

Voting, Elections And Us Federalism: The State Government Perspective

Abstract

State governments in the U.S. exercise broad authority over elections and maintain a diverse set of rules regulating the process of registering to vote, casting ballots, and drawing congressional district lines, and even determining in some respects who is eligible to vote. In this contribution, I highlight the significant discretion that states exercise in making election rules and the range of rules in effect in the 50 states. I also take note of several ways that the scope of state authority is subject to modification by the Supreme Court and Congress, focusing on some recent and pending Supreme Court cases and congressional acts with the potential to broaden or constrain state authority.

In the United States, responsibility for determining the rules for electing officers of the federal government is shared by federal and state governments. In fact, state authority over elections in the U.S. is exercised to a degree virtually unparalleled in other countries. Several developments during the last year illustrate the prominent role of state governments in setting election rules and the significant variation in the rules in place in the 50 states, even as other developments and debates highlight the ways that state government discretion is subject to modification by Supreme Court rulings and congressional acts.

State Legislative Debates about Election Rules after the 2020 Election

State legislatures are currently engaged in extensive debate about revising election rules in the aftermath of an election held during a pandemic that prompted numerous adjustments to ordinary election processes, especially by expanding availability of voting by mail.

There is nothing new about voters casting ballots by mail in the U.S. Even before the 2020 election, a handful of western states operated full *vote-by-mail* systems. In these states, ballots are mailed to all eligible voters, who complete and return their ballots by mail and without need for anyone to set foot in a voting booth. Meanwhile, all states have long permitted *absentee voting*, where voters can request ballots that they complete and return by mail, in some states without any justification needed (*no-excuse absentee voting*) and in other states only when voters can provide a valid reason to vote absentee.

COVID-19 prompted a significant expansion of voting by mail and generated a number of changes in vote-by-mail procedures. Several states in 2020 decided for the first time to mail *ballots* to all eligible voters, thereby joining several western states that had done this for several prior elections. Other states chose for the first time to mail absentee ballot *applications* to all eligible voters. Still other states relaxed their absentee-balloting rules by removing the need for voters to provide a justification to vote absentee.

In the lead-up to the 2020 election, decisions were also made in a number of states, occasionally by state legislatures but at times by state executive officials, election boards, or judges, to change other rules regarding absentee balloting. Some states suspended their rules requiring a witness signature to accompany absentee ballots. Other states extended the time after election day when completed absentee ballots could be returned.

In the aftermath of the 2020 election, where a record-setting 43 percent of ballots in the U.S. were cast by mail, state legislators have drawn a range of lessons from the experience. Some state legislators have been encouraged by the high voter turnout percentage, which is by some measures the highest turnout recorded in the U.S. in 120 years, and have viewed expanded voting by mail as a key contributing factor. These state officials have sought to build on and make permanent some of the election-rules changes made on an interim basis in 2020.

Other state legislators have taken different lessons and expressed concerns about possible threats to election integrity resulting from changes made on an emergency basis. Legislation enacted in Georgia in March 2021 has attracted significant attention. Georgia's Election Integrity Act is a wide-ranging law that reduces the time period when voters can request an absentee ballot, bars state or local officials from sending out unsolicited absentee ballot applications, requires voters to provide identifying information (a driver's license number, a portion of their Social Security number, or a copy of a photo ID) when requesting an absentee ballot, and also limits the number and use of drop-boxes where voters can deposit their ballot ahead of the election, among other changes. However, Georgia legislators are far from alone in drawing lessons of this kind and changing election rules in state legislative sessions in the first part of 2021. Some state officials have recommended limiting the availability of no-excuse absentee voting. Officials in some states have called for requiring absentee voters to provide greater proof of identification, to match the information required of in-person voters. Still other state officials have sought to move forward the deadline for the receipt of absentee ballots, so that all ballots must be returned by election day. Although the divergent lessons and paths taken by states after the 2020 elections might seem surprising, this behavior is

largely continuous with, rather than a departure from, recent developments in U.S. federalism. Scholars have in recent years noted the prevalence of variable-speed federalism, whereby states in enacting policies tend to move in the same direction and toward similar goals, albeit with some states progressing more rapidly than others, as with legalization of marijuana and minimum-wage increases. However, scholars have also noted another trend whereby states in some policy areas move in opposite directions and toward different goals. This is especially evident in policy-making regarding firearms, abortion, and immigration. Policy-making regarding election rules represents yet another area where states exercise broad discretion and are moving in contrasting directions.

Recent U.S. Supreme Court Cases with Implications for State Authority over Elections

State authority to regulate elections is broad but is dependent in part on U.S. Supreme Court rulings interpreting the U.S. Constitution and congressional statutes. Two recent lines of cases are of particular importance, including one case argued before the Supreme Court in March 2021, *Brnovich v. Democratic National Committee*, that could provide clarity about how judges will apply a section of the Voting Rights Act of 1965 (VRA) when adjudicating cases challenging state election rules.

Two sections of the VRA are particularly important. Section 5, which is not at issue in the present case, applies only to a subset of “covered” states, which are identified by a formula based on state voting and registration rates in the early 1970s. States covered by this formula are required to seek prior approval for changes in election rules from the U.S. Attorney General or the U.S. District Court for the District of Columbia, who must ensure these changes do not have the purpose and effect of abridging the right to vote based on race and ethnicity. This pre-clearance provision is currently unenforceable, after a Supreme Court ruling in *Shelby County v. Holder* (2013), invalidated the formula for determining which states are covered, on the ground that it was outdated. Congress can always update this formula and has in recent years considered doing so. Unless and until Congress approves an updated formula, though, states are not required to seek prior approval from federal officials for election-law changes.

Another provision of the VRA, Section 2, is currently before the Supreme Court in the *Brnovich* case and continues to provide a vehicle for litigants to challenge state laws on the ground that they result in an abridgment of the right to vote on account of race. The case currently before the Supreme Court features Section 2-based challenges to a pair of Arizona voting rules. One of these rules prohibits votes from being counted when they are cast outside of a voter’s designated precinct. Another rule seeks to combat what is referred to as “ballot harvesting” by limiting which persons can collect a voter’s completed ballot and transport it to the polls. The U.S. Court of Appeals for the Ninth Circuit held these rules run afoul of Section 2 of the VRA. However, oral arguments before the Supreme Court this spring have led to expectations that the Court will reach a different result in the case.

Of particular importance will be the standard that the Supreme Court relies on to determine if the Arizona rules and other state election rules going forward will be held to disadvantage minority groups and therefore be invalidated. Will it be sufficient for judges to conclude that an election rule has a disparate *effect* on minority groups? Or will judges be instructed to balance any disparate effects against a state’s rationale for enacting such rules, and if so, how exactly should this balance be undertaken? The Court’s decision, expected in summer 2021, will have significant implications for the fate of recently enacted state elections rules as well as longstanding state laws.

Separately, state officials have followed with much interest another line of argument advanced in a series of cases filed in multiple federal courts over the last year. These cases originated in a series of changes made to state election rules in the months leading up to the 2020 election. In some instances, state laws provided for certain rules governing absentee ballots; but judges, executive officials, and elections boards ordered changes in these rules, most notably by requiring absentee ballots to be counted even if they arrived later than mandated by state law. Numerous lawsuits challenged these adjustments, in part on the ground that allowing changes to be made by officials other than state legislators violates the

Constitution's Elections Clause, which provides that the "Times, Places, and Manner" of holding federal elections "shall be prescribed in each State by the Legislature," subject to modification by Congress.

In one sense, the Supreme Court has already addressed the question of whether entities other than state legislatures and Congress can make election rules. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015) the Court held that a state's voters, acting through the citizen-initiative process, can take from the legislature the responsibility for drawing congressional districts and entrust this task to an independent commission. But the Court's ruling in the Arizona case did not address directly various questions raised in the 2020 election about whether executive officials and judges can modify election rules.

The U.S. Supreme Court refrained from addressing the merits of this argument during the 2020 election cycle. However, in opinions delivered in cases regarding election-law changes made in North Carolina, Pennsylvania, and Wisconsin, several Justices signaled an interest in revisiting the meaning of the Elections Clause and possibly preventing changes by anyone other than state legislatures or Congress. As Justice Neil Gorsuch wrote in a concurring opinion joined by Justice Brett Kavanaugh, pursuant to an order issued a week before the November election in *Democratic National Committee v. Wisconsin State Legislature* (2020), "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." Justices Clarence Thomas and Samuel Alito also urged the Court to determine the meaning of the Elections Clause, when they wrote separate opinions after the election, in February 2021, dissenting from the Court's decision not to grant review of several cases challenging election-law changes in Pennsylvania. Statements of this kind suggest the Supreme Court may well in a future case confront more directly these questions about the Elections Clause and the scope of state legislative authority over elections.

Recent Congressional Debates about State Discretion regarding Election Rules

The scope of state authority over election rules is also regulated to a significant degree by Congress, which is currently considering legislation that would have a transformational impact on the balance of federal and state responsibility in this area. The House of Representatives, in a March 2021 vote where all affirmative votes were cast by Democrats and all opposing votes were cast by Republicans, approved the For the People Act, which would set uniform national standards and limit state discretion in a number of areas of election law.

Among other provisions, the Act would require states to allow *automatic voter registration*, a practice adopted by 20 states where persons are automatically registered to vote when they interact with motor-vehicle offices and other social-service offices. States would also be required to allow *election-day registration*, a process currently in place in 18 states (two more states allow *same-day registration*, where persons can register to vote and vote on the same day during an early-voting period prior to election day). States would also have to provide at least two weeks of in-person *early voting*, a practice currently permitted in the vast majority of states but for widely varying number of days in the various states.

The For the People Act would also require states to restore voting rights to persons convicted of felony offenses once they leave prison. At present, states maintain a range of positions on when felons may regain the right to vote. A couple of states never deprive felons of the franchise, even while they are imprisoned. Another group of states restores the franchise to felons once they are released from confinement. Other states require felons to wait even longer to regain the vote, until after they complete parole and probation, and sometimes even requiring additional steps to be taken.

Additionally, all states would be required to entrust the task of drawing congressional district lines to independent commissions. As things stand, ten states will rely on independent commissions to draw congressional districts after the 2020 census, while another half-dozen states rely on advisory or back-up commissions to help draw districts as necessary. However, in the majority of states redistricting is still undertaken through the ordinary legislative process, which would be

superseded by the legislation under consideration in Congress.

This is only a partial list of the aspects of election rules where states currently exercise wide discretion but would be constrained in notable ways upon passage of the For the People Act. The bill's prospects are unclear in the Senate, because passage would require agreement among all 50 Senators in the Democratic caucus not only on the bill's substantive provisions but also to eliminate or modify the Senate's current filibuster rule, which permits most legislation to move to a vote only if it has the support of 60 Senators. To date, neither of these conditions has been met. Still, state legislators are watching with much interest the progress of a bill that would bring dramatic changes in the balance of state and federal authority over elections and lead to significant changes in election rules in most states.

In this regard, the debate over the For the People Act not only illustrates the significant extent of current state discretion over election rules and wide range of state policies but also highlights the ways that the scope of state authority is subject to modification by federal officials, whether through Supreme Court rulings or congressional legislation.

Dinan, J. 2021. 'Voting, Elections and US Federalism: The State Government Perspective', *50 Shades of Federalism*.

Further Reading

Brenan Center for Justice. Annotated Guide to the For the People Act of 2021. Updated March 18, 2021, <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>

National Conference of State Legislatures, "NCSL State Election Resources," January 5, 2021, <https://www.ncsl.org/research/elections-and-campaigns/election-laws-and-procedures-overview.aspx>

U.S. Census Bureau, "Voting and Registration in the Election of November 2020," April 2021, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>