

**Elections, Federalism, and the Peril of a Partisan Race to the Bottom**

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How we conduct elections is normatively important. It is an inherently value-laden exercise. And this is one reason the politics around election reforms often is so intense---because values like fairness are involved. Certainly, I have many times found myself morally outraged by the recent machinations of policymakers and politicians to bend, break, and change the rules of elections.

Nonetheless, elections also are a competition with participants who monomaniacally pursue victory. Hence, I suggest there is value in setting aside our passions and trying to view these partisan machinations as a sort of game that has gone bad. I suggest we think of these partisan contests as an interactive prisoner's dilemma generating ruinous competition. Doing so both highlights the logic of the scrum and suggests some ideas for reforms that are win-win. Having said that, I want to be clear that I am not here suggesting moral equivalence among the various actors and actions. Some are worse than others---far worse.

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For certain, I am glad we do not have a centralized, federally administered system of elections for the presidency and Congress. To see the danger of such a system, one need only look to Russia, which has a Central Election Commission. That agency is one of the tools President Vladimir Putin uses to maintain his iron grip on the nation.

By assigning authority to conduct federal elections to the states, the US Constitution makes it far less likely that any president or cabal of legislators can control the elections. This strikes me as a critical bulwark for our representative democracy.

Yet a federal system comes with its own challenges. Such a system yokes together disparate entities in pursuit of collective goods. By nature, there will always be tensions between the good of the individual unit and that of the whole. At any moment, a state may see an interest in pursuing a course that it views as self-advantageous but that negatively affects other states or that can scuttle national objectives. The founders foresaw some of these perils and built in some

constitutional curbs. [Article I, section 10](#) of the Constitution, for example, expressly forbids any state from signing a treaty with a foreign nation or imposing duties on shipments arriving at its ports.

But the founders left most authority to conduct elections for federal offices to the states. [Article I, section 4](#) famously declares, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” Allowing each state to mostly craft its own policies for presidential and congressional elections means relying upon 50 separate entities to produce a collective result that the nation accepts as valid.

And today, unfortunately, we see more and more state-based actors attempting to pursue their own electoral interests at a cost to the collective good. Certainly, we saw the problem on January 6, 2020, when senators and representatives from various states sought to throw out states’ electoral slates under a spurious interpretation of a 130-year-old statute.

Across America, we are seeing sharp red-state-blue-state election policy divergences. Republican-led states are moving to alter elections rules to combat purported fraud; Democrat-led states are making permanent the emergency COVID access rules (e.g., drop boxes). In each case, the party operates under the assumption that these changes are advantageous. Republicans often imagine higher turnout increases the odds of Democratic victories. Democrats also believe that. Never mind that this operating assumption is [highly questionable](#) if not [outright wrong](#). And, of course, both parties engage in aggressive gerrymandering that often generates [lawsuits](#).

Why is this happening? The causes are many, but my view is that [increased partisan competition](#) for the presidency and Congress over the past few decades has fomented a zero-sum concept of federal election politics. Each party thinks it has a good chance to win the presidency or chambers of Congress. Therefore, the parties and their candidates see greater and greater incentives to heighten the brand differences between Democrats and Republicans. Those holding office see utility in actively thwarting the success of the other party’s elected officials on electorally salient issues and busting norms and rules around the conduct of elections.

Whether it is altering access to the ballot or having one’s congressional representatives and senators object to states’ electoral slates, the “rational” strategy in this game is to break or alter the rules. Of course, all this jockeying carries with it a collective cost: loss of faith in election results and increased distrust between partisans that seeps into the electorate.

The situation is akin to a [prisoner’s dilemma](#), wherein competitors choose selfish strategies that leave them both worse off. As classically analogized, imagine two individuals are arrested for a crime, separated from each other, and asked to confess. Under the punishment terms offered by the police, if each refuses to confess, they each get the shortest possible term, or maybe they are

set free. If they both confess, they each get long prison terms. But if one confesses and the other does not, the one who rats out the other gets a short stay in prison and the other gets a longer lockup. In short, participants, especially if they have low trust for each other, have strong incentives to pursue their self-interest, and when both do so, they each end up worse off.

Although an imperfect analogy, this game does illuminate the logic of partisan election competitions to control the presidency and Congress. Candidates and campaigns face a choice: Pursue victory while upholding the existing rules (cooperation) or pursue victory by breaking or changing the rules (defecting). Seeing a reasonable chance to win and utterly distrusting their opponents' willingness to follow the rules, competitors increasingly choose the latter course. This game is repeated every couple of years, and each previous misdeed increases the distrust between the competitors and further fuels their incentives to engage in rule-bending, rule-breaking, and rule-rigging.

But unlike for the prisoners in the dilemma, mutual defection in the election game creates spillover costs for Americans collectively. These come in the form of [decreased citizen trust in federal elections](#) and a [rising "us versus them" mentality](#) among partisans that leaches into the public generally.

This is deeply problematic, as representative government is predicated on a belief in a [fair competition](#) for office that establishes elected officials as the legitimate trustees for the public. So, here we are.

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Thinking of the relentless feuds over election rules in this way can provide some insights on what can be done to improve matters.

If we are fortunate, in some instances the ruinous competition will create incentives for the participants to negotiate a truce and remove certain dangerous machinations from the game. We are seeing this occur with the ongoing [bipartisan efforts](#) to reform the Electoral Count Act (ECA). Both parties recognize that at some point the other party's vice president will be the [presiding officer](#). Hence, they aim to amend the law to make it clear the presiding officer has no independent authority to refuse to count states' electoral slates. So, too, the proposed amendments recognize legislators' incentives to object to states' slates but would decrease the probability of a disrupted count by raising the evidentiary bar and limiting the bases for objections. And like in any game, there is good sense in firmly inserting an umpire (i.e., the judiciary) to render prompt, definitive rulings on aspects of the ECA game where controversies are likely.

Similarly, it is possible the participants in the elections game may rethink their strategies if the evidence continues to mount that toggling ballot access to affect turnout is of limited utility for producing partisan wins in federal elections. Unfortunately, both parties seem deeply bought into this notion, but we can remind them of the evidence to the contrary often and perhaps hasten their learning.

Partisan competitors in the elections game also are experiencing costs from lawsuits. Adverse court decisions and the attendant legal and reputation costs can alter the incentives to choose particular strategies and, if repeated, could dampen the perceived payoffs of rule bending, breaking, and changing. While few Americans are naturally fans of lawyers, the apparently never-ending suits around the November 2020 elections generally are beneficial.

Certainly, conceiving of partisan election policy fights as a game should dampen our hopes that appeals to fair play and high principles will correct behavior. The players simply believe too much is at stake and fear unilateral disarmament and being played for a sucker. Nonetheless, there is no harm in escalating the costs associated with behaviors with significant collective costs. For example, “Nobody likes a sore loser” has long been part of the American ethos. We need to find ways to restore this nonpartisan “[losers’ consent](#)” expectation to all candidates and heap scorn on those who do not abide by it and [corrode public trust](#).

We also should remind players in the voting wars that winning a dominant majority in control of all three branches is exceedingly unlikely, and, even if achieved, it will provide [limited payoffs](#). Our system of separated powers makes divided government the norm, and federal politics is never a winner-takes-all effort. Congress and presidents make bipartisan policy with [remarkable regularity](#), which is a win-win.

Lastly, we can reduce the incentives fomenting a race to the bottom by working to remove certain maneuvers from partisans’ playbooks. It will not be easy, but it could be achieved by bargaining out a federal framework for election policies that enhances the brands adopted by each party. Democrats pride themselves on access, Republicans on security. Too often, the parties portray these two goods as mutually exclusive. They are not, as Republican-dominated Utah’s [easy-to-vote, hard-to-cheat model](#) demonstrates. The Bipartisan Policy Center and various groups released a [framework](#) for reform earlier this year that proposes federal standards for both ballot security and access. The same senators who led the efforts to reform the ECA might be well positioned to lead the process to develop this into legislation.

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Indubitably, other insights and implications for conceiving of our nation's political fights over election policies can be gleaned from conceptualizing the disputes in terms of a game of ruinous competition. As scholars love to declare, further study is warranted.

Assuredly, the high stakes of failing to arrest a race to the bottom should encourage us all to direct our minds to solutions. We all might be mindful that like the prisoners in the dilemma, we will not escape this ruinous game until we transcend intense mutual distrust.