

Early- and Late-Adopters of Provisional Ballots

Charles Stewart III,

Massachusetts Institute of Technology

Provisional ballots are among the most vexed of the election reforms that proliferated following the 2000 presidential election. Although problems with voting machines dominated the news from Florida in the months following November 2000, reports about the purging of voter rolls suggested that problems with voter registration might be more pervasive, pernicious, and consequential than mechanical errors.¹ For this reason, academic and citizen reforms groups, such as the Caltech/MIT Voting Technology Project,² recommended the universal adoption of “fail safe” voting to ensure that citizens who mistakenly encountered voter registration problems on Election Day could vote.

In November 2000, roughly half the states had some mechanism to allow people who encountered registration problems on Election Day to vote.³ The Help America Vote Act (HAVA), adopted October 29, 2002 partly in reaction to the ballot controversy of the 2000 Presidential Election, required that all states adopt provisional ballots, unless they had Election Day Registration (EDR) or no registration at all. With this rollout of a new election procedure across half the country, it is worth asking whether the doubling of the geographic coverage of provisional ballot laws has doubled the franchise protection of marginal voters. Additionally there are concerns about the unintended consequences of provisional ballots, such as giving partisan election officials a new mechanism for making marginal voters *think* their vote has been recorded when it is actually discarded unceremoniously.

While these are important questions, there is one aspect of the provisional ballot rollout that has been largely unappreciated: for some state officials who were required to advocate the passage of provisional ballot laws due to HAVA, this new procedure was not an entirely welcome intrusion into the autonomous administration of elections by the states.⁴ While the federal government might be able to mandate the *passage* of provisional ballot laws, nothing was said about the vigorous implementation of this new practice. The mere passage of a federal law mandating that states enact a law was unlikely to make these states enthusiastic about implementing provisional ballots. Therefore, the first question to ask is not whether the usage of provisional ballots represents an expansion or contraction of the franchise, but whether the late-adopters of provisional ballots will ever implement these laws with the same vigor as the early-adopters have continued to muster.

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¹ Getter, Lisa, “Florida Net Too Wide in Purge of Voter Roles,” *The Los Angeles Times*, May 21, 2001. URL: <http://articles.latimes.com/2001/may/21/news/mn-620>

² Caltech/MIT Voting Technology Project, “What is What could be,” July 2001, URL: http://web.mit.edu/newsoffice/nr/2001VTP_report_all.pdf

³ Electionline.org, *Election Reform Briefing: The Provisional Voting Challenge*, 2001. URL: <http://www.pewcenteronthestates.org/uploadedFiles/ProvisionalVoting.pdf>, last accessed June 11, 2009.

⁴ Bousquet, Steve and Craig Pittman. “Election officials in a tizzy over flood of provisional ballots,” *St. Petersburg Times*, Oct. 30, 2008.

Interstate variability in the use of provisional ballots is staggering. In 2004, 1.8% of voters nationwide were handed a provisional ballot, a percentage that ranged from 0.08% in Hawaii⁵ to 7.4% in Alaska.⁶ In 2008, the provisional ballot rate ranged from 0.01% in Vermont to 6.6% in Arizona, with a national rate of 1.7%.

Variability within states has been substantial, too. Consider California, which had an overall provisional ballot rate of 5.4% in 2004.⁷ At the low end, 1.6% of Glenn County's voters were handed a provisional ballot. At the high end, Kern County is listed by the EAC as having given provisional ballots to almost half its voters — a rate so high that it must be an error. However, the next-highest county, San Bernardino, had a provisional ballot rate of 12.9% — over one-voter-in-eight. This degree of variability within California continued in 2008. Only 0.1% of voters in Del Norte County were given a provisional ballot, compared to 8.0% in Los Angeles County.

The purpose of this essay is to point out the fact that the biggest contributing factor to interstate variability in the usage of provisional ballots is whether states adopted them voluntarily or not. However, this is not to argue that differences in the provisional ballot rate are due *only* to the legacy of provisional ballot usage (or lack thereof) before 2000. There *is* evidence that the use of provisional ballots is correlated, at least somewhat, with objective indicators of “demand” for fail-safe voting.

For instance, if the biggest contributor to voter registration problems is the high residential mobility rates of Americans, then provisional ballots should be used more often in areas with high residential mobility. There is good evidence for this pattern in the three states for which we have county-level data about the use of provisional ballots in 2008 — the correlation between the mobility rate of a county and the percentage of provisional ballots cast in the county in 2008 was .25 in California and Florida and .57 in Ohio.⁸

If another major contributor to voter registration problems is the general administrative struggles that beset election officials in large urban areas with diverse populations, then the use of provisional ballots should be correlated with the size of the county — which it was in 2008. The correlation between the number of voters who turned-out to vote in a county and the provisional ballot rate in 2008 was .59 in California, .25 in Florida, and .50 in Ohio.

Yet, even when we account for the provisional ballot rates in counties that are caused by factors such as mobility and turnout level, Florida is still a significant outlier — to the point where one must ask whether Florida actually has an effective provisional ballot law at all. This claim is based on a simple multiple regression. The dependent variable is the number of ballots

⁵ The state with the lowest provisional ballot rate in the 2004 EAC data is actually Vermont, with a rate of 0.04%. However, Vermont did not report the number of provisional ballots cast in most of its towns, therefore calculating a provisional ballot rate for Vermont is meaningless.

⁶ The source of this analysis is the public use data file from the Election Assistance Commission's 2004 Election Day Survey: <http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/election-day-survey-results>

⁷ Alaska, which had a higher provisional ballot rate than California, does not report election statistics by county, and therefore is not available to provide inter-county comparison.

⁸ The mobility rate is based on the 2000 Census report of the number of residents who moved some time between 1995 and 2000. In Ohio, this rate ranged from 28% in Putnam County to 56% in Athens County.

cast provisionally in each California, Florida, and Ohio county, as a percentage of total turnout. The two independent variables are the mobility rate previously described and the voter turnout of the county. To measure interstate differences, separate intercepts were included for each state. The results are reported in Table 1.

Table 1. Provisional ballot rate in California, Florida, and Ohio (standard errors in parentheses). Ordinary Least Squares regression.

Variable	
Turnout (millions)	0.020 (0.002)
Mobility rate	0.041 (0.013)
Intercepts	
California	0.0097 (0.0064)
Florida	-0.019 (0.006)
Ohio	0.012 (0.005)
N	211
R ²	.89

The coefficients to focus on in Table 1 are the three intercepts. An *F*-test rejects the null hypothesis that the three intercepts are equal at $p < .0005$. More important, though, is the substantive interpretation of the intercepts. The difference between the California coefficient (0.0097) and the Florida coefficient (-0.019) is the measure of the difference in the usage rate of provisional ballots in counties that had equal turnout levels and mobility rates in the two states. This difference, 2.9%, is considerable, especially when we consider that the *raw* difference in provisional ballot rates between the two states was 5.6%. It suggests that about half the difference between Florida and California in the use of provisional ballots is due to factors other than differences in mobility rates and turnout levels, such as other administrative practices (explicit or implicit) associated with implementing election laws in the two states.

As previously noted, one way that California, Florida, and Ohio differ is that they had different provisional ballot regimes in 2000. California already used provisional ballots. Ohio also used provisional ballots, although in a much more restricted manner than California. Florida, on the other hand, did not use provisional ballots at all in 2000. In response to

controversies that arose when voters were improperly purged from the rolls in 2000, Florida adopted provisional ballots in 2001, before the passage of HAVA.

The overall experience of California, Florida, and Ohio with the use of provisional ballots since 2000 is similar to other states in their provisional ballot classes. States like California, which had relatively liberal provisional ballot laws in 2000, had an average provisional ballot rate of 3.3% in 2004 and 2.9% in 2008. States like Ohio, which had limited provisional ballot laws in 2008, had average provisional ballot rates of 2.3% in 2004 and 2.7% in 2008. States like Florida, which did not use provisional ballots in 2000, had provisional ballot rates of 0.6% in both 2004 and 2008.⁹

It is beyond the scope of this essay to suggest the precise mechanisms through which the pre-2000 legacies of provisional ballot use have carried over in the implementation of fail-safe voting since the passage of HAVA. While the states that had adopted provisional ballots by 2000 undoubtedly faced different challenges than those that lacked fail-safe voting, it defies credulity to claim that the states that had adopted provisional ballots before 2000 are now five times worse in handling voter registration than the states that adopted provisional ballots after HAVA. The differences that remain in the frequency with which provisional ballots are given out between the early- and late-adopting states must rest on administrative choices and practices that are fundamentally different in the two sets of states.

The empirical patterns discussed in this essay suggest two major implications, one empirical, and the other normative. The empirical implication is that analysis that attempts to assess the impact of provisional ballots nationwide should treat states that had the procedure prior to HAVA separately from those that adopted it afterwards. Overall, provisional ballots are an active part of the electoral arsenal in the former states, but not in the latter.

The normative implication is that the slow progress in the use of provisional ballots since the passage of HAVA is testimony to the inadequacy of provisions of that law that lacked strong enforcement mechanisms. Lacking a mechanism to enforce the *vigorous* implementation of provisional ballots nationwide, and lacking persistent local advocates for fail-safe voting in states that did not have the provision prior to 2000, provisional voting will remain a good idea that could eventually die of neglect in those areas of the country where it never put down deep roots.

⁹ The 2001 electionline.org report on provisional ballots also identified a fourth type of fail-safe voting, “affidavit ballots.” States with affidavit ballots in 2000 had provisional ballot rates of 0.3% in 2004 and 0.4% in 2008.