

# **STRUCTURING THE POLITICAL PROCESS UNDER AMERICAN STATE CONSTITUTIONS**

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## **I. Conceptual Overview**

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.

In the American federal system, states possess primary authority to create institutions and processes to implement self-government at the state level. They also, however, bear considerable responsibility for structuring 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 American states also have a long tradition of using state constitutions as vehicles to reform electoral politics.

State power over politics is nevertheless subject to constraints imposed by the U.S. Constitution and by federal civil rights laws. The national Constitution drastically restricts the grounds upon 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. 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 U.S. 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 such as the Voting Rights Act, which bars racial discrimination in voting practices and procedures.

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. First, 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, state constitutional drafters 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. Legislators have an obvious self-interest in the structure of electoral politics, a tension which may suggest 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 in the U.S. have been undertaken at the constitutional level through amendment by popular initiative rather than by legislative action.

Constitutional provisions regulating politics may take several forms. Some provisions are complete in themselves, such as provisions criminalizing bribing voters or betting on elections. Less explicit provisions merely direct the legislature to take some specified action, leaving it discretion as to the precise approach. A third form of constitutionalization grants governmental actors even greater flexibility by establishing only a constitutional allocation of responsibility for particular electoral functions. Finally, at the weakest end of the spectrum are constitutional provisions that do nothing more than express a commitment to certain political or electoral principles.

In structuring the constitutional regulation of politics, drafters and reformers need to pay close attention to some important questions: (1) What are the characteristics of a fair and just electoral process? (2) What constraints on such a process are imposed by national 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? (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?

## **II. Current State Constitutional Practices**

Perhaps the most obvious 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. 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, and treasurers. Most states also provide for popular election of some or all state judges. Besides providing opportunities to elect officials, about half the state constitutions set out procedures for popular initiatives and referenda at the state level, and many more require popular approval for certain kinds of local measures, typically concerning taxation, borrowing, and changes to the form or organization of local government.

Every state constitution contains at least some provisions, and in many cases extensive provisions, regarding eligibility to vote. Such regulations usually rest on consideration of (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. Thus, the major requirements of voter eligibility typically focus on national citizenship, age, state residency, and in some cases voter registration. Twelve state constitutions establish property qualifications as a prerequisite to voting in certain special-purpose elections, although some of these are of doubtful validity under the U.S. Constitution. Most state constitutions expressly disqualify persons suffering from a serious mental disability. The constitutions of forty-three states provide for the disqualification of those convicted of serious crimes.

Every state constitution contains at least some provisions protecting broad classes of individual political rights – for example, the freedoms of speech and assembly – that play some kind of role in enabling citizens and voters to participate meaningfully in the political process. In addition, most state constitutions also directly protect voting and the electoral process. For example, various state constitutions prohibit denial of the right to vote on the grounds of race, sex, property qualifications, nonpayment of a tax, and culture or social origin. Many states also constitutionalize rules protecting elections from violence or physical interference with voting. Another commonly provided protection for the right to vote requires preservation of secrecy in voting. A few states also protect the electoral process by constitutionalizing specific election crimes, most commonly bribery. By far the most common kind of state constitutional provision protecting the right to vote directs the legislature to take specific regulatory action, such as enacting certain kinds of laws to protect the electoral process. For example, eight states require the legislature to pass laws prohibiting “all undue influence [on elections], from power, bribery, tumult, and other improper conduct,” and thirteen require it to pass laws to secure the “purity” or the “integrity” of elections.

Every electoral system requires some authority to implement and administer it. Perhaps surprisingly, more than half the state constitutions are silent concerning the allocation of authority to administer elections, implicitly leaving the subject to the legislature, or provide only that the legislature is to decide upon the process of electoral administration.

One of the most important political functions states routinely perform is apportionment – that is, the division of the state and its localities into districts for purposes of electing members of multimember bodies such as legislatures, executive boards and commissions, and courts. In the aftermath of the Supreme Court's one-person, one-vote rulings and the enactment of the Voting Rights Act, most state constitutions provide either expressly or implicitly for the election of state representatives and senators exclusively from single-member districts. Most state constitutions use the completion of the decennial federal census as the trigger for reapportionment. About half go on to provide that reapportionment is to take place only every ten years. State constitutions generally allocate the authority to conduct legislative apportionment either to the legislature or to an independent board or commission. The main problem with permitting a legislature to reapportion itself is, of course, that incumbent officials may assure their own continuance in

office, and the continuance in office of other members of their party, through gerrymandering. In practice, thirty-six state constitutions opt for legislative apportionment, either through express delegation or omission to provide otherwise, although a substantial minority of fourteen provide for an independent redistricting commission. Such commissions are most commonly bipartisan, composed either of legislative leaders from each party or their designees.

The single most important quality that apportioned districts must possess is demanded by the federally mandated rule of one-person, one-vote: they must be equipopulous. However, the great majority of state constitutions provide additional criteria to guide the redistricting process, most dealing primarily with the shape and boundaries of election districts. For example, thirty-six state constitutions provide expressly that election districts for at least some legislative chambers be “contiguous.” Twenty-four states require election districts to be “compact.” Many constitutions require that certain kinds of local government boundaries be respected to varying degrees in drawing legislative districts. It is not clear, however, that provisions restricting allowable district shape have had any appreciable constraining effect on gerrymandering.

### **III. The Reform Agenda**

Reformers have most often been motivated by a desire to address a relatively small number of issues that they have repeatedly identified as problems of American democracy. These include:

- Insufficient citizen participation in politics, including low voter turnout.
- Insufficient voter competence caused by a lack of information, interest, or both.
- Insufficient citizen control over elected officials.
- A lack of adequate political virtue in voters, elected officials, or both.
- Insufficient representativeness of legislatures.
- Political inequality with respect to race, gender, class, geographical region, or other factors.

Past reformers typically attempted to address these problems by making voting easier and more convenient; by attempting to introduce alternative voting systems such as proportional representation (PR); by devolving political authority to subnational units of government, such as through the implementation of local home rule; or by introducing some aspect of direct democracy, such as the initiative and referendum. More recent reform movements have focused on term limits for incumbent officials; the use of advanced voting technology; alterations in the format of party primary elections; and regulating campaign finance.