Unsuccessful Provisional Voting in the 2008 General Election

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The 2002 Help America Vote Act (HAVA) required most states to adopt or expand procedures for provisional voting, primarily in cases where a person claims to be registered but whose name does not appear on voter registration lists. As a result, provisional voting has become a more observable element of election administration in the past six years. At the same time, we believe provisional voting offers an inviting target for post-election litigation. Invalidated and unrecorded ballots are a common source of dispute in election recounts, in part because they are examined and counted (or rejected) after Election Day. Litigation of the 2000 presidential election in Florida focused heavily on undervotes and overvotes on punch-card ballots and other ballots with confusing design features (Keating, 2002). The recent extended play of the United States Senate contest in Minnesota focused on rejected absentee ballots. Provisional ballots are another pool of votes whose status is resolved after Election Day. To measure a state or locality's attractiveness as a target for election litigation, we measure what we call the "unsuccessful provisional voting rate," the percentage of total ballots cast that were rejected provisional ballots. Since recount lawsuits typically involve contests with a margin of victory less than 0.1% of ballots cast, one can examine the unsuccessful provisional voting rate to see if it exceeds the vote margin between the top two candidates.

High rates of unsuccessful provisional voting may be a cause for concern because election administration matters a great deal when it comes to provisional voting. There is considerable variation among states in defining the types of voters who must cast a provisional ballot. Some state laws, as in Ohio, identify numerous situations that require a provisional ballot (Foley 2008; Norden 2009, p. 34). Other states, like Florida, define few cases requiring a provisional ballot (Eagleton Institute of Politics/Moritz College of Law 2006). As one of us has previously written, state and federal laws also tend to be vague in defining important terms critical to provisional balloting (Foley 2008, 2005). Finally, since provisional voting is a relatively new election feature, many local election officials and poll workers may not have a clear understanding about how to implement provisional voting laws. Thus, local officials exercise a lot of discretion in enforcing provisional voting laws. The recount litigation in the Minnesota Senate contest involved apparently different standards that local jurisdictions used in handling absentee ballots. If the litigation spotlight had turned to provisional voting in another state (Minnesota is exempt from using provisional ballots because the state has election day registration), there could have been a bevy of opportunities to uncover different standards and methods for issuing and handling provisional ballots (see Baybeck and Kimball 2008).

Election laws and their enforcement (especially by local election officials) appear to have a large impact on the number of provisional ballots cast and the likelihood that they will be counted. We find substantial variation across states, and across counties within the same state, in the administration of provisional voting. Certain states and counties are repeated hot spots for provisional voting while other states and counties generate very few provisional ballots.

We examine data on provisional voting in the 2008 general election provided by the Pew Center on the States (Pew Center on the States, 2009). These include state-level data from 44 states and county-level data from three states. We examine which states and counties have high rates of provisional voting and we compare them to similar data from the 2004 general election, provided by the states and the EAC Election Day Survey (U.S. Election Assistance Commission, 2005).

Figure 1 compares the provisional voting rate (as a percentage of total ballots cast) in 2004 and 2008 for the states where we have data for both elections. As Figure 1 shows, the relative frequency of provisional voting in American states is quite consistent from one presidential election to the next. The solid line in the graph denotes the same rate of provisional voting in both elections. States above the line had higher provisional voting rates in 2008; states below the line saw provisional voting rates drop in 2008 compared to 2004. The vast majority of states are close to the line. States with high rates of provisional voting in 2004 also tended to have high rates of provisional voting in 2008. In a large cluster of states in the lower left corner of the graph, less than one percent of ballots cast are provisional ballots. A smaller number of states have relatively high rates of provisional voting (roughly 2% or higher). Several, but not all, of the states with heavy provisional voting are in the West. Many of these states had some form of provisional voting before passage of HAVA, a predictor of more frequent provisional voting (Kimball, Kropf and Battles 2006).

Table 1 indicates the statistical correlation between provisional voting rates in the 2008 general election and other measures, for states and for counties in Ohio, California and Florida. Other measures of voter participation (such as overall turnout, early voting, and residual votes) tend to be correlated with education, race, income and residential mobility. Table 1 indicates that provisional voting tends to be more common in areas with large concentrations of Black or Hispanic residents and in places with large population growth. However, the single best predictor of a state's rate of provisional voting in 2008 is its provisional voting rate in 2004. The correlation between state provisional voting rates in 2004 and provisional voting rates in 2008 is .94, indicating a very strong relationship.

Figure 1

Rates of Provisional Voting in States, 2004 and 2008

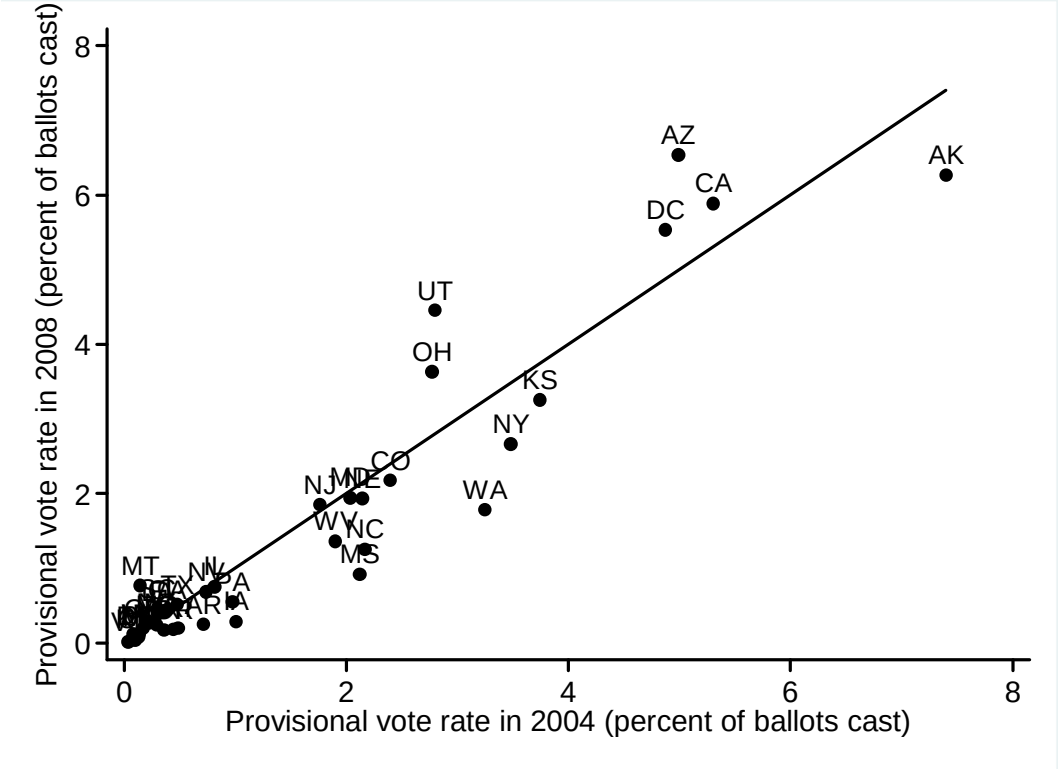


Table 1

Correlations between 2008 Provisional Voting Rates and Other Measures

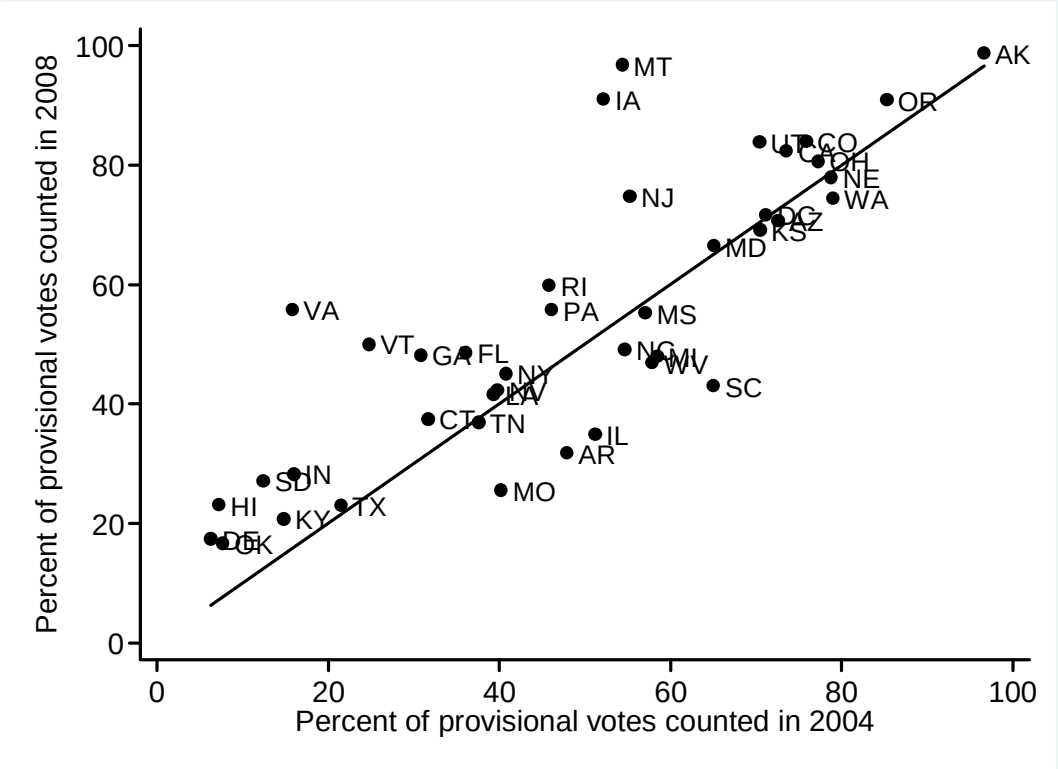
Jurisdiction	American States	Ohio Counties	California Counties	Florida Counties
Provisional voting rate in 2004 general election	.94**	.60**	.88**	.70**
Percent change in population from 2000 to 2008	.25*	-.03	.38**	.09
Percent high school graduates, 2000	.10	.12	-.33**	.16
Estimated percent Black population, 2007	.07	.49**	.50**	.08
Estimated percent Hispanic population, 2007	.41**	.17	.58**	.21*
Percent in poverty, 2007	-.04	.23**	-.05	-.13
Population, 2008	.23	.50**	.59**	.25**
Number of observations	41	88	58	67

*p<.1, **p<.05

Once provisional ballots are cast then local election officials must decide whether or not to accept them. We also examine the percentage of provisional ballots that are counted as valid ballots in each state. Figure 2 compares the percentage of provisional ballots counted in each state in the 2004 and 2008 elections. Again, the solid line indicates equal rates of accepting provisional ballots in the two elections. States above the line counted a higher percentage of provisional ballots in the 2008 election than in 2004. States below the line counted a lower percentage of provisional ballots in 2008. As Figure 2 below indicates, there is consistency in the relative frequency with which states accept provisional ballots. States that accepted a large share of provisional ballots in 2004 also accepted a large share of provisional votes in 2008. States accepting a relatively low percentage of provisional ballots in 2004 also had low acceptance rates in 2008. The correlation between provisional ballot acceptance rates in 2004 and acceptance rates in 2008 is .82, again indicating a very strong relationship. The single best predictor of a state's rate of accepting provisional ballots in 2008 is its rate in 2004.

Figure 2

Counting Provisional Votes in States, 2004 and 2008



Lastly, we combine the previous data to examine the percentage of total votes cast that are invalidated provisional ballots. Dividing the number of rejected provisional ballots by the number of total ballots cast measures what we call the "unsuccessful provisional voting rate" in a state. In previous discussions, this has been called the unsuccessful in-person voting rate (to distinguish it from invalidated absentee ballots). However, residual votes (overvotes and undervotes) can also occur during in-person voting, and we want to make clear that this measure does not take residual votes into account. We multiply the ratio by 100 to make it a percentage.

In addition to presenting a target for election litigation, a high unsuccessful voting rate is a reason for concern because it denotes people who attempted to vote in person but were unable to do so. Although the data on the reasons for rejecting provisional ballots in 2008 are incomplete, available data from 2004 to 2008 indicate that a lack of voter registration is the most common reason given for rejecting provisional ballots (U.S. Election Assistance

Commission, 2005, 2007). Thus, the unsuccessful provisional voting rate is one indicator of the degree to which the registration system acts as a barrier to voter participation.

Table 2 provides some summary statistics on provisional voting measures, including the unsuccessful provisional voting rate, in each of the last three general elections. On average, the unsuccessful provisional voting rate tends to be fairly low, although as we show below, a small number of states are well above the mean. In addition, the higher-turnout presidential elections of 2004 and 2008 produced a larger share of provisional votes and a higher share of rejected provisional ballots than the midterm election of 2006.

Table 2

Summary Statistics on Provisional Voting in American States

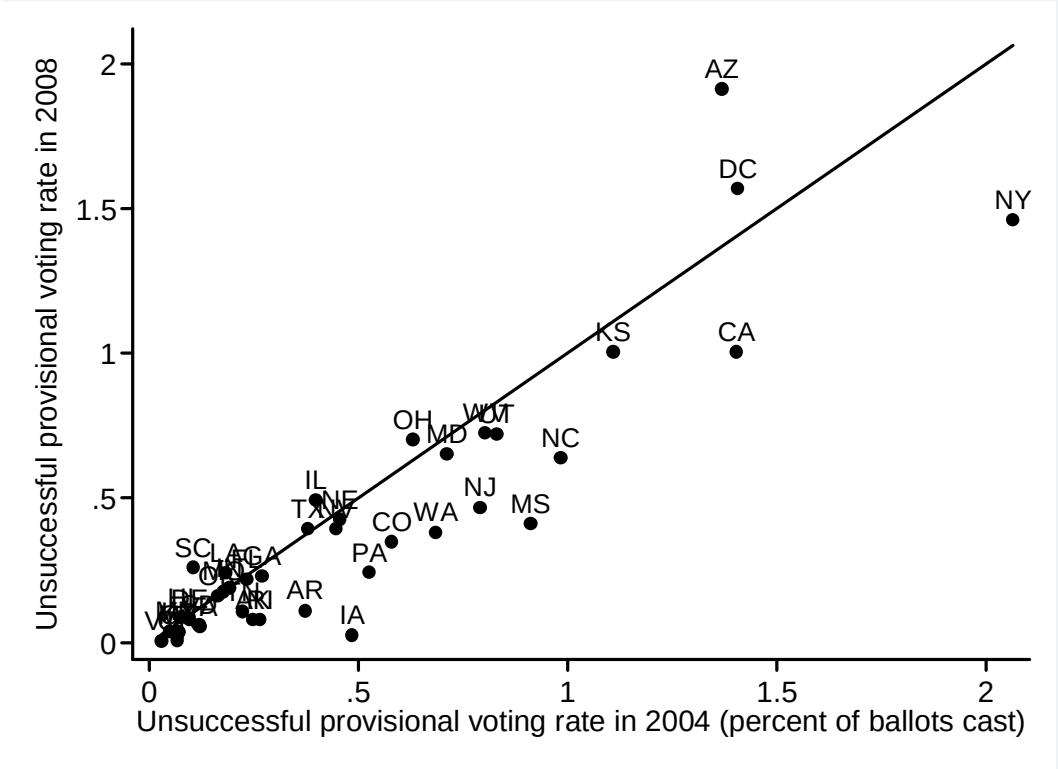
Measure	2004	2006	2008
Provisional voting rate			
Mean	1.5%	1.0%	1.3%
Median	0.6%	0.4%	0.4%
Standard deviation	1.7%	1.3%	1.8%
Percent of provisional ballots counted			
Mean	47.6%	58.7%	54.7%
Median	49.5%	61.9%	48.8%
Standard deviation	23.6%	25.4%	24.1%
Unsuccessful provisional voting rate			
Mean	0.5%	0.2%	0.4%
Median	0.3%	0.1%	0.2%
Standard deviation	0.5%	0.3%	0.4%
Number of states	44	41	44

When comparing unsuccessful provisional voting within states in the last two presidential elections, once again there is a remarkable degree of consistency (as seen in Figure 3). Unsuccessful provisional voting rates in 2008 were very similar to rates in 2004 within each state. If one compares Figure 3 to the first two figures, one will notice that the unsuccessful provisional voting rate is closely related to the overall provisional voting rate (the distribution of

states in Figure 3 is similar to the distribution in Figure 1). In 2008, the correlation between the provisional voting rate and the unsuccessful provisional voting rate in states is .77.

Figure 3

Unsuccessful Provisional Voting Rates in States, 2004 and 2008



A positive sign is that unsuccessful provisional voting rates dropped in most states in 2008 (i.e., most states are below the solid line in Figure 3). This is a trend worth following as election officials and poll workers become more familiar with provisional voting procedures. Arizona appears to be the only state where the unsuccessful provisional voting rate increased noticeably in 2008. In a very close election, rejected provisional ballots are a likely target for scrutiny and litigation. We might adopt an unsuccessful provisional voting rate of 0.5% (roughly the national average) as an arbitrary threshold to identify states where provisional ballots will be a likely source of conflict – in any statewide recount the number of rejected provisional ballots will very likely exceed the margin of victory in those cases. In 2004, sixteen states had unsuccessful provisional voting rates above 0.5%. In 2008, ten states were above the 0.5%

threshold. No state moved above the line in 2008 after being below it in 2004. Among the six states that dropped below the 0.5% threshold in 2008, all but one saw their overall rate of provisional voting decline in 2008 and all but two rejected a lower share of provisional ballots in 2008. The states with the highest rates of unsuccessful provisional voting are not confined to one region of the country. Most, but not all of them, implemented their own provisional voting programs before HAVA was passed in 2002. It appears that some states have created legal and administrative systems that simply produce more provisional voters.

We are beginning to see provisional voting appear in contested elections. For example, in the race for Ohio's 15th congressional district in 2008, the final count and outcome was delayed until state and federal courts ruled on the validity of provisional ballots.[1]

Table 3

Correlations between 2008 Unsuccessful Provisional Voting Rates and Other Measures

	American States	**Ohio Counties**	**California Counties**	**Florida Counties**
Unsuccessful provisional voting rate in 2004 general election	.90**	.53**	.68**	.82**
Percent change in population from 2000 to 2008	.22	.01	.34**	.01
Percent high school graduates, 2000	-.20	.04	-.30**	.22*
Estimated percent Black population, 2007	.29*	.35**	.49**	.06
Estimated percent Hispanic population, 2007	.46**	.17	.51**	.28**
Percent in poverty, 2007	.17	.17	-.05	-.18
Population, 2008	.31**	.39**	.43**	.35**
Number of observations	41	88	58	67

*p<.1, **p<.05

[1] The case is *State ex rel. Skaggs v. Brunner*. For case information and court documents see http://moritzlaw.osu.edu/electionlaw/litigation/skaggsv.brunner.php.

Table 3 indicates the statistical correlation between unsuccessful provisional voting rates in the 2008 general election and other measures, for states and for counties in Ohio, California and Florida. The patterns are similar to those found in Table 1. The best predictor of the unsuccessful provisional voting rate in 2008 in a state or county is the unsuccessful provisional voting rate in 2004. Some states and counties tend to produce relatively high rates of rejected provisional ballots, thus making them likely targets for litigation. Table 2 also indicates that unsuccessful provisional voting rates tend to be higher in more populous states or counties and in jurisdictions with large concentrations of Black or Hispanic residents. Although these data are not sufficient to indicate a disparate impact of provisional voting, this pattern may also make provisional voting a likely target of future election litigation (also see Baybeck and Kimball 2008).

Finally, we present graphs of provisional voting at the county level in three states (Ohio, California, and Florida) for which we have data from the 2008 general election. Ohio and California have among the highest rates of provisional voting in the country (as seen in Figure 1) while Florida has one of the lowest provisional voting rates. The figures below plot the unsuccessful provisional voting rates in 2008 against the unsuccessful provisional voting rates in 2004 at the county level. The circles in the scatterplots are sized in proportion to the number of provisional ballots cast in a county. Larger circles indicate more provisional ballots cast in the 2008 election.

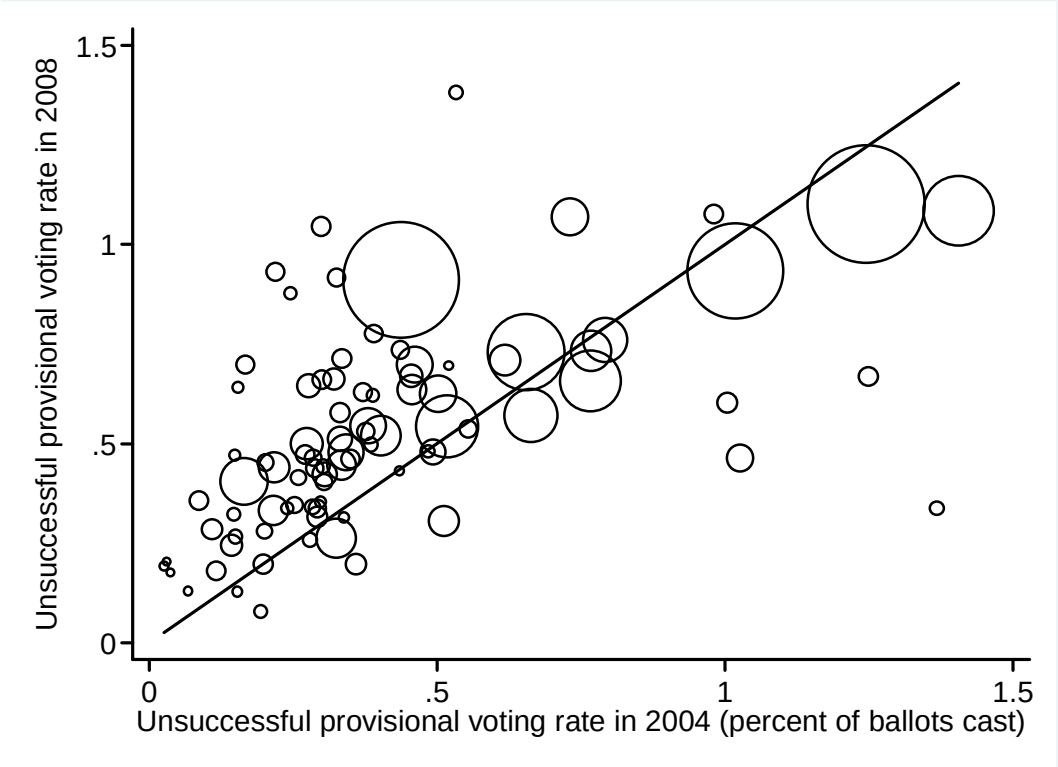
Two main patterns are evident in the graphs. First, as with the state data, the rate of unsuccessful provisional voting in a county in 2004 is a strong predictor of its unsuccessful provisional voting rate in 2008. Some counties invalidate a higher share of ballots through provisional balloting than other counties, and the best way to identify them is to see if it has happened in those counties in previous elections. As Table 2 indicates, we examined several demographic variables as predictors of provisional voting and none come close to past performance in explaining unsuccessful provisional voting rates in 2008. This pattern is evident in states with high rates of provisional voting (Ohio and California) and in a state with a low rate of provisional voting (Florida).

The second pattern evident in the graphs below is that the counties with relatively high rates of unsuccessful provisional voting tend to be the largest counties (with the most provisional ballots). The large dots tend to appear higher up on the solid line in each graph and the smaller dots tend to congregate near the lower left corner of each graph. Thus, the most

populous counties in each state will be the likely focus of provisional ballot litigation in the case of a highly contested statewide recount.

Figure 4

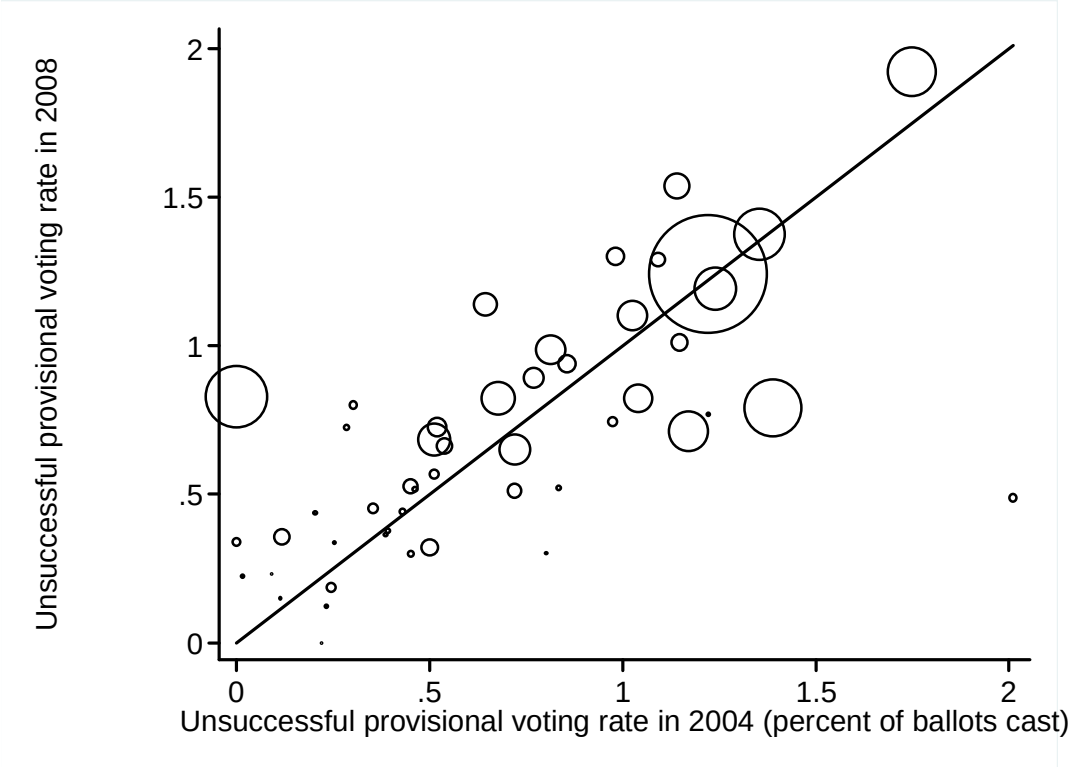
Unsuccessful Provisional Voting Rates in Ohio Counties, 2004 and 2008



Note: Circles are sized in proportion to the number of provisional ballots cast.

Figure 5

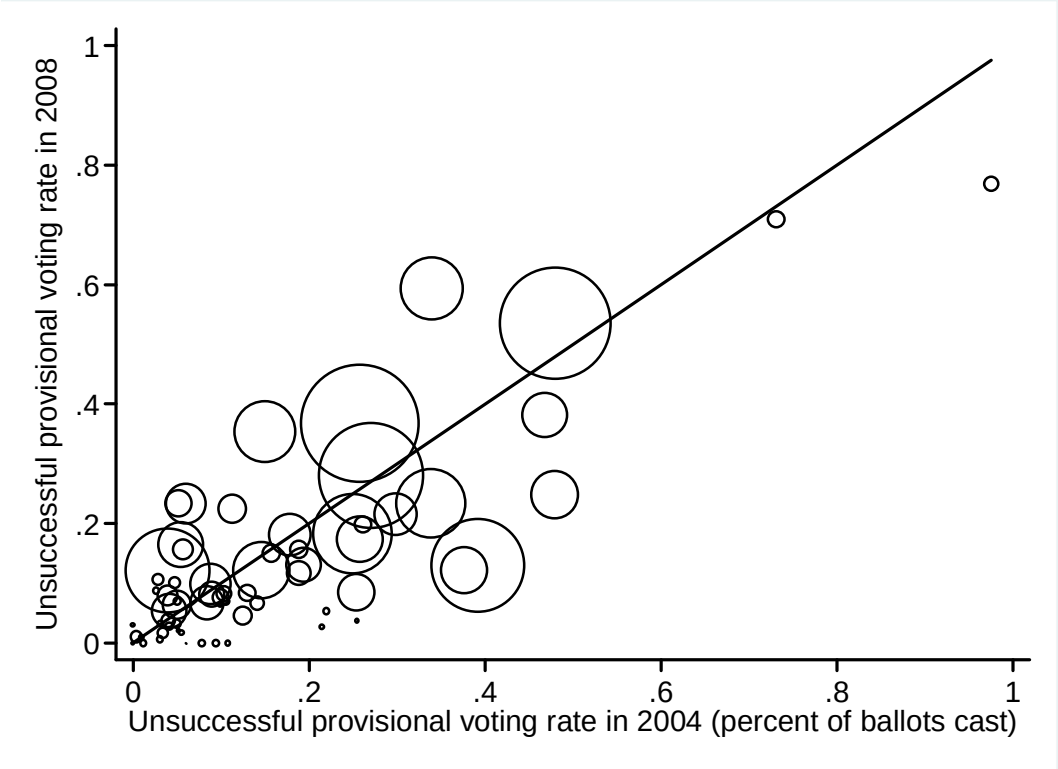
Unsuccessful Provisional Voting Rates in California Counties, 2004 and 2008



Note: Circles are sized in proportion to the number of provisional ballots cast.

Figure 6

Unsuccessful Provisional Voting Rates in Florida Counties, 2004 and 2008



Note: Circles are sized in proportion to the number of provisional ballots cast.

Conclusion

Provisional voting in the United States follows a fairly predictable pattern in that certain states and counties have relatively high rates of provisional voting in repeated general elections. This suggests that particular jurisdictions have established election systems that encourage higher rates of provisional voting. Our measure of the unsuccessful provisional voting rate indicates a fair amount of variation across states and counties in the United States. While unsuccessful provisional voting rates declined in many states in 2008, we find that these rates tend to be higher in larger jurisdictions and in places with larger concentrations of Black and Hispanic residents.

The unsuccessful provisional voting rate can pinpoint areas where the voter registration system serves as a barrier to a relatively large number of voters. In addition, this measure can identify locations for likely election lawsuits in the event of an extremely close election. In the spirit of *The Democracy Index* (Gerken 2009), it would be interesting to compute an overall count of "problem ballots" (the number or share of ballots not counted for one reason or another) in a jurisdiction in each election. This would include rejected provisional ballots, rejected absentee ballots, and perhaps residual votes in particular contests. This measure might identify places where barriers to voter participation are more onerous and where election litigation is likely to occur.

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