SCHOLARS
STRATEGY NETWORK

Improving Federal Preclearance of Potentially Discriminatory Changes in Voting Rules

Keith Gunnar Bentele, University of Arizona

One of the most important provisions of the 1965 Voting Rights Act was "preclearance," a process by which states and localities with a documented history of voting discrimination were required to receive approval from the Department of Justice before implementing changes to their election rules. Designed to prevent new forms of election discrimination, preclearance was used as recently as 2012 to block the implementation of strict voter identification laws that would have especially hindered minority voters in Texas and South Carolina.

The original 1965 provision had an expiration date, but Congress reauthorized it repeatedly. That happened once again in 2006, when Congress amassed evidence that voter discrimination *remains* unusually prevalent in the states and local jurisdictions originally covered by the preclearance provision. However, in 2013 the Supreme Court ignored the evidence Congress used and invalidated the existing use of preclearance on the grounds that the formula referred to decades-old facts about racial discrimination. Technically, the Supreme Court did not rule that preclearance is unconstitutional. Instead, it said that Congress needs to enact a new coverage formula. Until that happens, states are free to change voting rules as they like. Right after the Supreme Court cleared the way, seven states – including Texas – moved forward with new voting restrictions that had previously been blocked by federal authorities.

An Attempt to Update Rules for Preclearance

In early 2014, a bipartisan bill was introduced in Congress that would amend the Voting Rights Act in several ways, including by updating the formula for preclearance. Jurisdictions that have repeatedly violated voting rights over a period of 15 years would become subject to prior review of future voting rule changes, and this supervision would continue until ten years after the last violation. This modification would meet the Supreme Court's call to tie preclearance to recent instances of discrimination.

However, some voting rights advocates have questioned whether the proposed new coverage provision is broad enough. The bill's formula, if it were in effect today, would leave out some jurisdictions regulated by the original Voting Rights Act – and, more important, it would leave out states such as Florida, North Carolina, and Arizona that have recently changed their voting rules in controversial ways that have an extra impact on minorities. Of course, the dynamic nature of the newly proposed formula would allow such states to be subjected to preclearance in the future if they were found to have discriminated against groups of voters. Even so, this wait-and-see approach partially frustrates one of the key purposes of preclearance, which is to prevent discrimination against voters and their ability to influence election outcomes *before* harmful new rules go into effect in the first place. The new bipartisan effort in Congress certainly tries to reinstate some of what the Supreme Court stripped out of the Voting Rights Act, but it remains fundamentally backward-looking by targeting jurisdictions for extra scrutiny based on past violations of voters' rights.

The Value of Looking at Risk Factors for Voter Discrimination

A different approach would be to try to predict future discrimination and impose preclearance where it is especially likely to happen. Given that the value of preclearance lies in preventing voting rights violations before they happen, it might make sense to identify strong "risk factors" for such violations by specifying the combinations of demographic and other features of a state or local jurisdiction that are strongly associated with discrimination.

Predicting places where future violations may happen is not whimsical science fiction. Contemporary quantitative social science can do it, by examining characteristics of states that have been associated with the repeated passage of restrictive voting legislation. In a recent study, for example, my research collaborator and

I found that the states most likely to pass legislation restricting voter access between 2006 and 2011 fit a certain profile. They were states with relatively high and growing minority voter turnout and governments under full Republican control. Such findings tell us that states with similar factors are the ones most likely to pass restrictions. In fact, the risk factors that we identified were present in North Carolina – and just two months after the Supreme Court halted preclearance, that state passed a raft of harsh voter restrictions that will disproportionately affect racial minorities.

In short, states have clearly measurable characteristics associated with a greater or lower likelihood of instituting measures that impede voters. A very large minority population is one relevant characteristic, as is racially polarized voting, where voters of different races have very different political preferences. Yet another worrisome indicator is the prevalence of negative racial stereotypes in the electorate. As it turns out, these risk factors all tend to be relatively high in the states that were covered by the 1965 preclearance formula that the Supreme Court struck down; and they are also strongly present in states that are currently enacting new voter restrictions such as cut-backs in early voting and rules requiring people to present specific types of photo identification that some voters do not already have.

As the proposed new Voting Rights fixes in Congress suggest, past discrimination is a good way to decide which states should be kept under supervision. But adding an assessment of present risk factors would further strengthen equal voting protections. The state of Alabama, for instance, committed repeated violations in the past, but it would not be covered by the new bill. However, this state currently ranks high on measures of anti-African American stereotyping, racial polarization, and the size of its minority population, so a risk factors approach would impose preclearance on Alabama – and also on Florida, South Carolina, and North Carolina.

To be clear, the bipartisan bill under consideration in Congress would be an enormous improvement over the current situation, in which older forms of preclearance have been invalidated and not replaced. Nevertheless, Congress has an opportunity to improve preclearance to reflect modern conditions. Allowing the Justice Department to consider high risk indicators would enable it to review, and if necessary block, proposed new state and local rules that might undercut equal voting rights. That would bolster the original intent of the Voting Rights Act. Ironically, innovative recent efforts to undercut voting rights in states with polarized electorates only underline that strong protections not only remain necessary, but must be continually updated.