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.

*Disqualification for Electoral Crimes*

Delaware, Kentucky, Maryland, New York, Pennsylvania, Utah, Vermont, and West Virginia provide specifically for permanent disqualification of individuals who commit election fraud by offering bribes to voters to register or to vote, or for the commission of other crimes against the elective franchise. The Maine Constitution provides that disqualification for conviction of election bribery may extend for no more than ten years. A stronger case may be made for permanent disqualification of persons who have committed crimes against the electoral process itself than for those who have committed ordinary crimes against the person or property of another. One who commits election fraud not only has shown a specific disregard for the ground rules of politics established by the social contract, but also may be said to present a threat to the basic processes of self-governance that assure the legitimacy of governmental power. In these circumstances, permanent disfranchisement may constitute both just desert as well as a prudent precautionary measure for the protection of the electoral process.

## Political Rights

Every state constitution contains at least some provisions protecting broad classes of individual 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. Other provisions relate to the structure of popular sovereignty. For example, many state constitutions provide that "[a]ll political power is inherent in the people"[25] or that governments are "founded on their authority."[26] Some provide that governments derive their powers from popular consent or that government officials are trustees or servants of the people, and many provide that the people have a right to change the form of government whenever they wish. Thirteen states specifically enumerate a right of the people to "instruct" their representatives.[27] Many states require that elections be "free,"[28] or "free and equal,"[29] or "free and open."[30]

These declarations may be important statements of principle, but they do relatively little actual work in structuring popular self-government. Those provisions with federal counterparts, such as the freedom of speech, have rarely been construed to provide protection beyond that afforded by the U.S. Constitution. Although some provisions, such as the right to instruct representatives or the provisions requiring elections to be free and equal, seem at first glance to have potentially significant applications to electoral politics, in practice they have been either ignored or interpreted by state courts to have little practical significance.[31] Most recently adopted state constitutions, such as Alaska's and Hawaii's, dispense with elaborate articulations of political rights.

## Specific Protections for Voting

In addition to establishing broad political rights, most state constitutions also seek to protect democratic self-government in ways that are more specifically targeted toward voting and the electoral process.

*Limitations on Substantive Grounds of Denial of Right to Vote*

A few state constitutions provide specific substantive protection for the right to vote, most commonly by limiting the grounds on which it may be denied. 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. Some establish due process-style procedural protections for the right to vote by providing that no citizen may be disfranchised "unless by the law of the land."[32] Although these kinds of provisions tend to duplicate protections available under the federal Constitution, they may also provide a basis for establishing state constitutional protections that exceed federal minima.

*Protection from Physical Interference*

Many states constitutionalize rules protecting elections from violence or physical interference with voting. One provision, found in similar form in fourteen constitutions, provides: "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[33] Twenty-seven state constitutions establish an election-day privilege under which voters engaged in the act of voting, or in transit to or from the polls, may not be subjected to civil legal process or to criminal arrest for any crime less than a felony. A typical provision is Indiana's, which provides: "In all cases, except treason, felony, and breach of the peace, electors shall be free from arrest, in going to elections, during their attendance there, and in returning from the same."[34] Nine states additionally privilege voters from performing state military service on election day except in time of war or danger.

Access to polling places for the physically disabled is required by federal law. However, Kentucky and New Hampshire have constitutionalized specific provisions requiring access for the disabled.

*Protection of Secrecy*

Another commonly provided protection for the right to vote requires preservation of secrecy in voting. Twenty-eight state constitutions contain such a provision. A typical provision is Wisconsin's, which declares: "All votes shall be by secret ballot."[35]

*Election Crimes*
A few states also protect the electoral process by constitutionalizing specific election crimes, most commonly bribery. Since states that do not define these crimes at the constitutional level tend to include them in their election codes anyway, the benefits of constitutionalization are unclear.

*Direction to Legislature to Enact Protective Legislation*
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,"[36] and thirteen require it to pass laws to secure the "purity"[37] or the "integrity"[38] of elections.

Because state constitutions tend to grant legislatures plenary power, such provisions are probably unnecessary as grants of regulatory authority, and legislatures in states that lack specific directives to enact these kinds of laws tend to do so anyway. On the other hand, provisions directing legislative action may prove useful, if not always enforceable, by offering guidance to the legislature concerning the scope of its duties or by expressing a constitutional commitment to particular electoral processes.

## Election Procedures

In regulating the procedures by which elections are to be conducted, state constitutions generally pursue one or more of three strategies: (1) granting legislative authority to regulate specific areas of election procedure, or specifically directing the legislature to regulate certain subjects; (2) granting authority to specific officials to administer elections; and (3) constitutionalizing specific procedures to be followed in the electoral process.

*Grants of Legislative Authority*
State constitutions specifically grant legislatures a wide variety of powers to regulate electoral procedures. Some of these grants are extremely broad and unspecific. For example, the Maryland Constitution provides: "The General Assembly shall have power to regulate by Law . . . all matters which relate to the Judges of election, time, place and manner of holding elections in this State, and of making returns thereof."[39] Often these provisions direct the legislature to regulate the electoral process. The Alabama Constitution, for example, provides: "The legislature shall pass laws . . . to regulate and govern elections."[40] Others direct legislative regulatory action with greater specificity, requiring legislatures to set

the date for general elections, prescribe methods of voting, establish a system of voter registration, provide for absentee voting, regulate the use of voting machines, and regulate many other aspects of the electoral process.

These specific grants of regulatory authority tend to be superfluous because the legislature is generally deemed to possess plenary power. Furthermore, the more specific the constitutional directive, the less flexibility the legislature retains to respond to changed conditions in the electoral environment. A more flexible approach would be to specify the goals for which electoral regulation should be undertaken rather than the specific kinds of measures to be implemented. For example, rather than require the legislature to establish systems of voter registration, a state constitution might provide that electoral regulation should be undertaken so as to promote accuracy and prevent fraud; rather than require a system of absentee voting, it could require any electoral system to preserve the voting rights of the elderly, physically disabled, homebound, or those absent temporarily from the state.

*Allocation of Authority to Administer Elections*

Every electoral system requires some authority to implement and administer it. The choice of administrative authority may be important. For elections to serve as vehicles for the expression of popular will, they must be administered fairly and impartially, and there is obvious danger in entrusting to elected officials control over the very apparatus by which they may be ousted from office. These considerations suggest that those who administer elections ought to have some degree of independence from those who have a stake in electoral outcomes.

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 on the process of electoral administration. However, those that expressly address the issue generally pursue one of three different strategies to secure the integrity and independence of electoral administration. One strategy is to allocate the canvassing function to an official who is independently electorally accountable to the public. Louisiana goes the furthest, granting general responsibility for administering elections to the secretary of state, an independently elected official. Six states grant the secretary of state the somewhat narrower authority to oversee the process of canvassing votes for some or all constitutional offices. Connecticut creates a board of canvassers consisting of three independently elected state officials: the treasurer, secretary of state, and comptroller.

A second strategy is to apply constitutional principles of blended power to the allocation of administrative authority by creating canvassing boards consisting of officials from branches of government other than the one whose votes are being counted. Minnesota, for example, creates a hybrid board of canvassers

consisting of the secretary of state, two supreme court judges, and two "disinterested" district court judges.[41] Delaware, in which all judges are appointed, and Nevada, in which they are all elected, both provide for vote canvassing to be conducted by courts.

The third and probably weakest strategy is to create an appointed, politically dependent canvassing authority, but to increase its independence by requiring its membership to be bipartisan. Illinois and Oklahoma, for example, require the creation of a bipartisan state board of elections, and Virginia requires bipartisan local election boards; New York authorizes, but does not require, creation of bipartisan election boards to administer state and county elections.

In spite of this constitutional interest in fostering independence in the administration of elections, there is little evidence that election administrators are any less independent in those states where provision for administration is left entirely to legislative discretion.

*Threshold of Victory*

Although democracy is generally associated with majority rule, virtually every state that has constitutionalized an electoral threshold of victory has chosen to award elections to the candidate who wins a plurality of the votes cast. Only Vermont requires a true majority of votes, in executive branch elections.[42] A typical provision is Missouri's, which states: "[t]he persons having the highest number of votes for the respective offices shall be declared elected."[43]

Requiring only a plurality for election has certain advantages. A winner can nearly always be determined after just one round of voting, reducing the cost of holding elections without any loss of clarity in identifying the winner. Also, when elections require additional rounds of voting, as with the use of runoff elections, voter interest often wanes, leading to lower turnout in the later rounds. The use of a plurality system also makes it easier for independents and minor party candidates to compete successfully. During the 1990s, independent governors such as Jesse Ventura (Minnesota 1998, 38%), Angus King (Maine 1994, 35%), Walter Hickel (Alaska 1990, 39%), and Lowell Weicker (Connecticut 1990, 40%), all were elected with less than an absolute majority of votes cast. The same property is sometimes thought to make the plurality format more congenial to female or minority candidates.

On the other hand, officials who assume office with the backing of less than a majority of those voting sometimes suffer from a perceived lack of legitimacy. Moreover, the very qualities that make the plurality format more congenial to third party candidates also make it more vulnerable to candidacies of undesirable or unqualified candidates. Finally, although a majority vote requirement in a runoff format does not in itself violate the federal Voting Rights Act,[44] it would violate the Fourteenth or Fifteenth Amendments of the federal Constitution if adopted deliberately for the purpose of obstructing the success of candidates backed by racial minorities.

*Tie-breaking Procedures*

Another widely constitutionalized basic electoral ground rule is a procedure to break electoral ties. Most state constitutions provide that in case of a tie in gubernatorial and other executive branch races, the legislature, meeting in joint session, selects one of the tied candidates by joint vote. In Mississippi, the choice is made by the house of representatives alone. In Illinois and Kentucky, ties are broken by drawing lots.

In legislative races, twenty-eight state constitutions contain a provision much like Rhode Island's, which provides: "Each house shall be the judge of the elections and qualifications of its members."[45] This provision has the disadvantage of appointing the legislature final judge in its own cause, a practice that has traditionally been justified on the ground that lodging final authority over legislative elections in any other organ of government would unduly endanger legislative independence. Two states, however, do not follow this model: Maryland, which holds a new election, and North Dakota, in which ties in legislative races are broken by the secretary of state, who tosses a coin.

*Nonpartisanship*

Since the Progressive era, proponents of nonpartisanship have argued that party competition is destructive of cooperative political life, as well as unnecessary because most governmental functions require administrative skill rather than policy judgment. On this view, government officials should be chosen for their expertise and personal integrity rather than on the basis of their partisan affiliation. Political scientists, however, have often criticized nonpartisanship for weakening political parties and for increasing the electoral advantage of incumbents.

The highest visibility instance of constitutionally required nonpartisanship in the United States is Nebraska's unique establishment of a nonpartisan (and unicameral) state legislature. Although thousands of municipalities across the nation have adopted nonpartisanship as a matter of local choice, only California constitutionally requires it in county and municipal elections. The constitutions of California, Florida, and West Virginia require local school board elections to be nonpartisan. Hawaii and Nebraska require nonpartisan elections for the state board of education. Massachusetts, Ohio, Rhode Island, and Utah require local charter commissions to be elected on a nonpartisan ticket. Sixteen states, however, constitutionally require some or all judicial elections to be nonpartisan.

*Specific Procedural Choices*

Finally, many state constitutions approach certain aspects of the electoral process at a much greater level of specificity, constitutionalizing a wide variety of highly specific procedural choices. Among these are provisions setting the date for elections, the location and hours of polling places, the methods of recording votes, the content and presentation of information contained on ballots, details of voter registration, methods of proving eligibility to vote,

requirements for absentee voting, procedures for contesting elections, and many others.

Constitutionalization at a high level of specificity risks obsolescence, and the results are often painfully apparent in state constitutional provisions dealing with elections. For example, in this dawning age of electronic voting, numerous state constitutions still require votes to be cast by "ballot,"[46] one requires voting to be by "written ballot,"[47] and two, in sadly unsuccessful attempts to be more modern, require voting to be by "ballot" or any "mechanical" method.[48] Similarly, at a time when states are experimenting with extending the voting period by using early voting procedures and voting by mail, it makes little sense for a state constitution to specify either the location of polling places or their hours. Again, a better approach, if any constitutionalization is thought necessary, is to specify the values that electoral regulations must advance—accuracy, speed, convenience, and prevention of fraud, for example—rather than the precise procedures to be used.

## Apportionment

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.

*When Apportionment Is Required*

The federal Apportionment Act, with which states must comply, requires members of Congress to be elected from districts rather than at large. Art. II, sec. 1 of the federal Constitution leaves to state legislatures decisions concerning how electors are to be selected in presidential contests, and it is well within the legislative discretion to apportion the state into presidential elector districts. As of 2004, only two states, Maine and Nebraska, select presidential electors from districts, though they do not undertake a separate apportionment for that purpose. Instead, one presidential elector is elected from each existing congressional district, and the winner of the statewide popular vote is awarded two additional electors at large.

The main exercise of state discretion in apportionment lies in its choice of how to structure representation in the state legislature, county and municipal legislatures, courts, and various multimember elected boards and commissions, such as boards of education. The choice between representation at large or by district is typically informed by notions of (1) who or what is appropriately represented, and (2) what representation ought primarily to accomplish. Where a jurisdiction is thought to be inhabited by a united polity with substantially sim-

ilar interests and outlooks, election at large might be the more appropriate choice, although its feasibility is limited to some extent by the size of the jurisdiction and the number of representatives to be elected. Election at large is typically said to produce representatives who possess a jurisdiction-wide outlook rather than an interest in a particular region or neighborhood. Conversely, where a jurisdiction is thought to be inhabited by a collection of predominantly different groups with diverse interests and beliefs, representation by district may be the method of choice, so that representatives can monitor and advance the interests of their particular constituency (although this outlook need not be incompatible with a broader interest in the common welfare). Similarly, if the main function of representatives is thought to be participating in the making of policy for the benefit of the entire jurisdiction, at-large election might be the more appropriate vehicle. If a representative's main function is thought to be providing constituent service, then election by district may secure better constituent access and more efficient service from officials.

Election at large and election by district are not mutually exclusive. A jurisdiction might, for example, elect some representatives at large and others by district, as in Maine and Nebraska's systems for electing presidential electors. It is also possible for a jurisdiction to combine representation by district and at large by creating a mix of single-member and multimember districts, or by the use of "floterial" districts, which are at-large districts created from two or more contiguous single-member districts.[49]

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. Alaska, for example, provides expressly that the redistricting authority "shall establish forty house districts, with each house district to elect one member of the house of representatives."[50]

The one significant exception to this trend is West Virginia, in which state legislators are elected from a mix of single-member and multimember districts. The West Virginia Constitution expressly provides that "[e]very [senatorial] district shall elect two senators."[51] It also structures the allocation of representation in the house of delegates in such a way as to produce numerous multimember delegate districts; during the 2002 election, for example, Kanawha County, which contains Charleston, elected seven delegates.

About half the state constitutions expressly require the division of the state into judicial districts, most commonly for purposes of allocating and electing lower court judges. Several states expressly prohibit statewide at-large judicial elections. Practices respecting states' highest courts vary: California and Idaho require supreme court judges to be elected at large; Oklahoma requires them to be elected by district; North Carolina authorizes the legislature to choose either method.

State constitutions have much less to say about districting for elections to other offices, with only a handful constitutionalizing requirements for state boards of education, statewide service authority boards, county legislatures, and local charter commissions. Decisions about apportioning local jurisdictions are often left to the relevant localities, at least when they possess home rule authority.

*Basis of Apportionment*

Although the Equal Protection Clause of the U.S. Constitution requires districts for most offices to contain substantially equal numbers of people, it does not require any particular method of counting represented populations; states are thus free to include or exclude such groups as "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime."[52] The Supreme Court has suggested, however, that the use of registered or actual voters as a benchmark would be prohibited.

How the population of districts is measured has implications for the distribution of political power. A decision to exclude aliens or minors, for example, may disproportionately affect districts containing high concentrations of recent immigrants, a complaint sometimes heard from Latino groups. Similarly, a decision to count disfranchised felons increases the proportionate political clout of eligible voters within a rural prison district without exposing them to political competition from incarcerated populations.

About half the state constitutions do not specify the population basis for apportionment, thereby leaving the decision to the legislature. Of the remainder, most require apportionment based on "population." Ten states use the term "inhabitants." Ohio requires the use of "whole population." Texas uses "qualified electors" in senatorial redistricting. Maine, Nebraska, and New York specifically exclude aliens. Kansas and Washington exclude nonresident military personnel. Kansas also excludes nonresident students, although it includes resident military personnel and students.

*Timing of Apportionment*

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, or in some cases not until completion of the next federal census. However, fifteen states provide for the redrawing of districts for some or all offices more frequently than every ten years. Texas, for example, permits reapportionment "as the necessity appears."[53] In practice, however, legislatures generally do not undertake the politically divisive task of reapportionment more often than legally required. Recently, however, state legislatures in Colorado and Texas performed an unusual additional round of congressional redistricting after political control of the legislature changed hands in the 2002 election cycle. The Colorado Supreme Court invalidated the 2002

redistricting under the state constitution and a court challenge is pending in Texas. It is too early to tell whether these redistrictings are merely aberrations or presage a new tolerance for more frequent reapportionment.

*Authority to Apportion*

State constitutions generally allocate the authority to conduct legislative apportionment either to the legislature itself, 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.

It is not clear, however, that allocating redistricting authority to commissions will solve the problem of partisan gerrymandering. The political forces organizing legislatures may well reappear in redistricting commissions, particularly when its members are appointed by partisan officials, as is the case in most commission states. Perhaps more importantly, thanks to computerization, the precise impact of any redistricting criterion that a commission might adopt, even for use in a mechanically applied redistricting algorithm, can be known in advance. This requires redistricting commissions to evaluate any proposed plans, algorithms, or redistricting criteria, and it is unclear how they would do so other than through the exercise of subjective judgment. This, in turn, suggests countervailing dangers of redistricting by commission: unlike legislatures, commissions tend to be anonymous, temporary, and democratically unaccountable. Finally, there is at present no systematic evidence to suggest that incumbency is less of an advantage when commissions rather than legislatures control the redistricting process.

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. Some states combine the two apportionment models by using different methods to redistrict different bodies. For example, Colorado and Missouri designate a commission to redistrict the state legislature, but require the state legislature to conduct congressional redistricting. The picture is further complicated by the fact that the constitutional allocation of redistricting authority to the legislature does not necessarily preclude the legislature from redelegating that authority by statute to an independent commission, as in Iowa.

Another important variable concerns procedures where the primary apportionment authority fails to adopt a plan. In Connecticut, Illinois, Mississippi, Oklahoma, and Texas, the failure of the legislature to adopt a plan triggers appointment of a redistricting commission. In Florida, Iowa, Louisiana, Maine, South Dakota, Vermont, and Washington, and in Mississippi in the case of