From Registration to Recounts:

The Election Ecosystems of Five Midwestern States

A Project of *ELECTION LAW @ MORITZ* AT
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while, Ohio also continues to rely on each county to identify incarcerated felons, as well as to identify individuals found incompetent and to remove them from the list of registered voters. But even with statewide standards in these matters as well, some county-by-county variation in the implementation of these standards is likely to persist.

Of course, the efficiency and accuracy with which Ohio's counties update and correct their voter lists, both within each county as well as through electronic coordination with the remaining eighty-seven counties, has a direct impact on the provisional voting process in Ohio. A sound statewide voter database should reduce those instances when provisional ballots must be used by voters whose names or addresses do not match those on the voter list. At this point it is premature to conclude whether Ohio's statewide database in fact is having such an impact, although an early signal was not encouraging. Ohio saw widespread use of provisional ballots in 2004, and still greater use in 2006, measured as a percentage of voter turnout. Table 1 displays comparative data about the provisional balloting experiences of not only Ohio but also Illi-

TABLE 1
STATE PROVISIONAL VOTING DATA

November 2004

	Total Ballots Cast	Provisional Ballots Cast	% PB Cast	PB Counted	% PB Counted	PB Counted/ Total Cast
Ohio	5,722,443	158,642	2.772%	123,548	77.878%	2.159%
Illinois	5,350,493	43,464	0.812%	22,238	51.164%	0.416%
Michigan	4,875,692	5,610	0.115%	3,227	57.522%	0.066%

November 2006

	Total Ballots Cast	Provisional Ballots Cast	% PB Cast	PB Counted	% PB Counted	PB Counted/ Total Cast
Ohio	4,186,207	129,432	3.092%	104,581	80.800%	2.498%
Illinois	3,587,676	15,875	0.442%	5,874	37.002%	0.164%
Michigan	3,852,008	2,426	0.063%	952	39.242%	0.025%

Differences Between 2004 and 2006

	Change in % Cast	Change in % Counted	Change in PB Counted/Total Cast
Ohio	11.528%	3.751%	15.71%
Illinois	-45.529%	-27.681%	-60.61%
Michigan	-45.264%	-31.780%	-62.66%

Source: Data from Ohio Secretary of State, Michigan Secretary of State, and Illinois State Board of Elections

nois and Michigan. As this table reflects, in 2004, Ohio issued over 158,000 provisional ballots, representing 2.77% of those who went to the polls.[56] In 2006, Ohio issued approximately 130,000 provisional ballots, a smaller absolute number but one representing 3.09% of those who turned out that year.[57] Of course, even adjusting for variations in turnout across elections, comparing these figures is difficult given the changes that House Bill 3 made to Ohio's provisional balloting process in the interim.

Ohio's provisional ballots tell another story as well, this one about potential variations in election administration between counties. In 2006, the county-wide rates at which provisional ballots were cast varied from a high of 8.5% in semi-rural Athens County, home to Ohio University and a high student population, to a low of 0.4% in rural Harrison County.[58] With Athens County as an aberration, rural counties generally had much lower rates of provisional voting than urban ones. Of course, demographics – and the greater transiency of urban voters – likely explain much of this variation. But one curious feature is the difference in provisional voting rates even between just the state's most urban counties. For instance, in Cuyahoga County (Cleveland area), the provisional voting rate was 3.76% in 2006, while in Franklin County (Columbus area), the rate was 5.08%, more than 30% greater. More details about Ohio's provisional voting, with additional discussion of county variations, are presented in the Supplement on Provisional Voting at the end of this chapter.

These variations at least raise the question of whether poll workers applied provisional voting requirements inconsistently from county to county. To the extent that such inconsistency is to blame, it may reflect the difficulty in adapting to the rapid changes in the legal framework surrounding election administration that occurred in the run-up to the 2006 election. Precisely this circumstance gave rise to the ongoing *NEOCH v. Blackwell* case, described more below, over inconsistencies in the counties' applications of the state's complicated new voter identification rules. But voter identification requirements were not the only area of Ohio election administration to undergo rapid change for the 2006 election.

RAPID CHANGES IN VOTING EQUIPMENT AND PROCESSES

Until 2006, Ohio had relied heavily on punch card voting. By one estimate, seventy-two percent of the state's voters were using punch card machines in 2002, about twice the proportion of voters nationally.[59] Although by 2004 many other states had upgraded their voting equipment, most Ohio counties continued to use essentially the same equipment that year as well. Yet by 2006, Ohio's punch card machines were all but nonexistent, replaced by a combination of optical scan and touch screen or other direct recording electronic ballots. The rapid change in equipment did not come without transition problems, and lingering concerns remain over the security of electronic voting.

In exchange for federal funds, HAVA required states to replace their punch card and lever machines by the first federal election of 2006 with voting systems satisfying specific standards of security, accuracy, accessibility, and privacy. Many Ohio counties at first had hoped to upgrade by the 2004 election, and the secretary of state had authorized counties to select from

SUPPLEMENT ON PROVISIONAL VOTING:
WHY ARE PROVISIONAL BALLOTS REJECTED IN OHIO?

IN THE NOVEMBER 2006 general election, just over 23,000 provisional ballots (23,058, according to figures provided by the secretary of state) were rejected in Ohio, or almost 20% of all provisional ballots cast statewide in that election. The predominant reason for rejecting provisional ballots was that they were cast in the wrong precinct: 10,610 statewide, or 46%, were rejected for this reason. The second most common explanation for rejecting a provisional ballot was that the voter was not registered: 7,384, or 32% were rejected on this ground, although there is no available information concerning what steps were taken to determine that the voter – who, after all, as a prerequisite for casting the provisional ballot, signed a statement attesting to the belief that he or she was registered – was in fact not registered.

The third most prevalent reason for rejecting a provisional ballot was that the voter failed to show the required identification: 2,726 statewide, or 12%, were rejected on this basis. Together, these three reasons account for 90% of rejected provisional ballots statewide. No other specific explanation accounted for more than 2% of rejected provisional ballots statewide. Among the miscellaneous other reasons for rejecting a provisional ballot were: not eligible to vote (2%), no signature (1.25%), missing ballot (0.8%), or the person already voted (0.7%). Table 2 summarizes these data.

TABLE 2
OHIO REJECTED PROVISIONAL BALLOTS, NOVEMBER 2006
STATEWIDE FIGURES

Reason Ballot Rejected	Number of Ballots	Percent
Wrong precinct	10,610	46.0
Not registered	7,384	32.0
No ID	2,726	12.0
Not eligible	459	2.0
No signature	290	1.25
Missing ballot	181	0.8
Already voted	163	0.7
Other misc.	1,245	5.4
TOTAL	**23,058**	

[Percentages do not total 100% because of rounding]

Source: Ohio Secretary of State

Focusing on the six counties that contain Ohio's largest cities – Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Lucas (Toledo), Montgomery (Dayton), and Summit (Akron) – reveals some interesting differences among them. These counties were the six largest in terms of the number of provisional ballots rejected, and collectively they accounted for 13,171, or 57%, of all rejected provisional ballots. Yet they differed in a number of respects, as Table 3 shows. First, they differed in the aggregate rate at which they rejected provisional ballots, from 13% to 33%. But the primary reason for rejecting provisional ballots – voting at the wrong precinct – does not appear to explain most of this variation. Rather, these six counties are fairly similar in the rates at which they rejected provisional ballots for this reason. Two counties (Hamilton and Montgomery) rejected 10% of their provisional ballots for being in the wrong precinct, and two others (Lucas and Summit) rejected 12% of their provisional ballots for the same reason. One county (Franklin) was a little bit lower in this respect, at 9%, whereas another (Cuyahoga) was somewhat higher, at 16%. (Cuyahoga's outlier status on this point, with more voters showing up at the wrong place to cast their ballots, may be a reflection of the distinctive and significant administrative problems this county had in the 2006 election.)

Instead, the six urban counties diverged somewhat more with respect to the second major reason for rejecting provisional ballots: that the voter was not registered. These six urban counties ranged from a high of 11% (Lucas) to a low of 3% (Franklin) in rejecting provisional ballots for this reason. In other words, over one-tenth of provisional ballots cast in Lucas County were rejected on the ground that the voter was not registered, even though the voter thought he or she was and was willing to sign a statement to that effect. By contrast, Franklin County's rate of rejecting provisional ballots for lack of registration was less than one-third as large as Lucas County's. What explains this difference? Is it that three times as many voters in Lucas County are mistaken in thinking they are registered than in Franklin County, or do the two counties use different procedures in endeavoring to resolve discrepancies about a voter's registration status? Does Franklin County, for example, conduct more rigorous investigative searches to track down missing registration forms, or perhaps resolve doubts more favorably to the voter? (In between Lucas and Franklin, two counties – Cuyahoga and Montgomery – rejected 8% of their provisional ballots for lack of registration, and two others – Hamilton and Summit – rejected 6% for this reason.)

The six urban counties varied even more sharply with respect to rejecting provisional ballots for lack of required identification. Two counties, Lucas and Summit, stand out for rejecting a relatively large number of provisional ballots for this reason, 7.8% and 7.1% respectively. In absolute numbers, Lucas threw out 330 votes for lack of identification, and Summit discarded 349. By contrast, Franklin County *did not reject a single provisional ballot for failure to provide identification as required by Ohio law*, even though Franklin County had far more provisional ballots cast than any other county in Ohio. Over 20,000 provisional ballots were cast in Franklin in 2006, whereas less than 5,000 were cast in both Lucas and Summit. Franklin's refusal to reject any provisional ballots for lack of identification, in contrast to the willingness in

Lucas and Summit counties to reject hundreds of them (amounting to almost one in every dozen of provisional ballots cast), can be attributed only to a difference in policy at the county level in interpreting and enforcing Ohio law.

This county-level variation in applying Ohio's new voter identification rules presumably makes the state vulnerable to an Equal Protection challenge based on *Bush v. Gore*. In 2006, Franklin County may have been more generous to voters failing to provide the identification required by Ohio law in part because of the threat of litigation over rejected provisional ballots that loomed in the context of the Pryce-Kilroy recount. But this kind of local generosity, when absent elsewhere in the state and when not specifically authorized by state law, may create an unjustified inequality in the counting of ballots cast by citizens in equivalent circumstances, in violation of the U.S. Constitution's protection of equal voting rights.

Franklin County's generosity in this regard, while absolute, was mirrored to a lesser extent by Montgomery County, which rejected only eight of its over 6,000 provisional ballots, or 0.12%, for lack of identification. The two remaining counties, Hamilton and Cuyahoga, rejected 0.4% and 1.2% of their provisional ballots for lack of identification. These rates, although somewhat higher than Franklin and Montgomery, were still much lower than Lucas and Summit. In absolute numbers, Hamilton discarded 54 votes for lack of identification, and Cuyahoga threw out 189. Again, differences in administrative practices seem the most likely explanation for these variations, although the topic deserves further study.

One additional anomaly deserves brief mention. Although three of the six urban counties (Hamilton, Lucas, and Montgomery) did not reject any provisional ballots on the ground that the person who cast the ballot was not "eligible" to vote, and Franklin County rejected only two provisional ballots for this reason, Summit County rejected a surprising 128 provisional ballots on this basis. This number amounted to 2.6% of all provisional ballots cast in Summit County. Cuyahoga County rejected 27 provisional ballots on the ground that the voters were ineligible, or 0.17% of provisional ballots cast in that county. While that number separates Cuyahoga from the other four urban counties, it does not come close to the rate at which Summit County rejected provisional ballots on the ground of voter ineligibility – as distinct from lack of registration. One wonders whether Summit County employed a different administrative understanding of the concept of voter eligibility than elsewhere in the state, or whether instead some election officials in Summit County simply confused the two different concepts of eligibility and registration, with some of them reporting a lack of registration as a lack of eligibility instead. If the latter explanation were indeed the case, it would be disappointing but not surprising. It would merely corroborate other evidence that local officials sometimes have difficulty understanding – and therefore enforcing correctly – each of the many requirements of the state's election law.

TABLE 3
OHIO REJECTED PROVISIONAL BALLOTS, NOVEMBER 2006: LARGE COUNTIES

	LUCAS (Toledo)	SUMMIT (Akron)
Total provisional ballots cast	**4,227**	**4,891**
Provisional ballots rejected	**1,379**	**1,525**
Total rejected as percentage of PB cast	**32.62%**	**31.18%**
Number of provisional ballots rejected - wrong precinct	**489**	**601**
Percentage of Total Rejected	35.46%	39.41%
Percentage of Total PB Cast	11.57%	12.29%
Number of provisional ballots rejected - not registered	**475**	**278**
Percentage of Total Rejected	34.45%	18.23%
Percentage of Total PB Cast	11.24%	5.68%
Number of provisional ballots rejected - no ID provided	**330**	**349**
Percentage of Total Rejected	23.93%	22.89%
Percentage of Total PB Cast	7.81%	7.14%
Number of provisional ballots rejected - ineligible to vote	**0**	**128**
Percentage of Total Rejected	0.00%	8.39%
Percentage of Total PB Cast	0.00%	2.62%
Number of provisional ballots rejected - other	**85**	**169**
Percentage of Total Rejected	6.16%	11.08%
Percentage of Total PB Cast	2.01%	3.46%

Source: Ohio Secretary of State

CUYAHOGA (Cleveland)	HAMILTON (Cincinnati)	MONTGOMERY (Dayton)	FRANKLIN (Columbus)
15,917	**12,569**	**6,630**	**20,322**
4,168	**2,238**	**1,249**	**2,612**
26.19%	**17.81%**	**18.84%**	**12.85%**
2,541	**1,329**	**687**	**1,801**
60.96%	59.38%	55.00%	68.95%
15.96%	10.57%	10.36%	8.86%
1,282	**784**	**527**	**684**
30.76%	35.03%	42.19%	26.19%
8.05%	6.24%	7.95%	3.37%
189	**54**	**8**	**0**
4.53%	2.41%	0.64%	0.00%
1.19%	0.43%	0.12%	0.00%
27	**0**	**0**	**2**
0.65%	0.00%	0.00%	0.08%
0.17%	0.00%	0.00%	0.01%
129	**71**	**27**	**125**
3.10%	3.17%	2.16%	4.79%
0.81%	0.56%	0.41%	0.62%