

Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country

Tova Andrea Wang[†]

I. INTRODUCTION

The 2000 election debacle in Florida, with its butterfly ballots, hanging and pregnant chads, seemingly endless counts and recounts, and court battles ending only at the Supreme Court, was heralded at the time as a wake-up call to the American public about the weaknesses of our election system. In the aftermath of the election, the public, advocacy groups, and elected officials demanded reform of the election system. Commissions were formed and lawsuits were filed. Finally, after almost two years of debate and several negotiating sessions, Congress passed the Help America Vote Act of 2002 (HAVA).¹ This new law led to upgraded voting machines, the expanded use of provisional ballots, new procedures for voter registration, the additional counting of ballots, and, in some places, increased voting accessibility for the disabled.²

These various efforts promoted by HAVA, however, did not completely address the concerns raised in 2000, nor did they entirely avoid a repetition of familiar polling place problems four years later. In some states, the reforms and their implementation created new voting problems. These problems arose in part because HAVA does not require the implementation of some of its provisions until January 1, 2006.³ Voting problems also arose because HAVA left some areas of implementation

[†] Fellow, The Century Foundation. Much thanks to Melissa Riess, a senior at Brown University, whose contributions to this article were invaluable.

1. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

2. HENRY E. BRADY, AMERICAN ELECTIONS AND HAVA 4-7 (2005), available at <http://www.american.edu/ia/cfer/0418test/brady.pdf>.

3. See, e.g., 42 U.S.C. § 15481(d) (2002) (voting systems standards); 42 U.S.C. § 15482(d) (2002) (provisional voting and voting information requirements).

vague and too much discretion was given to the states as to how they would accomplish the goals of the new federal voting law.⁴

The disagreements surrounding current election procedures and the implementation of election reforms seems to be caused by a philosophical divide that often splits along partisan lines. The divide centers on two goals, which sometimes conflict: making voting as easy and as accessible as possible for all Americans, and protecting the integrity of the vote and the voting process against fraud and malfeasance. A different, though related, split among election goals is the goal of making voting rights and the counting of every valid vote paramount, versus the desire for finality—having elections decided at the ballot box, not in the courtroom. This latter split has emerged with greater force over the last few years as political parties, candidates, and others have engaged in increasing amounts of post-election litigation where contests have been close, or where there are suspicions of major irregularities in the voting process itself.

This Article examines the problems revealed in Washington State's election system as a result of its staggeringly close gubernatorial election, and compares such problems to those encountered by other states in the 2004 election. It examines the challenge of fixing these problems through the prism of the ongoing debate over what values and goals are most important when making election administration decisions. The various values and goals of expanding voter access, increasing voter participation and election efficiency, preventing voter fraud, ensuring the count of every vote, and creating finality in the voting system are included in this examination. Throughout this article, I argue that those who claim choices must be made among these values are often trying to force a false choice, and that where a genuine choice must be made, the right to vote and to have that vote counted ought to be paramount to the extent that the administrative process can bear. Under such a standard, the right choice to make is usually very evident.

Part II provides background information on the development of election reform law and election policy since the 2000 presidential election. Most important are the provisions of the Help America Vote Act of 2002, which provided the framework for both the election improvements of 2004 and the new difficulties that occurred in 2004. Part III provides a national overview of current election reform, focusing in particular on the effect of HAVA's requirements during the 2004 election on issues of (1) voter registration, (2) statewide voter registration databases, (3) voter identification, (4) provisional ballots, and (5) voting machines. It also

4. 42 U.S.C. § 15485 (2002).

discusses the issues of (6) felon disenfranchisement, and (7) voter intimidation and suppression through statutory challenges and other means. Part IV compares and contrasts the problems encountered by Washington election officials and voters with the problems encountered in other states on the issues of (1) felon disenfranchisement, (2) voter identification, (3) absentee ballots, (4) provisional ballots, and (5) voting machines. By comparing Washington's experience to the experience of other states, it becomes evident that forcing a choice between administrative values on some of these issues creates a false dilemma, and that on other issues the balancing of values should fall heavily on the side of the right to vote and have one's vote counted. Finally, Part V concludes with a summary of how these problems, disagreements, and proposed solutions reflect a larger philosophical and political debate over the competing values in election administration.

II. BACKGROUND: THE HELP AMERICA VOTE ACT

In a truly revolutionary move, HAVA's enactment was the first time in American history that the federal government pledged funding for elections.⁵ HAVA promised \$3.9 billion to the states for election improvements; \$3.1 billion has been appropriated thus far.⁶ In response to the Florida election debacle of 2000, HAVA specifically allocated \$325 million to states to replace punch card and lever voting systems.⁷

Other important provisions of HAVA include the following:

A. Voting Systems Standards

Beginning January 1, 2006, HAVA requires all voting systems used in federal elections, while maintaining voter privacy and ballot confidentiality, to:

1. Permit voters to verify their selections on the ballot, notify them of overvotes, and allow them to change their votes and correct any errors before casting the ballot, though jurisdictions using paper ballot, punch card, or central-count voting systems (including absentee and mail-in ballots) may instead use voter education and instruction programs for notification of overvotes;

5. 42 U.S.C. § 15301 (2002).

6. NAT'L COMM'N ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 10 (2005).

7. 42 U.S.C. § 15302 (2002) (providing \$4000 for each qualifying precinct).

2. Produce a permanent paper record for the voting system that can be manually audited and available as an official record for recounts;
3. Provide individuals with disabilities, including the blind and visually impaired, with the same accessibility to voting as provided to other voters through the use of at least one Direct Response Electronic Voting device (DRE), or properly equipped voting system at each polling place, and to this end, any voting system purchased with federal funds made available under Title II on, or after, January 1, 2007 must provide accessibility;
4. Provide alternative language accessibility as required by law; and
5. Comply with the error rate standards (the percentage of votes lost by the voting system) in the federal voting system standards in effect on the date of enactment.⁸

HAVA also requires each state to adopt uniform standards defining what constitutes a vote and what will be counted as a vote for each certified voting system.⁹

B. Voting Information Requirements

HAVA requires that a sample ballot and other voter information be posted at polling places on election day.¹⁰

C. Computerized Statewide Voter Registration List Requirements

Beginning January 1, 2004—or 2006 if a state certifies for good cause that it cannot meet that deadline¹¹—HAVA requires states to implement and maintain an interactive, centralized, and official computerized voter registration list,¹² accessible to all election officials in the state,¹³ that contains registration information on every registered voter in the state.¹⁴ HAVA also requires the sharing of information between voter registration and motor vehicle authority databases.¹⁵

8. 42 U.S.C. § 15481(a) (2002).

9. 42 U.S.C. § 15481(b) (2002).

10. 42 U.S.C. § 15482(b)(1) (2002) (voting information posted on election day); 42 U.S.C. § 15482(b)(2)(A) (2002) (defining voting information to include sample ballots).

11. 42 U.S.C. § 15483(d)(1)(B) (2002).

12. 42 U.S.C. § 15483(a)(1)–(2) (2002).

13. 42 U.S.C. § 15483(a)(1)(A)(v) (2002).

14. 42 U.S.C. § 15483(a)(1)(A)(ii) (2002).

15. 42 U.S.C. § 15483(a)(5)(B)(i) (2002).

D. Provisional Ballots

Beginning January 1, 2004, HAVA requires that persons who claim to be registered to vote in a federal election but who are not on the official list of registered voters or who are otherwise alleged to be ineligible to vote be offered and permitted to cast a provisional ballot.¹⁶

E. Identification Requirements

1. The Revised Registration Form

HAVA requires voter registration applicants to provide their driver's license number or the last four digits of their Social Security number. The state will assign a unique identifier to individuals who have neither a valid driver's license number nor a Social Security number.¹⁷

2. Mail-in Applications

Beginning January 1, 2003, HAVA requires first-time voters who register by mail to present identification either when registering or when voting. Accepted identification includes a copy of a current and valid photo identification (if voting in person, the identification must be the original), a utility bill, a bank statement, or a government document that shows the name and address of the voter. Alternatively, the voter may cast a provisional ballot.¹⁸

F. The Election Assistance Commission

HAVA establishes the Election Assistance Commission (EAC),¹⁹ which is responsible for distributing funding, conducting studies, and serving as a national clearinghouse for the administration of federal elections.²⁰ While the EAC should have been created in February 2003,²¹ the commissioners were not nominated and confirmed until December of 2003. This delay postponed the distribution of federal funds, which meant that the EAC was unable to provide necessary guidance to the states on issues such as voting technology and implementation of the statewide voter registration databases prior to the 2004 election. How-

16. 42 U.S.C. § 15482(a) (2002).

17. 42 U.S.C. § 15483(a)(5)(A)(ii) (2002).

18. 42 U.S.C. § 15483(b) (2002).

19. 42 U.S.C. § 15321 (2002).

20. 42 U.S.C. § 15322 (2002).

21. 42 U.S.C. § 15323(a)(4) (2002) ("The appointments of the members of the Commission shall be made not later than 120 days after the date of the enactment of this Act.").

ever, the EAC has slowly begun to issue guidance and guidelines on a variety of subjects.²²

By the November 2004 election, states had to (1) comply with voter information requirements; (2) utilize, or apply for a waiver of, a state-wide voter registration database; (3) comply with the voter identification requirements, both with respect to requiring a Social Security or driver's license number of all new registrants and special ID requirements for first-time voters who register by mail; (4) provide provisional ballots; and (5) replace or apply for a waiver for the replacement of punch card and lever machines.²³

III. NATIONAL OVERVIEW: WHAT HAPPENED IN ELECTION 2004 ACROSS THE COUNTRY?

With a margin of re-election victory for President Bush of more than three million votes,²⁴ it might be claimed that the 2004 election cleared "the margin of litigation." However, the *appearance* of a smooth election concealed a range of troubling developments, ranging from simple human errors to prosecutable felony violations of federal law, such as the destruction of voter registration forms.²⁵

Rather than representing a step forward in improving our broken voting process, we now realize that the flaws and gaps in HAVA and its implementation, coupled with a highly charged campaign season in 2004, led to continued obstacles for the American voting process. Moreover, concerns over the arbitrary application of voter identification rules, lost votes in some electronic machines, long lines in minority-majority precincts, questions about the neutrality of partisan election officials, access problems to those with disabilities, and a host of other pre- and post-election day issues have many voters continuing to question the fairness of the process.

22. See, e.g., U.S. ELECTION ASSISTANCE COMM'N, FISCAL YEAR 2004 EAC ANNUAL REPORT (2005), available at <http://www.eac.gov/docs/EAC%20Annual%20Report%20FY04.pdf>.

23. 42 U.S.C. § 15482 (2002) (provisional ballots); 42 U.S.C. § 15482(d) (2002) (voting information requirements); 42 U.S.C. §§ 15483(a)(1)(5)(A), 15483(b) (2002) (new registrants); 42 U.S.C. § 15302(a)(3) (2002) (replace punch card voting or apply for waiver); 42 U.S.C. § 15483(b) (2002) (voting by mail); 42 U.S.C. § 15483(d) (2002) (computerized registration system).

24. U.S. ELECTORAL COLLEGE, 2004 Presidential Election Results, http://www.archives.gov/federal-register/electoral-college/2004/election_results.html.

25. THE CENTURY FOUNDATION, BALANCING ACCESS AND INTEGRITY: REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM 3 (2005), available at <http://www.tcf.org/Publications/ElectionReform/baicomplete.pdf>.

A. Voter Registration

During the 2004 presidential election, a number of problems arose with respect to the proper completion and administrative processing of voter registration forms. HAVA required that mail-in voter registration forms include a check-off box verifying that the voter is a U.S. citizen,²⁶ and that states notify voters who failed to “answer the [citizenship] question” while also providing them with an opportunity to correct the form prior to the next federal election.²⁷ This new citizen check-off box requirement was redundant because the National Voter Registration Act of 1993²⁸ already requires registration forms to include language above the signature line requiring the applicant to affirm his citizenship. Nonetheless, some election officials decided to reject the registrations of thousands of people who signed the affirmation but failed to check either the citizenship box or a box indicating mental competency.²⁹ Complicating matters further, election officials insisted that registrants make any corrections to their forms before the original voter registration deadline, which in most states was a month before the election.³⁰ Some voters found themselves unable to meet that deadline.

This led to litigation in Florida where a group of individuals and labor unions sued the secretary of state and the supervisors of five boards of elections. In *Diaz v. Hood*,³¹ the plaintiffs alleged that the refusal to process such registration forms was an abridgement of the Voting Rights Act and the Fifth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution.³² Many Florida counties, as well as several states, processed forms in which the citizenship box was not completed; the plaintiffs in *Diaz* included voters who were not notified of their omission and its effect until after the voter registration deadline, if at all.³³ Moreover, the plaintiffs identified wide racial and ethnic disparities among voters whose applications were deemed incomplete by elections officials.³⁴ Nonetheless, the U.S. District Court dismissed the complaint, ruling that

26. 42 U.S.C. § 15483(b)(4)(A)(i) (2002).

27. 42 U.S.C. § 15483(b)(4)(B) (2002).

28. 42 U.S.C. § 1973gg (2002).

29. Terry M. Neal, *String of Electoral Storms Bear Down on Florida*, THE WASH. POST, Oct. 20, 2004, available at <http://www.washingtonpost.com/wp-srv/politics/issues2004/florida/floridaMagnify.htm>.

30. Press Release, Am. Civil Liberties Union, Florida Legal Services File Lawsuit on Behalf of Broward Voter Disqualified From Voting Because of an Unchecked Citizenship Box (Oct. 14, 2005).

31. *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004).

32. *Id.* at 1113.

33. *Id.*

34. Proposed Findings of Fact and Conclusions of Law by All Plaintiffs, *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004) (No. 04-22572).

many of the plaintiffs lacked standing to sue.³⁵ With respect to one plaintiff, the court said:

No federal or state statute prescribes a time period within which a supervisor must notify an applicant that her application is incomplete, nor do Plaintiffs cite any law that would provide such time periods. Kaplan properly notified [plaintiff] Diaz of her failure to complete her registration application and Diaz did not provide any authority in her Complaint that would have required Kaplan to handle Diaz's incomplete application any differently. Diaz created her own injury.³⁶

In a similar fashion, the Secretary of State of Ohio ordered election boards to reject any form submitted in person that did not include the voter's driver's license number or the last four digits of the voter's Social Security number. If the voter left the field blank, the Board would disqualify the application. The registrant's form would be accepted only if the registrant wrote the word "none" in the box.³⁷

Issues of incomplete and faulty registration forms, and forms that Boards of Elections failed to receive or failed to process, also arose after Election Day 2004. Many voters who were left off registration rolls due to faulty registration forms opted to vote via provisional ballots. These provisional votes left election administrators with several unanswered questions about the votes' validity, as the rules regarding whether and under what standards such ballots should be counted were unclear.³⁸

B. Voter Databases

HAVA requires each state to implement a "single, uniform, official, centralized, interactive computerized statewide voter registration list."³⁹ The registration list is to be "defined, maintained, and administered at the State level" and must contain the "name and registration information of every legally registered voter in the State."⁴⁰ The manner of creating, operating, and maintaining these statewide voter registration lists was left

35. *Diaz*, 342 F. Supp. 2d at 1116, 1120.

36. *Id.* at 1118.

37. Ohio Secretary of State Directive 2004-33 (Sept. 16, 2004).

38. THE CENTURY FOUNDATION, *supra* note 25, at 8.

39. 42 U.S.C. § 15483(a)(1)(A) (2002).

40. *Id.*

to the states.⁴¹ As of the November 2004 elections, fifteen states had some form of statewide voter registration lists in use.⁴²

Statewide databases have a number of potential advantages. They can link to correctional databases and courts, making the process of taking felons off the list of eligible voters and restoring the franchise to ex-felons more efficient. They can also link to social service agency databases, which can help enfranchise people that have historically had low voter participation rates by getting their information into the registration system accurately and by keeping it updated. Statewide databases can also help prevent duplicate registrations by more accurately purging voters who have moved out of the state and by quickly changing registration information for voters who move within state. These databases also reduce the potential for fraud by expediting the flow of information from health and vital statistics departments for the purpose of deleting deceased voters from the rolls. Finally, a clean and up-to-date voter roll reduces the number of eligible voters mistakenly omitted from the poll book, thereby reducing the need for provisional ballots.⁴³

C. Polling Place Fraud and Voter Identification

Perhaps the most divisive and partisan issue in election administration throughout the country is whether to require voter identification in order to vote. In general, Republicans at both the federal and state level view requirements for polling place identification as necessary to ensure security.⁴⁴ They argue that those who would commit fraud would be thwarted by requirements that they prove their identity beyond stating their names or signing a poll book.

In contrast, Democrats at the federal and state level generally refer to voter identification rules as a “solution in search of a problem,”⁴⁵ since there is very little evidence of polling place voter fraud and no evidence

41. 42 U.S.C. § 15485 (2002) (giving states discretion as to “specific choices” on methods for compliance).

42. ELECTION REFORM INFORMATION PROJECT, ASSORTED ROLLS: STATEWIDE VOTER REGISTRATION DATABASES UNDER HAVA (June 2, 2005), available at <http://electionline.org/Portals/1/Assorted%20Rolls.pdf>.

43. THE CENTURY FOUNDATION, *supra* note 25.

44. See THE CENTURY FOUNDATION AND THE ELECTION REFORM INFORMATION PROJECT, ELECTION PREVIEW 2004: WHAT’S CHANGED, WHAT HASN’T AND WHY (OCTOBER 2004), available at <http://electionline.org/Portals/1/Publications/Election.preview.2004.report.final.update.pdf>; THE CENTURY FOUNDATION AND THE ELECTION REFORM INFORMATION PROJECT, PRIMARY EDUCATION: ELECTION REFORM AND THE 2004 PRESIDENTIAL RACE (January 2004), available at <http://electionline.org/Portals/1/Publications/Primary%20Education.pdf>.

45. See THE CENTURY FOUNDATION, *supra* note 25; Karen E. Pride, *Obama Voices Opposition to Photo Voting Requirement*, CHICAGO DEFENDER, Sept. 26, 2005, available at <http://www.chicagodefender.com/page/local.cfm?ArticleID=2377>.

that it takes place in even a remotely broad or coordinated manner. Moreover, while it does nothing to prevent or thwart the types of election fraud that may truly occur—such as absentee ballot fraud—voter identification is an unnecessary burden that potentially intimidates certain segments of the population from voting at the polls on election day. Identification requirements are also more likely to disenfranchise groups less likely to have the required verification, such as the elderly, the poor, and language or ethnic minorities.⁴⁶

By passing HAVA, Congress constructed a compromise between Democrats unwilling to accept broad national identification requirements and Republicans seeking more stringent identification requirements at polling places. HAVA mandates that identification be presented at the polling place only when a voter (1) registered by mail for the first time in that jurisdiction; (2) is voting for the first time in that jurisdiction; and (3) failed to include a copy of their driver's license, utility bill, bank statement, government check, or other government document that shows their name and address, or failed to provide the last four digits of their Social Security number. If these elements are present and the voter fails to present a valid form of identification, HAVA mandates that the voter may only vote by provisional ballot, which is counted if the voter is later determined eligible to vote under state law.⁴⁷

In 2000, eleven states required voters to provide verification of their identity before voting. Four states allowed voter identification as an option for poll workers or allowed localities to establish their own rules. Nine states required a signature match, while eighteen required the voter's signature in a poll book. In nine states, voters were asked to state their names.⁴⁸

The passage of HAVA, coupled with the flurry of state legislation around the country following the 2000 election, led to a marked increase

46. In the early 1990s, the Department of Transportation estimated that 87% of the voting age population had a driver's license and another 4% had a non-driver ID from the Department of Motor Vehicles. A Gallup poll in October 2000 found that 93% of Americans have a driver's license. Therefore, 6–10% of the voting age population does not have state issued identification. "We have not been able to locate information about the characteristics of adults who lack driver's licenses but they probably parallel the characteristics of people who do not own automobiles: they are poorer . . . or urban." TASK FORCE ON THE FEDERAL ELECTION SYSTEM, NAT'L COMM'N ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTION PROCESS 77 (2001). A 1994 Department of Justice study found that blacks in Louisiana were four to five times less likely than whites to have photo IDs. Spencer Overton, *Voter ID Supporters Lack Hard Evidence*, ATLANTA JOURNAL-CONSTITUTION, Apr. 8, 2005, available at http://docs.law.gwu.edu/facweb/soverton/ajc_april8_2005.pdf.

47. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1708–14 (2002).

48. THE ELECTION REFORM INFORMATION PROJECT, VOTER IDENTIFICATION (Apr. 2002), available at <http://www.electionline.org/Portals/1/Publications/Voter%20Identification.pdf>.

in the number of states requiring all voters to show identification. In thirty-three states and the District of Columbia, HAVA's enactment marked the first time any voter was required to show identification. Lawmakers in Alabama, Colorado, Montana, North Dakota, South Dakota and Tennessee, confronted with the necessity of updating voter identification laws to make them compliant with HAVA, enacted universal voter identification. In 2004, lawmakers in thirteen more states debated similar voter identification bills.⁴⁹

There are indications that the number of states requiring identification will rise. In 2005 Georgia and Indiana passed the most draconian identification laws in the country, requiring all voters to present government-issued photo identification before voting.⁵⁰ Arizona voters passed a referendum requiring all voters to show identification at voting polls.⁵¹ Thirteen state legislatures have considered voter identification legislation in 2005, including many in states where bills had failed the year before.⁵²

As in previous years, the debate in state legislatures over voter identification has been divisive, partisan, and sometimes racially charged. According to a recent report in the Atlanta Journal Constitution,

Lingering anger over a vote to require picture IDs at the polls spilled over into a special Saturday session of the Georgia General Assembly centered on the symbolic repeal of the state's Jim Crow laws. African-American lawmakers, and some white ones, staged walkouts in the House and Senate on Friday night to protest proposed photo ID requirements that they likened to the poll taxes, literacy tests and other obstacles used to suppress black votes during segregation. House leaders threatened to formally chastise or censure lawmakers who walked out Friday night, as well as a single black legislator who continued the protests Saturday during "Family Day at the Capitol." State Rep. Alisha Thomas Morgan (D-Austell), an outspoken opponent of mandatory picture IDs for voters, used a procedure known as "morning orders" to make a speech against critics of her stand on the proposal. She took the podium before House members voted to repeal five Jim Crow laws, including one to give tuition grants so students who did not want to attend integrated schools could go to private segregated schools. But Morgan

49. THE CENTURY FOUNDATION, *supra* note 25.

50. GA. CODE ANN. § 21-2-417(a)(6) (1997), *amended* by Act of July 1, 2005, 2005 Ga. Laws 53 (allowing a tribal identification card in addition to other forms of identification, each of which is issued by the U.S. or Georgia government); IND. CODE § 3-5-2-40.5(4) (2005) (stating that voter identification must be issued by the United States or state government).

51. See Nicholas Riccardi, *Eligible to Vote in Arizona? Prove It*, L.A. TIMES, Nov. 5, 2005, available at <http://www.latimes.com/la-na-arizona5nov05,0,5192166,full.story?coll=la-story-footer>.

52. See The Election Reform Information Project, Voter ID Legislation, <http://www.electionline.org/Default.aspx?tabid=473> (last visited Nov. 17, 2005).

refused to leave the podium when her time for her remarks had expired, despite repeated requests and slams of the gavel by House Speaker Glenn Richardson (R-Hiram). Richardson later apologized to the crowd of spectators for his display of temper and Morgan's failure "to respect the rules of the House."⁵³

Senator Mitch McConnell (R-Ky) and Senator Christopher "Kit" Bond (R-Mo) recently introduced federal legislation that would require all voters nationwide to show identification.⁵⁴ The legislation would also place the burden on states to provide identification to all voters free of charge with money from federal grants.⁵⁵

D. Provisional Ballots

The 2002 election reforms under HAVA included an important new protection: the right to cast a "provisional" ballot that would be counted once elections officials could confirm its validity.⁵⁶ However, because HAVA was vague on certain aspects of provisional voting, provisional ballots were treated differently not only from state to state, but even from county to county.⁵⁷ This lack of clarity led to numerous lawsuits disputing the circumstances under which provisional ballots should be used (e.g., if a voter was flagged for needing to present identification) and the circumstances under which they should be counted (e.g., if cast in the wrong polling place or if the voter had requested an absentee ballot).⁵⁸

In 2004, voters cast over 1.6 million provisional ballots, of which approximately 1.1 million, or 68%, were counted.⁵⁹ In twenty-eight states, provisional ballots cast in the wrong precinct were not counted.⁶⁰ In seventeen states, ballots cast in the wrong precinct but within the correct jurisdiction (usually the county) would be counted.⁶¹

Despite predictions that statewide registration databases would greatly ameliorate the problems associated with provisional ballots, a comparison of all seventeen states that had statewide voter registration

53. Nancy Badertscher & Carlos Campos, *ID Debate Gets Heated*, ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2005, at E5. Georgia has since passed this bill and the governor has signed it. H.B. 244, 148th Gen. Assem., Reg. Sess. (Ga. 2005).

54. Voter Protection Act of 2005, S. 414, 109th Cong. (2005).

55. Voter Protection Act of 2005, S. 414, 109th Cong. §§ 302, 297 (2005).

56. 42 U.S.C. § 15483(a)(4) (2002).

57. THE CENTURY FOUNDATION, *supra* note 25, at 8.

58. See James Dao, Ford Fessenden & Tom Zeller, Jr., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES, Dec. 24, 2004, at A1.

59. THE ELECTION REFORM INFORMATION PROJECT, ELECTIONLINE.ORG BRIEFING: SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004 (Apr. 2005), available at <http://www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf>.

60. *Id.* at 6.

61. *Id.*

databases during the November 2004 election with those states that did not reveals little difference in the percentage of ballots counted. In states with databases, 65% of the provisional ballots cast were counted, while in states without databases, 68% of the provisional ballots cast were counted.⁶²

E. Voting Machines

The 2000 election publicized vast problems with the nation's punch card and lever voting machines. These machines are difficult to repair as they age, and are prone to inaccuracy and losing votes. In response, HAVA set aside one-time payments for states to phase out antiquated voting machines and established standards for the machines that replace them.⁶³ Many jurisdictions used their HAVA funds to buy computerized Direct Response Electronic Voting devices (DREs) to replace their old machines, and 2004 saw a surge in the use of electronic voting equipment. Election Data Services estimates that the proportion of voters using computerized voting devices increased from 13% in 2000 to 29% in 2004.⁶⁴ An estimated thirty million voters used some form of DRE in the 2004 election.⁶⁵

HAVA's standards addressed concerns about the accuracy of electronic voting systems by requiring all voting devices to allow voters to verify their selections and produce a permanent, official paper record that could be manually audited in a recount; nevertheless, the rush to adopt DREs was not well received in all quarters. A group of skeptics, mainly computer scientists, politicians, and members of the public, raised concerns about the reliability of new computer voting machines.⁶⁶ A large-scale movement arose to require a verifiable paper trail for these machines that would allow voters to double-check their computer vote and permit elections officials to conduct a manual audit.⁶⁷ This became almost the sole concern with the running of the election system in 2004.

62. *Id.* at 4.

63. Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 302–303, 116 Stat. 1666, 1706–14 (2002).

64. ELECTION DATA SERVICES, NEW STUDY SHOWS 50 MILLION VOTERS WILL USE ELECTRONIC VOTING SYSTEMS, 32 MILLION STILL WITH PUNCH CARDS IN 2004 (Feb. 2004), available at http://www.electiondataservices.com/EDSInc_VEstudy2004.pdf.

65. THE ELECTION REFORM INFORMATION PROJECT, ELECTIONLINE.ORG BRIEFING: THE 2004 ELECTION (Dec. 2004), at <http://www.electionline.org/Portals/1/Publications/Election%20Reform%20Briefing%209.pdf>.

66. Jim Drinkard, *Push To Replace Voting Machines Spurs Confusion*, USA TODAY, May 9, 2005, at A6.

67. See, e.g., Press Release, VerifiedVoting.org, More Than 200 Election Reform Advocates From 25 States Expected in D.C. for Two-Day Lobbying Blitz in Support of Voter-Verifiable Paper Trail (June 7, 2005), at <http://www.verifiedvoting.org/article.php?id=5782>.

Just as damaging as the growing mistrust of the computer systems was the backlash against them.⁶⁸ States and localities that had planned to get rid of punch card ballot machines, which are more prone to losing votes and more frequently found in African American neighborhoods,⁶⁹ were stopped in their tracks. Tens of millions of voters, including many in key battleground states, used punch card ballots in the 2004 election.⁷⁰

F. Felon Purges of Registration Lists

Just before the 2000 election, the State of Florida removed thousands of eligible voters, primarily African Americans, from the rolls.⁷¹ Unfortunately, in 2004, Florida and other states again encountered trouble when it came to accurately adding and subtracting voters from their registration rolls on account of criminal status. Florida was urged to withdraw its purge list after media investigations revealed that the list included thousands of people who were eligible to vote.⁷² The list included a disproportionate number of African American versus Hispanic voters, and would have disqualified 22,000 African Americans (likely Democrats) and only sixty-one Hispanics (likely Republicans).⁷³

G. Statutory Challenges and Voter Intimidation

State statutes allowing certain individuals to file challenges to a person's right to register or vote have long been on the books, but rarely used in practice.⁷⁴ In 2004, the aggressive use of previously obscure rules allowing for "challenges" of a person's right to vote was, arguably, a new way to suppress the vote.

In Ohio, the Republican Party used the state's challenge law to preemptively challenge more than 35,000 new registrants in mainly Democ-

68. ELECTIONLINE.ORG, ELECTION REFORM 2004: WHAT'S CHANGED, WHAT HASN'T AND WHY (Oct. 2004), at <http://www.electionline.org/Portals/1/Publications/Election.preview.2004.report.final.update.pdf>.

69. See TOVA ANDREA WANG, THE CENTURY FOUNDATION, ISSUE BRIEF: AFRICAN AMERICANS, VOTING MACHINES, AND SPOILED BALLOTS (Sept. 2004), available at <http://www.tcf.org/Publications/ElectionReform/afamvoting.pdf>.

70. ELECTION DATA SERVICES, VOTING EQUIPMENT SUMMARY BY TYPE AS OF: 11/02/2004, http://www.electiondataservices.com/VotingSummary2004_20040805.pdf (last visited Nov. 13, 2005).

71. Robert E. Pierre, *Botched Name Purge Denied Some Right to Vote*, WASH. POST, May 31, 2001, at A1.

72. Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES, July 10, 2004, at A13.

73. *Id.*

74. James Dao & Adam Liptak, *GOP in Ohio Can Challenge Voters at Polls*, N.Y. TIMES, Nov. 2, 2004, at A1; Press Release, American Civil Liberties Union, ACLU of Florida to Distribute Flyers Informing Voters of Their Rights if Challenged at the Polls (Nov. 1, 2004).

atic and minority communities.⁷⁵ The challenges were made on the grounds that postcards mailed to the new registrants were returned as undeliverable.⁷⁶ Challenged registrants were required, just days before the election, to attend a hearing and prove their eligibility. This went on in some areas until courts put a stop to it immediately prior to election day.⁷⁷

The Ohio GOP also announced that it would send people to the polls on election day in order to challenge the right to vote of pre-selected registrants.⁷⁸ This plan set off a rush of last-minute lawsuits, conflicting rulings, and appeals, producing great uncertainty about what would happen on election day.⁷⁹ In one case, the plaintiffs called Ohio's law a "Jim Crow-era" statute being used to disenfranchise African American voters.⁸⁰ The Justice Department wrote a letter to the District Court judge, telling her that challenges *should* be allowed.⁸¹ The district

75. According to the plaintiffs' first complaint:

Challengers are regulated by Ohio law. Each party may have one challenger present in each polling place. A challenger may challenge a voter as "unqualified" to vote. O.R.C. § 3505.21. Once a challenge is tendered, a lengthy process begins. The presiding judge administers an oath to the voter. If the voter is challenged on the grounds she is not a citizen, all of the elections judges must ask three questions. If the voter is a naturalized citizen she will be forced to present proper paperwork or submit to further testimony under oath. O.R.C. § 3505.20 (A). If the voter is challenged on the ground she has not lived in the state for 30 days preceding the election, all of the elections judges must ask eight questions. If challenged on the ground she does not reside in the county or precinct, the judges shall ask three questions. O.R.C. § 3505.20 (B) & (C). The statute also provides that the presiding judge is permitted to put such other questions to the voter as are necessary to test the person's qualifications as an elector at the election. O.R.C. § 3505.20 (§ following (D)). The statute provides no parameters for this additional interrogation. A majority of the election officials may refuse the person a ballot if in their opinions the voter did not fully answer any question, the voter answered the questions differently than the answers on the registration form or for "any other reason." The decision of the judges is final. O.R.C. § 3505.20 (§ following (D)).

First Amended Complaint for Declaratory and Injunctive Relief at 5, *Spencer v. Blackwell*, 347 F. Supp. 2d 528 (S.D. Ohio 2004) (No. 04-738).

76. James Dao & Adam Liptak, *GOP in Ohio Can Challenge Voters at the Polls*, N.Y. TIMES, Nov. 2, 2004, at A1.

77. *Miller v. Blackwell*, 388 F.3d 546 (6th Cir. 2004).

78. Michael Moss, *Big G.O.P. Bid to Challenge Voters at Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, at A1.

79. See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. (forthcoming August 2005); Election Law @ Moritz, Moritz College of Law, Swing State Daily Update (Oct. 30, 2004), <http://moritzlaw.osu.edu/electionlaw/analysis/2004/041030.php>.

80. First Amended Complaint for Declaratory and Injunctive Relief at 2, *Spencer*, 347 F. Supp. 2d 528.

81. Letter from R. Alexander Acosta, Assistant Attorney General, United States Department of Justice, to the Honorable Susan J. Blott, Judge, S.D. Ohio (Oct. 29, 2004), available at <http://www.usdoj.gov/crt/voting/hava/spencer.htm>.

court judges said that the challenges were unconstitutional. One of the judges stated the following in her ruling:

The Civil War ended in 1865. Only two years later, in 1867, the Ohio Supreme Court struck down the practice of individually interrogating potential African American voters at the polling place regarding their race. The vehicle used to pursue these questions was a statute that permitted voter challengers to be posted inside a polling place. O.R.C. § 3505.20 is the present day version of that statute. For the first time in more than one hundred and thirty years, this statute is once again being used for a racially discriminatory purpose.⁸²

Nonetheless, a federal appeals court ultimately ruled the challenges lawful.⁸³

Democrats made plans to post their own people at the polling sites to challenge the challengers on Election Day.⁸⁴ In other key battleground states, Republican officials pursued similar plans, filing challenges and deploying challengers. In Florida, the Republican Party developed a database of thousands of voters it wanted to challenge on election day,⁸⁵ and in Wisconsin, Republicans tried to challenge thousands of registrants—but only in heavily Democratic Milwaukee.⁸⁶

Additionally, blatant voter suppression and intimidation, mostly committed by unidentified individuals or groups, took place throughout the country.⁸⁷

82. First Amended Complaint for Declaratory and Injunctive Relief at 4, *Spencer*, 347 F. Supp. 2d 528.

83. *Summit County Democratic Cent. and Executive Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004).

84. Lisa Cornwell, *Federal Court Clears the Way for GOP Representatives to Challenge Voters' Eligibility in Ohio*, ASSOCIATED PRESS, Nov. 2, 2004.

85. See Gary Fineout, *GOP Calls 925 Felons Illegal Voters*, MIAMI HERALD, Oct. 29, 2004, at A1; William March & Garrett Therolf, *Republicans Press Voter Challenges*, TAMPA TRIB., Oct. 30, 2004, at 14; Garrett Therolf, *GOP Plans Challenge of Voters It Suspects*, TAMPA TRIB., October 27, 2004, at 1.

86. *Wisconsin Republicans Question Another 37,000 Milwaukee Addresses*, ASSOCIATED PRESS, Oct. 31, 2004.

87. For example, in Nevada, employees of a private voter registration company doing registration targeted at Republicans ripped up forms filled out by Democrats and threw them away. Democrats found that they had not been filed with the county as required by law. In Milwaukee, a flier purportedly from the "Milwaukee Black Voters League" was allegedly distributed in African American neighborhoods. It read, in part: "Some warnings for election time. If you've already voted in any election this year you can't vote in the presidential election if you [or anybody in your family] have ever been found guilty of anything, even a traffic violation, you can't vote in the presidential election . . . if you violate any of these laws you can get ten years in prison and your children will be taken away from you." According to local media reports, Pennsylvania officials received calls regarding leaflets on "official" county letterhead distributed in a Pittsburgh mall. The leaflets said that "due to immense voter turnout expected Tuesday," Republicans should vote on Tuesday, November 2, and

IV. COMPARING PROBLEMS IN THE WASHINGTON STATE ELECTION WITH THE REST OF THE COUNTRY

The Washington State gubernatorial election was historic—no statewide election in American history has been as close.⁸⁸ After the first ballot count, a margin of only 261 votes separated the leading candidate, Republican Dino Rossi, from his competitor, Democrat Christine Gregoire.⁸⁹ A mandatory recount brought the margin down to forty-two votes, and the subsequent hand recount requested by the state Democratic Party gave Gregoire the lead with 129 more votes than Rossi.⁹⁰ The ensuing litigation over the election results, giving rise to *Borders v. King County*,⁹¹ subjected the state's ballots to a relentless scrutiny that laid bare fundamental problems in the state's election system.

While no other election in 2004 was remotely as close as the Washington gubernatorial race, it is evident that many of the problems that Washington experienced could easily have occurred in other states. The results of the *Borders* trial provide us with detailed information about Washington's electoral system. This Part explores the similarities and differences of Washington and the rest of the country's election experiences in the order in which they most heavily factored into the Washington State controversy.

In resolving electoral disputes, many contend that choices must be made between competing values, only to opt for the easiest way out. In many instances, the choice presented does not in fact exist or competing values can be mutually satisfied. Disputes over felon re-enfranchisement and polling place and voter identification illustrate this point. In other

Democrats should vote on Wednesday, November 3. And in Lake County, Ohio, some voters received an "Urgent Advisory" on fake Board of Elections letterhead warning that any voter registered through the Kerry campaign, America Coming Together, or the NAACP could not vote. See Steven Carbo, *Color it Wrong*, THE AMERICAN PROSPECT, Jan. 4, 2005, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8965>; Daily Kos: Voter Suppression Time (Oct. 28, 2004), <http://www.dailykos.com/story/2004/10/28/201853/53> (last visited Nov. 13, 2005); PEOPLE FOR THE AMERICAN WAY, NAACP, LAWYERS COMMITTEE FOR CIVIL RIGHTS, SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS (Dec. 2004), available at http://www.pfaw.org/pfaw/dfiles/file_477.pdf; Tova Andrea Wang, *Election 2004: A Report Card*, THE AMERICAN PROSPECT, Jan. 4, 2005, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8961>.

88. *All Things Considered: Democrat Leads in Latest Washington State Gubernatorial Recount* (National Public Radio broadcast Dec. 22, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4241110>.

89. Washington Secretary of State Sam Reed, Washington State 2004 General Elections, Statewide Offices, <http://vote.wa.gov/general/statewide.aspx> (last visited Nov. 13, 2005).

90. Washington Secretary of State Sam Reed, Washington State 2004 General Elections, <http://vote.wa.gov/general/recount.aspx> (last visited Nov. 13, 2005).

91. Court's Oral Decision at 8, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

cases, weighing competing values tilts the balance heavily in favor of voter rights rather than other policy interests. The issue of absentee ballots in the case of Florida, provisional ballots generally, and the allocation of voting machines in Ohio and elsewhere illustrate this line of reasoning.

A. Felon Disenfranchisement

1. Washington State

A convicted felon in Washington State is not allowed to vote while on probation, parole, or in prison; until he has completed the requirements of his or her sentence; until he has paid all court-related fees; and until he has had his right to vote restored by the state.⁹² Washington's law requiring the satisfaction of legal financial obligations as a condition to restoring voting rights⁹³ presents a significant economic barrier for many people. As a result, many individuals are unable to vote years or decades after their release from incarceration.⁹⁴ In some cases, individuals are permanently disenfranchised.

According to the Washington State chapter of the American Civil Liberties Union,

[p]ersons convicted of a felony in Washington are required to obtain a "Certificate of Discharge," in order to restore their right to vote. Discharge certificates are issued by the court of conviction. Statistics from the Washington Department of Corrections (DOC) show that only a fraction of the individuals released from prison have been issued a Certificate of Discharge. The primary obstacle is their inability to satisfy legal financial obligations. Since 1988, fewer than 70,000 discharges have been issued. During the same time period, over 200,000 individuals have been released from DOC supervision without a Certificate of Discharge. Those individuals must petition the court on their own to obtain a certificate.⁹⁵

The Executive Director of the chapter has also pointed out that "[t]he state's current system for restoring voting rights is a morass that has led to much confusion among both citizens and election officials as to who is

92. WASH. REV. CODE § 29A.08.520 (2004).

93. WASH. REV. CODE § 9.94A.637 (2004).

94. Sam Skolnik, *Freed From Bars But Barred From Voting*, SEATTLE POST-INTELLIGENCER, Jan. 17, 2002, at A1.

95. American Civil Liberties Union of Washington, Washington State Voting Rights Restoration Stats, http://www.aclu-wa.org/ISSUES/voting_rights/wavotingrightsstats.htm (last visited Nov. 13, 2005).

eligible to vote.”⁹⁶ In an amicus brief submitted in the *Borders* case, the ACLU stated:

[F]or individuals, the process for restoring voting rights varies depending on the nature of the conviction, when and where the conviction occurred, and factors unique to each person’s case. Government responsibilities related to reinstating the vote are divided among a number of agencies that do not always communicate well with each other. Official records needed to restore voting rights are dispersed among many different local and state governmental bodies, each with its own policy for retention of records.⁹⁷

More than 150,000 ex-felons are unable to vote.⁹⁸

In *Borders v. King County*, both sides alleged that hundreds of felons had voted illegally in the 2004 election.⁹⁹ The felons’ votes quickly became a central topic of debate in both the press and the court, focusing on three primary issues: (1) under what conditions is it illegal for a felon to vote; (2) whether the illegal felon votes affected the vote tallies and ultimate outcome of the gubernatorial contest; and (3) why so many felons voted illegally.

Republicans produced a list of 946 names that they believed belonged to felons who had voted illegally in the 2004 general election; most of the names on the list were from precincts won by Democratic candidate Christine Gregoire.¹⁰⁰ The Democrats submitted a similar list of 743 names, mostly from precincts leaning towards Rossi.¹⁰¹ In pretrial arguments, Judge Bridges set the standard of proof for excluding an individual illegal felon vote from the total election count as follows: evidence would have to be provided to prove that an individual had:

1. Been convicted of a felony, not a misdemeanor;
2. Been convicted as an adult, not a juvenile;
3. Not been given a deferred sentence;
4. Not had his or her voting rights restored;

96. Press Release, American Civil Liberties Union of Washington, ACLU Provides Guidance on Voting Rights, Submits Friend-of-the-Court Brief in Election Case, Supports Legislative Reform (Apr. 20, 2005), available at http://www.aclu-wa.org/ISSUES/voting_rights/ACLUAmicusGuidance.html.

97. *Id.*

98. Rachel La Corte, *Groups Fighting For Washington Ex-Felons To Get Voting Rights Restored*, ASSOCIATED PRESS, June 23, 2005, available at http://www.komotv.com/news/story_m.asp?ID=37653.

99. Court’s Oral Decision at 6, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

100. Gregory Roberts, *Democrats List 743 Felon Votes as Illegal*, Seattle Post-Intelligencer, May 7, 2005, at B1.

101. *Id.*

5. Cast a ballot in the 2004 election;
6. Voted for a gubernatorial candidate on that ballot.¹⁰²

Producing evidence to prove these elements caused the final list of illegal felon votes accepted by the Washington Supreme Court to shrink considerably. Many of the names ended up on the original list because of faulty or incomplete superior court files that did not indicate sentences had been reduced or rights had been restored. Inaccurate county voting records made it difficult to prove whether an individual had actually voted in the election. Ultimately, the court found that 754 of the felons on the Republicans' list and 647 of the felons on the Democrats' list had cast ballots illegally in the 2004 election.¹⁰³

After the court ruled on the standard of proof to define an illegal felon vote, the debate shifted to how the illegal votes should be subtracted from the final vote tallies of the gubernatorial candidates. In the press, Republicans pointed to national studies of trends in voting among felons that showed that felons were more likely to vote for Democrats, while the Democrats argued that subtracting the illegal votes would require months of testimony from each of the more than 1000 felons to determine whether they had voted in the 2004 gubernatorial election and for whom. Because voting without the proper qualifications is a felony, Democrats argued that succeeding in the subtractions would require the listed felons to admit to having committed a crime in court, which would significantly complicate the proceedings.¹⁰⁴ Having the felons testify in person was never a serious option. To date, there have been no plans to prosecute any of the felons who voted illegally.

In court, Republicans brought in expert witnesses who described a process of "proportionate deduction" in which illegal votes are assigned based on the percentages each candidate won in a given precinct. According to this method, if ten felons voted illegally in a precinct in which Gregoire won 60% of the vote and Rossi won 40%, six votes would be subtracted from Gregoire's total and four from Rossi's. According to calculations performed by the Republicans, this method of subtraction would put Dino Rossi's vote total ahead of Christine Gregoire's.¹⁰⁵

102. Court's Oral Decision at 8, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

103. *Id.*

104. Kenneth P. Vogel, *Theories Abound On Voting by Felons; Are Felons Red or Blue? Republican and Democratic Experts Offer Conflicting Theories In Court Challenge of the Governor's Race*, THE NEWS TRIBUNE, May 10, 2005, at A1. See also Jim Camden, *Politics, Math Collide In Court; Judge to Decide How Votes in Governor's Race Add Up*, SPOKESMAN REVIEW, May 23, 2005, at A1.

105. Kenneth P. Vogel, *Each Party's Experts Claim Win; Democrats and Republicans Say Their Formulas Decide Governor's Race. The Political Parties Get Professors to Study Who Won*

The court ultimately rejected the “proportionate deduction” method, however, because the data was neither a complete census of every felon who had voted illegally in Washington nor a random or scientific sample of illegal votes, but was instead overly weighted towards precincts in which Gregoire had won.¹⁰⁶ Moreover, the “proportionate deduction” argument depended on an “ecological inference” that Judge Bridges determined was “not shown to be scientifically accepted as a substitute for evidence or other scientific proof in these circumstances.”¹⁰⁷

The only illegal felon votes the court subtracted from the candidates’ total vote tallies were those of felons who testified in court as to their participation in the gubernatorial election. The court heard evidence from four felons who had voted illegally for Rossi, and one who had voted for the Libertarian candidate Ruth Bennett. Accordingly, four votes were subtracted from Rossi’s total, one from Bennett’s. Apart from these five votes, no illegal felon votes were subtracted because neither party provided any evidence of how individual felons voted.¹⁰⁸

Though the Republicans’ case rested on the claim that “errors, omissions, mistakes, neglect, and other wrongful acts” made it “impossible to determine which candidate received the greatest number of legitimate, valid, legal votes,”¹⁰⁹ they did not allege fraudulent behavior or claim that the hundreds of illegal felon votes were the result of an attempt to influence the outcome of the election.¹¹⁰ In its own investigation into the validity of the list of 1100 names that the Republicans released in early March, the *Seattle Times* contacted a random sampling of more than 100 felons who had voted illegally; nearly all of them had not been aware that it was unlawful for them to vote.¹¹¹ The large number of felons who voted illegally in the 2004 gubernatorial election seems to have been a result of administrative error, misinformation, and faulty databases. Given the complexity of re-enfranchisement in Washington State, this is not surprising.

The Washington state legislature failed to pass legislation that would have simplified the restoration of voting rights or automatically re-enfranchise ex-felons, thereby reducing the number of ex-felons ille-

the Governor’s Race. Big Surprise: The Democrats Say it is Christine Gregoire and the Republicans Say it is Dino Rossi, THE NEWS TRIBUNE, May 14, 2005, at B1.

106. Court’s Oral Decision at 7, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

107. *Id.* at 8.

108. *Id.*

109. *Id.* at 3.

110. *Id.*

111. Peggy Anderson, *Democrats Scold GOP for Publicly Accusing People of Illegal Voting*, ASSOCIATED PRESS, Mar. 4, 2005, available at <http://www.komotv.com/news/story.asp?ID=35562>.

gally voting. Nonetheless, legislators did enact a number of legislative reforms with respect to re-enfranchisement. Perhaps the most important legislation passed was the Enhancing Voter Registration Recordkeeping Act,¹¹² which requires the statewide voter registration list to be coordinated with other agency databases within the state, including the Department of Corrections, the Washington State Patrol, and the Office of the Administrator for the Courts. In addition, this new law does the following:

- Adds a sworn statement to the voter registration form about penalties for illegal voting;
- Makes it a class C felony to knowingly register to vote without the legal qualifications;
- Requires a quarterly screening of the voter database for felons and other people who are barred from voting such as the deceased, the legally incompetent, and people who have declined to serve on juries due to lack of citizenship;
- Requires that felons be notified at the time of conviction that the right to vote has been suspended and that voting before the right is restored is a felony;
- Clarifies the process by which felon voting rights can be restored;
- Clarifies the process by which a felon's right to vote is suspended, namely, that after a voter's name appears on a felon list, he or she must be notified that the right to vote has been suspended and informed of the process for restoring the right to vote, after which he or she has thirty days to respond, lest the registration be cancelled;
- Requires that records be kept on previous successful appeals so as to prevent repeated cancellations;
- Requires the county clerk to notify the Secretary of State each time a felon completes all the requirements of a sentence; and
- Requires the Secretary of State to notify the appropriate county auditor when a felon has completed all the requirements of a sentence.¹¹³

112. S.B. 5743, 59th Leg., Reg. Sess. (Wash. 2005).

113. *Id.*

2. Rest of the Country

The issue of ex-felon disenfranchisement was largely neglected at the national level until Florida's problems with the accuracy of their felon purge lists went public. Now, across the country, attention is being paid not only to the challenge of compiling such lists, but also to the core issue of whether we ought to be disenfranchising ex-felons in the first place. If nothing else, from an administrative perspective, it is becoming clear that the easiest way to address the felon list problem is to narrow down the names that must be on it and their current criminal status. In this instance, the allegedly competing values of administrative efficiency and the right to vote can be satisfactorily resolved.

Public and elected officials are increasingly recognizing that ex-felon disenfranchisement is not desirable from a democratic or social standpoint. Several states have reformed their felon disenfranchisement laws to make the process for restoration of rights simpler, and some states are getting rid of ex-felon disenfranchisement laws altogether.¹¹⁴ In

114. The Sentencing Project has identified the following policy changes on felon voting rights in recent years:

Alabama: In 2003, Governor Riley signed into law a bill that permits most felons to apply for a certificate of eligibility to register to vote after completing their sentence.

Connecticut: In May 2001, Governor Rowland signed into law a bill that extends voting rights to felons on probation. The law is expected to make 36,000 persons eligible to vote.

Delaware: Until recently, Delaware imposed a lifetime voting ban for felons. In June 2000, the General Assembly passed a constitutional amendment restoring voting rights to some ex-felons five years after the completion of their sentence.

Florida: The Brennan Center and the Lawyers' Committee for Civil Rights Under Law have a voting rights case pending in the U.S. District Court for the Southern District of Florida challenging the constitutionality of the voting laws that disenfranchise ex-felons.

Iowa: Governor Vilsack issued an executive order in 2005 automatically restoring the voting rights of all ex-felons, a process that will continue on a monthly basis upon completion of sentence.

Kansas: In 2002, the legislature added probationers to the category of excluded felons.

Kentucky: In 2001, the legislature passed a bill that requires that the Department of Corrections inform and aid eligible offenders in completing the restoration process to regain their civil rights.

Maryland: In 2002, the legislature repealed its lifetime ban on two-time ex-felons (with the exception of felons with two violent convictions) and imposed a three-year waiting period after completion of sentence before rights can be restored.

Massachusetts: Until the 2000 presidential election, Massachusetts was one of three states that allowed inmates to vote. On November 7, 2000, the Massachusetts electorate voted in favor of a constitutional amendment, which strips persons incarcerated for a felony offense of their right to vote.

Nebraska: In March 2005, the legislature repealed the lifetime ban on all felons and replaced it with a two-year post-sentence ban.

Nevada: In 2003, the state approved a provision to automatically restore voting rights for first-time nonviolent felons immediately after completion of sentence.

New Mexico: In 2001, the legislature adopted a bill repealing the state's lifetime ban on ex-felon voting. In 2005, a bill was passed that requires the Department of Corrections to provide notification of completion of sentence to the Secretary of State's office.

Pennsylvania: A Commonwealth court restored the right to vote to thousands of ex-felons who, as a result, were entitled to vote in the 2000 presidential election.

March 2001, New Mexico eliminated its permanent ban on voting by those who had committed a felony.¹¹⁵ In March 2005, Nebraska also ended its permanent ban, with the legislature overriding the governor's veto of a bill giving former felons the right to vote two years after completion of their sentence, parole or probation.¹¹⁶ In June 2005, the Governor of Iowa announced that he would restore voting rights for all felons who had completed their sentences.¹¹⁷ Iowa was one of only five states to deny voting rights to ex-felons for life. The other four states are Alabama, Florida, Kentucky and Virginia.¹¹⁸ Fourteen states now automatically restore voting rights after release from prison, four states restore rights after completion of parole, and eighteen states restore rights when an ex-felon has completed probation.¹¹⁹

While a small number of ex-felons may vote illegally, this is often due to confusing rules for re-enfranchisement—at least part of the problem in Washington—and ex-felons' ignorance of their rights and proper procedures. Alabama, Texas and Virginia have simplified and expedited their re-enfranchisement procedures, resulting in thousands more Americans being allowed to vote. When Texas removed its two-year waiting period for felon re-enfranchisement, an estimated 316,981 former felons regained the right to vote.¹²⁰

On the other hand, a recent report by The Sentencing Project on fourteen states where action must be taken by an ex-felon to regain the right to vote found “a restoration process that is frequently confusing,

Texas: In 1997, the Texas Legislature passed a bill, signed by Governor George W. Bush, eliminating the two-year waiting period after completion of sentence before individuals can regain their right to vote.

Utah: In 1998, Utah voters approved an amendment prohibiting persons incarcerated for a felony conviction from voting.

Virginia: The Virginia Legislature passed a law in 2000 enabling certain ex-felons to apply to the circuit court for the restoration of their voting rights five years after the completion of their sentence; those convicted of felony drug offenses must wait seven years after completion. The circuit court's decisions are subject to the Governor's approval.

Wyoming: In 2003, Governor Freudenthal signed a bill to allow people convicted of a non-violent first-time felony to apply for restoration of voting rights five years after completion of sentence.

THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2005), available at <http://www.sentencingproject.org/pdfs/1046.pdf>.

115. N.M. STAT. § 31-13-1 (2001), *as amended* by 2005 N.M. Laws 18, now allows for restoration of citizenship and voting rights for convicted felons.

116. L.B. 53, 99th Leg., 1st Reg. Sess. (Neb. 2005).

117. Kate Zemike, *Iowa Governor Will Give Felons the Right to Vote*, N.Y. TIMES, June 18, 2005, at A8.

118. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2005), available at <http://www.sentencingproject.org/pdfs/1046.pdf>.

119. Zemike, *supra* note 117.

120. THE SENTENCING PROJECT, IMPACT OF RECENT LEGAL CHANGES IN FELON VOTING RIGHTS IN FIVE STATES (2003), available at <http://www.sentencingproject.org/pdfs/UggenManzaSymposium.pdf>.

cumbersome, and not widely used.”¹²¹ The report found the regulations governing waiting confusing, sometimes varying with the crime committed.¹²² For example, in Tennessee, the process for restoration of rights depends upon whether the felon was convicted in one of five different time periods.¹²³ Many ex-felons have no idea whether they are allowed to vote.¹²⁴

A handful of states besides Washington have found evidence that a very small number of ex-felons willfully or mistakenly voted in violation of state law in 2004. The only state that seems to have discovered a statistically relevant amount of ex-felon voting is Wisconsin. The Milwaukee Journal-Sentinel claimed it had found a number of fraudulent votes in Milwaukee and throughout the state, and a joint task force of the police department, the district attorney, the FBI, and the U.S. Attorney’s Office undertook an investigation.¹²⁵ According to the Journal-Sentinel, at least eighty-two felons voted illegally in the November 2004 election in Milwaukee.¹²⁶ However, it is likely that most of these voters were unaware that they could not vote legally, as several Journal-Sentinel articles have suggested.¹²⁷ In a telling example, the paper reported that investigators working with the joint task force found “two felons who visited their probation officer on election day wearing ‘I voted’ stickers.”¹²⁸ As the paper points out, felons who vote illegally are committing a felony punishable by up to four years in prison and a \$10,000 fine.¹²⁹ It would hardly seem that the risk in such cases would be worth the reward to these individuals. The joint task force, in its preliminary findings, found 200 cases of felons voting illegally in Milwaukee, noting the following:

In order for such action to constitute a criminal offense, the prosecution must establish, beyond a reasonable doubt, that the felon was ineligible to vote under state law and that the felon knew that he or

121. THE SENTENCING PROJECT, *BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES 2* (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

122. *Id.* at 2.

123. *Id.* at 3.

124. See, e.g., Jane DeFao, *Many Felons Surprised They Get to Vote*, S.F. CHRON., Oct. 6, 2004, at B3; Sherri Williams, *Many Felons Surprised to Learn They Can Vote*, COLUMBUS DISPATCH, Oct. 3, 2004, at B1.

125. Greg J. Borowski, *82 Felons Voted in November 2 Election*, MILWAUKEE JOURNAL-SENTINEL, Mar. 18, 2005, at A1.

126. *Id.*

127. Greg Borowski & Mark Maley, *Review Indicates 278 Felons Cast Ballots Illegally in State*, MILWAUKEE JOURNAL-SENTINEL, Apr. 1, 2005, at A1; Greg Borowski, *Voter List Lacks Key Element*, MILWAUKEE JOURNAL-SENTINEL, Mar. 23, 2005, at A1.

128. Greg J. Borowski, *Bad Vote Tally Revives Reform Debate*, MILWAUKEE JOURNAL-SENTINEL, June 9, 2005, at B1.

129. Borowski & Maley, *supra* note 127.

she was ineligible to vote. As a result of this standard, the task force is proceeding cautiously in its charging decisions and is evaluating each case on the individual facts.¹³⁰

The cases in Washington and Wisconsin underscore the need for states that continue to disenfranchise felons to make the process of restoration simple, and to ensure that ex-felons know their rights and how to exercise them properly.

States should also take steps to actualize the potential of their statewide registration databases in addressing these problems. Databases should make it immediately clear who is and is not legally entitled to vote on election day. Many states, including Washington, have already taken effective action to do just that by building databases that are inter-actively connected with courts and departments of corrections.¹³¹

Unfortunately, some states have not succeeded in ensuring that their processes for purging and adding felons and ex-felons operate efficiently. A recent survey by the ACLU of the purging processes of fifteen states with a wide variety of disenfranchisement laws revealed the following information:¹³²

- One-quarter of the states surveyed compiled their purge lists without reference to any legislative standards whatsoever, while half the states surveyed did so using only an individual's name and address;
- No state surveyed had codified any specific or minimum set of criteria for its officials to use in ensuring that an individual with a felony conviction is the same individual being purged from the voter rolls; and
- Two-thirds of the states surveyed did not require election officials to notify voters when they were purged from the voter rolls, denying these voters an opportunity to contest erroneous purges.

There are a number of steps states can take regarding felon re-enfranchisement that promote the goals of administrative ease and effi-

130. MILWAUKEE POLICE DEPARTMENT, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE, FEDERAL BUREAU OF INVESTIGATION & UNITED STATES ATTORNEY'S OFFICE, PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD (2005), available at http://www.usdoj.gov/usao/wie/press_releases/pr051005_electionfraud.pdf.

131. See THE ELECTION REFORM INFORMATION PROJECT, ELECTIONLINE.ORG BRIEFING: ASSORTED ROLLS: STATEWIDE VOTER REGISTRATION DATABASES UNDER HAVA (June 2005), available at <http://www.electionline.org/Portals/1/EB11.FINAL1.pdf>.

132. AMERICAN CIVIL LIBERTIES UNION, PURGED! HOW FLAWED AND INCONSISTENT VOTING SYSTEMS COULD DEPRIVE MILLIONS OF AMERICANS OF THE RIGHT TO VOTE (2004), available at <http://www.aclu.org/Files/getFile.cfm?id=16844>.

ciency while at the same time serving the interests of equity and democracy. Such reforms will help to reduce the problems experienced where there is confusion among elections workers about the proper handling of felon lists, lack of clarity about felon disenfranchisement laws, mismanagement of databases with respect to felons, and problems with ex-felons not knowing whether or not they may vote. As more and more Americans are coming to recognize, reforms are also important because of the democratic values at stake. According to the Sentencing Project, 80% of the public supports restoration of voting rights for ex-felons who have completed their sentences, while 64% and 62% respectively support the right of probationers and parolees to vote.¹³³ In the 2004 election, some five million Americans—2.4% of the electorate—were denied a vote on the basis of a felony conviction.¹³⁴ This disenfranchisement fell most heavily on African Americans—13% of black men cannot legally vote, seven times the national average.¹³⁵

In states that disenfranchise felons, the process of re-enfranchisement upon completion of incarceration, parole, or probation should be automatic. When a felon has completed his sentence, he should be put back on the list of eligible voters, automatically re-enfranchised through a computerized statewide voter registration list if returning to the same location, or allowed to fill out a normal voter registration form if new to the area. If an ex-felon must complete a new registration, he should be notified of that requirement immediately upon release. Courts should notify counties when a felon's sentence is finished so that the felon status may be removed.

States should not impose a lengthy application process or require the production of an unnecessary amount of documentation, nor should an ex-felon be required to pay court fees and court-ordered restitution before regaining his voting rights. There should not be a price tag or an economic means test on the right to vote in the United States. States should not require drawn-out reviews by the governor or state legislature before an ex-felon can regain his rights. Furthermore, states should eliminate statutory waiting periods and require corrections officers to provide ex-felons with all pertinent information and assistance to regain voting rights.¹³⁶

133. The Sentencing Project, *Felony Disenfranchisement*, http://www.sentencingproject.org/issues_03.cfm (last visited Nov. 13, 2004).

134. Fox Butterfield, *Two Studies Find Laws on Felons Forbid Many Black Men to Vote*, N.Y. TIMES, Sept. 23, 2004, at A22.

135. Editorial, *Felons and the Right to Vote*, N.Y. TIMES, July 11, 2004, at D12.

136. MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, *BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES* (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

States should also adopt statutes that specify and standardize matching criteria for identifying felons in statewide databases. These statutes should prescribe the use of numerous matching criteria, require exact matches of felony conviction and voter registration data, and require that matches be double-checked at state and county levels. Matching criteria should include first, middle, last, and maiden names, gender, alias, date and place of birth, and driver's license number, if any.¹³⁷

Purges should be done year-round, but end ninety days before the election so anyone purged is given due notice and an opportunity to appeal. As is done in New York, any individual to be purged should *first* be mailed a certified, forward-able notification letter to the last known address, to which he would have a certain number of days to respond before registration is cancelled (in the case of New York it is fourteen days). The letter in New York includes a postage-paid card that asks the individual to list any reasons why he should not be removed.¹³⁸ If the individual does not respond, the state sends out a second letter giving notice that his registration has been cancelled and providing information about re-enfranchisement.¹³⁹

The issue of felon voting, and the solution of automatic re-enfranchisement of ex-felons no longer in prison, is an area in which the values of administrative ease, finality, and ensuring voting integrity do not conflict with the values of opening up the process and ensuring voting rights. Simply and quickly re-enfranchising ex-felons serves all these interests. Administrators will have less work to do with respect to registration lists, there will be no concerns about ex-felons illegally voting, and the right to vote will be granted to millions of Americans who have already paid their debts and need to be brought back into the life of our democratic society.

B. Polling Place Fraud and Voter Identification

1. Washington State

In terms of fraud actually taking place at the polling place, the judge in *Borders* found that out of the millions of votes cast, nineteen ballots were tabulated in the name of deceased voters and six voters voted twice.¹⁴⁰ These are the only kinds of election fraud that identification requirements could have deterred or thwarted. Nevertheless, like

137. AMERICAN CIVIL LIBERTIES UNION, *supra* note 132.

138. N.Y. ELEC. LAW § 5-402(2) (McKinney 1997).

139. N.Y. ELEC. LAW § 5-402(3) (McKinney 1997).

140. Court's Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

several other states, Washington passed legislation imposing stricter identification requirements in 2005. This legislation ranks Washington among states with very restrictive identification requirements, and serves as an apt example of an area of election law and administration where the dichotomy between competing values is false. The debate over whether an ID requirement is necessary to combat voter fraud and the value of ensuring eligible voters are not disenfranchised is completely misplaced. A voter ID requirement does not solve the problem of voter fraud, and no compelling, evidence-based value is addressed by this “reform.”

Washington’s new law requires all voters to present ID at the polls.¹⁴¹ Acceptable forms of ID are limited to voter registration cards and current government-issued photo ID, including but not limited to a driver’s license, state ID card, passport, tribal ID card, or military ID card. Any individual who desires to vote in person but cannot provide ID must be issued a provisional ballot.¹⁴² This was enacted despite the fact that there was already a law on Washington’s books that made voting more than once, or knowingly casting a vote illicitly, a felony offense.¹⁴³

2. Rest of the Country

Many state and national legislators have alleged widespread fraud at polling places in 2004 that could only be prevented by requiring identification in order to vote. A number of states have passed, or are in the process of enacting, stricter identification rules. Indiana and Georgia have just enacted legislation that requires all voters to present government issued photo identification at the polls.¹⁴⁴

Yet the evidence points to the absolute contrary of the policy conclusions behind the drive for stricter identification requirements. While much of the emphasis on ballot security and fraud reduction has centered on proposals to introduce or change requirements for polling place identification, election officials in many states have said that the *mail* (i.e., absentee ballots and early voting by mail) provides the best opportunity for those seeking to undermine the electoral process and commit fraud on a much larger scale.¹⁴⁵

In contrast, there is a good deal of anecdotal evidence suggesting that polling-place voter fraud is exceedingly rare.¹⁴⁶ Only six cases of

141. S.B. 5499, 59th Leg., Reg. Sess. (Wash. 2005).

142. WASH. REV. CODE § 29A.44.205 (2005).

143. WASH. REV. CODE § 29A.84.650–660 (2005).

144. H.B. 244, 148th Gen. Assem., Reg. Sess. (Ga. 2005); P.L. 109-2005, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

145. See note 181, *infra*, and accompanying text.

146. Professor Lorraine Minnite of Barnard College, who has studied voter fraud extensively, says:

alleged double voting were found in Washington. In Ohio, perhaps the only other state to be subjected to the same level of scrutiny as Washington, a statewide survey found that of the 9,078,728 votes cast in Ohio's 2002 and 2004 general elections, a total of four were deemed ineligible or "fraudulent."¹⁴⁷

As Georgia Secretary of State Cathy Cox wrote in a letter to Governor Sonny Purdue opposing the state's new identification bill:

One of the primary justifications given by the Legislature for the passage of the photo identification provisions of House Bill 244—the elimination of voter ID fraud at the polls—is an unfounded justification. I cannot recall one documented case of voter fraud during my tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls. Our state currently has several practices and procedures in existence to ensure that such cases of voter fraud would have been detected if they in fact occurred, and at the very least, we would have complaints of voters who were unable to vote because someone had previously represented himself or herself as such person on that respective Election Day.¹⁴⁸

This is not surprising. As Professor Daniel Tokaji of the Moritz College of Law at Ohio State University recently wrote,

For the individual voter, voting fraud is a high risk/low reward strategy. A voter who pretends to be someone else risks prosecution

There are no reliable, officially compiled national or even statewide statistics available on voter fraud. Researchers working on voter fraud must construct their own datasets by culling information about allegations, investigations, evidence, charges, trials, convictions, acquittals and pleas from local election boards and local D.A.s, county by county and sometimes town by town across the U.S. The task is painstaking which explains in part why nobody has done it yet. Such a dataset is desirable because hard data are persuasive, at least with reasonable people. On the other hand, I do not think the lack of such data means we can't observe patterns from the available non-statistical data and draw reasonable conclusions about the low incidence of voter fraud in U.S. elections today. Moreover, if fraud is such a persistent concern of those who run elections and a widespread cause for concern among a large number of voters who believe there is a great deal of fraud in elections, why don't government agencies responsible for election administration collect statistics on voter fraud? Some ID proponents argue law enforcement officials don't bother with voter fraud, they don't have the resources to do the investigations, they are under much more pressure to find the murderers, rapists and thieves who commit more serious crimes. I've interviewed elections officials and law enforcement people for my work on voter fraud who adamantly do not agree with this argument.

Email from Lorraine Minnite to Tova Andrea Wang (Apr. 23, 2005) (on file with author).

147. THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO AND THE LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE: A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>.

148. Letter from Georgia Secretary of State Cathy Cox to the Honorable Sonny Purdue 1–2 (Apr. 8, 2005), available at <http://www.aclu.org/Files/OpenFile.cfm?id=18651>.

if he or she is caught, and the state should aggressively prosecute those who engage in such fraud. On the other hand, the rewards for the individual who engages in fraud are meager. The anonymity of the ballot—the fact that outsiders can't confirm who someone voted for at the polls—makes it very difficult to mount any successful scheme of widespread fraud, without bearing an enormous risk.¹⁴⁹

As Professor Spencer Overton of George Washington School of Law has pointed out, political leaders and voters must think about balancing values. He argues that “[i]f only 0.01 percent of votes cast are fraudulent . . . adopting an ID requirement that reduces legitimate voter turnout by five percent hurts democracy.”¹⁵⁰

It is also likely that identification requirements have disproportionate disenfranchising impacts on certain communities. This includes those less likely to have the requisite identification and those with less ability to attain it—the poor, minorities, the elderly, the young, and urban residents. A June 2005 study by the University of Wisconsin found the following:

An estimated 23 percent of persons aged 65 and over do not have a Wisconsin drivers license or a photo ID. The population of elderly persons 65 and older without a drivers license or a state photo ID totals 177,399, and of these 70 percent are women. While racial data was not available on the state population with photo IDs, 91 percent of the state's elderly without a Wisconsin drivers license are white. An estimated 98,247 Wisconsin residents ages 35 through 64 also do not have either a drivers license or a photo ID.

Minorities and poor populations are the most likely to have drivers license problems. Less than half (47 percent) of Milwaukee County African American adults and 43 percent of Hispanic adults have a valid drivers license compared to 85 percent of white adults in the Balance of State (BOS, i.e., outside Milwaukee County). The situation for young adults ages 18-24 is even worse—with only 26 percent of African Americans and 34 percent of Hispanics in Milwaukee County with a valid license compared to 71 percent of young white adults in the Balance of State.

At UWM, Marquette University, and the University of Wisconsin-Madison, a total of 12,624 students live in residence halls, but only

149. Daniel P. Tokaji, *ID and the Right to Vote*, ELECTION LAW @ MORITZ, Apr. 12, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050412.php>.

150. Spencer Overton, *Voter ID Supporters Lack Hard Evidence*, ATLANTA JOURNAL-CONSTITUTION, Apr. 8, 2005, available at http://docs.law.gwu.edu/facweb/soverton/ajc_april8_2005.pdf.

280 (2 percent) have drivers licenses with these dorms' addresses Over half of the adults of the 18–24 year old age group did not have a drivers license with an address in their current ZIP code for college neighborhoods in Eau Claire, LaCrosse, Madison, Milwaukee, Oshkosh, Platteville, River Falls, Stevens Point, Stout, and Whitewater.¹⁵¹

A 2001 study by the National Commission on Federal Election Reform found that 6–10% of the existing American electorate lacks any form of state ID.¹⁵² A 1994 Justice Department study found that blacks in Louisiana were four to five times less likely than whites to have photo IDs.¹⁵³

Conditioning voter registration on any payment of fees is indistinguishable from imposing a poll tax and might be a violation of the Voting Rights Act.¹⁵⁴ The Supreme Court has held even a \$1.50 fee to be an unconstitutional poll tax.¹⁵⁵

The argument that governments can solve this problem by providing free ID to everyone, as suggested by the McConnell-Bond bill,¹⁵⁶ is a theory with no basis in evidence or fact. Even if a state provides a free voter ID card, the issue of what documents a voter must present in order to get the ID card remains unaddressed. Birth certificates, proof of citizenship, and passports cost time and money to obtain, making the requirement essentially a poll tax.

Moreover, simply saying that all voters should get a free ID hardly fixes the problem. To be effective, a massive and expensive undertaking is required to ensure that all eligible voters—including the elderly, disabled, and those who live in more remote areas—get the necessary identification. It is unlikely that the federal government would appropriate sufficient money for such a project, and most states are not in a position to adequately fund such a venture.

Finally, in the areas where free voter ID has been tried, such as Michigan and Georgia, it has not solved the problem. Despite a program that includes mobile vehicles from which election workers distribute IDs, 10% of voting-age citizens in Michigan still have no driver's license or

151. JOHN PAWASARAT, UNIVERSITY OF WISCONSIN-MILWAUKEE, THE DRIVERS LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1–2 (2005).

152. TASK FORCE ON THE FEDERAL ELECTION SYSTEM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 4 (Aug. 2001), available at http://www.tcf.org/Publications/ElectionReform/full_tf_report.pdf.

153. Overton, *supra* note 150.

154. Letter from Coalition of Civil Rights Groups to Mr. John Tanner, Chief, Voting Section, U.S. Department of Justice (July 7, 2005), available at <http://www.aclu.org/Files/OpenFile.cfm?id=18647>.

155. *Harper v. State Board of Elections*, 383 U.S. 663, 666 (1966).

156. See *supra* note 54 and accompanying text.

photo ID. A similar mobile program in Georgia, which now demands that all voters provide a government-issued photo ID in order to vote, was forced for financial reasons to limit its service such that a single bus would travel to one location for a day or two at a time between the hours of 9 a.m. and 3 p.m.—the heart of the work day.¹⁵⁷

The debate over voter identification is often portrayed as emblematic of the split between those who would maintain the integrity of the vote and those who put a higher value on ensuring access to the polls. However, this is clearly a false choice. There is scant evidence that voter identification requirements effectively deter or catch incidents of fraud, especially when weighed against the number of people that are likely to be disenfranchised by significant voter identification requirements.¹⁵⁸

C. Problems with Absentee Ballots

1. Washington State

Washingtonians vote absentee in higher numbers than voters in most other states, thanks in part to a state law that guarantees an absentee ballot to anyone who requests one.¹⁵⁹ In 2004, 66.44% of the voters who participated cast absentee ballots.¹⁶⁰ After the 2004 election, the state legislature passed a bill giving counties the option of holding all future elections by mail.¹⁶¹ As of this writing, twenty-eight of Washington's thirty-nine counties have opted for all-mail elections.¹⁶²

Borders v. King County reveals two major problems associated with absentee ballots in the Washington gubernatorial recount. First, there were discrepancies between the number of voters credited with having voted by absentee ballot and the number of ballots actually counted. In Washington State, the law requires counties to issue an absentee ballot to

157. BRENNAN CENTER FOR JUSTICE, RESPONSE TO REPORT OF THE 2005 NATIONAL COMMISSION ON FEDERAL ELECTION REFORM 7 (2005), available at http://www.brennancenter.org/programs/downloads/_%20CFER%20final%20report.pdf.

158. See, e.g., Jay Bookman, Opinion, *Rationale For Voter ID Law Fraudulent*, ATLANTA JOURNAL-CONSTITUTION, Oct. 20, 2005, at A17.

159. WASH. REV. CODE § 29A.40.010 (2005) (anyone can vote absentee); WASH. REV. CODE § 29A.40.020 (2005) (providing that one wishing to vote absentee must request an absentee ballot, and establishing the procedure for doing so). See also WASH. REV. CODE § 29A.40.061 (2005).

160. Sam Reed, Washington Secretary of State, Absentee Statistics for the 2004 General Election, http://www.secstate.wa.gov/elections/absentee_stats.aspx?y=2004 (last visited Nov. 13, 2005).

161. H.B. 1754, 59th Leg., Reg. Sess. (Wash. 2005) (authorizing county-wide mail ballot elections, amending WASH REV. CODE § 29A.48.010, and creating a new section).

162. See Brad Shannon, *Optical Scan Passes Test, Officials Say*, THE OLYMPIAN, Nov. 4, 2005, available at <http://www.theolympian.com/apps/pbcs.dll/article?AID=/20051104/NEWS01/511040346/1006>.

each registered voter who requests one.¹⁶³ Before the ballot is sent out, the county verifies that the voter requesting the ballot is registered, then sends the ballot with a label bearing a ballot ID code. This code is then matched to the voter's voter registration number once the ballot is returned.¹⁶⁴ Once these two numbers are matched, the voter is said to be "credited" with having voted.

However, in several of Washington's thirty-nine counties, the number of voters credited with having voted absentee was much smaller than the number of absentee ballots received and counted. The Washington Republican party, arguing on behalf of Republican candidate Dino Rossi in *Borders v. King County*, petitioned to have these extra ballots excluded from the final counts because they had not been verified.¹⁶⁵ Judge John E. Bridges ruled that there was insufficient evidence to prove that the approximately 1000 uncredited votes were cast improperly according to the standard he established during pretrial arguments.¹⁶⁶ According to the *Borders* court, the fact that a voter had received an absentee ballot in the first place was proof enough that he or she was registered properly, and the extra step of crediting the voter at the end of the process was not necessary to prove that the voter had cast his or her ballot legally.¹⁶⁷ The discrepancies between the number of credited voters and absentee ballots received were more likely the result of administrative mistakes than illegal votes.¹⁶⁸

The second major problem associated with absentee ballots in the Washington gubernatorial recount is that after the final certification of the election results, King County discovered ninety-six uncounted absentee ballots, Pierce County found sixty-four, and Spokane County found eight; all had been misplaced following the election, but there was no mechanism for reconciling the number of absentee ballots received with the number counted.¹⁶⁹ The *Borders* court found no evidence of malfeasance, just sloppiness and flaws in the system:

163. WASH. REV. CODE § 29A.40.061 (2005).

164. WASH. REV. CODE § 29A.40.110 (2005); WASH. ADMIN. CODE 434-240-190-200 (repealed Sept. 19, 2005). See also Petitioners' Trial Brief at 11, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://soundpolitics.com/PetitionersTrialBrief.pdf>.

165. Petitioners' Trial Brief at 9, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://soundpolitics.com/PetitionersTrialBrief.pdf>.

166. Court's Oral Decision at 10, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

167. *Id.*

168. See *id.*; see also Jim Camden, *Ballot Total Best Available at Time, Official Says; Democrats Attack Data Used by GOP in Washington Election Trial*, SPOKESMAN REVIEW, May 26, 2005, at B1.

169. Court's Oral Decision at 6, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>. See also Keith Ervin, *King*

The Secretary of State's office received no information from any of the state's 39 counties that any election worker either removed ballots or added ballots. Specifically with reference to King County, there is no evidence that the significant errors which occurred resulted from intentional misconduct or someone's desire to manipulate the election. There is no evidence that anybody associated with any of the candidates in the governor's race had anything to do with causing the errors. There is no evidence that has been produced in this Court to suggest that the errors resulted from partisan bias. During the 2004 general election, the various polling sites across the State were populated by inspectors, judges, Accuvote judges, observers, attorneys, and the media. No testimony has been placed before the Court to suggest fraud or intentional misconduct.

Election officials attempted to perform their responsibilities in a fair and impartial manner. There is no evidence before the Court to question ballot security as to those ballots actually counted.¹⁷⁰

Washington State has taken major steps to address these problems in the future. The Legislature recently passed, and the governor signed, the Clarifying and Standardizing Various Election Procedures Act which, with respect to absentee ballots, does the following:¹⁷¹

- Requires that provisional and absentee ballots be distinguishable from other ballots by color paper or imprinted with a bar code;
- Requires measures preventing provisional and absentee ballots from being tabulated by poll-site ballot counters, calculated to prevent election staff from mistakenly inserting absentee and provisional ballots into mechanical vote counting machines along with regular poll ballots—one of the problems credited with causing the absentee ballot discrepancies outlined above;
- Requires a space for the voter to provide his or her phone number;
- Allows auditors to begin processing absentee ballots immediately upon receipt rather than 10 days before the election, allowing more processing time for the growing numbers of absentee ballots received by county election offices—almost 70%

County Ballot Numbers Don't Add Up; 4,000 Discrepancies—Review Finds Flaws at Each Stage of the Election: Voting, Processing, Counting, THE SEATTLE TIMES, May 25, 2005, at A16.

170. Court's Oral Decision at 6, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

171. S.B. 5743, 59th Leg., Reg. Sess. (Wash. 2005).

of voters registered in Washington are now opting to vote absentee;¹⁷²

- Requires auditors to submit two reconciliation reports, one at the time of certification including the number of registered voters, ballots counted, provisionals issued, provisionals counted, provisionals rejected, *absentees issued*, *absentees counted*, *absentees rejected*, federal write-ins counted, UOCAVA ballots issued, UOCAVA ballots counted, and UOCAVA ballots rejected, and one thirty days after certification that includes the number of registered voters, all voters credited, poll voters credited, provisionals credited, *absentees credited*, federal write-ins credited, UOCAVA voters credited, *voters credited even though the ballot was late and not counted*, and any other information necessary to reconcile the number of ballots counted with the number of voters credited; and
- Extends general election certification from fifteen days to twenty-one days.¹⁷³

2. Rest of the Country

Other parts of the country experienced difficulties with absentee ballots as well, although not in exactly the same manner as Washington. The biggest problem with absentee ballots was not so much in processing them, but rather in distributing them, ensuring their receipt, and determining their legitimacy.

The timely distribution of absentee ballots was particularly problematic in Florida. Six days before the 2004 election, “[t]he Broward County Supervisor of Elections office . . . said it couldn’t account for nearly 60,000 missing absentee ballots sent to voters and that its phone lines were being overwhelmed by calls.”¹⁷⁴ The next day, The Miami Herald reported that 76,000 missing absentee ballots would be re-mailed five days before the election to people all over the country.¹⁷⁵ Thousands of absentee ballots were sent out as late as the Saturday before the Tuesday election.¹⁷⁶

172. Reed, *supra* note 160.

173. S.B. 5743, 59th Leg., Reg. Sess. (Wash. 2005).

174. Jean-Paul Renaud, *60,000 Mailed Ballots Missing, Broward Elections Office Says*, BRADENTON HERALD, Oct. 27, 2004, at 12.

175. Erika Bolstad, Gary Fineout & Amy Sherman, *Missing Ballots to Be Remailed, Broward Says*, MIAMI HERALD, Oct. 28, 2004, at A1.

176. Evan S. Benn & Nathalie Gouillou, *Absentee Ballots, Long Lines a Worry*, MIAMI HERALD, October 31, 2004, at A1.

Not surprisingly, the American Civil Liberties Union and Florida Legal Services filed suit in U.S. District Court requesting that absentee ballots postmarked by election day but received after the election be counted on behalf of voters who, through no fault of their own, were sent absentee ballots so late that they were unable to vote.¹⁷⁷ However, the Court in *Friedman v. Snipes* held that counting absentee ballots postmarked by, but received after, the election would be a violation of Florida law, and that the law in question did not violate the Voting Rights Act or the U.S. Constitution.¹⁷⁸

Florida's experience, and the court's decision in *Friedman*, illustrates the competing values that appear to divide those involved in the debate over our elections system: the need for administrative ease and finality on election day versus the value of counting every vote. The court in *Friedman* ruled that because elections officials did not arbitrarily or deliberately delay the sending of the absentee ballots but rather made an administrative error, the voters' rights were not violated such that the rules should be changed.¹⁷⁹ On the opposing side, voting rights advocates argued that, when there is administrative error, a voter should not lose the right to vote.

In this instance, voters ought not to have been disenfranchised. The value of a legitimate voter having his vote counted should outweigh regulations designed to promote administrative efficiency whenever it is possible to count the votes without disrupting the system completely. The Supreme Court has repeatedly ruled that the right to vote is a "fundamental right."¹⁸⁰ When a voter has taken every step required under the law in order to exercise his right to vote, widespread administrative error that is remediable in a relatively easy manner should not trump that right.

Absentee ballots, as opposed to ballots cast at a polling site, are generally more susceptible to fraud.¹⁸¹ As noted by the National Commission on Federal Election Reform, the

[g]rowing use of absentee voting has turned this area of voting into the most likely opportunity for election fraud now encountered by law enforcement officials. These cases are especially difficult to prosecute, since the misuse of a voter's ballot or the pressure on voters occurs away from the polling place or any other outside scru-

177. *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004).

178. *Id.* at 1368, 1382.

179. *Id.* at 1377, 1382.

180. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966).

181. NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ENSURE PRIDE AND CONFIDENCE 44 (Aug. 2001), available at http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf.

tiny. These opportunities for abuse should be contained, not enlarged.¹⁸²

Concern about voter fraud through absentee ballots is bipartisan. In March 2005, Kansas Secretary of State Ron Thornburgh, a Republican, said that “[t]he greatest potential for abuse in the state of Kansas in our election system right now is advance voting. We’ve got a situation where any person may return another individual’s ballot.”¹⁸³

Georgia Secretary of State Cathy Cox, a Democrat, told *The New York Times* in April 2005 that she had not heard of any cases of voters accused of voter fraud at polling places. Cox, however, said in the same article that stringent voter ID rules at polling places “opens the floodgates” to “already rampant fraud in absentee voting.”¹⁸⁴ According to Gary Bartlett, Director of Elections in North Carolina, “whenever there is hanky-panky in elections, it’s usually through absentee voting.”¹⁸⁵

Recent newspaper reports detail numerous incidents of questionable, if not outright fraudulent, handling of absentee ballots. In 2004, the South Dakota Republican Party hired eight people to register voters and fill out absentee ballot applications¹⁸⁶ even though the state GOP had been accused in the past of improperly notarizing absentee ballot applications.¹⁸⁷ Illinois officials began investigating allegations of voter fraud in January 2005, centering on thirteen ballots cast from a boarding house in East St. Louis.¹⁸⁸ In the city of Passaic, New Jersey, three dozen voters claimed they had been victims of absentee ballot fraud in 2003.¹⁸⁹ From 2000–2004, prosecutors have brought criminal cases in at least fifteen states for absentee ballot fraud.¹⁹⁰ In the 2004 election, felony charges were filed and then dropped against the mayor of Orlando, Florida, for allegedly paying people to gather absentee ballots.¹⁹¹

182. *Id.*

183. Tim Hrenchir & Liz Montano, *Mail Ballot Mix-Up Illustrates Potential Flaws*, TOPEKA CAPITAL-JOURNAL, Mar. 31, 2005, at A1.

184. Ariel Hart, *Georgia Voters May Soon Need Photo ID's*, N.Y. TIMES, Apr. 1, 2005, at A15.

185. Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES, Sept. 13, 2004, at A1.

186. David Melmer, *Voting Problems Resurface in South Dakota*, INDIAN COUNTRY TODAY, Oct. 27, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096409748>.

187. *Id.*

188. *St. Clair Prosecutors Join Feds in Investigating Voter Fraud*, ASSOCIATED PRESS, Jan. 6, 2005.

189. Bob Ivry, *Absentee Ballot Abuse is Difficult to Forestall*, BERGEN COUNTY RECORD, Oct. 4, 2004, at A1.

190. Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES, Sept. 13, 2004, at A1.

191. Marc Caputo, *Measure Aims to Clarify Absentee Ballot-Fraud Law*, MIAMI HERALD, May 4, 2005, at B8.

As in Washington, many states are greatly expanding the use of absentee and mail-in ballots. According to a 2004 survey by the National Association of Secretaries of State, thirty states allow for unconditional early voting by standard or absentee ballot.¹⁹² Georgia passed legislation in 2005 allowing voters to mail in a ballot during a forty-five day window without offering an explanation.¹⁹³ Michigan has similar legislation pending,¹⁹⁴ as does Missouri.¹⁹⁵

At the same time, some states are starting to move in the direction of making the vote-by-mail process more secure. Oregon employs a multi-layered system in an effort to curtail fraud. Ballots cannot be forwarded;¹⁹⁶ the voter is required to sign an outer envelope,¹⁹⁷ which is cross-referenced with a computer signature on record,¹⁹⁸ and questionable ballots are put aside for further investigation.¹⁹⁹ Oregon required all counties to file a “ballot security plan” beginning in 2002,²⁰⁰ and now requires that ballot “drop boxes,” which voters can use to save a stamp, must be marked as “official.”²⁰¹

According to an electionline.org report, two bills are under consideration in Connecticut—one would impose greater accountability on those distributing absentee ballot applications, and the other would require anyone who assists a voter in filling out an absentee ballot application to sign their name as well.²⁰² A bill in the Illinois legislature would require a voter’s address to be included on a list of those who have received and returned absentee ballots.²⁰³ Indiana has already passed a law that prohibits “electioneering” in the presence of those who possess absentee ballots, establishes rules concerning those who deliver ballots, and adds new criminal penalties.²⁰⁴ In Texas, a bill is pending that would

192. NATIONAL ASSOCIATION OF SECRETARIES OF STATE, EARLY VOTING SURVEY (Sept. 2004), available at <http://www.nass.org/electioninfo/Early%20Voting%20Survey.pdf>.

193. Sonji Seligson & Carlos Campos, *Perdue Signs ID Bill*, ATLANTA JOURNAL-CONSTITUTION, Apr. 23, 2005, at B1.

194. H.B. 4320, 93rd Leg., 1st Reg. Sess. (Mich. 2005).

195. S.B. 478, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005).

196. OR. REV. STAT. § 254.470 (2001).

197. *Id.* § 254.470 (9)(b).

198. *Id.* § 254.470(10) provides only that the clerk shall check the signature against that on the voters’ registration card, according to rules set out by the Secretary of State.

199. OREGON SECRETARY OF STATE BILL BRADBURY, STATE OF OREGON, VOTE BY MAIL 3 (2000), available at http://www.sos.state.or.us/elections/vbm/vbm_guide.pdf.

200. OR. REV. STAT. § 254.074 (2003).

201. *Id.* § 250.470(2).

202. Dan Seligson, *Absentee Ballot Bills Overshadowed by Voter ID*, ELECTIONLINE WEEKLY, Apr. 15, 2005, available at <http://www.electionline.org/Newsletters/tabid/87/ctl/Detail/mid/643/xmid/33/xmfid/3/Default.aspx>.

203. *Id.*

204. *Id.*

make assisting more than one voter with an absentee ballot—with exceptions for officials, family members and others—a criminal offense.²⁰⁵

D. Provisional Ballots

1. Washington State

Washington State law provides that provisional ballots cast in the correct jurisdiction but the wrong precinct should be counted for those races in which the voter was eligible to vote.²⁰⁶ Just as important, Washington's administrative code says that "[if] a provisional ballot was voted because a voter failed to produce required identification, the ballot shall be counted if the voter is otherwise eligible."²⁰⁷

As a result, Washington has escaped many of the controversies and legal actions that other states have endured due to those states' more restrictive policies for counting provisional ballots. In addition, Washington's percentage of valid provisional ballots was the third highest in the nation at 80%.²⁰⁸ While Washington election officials did not completely avoid provisional ballot-related problems, the difficulties they encountered were more a matter of poll worker and administrative errors than confusion or controversy as to what the proper policy and procedures should be.

In Washington, provisional ballots are separated from regular ballots and sent to the auditor for verification of voter registration. In the 2004 election, due to confusion at polling places, some voters mistakenly inserted provisional ballots into a tabulating machine for regular ballots, rather than submitting them in the required envelopes that are sent to the auditor for verification of registration.²⁰⁹ In *Borders v. King County*, the court found that seventy-seven provisional ballots were improperly cast this way in Pierce County.²¹⁰ No evidence was presented as to whether these seventy-seven ballots were cast by registered voters or whether those voters participated in the 2004 gubernatorial election.²¹¹ In King County, 348 provisional ballots were improperly cast; of these, 252 were

205. *Id.*

206. WASH. ADMIN. CODE 434-253-047 (2002).

207. As amended, Subsection 7 now reads: "If the voter voted a provisional ballot because he or she failed to produce identification as required by WASH. REV. CODE § 29A.44.205 (2005), the ballot is counted if the signature on the envelope matches the signature in the voter registration record." *Id.*

208. THE ELECTION REFORM INFORMATION PROJECT, *supra* note 59, at 11.

209. Keith Ervin, *Provisional-Vote Flaws Revealed*, SEATTLE TIMES, Jan. 5, 2005, at B1.

210. Court's Oral Decision at 5, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

211. *Id.*

determined to have been cast by registered voters, thus leaving ninety-six unverified ballots.²¹² Four hundred thirty-seven provisional ballots were cast in King County without labels; after an investigation, it was determined that 358 of these ballots had been cast by registered voters, leaving seventy-nine additional unverified ballots.²¹³

King County officials also discovered that 348 provisional ballots had been inserted into the vote tabulator improperly and counted with the normal ballots.²¹⁴ After verifying the ballots, they found that 252 had been cast by properly registered voters, leaving ninety-six that were unverifiable and therefore illegal.²¹⁵ The Republican Party, on behalf of Republican gubernatorial candidate Dino Rossi, argued that these ballots should be excluded from the election results, recommending a methodology—rejected by the court—which would apportion illegal votes to candidates in proportion to the percentages candidates received in each precinct.²¹⁶ Because no evidence was presented as to the identities of these 96 illegal provisional voters or as to whether any of them participated in the 2004 gubernatorial election, the votes were not subtracted. The court found, as with the other illegal votes, that the problems with provisional ballots were the result of administrative error and the unexpectedly large turn-out of provisional voters, rather than fraud and intentional meddling in election results.²¹⁷

Washington has made efforts since the election to ensure that these kinds of mistakes are reduced. The Enhancing Voter Registration Recordkeeping²¹⁸ provides the following with respect to provisional voting:

As to signature verification:

- Requires the county auditor to notify the voter if he or she has failed to sign the provisional ballot envelope or if the signature on the envelope that does not match the one on the voter registration;
- Specifies that the auditor must contact the voter by telephone and then by mail, stipulating that ; voice messages are not considered telephone contact; and

212. Ervin, *supra* note 209.

213. *Id.*

214. *Id.*

215. *Id.*

216. Petitioners' Trial Brief at 42, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://soundpolitics.com/PetitionersTrialBrief.pdf>.

217. Court's Oral Decision at 5, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at <http://www.secstate.wa.gov/documentvault/629.pdf>.

218. S.B. 5743, 59th Leg., Reg. Sess. (Wash. 2005).

- Provides the voter with the opportunity to cure the missing or mismatched signature either in person or by mail so long as he or she does so by the day before certification of the election results.

As to provisional ballots:

- Requires provisional ballots to be visually distinguishable from other ballots and either printed on colored paper or imprinted with a bar code;
- Requires measures to prevent provisional ballots from being read by vote counting machines at the polling site in order to prevent tabulation before the provisional votes have been verified;
- Specifies what information must be recorded on the provisional ballot envelope.
- Requires the county auditor to provide a free access system so that provisional voters can learn whether their ballots were counted; and
- Requires that voters without identification be given a provisional ballot.

As to ballot reconciliation:

- Requires that county auditors prepare two public reconciliation reports: the first is due by certification and must include the number of provisional ballots issued, counted, and rejected, and the second is due within thirty days of certification and must include the number of provisional voters credited with voting; and
- Extends the certification period from fifteen to twenty-one days to allow more time for processing.²¹⁹

2. Rest of the Country

The issue of provisional ballots was a much broader and more contentious issue in the rest of the country in 2004 than it was in Washington. The problem was not so much in the handling of the provisional ballots as it was in deciding the more fundamental questions of who could cast such ballots and which ballots would be counted. Provisional ballots provide an instance in which choices do have to be made. Provisional ballots can lead to more work for administrators during election time, but at the same time have the potential to be a very important safeguard

219. *Id.*

against wrongful disenfranchisement. Nevertheless, the problems caused by provisional ballots do not outweigh the need to protect the right to vote through their limited use.

Nationwide, the biggest battle with respect to provisional ballots was whether a provisional ballot cast in the correct jurisdiction but the wrong precinct should be counted for the top of the ballot races, e.g. U.S. Senator and President. This led to pre-election litigation all over the country, including in Ohio, Missouri, Colorado, Michigan, Iowa and Florida. In several instances, the U.S. Department of Justice took the unusual step of intervening to argue that provisional ballots cast in the wrong place should not count for any office.²²⁰ After several rounds of litigation in these states, the United States Court of Appeals for the Sixth Circuit ruled that HAVA does not require a voter's provisional ballot to be counted if cast anywhere in the county; therefore, provisional ballots cast in the wrong polling site could be discarded.²²¹

Under HAVA, the right to cast a provisional ballot and have it counted is contingent upon being an eligible registered voter in the jurisdiction.²²² As defined by the National Voter Registration Act (NVRA), jurisdiction means the geographic area responsible for voter registration (usually the county), and not the precinct or polling site.²²³ HAVA should be read in conformance with NVRA; therefore, if the voter casts the ballot in the correct jurisdiction (usually the county) the vote will count for those races in which the voter was eligible to vote (e.g. president, senator). This was the view advocated by the National Commission on Federal Election Reform (the Carter/Ford Commission).²²⁴

Such a definition of jurisdiction maintains the balance between the right of every eligible voter to vote and have his vote counted and the need for administrative efficiency and prevention of fraud. There is some evidence that narrower definitions of jurisdiction for the purposes of provisional ballots resulted in disenfranchisement in 2004: officials counted 70% of provisional ballots in the eighteen states where ballots were counted or partially counted if cast in the wrong precinct but correct ju-

220. See Memorandum of the United States as Amicus Curiae Supporting Respondents, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (No. 04-4265, 04-4266); Memorandum of the United States, *Florida Democratic Party v. Hood*, No. 04-395 (N.D. Fla. Oct. 19, 2004); Memorandum of the United States, *Bay County Democratic Party v. Land*, 347 F. Supp. 2d (E.D. Mich. 2004) (No. 04-10257); *Michigan State Conferences of NAACP Branches v. Land*, No. 04-10267 (E.D. Mich. 2004).

221. *Sandusky County Democratic Party*, 387 F.3d at 579.

222. 42 U.S.C. § 15482(a)(2) (2002).

223. 42 U.S.C. § 1973gg-6(j)(2) (2002).

224. COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 35-36 (Sept. 2005), available at http://www.american.edu/ia/cfer/report/full_report.pdf.

risdiction. Of those states, eleven counted more than 50% of these ballots. In the twenty-five states that did not count provisional ballots cast in the wrong precinct, 60% of the ballots were counted. Of those states, sixteen counted fewer than 50% of these ballots.²²⁵

There are many legitimate reasons why a voter might appear in the wrong polling location, especially in an election like that in 2004 with millions of first-time voters. Voters who have recently moved may show up at their old site, polling locations may change without notification, and a voter's registration may be filed in the wrong place through administrative error. In no case should a provisional ballot cast at the wrong precinct but at the right polling site be disqualified. In urban areas, several precincts or election districts may be in the same polling location, such as a public school. Voting at the wrong precinct may simply mean that the voter went to the wrong desk in the right room. A vote in the right polling site but wrong precinct should be presumed an administrative error and the provisional ballot counted.

States should mirror the recent holding of the New York State Court of Appeals:

When a ballot is contested in a judicial proceeding, the court must, after determining that the person who cast the ballot was entitled to vote, order the ballot to be counted "if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face" We can reasonably infer that casting an affidavit ballot at the correct polling site but at the wrong election district is the result of ministerial error on the part of a poll worker in failing to direct the voter to the correct table, and instead providing the voter with an affidavit without first properly verifying such voter's right to vote in the election district.²²⁶

The confusion surrounding whether such provisional ballots ought to count had a significant impact on an election in North Carolina in 2004. At the time of this writing, that state had still not determined the outcome of the race for school superintendent because of a dispute over whether out-of-precinct ballots should be counted. After the state supreme court ruled that such ballots should not be counted,²²⁷ the state legislature passed bills negating that ruling. A law was passed to re-establish the legislature's intent that out-of-precinct ballots should be

225. THE ELECTION REFORM INFORMATION PROJECT, *supra* note 59, at 10.

226. *Panio v. Sunderland*, 824 N.E.2d 488, 490 (N.Y. 2005).

227. *James v. Bartlett*, No. 602PA04-2 (N.C. Feb. 4, 2004), available at <http://www.aoc.state.nc.us/www/public/sc/opinions/2005/pdf/602-04-2.pdf>.

counted.²²⁸ The Republican Party has filed suit in federal court, and the matter of determining the outcome of the election is before a committee of the General Assembly.²²⁹

Some election officials argue, and a decision in the Sixth Circuit has stated, that counting provisional ballots cast in the correct county will lead to voters showing up “at whatever polling place happened to be handy”²³⁰ and lead to increased administrative problems. However, as Daniel Tokaji from the Moritz College of Law at Ohio State University has stated,

No one is suggesting that voters should vote anywhere they please. But the reality of elections is that not all voters do appear at the correct precinct. Sometimes, it may be that they made a mistake—for example, they didn’t realize that their precinct had changed—while other times they may have been directed to the wrong precinct by an election official or third party. There’s no evidence of voters intentionally appearing at the wrong precinct in those states that have had provisional voting for several years, such as California and Washington.

The issue in dispute, then, is not whether voters should appear at the right polling place: they should. The question is what the sanction should be if they don’t appear at the right place, whether through their own fault or another’s faulty information. Should their ballot be counted for those races for which they were entitled to cast a vote? Or should it be thrown out entirely? To do the latter smacks of “gotcha” disenfranchisement, particularly given that the state-wide registration database that must be in place by 2006 will make it a simple matter to determine if a voter is registered in the county or the state.²³¹

A number of state legislatures are considering legislation that would clarify the rules governing the casting and counting of provisional ballots.²³² Although only a few address the issue of ballots cast in the wrong precinct, many of these bills address situations in which someone has requested an absentee ballot but then shows up to vote at the polls.

228. 2005 N.C. Sess. Laws 2.

229. Gary D. Robertson, *Ruling Appears to Favor Wade for Commissioner; It Doesn’t Guarantee Her Win But Orders Certain Provisional Ballots to be Thrown Out*, GREENSBORO NEWS & RECORD, Mar. 18, 2005, at B1.

230. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004).

231. *Hearing Before the Senate Rules Committee on Sub. H.B. 3* (June 15, 2005) (testimony of Daniel P. Tokaji).

232. See National Conference of State Legislatures, Election Legislation Database: Bill Updates for 2005 Legislative Sessions, <http://www.ncsl.org/programs/legman/elect/taskfc/datastat.htm> (last visited Nov. 13).

However, apart from North Carolina, no state has taken any specific legislative action in this respect since the 2004 election.

The provisional ballot debate is an area in which the divide over the desire for administrative ease and finality and ensuring voter access clearly comes into play. Although there is no information that would indicate problems in states where out-of-precinct ballots are counted, some administrators argue that counting such ballots could lead to great difficulties in preparing and implementing elections. Moreover, if more provisional ballots are counted, the chances are higher that provisional ballots might prove decisive in a very close election.

The case for administrative ease and finality, however, is weak when compared to the principle of counting the votes of every eligible registered voter. It is true that provisional ballots may entail more work. It is also true that elections decided by provisional ballots, the validity of which may end up in a court room in an extremely close election, are less than ideal. But neither of these fairly remote considerations outweigh the injustice that would transpire by throwing out the vote of an American who is otherwise duly registered and eligible to vote for his or her United States Representative, Senator, or President, but mistakenly happens to vote at the poll site down the street.

E. Voting Machines

1. Washington State

The issue of voting machines has not been as contentious in Washington as in other states because a majority of voters in Washington vote by mail, not by machine. Indeed, only 2% of Washingtonians vote by the more controversial type of system, the electronic voting machine.²³³ Nonetheless, Washington does have its share of problems with voting machines.

Washington State had been using punch card ballot machines through the 2004 election. Through HAVA's machine replacement program, the state received \$6,799,430 from the federal government to replace those machines by 2006.²³⁴ That said, Washington's residual ballot

233. Press Release, Office of the Secretary of State Sam Reed, Is WASHINGTON Ready For 2004? State Preps For First Presidential Election Since The 2000 Florida Debacle (Oct. 26, 2004), available at http://www.secstate.wa.gov/office/osos_news.aspx?i=yP7uyLq5hm58NYWauatZkw%3D%3D.

234. Election Assistance Commission, Funding for States: Early Money Distributed to States—GSA Statistics, http://www.eac.gov/early_money.asp?format=none (last visited Nov. 13, 2005).

rate²³⁵ has been around 1% in the last two election cycles, likely due in part to the low number of voters voting on machines.²³⁶

Several counties failed to conduct independent testing for compliance with federal guidelines before the 2004 election even though new software programs had been added to the voting systems, leading citizen groups to raise concerns about the integrity of the election.²³⁷ One advocate filed suit against Sequoia Voting Systems, Inc. and his home county due to the company's refusal to make public the source code of the company's voting machine.²³⁸ Sequoia, like many manufacturers around the country, has refused to share its source code, claiming it is a trade secret.²³⁹ This has led many voting advocates and election officials to demand that manufacturers make their source codes open and reviewable through legislation and the contract procurement process.²⁴⁰

Concerns about the integrity of electronic voting systems led to the passage of a bill requiring that by 2006 all electronic voting machines include a device that will produce a paper trail allowing voters to verify their ballots.²⁴¹

2. Rest of the Country

Given the great alarms raised prior to the election about the dangers of computerized voting systems, it was somewhat surprising that the biggest machine problem on Election Day 2004 may not have been the efficacy of the machines, but the *number* of machines employed. While it may be easier to decide early on in the process the number of machines to be allocated, and while it may be less expensive for government and elections officials to provide fewer machines, these are not compelling reasons to risk disenfranchisement.

The possibility of extraordinarily high turnout was evident months before the 2004 election. Despite this, election officials throughout the nation were unprepared. Consequently, lines and wait times to vote were unacceptably high—and possibly a violation of voting rights.

235. The residual ballot rate is the vote error rate based on overvotes, spoiled or uncountable votes, and undervotes, less what the best research says is the estimated intentional undervotes.

236. Charles Stewart III, *Residual Vote in the 2004 Election* (Caltech/MIT Voting Technology Project, Working Paper No. 2.3), available at http://www.vote.caltech.edu/media/documents/vtp_wp21v2.3.pdf.

237. Lewis Kamb, *Untested Voting Systems Used*, SEATTLE POST-INTELLIGENCER, Jan. 8, 2005, at B1.

238. Jerry Cornfield, *Suit Filed in Washington on County Vote Machines*, THE MIAMI HERALD, Apr. 8th, 2005, available at <http://www.verifiedvotingfoundation.org/article.php?id=5750>.

239. *Id.*

240. *Id.*

241. S.B. 5395, 59th Leg., Reg. Sess. (Wash. 2005).

All over the country, voters had to wait in line for up to *ten hours*.²⁴² By the time the polls were about to close in Ohio, wait times had gotten so bad that a federal judge ruled it was an abridgement of the right to vote and ordered paper ballots to be distributed to voters still in line, stating that “[p]articipation in this Democracy should not be as onerous as it is being made today.”²⁴³ According to the Columbus Dispatch, thousands of voters were still waiting in line when the polls closed at 7:30 p.m., with the last person voting at 11:20 p.m.²⁴⁴

The worst incident occurred on the campus of Kenyon College in Ohio, where there were only two voting machines. According to the Beacon Journal, one student waited ten hours—until 2 a.m.—to vote.²⁴⁵ When the federal court ruling came down, the students demanded to vote on the machines, chanting “No paper!” They were politically aware enough to fear that paper ballots would not be counted.²⁴⁶ A study by the Democratic National Committee of the election in Ohio found that 2% of voters left polling sites without voting because the lines were so long.²⁴⁷

In Florida, a study of three South Florida counties by the Broward Daily Business News found the following:

[T]he voter-to-machine ratio varied significantly among the counties. Overall, Miami-Dade precincts had an average of 195 registered voters per machine, Broward precincts had an average of 184 registered voters per machine and Palm Beach County had an average of 145. The contrasts were more dramatic between the 1,502 precincts in the three counties. Precinct 640 at the University of Miami had a registered voter to voting machine ratio of 347—the highest in the three counties. In contrast, in some Palm Beach County precincts, a single registered voter was assigned his or her own personal machine . . . In Miami Dade, the shortage of machines was at least partly due to the fact that the elections office did not use the final voter registration figures—available 28 days before Election Day—to allocate machines . . . Miami-Dade used voter registration data taken from the primary election in early September.

242. PEOPLE FOR THE AMERICAN WAY, NAACP, & LAWYERS COMMITTEE FOR CIVIL RIGHTS, SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTION 8 (Dec. 2004), available at <http://www.lawyerscomm.org/2005website/features/pdf/preliminaryreport.pdf>.

243. T.C. Brown, *Judge Says Long Lines Can Prevent Voting*, CLEVELAND PLAIN DEALER, Nov. 4, 2004, at B5.

244. *Turnout and Troubles: Waiting was the Hardest Part*, COLUMBUS DISPATCH, Nov. 3, 2004, at A1.

245. Stephanie Warsmith, *Ballots Cast In Wee Hours: Knox County Voters, In Possibly Longest Line In America, Wait 10 Hours*, AKRON BEACON JOURNAL, Nov. 4, 2004, at B1.

246. *Id.*

247. DEMOCRATIC NATIONAL COMMITTEE VOTING RIGHTS INSTITUTE, DEMOCRACY AT RISK: THE 2004 ELECTION IN OHIO 2 (2005).

That 2-month-old data was used even though both the Republicans and Democrats had conducted an unprecedented, highly publicized voter registration drive that signed up thousands of new voters . . . At the University of Miami, the wait times were as long as five hours, and many students who had classes and tests left without casting a ballot . . . Of the 20 precincts where [Elections] Supervisor Kaplan's office most severely underestimated the number of voters, 14 were in heavily Democratic Miami Beach.²⁴⁸

It is notable that the distribution of voting machines within states and even within counties varied widely. According to Edward Foley of Ohio State School of Law, disparities in the number of voting machines per capita might present an Equal Protection problem under *Bush v. Gore*.²⁴⁹

The Court there observed that “[e]qual protection applies” not just to “the initial allocation of the franchise,” but also to “the manner of its exercise.” This principle would seem to easily cover voting machine disparities that have the effect of imposing differential barriers to the voting booths for citizens in different parts of the state.²⁵⁰

Three bills, introduced in Congress to address this problem, have called for standards setting minimum numbers of voting machines per precinct.²⁵¹ Legislation introduced by Senator Hillary Clinton proposes that a number of factors ought to be considered when establishing those standards, such as voting age population, voter turnout in past recent elections, the number of voters who have registered since the most recent election, the educational levels and socio-economic indicators in the jurisdiction, and the needs and numbers of disabled voters and voters with limited English proficiency.²⁵² These bills have little chance of passage, however.

The idea of establishing standards for the number of voting machines that must be deployed on election day makes sense, yet only one state can be identified that has enacted such standards since the 2004 election.²⁵³ Once again, the issue comes down to balancing what is easy and less expensive against the necessity of ensuring that voters are not effectively disenfranchised. It is obviously easier to base machine de-

248. Jessica M. Walker, *Cover Story*, BROWARD DAILY BUS. REV., Mar. 28, 2005, at 8.

249. *Bush v. Gore*, 531 U.S. 98 (2000).

250. Edward B. Foley, *Voting Machines Per Capita: a Bush v. Gore Issue?*, ELECTION LAW @ MORITZ, Nov. 5, 2004, <http://moritzlaw.osu.edu/electionlaw/analysis/2004/041105.php>.

251. See Voting Opportunity and Technology Enhancement Rights Act of 2005, H.R. 533, 109th Cong. (2005).

252. Count Every Vote Act of 2005, S. 450, 109th Cong. (2005).

253. See, e.g., S. 197, Reg. Sess. (La. 2005).

ployment on past information rather than relatively recent information. It is also clearly less expensive to buy and use as few machines as possible. But the trade-off for such considerations—making voting so difficult that voters are simply unable to vote—hardly seems worth it.

Although it was not much of a focus in the 2004 election aftermath, a national problem remains that voters, depending on where they live, use voting machines of widely varying accuracy and efficacy. It is not just a question of fairness; in light of *Bush v. Gore*, it is now a potential constitutional question.²⁵⁴ Many even argued that had the Kerry campaign insisted on a recount of the punch card ballots in Ohio, there could have been enough ballot spoilage to put the election result into question.²⁵⁵ The Columbus Dispatch reported that 93,000 votes went uncounted in Ohio in the 2004 election.²⁵⁶

In the 2004 election, more than fifty million voters were in jurisdictions using electronic voting equipment, fifty-five million were in optical scan areas, and thirty-two million lived in places where punch cards were used. Up to one million voters nationwide used old-fashioned pen and paper. About twenty-two million voters used lever machines.²⁵⁷

Optical scan ballots that are counted at a central location, rather than at the precinct where they are cast, are of dubious efficacy. A recent report by Professor David Kimball from the University of Missouri-St. Louis found that in 2004, the residual vote rate for central count optical scans was 1.6%, whereas the rate for precinct count optical scans was 0.7%.²⁵⁸

The security and effectiveness of the computer machines did become an issue. A large number of problems arose with machines on election day, including a number of allegations that voter's choices were being switched by the computer.²⁵⁹ Most important, perhaps, were the nearly 4000 votes that computer machines mistakenly gave to Bush in a suburb of Columbus, Ohio.²⁶⁰ Given the high level of alarm before the election, these problems were treated by the press as minimal. Nonethe-

254. *Bush v. Gore*, 531 U.S. 98 (2000).

255. See, e.g., Juan Gonzalez, *Ohio Tally Fit for Ukraine*, N.Y. DAILY NEWS, Nov. 30, 2004, available at <http://www.nydailynews.com/news/politics/story/257365p-220441c.html>; Greg Palast, *Kerry Won*, TOM PAINE.COM, Nov. 4, 2004, http://www.tompaine.com/articles/kerry_won_.php.

256. Darrel Rowland, *Fewer Ohio Votes Uncounted This Time*, COLUMBUS DISPATCH, Nov. 4, 2004, at A13.

257. ELECTION DATA SERVICES, *supra* note 64.

258. DAVID C. KIMBALL, UNIVERSITY OF MISSOURI-ST. LOUIS, SUMMARY TABLES ON VOTING TECHNOLOGY AND RESIDUAL VOTE RATES, <http://www.umsl.edu/~kimball/drtables.pdf> (last visited Dec. 16, 2005).

259. Brian Mooney, *Voting Errors Tallied Nationwide*, BOSTON GLOBE, Dec. 1, 2004, at A1.

260. Thomas J. Sheeran, *E-Voting Counties Say Election Was Done Properly*, ASSOCIATED PRESS, Dec. 21, 2004, available at <http://www.votersunite.org/article.asp?id=4378>.

less, accusations of manipulation of the machine counts were rampant on the Internet for months after the election.²⁶¹

The data shows that overall, the voting machines worked better in 2004 than they did in 2000. According to the CalTech-MIT Voting Technology Project, 1.9% of votes were not tallied by the machines in 2000.²⁶² The same report showed the percentage decreased in 2004 to 1.1%.²⁶³ Two states that had wholesale changes in the types of voting systems used, Florida and Georgia, saw the biggest decreases in the number of lost or “residual” ballots. Jurisdictions that changed their voting technology generally saw decreases in the number of residual ballots, and those jurisdictions that went from punch card machines to DRE machines saw the greatest improvements in this regard.²⁶⁴

As a solution to the crisis of confidence in computerized voting machines, most advocates are pushing for what is called a voter-verified paper trail to accompany the electronic vote recorded by the machine. According to an electionline.org examination of state laws and legislation, nineteen states now have laws requiring voter-verifiable paper audit trails, or something similar, with varying deadlines. Of that list, legislatures in nine states—Arkansas, Colorado, Idaho, Minnesota, Montana, New Mexico, Utah, Washington and West Virginia—enacted laws in 2005. Eighteen more states have legislation pending.²⁶⁵

V. ELECTION ADMINISTRATION PROBLEMS AND SOLUTIONS: A MATTER OF COMPETING VALUES

As the nation moves forward from the 2004 election and looks toward the 2006 and 2008 federal elections, the debate over how to solve the lingering problems in the system often seems to reflect a divide between those who value administrative ease, prevention of fraudulent votes, and ensuring a timely conclusion to elections and those who value broadening access and ensuring that no matter what it takes, every legitimate vote is counted.

However, as is evident from the problems and the proposed solutions in Washington State and throughout the nation, in at least some specific instances, this sentiment is overstated. Sometimes this is because misleading arguments have led people to believe they must make a

261. See Mark Crispin Miller, *None Dare Call it Stolen*, HARPER'S, Aug. 2005; Tom Zeller, *Vote Fraud Theories, Spread By Blogs, Are Quickly Buried*, N.Y. TIMES, Nov. 12, 2004, at A1.

262. Stewart, *supra* note 236.

263. *Id.*

264. *Id.*

265. Dan Seligson, *Senate Set to Hold First Hearing on Voter-Verifiable Audit Trails*, ELECTIONLINE WEEKLY, June 16, 2005, available at <http://www.electionline.org/Newsletters/tabid/87/ctl/Detail/mid/643/xmid/130/xmfid/3/Default.aspx>.

choice between these values. This is most evident in the case of voter identification requirements and the process of felon re-enfranchisement. In the former, voter identification does not appear to address the problem of voting integrity in the first place. In the latter, administrative ease is compatible with broadening access.

In other instances, however, because of the incredible scrutiny to which every aspect of the election system is now subjected, some have lost sight of the democratic values that make the system work. Of course there are limitations to how much elections administrators and technology can do. This is especially true, for example, in the case where a voter's registration simply cannot be accounted for and the voter attempts to vote by provisional ballot. It is a legitimate question whether elections officers can be expected to count such a ballot. Yet it seems clear that the system should strive to push those limits to the farthest extent possible in order to ensure that as many Americans as possible participate in the democratic process, and that every American that does so has his voice heard and recorded.

Problems that voters experienced in registering to vote in 2004 provide an example. Voters who simply failed to check off a box providing redundant information on the voter registration form should not have been denied the right to vote. Similarly, voters who did not receive absentee ballots in time because of massive administrative error should at least have been given a greater opportunity to have their absentee ballot counted if it was postmarked as of election day. If someone was required to show identification but failed to do so and voted by provisional ballot, and that voter's identity could be verified by officials through other means, that vote should have counted. Voters who appeared at the correct polling site—for example, a public school—but went to the wrong desk in the room should not have had their ballots discarded. As we go forward with implementation of statewide voter registration databases, simple errors by would-be voters, such as transposing two numbers of a driver's license number, should not mean that the registration is disqualified out of hand.

In the same vein, a situation like that in Washington, where the outcome is not immediately known and is the subject of litigation, is far from ideal. Yet is it a better outcome to simply throw up our hands and not take the time and effort to ensure that every vote that should be counted is indeed counted? It is true that voters do not like the sense that the election is being decided in a court room, but that is a false view of what is happening. The courts are simply there to act as a last resort mediator for an imperfect system. In the best of circumstances, judges serve

to ensure that the will of the people is accurately and fairly reflected, not to decide the election themselves.

As we head toward the next round of federal elections, state elected officials and elections administrators will continue to make many decisions that will deeply impact the nature of our right to vote and the public confidence in our elections system. As they do so, and as they learn from the problems that beset the last two presidential elections, it is hoped that they will strive to reach decisions that reflect not what is necessarily easiest, but what is best for maintaining a healthy democracy.