Voting, Elections And Us Federalism: The Federal Government Perspective

Abstract

This article examines the U.S. Constitution's treatment of voting and elections and the use that the federal government has made of the powers granted to it by the Constitution. Because the thirteen states that formed the nation differed in the qualifications they imposed for voting, the Constitution originally avoided setting national qualifications, authorizing persons to vote in federal elections if they could vote for the lower house of their state legislature. Constitutional amendments have established a federal floor on voting qualifications, forbidding discrimination based on race, gender, age, and ability to pay a poll tax. States have largely regulated both their own and federal elections, but the Constitution grants the federal government concurrent authority in this area, and the constitutional amendments have granted it authority to enact "appropriate legislation" to enforce their prohibitions of discrimination. Congress relied on that authority to adopt the Voting Rights Act of 1965, giving the federal government unprecedented power to supervise state elections and voting regulations. This power has been circumscribed by Supreme Court rulings in recent years, leading Democrats in Congress to introduce bills to restore that power. Congress has also legislated to facilitate voting more generally, though Republicans have sought instead to restrict voting, claiming that this will combat election fraud. A major piece of legislation, the For the People Act, is currently before Congress, designed to nationalize election regulations and facilitate voting, but it faces strong Republican opposition, and its fate is uncertain.

When one thinks about American federalism, what comes to mind is the distribution of powers between the federal government and state governments, as mandated and safeguarded by the Federal Constitution. But with regard to voting and elections, things are different. Instead of sharply distinguishing federal and state powers, the U.S. Constitution grants overlapping authority. Article I, section 4 states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Note the Constitution's emphatic "at any time", confirming that federal power is coextensive with state power. Constitutional amendments have also established national standards for the franchise—making it illegal to bar anyone from voting on the basis of race, gender, age of at least 18, or through the use of a poll tax–and each amendment grants Congress the power to enforce its restrictions by "appropriate legislation". Voting and elections, then, are fields of fully concurrent power, of shared responsibility between nation and state, with the added proviso that should federal and state laws conflict, the Supremacy Clause dictates that federal law prevails.

This is not to denigrate the states' role—indeed, one scholar aptly described American elections as hyper-decentralized. For one thing, even if the federal government shares constitutional authority, often it chooses not to exercise that authority and leaves matters to the states. Arguably, that comports with the constitutional text, which assigns to state legislatures responsibility for voting qualifications and for the conduct of elections, even as it confirms the authority of the federal government to intervene "at any time". And throughout American history state governments have played the predominant role. Consider the controversy over the 2020 presidential election. It was state officials that oversaw the counting and recounting of ballots in this federal election and state secretaries of state that certified the election results.

Even when the federal government does act, federal law may establish a floor rather than a ceiling. States may not go below that floor—they can no longer, for example, deny the vote on the basis of race or gender–but they remain free to go beyond the federal law and to experiment. When an experiment in a single state succeeds, other states may choose to follow that lead—think, for example, of how several states extended the right to vote to women long before the federal government did so. Indeed, under American federalism, states historically have been the innovators–almost all federal initiatives on voting and elections were pioneered in the states. Justice Louis Brandeis referred to the states as little laboratories of democracy, and that description definitely applies with regard to voting and elections, both in the past and in the present day.

In addition, states remain totally free to determine the matters on which people vote. At the federal level, Americans vote directly only for representatives and, since the adoption of the Seventeenth Amendment in 1913, for senators. But in all the states citizens vote directly for the governor and often for other executive-branch officials and for judges as well, and in nineteen states they can recall these officials before the end of their term of office. Many states also authorize their citizens to vote on matters of public policy via state constitutional amendments, initiatives, and referenda. Once again, the federal government plays no role in determining the matters on which the citizens of a state can vote.

Finally, it should be noted that in setting voting qualifications for federal elections, the delegates to the Constitutional Convention of 1787 confronted a dilemma: the states had already established qualifications for their own elections, and these differed from state to state. Thus any national standards for voting in federal elections would have differed from those operating in at least some states, complicating the conduct of elections and implicitly disparaging the state standards from which they diverged. Some delegates actually feared that imposing distinctive federal qualifications for voting might jeopardize the ratification of the Constitution. To avoid this, the delegates decided that persons would be able to vote in elections for the House of Representatives if they could vote for members of the lower house of the legislature in their home state. That solution had an added advantage: those administering elections would not need two lists of eligible voters, one for federal elections and another for state elections. But it introduced two complications. First, it meant that there was no

uniform national standard for voting—if a state decided to lower the age for voting in state elections to sixteen, for example, then sixteen-year-olds in that state would also be eligible to vote in federal elections, but their counterparts in other states would not. Second, when the federal government does impose qualifications on voting in federal elections, this gives states a strong incentive to amend their state voting laws so that there are not different qualifications for voting in federal and state elections and different lists of eligible voters for each.

What has the federal government done with the power granted to it by the Constitution, and what might it do in the future? First of all, Congress has, albeit very belatedly, outlawed racial barriers to voting through the Voting Rights Act of 1965. Prior to its adoption, African-Americans in the South were systematically denied the vote, in blatant violation of the Fifteenth Amendment. In 1940, for example, only 3 percent of Southern blacks were even registered to vote. The Voting Rights Act authorized unprecedented intervention by the federal government to remedy that. Section 2 of the Act prohibited all state and local governments from adopting any voting law that discriminated against racial minorities. Section 5 prohibited jurisdictions with a history of racial discrimination from implementing any new voting laws or regulations until they were pre-cleared by the U.S. Attorney General or by the U.S. District Court for the District of Columbia. And Section 6 allowed federal examiners both to oversee voting registration in jurisdictions in which less than 50 percent of blacks were registered and to register voters themselves. This law had an immediate impact–in Mississippi, for example, African-American voter turnout rose from 6 percent in 1964 to 59 percent in 1969.

The Voting Rights Act continues as law today, but in diluted form. In *Mobile v. Bolden* (1980), the U.S. Supreme Court ruled that state laws or policies that had a disproportionate effect on racial minorities, absent proof of purposeful discrimination, did not violate the Voting Rights Act. Congress overturned that interpretation two years later, amending the Act to ban any voting practice that had a discriminatory effect, regardless of whether it was proved that the practice was enacted for a discriminatory purpose. Then in *Shelby County v. Holder* (2013) the Supreme Court struck down the Act's preclearance regime, arguing that many of the jurisdictions originally subject to preclearance no longer discriminated and that the law's determination of what jurisdictions should be subject to preclearance was therefore outdated. Four justices dissented, with Justice Ruth Bader Ginsburg observing that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." The ruling in *Shelby County* had a dramatic impact on politics in those previously covered jurisdictions. Texas, for example, immediately put into operation a very strict voter identification law that had previously been blocked under the preclearance provisions, and several other states that previously were constrained or deterred by preclearance also enacted laws that would not have survived preclearance.

In March, 2021, the Supreme Court heard oral argument in *Brnovich v. Democratic National Committee*, in which litigants argued that the justices should interpret Section 2 of the Voting Rights Act narrowly or even declare it unconstitutional. The decision in that case will likely not be announced until June. Meanwhile, legislation has been introduced in Congress to respond to the Supreme Court's ruling in *Shelby County*. The John Lewis Voting Rights Advancement Act, as it has been christened by its proponents, reintroduces preclearance for changes in voting and redistricting but applies it only to jurisdictions with a recent history of discriminatory action. It also specifically targets measures that states have historically used to discriminate against minority-group voters. When the bill was initially introduced in 2020, it passed in the House of Representatives on a largely party-line vote, but it was never considered by the Senate. It has been reintroduced in 2021, but it has yet to be voted on by either the House or the Senate.

Federal legislation on voting and elections has not been limited to combatting racial discrimination; it has also focused on facilitating voting and safeguarding the security of elections. Take, for example, the National Voter Registration Act of 1993 (also known as the Motor Voter Law). The Act required States to offer voter registration at state motor vehicle agencies and

some other state and local offices. It also required states to permit voter registration by mail-in application. Finally, it set standards and procedures for the administration of voter registration in order to ensure that states maintained accurate and current voter registration lists. When the law took effect, it affected forty-four states that did not already provide such registration opportunities. Or, put differently, six states had already pioneered the changes the law prescribed, acting as the little laboratories referred to earlier.

Events have sometimes also prompted congressional action on voting and elections. For example, in 2002 Congress adopted the Help America Vote Act, in response to the ballot controversy in Florida in the 2000 presidential election. The law required states and localities to upgrade their election procedures, including their voting machines, their registration processes, and poll worker training. However, it provided federal funds for these purposes, and it granted the states considerable leeway in how they would implement the requirements, so it was not a major imposition on the states.

The most comprehensive federal legislation affecting voting and elections is now before Congress, christened by its proponents the For the People Act. In March, 2021, the bill passed in the House of Representatives by a 220-210 vote, without a single Republican supporting it, and its fate in the Senate likely depends on whether the slim Democratic majority eliminates the filibuster and other obstacles to its passage. The For the People Act deals with matters as diverse as redistricting, campaign finance, the disclosure of campaign contributions, the recruitment and training of poll workers, the extension of voting rights in presidential elections to citizens living in American territories, the security of elections from cyberattacks and disinformation campaigns, ethics reforms for all three branches of the federal government, and the disclosure of tax returns for presidents, vice presidents, and candidates for those offices. In short, as even its supporters admit, it is a laundry list of proposals, united in their view by a concern to make elections more inclusive and secure and to ensure that they better reflect the popular will. As the bill states, the provisions are severable, that is, a ruling that one or more of them is unconstitutional does not affect the validity of the other provisions.

Let me highlight a few provisions of the Act dealing with voting and the conduct of elections. First, voter registration: The Act provides for online voter registration for federal elections nationwide and requires states to offer same-day registration for those elections. It also requires states to implement Automatic Voter Registration, under which when eligible citizens provide information to government agencies like the Department of Motor Vehicles, they are automatically registered to vote unless they affirmatively decline. This would in essence shift voter registration from an “opt-in” to an “opt-out” process.

In a sense, there is nothing novel about any of these proposals. Currently forty states have online voter registration, twenty-one have same-day registration, and eighteen have automatic voter registration. One can see this as the “little laboratories” aspect of federalism at work, proposing that initiatives that have succeeded in some states now be adopted more generally. But opponents object that this represents a nationalization of standards that currently differ from state to state and that reflect the differing perspectives of those states, a diversity that federalism is also designed to encourage.

Much the same can be said of the Act’s provisions dealing with the conduct of elections. These extend early voting to all fifty states, requiring states to allow at least two weeks of early voting for federal elections (including weekends), for a period of at least ten hours per day; to ensure that early voting locations are within walking distance of public transportation, and are accessible to rural voters; and to begin processing and scanning ballots cast during early voting at least two weeks prior to the date of the election. The Act also requires states to give every voter the option to vote by mail, and it simplifies the task of returning ballots by requiring states to provide drop boxes.

These proposals likewise are hardly novel. In 2020, forty-five states allowed their residents to vote in person before election

day, and twelve allowed such voting for at least two weeks prior, which is the standard proposed in the bill. Most states also encouraged vote by mail—in fact, forty-six percent of voters used that option in the November 2020 election. Nor is the aim of these proposals, namely, to facilitate voter participation, controversial. The question is whether a national standard is necessary or desirable or whether it is better to permit variation among the states.

Yet the issue is unlikely to be resolved based on federalism concerns. Democrats believe that facilitating participation in elections will work to their advantage, so they have both principled and partisan incentives for supporting the legislation. Republicans insist that the legislation will encourage voter fraud and destroy popular confidence in American elections, as well as working to their political disadvantage. They have therefore sought to address these issues through legislation in states in which they are the political majority, and so they oppose efforts to impose national standards governing voting and elections.

Tarr, A. 2021. 'Voting, Elections and US Federalism: The Federal Government Perspective', *50 Shades of Federalism*.

Further Reading

Brennan Center for Justice. "Voting Laws Roundup: March, 2021." www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 .
Gardner, James A. "Illiberalism and Authoritarianism in the American States," 70 AMERICAN UNIVERSITY LAW REVIEW 829-912 (2021).
Hasen, Richard L.; Lowenstein, Daniel Hays; Tokaji, Daniel P.; and Stephanopoulos, Nicholas O. ELECTION LAW—CASES AND MATERIALS, 6th edition. Carolina Academic Press, 2017.