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Research Note on Footnote 24 of the 6th Circuit *Hunter* Decision

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The decision issued by the three-judge panel of the 6th Circuit Court of Appeals in the matter of *Hunter* v. *Hamilton County Board of Elections*[2] contains a very interesting analysis of problems with Ohio's law about counting provisional ballots when they are cast in "the right church, wrong pew" (RCWP).[3]

On the whole, the appeals court opinion contains a strong argument against the Draconian effects of the Ohio law, which allows — indeed, mandates — disenfranchisement of voters who have followed the instructions of a poll worker.

However, the decision makes what appears to be an empirically questionable assumption in its footnote 24, which reads as follows:

> It is also discomforting that Ohio's rule that all provisional ballots cast in the wrong precinct must be excluded may fall—at least in this instance—unevenly on voters depending on where the Board directs them to vote. In single-precinct polling places there is less room for error than at the multiple precinct locations that have caused so much difficulty in this case. *As a result, fewer provisional ballots are likely to be counted in multiple-precinct polling places than in those that serve only a single precinct.* This disparate impact might not be of constitutional significance everywhere in Ohio, but here Plaintiffs assert that "the polling places where most of the error-infected provisional ballots were cast are in African-American areas of Hamilton Country." Plaintiffs 2d Br. at 3. It appears, then, that the exclusionary rule in this case may accrue to the detriment of a protected class. (Emphasis added)

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[2] http://www.ca6.uscourts.gov/opinions.pdf/11a0021p-06.pdf
[3] "Right church, wrong pew" refers to the problem that occurs when a voter goes to a physical voting location that contains multiple precincts and casts a (provisional) ballot in the wrong precinct, even though the *correct* precinct is also at the same location where the voter cast the (provisional) ballot. Under the Ohio law at issue, the voter must cast the ballot in the correct precinct; even an egregious error by a poll worker directing a voter to the wrong precinct is insufficient to make an exception.

The italicized sentence proposes a hypothesis that provisional ballots will be rejected more often in multi-precinct polling places than in single-precinct polling places. This hypothesis suggests the possibility that Ohio's policy of rejecting RCWP ballots produces disproportionate effects in minority and non-minority communities.

A direct test of the footnote 24 proposition is possible, though not provided in the decision. It is not clear whether direct evidence on the point was given at trial. However, it is possible to test the general proposition, at least at the county level.

When we examine this proposition with the best data we have for the 2008 election, it turns out to be only weakly supported. However, in the process of examining the proposition that multi-precinct polling places lead to the greater use and rejection of provisional ballots, we come up against the more important empirical pattern, the considerable discretion exercised by local election officials in the implementation of election laws.

As far as the 2008 election is concerned, counties with more multi-precinct polling places were no more likely to provide provisional ballots than those with fewer. When measured in terms of voters (rather than in terms of counties), voters in counties with more multi-precinct counties were somewhat more likely to see their ballots rejected, but the variability around this relationship is so great that it is clear that even if multi-precinct voting locations are a problem, there are bigger factors than simple polling place chaos.

The data for this analysis are taken from the Election Assistance Commission's 2008 Election Administration and Voting Study (EAVS).[4] The EAVS contains considerable data about election administration, reported at the county level. For the 2008 presidential election, the EAVS asks the following of each county: (1) the number of physical Election Day polling

[4] http://www.eac.gov/research/election_administration_and_voting_survey.aspx

locations, (2) the total number of precincts, (3) the number of provisional ballots cast, and (4) the number of provisional ballots rejected.

The logic of my (very simple and crude) analysis proceeds as follows. First, if multi-precinct polling places lead to more confusion about which precinct a voter should cast a ballot in, then we should expect more provisional ballots to be cast in counties that have more multi-precinct polling places. Second, if multi-precinct polling places lead to confusion, then a higher rate of provisional ballots will be rejected in these precincts. On this second point, it is unclear which is the correct denominator to use in calculating the rejection rate — should it be as a percentage of *all voters* or just *those who cast provisional ballots*? Therefore, I examine both. (While the two denominators arise from different theories about what problem we are worrying about when we examine the rejected provisional ballot rate, in practice, the two measures are highly correlated [r = .80] at the county level in Ohio.)

In addition, there are two ways to generate correlations in analyses such as these. One can either treat all counties as equal, or one can weight each by a variable such as turnout. The former analysis may allow us to focus on counties as distinct administrative units, each of which is held to a common standard regardless of how large it is. The latter analysis allows us to focus on individual voters, giving greater influence to counties that have larger populations, or more experience with the use of provisional ballots (in this case). I report the results of both analyses below.

1. Ohio counties with more multi-precinct voting locations in 2008 did not issue more provisional ballots (as a percentage of in-person voters) than counties with fewer multi-precinct voting locations.

I first look at the relationship between the percent of ballots cast provisionally and the use of multi-precinct polling locations. For this analysis, the denominator for the dependent variable is the total number of ballots cast on Election Day *and* in early voting. Figure 1 shows that the relationship is unrelated to the number of precincts per polling place.

[Figure 1 about here]

The correlation coefficient (r) in this case is .12 when we weight each county equally. When we weight them by in-person turnout, r = -.01. Using the conventional statistical tests, we would conclude that these relationships are indistinguishable from zero. The data point for Hamilton County is indicated in the graph (as it is for all the graphs in this research note). This allows us to see that Hamilton County had one of the highest percentages of provisional ballots cast, although it is roughly in the middle of counties, in terms of polling place consolidation.

2. Ohio counties with more multi-precinct voting locations in 2008 may have rejected more provisional ballots, but the answer to the question depends on how the rejection rate is calculated and whether or not the data are weighted by turnout (or provisional ballot usage).

There are two ways to examine this. The first is to compare the percentage of all provisional ballots that are rejected against the previously used measure of multi-precinct voting locations. That graph is shown in Figure 2. The unweighted r = .13; the correlation coefficient weighted by the number of provisional ballots cast in each county is .28. The former correlation is very weak, when we ask about statistical significance, but the latter passes the traditional 95% confidence interval test.

[Figure 2 about here]

The alternative way of measuring the provisional ballot rejection rate is to divide the number of rejected provisional ballots by the total number of in-person ballots cast. Using that

measure of the dependent variable, we generate the graph in Figure 3. The unweighted r = .14; the correlation coefficient weighted by the number of in-person votes cast in each county is .13. Each of these correlations is very weak, and would not pass the traditional threshold for statistical significance. Thus, at most, there is weak evidence that in Ohio, if a voter is given a provisional ballot, it is less likely to be counted in a county with many multi-precinct voting locations.

[Figure 3 about here]

Examination of the figures shows a couple of interesting patterns. First, Hamilton County is on the low end of counties in the use of multi-precinct polling places. Second, Hamilton County is close to the mean of all Ohio counties in terms of both provisional ballot usage and rejection rates. Thus, if there are outliers in Ohio, in terms of provisional ballots and the RCWP problem, Hamilton County is not the first place to look.

Third, the data provide evidence that the large amount of discretion employed by poll workers and election officials in the use of provisional ballots. Note the tremendous variation in the use and rejection of provisional ballots. Across Ohio counties, the use of provisional ballots ranged from 1.8% of turnout (Coshocton County) to 8.2% (Franklin). The rejection rate as a percentage of provisional ballots cast ranged from 3.2% (Pike) to 38% (Lawrence). As a percentage of turnout, the rejection rate ranged from 0.1% (Pike) to 1.9% (Adams). These are order-of-magnitude differences that are hard to explain based on demographics alone, although the fact that Franklin County (Columbus), with a highly mobile student and young professional population, has such a high provisional ballot usage rate suggests that demographics do play a part in explaining some of this variation.

Finally, it does not appear that Hamilton County in 2008 had a particularly large RCWP problem. The percentage of provisional ballots rejected because they were cast by a registered voter who showed up at the wrong precinct was 21%, compared to the statewide average of 19%. The other two largest jurisdictions in Ohio, Cuyahoga and Franklin Counties, had similar rejection rates for this reason, 25% and 18%, respectively. The counties with the highest RCWP problems were Lawrence (38%) and Adams (37%), which had the highest rejection rates overall.

In assessing this empirical analysis, it is important to keep in mind that it was done at the county level using data from the 2008 election. Things may have been different in 2010 (we will know when the EAC releases their 2010 data next fall), and they may have been different if we had done the analysis at the precinct level.

Although there is, at best, limited evidence that multi-precinct polling places are causing provisional ballots problems in Ohio, the best data we have about provisional ballot use and rejection illustrate a considerable amount of discretion being exercised at the local level. As an aside, according to the EAVS dataset, 155 provisional ballots were partially counted in Stark County, which seems inconsistent with Ohio's provisional ballot counting laws. Logan County reported one provisional ballot that was partially counted. All other counties reported either zero or did not report any number. Careful scrutiny of provisional ballot data may demonstrate other types of discretion that are not always apparent when we look at election administration one precinct at a time.

The Hamilton County case is a nice anecdote that illustrates a larger pattern that emerges when we examine nationwide data about election administration — local election officials do not always feel comfortable implementing election laws with Draconian effects. This leads to local officials — county boards and poll workers — making exceptions that are often well meaning,

but contrary to law, and potentially producing disproportionate effects. The degree to which this happens in practice is an important field of election administration that has been little researched, and therefore rarely addressed when laws passed. Research by Alvarez et al,[5] for instance, has suggested that a similar level of discretion is being exercised locally in the implementation of voter identification laws — a small fraction of voters (often white women of a certain age) more easily get off without showing photo identification in states like Indiana and Georgia that have very strict identification requirements. At the same time, voters of all sorts are being asked for photo identification in states that not only do not require photo identification, but also ban the use.

In an era in which policymakers are paying attention to fraud at the polls, something to caution against is passing laws and promulgating regulations that local officials will be unable, or unwilling, to enforce consistently. Hard evidence of voter fraud is difficult to come by. Hard evidence of poll worker discretion is easy to come by. If election administration were as data-driven as other areas of public administration, one would think that we would be tackling the problems related to polling place integrity we know to exist.

[5] R. Michael Alvarez,, Stephen Ansolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III, and Thad E. Hall, 2009, *2008 Survey of the Performance of American Elections.* Pasadena/Cambridge: Caltech/MIT Voting Technology Project.

Figure 1. Provisional ballots issued to voters, as a proportion of all voters, plotted against the average number of precincts per physical polling place, Ohio, 2008. (Source: EAC, 2008 Election Administration and Voting Survey.)

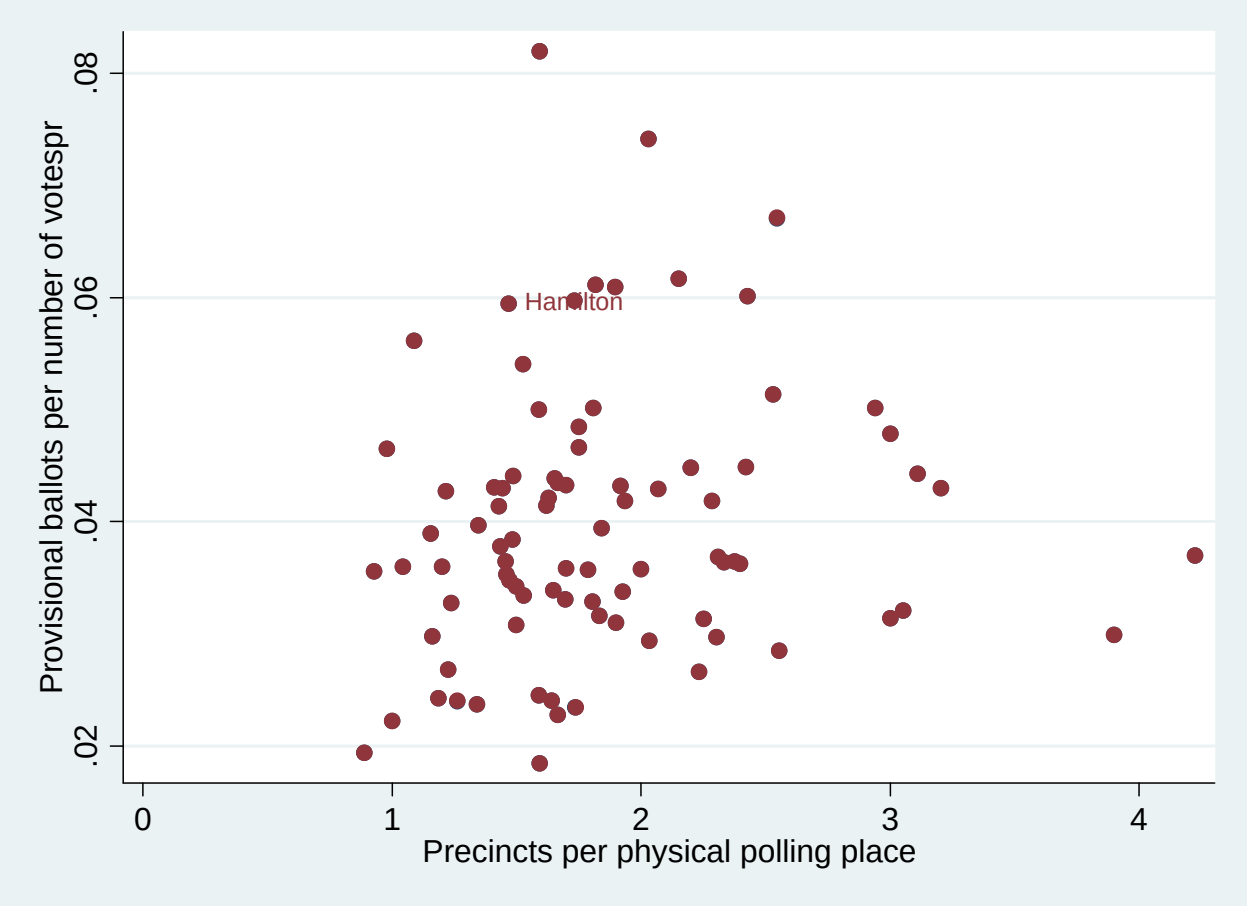

Figure 2. Provisional ballots rejected as a proportion of provisional ballots issued, plotted against the average number of precincts per physical polling place, Ohio, 2008. (Source: EAC, 2008 Election Administration and Voting Survey.)

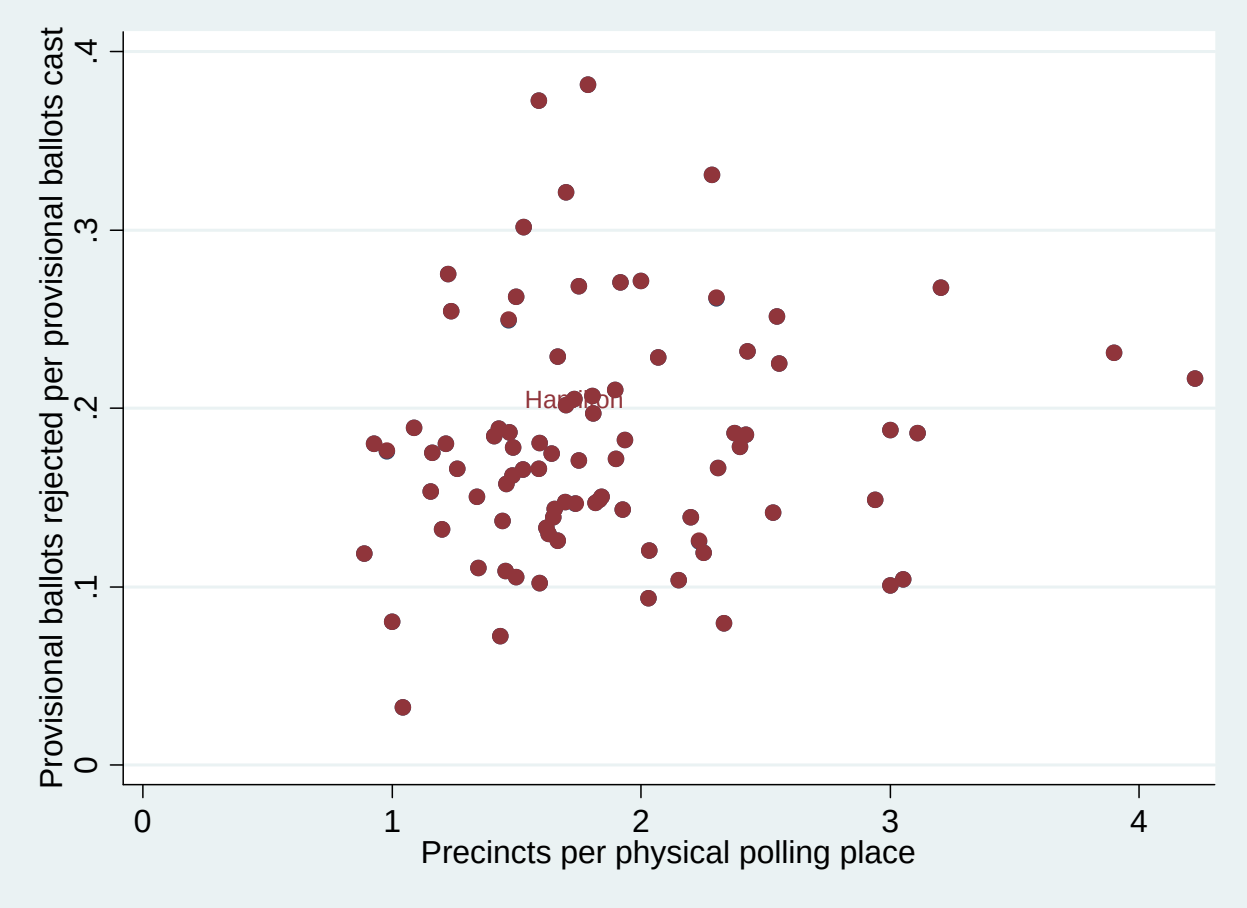

Figure 3. Provisional ballots rejected as a proportion of all ballots cast plotted against the average number of precincts per physical polling place, Ohio, 2008. (Source: EAC, 2008 Election Administration and Voting Survey.)