



STATEWIDE BALLOT PROPOSAL 2018-3 — VOTING RIGHTS

In a Nutshell

Voting and access to the ballot are fundamental to a thriving, well-functioning democracy. While all citizens have a responsibility to vote on Election Day, it falls to the government to ensure that all aspects of the voting process, from voter registration to election certification, are efficient, secure, fair, and accurate. The Michigan Constitution entrusts the state legislature with the responsibility “to regulate the time, place and manner of all elections,” except for instances where the Constitution specifically addresses aspects of the voting franchise. The legislature has enacted the Michigan Election Law to carry out its constitutional responsibility. The legislature, through a majority vote and with the approval of the governor, can change different aspects of the voting franchise.

If Proposal 2018-3 passes, a number of “voting rights” will be enshrined in the Michigan Constitution. Many of them are currently dealt with in state law. By including these rights in the state constitution, it will make it more difficult for the legislature to make changes to certain aspects of the voting franchise.

If Proposal 2018-3 is rejected, many of these “voting rights” would be enforced in current state law. Lawmakers will continue to be responsible for safeguarding voting in Michigan through state law and would have the prerogative of implementing provisions not currently available. For example, if they wanted to adopt the automatic voter registration policy included in the ballot proposal, they would have to amend the Michigan Election Law to do so.

Major Issues to Consider: The key issue raised by the proposal deals less with the specific “voting rights” that would be included in the state constitution, than whether these policy preferences should be enshrined in the constitution. Most constitutional scholars believe that the state’s fundamental law should be reserved for establishing, defining, and limiting the basic powers of the government, stating general principles, and declaring the rights of citizens. Many of the policies contained in the proposal are ones that are essentially legislative matters that currently reside in the Michigan Election Law. Other states address these issues in statutory law as opposed to their state constitutions.

Introduction

Proposal 2018-3 on the November 6 statewide ballot is an initiated constitutional amendment proposed by a group called Promote the Vote. If adopted by the voters, it would grant to citizens certain voting “rights” within the Michigan Constitution as follows:

1. Protect the right to a secret ballot
2. Ensure military service members and overseas voters are sent their ballots at least 45 days before an election
3. Provide voters with a “straight party” voting option on the partisan section of ballots
4. Automatically register citizens to vote when they conduct business regarding a driver’s license or personal identification card with the Michigan Secretary of State, unless the person declines
5. Allow a citizen to register to vote anytime, including on Election Day, with proof of residency
6. Allow voters to vote absentee without providing a reason
7. Require audits of statewide election results

Each of these provisions would be added as separate subsections to Article II (Elections), Section 4 of the 1963 Michigan Constitution. Many of the provisions are either currently covered in the existing constitutional language (e.g., secret ballot) or within state law (e.g., straight party vote option). Other provisions (e.g., military and overseas

voting, same day voter registration) modify current timeframes related to election/voter registration administration. By including existing statutory provisions (e.g., straight party vote option) within the state constitution, the proposal would effectively insulate them from legislative intrusion.

Secret Ballot

The first subsection would provide for secret voting. Currently, Article II, Section 4 of the Michigan Constitution guarantees voters the right to vote a secret ballot. The current language directs the legislature to enact laws to preserve the secrecy of the ballot. This language would not be affected by the proposal. Instead, new language would be added to grant every qualified Michigan elector a specific “right” to vote a secret ballot. If adopted, the proposal would result in two secret ballot references in Section 4.

The secret ballot, also called the Australian ballot, allows voters to mark their choices in private on uniform ballots printed and distributed by the government at polling places. This type of ballot dates back to 1856 and was developed for use in Australian elections to protect against voter coercion and intimidation and to cut down on voting fraud. It

was adopted by individual states in the late 1800s through the early 1900s, with many moving to the secret ballot following the presidential election of 1884.

Today, all states protect the secret ballot, either via a constitutional (44 states) or a statutory (six states) provision. Three states (Colorado, Oregon, and Washington) conduct all elections by mail. In these states, ballots are distributed through the mail as opposed to the polling place and they can be marked in the presence of others, violating tenets of the secret ballot. In states that allow Internet voting, voters are required to sign a privacy waiver forfeiting the right to a secret ballot when votes are transmitted via the Internet. While Michigan’s absentee voting can be done like mail voting, it currently does not allow for Internet voting.

Military and Overseas Voting

Provisions in the Michigan Election Law already require local clerks to electronically transmit or mail an absentee ballot at least 45 days before an election to each absent uniformed services voter or overseas voter upon application. Proposal 3 would codify the existing 45-day requirement for military service members and overseas voters in the Michigan Constitution.

The 45-day requirement under state law was prompted by changes to federal law. In 1986, the

Uniformed and Overseas Citizens Absentee Voting Act established a set of guidelines for states to follow when providing ballots to those not at home to vote. After it became clear that timing of overseas ballots was an issue with the original federal law, the law was amended in 2009 (Military and Overseas Voter Empowerment Act) to require states to deliver absentee ballots to overseas voters at least 45 days before an election. Michigan law was amended to comply with changes in federal law.

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Straight Party Voting

General election ballots in Michigan are comprised of three sections: partisan (e.g., President, Governor, U.S. Congress), nonpartisan (e.g., judicial, school board), and ballot questions (e.g., local millage, constitutional amendments). Currently, voters may vote the partisan section of the ticket one of three ways: straight ticket, split ticket, or mixed ticket. The straight ticket ballot option, sometimes called the straight party option or one punch voting option, permits voters to make a single selection in the partisan section of a general election ballot to vote for all candidates with that party's designation. The straight party option applies to all federal, state, and local partisan offices that appear on the ballot. Current Michigan law permits the use of straight party voting. Proposal 3 would give straight party voting constitutional status and protection.

According to the National Conference of State Legislatures (NCSL), nine states currently allow straight party voting.^a States that once allowed the practice have been eliminating the straight ticket option on a regular basis, beginning with Georgia in 1994. Within the Great Lakes region, Illinois abolished the practice in 1997 and Wisconsin followed in 2011.

There is no consensus among scholars for or against allowing straight party voting. However, there is consensus regarding voting behaviors. While the direction of straight party voting follows party strength within a given jurisdiction (for example, in Utah more voters cast Republican straight ticket votes than Democrats), Democratic voters, especially low-income and minority voters, tend to use the option more. Republicans are more likely to vote straight ticket the conventional way without using the straight party option.¹ The conventional wisdom is that, the presence of a straight ticket ballot option helps Democratic candidates in statewide elections, while

its absence helps Republican candidates.

Voters, when presented with the option, tend to use it. Roughly one-third of voters in the U.S. use the option when it is on the ballot.² Previous research by the Citizens Research Council shows that Michigan voters tend to use straight party voting more frequently than is the case nationally.³ Participation in the partisan portion of the ballot increases as voters use the heuristic of party affiliation to predict which candidate they support and use the party identification as a shortcut. On the other hand, voting participation in the nonpartisan portion and ballot questions decreases because voters may not realize they have not voted this section of their ballot or they think the straight party selection covered these sections.

The mechanism reduces ticket splitting and may reduce ballot roll-off (this occurs when voters are fatigued with voting a long ballot and tend to cease voting after deciding on the high-profile, top-of-the-ticket offices). There is evidence that the option is associated with a higher incidence of voter errors. Some of this is explained by confusing ballots, complex instructions, and lack of feedback.⁴

Straight party voting has been an option in Michigan since 1891. Over the past 127 years, the legislature has attempted three times to get rid of the practice (1964, 2001 and 2015). Following the efforts to eliminate the practice in 1964 and 2001, public referenda successfully reinstated the option for Michigan voters.

The legislature attempted to get rid of it again in 2015^b; however, the law was blocked from taking effect in July 2016 by a federal court on grounds that it violated both the U.S. Constitution and the federal Voting Rights Act (VRA) of 1965 because it disproportionately affects African Americans. As a result, the straight party voting option was available at the November 2016 general election. In August 2018, the U.S. District Court in Detroit approved a permanent injunction against the state's straight party voting ban, arguing that it violated both the

a The states include: Alabama, Indiana, Kentucky, Oklahoma, Pennsylvania, South Carolina, Texas, and Utah. As noted in the text, the repeal of the straight party option in Michigan is currently under review by the federal court. The Texas Legislature repealed the option in 2017, but the law does not take effect until 2020.

b See Public Act 268 of 2015, effective January 5, 2016.

Equal Protection Clause of the U.S. Constitution and the VRA.⁵

In early September 2018, the 6th Circuit U.S. Court of Appeals ruled that the lower court erred in its August decision, effectively allowing the 2015 state law banning straight party voting to take effect. As of this writing, the straight party option will not be available to voters at the 2018 general election..

Automatic Voter Registration

The 1993 federal National Voter Registration Act ushered in a new mechanism for registering citizens to vote. The law, commonly known as the “motor voter”, required most states to provide citizens with an opportunity to register to vote when conducting driver’s license transactions with motor vehicle agencies (i.e., Department of State in Michigan). Recent state efforts to build on the foundation of “motor voter” laws endeavor to automatically register people to vote when they interact with a state agency, rather than merely providing them with the opportunity to register. These states are changing from an “opt-in” to an “opt-out” focus for voter registration.

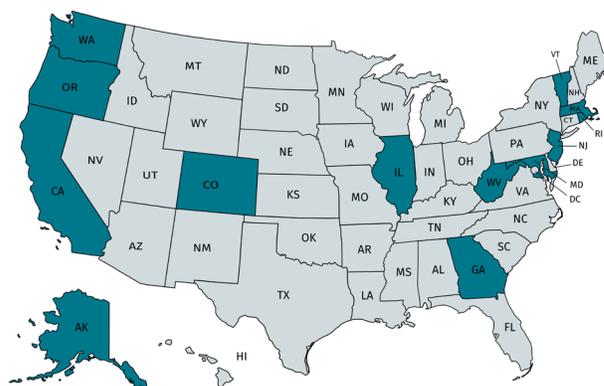
According to the Brennan Center for Justice, 12 states and the District of Columbia have authorized automatic voter registration programs (see **Map 1**). Oregon was the first to enact the policy in 2015. In addition to motor vehicle departments, some states automatically register citizens to vote when they interact with another agency (e.g., social service, veterans’ affairs).

While automatic registration increases convenience, scholars question its impact on actual turnout. Voting behavior experts conceptualize participation as a two-step process: registration and voting. When the onus is on citizens to register, those who do register are more likely to vote – they have gone out of their way to register in the first place, indicating an interest in voting and thus a higher propensity to vote.

However, this principle does not necessarily hold for automatically registered voters. The nature of automatic registration is that it registers those who

Codifying the straight ticket voting option in the Michigan Constitution would make it more difficult to eliminate it in the future (i.e., it would require a constitutional amendment as opposed to a simple statutory change). However, it is unclear if the recent federal court decision allowing the Michigan Legislature to get rid of the straight ticket option will be appealed and what will result from such an appeal.

Map 1
States with Automatic Voter Registration



Source: Brennan Center for Justice, New York University School of Law.

do not register on their own; once registered, these people are not necessarily going to vote. The total raw number of eligible voters will certainly increase, but the proportion of automatically registered people who will vote is lower than the proportion of those who registered on their own who vote.⁶ Despite this, the increased convenience and option to vote given by registration are positives.

If approved, Proposal 3 would grant each citizen the “right” in the state constitution to be automatically registered to vote. All states except Alaska that have adopted this policy have done so either legislatively or administratively; no state has it in their constitution. In Alaska, voters adopted the policy at the ballot box in 2016.

Voter Registration Deadlines

States are required by federal law to set voter registration deadlines no more than 30 days before an election. States can set a voter registration deadline for federal elections shorter than 30 days, but cannot set a longer deadline. Within the federal limit, states have different deadlines for in-person and mail-in voter registrations. Many states have registration deadlines much closer to Election Day (8 to 15 days is common). Michigan's deadline is 30 days, if registering in-person or by mail (it is one of 16 states that does not allow online voter registration).

Proposal 3 would extend Michigan's current 30-day registration deadline for both in-person and mail-in methods to 15 days before an election. This would effectively provide citizens with more time to register to vote at an upcoming election.

More significantly, the proposal would allow citizens to register to vote in person any time before an election, and on Election Day, with proof of residency. This change would effectively allow same day voter registration. Seventeen states plus the District of Columbia currently have same day/Election Day registration.

All states permitting same day/Election Day registration require proof of residency (e.g., driver's license or personal I.D.) as a security measure and to deter voting fraud. Also, all states allowing Election Day registration require voters to present identification. Proposal 3 would require individuals

to submit a completed registration form and proof of residency before receiving a ballot. Michigan law currently requires each voter to present a picture identification at the polls, or sign an affidavit attesting that he or she does not have identification, before receiving a ballot. The proposal's requirement to present proof of residency to register to vote is consistent with the current practice of presenting identification to vote under Michigan Election Law. Under the proposal, on Election Day, local clerks workers would be tasked with both registering citizens to vote and providing ballots to individuals that present a completed voter application and proof of residency.

Multiple benefits are associated with shortening the voter registration deadlines. Same day voter registration removes the traditional two-step process to voting, effectively making voting more convenient. With same day registration, citizens are able to fully participate in all aspects of the voting franchise when they are most aware of an election as opposed to earlier when they are less aware. Beyond convenience, same day registration has shown to increase voter turnout between three and seven percent.⁷

Unlike in other states, Michigan voter registration deadlines under Proposal 3, including same day/election day registration, would be established within the state constitution. All other states establish and define such deadlines within statutory provisions.

Absentee Voting

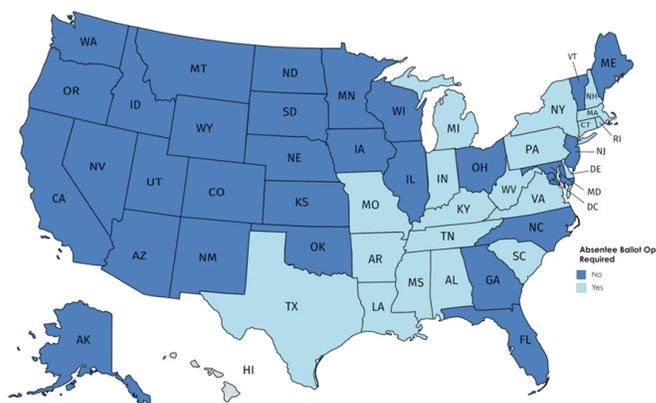
Thirty-seven states and the District of Columbia allow citizens to vote before Election Day, either by way of early voting, mail voting, or “no-reason” absentee voting. These procedures are intended to make voting easier. Absentee voting involves voters receiving paper ballots prior to Election Day and then returning their completed ballots to election officials. Procedures for absentee voting vary across the states. A common distinction across states is whether a reason is required in order to vote absentee. Twenty states require voters to provide a reason in order to receive an absentee ballot while the remainder allow no-reason absentee voting (see **Map 2**). Three states (Colorado, Oregon, and Washington) conduct all voting by mail and therefore a ballot is automatically sent to every registered voter.

Michigan does not allow any of the early voting mechanisms common across states. Instead, early voting can only occur if citizens provide a reason to vote absentee. Current law requires a registered voter wishing to vote absentee to meet at least one of six criteria. Proposal 3 would provide electors with the constitutional “right” to vote absentee without giving a reason. The proposal states that the right to a no-reason absentee ballot would be available anytime during the 40 days before an election. During this period, citizens would have the option to vote absentee either by mail or in person.

Another policy change included in Proposal 3 requires local clerks to be available during regular business hours and for at least eight hours during the Saturday and/or Sunday immediately prior to the election to issue and receive absentee ballots. Current law requires local election officials to be available on the Saturday preceding the election until 2:00 pm to receive mail-in absentee ballot applications.

Map 2

No Reason Absentee Voting in United States



Source: Brennan Center for Justice, New York University School of Law.

Statewide Election Audits

Post-election audits are designed to check that the equipment and procedures used to tabulate votes worked properly, and that the election yielded the correct result. Post-election audits can take many forms and states differ in their audit approaches. Generally, the procedure involves checking a portion of the paper ballots against the results coming from voting systems. Not all states require them. Post-election audits are different from recounts in that the latter are usually initiated or requested when the vote margin is close. Audits can lead to a full recount if errors are detected.

When they are required by states, the authorization for audits is found in state law. While Proposal 3 establishes within the Michigan Constitution the “right” to have the results of statewide elections audited, it would be up to the Michigan legislature to implement the specific procedures and processes involved. The specific language of the proposal refers to “statewide elections”, a term that generally refers to offices that appear on a statewide ballot, such as President, U.S. Senator, Governor, Michigan Supreme Court, education boards (e.g., State Board of Education, Michigan State University Board of

Trustees, etc.). Although they are state officials, members of the Michigan House of Representatives and Senate are not elected on a statewide ballot.

Michigan implemented a post-election audit program for county clerks in May 2018. The post-election audit process established by the Secretary of State

involves thoroughly reviewing procedures performed before, during, and after the conduct of an election, including a limited review of voted ballots with a hand tally of select contests. The review of voted ballots verifies that the equipment used to count votes works properly and yielded the correct result.^c

The Key Question – Constitutional Material

The important issues raised within Proposal 3 and the specific policy positions contained therein may very well be good, sound positions. Clearly, many of the issues have been the subject of public debate within the legislative arena for decades. As noted, many of the policies are settled and currently contained within statutory law. Experiences in other states suggest that many of the proposed changes will make it easier for citizens to vote, improve voter turnout, and/or ensure the integrity of the voting franchise.

The key issue raised by the proposal deals less with the policies themselves, than whether these policies should be enshrined within the state’s fundamental law – the state constitution. For most constitutional students, the document should serve to establish, define, and limit the basic powers of government and state the general principles and declare the rights of the governed. In this vein, Proposal 3 seeks to confer to every citizen certain voting “rights.”

It must also be pointed out that in addition to affirming rights, the proposal contains material that might otherwise be found in statutory law. In this regard, Proposal 3 joins a long list of proposed amendments to the 1963 Michigan Constitution submitted to voters (either by the legislature or by the people themselves) that contain detailed policy prescriptions that are essentially legislative matters. Housing public policy preferences within the state constitution makes it more difficult to remove or modify them, effectively insulating them from legislative responsibility and discretion. Voters would be well served to consider whether these preferences are constitutional “material” and avoid including matters ordinarily reserved for the legislative process.

c Michigan Department of State, Bureau of Elections. “Post-Election Audit Manual.” retrieved August 10, 2018. www.michigan.gov/documents/sos/Post_Election_Audit_Manual_418482_7.pdf

Endnotes

1 Kimball, David C., Chris T. Owens, and Matthew J. McLaughlin. “Straight-Party Options and State Legislative Elections.” Paper presented at Conference on State Politics and Policy, Milwaukee, WI, May 2002.

2 Ibid

3 Citizens Research Council of Michigan. *CRC Memorandum State Ballot Issues on November General Election Ballot*. No. 1065. September 2002. <https://crcmich.org/PUBLICAT/2000s/2002/props1-4/memo1065.pdf>

4 Hernson, Paul S., Michael J. Hanmer, and Richard G. Niemi. “The Impact of Ballot Type on Voter Errors.” *American Journal of Political Science*. Vol. 56 No. 3 (2012).

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6 Brown, Robert D. and Justin Wedeking. “Motor Voter, Registration, and Turnout Revisited.” *American Politics Research*. Vol. 34 No. 3 (2006).

7 National Conference of State Legislatures. “Same Day Voter Registration.” retrieved August 3, 2018. www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx

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