

'Till Death Do We Vote: The Thorny Issue of Votes Cast By People Who Die Before Election Day

Author : Sergio Pareja

Date : April 11, 2022

David Horton, [The Dead Voter Rule](#), 73 *Ala. L. Rev.* 341 (2021).

It is vastly better to address issues related to voting outside the context of a hotly contested election. Professor David Horton has done an admirable job of doing this with his article that addresses what he accurately refers to as a “comparatively niche issue of predeceasing absentee voters.” (P. 347.) Specifically, he takes on the nuanced and thorny issue of whether to count votes that were cast by a voter who subsequently dies before election day.

In his thought-provoking article, *The Dead Voter Rule*, Professor Horton notes that in the 2020 national election, more than 100 million voters used absentee ballots and early voting procedures before Election Day. This was out of the approximately 160 million total votes cast. A small number of early voters, however, died before Election Day. When this happens, many states utilize what Professor Horton refers to as the dead voter rule (the “DVR”) to invalidate those votes. While the numbers are small, Professor Horton accurately notes that those votes can alter the outcome of a close election. He argues persuasively that the DVR should be abolished and that we should not wait until we have a really close election to enact reforms.

Part I of the article surveys the rules surrounding early absentee voting around the country. It notes that many states apply the DVR to discard the ballots of people who cast ballots and die before Election Day. Professor Horton explains the history of absentee voting in the United States, noting that it initially emerged in some states to allow soldiers who were away during the Civil War to vote. It expanded after World War II to allow anybody who needed to be away, such as due to illness or traveling for business, to vote. By the late 1970s and 1980s, it expanded again in certain states to allow “no excuses absentee voting.” Similarly, some states began adopting early in-person voting as well. Collectively, these initiatives indicate a growing trend toward allowing “convenience voting.” This trend inevitably raises the question of whether states should honor the votes of people who vote early and pass away before the polls open on “Election Day.”

The article then explores the history of the DVR and notes that the first mention of the DVR seems to be in New Hampshire’s 1921 absentee voting law, which simply held that ballots cast by people who subsequently die before election day would not be counted if the officials charged with counting votes became aware of a voter’s death. Other states subsequently expanded that principle, saying that votes cast by people who die before election day would not be counted. By the 1990s, the DVR was the majority approach throughout the United States.

The rationale given for the DVR is simply that a person must be alive on Election Day to be qualified to vote. Professor Horton refers to this rationale as “rank formalism.” If a person votes and then dies before Election Day, the simplistic argument goes, that person’s vote will not count because they were not qualified to vote on Election Day. But had the person died on Election Day, his or her vote would count even though there is no strong substantive rationale that would justify the differential treatment. Professor Horton notes that, while the DVR is not applied with a great deal of frequency, it is a “visible part of the electoral landscape.” Most recently, in the last election, states rejected 6,599 ballots under the DVR, and that doesn’t count the 20 percent of localities that do not report this data.

Part II of the article evaluates two theories: (1) that the DVR is unconstitutional and (2) that the DVR is normatively flawed. As to constitutionality, it appears possible that intermediate scrutiny might apply to some applications of the DVR because voting is a fundamental right. However, because courts have uniformly held that there is no “right” to

vote absentee, a court could simply note that, because it is impossible for a dead person to actually vote on Election Day, candidates are not entitled to count absentee ballots submitted by predeceased voters in their favor.

Professor Horton also highlights a major issue with litigating such a constitutional challenge: standing. Who is able to challenge the DVR? The three potential plaintiffs are (1) estates of decedents who voted and then died, (2) candidates who, in order to win an election, needed the votes of predeceased voters, or (3) living voters who are terminally ill and likely to die before Election Day. As to (1), the estate lacks standing because constitutional rights die with the decedent, and the decedent is necessarily dead at the time of the alleged constitutional violation. As to (2), while the candidate might be able to demonstrate third-party standing, it is still necessary to demonstrate that the voter suffered a constitutional deprivation, which is not possible after death. Finally, as to (3), it is impossible to prove that the voter will definitely die before election day, making proof of standing impossible. Professor Horton ultimately concludes that a lack of standing should preclude a successful constitutional challenge to the DVR.

Although the DVR almost certainly would survive a constitutional challenge, Professor Horton argues that the DVR is normatively flawed and should be repealed anyway. Specifically, he argues that there is no persuasive justification for the DVR. His primary point is that the rationale for the DVR, that absentee ballots are not effective until Election Day, is a mere technicality. He argues that the rationale for not letting people vote after dying, either through a representative or through instructions in a will, does not apply to people who have actually cast a vote before dying. It would be inappropriate to allow people who die before attempting to cast a ballot to vote because they can no longer make informed decisions regarding issues presented in the election. Somebody who actually casts a ballot before dying, however, can make an informed decision, like any other early voter. Stated simply, the factors that generally disqualify dead people from voting under the DVR do not apply to living absentee voters who actually vote but happen to die before Election Day.

Another argument that is often made in support of the DVR is that it is administratively difficult to deal with the issue of predeceased voters. Professor Horton correctly notes that the opposite is true. It is administratively less convenient to figure out which voters may have died before Election Day so that their votes can be eliminated. In short, the DVR itself is burdensome to administer, and we would be better off without it.

The final argument often asserted in support of the DVR is that it reduces the risk of fraud. Professor Horton dismisses this allegation by noting that there is astoundingly little actual evidence of voter fraud of any kind in elections in the United States. With respect to absentee ballots, he notes that the conservative Heritage Foundation has identified only 204 cases of fraud involving absentee ballots out of 250 million votes cast in 2020. In short, there simply is no significant evidence of fraud that would support a rule, such as the DVR, that erases legitimately cast votes.

Professor Horton has written a thought-provoking article. While this may be a “niche issue” that will affect relatively few voters, I am persuaded by his arguments. The arguments in support of abolishing the DVR simply outweigh the arguments in support of keeping it in place.

Cite as: Sergio Pareja, *‘Till Death Do We Vote: The Thorny Issue of Votes Cast By People Who Die Before Election Day*, JOTWELL (April 11, 2022) (reviewing David Horton, *The Dead Voter Rule*, 73 *Ala. L. Rev.* 341 (2021)), <https://trustest.jotwell.com/till-death-do-we-vote-the-thorny-issue-of-votes-cast-by-people-who-die-before-election-day/>.