

FAIR ELECTIONS --- LEGAL NETWORK

Saving Votes

*An Easy Fix to the Problem of Wasting
Provisional Ballots Cast Out of Precinct*

The Problem: Discarding Whole Ballots Cast in the Wrong Precinct

While litigation over various voter ID laws and other voter suppression measures continues in state and federal courts, we should not forget that voters are disenfranchised in every election by less visible but no less misguided election rules. Enacted in the wake of the 2000 presidential election, the Help America Vote Act (HAVA) provides that states must afford voters an opportunity to cast a provisional ballot, if that voter's name does not appear on the rolls, unless the state allows voters to register on Election Day or the state lacks a registration system altogether (only North Dakota).¹ The states that offer Election Day Registration (EDR) include Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, Wyoming, and recent additions, Connecticut and Colorado, as well as the District of Columbia.² Technically, the exemption from the provisional ballot requirement only applies to those states that had EDR in place at the time HAVA was passed in 2002, but, for ease of reference, all of the EDR states have been listed because these states record few to no provisional ballots.

A voter's name might not appear in the poll book for a variety of reasons, including failure to register (or re-register after a move) or because the voter has appeared at the wrong polling place or precinct.³ When a provisional ballot is cast in the wrong location in some states, it is subject to full rejection (*i.e.* being set aside and never opened), regardless of the voter's intent or whether a poll worker caused the error. In other states, when a person votes in the wrong place, that ballot will be counted for offices the voter could have voted for if the ballot was cast in the correct precinct. Leaving aside the many problems with our outmoded registration system, there is no reasonable justification for rejecting whole ballots simply because they have been cast in the wrong precinct, wrong polling place, or even the wrong county.

Today, there are 22 full-rejection states: Alabama, Arizona, Arkansas, Delaware, Florida, Hawaii, Indiana, Kentucky, Michigan, Mississippi, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and West Virginia.⁴ In Arizona alone, nearly 11,000 provisional ballots were rejected in full because they were cast in the wrong precinct; 3,645 was the number in Texas.⁵ Often wrong-precinct ballots are miscast simply because a poll worker directed the voter to the wrong table in the correct polling place—this is known as the “right church, wrong pew” problem. Ohio had to take a year off from discarding “right church, wrong pew” provisional ballots as a result of a federal court injunction.⁶ However, back in the 2008 general election, the state refused to count 14,335 wrong-precinct ballots. Moreover, the injunction in place in 2012 did not prevent the state from fully rejecting 9,482 provisional ballots, most of which were cast in the wrong polling place (“church”), but the right county.

Should a voter in the wrong precinct be denied an opportunity to vote for all the offices and measures he or she would have been able to vote for in his or her correct precinct? In the 2012 general election, 45,376 ballots were rejected top to bottom because they were cast in the wrong precinct or wrong jurisdiction (county) in a full-rejection state.⁷ 29,355 or 64.7 percent of those rejected ballots were cast in the wrong precinct. In the 2008 general election, a total of 53,468 wrong-precinct and wrong-county ballots were rejected in full in full-rejection states, including 43,878 wrong-precinct ballots (82 percent).⁸ In the only two states that count “right church, wrong pew” ballots but reject ballots cast in the wrong polling place or county (Missouri and New York), another 94,474 provisional ballots in 2012 were rejected in full because they were cast in the wrong polling place or county.⁹ The Ohio General Assembly is considering a bill that passed the Senate, SB 216, which will codify the “right church, wrong pew” injunction and draw the same line as Missouri and New York.¹⁰ The actual numbers of wrong-precinct and wrong-county rejections are likely substantially higher than the totals above, since hundreds of thousands of rejected provisional ballots remain uncategorized by reason for rejection in the data collected by the U.S. Election Assistance Commission.¹¹

In a close election, state laws commanding full rejection of ballots cast in the wrong precinct, polling place or county can be decisive. Prior to the recount, the certified results of last year’s statistically-tied race for Virginia Attorney General reflected that the Democratic candidate’s margin of victory was 165 votes.¹² Moreover, the State Board of Elections’ tabulation showed that voters had cast 2,150 provisional ballots *not* due to a lack of ID or a failure to register. Those ballots must have been rejected for being cast in the wrong county or wrong precinct, or for failure to complete or legibly complete the ballot or envelope. Given that Mark Herring’s margin increased substantially during the recount, it is unlikely that Virginia’s full rejection rule could have altered the outcome in this particular race, but it demonstrates the potential for the rule to do so in another tight contest.

Full-rejection laws are arbitrary, unnecessary, and completely outdated. Americans are a mobile people. Whether for employment opportunities, family, or just a better view, an estimated 29 million voting-age Americans move every year, and 90 million eligible voters, or 45 percent of the population, move every five years.¹³ Roughly 9 percent of the American population aged 1 year or more moves residences within the same county; roughly 3 percent moves between counties in the same state; and roughly 2 percent moves between states.¹⁴ That is a total of roughly 43 million people or 14 percent moving every year.¹⁵ So it should come as no surprise to election officials when some fraction of this highly mobile population votes in the wrong place. Now, if the voter would not have been eligible to vote in a particular race anyway, that is of course fatal to that specific wrong-precinct vote—City Council Ward 1 resident’s vote for the City Council Ward 4 race has to

be rejected. But there is no sense in rejecting that same person's votes for President, U.S. Senate and Congress, gubernatorial and other statewide races, state legislative and local races for which they were eligible to cast a ballot notwithstanding their showing up at the wrong location.

The Fix: Partially Counting Ballots Cast in the Wrong Precinct

Fortunately, this problem has an easy fix. A diverse array of fifteen states and the District of Columbia have adopted counting rules that salvage some portion of the votes on wrong-precinct and/or wrong-jurisdiction provisional ballots. Three of these states, Maryland, Oregon, and Washington, have passed laws to count every vote the voter was eligible to cast, regardless of *where* the ballot was cast.¹⁶ Crucially, the provisional ballot may be cast anywhere in the state and, at a bare minimum, the votes for President, U.S. Senate, and any other statewide races such as gubernatorial races will count. And, for example, if the voter votes in the wrong precinct but the correct state legislative district, his or her vote for that particular race will count as well. Because these three states are rightly only interested in the voter's *eligibility*, not the voter's *location* on Election Day, if the voter was eligible to vote for other offices or measures on the ballot, those will be counted too.

Twelve states plus the District of Columbia add some restrictions to their partial counting laws, but any partial counting is still vastly better than full rejection. So long as the voter casts his or her provisional ballot in the county of his or her registration, California, Georgia, Kansas, New Jersey, New Mexico, Pennsylvania, and Utah will count the votes for offices or issues which the voter was eligible to cast.¹⁷ Georgia's statute instructs officials to "count such person's votes which were cast for candidates in those races for which the person was entitled to vote but... not [to] count the votes cast for candidates in those races in which such person was not entitled to vote."¹⁸ Massachusetts requires that the ballot be cast in the correct "city or town."¹⁹ Louisiana will only count votes for federal office, and the individual must have voted in the parish in which he or she is registered.²⁰ Rhode Island will count the votes for all federal races, unless the voter is a resident of Providence and votes outside his or her Congressional district, in which case only the votes for President and U.S. Senate will be counted.²¹ Alaska broadens its list to include state senate and judicial races, as well as federal and statewide races and ballot measures, and does not have a right-county restriction.²² The District of Columbia will salvage votes for federal and district-wide races only.²³

Finally, in Illinois, votes for federal and statewide races are counted, and "[v]otes for General Assembly, countywide, citywide, or township office on a provisional ballot cast in the incorrect precinct but in the correct legislative district, representative district, county, municipality, or township, as the case may be, shall be valid and counted..."²⁴ However, the

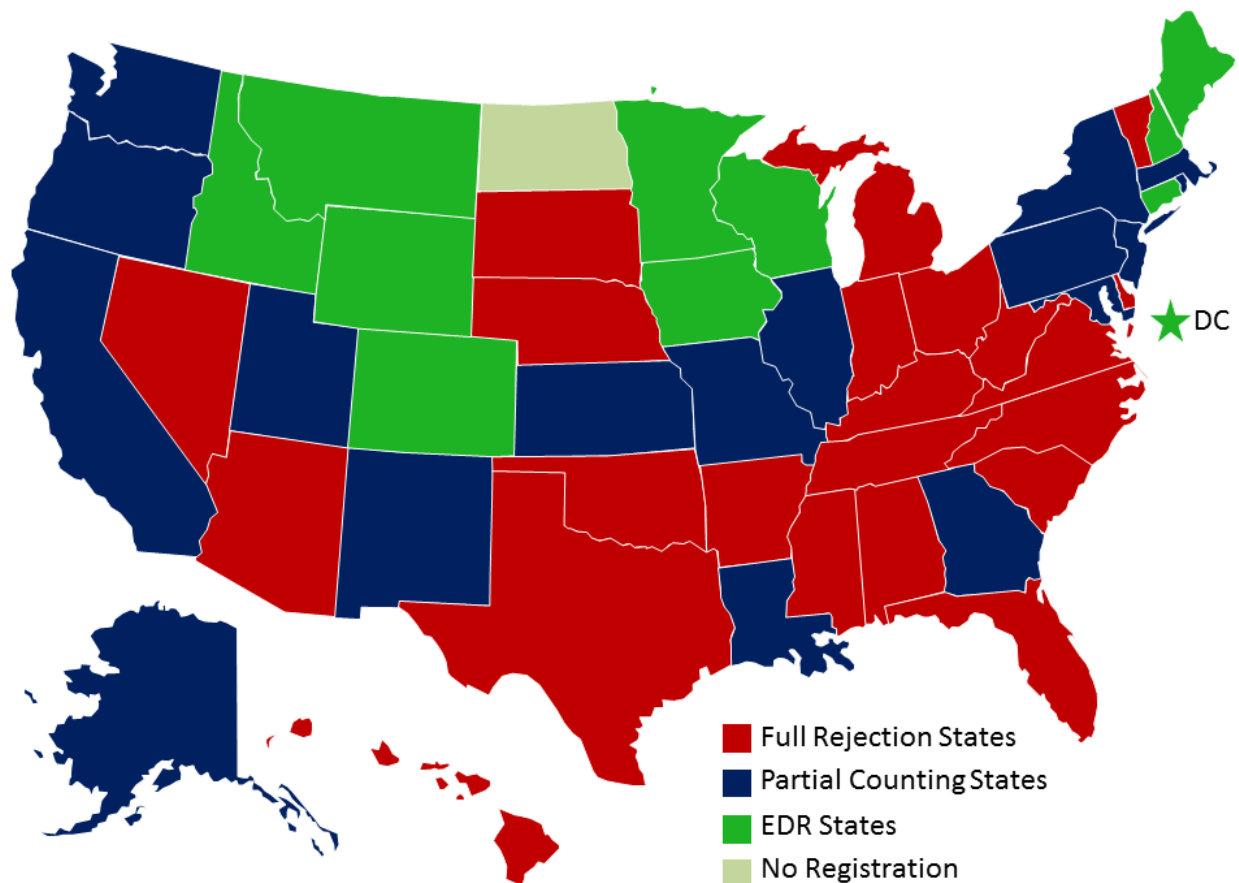
proposed rule seems to more narrowly require that a wrong-county provisional ballot be cast in the right municipality, a limitation that does not appear in the statute.²⁵

North Carolina used to partially count right-county, wrong-precinct provisional ballots up until last year when new restrictive legislation was approved.²⁶ According to one analysis, North Carolina’s prior rule salvaged votes from approximately 6,700 wrong-precinct provisional ballots.²⁷ The new full-rejection rule and other provisions that rolled back the state’s pro-voter rules are being challenged by the U.S. Department of Justice in its Voting Rights Act lawsuit which is set for trial in 2015. Therefore, in 2013, Illinois and North Carolina traded places, with North Carolina backsliding and Illinois, making progress on behalf of voters.

Table 1. State Provisional Ballot Counting Laws

FULL REJECTION STATES	PARTIAL COUNTING STATES			EDR or NO REGISTRATION
	POLLING PLACE MUST BE RIGHT	COUNTY OR CITY MUST BE RIGHT	VOTE STATEWIDE	
Alabama	Missouri	Alaska	Maryland	Colorado
Arizona	New York	California	Oregon	Connecticut
Arkansas		Georgia	Washington	Idaho
Delaware		Illinois		Iowa
Florida		Kansas		Maine
Hawaii		Louisiana		Minnesota
Indiana		Massachusetts		Montana
Kentucky		New Jersey		New Hampshire
Michigan		New Mexico		Wisconsin
Mississippi		Pennsylvania		Wyoming
Nebraska		Rhode Island		D.C.
Nevada		Utah		North Dakota
North Carolina				
Ohio				
Oklahoma				
South Carolina				
South Dakota				
Tennessee				
Texas				
Vermont				
Virginia				
West Virginia				

Combine the 15 partial-counting states with the 11 states that either have Election Day Registration or no registration whatsoever, and the District of Columbia,²⁸ and it becomes clear that over half the country has figured out a way to either avoid discarding thousands of ballots simply because they were cast in the wrong place or to keep the need for provisional ballots very low. States could also cure much of this problem by adopting statewide registration portability, permitting registrants to update their addresses on Election Day even if they have moved to a different county. Add in two more states, Missouri and New York, which have taken a step in the right direction by salvaging votes on ballots that were at least cast in the right (multi-precinct) polling place, and that leaves a minority of 22 full-rejection states standing against this tide of pro-voter reason.



The typical counterargument to the trend in favor of partial counting is that it will encourage voters to vote wherever they please, that is, to engage in unfettered convenience voting. First and foremost, partial counting of provisional ballots is *partial*—the voter is penalized for voting in the wrong place. Their votes for a number of down-ticket races will be rejected even under the most liberal rules. Second, there is a big difference between having this law on the books and advertising it to the public. This is about salvaging votes

largely cast by mistake, not about encouraging voters to cast their ballots wherever they feel like it. There is no evidence that voters are intentionally voting by provisional ballot in the wrong location out of convenience. Most wrong-location provisional ballots are the result of the mutually reinforcing failures of public education and voter and poll-worker diligence. Any rational person would rather vote a regular ballot, avoid the hassle of a provisional ballot, *and* have each and every one of their votes counted. And other than this perceived deterrence in fully rejecting wrong-precinct and wrong-county ballots, proponents of the strict, full-rejection regimes have no good reason to resist adopting partial counting.

Conclusion

Hurricane Sandy's impact on the 2012 presidential election dramatically highlights the need for partial counting laws and treating all voters uniformly. The mammoth 94,240 wrong-location provisional ballots rejected in New York were likely due in part to voter confusion as to whether they were covered by Governor Cuomo's executive order permitting displaced Hurricane Sandy victims to vote by provisional ballot in any location.²⁹ That order instructed the county boards of elections "to provide notice and guidance to voters . . . (a) that indicates that voters who reside in the counties of Nassau, Rockland, Suffolk, or Westchester, or in New York City may receive and complete an affidavit ballot at any polling place in New York State; and (b) that the voter's vote will count for the office of President and United States Senator and it will also count for any other candidate for office and district as well as any ballot initiative that appears on the official ballot in the voter's home district." Provisional ballots cast by voters who did not reside in those designated areas need not have been rejected in full. In reality, the state was already partially counting ballots cast by displaced voters embraced by the executive order, since their eligibility for certain races was still limited by their home residence. The state should have extended the same flexibility to all voters in that election. Disaster readiness should entail implementing an electoral framework that will salvage the maximum number of votes when crisis causes confusion. But a rule that fairness dictates in an emergency should be applied in all elections, given that mobility is always high, voting locations change frequently, and state-provided voter information is imperfect at best.

No one disputes that these provisional voters are eligible to vote; it is only that they have voted in a different precinct or county. Sometimes voters fail to realize that their polling places have changed, but often enough a poll worker makes an error that causes the voter to vote the wrong ballot in a multi-precinct polling place or fails to direct a voter to the correct polling place. A poll worker with bad eyesight might simply read Precinct 8F as 8E and send a voter to the wrong line in a high school gym. But there is a simple fix, one that has already been adopted by legislatures controlled by different political parties and in states with some of the country's largest electorates (California, Georgia, Illinois, and

Pennsylvania). Partial counting of provisional ballots should be the law of the land. If, as Justice Brandeis wrote, the states serve as “laborator[ies]” in our federal system,³⁰ then partial counting has already been tested and proven effective and harmless. Votes are salvaged with no detriment to electoral integrity or fairness. And when more than half the country has found a way to avoid or seriously diminish this problem, we are way past the point of tinkering and experimentation. The 22 holdouts should follow the leaders in this area and support their voters by enacting Election Day Registration, statewide registration portability or, at a bare minimum, a partial counting rule for provisional ballots.

¹ 42 U.S.C. § 1973gg-2(b), 42 U.S.C. § 15482.

² C.G.S.A. § 9-19j; Colo. Rev. Stat. Ann. § 1-2-201(3)(b)(V); D.C. Mun. Regs. tit. 3, § 513; Idaho Code Ann. § 34-408A; Iowa Code Ann. § 48A.7A; Iowa Admin. Code § 721-21.7; Me. Rev. Stat. Ann. tit. 21, § 122(4); Minn. Stat. Ann. § 201.061 subd. 3; Mont. Code Ann. § 13-2-304; N.H. Rev. Stat. Ann. § 654:7-a; Wis. Stat. Ann. § 6.55; Wyo. Stat. Ann. § 22-3-102. California has adopted EDR, but has not yet implemented it because it remains the only state that still does not have a HAVA-compliant statewide voter registration database. Cal. Elec. Code § 2170.

³ Note that a polling place may contain multiple precincts.

⁴ See Ala. Code §§ 17-9-10, 17-10-2(b)(2); State of Ala., Office of the Att’y Gen., Op. No. 2005-051 (Jan. 27, 2005); Ariz. Rev. Stat. Ann. § 16-584; Ark. Code Ann. § 7-5-308(d)(2); 108.00.9 Ark. Code R. § 909; 15 Del. C. § 4948(h)(7); Fla. Stat. Ann. § 101.048(2)(b); Haw. Code R. § 3-172-140(c); Ind. Code Ann. § 3-11.7-5-3; 31 Ky. Admin. Regs. 6:020 §§ 4(13)-(14); Mich. Comp. Laws § 168.523a; Mich. Dep’t of State, Procedure for Handling “Envelope” Ballots Returned to Clerk’s Office (Feb. 2012), at 2-3, *available at* http://www.michigan.gov/documents/sos/Procedure_Handl_Env_3-09_351952_7.pdf; Miss. Code Ann. § 23-15-573; State of Miss., Office of the Att’y Gen., Op. No. 1999-0697 (Dec. 22, 1999); *id.*, 1991 WL 578080 (Oct. 30, 1991); Neb. Rev. Stat. Ann. § 32-1002(5)(e); Nev. Rev. Stat. Ann. § 293.3085(4); N.C. Gen. Stat. Ann. § 163-182.2(a)(4); Ohio Rev. Code Ann. §§ 3505.181(C)(2)(a), 3505.181(E)(1), 3505.182, 3505.183(B)(4)(a)(ii); *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011); 26 Okla. Stat. Ann. § 7-116.1(C); S.C. Code Ann. §§ 7-13-820, 7-13-830; S.D. Codified Laws § 12-20-5.1; Tenn. Code Ann. § 2-7-112(a)(3)(B); Tex. Elec. Code Ann. § 63.011(a); 1 Tex. Admin. Code §§ 81.172(c)(1), 81.172(i)(4)(J); Vt. Stat. Ann. tit. 17, § 2555; Va. Code Ann. § 24.2-653(B); W. Va. Code § 3-1-41(d). Curiously, West Virginia will count the votes of election commissioners or clerks who vote a wrong-precinct ballot where they are serving on Election Day, but denies the same leniency to its voters. W. Va. Code § 3-1-41(f). For whatever reason, zero wrong-precinct provisional ballots were recorded in Nevada and Vermont in 2012. U.S. Election Assistance Commission, 2012 Election Administration and Voting Survey: A Summary of Key Findings, Sept. 2013, Appendix B, Table 35A.

⁵ Ohio Sec’y of State, Election Results, General Election 2008, Provisional Ballot Statistics, *available at* <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>.

⁶ *SEIU, Local 1 v. Husted*, 906 F. Supp. 2d 745 (2012) (granting preliminary injunction), *affirmed in part, reversed on other grounds by NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012); *SEIU Local 1 v. Husted*, Nos. 2:12-CV-562, 2:06-CV-896, 2013 WL 3456756, at *1-2 (S.D. Ohio July 9, 2013) (granting permanent injunction).

⁷ U.S. Election Assistance Commission, 2012 Election Administration and Voting Survey: A Summary of Key Findings, Sept. 2013, Appendix B, Table 35A.

⁸ U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey: A Summary of Key Findings, Nov. 2009, Appendix B, Table 36A.

⁹ The EAC survey data does not disaggregate votes cast in the wrong polling place from votes cast in the wrong jurisdiction. See Mo. Ann. Stat. § 115.430; *Panio v. Sunderland*, 4 N.Y.3d 123 (N.Y. 2005) (finding per se poll worker error where ballot is cast in right polling place, but wrong precinct, and holding that such a ballot must be counted). The New York Elections Code does not appear to have been amended to reflect the Court of Appeals of New York's decision in *Panio*. See N.Y. Elec. Law § 8-302.

¹⁰ State of Ohio 130th General Assembly, Regular Session 2013-2014, Sub. S.B. No. 216, available at http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_216.

¹¹ U.S. Election Assistance Commission, 2012 Election Administration and Voting Survey: A Summary of Key Findings, Sept. 2013, Appendix B, Tables 35A & 35B.

¹² Virginia State Board of Elections, Unofficial Results - General Election - November 5, 2013, available at <http://electionresults.virginia.gov/resultsSW.aspx?type=SWR&map=CTY>.

¹³ Myrna Pérez, Brennan Center for Justice, When Voters Move (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/MoversGuideNEW.pdf>.

¹⁴ U.S. Census Bureau, 2012 American Community Survey 1-Year Estimates, Geographic Mobility by Selected Characteristics in the United States; see also U.S. Census Bureau, 2010 American Community Survey 5-Year Estimates, Geographic Mobility by Selected Characteristics in the United States.

¹⁵ The Current Population Survey (CPS), which is conducted by the U.S. Census Bureau and the U.S. Department of Labor, records comparable but somewhat lower figures for a total of approximately 34,881,000 people or 11.35 percent moving between states, between counties, and within a county for the 2012-2013 "mobility period." See U.S. Current Population Survey, Geographical Mobility/Migration, Table A-1. Annual Geographical Mobility Rates, By Type of Movement: 1948-2013, available at <http://www.census.gov/hhes/migration/data/cps/historical.html> (last visited November 20, 2013).

¹⁶ 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(b), 5/18A-15(e); Md. Code Ann., Elec. Law § 11-303(e); Or. Rev. Stat. Ann. § 254.408(6); Wash. Admin. Code 434-262-031, 434-262-032(4), 434-262-032(5). Washington, which along with Oregon has all-mail balloting, goes even farther to permit write-in votes for races not appearing on the out-of-precinct provisional ballot. Wash. Admin. Code 434-261-086(1)(o).

¹⁷ Cal. Elec. Code § 14310(c)(3); Ga. Code Ann. § 21-2-419(c)(2); Kan. Stat. Ann. § 25-3002(b)(3); N.J. Stat. Ann. § 19:53C-17; N.M. Stat. Ann. § 1-12-25.4(F); 25 Pa. Cons. Stat. § 3050(a.4)(7); Utah Code Ann. § 20A-4-107 (2013). Previously, Utah would count the wrong-precinct provisional ballot only if it were identical to the ballot form the voter should have cast. Utah Code Ann. § 20A-4-107 (2011). Georgia and New Jersey election officials represent that they reject wrong-county provisional ballots, but the EAC surveys contain no evidence of such rejections and the statutory citations above do not contain any such express limitation.

¹⁸ Ga. Code Ann. § 21-2-419(c)(2).

¹⁹ Mass. Gen. Laws Ch. 54, § 76C(d).

²⁰ La. Rev. Stat. Ann. § 18:566; see also Louisiana Secretary of State, Vote Provisionally, available at <http://www.sos.la.gov/ElectionsAndVoting/Vote/VoteProvisionally/Pages/default.aspx>.

²¹ R.I. Admin. Code § 23-1-10:6(B)(1).

²² Alaska Stat. § 15.20.211(a); Alaska Admin. Code tit. 6, § 25.541.

²³ D.C. Mun. Regs. tit. 3, §§ 713.4, 714.13, 806.09.

²⁴ 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(b), 5/18A-15(e).

²⁵ 38 Ill. Reg. 4328-29, 4506-17 (Feb. 14, 2004); 26 Ill. Admin. Code § 218.

²⁶ N.C. Gen. Stat. Ann. § 163-182.2(a)(4), *amended by* 2013 N.C. Laws S.L. 2013-381 (H.B. 589) § 49.4.

²⁷ Bertrand M. Gutierrez, "Election law changes narrow use of provisional ballots," WINSTON-SALEM JOURNAL, Dec. 9, 2013, *available at* http://www.journalnow.com/news/elections/local/article_863286c0-5f8e-11e3-bff7-001a4bcf6878.html.

²⁸ D.C. has both Election Day Registration and a partial-counting law.

²⁹ *See* State of New York Executive Chamber, Executive Order No. 62, Temporary Suspension of Provisions Relating to the Election Law (Nov. 5, 2012), *available at* <http://www.governor.ny.gov/executiveorder/62>.

³⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").