

UCLA

UCLA Public Law & Legal Theory Series

Title

States a Bulwarks Against, or Potential Faciliators of, Election Subversion

Permalink

<https://escholarship.org/uc/item/204162vf>

Journal

Public Law & Legal Theory, 26(5)

Author

Hasen, Richard

Publication Date

2024-07-01

STATES A BULWARKS AGAINST, OR POTENTIAL FACILITATORS OF,
ELECTION SUBVERSION

BY

RICHARD HASEN

PROFESSOR OF LAW AND POLITICAL SCIENCE

DIRECTOR, SAFEGUARDING DEMOCRACY PROJECT

Appearing as a chapter in *Our Nation at Risk: Election Integrity as a National Security Issue* Issue 253-70 (Julian E. Zelizer & Karen J. Greenberg eds. NYU Press 2024))

Introduction to: Richard L. Hasen, *States a Bulwarks Against, or Potential Facilitators of, Election Subversion*, in *OUR NATION AT RISK: ELECTION INTEGRITY AS A NATIONAL SECURITY ISSUE 253-70* (Julian E. Zelizer & Karen J. Greenberg eds. NYU Press 2024)

States stand at the fulcrum of a decentralized, fragmented, and partially partisan system of election administration in the United States.¹ The continued ability to run free and fair US elections in these polarized and tumultuous times depends in no small part on whether states will continue to serve as bulwarks against election subversion or whether state actors will become facilitators of it, as the 2020 election signaled was possible.

Placing the states at the center of election security may seem odd given other actors' significant roles in the US electoral process. On the one hand, states do not have the final word on election rules governing federal, state, and local elections. Federal statutory and constitutional law trumps state rules by virtue of the US Constitution's Supremacy Clause.² For example, federal statutes require states to elect members of Congress from single-member districts, protect minority voters under the Voting Rights Act, and offer a provisional ballot to anyone showing up at the polling place in a federal election who asks to vote but who does not appear to be properly registered.³ On the other hand, states do not organize and run elections; they generally delegate that task to thousands of local election jurisdictions, typically counties, throughout the United States. Local agencies register voters, organize polling stations, process absentee ballots, and tabulate votes.⁴

The list of tasks and ground rules that states are not responsible for in US election administration, however, obscures the key role that states play in federal elections. Under the Constitution, states set qualifications for voting in congressional elections, subject to US constitutional constraints.⁵ States also establish the rules for choosing presidential electors and conducting congressional elections, the latter subject to congressional override; the Constitution gives little guidance for how states should do so.⁶ As the Supreme Court wrote in the 2023 case *Moore v. Harper*: "Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimension and font of individual ballots. Legislatures must provide a complete code for congressional elections, including regulations relating to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."⁷ States also help fund elections and establish statewide rules for their conduct, such as voter identification requirements, standards for parties and candidates to

¹ Richard L. Hasen, "Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them," *Election Law Journal* 19, no. 3 (September 2020): 263–88, <https://doi.org>.

² U.S. Const. art. VI, cl. 2.

³ Uniform Congressional District Act, 2 U.S.C. § 2c (West 2024); Voting Rights Act, 52 U.S.C. § 10301–10508 (West 2024); Help America Vote Act of 2002, 52 U.S.C. § 21082 (2002).

⁴ On the general contours of fragmented and divided election administration in the United States, see Kathleen Hale and Mitchell Brown, *How We Vote: Innovation in American Elections* (Washington, DC: Georgetown University Press, 2020), 19–44.

⁵ U.S. Const. art. I, § 2.

⁶ U.S. Const. art. I, § 4; art. II.

⁷ *Moore v. Harper*, 143 S. Ct. 2065, 2085 (2023) (internal quotation marks and brackets omitted, quoting *Smiley v. Holm*, 285 U.S. 355, 366 [1932]).

appear on the ballot, and the number of days (if any) of early in-person voting and voting by mail.

The states' central role in the US system of election administration came under close scrutiny during and after the contested 2020 presidential election. US president and presidential candidate Donald J. Trump repeatedly called the integrity of the US election system into question despite all evidence that the election was being run remarkably well under the difficult conditions of the COVID-19 pandemic. His complaints about the potential for fraud led some states to pull back from or seek to shut down efforts making it easier for people to vote in the pandemic.⁸

Following that election, when it was clear that Joe Biden had secured enough Electoral College votes in a fair election to win the presidency, Trump pressured state officials to nonetheless declare irregularities. For example, Trump infamously insisted that Georgia's secretary of state Brad Raffensperger "find" the 11,870 votes he would need to flip the state's Electoral College votes to his column. Trump and his allies wanted to use such declarations as a pretext for Republican state legislators in states that Biden had won to send to Congress alternative slates of presidential electors declaring Trump the winner. Trump was unsuccessful in convincing state officials across many states to subvert the election. The efforts came to a head with the January 6, 2021, insurrection at the US Capitol, when Trump supporters violently disrupted Congress's counting of Electoral College votes in an effort that some hoped would buy more time for state legislatures to send in fake elector slates.

The effort to overturn the 2020 elections failed, but the risk was salient enough that Congress in 2022 passed a new set of rules to clarify that state legislatures do not have the power to send in a slate of presidential electors after the state's voters have already chosen that slate in a fair election. The Supreme Court in the 2023 *Moore v. Harper* decision also rejected a radical version of the "independent state legislature" legal theory that could have given license for state legislatures to subvert voters' will in presidential elections.⁹ Trump also faced federal and state charges related to attempted election subversion.¹⁰

Post-insurrection federal change has not fully eliminated the risk of election subversion in the states, however. Millions of Trump's followers continue to believe the false claim of a stolen 2020 election and have pressured their legislators for faux "audits" of 2020 election results, for laws making it harder to register and vote, and for legislation that would shift power from local governments to states to administer elections. Some local election administrators and county canvassing boards have been swept up in voter fraud hysteria, and it has fallen to states to prevent local governments from opening new pathways to stolen elections.

This chapter considers states' essential role in ensuring the security of the US election system. The first section considers how states have served and can continue to serve as bulwarks against election subversion by local actors in a fragmented system. The second section considers the

⁸ For a brief description of the events of and following the 2020 election from which the rest of this account is drawn, see Richard L. Hasen, *A Real Right to Vote* (Princeton, NJ: Princeton University Press, 2024), chap. 5. For additional details, see Richard L. Hasen, "Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States," *Harvard Law Review Forum* 135, no. 6 (2022): 265–301.

⁹ *Moore*, 143 S. Ct. at 2085–88.

¹⁰ "Keeping Track of the Trump Investigations," *New York Times*, August 14, 2023, www.nytimes.com.

risks of states themselves as potential facilitators of election subversion, focusing in part on conflicts among state actors and the potential for state actors to check each other's power to ensure free and fair elections. The third section concludes by discussing what Congress and federal courts have done and should do to limit the risks of election subversion by states, local election entities, and private actors.