

II. The Federal Government *and the Federal Election System*

The Constitution's Allocation of Authority

The conduct of federal elections is a federal function—as the Supreme Court reiterated just this year, states have no inherent or reserved powers over federal elections because federal elections only came into being when the United States

Constitution was ratified.³ Nonetheless, the framers of the Constitution foresaw a federal-state partnership in the administration of federal elections, and delegated to the states a substantial role in the conduct of those elections. Article 1, Section 4, of the U.S. Constitution states that: “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 choosing Senators.” And Article II, in conjunction with the Twelfth Amendment, provides that the states shall choose electors for the President and Vice President, but that “the Congress may determine the Time of choosing the Electors and the Day on which they shall give their Votes,” and specifies rules by which the Congress might settle contested presidential elections.

As Alexander Hamilton explained in Federalist No. 59, the Constitutional Convention deliberately chose to submit “the regulation of elections for the federal government” to local governments that,

ordinarily, “may be both more convenient and more satisfactory.” But the Constitution “reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.” After all, Hamilton wrote, the national government should not subject its existence “to the pleasure of state governments.”⁴

The federal courts have therefore long ruled that Congress has broad authority to regulate elections where candidates for Congress are on the ballot, either in a primary or a general election.⁵ State power to set neutral rules for federal elections is limited to time, place, and manner, and the federal government may pass laws to supersede any of these rules.⁶ Thus the National Voter Registration Act of 1993 was upheld by the courts even though it effectively told states exactly how they had to register voters in federal elections, right down to the layout of the registration form.⁷ Though in theory, and occasionally even in practice, states have tried to mitigate such federal edicts by setting up separate systems for federal and state elections, none has found such bifurcated systems sustainable.



Commissioners Christopher Edley and Colleen McAndrews

The federal power created by the Elections Clause is reinforced by the constitutional authority granted Congress to enforce the Equal Protection Clause of the Fourteenth Amendment and by other constitutional amendments prohibiting discrimination in voting. Because the Supreme Court’s decision in *Bush v. Gore* found that differing definitions of a vote within Florida during the recount violated the Equal Protection Clause, Congress may well have authority under the Fourteenth Amendment to legislate to ensure greater uniformity within each state’s voting procedures.⁸



A member of the 54th Electoral College of Pennsylvania casts his ballot, December 18, 2000.

Presidential Elections and the Electoral College

The Constitution confided the choice of how to select presidential electors to the judgment of “[e]ach state”. For a generation, most electors were chosen by the state legislatures without any popular vote. But by the 1820s almost every state had decided to move to direct election of presidential electors by popular vote. By the Civil War, the practice had become universal. The Constitution was not, however, amended to reflect this new custom.

From the outset this Commission decided that it would not make recommendations about whether or how the Constitution should be amended in order to do away with or refashion the choice of presidential electors, the institution generally called the Electoral College. We are aware of the critique that the Electoral College is an anachronism that can award an election to a candidate who did not win the majority of the popular vote and that it gives somewhat more proportional weight to the populations of small states.⁹ The supposed disproportionate influence of small states may be counter-balanced by the “unit rule” adopted by 48 of the 50 states that allows the popular vote winner, whatever the margin, to claim all the state’s electors.¹⁰

Yet the compromises embodied in the Electoral College are central to the organization of our republic. The basic political units of the country were the states; yet the president and vice president were to be elected by the entire nation. The Electoral College was a delicate compromise that solved one of the most difficult problems of the Constitutional Convention and did so in a way that

satisfied even most anti-Federalist critics of the new document.¹¹ James Madison put it well:

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society.... From this aspect of the government it appears to be of a mixed character, presenting at least as many federal as national features.¹²

Within the Commission there are different views about how to strike the balance of state and national “features” and we are reluctant to suggest refashioning such a fundamental balance unless our search for constructive answers compels us to do so. Fortunately, a strong and effective set of ideas for federal election reform is available that can satisfactorily address most of the problems that came into national view last year without reaching out to rewrite the Constitution.

Co-Chair Bob Michel and
Commissioner Griffin Bell



The Primary Role of State Governments

Even though the federal government has broad constitutional authority to mandate how the states conduct federal elections, we believe that state governments should have a primary role in the conduct of such elections for a simple reason: federal elections are, as a practical matter, conducted in conjunction with a vast array of state and local elections across widely varying conditions. The last presidential election involved more than 100 million voters casting ballots at more than 190,000 polling places, staffed by more than 1.4 million regular or temporary administrators and poll workers. The original constitutional premise, that state governments should oversee the conduct of elections, subject only to limited and necessary federal intervention, remains sound.

But we recommend that state governments should do far more to accept their lead responsibility for improving the conduct of elections, especially federal elections. Most congressional elections involve multiple local jurisdictions, and often more than one county. All presidential and senatorial elections are statewide contests in their states. State governments should ensure uniformity of procedures and standards within the state and provide the essential guidance for the consistent and constitutional conduct of these elections.

Thus the states are vital partners to the federal government in any plan for nationwide reform. They are also a necessary bridge between federal policy and local administration.

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