Party representatives to present their evidence regarding the conduct of King County election officials in the 2004 election.²³⁰ During the two week trial consisting mostly of testimony from election officials and experts,²³¹ the court rejected a motion to dismiss the petition after the close of petitioners' case in chief²³² and appeared to be skeptical of King County's claim that the problems associated with the 2004 elections were being addressed.²³³ Despite its skepticism of the process, the court dismissed the petition and confirmed the certification of Gregoire as the state's governor.²³⁴ The court found a lack of fraud²³⁵ and found the sta-

statistical method. David Postman, *GOP Legal Challenge to Election Kept Alive*, SEATTLE TIMES, May 3, 2005, at A1. In response to the use of this statistical procedure, the Democratic Party representatives stated that they would also present evidence of ineligible felons voting in voting precincts that supported Rossi. Associated Press, *Democrats Now Claim 544 Felons Cast Votes*, SEATTLE TIMES, May 5, 2005, at B3; David Postman, *Dems Flag 743 Votes They Say Felons Cast*, SEATTLE TIMES, May 7, 2005, at B1. On the eve of trial, a newspaper study presented findings that demonstrated that even without the felon vote, Gregoire would have won the election. *Toss Out Felon Vote, Gregoire Still Wins, Times Analysis Finds Felons Alone Wouldn't Change Governor's Race, Election Trial Starts Tomorrow*, SEATTLE TIMES, May 22, 2005, at A1.

227. See *Toss Out Felon Vote, Gregoire Still Wins*, *supra* note 226. As trial preparations continued, in a stunning announcement, King County election officials declared that another 93 absentee ballots had not been counted in the previous three voter tallies. Keith Ervin, *Support Erodes for Elections Director*, SEATTLE TIMES, Apr. 5, 2005, at A1.

228. David Postman, *GOP Focuses on Election "Fraud," New Central Claim: Governor's Race Was Stolen, Judge: Allegation Can't Be Added on Trial's First Day*, SEATTLE TIMES, May 24, 2005, at A1. The strategy behind the fraud allegations related to the Republican Party representative's burden of proof. If fraud was demonstrated, there would be no need to demonstrate that particular votes were cast for certain candidates. *Id.*

229. *Id.*

230. *Id.*

231. See David Postman, *Leadoff Witness Key for GOP? Suspended King County Ballot Supervisor Takes Stand Today*, SEATTLE TIMES, May 25, 2005, at A1 (testimony from an election superintendent on an election report which Republican Party representatives contended was purposefully falsified); David Postman, *Numbers Speak for Themselves, GOP Says*, SEATTLE TIMES, May 26, 2005, at A1 (evidence on discrepancies showing that errors favored Gregoire permitted; an election official testifying about the discrepancies in a previously presented election report); David Postman, *Felon-Voter Evidence Allowed*, SEATTLE TIMES, May 27, 2005, at B1 (expert testimony on statistical procedures for pro-rating illegal felon vote). After the Republican Party representatives closed their case, the Democratic Party representatives presented their witnesses—county auditors and election officials—seeking to demonstrate that there was no fraud, only the normal errors that are associated in statewide elections. See David Postman, *Judge Won't Dismiss Lawsuit*, SEATTLE TIMES, May 28, 2005, at B1.

232. Postman, *Judge Won't Dismiss Lawsuit*, *supra* note 231.

233. David Postman, *Elections Chief Logan Put on Hot Seat—By Judge*, SEATTLE TIMES, June 2, 2005, at A1.

234. Transcript of Court's Oral Decision at 25, *Borders v. King County*, No. 05-2-00027-3 (Thurston County Super. Ct., Wash. filed June 7, 2005).

tistical method for prorating the impact of invalid votes presented by the Republican Party representatives to be unacceptable.²³⁶ The court concluded that there were "1,678 illegal ballots cast in the 2004 general election"²³⁷ and, most significantly, that the petitioners had not met their statutory burden of proving that the illegal votes would have changed the outcome of the election.²³⁸ After the court announced its decision, Rossi stated that he would not appeal the court's ruling.²³⁹ And, in this manner, the litigation phase of this electoral and political crisis ended.

IV. THE SUBSEQUENT REFORM MOVEMENTS

Perhaps the most positive aspect of this electoral and political crisis is that a serious reform effort aimed at addressing the problems associated with the 2004 gubernatorial election was undertaken. This reform was pursued in the state legislature, by the governor's office, and in King County. In the legislative arena, changes included requiring the production of paper records by voting devices;²⁴⁰ mandating a review of election policies, practices, and procedures, every three years, and requiring county canvassing boards to take corrective action of any problems discovered during this review with a verification by the Secretary of State that such corrective action was taken;²⁴¹ facilitating and expanding the use of county-wide mail ballots;²⁴² and standardizing certain election procedures, such as allowing the processing of absentee ballots upon receipt by election officials and mandating the reconciliation of election numbers, as well as specifying that provisional ballots must be distin-

235. At the beginning of the proceedings the court stated that the fraud claim was not part of the Republican petitioners' case. Nevertheless, the court stated in dicta that no fraud was evident during the 2004 election. *Id.* at 15 ("No testimony has been placed before the Court to suggest fraud or intentional misconduct.").

236. *Id.* at 16 ("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.").

237. *Id.* at 19.

238. *Id.* at 23 ("There is no substantial evidence by clear and convincing evidence that improper conduct or irregularity procured Ms. Gregoire's election to the Office of Governor.").

239. David Postman, *It's Over: Rossi Loses in Court, Ends Fight, Rossi Won't Appeal Ruling; Gregoire Says She's "Personally Relieved,"* SEATTLE TIMES, June 7, 2005, at A1. Although the election contest filed in Thurston County was over, there were still four election contest petitions pending before the State Supreme Court. David Postman, *Not All Election Suits Resolved*, SEATTLE TIMES, June 9, 2005, at B1; see *In Re Michael J. Goodall*, No. 76541-3 (Wash. Sup. Ct. filed Jan. 19, 2005); *In Re Suzanne Karr*, No. 76500-6 (Wash. Sup. Ct. filed Jan. 10, 2005); *In Re Dr. Arthur Coday, Jr.*, No. 76480-8 (Wash. Sup. Ct. filed Jan. 7, 2005); *In Re Daniel P. Stevens*, No. 76479-4 (Wash. Sup. Ct. filed Jan. 4, 2005). As of November 1, 2005, the State Supreme Court had not disposed of these cases.

240. 2005 Wash. Legis. Serv. 624-25 (West) (S.S.B. No. 5395).

241. *Id.* at 622 (H.B. No. 1749).

242. *Id.* at 623 (S.H.B. No. 1754).

guishable from other ballots.²⁴³ Although comprehensive and dealing with such major issues as auditable paper trails for electronic voting machines and improving the handling of provisional ballots, the legislative package did not deal with the major problem of having a primary election so close in time to the general election. Many of the difficulties associated with the administration of elections in Washington are attributable to the compressed time schedule between the primary and general elections.²⁴⁴ And, of course, adequate increased state funding for improving and conducting elections remains to be addressed.²⁴⁵

At the state executive level, Governor Gregoire formed an Election Reform Task Force to make specific recommendations to improve the administration of elections.²⁴⁶ On March 1, 2005, this Task Force issued a Report identifying several areas of concern, such as moving the primary election date at least four weeks earlier than the present date, providing the Secretary of State with a greater role in insuring more consistent administrative practices between counties, and making changes to the method of handling provisional ballots.²⁴⁷

At the county level, King County Executive Ron Sims appointed an Independent Task Force on Elections.²⁴⁸ Sims's Task Force issued a series of comprehensive reforms addressing the work culture of the elections department, management issues, and more immediate practical

243. *Id.* at 625–34 (S.S.B. No. 5499). Other changes related to voter registration recordkeeping requirements, *id.* at 635–45 (S.S.B. No. 5743), and the publication of a manual on election laws and rules, *id.* at 635 (S.B. No. 5565).

244. ELECTION REFORM TASK FORCE, REPORT 5 (Mar. 1, 2005), available at <http://www.secstate.wa.gov/elections/news/FinalReportofElectionReformTaskForce.pdf> [hereinafter TASK FORCE REPORT] (“The Task Force recommends that the date of the primary election be moved at least four weeks earlier to give election supervisors sufficient time to certify the primary results, mail the general election ballots, and prepare for the general election.”).

245. *Id.* at 10 (“The state currently only contributes a share of the funding during each odd-year election. It should not make a difference what year the election occurs. The Task Force recommends the state fund its fair share of any election that includes any congressional or statewide position or measure on the ballot.”).

246. Emily Heffter, *Gregoire in Everett on 1st day on Job*, SEATTLE TIMES, January 14, 2005, at B2.

247. TASK FORCE REPORT, *supra* note 244, at 5–10 (other reforms included requiring voter identification at the polls, improving voter registration records, improving the processing of military ballots, assuring statewide uniformity in the administration of elections, instituting greater protections to prevent voter fraud, implementing a consistent date for the certification of election results, retaining the option to vote by mail on a local basis, restoring oversight authority and funding by the Secretary of State to audit county election offices, a specific request for King County to improve its election administration, and production of a voter pamphlet for the primary election if statewide offices are listed on the ballot).

248. Alwyn Scott & Warren Cornwall, *Sims' Panel to Probe Election Office*, SEATTLE TIMES, April 11, 2005, at B1; KING COUNTY INDEP. TASK FORCE ON ELECTIONS: REPORT AND RECOMMENDATIONS TO THE KING COUNTY EXECUTIVE 6 (July 27, 2005), available at <http://www.secstate.wa.gov/documentvault/846.pdf> [hereinafter KING COUNTY REPORT].

concerns including permitting observers to stand near tables where the actual counting of ballots is occurring.²⁴⁹ This Task Force also recommended legislative changes that would restore voting rights to former felons upon release from incarceration and would move the state's primary election to an earlier date.²⁵⁰

The implementation of the newly enacted legislative reforms and the enactment of the reforms proposed by the Governor's Election Reform Task Force and King County's Independent Task Force on Elections should improve the administration of elections in the State of Washington and increase the opportunity for providing minorities with greater access to the political process. For example, the proposed changes to the handling of provisional ballots will not only insure the integrity of the vote canvass, but will also generate greater awareness of the availability of provisional ballots. Such a wider public awareness will benefit minority communities where voters who were once prevented from voting without protesting the actions of poll officials will now insist on voting on a provisional basis. As more funding is made available and as more electronic voting machines are utilized, there will be greater opportunities for the translation of ballots into languages other than English. In summary, as the pace of electoral reforms increases, there will be a greater convergence between improvements in the administration of elections and in the political integration of minority communities into the body politic.²⁵¹

V. CONCLUSION

For a brief moment, the political and electoral crisis created by the 2004 gubernatorial election seemed insurmountable. Although the uncertainty surrounding the state's gubernatorial succession was ultimately resolved by two recounts, two state supreme court decisions, and an election contest, discrepancies in the canvassing of the votes and other malfunctions served to significantly erode public confidence in the integrity of the electoral process. Restoring public confidence will require a con-

249. KING COUNTY REPORT, *supra* note 248, at 9–18.

250. *Id.*

251. Unfortunately, not all legislative reforms are an improvement. In Georgia, the state legislature enacted one of the most restrictive requirements for voting in the nation. In order to be permitted to vote, voters will need to present a photo identification card. Such a requirement is the functional equivalent of a poll tax. In order to secure such a state identification card many persons, who do not drive and thus do not have a driver's license, will have to pay to secure this form of identification. This requirement will have a disproportionate impact on minority eligible and registered voters. The implementation of this requirement has been enjoined by a federal district court. See *Common Cause/Georgia v. Billups*, No. 4:05-CV-201-HLM (N.D. Ga. Oct. 28, 2005) (order granting preliminary injunction).

certed response by the state's executive and legislative branches of government to create a more transparent election machinery that is both well funded and well managed. The recently enacted legislation and proposed reforms are only a beginning.

Although these legislative improvements in Washington may herald a new era of election reform, these reforms are part of a historical process that commenced with the adoption and ratification of the Fifteenth Amendment and continued with the civil rights struggles that sought to end voting discrimination. The efforts to provide minority communities with greater access to the political process highlighted the importance of the right to vote. The trajectory of these efforts to expand the franchise also provided an important context to those reform efforts aimed at improving the administration of elections. Both of these efforts ultimately will result in an election system that is more accessible to all communities by seeking the removal of obstacles that unfairly inhibit voter participation and in providing for a more open and efficient administration of elections. These reform efforts received renewed public attention as a result of the 2004 gubernatorial electoral and political crises. The challenge facing the state's political leadership is to address the issue of electoral reform in a manner that serves to both restore and enhance public confidence in the conduct of elections.

The Symposium and the articles included in this issue seek to assist the state's political leaders in defining both the scope and nature of this challenge, as well as to stress the urgency of enacting legislative reforms to improve the state's election machinery. Such urgency was certainly recognized by those voters who took the time to prepare and submit letters to newspaper editors expressing their outrage over the seemingly never-ending saga of election snafus.²⁵² In response to this voter discontent and distrust, this Symposium was convened to initiate and further a much-needed dialogue that focused not only on technical improvements of the state's electoral process, but that also highlighted the important broader issues of restoring and preserving the public's confidence in the conduct of elections in order to promote a more cohesive body politic. The work product of this Symposium is now reflected in this issue. The purpose of this Symposium issue is to play a role in the new reform effort by providing a compass as legislators, state and local elected officials, and policymakers navigate through the maze of electoral reform. The materials here encourage them to maintain their focus on the task at hand: the task of rebuilding public trust in the exercise of that most fundamental of all rights—the right to vote.

252. See sources *supra* note 16.