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110. N. Dak. Const., art. VII, § 1.

111. American Municipal Association, supra. n. 4, 20.

112. N.J. Const., art. IV, § 7, par. 9(13), par. 10.

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115. *City of Miami Beach v. Fleetwood Hotel, Inc.,* 261 So. 2d 801 (1972) (Fla. Const., art. VIII, § 2(b)).

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132. ACIR, *State Mandating of Local Expenditures* (1978); Cal. Const., art. XIII B, § 6.

133. Mo. Const., art. X, § 21; art. XII, § 2(6).

134. Pa. Const., art. IX, § 5, § 8.

135. Ariz. Const., art. XIII, § 7; Va. Const., art. VIII, § 7; *School Board of City of Richmond v. Parham*, 218 Va. 950, 243 S.E. 2d 468 (1978).

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Chapter Six

Voting and Elections

James A. Gardner

Introduction

A basic function of a constitution in a democratic society is to establish the ground rules of politics. A substantial portion of even the sparest American constitutions is devoted to structuring the political process by distributing the franchise, allocating political control over government officials, establishing electoral rules and practices, and assuring the integrity of the electoral process.

Although constitutional responsibility for structuring the political process is shared at the state and national levels, states shoulder significant responsibility in this area. States possess primary authority to create institutions and processes to implement self-government at the state level, subject to federal constitutional limitations, but they also bear considerable responsibility to structure the processes by which even national politics is conducted by determining qualifications for voting in congressional elections, exercising in the first instance the power to regulate the time, place, and manner of congressional elections, and determining how presidential electors are selected.

The states have a long reformist tradition of using state constitutions as vehicles to remake electoral politics. Indeed, the American record of political reform is written overwhelmingly at the state level. The Jacksonian revolution in expansion of the franchise, for example, was effected entirely at the state level, mainly through elimination of restrictive state constitutional property qualifications. Progressivism brought a host of state constitutional reforms including initiatives and referenda; term limits; recall elections; nonpartisanship in local and judicial elections; and in some cases even proportional representation and unicameralism. Today, the tradition of state constitutional reform of politics continues in the form of novel regulation of political parties; increasing constitutionalization of the regulation of campaign finance; and the movement to establish term limits for elected government officials.[1]

State power over politics is nevertheless subject to constraints imposed by the U.S. Constitution and by federal civil rights laws. The federal Constitution drastically restricts the grounds on which the franchise may be withheld, making it illegal to deny the right to vote on the basis of race, color, sex, failure to pay a poll tax, or age when a person is eighteen or over.[2] The Equal Protection Clause implements a rule of one-person, one-vote under which all federal, state, and local legislative districts must be of approximately equal population. The Constitution also prohibits discrimination through "vote dilution" worked through gerrymandering or the use in certain circumstances of at-large voting systems. Principles of free speech and association place significant restrictions on the ability of states to regulate candidates' access to the official ballot, the procedures by which political parties nominate candidates, the spending and donation of money in political campaigns, and the substance and timing of political speech itself.

Additional limitations on state authority are imposed by federal statutes. The Voting Rights Act (VRA) bars racial discrimination in all voting practices and procedures, and prohibits states from conditioning voting on passage of a literacy test. Under section 5, the VRA's most restrictive provision, officials in nine states and portions of seven others may not enact any change to existing voting practices and procedures without advance approval by the United States Attorney General or a federal court. Other federal laws with which states must comply proscribe electoral violence and intimidation; regulate voting eligibility in presidential elections; require states to maintain voter registration procedures for federal elections that are convenient and easy to satisfy (the "motor voter" law); and provide standards governing absentee voting by members of the armed forces.

Notwithstanding this federalization of the regulation of politics, state constitutional drafters should devote careful attention to constitutional provisions dealing with voting, elections, and other aspects of political architecture. In the first place, federal law leaves to the states far more areas of discretion than it forecloses, particularly concerning the design and management of their internal political institutions. Second, federal constitutional law can change, so the fact that states are presently foreclosed from exercising certain kinds of discretion does not necessarily mean that they should refrain from making important constitutional choices.

Third, and most important, state constitutional drafters must pay careful attention to the structure of state political and electoral institutions because they must inevitably decide, in drafting the state constitution, how much authority and discretion to grant the state legislature to regulate the state's political processes. Most state constitutions grant legislatures plenary legislative power, meaning that all questions are left to the legislature except those specif-

ically decided by the state constitution. Drafters must therefore choose whether to allocate decisions on legal rules to the people by constitutionalizing them, or to leave such decisions to the legislature to resolve in the course of ordinary legislative politics. While drafters face this decision in virtually every domain of law, the question of whether to constitutionalize legal rules takes on special significance in the realm of structuring and regulating the political process.

An electoral system must be set up fairly and impartially at the outset. Legislators, however, have an obvious self-interest in the structure of electoral politics, since sitting legislators are always the beneficiaries of whatever political structures and practices got them there in the first place and thus are likely to be predisposed against change. This conflict of interest suggests that more rather than fewer significant decisions about the electoral process should be made at the constitutional rather than the legislative level, and probably explains why the most significant recent reforms have been undertaken at the constitutional level through amendment by popular initiative rather than by legislative action.

Constitutionalization may take several forms ranging from explicit, authoritative constitutional decision-making to mere encouragement of legislative action. The most authoritative and explicit constitutional provisions are complete in themselves, such as provisions criminalizing bribing voters or betting on elections. Less explicit provisions might merely direct the legislature to take some specified action. For instance, the Connecticut Constitution does not identify specific election crimes, but instead directs the legislature to "prescribe the offenses" resulting in a loss of voting eligibility.[3]

A third form of constitutionalization that grants governmental actors even greater flexibility involves establishing a constitutional allocation of authority or responsibility for particular electoral functions. Thus, rather than setting out specifically how election returns are to be canvassed and counted, a state constitution might merely designate a particular entity to perform those functions, such as the secretary of state or a state canvassing board. Finally, at the weakest end of the spectrum, drafters might decide to include a provision that does nothing more than express a commitment to certain political or electoral principles. For example, numerous state constitutions provide that "[a]ll political power is inherent in the people."[4] Although such a provision neither requires nor prohibits any government action, it nevertheless expresses a constitutional commitment to a discrete principle of popular sovereignty in a way that might guide state legislative or executive officials in the performance of their duties, and might even help courts give meaning to other provisions of the state constitution with greater legal "bite."

In making these kinds of decisions, drafters and reformers need to pay close attention to the substantive principles that ought to guide their structuring of

the state's democratic institutions. The discussion that follows suggests that attention ought to be paid to several important questions:

1. What are the characteristics of a fair and just electoral process?
2. What constraints on such a process are imposed by federal law, and how is compliance best achieved?
3. How trustworthy is the legislature likely to be in using its authority to superintend the electoral process?
4. In view of the answer to the previous question, what aspects of the electoral system should be constitutionalized rather than delegated to the legislature?
5. What level of detail is desirable in constitutionalized provisions given the expected characteristics of the legislature and the anticipated risks of rigidity associated with excessive constitutional detail in this area?
6. Given that the legislature must be granted at least some, and perhaps substantial, authority to regulate the electoral process, what is the best way to secure legislative fidelity to constitutionalized principles of electoral democracy?

With these principles and questions in mind, the ensuing sections of this chapter review the main areas of current state constitutional practice and then discuss current issues of interest to state constitutional drafters and reformers.

CURRENT STATE CONSTITUTIONAL PRACTICES

The Occasions for Democracy

Certainly the most obvious and in some ways the most significant question regarding the constitutional structure of electoral institutions concerns when and how often the public is to be afforded opportunities to exercise democratic control over state affairs. State constitutions routinely provide numerous "occasions for democracy." For example, every state constitution provides for an elected legislature and governor, and nearly all provide for the election of other executive branch officials such as an attorney general or secretary of state. The majority of state constitutions also provide for the election of local officials such as county commissioners, sheriffs, district attorneys, clerks, treasurers, and assessors. Most states also provide for popular election of some or all state judges.

Besides providing opportunities to elect officials, most state constitutions afford opportunities for direct popular approval of certain kinds of substantive measures. About half the state constitutions set out procedures for popular initiatives and referenda, but even state constitutions that lack such procedures

typically provide that some kinds of measures cannot take effect without popular approval. At the state level, for example, seven state constitutions require statewide popular approval before legislative measures increasing tax rates may take effect. Many more such requirements appear at the local level, typically requiring popular approval of taxation and borrowing, alteration of county boundaries, adoption or amendment of county and municipal home rule charters, and changes to the form or organization of local government.

This proliferation of opportunities for popular control has sometimes been viewed as an unadulterated good on the theory that since democracy is good, more democracy must be even better. Today, however, in the light of experience, it seems clear that the multiplication of occasions for democracy carries with it certain democratic costs. Voter turnout in the United States is notoriously low in national elections, and even lower for state and local elections. Low turnout, together with "ballot fatigue"—the tendency of voters to lose interest partway through a lengthy ballot—may cause electoral contests to be decided by an extremely small and often unrepresentative portion of the electorate, paradoxically casting doubt on the democratic legitimacy of decisions that have been submitted to the people precisely for the purpose of enhancing their legitimacy.

Voter Eligibility

Every state constitution contains at least some provisions, and in many cases extensive provisions, regarding eligibility to vote, reflecting a judgment that the most significant questions of voter eligibility should be settled by the constitution rather than left to the legislature. These questions involve two distinct factors: (1) a person's competence, both mental and moral, to be entrusted with the franchise; and (2) a person's entitlement to vote either as a member of the relevant political community, or on account of having a stake in the outcome of the electoral process.

Citizenship

Nearly every state expressly requires that voters be citizens of the United States. Delaware, South Carolina, and West Virginia also require that voters be citizens of the state itself. However, the ubiquitous requirement of state residency is functionally equivalent to a requirement of state citizenship, as the Fourteenth Amendment of the U.S. Constitution provides that all citizens of the United States are also automatically citizens of "the State wherein they reside."[5]

States are not required to exclude noncitizens from the franchise and at various times in the past have granted aliens the vote. Pennsylvania, for example, permitted unnaturalized German immigrants to vote in the mid-eighteenth century, and the United States permitted noncitizens to vote in the western territories

as part of a deliberate policy to encourage settlement.[6] More recently, a few localities have attempted to extend the right to vote to noncitizen residents, though no state has done so in modern times.

Age

The Twenty-sixth Amendment to the United States Constitution forbids denial of the right to vote to those eighteen years old or older. States are permitted to set the age limit lower, but none has done so.

Residency

Most state constitutions establish a state residency requirement for voting. Some state constitutions also condition voting on residency in a county, town, or election district. Residency is not a self-defining concept, and state constitutions have attempted to give meaning to the term in several ways. The most common approach is to establish a required residency period. Here, it is relevant that the U.S. Supreme Court has invalidated a durational residency requirement of three months, though it has twice upheld residency requirements of fifty days.[7] Rather than set a firm period, some states have required only that residency be "permanent"[8] or "bona fide,"[9] or have delegated to the legislature the task of defining residency more specifically.

Following widely accepted legal principles of domicile, some state constitutions have unlinked the concept of state residency for purposes of voting eligibility from actual physical presence in the state. One common measure, adopted in thirteen states, provides that no person shall be deemed to have lost state residency merely on account of physical absence from the state while performing military service, conducting private business, serving a prison sentence, attending school, or for certain other reasons.[10] Conversely, eleven state constitutions specifically bar any presumption that mere physical presence within the state for the requisite period may establish the required residency by providing that military service within the state is not enough, by itself, to give a person constitutionally sufficient residence. Such provisions must be drafted with care, however, because the U.S. Constitution forbids states from denying members of the military the right to vote merely because of their membership.

In conformity with federal law, many state constitutions provide for the relaxation of residency requirements for purposes of voting in presidential elections. This assures that otherwise eligible voters who move shortly before a presidential election from one state to another, or within a state from one voting jurisdiction to another, will not thereby lose their eligibility to vote for nationwide offices.

Colorado is the only state to have expanded voter eligibility in a few narrowly defined circumstances to nonresidents of the relevant jurisdiction. The

pertinent section provides: "No unincorporated area may be annexed to a municipality unless . . . [t]he question of annexation has been submitted to the vote of the *landowners* and the registered electors in the area proposed to be annexed."[11] This provision permits nonresident landowners to vote on questions of municipal annexation.

Registration

Eighteen states have constitutionally established voter registration as a condition of voting eligibility, and five others have expressly authorized the legislature to make registration a condition of voting eligibility. However, since virtually every state that has not constitutionalized the registration requirement nevertheless has found it necessary to maintain a voter registration system to prevent fraud (only North Dakota maintains no system of voter registration), it is not clear what advantage accrues from constitutionalizing the registration requirement.

Property Qualifications

Twelve state constitutions establish property qualifications as a prerequisite to voting in certain special-purpose elections. For example, Arizona and Michigan limit voting on bond issues and special assessments to real-property-tax payers. New Mexico permits only property taxpayers to vote in local elections seeking approval to incur debt. In Florida, only freeholders may vote on whether to exceed local property tax rate limitations, and in Georgia only owners of affected real property may vote on whether to create a community improvement district. While some of these provisions are of dubious validity under the U.S. Constitution (Arizona's was struck down by the Supreme Court),[12] they reflect on the merits a largely obsolete way of thinking about membership in political communities, and state constitutional drafters and reformers should give serious consideration to eliminating property qualifications on voting.

Early property qualifications for the franchise typically were justified on the ground that the lack of property made individuals unduly dependent on their social and economic superiors.[13] This belief soon was supplanted by Jacksonian notions of equality, and today wealth and property ownership qualifications are generally disfavored under the U.S. Constitution.[14] Nevertheless, some states continue to impose property qualifications for certain highly specialized local government offices, such as agricultural water storage and reclamation districts, and the U.S. Supreme Court has in some cases sustained them.[15]

States typically defend modern property qualifications on the ground that certain government policies are so narrow in scope, and so disproportionately affect property owners, that only property owners have a genuine stake in managing those policies through voting. This argument proves too much. Many government programs such as food stamps or soybean subsidies affect only a

narrow and well-defined class of citizens, yet we do not typically delegate control over those programs to specialized officials elected exclusively by food stamp recipients or soybean farmers. Moreover, single-purpose agencies and ballot measures preclude the kind of negotiation and logrolling that occurs in general purpose legislatures, amplifying the power of property owners to establish policies that affect them without the need to consider the interests of other political constituencies. Finally, it is rare that even the most narrowly targeted government functions and programs truly lack any significant spillover effects on nonproperty owners.

A few state constitutions have taken a very different approach to property qualifications by banning them outright. For example, the North Carolina Constitution provides: "As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office."[16]

Disqualification for Mental Incompetence

Thirty-five state constitutions expressly disqualify from voting persons suffering from a serious mental disability. Most affirmatively require disqualification on this ground, although four states merely authorize disqualification by the legislature. As with the disqualification of minors, such provisions reflect a commonplace and fundamentally sound belief that popular political decisions should be well-considered and rational, and that meaningful, rational participation in politics requires some minimal level of mental competence.

Defining the relevant mental disability is a complex task, and no state constitution attempts to do so. Most implicitly leave further definition of the conditions of ineligibility to the legislature by incorporating by reference standard legal concepts of mental disability (e.g., "insane," "non compos mentis") that are within the province of the legislature to define. Oregon's unique provision combines disqualification for mental incompetence with an extension of protection against disqualification to the merely disabled: "A person suffering from a mental handicap is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law."[17]

Disqualification for Felony Conviction

The constitutions of forty-three states provide for the disqualification from voting of those convicted of serious crimes. Some state constitutions require disqualification on conviction of an "infamous crime,"[18] or a crime of "moral turpitude."[19] Most specify disqualification on conviction of "a felony."[20] Disqualification is usually mandatory, although in eight states the legislature is merely authorized to enact disqualifying legislation. In some states, convicted felons are disqualified from voting only while serving their prison terms; others

also disfranchise felons on parole. The state constitutions are almost evenly divided between those that provide for permanent disqualification and those that provide for requalification on formal restoration of civil rights. However, the prospect of restoration of civil rights is widely thought to be illusory because the procedure for restoring civil rights is so difficult and so rarely navigated successfully by convicted felons. Typically, restoration of civil rights requires individualized action by the governor, and most governors grant very few clemency petitions of any kind. Under the Mississippi Constitution, a convicted felon's civil rights may be restored only upon a two-thirds vote of each house of the state legislature,[21] making it just as difficult to restore a felon's civil rights as to amend the state constitution.

The practice of disqualifying those convicted of felonies has a significant impact on voting eligibility around the nation. It is estimated that nearly four million American citizens presently cannot vote as a result of felony convictions, including over one million who have completed their sentences. Largely as a result of the increased severity and stepped-up enforcement of drug laws over the last two decades, the impact of felon disfranchisement provisions has tended to fall increasingly on African-Americans, and particularly on African-American men. Nationwide, approximately 1.4 million African-American males of voting age—thirteen percent of that population group—are currently disfranchised. About 440,000 of that group have completed their sentences.

Felon disfranchisement has unsavory roots in Jim Crow efforts to suppress African-American voting strength. Many late nineteenth- and early twentieth-century felon disfranchisement provisions were added to state constitutions in a deliberate attempt to specify disqualifying crimes that were believed to be committed more often by African-Americans and thus disproportionately to deprive African-Americans of the right to vote. The United State Supreme Court has held that felon disfranchisement provisions added to state constitutions for the purpose of racial discrimination violate the Equal Protection Clause of the U.S. Constitution.[22] However, the Court also has acknowledged that felon disqualification can serve legitimate purposes, and that disqualification provisions adopted for nondiscriminatory reasons are expressly permitted by Section 2 of the Fourteenth Amendment.[23] In addition, some suspect older provisions can be and have been "sanitized" by later nondiscriminatory readoption or amendment.[24]

The best justification for disqualification of felons is that commission of a serious crime constitutes a fundamental breach of the social contract. While this reasoning may justify disfranchisement during periods of criminal punishment, it provides little justification for permanent disqualification. Those who serve out prison terms generally are understood to have "paid their debt " to society. If the social contract is suspended during imprisonment and restored on its conclusion, it is unclear what legitimate purpose is served by permanent disqualification.