

Election Reform, Federalism, and the Obligations of Voters

by John Samples

Executive Summary

Congress will soon decide whether to change the American electoral system. Several private commissions—one headed by former presidents Gerald Ford and Jimmy Carter—have already reached their conclusions and proposed changes to the way we run our elections.

Since the founding of this country, state and local governments have had primary responsibility for running congressional elections. Congress has the authority to override state and local regulations regarding congressional elections, although the Founders foresaw this power being used only in “extraordinary circumstances.” The events of 2000 were not “extraordinary.”

Congress should preserve the primacy of the states in electoral administration. If Congress decides to spend federal tax money on elections, the funds should go to the states without any strings attached. Nationalizing elections through federal mandates would be a constitutional and policy mistake.

Until now the election reform debate has

ignored the need to preserve the integrity of elections. Voters have at least the obligation to register and to be informed enough to cast a ballot successfully. Seeing election reform as a collective problem to be solved solely by collective action is a profound error that may harm the Republic.

The states should be free to make their own decisions about voting equipment and voter registration systems. Congress should reform the Motor Voter law by removing the obstacles that have ruined many voting lists. States should consider sharply limiting absentee and other voting outside the polling place. Provisional voting will prove costly both in direct outlays and in delaying election results. Election Day should not be a national holiday. Media projections of election results do little harm and should not be banned directly or indirectly by government. Voters need more education, a goal served by more competitive elections and an end to current restrictions on campaign finance.

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Introduction

Following the disputed presidential election of 2000, Congress seemed ready to move quickly to reform American elections. Conflict soon replaced consensus, however, especially in the House of Representatives, and other, more pressing issues filled the congressional agenda. Congress is now expected to address election reform in the fall of 2001.

While Congress worked on other issues, several commissions examined the putative shortcomings of American elections and proposed reforms. A commission headed by former presidents Gerald Ford and Jimmy Carter reported first,¹ followed shortly by reports from a loose alliance of liberal organizations² and from the National Council of State Legislatures,³ the National Council of Secretaries of State,⁴ and state and local election administrators.⁵ The findings of these groups may well inform policymaking in Congress.

Until now, most of the debate about election reform has focused on technical details, perhaps because of Florida's legacy of hanging chads and residual votes.⁶ This paper will take a broader look at election reform. Improving America's elections is more than a matter of buying better machinery for registration and voting. Election reform, like much of our politics, involves our deepest constitutional and political values. This paper will examine proposals to reform elections in light of those values.

Constitutional Considerations

Most reformers look to the federal government to improve elections. However, from the beginning of the Republic, state and local governments have had primary responsibility for electing the president. In Article II, sec. 1, the Constitution grants state legislatures the power to decide how to select presidential electors. Although much of the controversy in 2000 concerned the presidential election,

most of the debate about election reform will focus on the power of Congress to regulate elections throughout the nation. The states have also traditionally administered elections to the House and the Senate. Nationalizing administration of congressional elections would depart from settled practice. Would it contravene the Constitution? Answering that question requires a clear and distinct idea of the constitutional basis of congressional authority to regulate the administration of federal elections.⁷

The Constitution confers authority on Congress to regulate congressional elections in Article I, sec. 4, clause 1 (the so-called Elections Clause):

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, except as to the Places of chusing Senators.

The second section of the clause allows Congress to override the states in regulating elections. This override was controversial from the start. During the Constitutional Convention, two delegates tried and failed to strike the section that begins "but the Congress may at any time. . . ." Speaking against that deletion, James Madison said the congressional override assumed "the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices."⁸

During the ratification debate, the anti-Federalist opposition to the Constitution attacked the Elections Clause, arguing that a predatory Congress would assume full control over all elections to rig the continual election of "the wealthy and well-born."⁹ That critique forced James Madison, Alexander Hamilton, and others to justify and explicate the Elections Clause.

In *Federalist* no. 59, Hamilton notes that the Constitutional Convention could have

given authority to regulate elections to the national government alone, to the states alone, or to both. Hamilton recounts the convention's decision:

They have submitted the regulation of elections for the Foederal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.¹⁰

The Constitution clearly establishes a presumption that the state governments are to regulate congressional elections largely because, as Madison said at the Virginia ratification debate, the states are "best acquainted with the situation of the people."¹¹ That presumption could be overcome, Hamilton said, in "extraordinary circumstances." According to the original understanding, the Constitution did not establish an unrestricted right of the national government to override state regulation of elections; it could do so only in "extraordinary circumstances." What were those circumstances in the view of the founding generation?

On this question, Madison and Hamilton offer slightly different answers. For the latter, the federal override prevents the state governments from destroying the union. He worried that if the states had exclusive control, a few "might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited) to discontinue the choice of members for the Foederal House of Representatives."¹² Madison later gave a similar account of the reasoning of the convention on this point at the Virginia ratification debate.¹³

Madison supplemented Hamilton's view of the Elections Clause. The convention, Madison

says, "thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent." By this he did not mean that the national government should impose a detailed blueprint on states and localities. Instead, Madison believed the national government should override state regulations to avoid gross injustices: "Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government."¹⁴

In sum, the founding generation did not believe Congress had plenary power to regulate state elections. Defenders of the Constitution, not to mention their anti-Federalist opponents, saw the Elections Clause as favoring state primacy in almost all situations, save for Hamilton's and Madison's exceptions. A Congress attentive to the original understanding of the Constitution would avoid federal control over elections absent extraordinary circumstances.¹⁵

In retrospect, the presidential election in 2000 was simply a close contest dependent on a recount in one state. National unity did not come into question nor do we have convincing evidence that officials denied anyone the right to suffrage, though some Americans, as always, did not successfully cast ballots.¹⁶ Moreover, survey data indicate Americans were more satisfied with their democratic process after the 2000 election than after the 1996 contest.¹⁷ Neither the election nor the electoral systems used by the states constitute the "extraordinary circumstances" foreseen by the Founding generation.¹⁸ Accordingly, the constitutional basis of a federal override of the states is absent. Without that foundation, Congress should not set about regulating state elections.

It should also be recognized that the courts have asserted broad de facto constitutional authority for Congress to override virtually any state regulations on elections. In 1880 the Supreme Court stated:

If Congress does not interfere, of course [electoral regulations] may be

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made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially.¹⁹

In 1997 a majority assumed in passing that Congress could override the states in matters of election administration including both general and primary contests.²⁰ Concerning the Elections Clause, like many other parts of the Constitution, the Supreme Court has rejected the original understanding of the Constitution in favor of a strong national state.

For purposes of argument and analysis, I will accept this broad interpretation of the Elections Clause. Having done that, I can only hope for a second-best solution in which the original understanding of the Elections Clause creates at best a presumption in favor of the primacy of the states, even if not the originally intended high bar against federal action absent “extraordinary circumstances.” I will examine proposals for election reform with an eye to preserving the role of the states.

Nationalizing Elections

Given the current understanding of the Elections Clause, Congress has a de facto power to spend money on federal elections. Should it? Election officials in the states are now eager for new federal funding for election reform.²¹ As in other policy areas, a great danger exists that federal money will come with federal controls. On the whole, the states might be better off refusing money from Washington.

In fact, it seems likely that Congress will soon pass a law concerning federal elections. Given that, the question facing the nation is whether Congress will also give the states federal tax money to carry out the law or impose the cost of the new legislation wholly on the states. In that light, a federal commitment to comity with the states might lead Congress to send funding to the states.²² The question

of how states might receive federal money without becoming subservient to Congress and national political groups remains.

Congress can send money for election reform to the states in three broad ways. It can mandate specific policies and provide money for their implementation. If Congress does provide money, it could either make federal money conditional on the states’ meeting federal guidelines or it could simply give states the money with few strings attached. Federal mandates are the least respectful of the states, whereas block grants allow states the most discretion.

Federal Mandates

Sen. Christopher Dodd (D-Conn.) and Rep. John Conyers (D-Mich.) have jointly introduced a bill that places several mandates on the states regarding election equipment and administration.²³ Senator Dodd has said, “There is only one way to guarantee that these reforms become part of the fabric of our democracy, and that is to require them and give the states the resources they may require to weave them into their state and local practices.”²⁴ Six liberal Democrats on the Ford-Carter commission also supported federal mandates.

The public debate on election reform has evinced a surprising respect for the role of the states in election administration. The sponsors of the leading bipartisan bill in the House recognize “that the federal government should not mandate solutions. States and localities have expertise and practical experience, and the federal government should work with them to ensure the integrity of the process.”²⁵ Rep. Bob Ney (R-Ohio), House Administration Committee chairman, has said: “I am not on the mandate side. We have to be extremely cautious about federalizing elections.”²⁶ As a result, the House seems unlikely to pass legislation containing federal mandates of election standards and technology.

Ney’s doubts about federal mandates are shared beyond Congress. The officials who actually administer elections, the National Association of Secretaries of State, oppose feder-

al mandates on elections.²⁷ The same can be said of the National Council of State Legislatures.²⁸

More surprising perhaps is the unwillingness of the National Commission on Federal Election Reform (the Ford-Carter commission) to support federal mandates. Not many years ago, a prestigious centrist undertaking like the Ford-Carter commission would have recommended a federal solution for all election issues. Instead, a majority of the commission took no position on whether Congress should mandate policies and standards. The majority recommended that Congress adopt a set of conditions for getting federal assistance and then noted that "specific choices on how to comply with these conditions should be left to the discretion of the states."²⁹ Only 6 of the 19 commission members supported a federal mandate.³⁰

This general skepticism about federal mandates is well-grounded. The nationalization of elections sought by Dodd-Conyers would impose inflexible standards on thousands of elections in as many localities. The mandate approach is a throwback to the Great Society era, when Washington always knew better and states and localities were considered merely instruments of national policy.³¹

Conditional Funding

Instead of mandates, Congress could provide incentives for the states to meet national standards. Specifically, Congress could make federal funding dependent on the states meeting conditions for election reform. Such conditional grants are theoretically friendlier to federalism since they allow states the choice of whether to comply with congressional conditions. In fact, the lure of federal largesse generally creates the same outcome for the states as a federal mandate: a state is bound by standards and policies created in Washington to serve the interests of members of Congress.

Conditional grants create another potential threat to state oversight of elections. If federal money is dependent on meeting federal conditions, someone must decide when a state has met those standards. One possibi-

ty would be that a pertinent authority within a state would certify that it has met the conditions for the grant. Anyone who favors competitive federalism (and not a federalism dominated by the national government) would prefer state certification if there must be conditional grants related to election administration. Another option, less friendly to the states, would be for a national agency to certify that a state has met the conditions for federal money to flow. Dodd-Conyers gives the power of certification to the attorney general.³² The Ford-Carter commission leaves the question of certification open. The power of certification would clearly give enormous control over elections to a federal official or agency. We should not ignore the possibility that such power would be abused to force states to accept policies and standards that might skew elections toward one party or the other.

Of course, self-certification by the states would mean placing some trust in state officials. That trust would be backed by public knowledge of the situation in a state. If Congress is to pass conditional grants related to elections, it should respect the states enough to allow them to certify their compliance with the conditions established by the national legislature. Moreover, dividing power among the states involves less risk to the nation; states might betray their trust here and there in self-certifying (though it seems unlikely in the face of the diverse and aggressive media), but a powerful federal agency or official intent on reshaping federal elections for partisan or other reasons could do far more damage to our democracy. Finally, we should keep in mind that Congress would be making rules for *congressional* elections, a good reason to be distrustful. As Madison put it:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both

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judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?³³

Block Grants

Congress could also provide money to the states for election reform with neither mandates nor conditions attached. Providing money through such a "block grant" approach would give states maximum flexibility to deal with whatever election problems they wish to address in whatever way they thought best. Block grants would foster state experimentation in election reform, a discovery process that would both produce new answers to questions of election administration and allow states to adapt policies to their circumstances. A bloc grant approach promises the best policy outcomes and fits well with the primacy of the states implicit in the Elections Clause.

We may be on the cusp of Congress's nationalizing congressional elections, contrary to the original understanding of the Elections Clause and clear considerations of good policy. The original understanding of the Elections Clause provided for a federal override of the states only under extraordinary circumstances. Such problems as did exist in 2000 hardly constitute a pretext for nationalizing elections. If Congress wishes to send money to the states for election reform, it should allow the states broad discretion in spending those funds. In the end, Alexander Hamilton's remark that state responsibility for elections is "more convenient and more satisfactory" still rings true.

Two Neglected Obligations

The national discussion about election reform has largely ignored the obligations of

citizens and governments. Along with concerns about preserving federalism, these obligations should inform any assessment of competing policy proposals.

The Integrity of the Ballot

States have a responsibility to protect the integrity of the ballot. A recent report by election administrators explains the rationale for this duty:

Voter registration systems are the basis of election legitimacy in most of the United States. In most states each county maintains a database of names, addresses, and signatures for all eligible voters in that county. Its purpose is to guarantee that only people eligible to vote can do so and that no one can vote more than once. Any major compromise of the voter registration system could lead to fraudulent elections.³⁴

Congress has made it virtually impossible for the states to make good on this obligation. In 1994 Congress passed the National Voter Registration Act of 1993 (popularly known as the Motor Voter law). The law aimed at making it easier for citizens to register to vote while protecting the integrity of the electoral process and ensuring that accurate and current voter registration rolls were maintained. Registration rolls grew by 20 percent from 1994 to 1998.

Motor Voter has not been good for the integrity of the ballot. It allowed citizens to register to vote simultaneously with an application for a driver's license, by mail, or in person. The act made it harder to verify the identity of voters seeking to register. It also considerably complicated the states' task of keeping the registration rolls clean. For example, to remove a voter who has moved from the rolls of a voting district, the local jurisdiction has two choices. First, it can get written confirmation of the move from the citizen. Lacking that, the jurisdiction has to send a notice to the voter. If the

notice card is not returned and the person does not vote in two general elections for federal office *after* the notice is sent, then the jurisdiction can remove the person's name from the rolls.³⁵

The cost of those mailings is significant. In Indiana, for example, such a mailing would have a price tag of about \$2 million, or about twice the Election Division's entire annual budget. Given this price tag and the limited resources of most local election boards, we should not be surprised that the registration rolls throughout the nation are wildly inaccurate.³⁶ Congress made sure in 1994 that the cost of cleaning the voting lists would be prohibitive.

Since the presidential election, Americans have seen new evidence of the disorder of registration rolls in several states. In Indiana, for example, the *Indianapolis Star* looked closely at the rolls. The newspaper concluded that tens of thousands of people appear on the voter rolls more than once and that more than 300 dead people were registered. In general, experts believe one in five names on the rolls in Indiana does not belong there.³⁷ A recent study in Georgia found more than 15,000 names of dead people on active voting rolls statewide.³⁸ Alaska, according to Federal Election Commission, had 502,968 names on its voter rolls in 1998. The census estimates only 437,000 people of voting age were living in the state that year. Similar studies in other states would no doubt return similar data.³⁹

In the Ford-Carter report's list of harms done by inaccurate voting are two important ones:

1. Significantly inaccurate voter lists add millions of dollars in unnecessary costs to already underfunded election administrators and undermine public confidence in the integrity of the election system and the quality of public administration.
2. Significantly inaccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit

"repeaters" to use such available names. For generations these practices have been among the oldest and most frequently practiced forms of vote fraud. . . . The opportunities to commit such frauds are actually growing because of the trend toward more permissive absentee voting.⁴⁰

Individual Obligations

Adult citizens of the United States have a legal right but not a legal obligation to vote. Many Americans choose not to exercise their right to vote. That too is their right in a free society. Mandatory voting would run counter to American traditions of individual freedom. Perhaps for that reason mandatory voting has not been on the congressional agenda.

At the same time, *citizens in a constitutional republic have responsibilities as well as rights connected to voting.* Those who do wish to vote are expected to undertake some minimal obligations related to voting. They have to register, thereby proving their eligibility for the franchise. Voters are also expected to gather enough information to make reasoned choices on Election Day. A task force appointed by the National Council of State Legislatures has provided a good list of voter responsibilities:

1. Make informed choices about candidates and issues.
2. Exercise the right to vote.
3. Keep your voter registration information current.
4. Know your voting precinct and the hours of operation.
5. Bring proper identification to the polling place as required by law.
6. Know how to operate voting equipment properly.
7. Treat Election Day workers with courtesy.
8. Respect the privacy of other voters.
9. Report problems with the process or violations of election law.

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A constitutional republic assumes that its citizens are capable of contributing to collective choices and of assuming certain minimal obligations related to voting.

10. Ask questions when confused.
11. Check completed ballot for accuracy.⁴¹

These considerations seem commonsensical and fully in tune with American traditions of individual rights and responsibilities.

The Ford-Carter report mentions the obligations of the individual citizen only twice. The first mention suggests that individuals do have both rights and obligations connected to voting; the second mention suggests that voters have little obligation to educate themselves to vote.⁴² The report suggests that any failure in an election is a *collective* failure, which should be set right by *collective* action. The report adopts a “social work” view of voting: the individual voter is a victim who bears no responsibility for successfully casting an informed vote or ensuring the integrity of the ballot by registering to vote. In this view, individual voting is simply an outcome of collective forces, and government should adapt voting equipment and procedures to voter shortcomings. The Ford-Carter report reflects well the activists’ view on this point: few in the media have suggested that voters have even minimal obligations that go with the right to vote. Voters are portrayed as victims of malevolent forces that seek to “disenfranchise” them. Few people seem willing to state unwelcome truths: voters sometimes intentionally miscast votes,⁴³ and, in Florida, the spoiled ballots of 2000 seem to be a result of poor voter education by the parties combined with voter inexperience and ignorance rather than public malevolence.⁴⁴

To be sure, government should not make voting unreasonably difficult. However, by denying individual responsibility, the Ford-Carter report shows little respect for citizens. Democracy posits that citizens are capable of assuming responsibility in important matters. The Ford-Carter report, by contrast, sees citizens as children who need the help of a benign, technological nanny to exercise the franchise. We should expect more from citizens.

Americans should protect their rights, including the legal right to vote. At the same time, fair and informed elections require citi-

zens to meet minimal obligations, including registering and gaining knowledge about the choices offered and how to vote. These obligations have been largely ignored in the current debate on election reform. Instead, we have heard much about the victimization of voters.

The rhetoric of victimization presents two subtle threats to American public life. First, by implying that all obligations are collective, such rhetoric suggests that voters are not capable of assuming the minimal obligations of casting a ballot correctly or registering to vote. If citizens come to believe that, the Republic will be undermined. A constitutional republic assumes that its citizens are capable of contributing to collective choices and of assuming certain minimal obligations related to voting. If Americans come to doubt that assumption, how much longer will they recognize each other as political equals?

Moreover, for every victim, there is a victimizer. For voters in 2000, the argument goes, the victimizers were public officials intent on “disenfranchising” voters. Those who accept this claim inevitably distrust election officials, their fellow citizens who putatively benefit from “disenfranchisement,” and American democracy. Over time, this distrust may do real damage to the comity among citizens needed by a republic.

Policy Proposals

I turn now to the leading proposals for changing American elections. Since federal mandating or conditioning of changes in elections is not in keeping with our constitutional system, these proposals are recommendations to state legislatures only.

Equipment Standards

Americans have learned a great deal since last November about the technicalities of voting and voting machines. The Ford-Carter report says each state should set a benchmark for voting system performance defined by its residual votes.⁴⁵ They also call for a new federal agency—the Election Administration

Commission—to develop voting equipment standards “for the benefit of state and local election administration.”⁴⁶

Although it seems to be a technical issue, the question of equipment standards goes to the heart of the federalism question in election reform. Ultimately, setting standards has implications for state taxpayers. Meeting an equipment standard may well require more spending and higher taxation by the states. Why should a state budgetary decision like that be made in Washington? Keep in mind that such spending inevitably involves tradeoffs either against other government purposes (including goals like improved voter education) or against individual freedom (if additional taxation is required). If the states have primacy concerning elections except under “extraordinary circumstances,” elected *state* officials decide on such tradeoffs. The creation of a new federal agency also bodes ill for a strong competitive federalism. One danger would be that the new agency would acquire “mission creep” and eventually, with the help of Congress, become the central authority over elections in the United States. Absent a national authority, the states will be free to compete in developing benchmarks for equipment and new strategies for improving elections. A new federal agency would only cut short that discovery process and impose the agendas of national politicians and national interest groups on all the states.

The experience in Florida suggests that the Ford-Carter commission is on more solid ground in proposing that each state determine what constitutes a vote in the case of recounts, contests, and certification. Had Florida done that, the unpleasantness of last November and December might have been avoided. The states should have full authority to determine what constitutes a vote without federal interference.

Provisional Voting

Citizens who go to the polls and are not on registration lists generally cannot vote. Provisional voting, used in California and Washington State, allows a person whose

name is not on the list to be issued a ballot. The voting authorities then confirm or disconfirm the provisional voter’s eligibility and either accept or reject his or her ballot.

The Ford-Carter commission reports that in King County, Washington, about 2 percent of the ballots were cast provisionally; 78 percent of those were later found to be valid. In Los Angeles County, California, about 4 percent of totals were cast provisionally, and 61 percent turned out to be valid, at least in part. The costs of provisional voting in these two areas were not trivial. In King County, 15 staff members took nine days to evaluate the provisional ballots. In Los Angeles, it took 30 staff members two weeks to count the provisional ballots.⁴⁷ On the basis of these numbers, we can estimate that provisional balloting would have directly added \$2.7 million to the cost of administering the 2000 election.⁴⁸ The total costs would be higher if we took into account the costs associated with delaying election results for several weeks.

At this point, the question of individual obligations related to voting is pertinent. Absent provisional voting, the costs associated with registering (including making sure one is registered) fall primarily on the individual voter. At the same time, the benefits of casting a vote—which are primarily expressive⁴⁹—also accrue mostly to the individual voter. Provisional voting forces taxpayers to absorb the entire cost of verifying registration. Therefore, the incentive to ensure that one is on the registration list is significantly reduced. In cases where provisional ballots turn out to be valid, this cost shifting may be justified. The experience of King County and Los Angeles County taken together indicates that about 37 percent of provisional ballots are not valid. Projected to the nation as a whole for the 2000 election, state governments would spend at least \$1 million on checking invalid voter registration claims. Provisional voting would allow individuals wrongly claiming to be eligible to vote to impose a \$1 million cost on taxpayers. Each state should consider these additional costs before adopting provisional voting.

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Statewide Voter Registration

The Ford-Carter commission advises states to set up computerized statewide voter registration. The commission recommends that every state collect substantial information about registering voters including the last four digits of their Social Security numbers. The commission also suggests that states share data on registered voters with other states. The Ford-Carter commission wisely leaves the decision about whether to set up an advanced voter registration system to each state.

Presumably, the reason for setting up a networked registration system would be to create an accurate and usable database. As noted earlier, the Motor Voter law has made it all but impossible to correct inaccurate voting lists. However fancy the computers, states working under the onerous rules of Motor Voter will not be able to clean their registration lists. Ideally, Congress should move now to reform Motor Voter and make it easier for states to regain control of registration lists. A second-best policy would be to exempt states that are establishing state-of-the-art registration systems from the costly multiple mailings and other roadblocks to accurate lists set out in the Motor Voter law. In the end, the damage done by inaccurate registration lists is not caused by outdated systems and will not be improved by expensive technology. The primary cause of registration inaccuracy is the Motor Voter law.

Making Election Day a National Holiday

The Ford-Carter commission recommends using Veteran's Day as a national holiday for voting. They argue that having such a holiday would make it easier to obtain poll workers and would enhance the civic character of the election.⁵⁰ The commission's justification is rather different from the arguments usually heard in defense of a national holiday for voting. Usually proponents argue that a national holiday will increase turnout.⁵¹ Many advocates of higher turnout believe liberalism and the Democratic Party would benefit because the poor, the less edu-

cated, and minorities are overrepresented among nonvoters. However, a careful study of nonvoters found that universal turnout would produce trivial benefits for Democratic candidates and liberal positions. The authors of the study conclude, "Taken as a whole, nonvoters appear well represented by those who vote."⁵² Moreover, a study of voting turnout across nations and over time reveals that weekend voting in Europe (similar to a voting holiday) has no statistically significant effect on voter turnout, and countries that move to or from weekend voting do not see an increase or a decrease in turnout.⁵³ In any case, a concern about declining turnout is misplaced: voter turnout has remained roughly at the same level since 1973 or so.⁵⁴

Absentee Balloting

Many observers, including the Ford-Carter commission, regret the growth in absentee and other voting outside of polling places. In 2000 about 20 percent of all votes were either sent absentee or filed early. All of Oregon's votes and about half of Washington State's came by mail; California saw nearly 25 percent of its citizens using absentee ballots. More than a quarter of all voters filed early in Tennessee and Texas.⁵⁵

We should be concerned about the possibilities for fraud implicit in the rise of voting outside polling places.⁵⁶ The move toward absentee voting saves money and is convenient for voters. How should we balance the possibility of fraud against money and convenience? Recall that both voters and the states have minimal obligations to ensure the integrity of the electoral system. Asking most citizens to show up at a polling place to cast their ballot is an effective way to prevent fraud. The states should move quickly to reduce absentee voting by adopting stricter standards for issuing an absentee ballot.

Media Projections

Media projections of election winners in one state or another or for the whole nation have been controversial in the past. In the 2000 elec-

tion, the media called Florida for Al Gore about 15 minutes before all the polls in the state closed. Some argued that this projection discouraged many Bush voters from casting a ballot. At least one scholar suggested that this early call of the winner, though retracted later, cost Bush thousands of votes.⁵⁷ In general, academic studies have found little robust evidence that media projections have profoundly affected American elections.⁵⁸

Despite a dearth of data, the Ford-Carter commission recommends that the media avoid calling any presidential election results as long as polls remain open in the 48 contiguous states. If the networks refuse that suggestion, the commission urges Congress to prohibit any government entity from disclosing electoral results at the precinct level and above. By denying results to the media, the commission hopes to make their projections more inaccurate, thereby raising the costs of calling races. Finally, if the media still do not get in line, the commission says Congress should impose uniform poll closings across the nation.⁵⁹

The commission's focus on media projections leads it to propose central control over when election results can be made public and uniform, national polling hours. Perhaps such measures would be justified if media projections did profound harm, but the evidence does not establish deep damage to the body politic. Moreover, the Florida debacle embarrassed the television networks and no doubt will lead them to be more careful in the future about making projections before the polls have closed in a state.⁶⁰

The commission's final step to influence the media—uniform national poll-closing hours—imposes large administrative costs on states and localities while mandating a one-size-fits-all solution for all states. A task force of election administrators note that uniform poll-closing hours will deprive some Westerners of the chance to the vote; will introduce confusion on Election Day; and will make it hard to recruit and train poll workers, who will have to work longer hours. They conclude, "The problems created by try-

ing to force uniform poll hours far outweigh any supposed gains."⁶¹

Voter Education

Voters miscast many ballots in the election of 2000, and more voter education may make sense. The question is how this might be done. Traditionally, voter education about issues and candidates has been done by private efforts while the electoral authorities inform voters about casting their ballots. As mentioned earlier, the states should be left free to make their own decisions about how much to spend on voter education; it would hardly be surprising if the need for voter education varied from state to state or from locality to locality.

Others have more specific ideas about how to educate voters. The Ford-Carter commission recommends that during the last month of the campaign the television networks be forced to provide five minutes each night to each presidential candidate who has qualified for federal matching funds. The networks or their local affiliates would have to provide free time to state and local candidates.⁶²

Supporters of "free time" claim that the public owns the airwaves and thus can attach conditions to the licenses to use the common property granted to the networks. The Supreme Court has upheld regulations like the "equal time doctrine" of the broadcast spectrum on the grounds of scarcity. The "free time" argument seems much like the "equal time" argument: the market does not lead to enough talk about politics, therefore the media should be compelled to provide more at no charge to the candidate using it.

The foundation of "free time" is hardly convincing. Scarcity is no justification for government action; it simply begs the question of whether administrative allocation is justified.⁶³ On the whole, the free market has proven itself far better than government at efficiently allocating scarce goods or services. In any case, with the advent of cable broadcasting, television time has become much less scarce and seems likely to become even more plentiful as broadband becomes more widespread.

Academic studies have found little robust evidence that media projections have profoundly affected American elections.

“Free time” is really a form of compelled speech, which distorts democracy and forces individuals to affirm views they abhor.

On the other hand, government is good at creating and enforcing deadweight losses.⁶⁴ In the case of “free time,” the loss to the shareholders of corporations who own the television networks will be exactly matched by the gain to candidates who will receive “free” advertising. Looked at narrowly, “free time” is a zero-sum game, which produces no net benefits for the nation. From society’s point of view, however, the resources spent on struggling over “free time” are a deadweight loss.

Compelling the networks to provide “free time” does provide benefits to candidates for office who receive a good without paying for it. The ad time is paid for by the owners of the media companies who are forced to provide it to the politicians; their losses equal the revenue foregone by not selling the ad time on the open market. “Free time” is a particularly insidious form of rent-seeking since the benefits go directly to the politicians who force the media to provide them with uncompensated goods and services. At the same time, forcing shareholders of media companies to pay for ad time inevitably compels individual owners of stock to support political candidates and political causes they might not otherwise support. “Free time” is really a form of compelled speech, which distorts democracy and forces individuals to affirm views they abhor.⁶⁵

The “free time” proposal does rest on a kernel of truth: the media are crucial in educating voters during an election. Surprisingly, those who support “free time” also generally support campaign finance “reform.” The “free time” proposal assumes we need more talk broadcast by the networks. In contrast, “reformers” are currently proposing to limit access to the broadcast media by labor unions, corporations, and most interest groups.⁶⁶ On the one hand, “reformers” ostensibly want to widen access to the media for talk about politics; on the other, they close off that very access by direct prohibition. “Reformers” may be tempted to argue that “free time” is paid for by the public for public purposes while the “sham ads” prohibited by S.R. 27 (popularly known as McCain-Feingold-Cochran) are pri-

vately funded and corrupt the public. Recall, however, that the shareholders in media companies pay for the “free time” from which politicians benefit. “Free time” means that some private entities pay and other private individuals benefit.

Those who believe election reform should be separate from questions about campaign finance are mistaken.⁶⁷ Election reform includes the proposition that “election officials should encourage as much participation by the public in the electoral process as possible.”⁶⁸ Reaching that goal requires allowing Americans to freely contribute to campaigns and candidates and parties to freely spend in pursuit of votes. In particular, we need more competitive elections to garner the attention of voters and provide more information about candidates.⁶⁹ The best policy for educating voters would be to liberate campaign finance from the command-and-control system now in place.

Conclusion

The anger and bitterness associated with the struggle over the 2000 presidential election have now passed for all but the most dedicated partisans. In the end, that struggle did little or no damage to the American republic. The staff of the Ford-Carter commission found that Americans were more satisfied with their democratic process after the 2000 election than after the 1996 contest.⁷⁰

Lacking a crisis of the regime, Congress may nonetheless centralize control of elections in the federal government to augment its own power or to pursue partisan advantage. Along the way, many Americans may come to believe that their fellow citizens are either not capable of assuming the minimal obligations of citizenship or not to be trusted on Election Day. The great danger to the American constitutional republic was not the disputed election of 2000. The greatest threat lies ahead in what Congress does (or does not do) and in what we say and come to believe about each other and ourselves.

Notes

1. National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process," August 2001, www.reformelections.org. Hereinafter Ford-Carter report.
2. Constitution Project, Forum for Election Reform, "Building Consensus for Reform," http://www.constitutionproject.org/eri/CP_ERreport.pdf.
3. National Council of State Legislatures, "Voting in America: Final Report of the NCSL Elections Reform Task Force," http://www.ncsl.org/programs/press/2001/electref0801.htm#_Toc522012603.
4. National Association of Secretaries of State, "NASS State-by-State Election Reform Best Practices Report," http://www.nass.org/reports/reform_report.htm.
5. National Task Force on Election Reform, "Election 2000: Review and Recommendations by the Nation's Elections Administrators," Election Center, Houston, August 2001. Hereinafter Election Center report.
6. Residual votes are a combination of overvotes, undervotes, and spoiled ballots.
7. On the importance of ascertaining the meaning of the Constitution, see Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 2000). The focus here will be on the Elections Clause, the most relevant constitutional provision. Article II, sec. 1, clause 4, of the Constitution gives Congress the power to set the time of choosing presidential electors: "The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Perhaps not surprisingly, the constitutional power of Congress to regulate presidential elections is more limited than its ability to control its own elections. Regarding the latter, Congress may set the "times, places, and manner" while it may only choose the time of selecting presidential electors. Other parts of the Constitution also give Congress power to enforce specific discriminatory practices in national, state, and local elections. See, generally, General Accounting Office, "Elections: The Scope of Congressional Authority in Election Administration," Report to Congress, March 2001, p. 2: "However, Congress has the authority, under a number of constitutional amendments, to enforce prohibitions against specific discriminatory practices in all elections, including federal, state and local elections. For example, constitutional amendments prohibit voting discrimination on the basis of race, color, or previous condition of servitude (Fifteenth Amendment), sex (Nineteenth Amendment), and age (Twenty-Sixth Amendment). In addition, the Equal Protection Clause of the Fourteenth Amendment provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Each of these Amendments contains an enforcement clause, allowing Congress to pass legislation to enforce the substantive rights promised in the Amendment."
8. James Madison, "Records of the Federal Convention," in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1978), vol. 2, art. 1, sec. 4, clause 1, doc. 1, p. 248, http://press-pubs.uchicago.edu/founders/documents/a1_4_1s1.html.
9. See Brutus, no. 4 in *Founders' Constitution*, vol. 2, art. 1, sec. 4, clause 1, doc. 5, p. 251. "It is clear that, under this article, the foederal legislature may institute such rules respecting elections as to lead to the choice of one description of men. The weakness of the representation, tends but too certainly to confer on the rich and well-born, all honours; but the power granted in this article, may be so exercised, as to secure it almost beyond a possibility of controul," http://press-pubs.uchicago.edu/founders/documents/a1_4_1s5.html.
10. Alexander Hamilton, *Federalist* no. 59, in *Founders' Constitution*, vol. 2, art. 1, sec. 4, clause 1, doc. 13, p. 261, http://press-pubs.uchicago.edu/founders/documents/a1_4_1s13.html.
11. James Madison, "Debate of the Virginia Ratification Convention," June 14, 1788, in *Founders' Constitution*, vol. 2, art. 1, sec. 4, clause 1, doc. 16, p. 268, http://press-pubs.uchicago.edu/founders/documents/a1_4_1s16.html.
12. Hamilton, *Federalist* no. 59, in *Founders' Constitution*, p. 263.
13. Madison, "Debate of the Virginia Ratification Convention," p. 268.
14. *Ibid.*
15. National Association of Secretaries of State came close to the original understanding when it wrote, "The role of the federal government in elections is defined by the Constitution as an important but limited role." NASS, "Resolution on Election Reform Policies and Federal Government," July 17, 2001, http://www.nass.org/electionres_fedgovt.html.
16. The National Task Force on Election Reform, composed of expert election administrators drawn

from all parts of the nation, notes that "allegations of systematic disenfranchisement of some citizens by election officials have been made, though hard evidence of this happening has been difficult to find." Election Center report, p. 2. Abigail Thernstrom, the newest member of the U.S. Commission on Civil Rights, said that in the commission's hearings on the election in Florida most allegations of disenfranchisement were based on hearsay and that no solid evidence of deliberate voter suppression has emerged. See Katharine Q. Seelye, "From Selma to Florida, Election Reform, Meet Politics," *New York Times*, March 4, 2001. Soon after the election, some political activists asserted that minorities and the poor were given punch card machines that had a higher error rate than the machines available to affluent Republican-leaning districts. This turned out to be incorrect. See Stephen Knack and Martha Kropf, "Who Uses Inferior Voting Technology?" Paper available from the authors at Sknack@worldbank.org or kropfm@umkc.edu. See also the dissenting report of two members of the U.S. Civil Rights Commission: "The Commission's majority report is a partisan document that has little basis in fact. Its conclusions are based on a deeply flawed statistical analysis coupled with anecdotal evidence of limited value, unverified by a proper factual investigation. This shaky foundation is used to justify charges of the most serious nature—questioning the legitimacy of the American electoral process and the validity of the most recent presidential election. The report's central finding—that there was 'widespread disenfranchisement and denial of voting rights' in Florida's 2000 presidential election—does not withstand even a cursory legal or scholarly scrutiny. Leveling such a serious charge without clear justification is an unwarranted assault upon the public's confidence in American democracy. Using all the variables in the statistical analysis in the majority report, Dr. John Lott, an economist at Yale Law School, was unable to find a consistent, statistical significant relationship between the share of voters who were African Americans and the ballot spoilage rate." The dissent can be found at http://www.manhattan-institute.org/html/final_dissent.htm.

17. See John Mark Hansen, "Sizing the Problem," Background paper for Ford-Carter report, p. 4.

18. Strikingly, the National Task Force on Election Reform begins its report by stating, "In our professional opinion, America's election system is NOT in crisis" (emphasis in original). Election Center report, p. 1.

19. *Ex Parte Siebold*, 100 U.S. 383 (1880).

20. *Foster v. Love*, 522 U.S. 69, fn. 2: "The Clause gives Congress 'comprehensive' authority to regulate the

details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Smiley v. Holm*, 285 U.S. 366 (1932). Congressional authority extends not only to general elections but also to any "primary election which involves a necessary step in the choice of candidates for election as representatives in Congress." *United States v. Classic*, 313 U.S. 320 (1941).

21. Election Center report, recommendation 17, p. 46.

22. Congress does seem likely to appropriate significant money for election reform. The leading Democratic bill in the Senate is expected to cost \$3.5 billion, the Republican alternative \$2.5 billion. Adam Graham-Silverman, "The Senate Gets around to Voting System Overhaul," *CQ Monitor News*, July 27, 2001.

23. See S.R. 565, "Equal Protection of Voting Rights Act of 2001," 107th Cong., 1st sess. The mandate is in sec. 303; the conditions can be found in sec. 301.

24. Quoted in John Cochran, "Dodd, Conyers Still Back Voting Standards," *CQ Monitor News*, July 31, 2001.

25. Office of Rep. Steny H. Hoyer (D-Md.), "Hoyer, Ney Take Next Step on Election Reform," press release, May 10, 2001.

26. Quoted in David S. Broder, "Election Report Delivered to Bush; He Lauds 'Key Principles'; Democrats Call It Lacking," *Washington Post*, August 1, 2001, p. A2.

27. National Association of Secretaries of State, "Resolution on Election Reform Policies and Federal Government."

28. National Council of State Legislatures, "The NCSL Elections Reform Task Force also believes that such funding should be based on broad principles, not upon specific mandates which would lead to a 'one size fits all' approach to elections." Special Task Force on Elections Reform Recommendations, <http://www.ncsl.org/programs/legman/elect/taskfc/finalrecs.htm>.

29. Ford-Carter report, pp. 13–14.

30. Broder, p. A2.

31. See the discussion of intergovernmental relations in Whittington, p. 488.

32. S.R. 565, sec. 205.

33. James Madison, *Federalist* no. 10 in *Founders' Constitution*, vol. 1, p. 129.
34. Election Center report, p. 47.
35. See 42 U.S.C.S. § 1973 gg-6.
36. For evidence on this point, see Ford-Carter report, p. 26.
37. Bill Theobald, "Bogus Names Jam Indiana's Voter List; Invalid, Repeat Entries Damaging Credibility," *Indianapolis Star*, November 5, 2000.
38. Jingle Davis, "Georgia Sees Dead People on Voting Roll," Cox News Service, November 5, 2000.
39. Theobald.
40. Ford-Carter report, p. 27.
41. National Council of State Legislatures, "Voting in America: Final Report of the NCSL Elections Reform Task Force," August 14, 2001. http://www.ncsl.org/programs/press/2001/electref0801.htm#_Toc522012603.
42. "Of course, administration of elections is likely to be more effective, and the effectuation of voting rights more complete, if voters understand both their rights and their obligations. . . . Election officials should continue their efforts to educate voters through the use of sample ballots, voter pamphlets, demonstration equipment, and public outreach in a broad and diverse range of settings. No one should believe, however, that poll worker training and voter education alone will eliminate the disparities in the performance of election systems across communities. Nor can campaigns to promote voter awareness, especially when framed as obligations of the individual voter, substitute for concerted efforts by officials to obey the law." Ford-Carter report, p. 49.
43. About 1 percent of votes are intentionally mis-cast. Election Center report, p. 27.
44. "In Florida, the [United States Civil Rights Commission] charged, blacks were far more likely than whites to 'have their vote spoiled' and were therefore 'disenfranchised.' Spoiled by whom? The voters themselves. More than 890,000 Florida blacks went to the polls in November, up 65 percent from 1996. This unexpectedly huge turnout brought a large number of inexperienced voters to the polls. Many voters mismarked their ballots, thus 'disenfranchising' themselves. . . . Experts do not believe that differing voting systems were the source of the difficulty. They think the underlying problem was the surge in first-time minority voters who did not know how to cast a ballot correctly—regardless of the voting technology." John Leo, "Boxing with Ballots: The Legend of Florida's 'Disenfranchised' Voters," *U.S. News & World Report*, June 18, 2001. See also the comment by Donna Brazile, Al Gore's campaign manager, "I, too, am to blame for [what happened in Florida]. I take full responsibility for lack of voter education resources that could have helped us. And I think everyone else should come to the table and say 'None of us are clean.'" Quoted in Stan Simpson, "Report Inspires Gore Aide," *Hartford Courant*, June 11, 2001, p. A3.
45. The Ford-Carter commission recommends that states take account of voters who deliberately do not make a choice when counting residual votes. How that might be done is not mentioned.
46. Ford-Carter report, pp. 9, 13.
47. *Ibid.*, pp. 36–37.
48. King County and Los Angeles County examined on average 8.33 ballots per employee-hour. Assuming a 3 percent nationwide rate of provisional voting during the 2000 election, there would have been 3,867,821 provisional ballots, which would have taken 380,838 employee-hours to evaluate. Assuming an opportunity cost of \$7 per employee-hour, the direct cost of provisional balloting would be roughly \$2.7 million. If, as seems possible, the opportunity cost of employee time were higher, the total cost would rise proportionally. It should be noted that King County and Los Angeles County are not a random sample. The fact that King County and Los Angeles County have implemented provision voting suggests their electorates care a great deal about the accuracy of voting. That may well mean that the voters of both counties are more careful about keeping up their registration. If so, both counties would have fewer cases of provision voting than the nation as a whole and the costs of provision voting in both counties would be lower, perhaps much lower, than in the entire United States.
49. Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires: Theories of Institutional Design* (New York: Cambridge University Press, 2000), pp. 30–33.
50. Ford-Carter report, pp. 41–42.
51. Arend Lijphart, "Unequal Participation: Democracy's Unresolved Dilemma," *American Political Science Review* 91(March 1997): 1–14.
52. Benjamin Highton and Raymond E. Wolfinger, "The Political Implications of Higher Turnout," Institute of Government Studies, University of California, Berkeley, Working Paper no. 99-5, 1999, p. 24.

53. Mark Franklin, "The Dynamics of Electoral Participation," in *Comparing Democracies 2: Elections and Voting in Global Perspective*, ed. Laurence Leduc, Richard Niemi, and Pippa Norris (Thousand Oaks, Calif.: Sage, 2001), pp. 18–19.
54. Michael P. McDonald and Samuel Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* (forthcoming) available at <http://ilsc.uis.edu/mcdonald/036007McDonaldMi.pdf>.
55. Norman Ornstein, "The Dangers of Voting Outside the Booth," *New York Times*, August 3, 2001.
56. James Ceaser, a political scientist at the University of Virginia, notes that getting ballots before Election Day makes fraud more probable: "We know votes are sold," Ceaser said. "Isn't it more plausible to sell a ballot when you can verify what you've paid for?" Ceaser added that because early voting gets rid of secret ballots, it makes coercion possible. A husband or wife, for example, could pressure his or her spouse into voting for a candidate and make sure of the result. Others argue that because absentee ballots are so popular, the measures keeping them fraud free aren't strong enough to work. Ceaser is quoted in Benjamin Kepple, "Do Looser Rules, 'Motor Voter' Law Make for Easier Election Fraud?" *Investor's Business Daily*, November 27, 2000.
57. John R. Lott Jr., "Media Suppressed the Bush Vote," *Philadelphia Inquirer*, November 14, 2000.
58. Strikingly, the leading article in the literature is almost 20 years old. John E. Jackson, "Election Night Reporting and Voter Turnout," *American Journal of Political Science* 27 (November 1983): 615–35. As John Mark Hansen notes in his worthwhile survey of the literature for the Ford-Carter commission, the effects of early projections of election results are generally small and limited to the western states. In 1980, while projections suppressed turnout by 12 percent among those who heard them, the effect on total turnout was much smaller since not everyone heard the projections. See John Mark Hansen, "Uniform Poll Closing and Uniform Reporting," Background paper for the Ford-Carter report.
59. Ford-Carter report, p. 11.
60. Joan Konner, James Risser, and Ben Wattenberg, "Television's Performance on Election Night 2000: A Report for CNN," January 29, 2001, <http://i.cnn.net/cnn/2001/ALLPOLITICS/stories/02/02/cnn.report/cnn.pdf>.
61. Election Center report, pp. 39–40.
62. Ford-Carter report, p. 11.
63. Thomas G. Krattenmaker and Lucas A. Powe, Jr., *Regulating Broadcast Programming* (Washington: American Enterprise Institute Press, 1994), p. 54.
64. Gordon Tullock, Arthur Seldon, and Gordon L. Brady, *Government: Whose Obedient Servant?* (London: Institute of Economic Affairs, 2000), pp. 45–55.
65. For some arguments against compelled speech, See John Samples, Christopher Yablonski, and Ivan G. Osorio, "More Government for All: How Taxpayers Subsidize Anti-Tax Cut Advocacy," *Cato Policy Analysis* no. 407, July 10, 2001.
66. S.R. 27, Bipartisan Campaign Reform Act of 2001, §§ 203, 204.
67. Election reform "should be considered separately from the often bitter and contentious issues surrounding campaign finance reform." Election Center report, p. 22.
68. *Ibid*, p. 53.
69. Restrictions on spending hurt challengers and help incumbents. See generally Christopher Magee, "Campaign Contributions, Policy Decisions, and Election Outcomes," Jerome Levy Economics Institute of Bard College Public Policy Brief no. 64, 2001.
70. Hansen, p. 4.

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