

New Federal Initiatives Project

**Elections; Universal Voter Registration;
Same Day Voter Registration**

By
Charles H. Bell, Jr.ⁱ

April 13, 2009



*The Federalist Society
for Law and Public Policy Studies*

www.fed-soc.org

Elections; Universal Voter Registration; Same Day Voter Registration

Background

Voter registration has traditionally been a function and responsibility of state and local governments in our federal system. All but one of the fifty states has some form of voter registration for eligible voters. South Dakota is the exception. Eligible voters are often called “electors” in the Federal Constitution and state constitutions. Typically, an “elector” for elections of members of Congress must meet the qualifications applicable for “electors of the most numerous branch of the state legislature” (Article I, section 2), which generally include being at least 18 years of age, a resident of the state, not imprisoned or on parole for the commission of a felony offense, and a United States citizen. Forty two states currently have voter registration systems with 15 or 30 day registration deadlines for voting in state elections. Seven states currently allow “election day” or “same day” voter registration: Idaho, Iowa, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming.

While Congress has the power to regulate the “time, place and manner” of federal elections under Article I, section 4 of the United States Constitution, the Congressional power to regulate with respect to federal, state and local elections had not been tested until Congress mandated that 18 year olds could vote in all elections. In *Oregon v. Mitchell*, 400 U.S. 112 (1970) the Supreme Court upheld Congress’ authority to set the age limit for voting in federal elections at 18 years, finding such authority under the Necessary and Proper Clause (Article II, section 1), the Fourteenth and Fifteenth Amendments and the “time, place and manner” clause (Article I, section 4). Concurrently, the Supreme Court affirmed that states could set their own age limits for state elections. The Twenty-Sixth Amendment to the Constitution setting the federal voting age limit at 18 was ratified in 1971.

1. National Voter Registration Act of 1993 (Motor Voter)

In 1993, Congress adopted the National Voter Registration Act (42 USC § 1973gg; Pub. L. 103-31, Sec. 2, May 20, 1993, 107 Stat. 77), often referred to as the “Motor Voter” law or NVRA. NVRA arguably commandeered the states’ voter registration processes to the extent it mandated that states utilize motor vehicle and other “public assistance” agencies of state government to register voters (section 1973gg-3; 1973gg-5), provided for mail-in voter registration of voters prior to 30 days before a federal election (section 1973gg-4), specified that “purges” of state voter registration rolls be limited so that registered voters would be maintained on the voter rolls unless they had failed to vote in two successive federal general elections, and required “same day ‘re-registration’ of voters who had moved within the same Congressional district without re-registering at their new voting domicile” (section 1973gg-6). Challenges to NVRA by a number of states, including California, Illinois, Michigan, Mississippi, Pennsylvania, New York, South Carolina, Vermont, and Virginia, were decided against the states’ constitutional claims. See, e.g., *Wilson v. United States*, 878 F.Supp. 1324 (N.D.Cal., 1995.)

Nonetheless, the issue as to the scope of Congressional power to regulate intertwined federal, state and local election matters, whether under the Tenth Amendment or general principles of federalism, remains unresolved. In *New York v. United States*, 504 U.S. 144 (1992), the Supreme Court noted that the limitations on Congressional power were found neither in the Tenth Amendment nor the Commerce Clause but derived from general principles of federalism. 505 U.S. at 158.

2. Help America Vote Act of 2002 (HAVA)

In 2002, Congress adopted the Help America Vote Act (42 USCA 15481 et seq.; Pub. L. 107-252), known widely as “HAVA,” which contained reforms related to federal elections, and amended NVRA, in a number of ways. HAVA created new mandatory minimum standards for states to follow in several key areas of election administration and provided funding to help states meet these new standards, replace voting systems and improve election administration. HAVA also established the Election Assistance Commission (EAC) to assist the states in HAVA compliance and to distribute HAVA funds to the states. EAC is also responsible for creating voting system guidelines and operating the federal government's first voting system certification program.

HAVA requires that the states implement the new programs and procedures in six key areas:

- (1) Provisional Voting
- (2) Voting Information
- (3) Updated and Upgraded Voting Equipment
- (4) Statewide Voter Registration Databases
- (5) Voter Identification Procedures
- (6) Administrative Complaint Procedures

HAVA has not generated broad constitutional challenges by the states to its new federal mandates. However, the pending U.S. Supreme Court case *North Austin Muni. Util. Dist. No. One v. Gonzales*, USSC No. 08-322, 557 F.Supp.2d 9 (USDC, Dist. Columbia 2008), probable jurisdiction noted, January 9, 2009, which challenges Congress’ reauthorization of section 5 of the Voting Rights Act, may raise new federalism issues that implicate both NVRA and HAVA’s mandates. Section 5’s constitutionality was affirmed previously by the Court in *South Carolina v. Katzenbach*, 383 U.S. 301(1966) and *City of Rome v. United States*, 446 U.S. 156 (1980). However, as one commentator has noted, section 5 of the VRA constitutes a uniquely intrusive “inversion of the normal federal-state relationship.” Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 216 (2007).

New Congressional Initiatives

Ferment about federal election reforms resumed following the 2004 Presidential elections. New legislative proposals were promoted by groups such as the NYU Law School’s Brennan Center for Justice and ACORN-controlled Project Vote and sponsored by leading Democrat members of Congress, to enact a new federal mandate for “election day voter registration.” See, e.g., S. 804-110th Congress (Clinton, D-NY) and H.R. 1381-110th Congress (Stubb-Jones, D- OH 11). S. 804 and H.R. 1381 mandate that states adopt “election day registration” for voters in federal elections (See, e.g. S. 804, Part 9, section F). Neither of these legislative measures was adopted in the 110th Congress.

Following the 2008 elections, the Brennan Center, Project Vote and other groups promoted the concept of “universal voter registration” (UVR). See, e.g., Brennan Center for Justice “Voter Registration Modernization,” October 31, 2008 Report. W. Weiser, M. Waldman, R. Paradis. (http://brennan.3cdn.net/b75f13413388b2fccc_ynm6bn112.pdf.) UVR’s goal would be federally-

mandated automatic voter registration of all citizens of voting age. The premise of UVR proposals is that voter registration is too important to be left to voluntary private initiatives (of voters and third parties) or government assisted programs (most states have voter registration outreach and promotion activities, which were encouraged by NVRA and HAVA.) The proposals are for Congress to provide:

- (1) A mandate for universal voter registration within each state;
- (2) Federal funds for states to take steps toward universal registration;
- (3) A mandate for “permanent voter registration” systems, so that once voters are registered, they will stay on the rolls when they move; and
- (4) A mandate for fail-safe procedures, so that eligible voters whose names do not appear on the voter rolls or whose information is not up to date can correct the rolls and vote on the same day.

The Brennan Center proposes two methods to establish universal registration lists: (1) use existing lists such as DMV, income tax, and social service records, and (2) conduct a census-like enumeration using mail surveys and in-person follow-up visits. Other groups such as Progressive.org and Fair Vote have suggested similar reforms, including pre-registration of 16-17 year olds and opt-out features that would allow individuals to decline to accept this mandatory, universal voter registration status.

Constitutional and Legal Issues

In addition to any policy issues that exist concerning voting, there are also a number of potential constitutional and legal questions. A few that have been raised are:

1. Would either the principles of federalism or the 10th Amendment pose problems for the enactment of UVR requirements for federal elections (universal voter registration, permanent voter registration, and fail safe procedures)?
2. Are UVR requirements consistent with states’ Constitutional rights to conduct state and local elections or set qualifications for “electors”?
3. Will the Supreme Court ultimately decide the pending case *Republican National Committee v. Federal Election Commission*, concerning prohibitions and restrictions upon political parties of the Bi-Partisan Campaign Finance Act, pending before a three judge panel of the U.S. District Court for the District of Columbia to restrict federal campaign regulation to activity that “unambiguously relates to a federal election,” and if so, will such a result impact the constitutionality of federal statutes concerning voter registration that affect state regulation of state and local elections?

Related Links:

The National Voter Registration Act of 1993

http://www.usdoj.gov/crt/voting/nvra/activ_nvra.php#1993

The Help America Vote Act

http://www.fec.gov/hava/law_ext.txt

South Carolina v. Katzenbach, 383 U.S. 301(1966)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=383&invol=301>

City of Rome v. United States, 446 U.S. 156 (1980)

<http://supreme.justia.com/us/446/156/case.html>

ⁱ Bell, McAndrews & Hiltachk, LLP