Some Kind of Process for Felon Reenfranchisement

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State executives have long had the authority to issue pardons and to release individuals from the legal consequences of conviction. Clemency may take various forms: 1 the state may issue a full or absolute pardon, which erases any legal consequences stemming from conviction (including any time remaining on a sentence); 2 the state may commute a sentence, which converts a capital penalty to a life sentence or reduces the length of incarceration; or the state may issue a partial pardon, which restores only certain civil rights such as the right to vote, the right to serve on a jury, or the ability to hold public office. 3

Exercise of the clemency authority has evolved over the years. In the past, restoring suffrage was largely an incidental effect of clemency grants. Then in the wake of the recount in Florida after the 2000 election, public pressure began to mount against criminal disenfranchisement, under which individuals are temporarily or permanently rendered ineligible to vote. In response, many states reduced criminal disenfranchisement or dropped it altogether. 4 Other states, such as Alabama and Florida, began relying on ad hoc clemency determina-

1 Clemency is defined as “mercy or leniency,” especially “the power of the President or a governor to pardon a criminal or commute a criminal sentence. — Also termed executive clemency.” Black’s Law Dictionary 269 (West 8th ed 2004) (emphasis omitted).
2 An absolute pardon is a “pardon that releases the wrongdoer from punishment and restores the offender’s civil rights without qualification.” Id.
3 A partial pardon is a “pardon that exonerates the offender from some but not all of the punishment or legal consequences of a crime.” Id. Even if the authority to confer partial pardons is not explicitly granted by state constitution or statute, the greater power of absolute clemency infers the lesser power of partial clemency. See, for example, Anderson v Commonwealth, 107 SW3d 193, 196 (Ky 2003) (affirming the power of the governor to issue partial pardons that restore some rights, but not others). There is no operative difference between commutation and partial pardons, except that commutation generally refers to mitigation of a criminal sentence, and pardons comprise both mitigation of sentences and mitigation of legal consequences stemming from conviction.
tions to minimize the effect of disenfranchisement. With a discretionary regime for reenfranchisement, these states use the clemency power for the express purpose of restoring voting rights.

In Alabama and Florida, ex-felons seeking to have their voting rights restored may participate in oral hearings before an executive clemency or parole board. During these hearings, the petitioner has an opportunity to explain why he or she deserves to vote again. Members of the clemency or parole board are free to inquire into any area of the petitioner’s life, and have asked about anger management, sobriety, and traffic violations. Petitioners may provide documentary evidence, such as letters of support from employers or other members of the community; however, victims of the crimes for which petitioners were originally convicted (or their families) may also speak as to why the petition should not be granted. This Comment addresses the procedural dimension of reenfranchisement proceedings: whether due process applies to the clemency hearings that restore a felon’s right to vote; and if so, what process is due. So far, no circuit court has considered the issue.

6 Id (noting the board’s refusal to reenfranchise a felon after a victim claimed the felon had never apologized). See also Jerome R. Stockfisch, Long Path to Clemency Ends at Governor’s Feet, Tampa Trib 1 (July 4, 2004) (reporting a state senator’s testimony for a former neighbor and that the governor “has denied restoration of civil rights after hearing haunting testimony from relatives of victims”); Wyatt Olson, Barred for Life: The Process for Restoring the Civil Rights of Felons in Florida Works Perfectly—If Not Restoring Their Rights Is the Goal, Miami New Times (Jan 16, 2003) (reporting that some petitioners might not have succeeded if they hadn’t “kept as much documentation as [they] did”).
7 The title of this Comment derives from Wolff v McDonnell, 418 US 539 (1974). The cautious declaration that “some kind of hearing is required at some time before a person is finally deprived of his property interests,” id at 557–58, at once illustrated both the Court’s confidence that procedural safeguards were guaranteed by due process, and the Court’s uncertainty as to the principle governing when particular procedures were necessary and why. At a time when the administrative state was beginning to take on judicial dimensions, Judge Friendly’s influential article Some Kind of Hearing attempted to bridge the analytical gap left by McDonnell and its progeny by offering a systematic appraisal of the benefits and burdens of additional procedures. Henry J. Friendly, Some Kind of Hearing, 123 U Pa L Rev 1267 (1975). Applying the reasoning of McDonnell and subsequent cases, this Comment argues that the Constitution requires some kind of process when the clemency power is used for felon reenfranchisement. Using Judge Friendly’s article as a model, this Comment examines exactly what kind of process is due, and evaluates the costs and consequences of requiring additional procedures.
8 Compare Howard v Gilmore, 2000 US App LEXIS 2680, *2 (4th Cir) (sustaining the dismissal of a claim that felony disenfranchisement violated the Equal Protection Clause). The clemency power has existed for a long time in Alabama and Florida, so residents have always been technically able to seek clemency as a method of regaining the franchise. See, for example, Hogan v Hartwell, 242 Ala 646, 7 S2d 889, 891–92 (1942) (holding that a pardon granted after the term of imprisonment has expired removes the remaining consequences of conviction). Many years before the current systems were put into place, there was an unsuccessful challenge to discretionary reenfranchisement in Florida, which alleged equal protection and due process
In the past, courts have applied the Due Process Clause of the Fourteenth Amendment to proceedings that states are not obligated to provide, such as criminal appeals and parole hearings. Applying constitutional procedures to these elective proceedings prevents states from holding partial or unfair hearings. In the context of criminal appeals and parole hearings, if a state decides to hold any hearings at all, the hearings must comply with the Fourteenth Amendment.

If due process applies to discretionary appeals and parole hearings, it seems that due process should also apply to reenfranchisement proceedings, where the clemency power is used to restore voting rights. However, the Supreme Court has never held that due process applies in the clemency context. Because clemency was traditionally considered to be an “act of grace” by the executive, petitioners could have no reasonable hope of receiving clemency, and therefore had no liberty or expectation interest that would be protected under the Due Process Clause.

This Comment argues that, in contrast to traditional clemency, due process should apply when the clemency power is expressly used to restore voting rights and when there is an opportunity for an oral hearing. First, there are substantive and procedural limitations on discretion in the reenfranchisement context, which do not apply to clemency. Administrative hearings, unlike the review of paper applications, mandate procedures that are consistent with due process. Second, restrictions on the right to participate in the political process present

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violations. See Beacham v Braterman, 300 F Supp 182, 183–84 (SD Fla 1969) (three judge panel) (holding that the pardon power was a traditional right of the executive, free from “judicial control”), affd without opinion, 396 US 12 (1969). Because the restoration processes in both Alabama and Florida were revamped after 2002, Beacham does not necessarily dispose of the matter.


10 Lucey, 469 US at 401 (“When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act... in accord with the Due Process Clause.”).

11 See Woodard, 523 US at 279–85 (considering due process inapplicable to clemency petitions); Dumschat, 452 US at 464–67 (holding due process inapplicable to commutation decisions).

12 Woodard, 523 US at 285; Beacham, 300 F Supp at 184.
unique concerns because of the potential for compounding injustice. As states move from a system of blanket disenfranchisement to discretionary reenfranchisement, it is important for the judicial system to remain vigilant to potential abuse. Whatever application due process may have for ordinary clemency, closer scrutiny is appropriate when the purpose of clemency is to reinstate voter eligibility.

This Comment proceeds in four parts. Part I describes the process of reenfranchisement, highlighting the schemes in Alabama and Florida and contrasting them with the schemes in Kentucky and Virginia, which operate more like traditional clemency. Part I also discusses previous legal challenges to disenfranchisement and reenfranchisement.

13 Political accountability alone may be insufficient for curing or preventing any defects in voter eligibility structures because individuals who are adversely affected will not be able to express their disapproval at the ballot box. Consider United States v Carolene Products Co, 304 US 144, 152 n 4 (1938):

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.


Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary’s close surveillance. The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determinant of what the legislature will do that does not coincide with perceived majority interests.

See also Goosby v Osser, 409 US 512, 522 (1973) (concluding that states may not deny the right to vote to those awaiting trial). Goosby distinguished state provisions making voting more convenient for a group of persons, which undergo rational basis review, from state impediments to the right to vote, which require compelling state interests. Id at 519–21.

14 Courts are wary of election schemes that afford discretion to officials, because discretionary schemes may obfuscate discriminatory intent by pushing decisions from the legislative level to the level of individual officers. As the Fifth Circuit has noted, states could not enact a broad disenfranchisement scheme, “then reenfranchise only those who are, say, white.” Shepherd v Trevino, 575 F2d 1110, 1114 (5th Cir 1978). However, the absence of systematic recordkeeping prevents courts from assessing whether a discretionary regime has a systematic racial bias, since no reason need be given for any single decision. Furthermore, discretionary schemes are problematic not only when there is actual discrimination by officials, but also when individual authority conferred by the scheme has the potential to be misused. See Louisiana v United States, 380 US 145, 152–53 (1965) (invalidating constitutional interpretation tests because of the potential for officials to abuse the tests or use them as a way to mask racial discrimination). More generally, commentators have aptly pointed out that decisionmaking outside of the legislative environment warrants careful judicial inquiry due to the absence of transparency. See, for example, John Hart Ely, Democracy and Distrust 97 (Harvard 1980) (noting that law enforcement has a good deal of “low visibility discretion” in conducting searches and seizures and that for that reason the Fourth Amendment requires not only a “certain quantum of probability” but also an independent determination of that probability by a neutral magistrate when possible).
Part II considers whether individuals petitioning to restore their voting rights possess a liberty interest in a fair hearing. This Part concludes that there is a protectable liberty interest when there are statutory limitations on the clemency authority, as in Alabama, Florida, and Virginia, but not in the ordinary clemency context, as in Kentucky. Part III discusses various procedural safeguards that might be applied to reenfranchisement hearings and concludes that because neither Alabama's nor Florida's procedure facilitates judicial review and transparent decisionmaking, the procedures are constitutionally deficient. Part IV discusses possible disadvantages to applying due process to reenfranchisement hearings, and concludes that these disadvantages do not outweigh the constitutional right of ex-felons not to have their right to vote arbitrarily restricted.

I. BACKGROUND

Most states deny or qualify the right to vote for inmates, parolees, and probationers, but only eleven states place permanent restrictions on an ex-felon's right to vote. Among these states are Alabama and Florida, where individuals who have been convicted of certain crimes are ineligible to vote in federal, state, and local elections. However, individuals in Alabama and Florida may request review by a hearing before an administrative body—the state Board of Pardons and Paroles in Alabama, or the Governor's Clemency Board in Florida—

15 Every state but Maine and Vermont prohibits citizens from voting while incarcerated. Developments, 115 Harv L Rev at 1942 (cited in note 4). Many states require completion of a sentence before reenfranchisement, which would make parolees and probationers ineligible to vote. See, for example, Ga Code Ann § 21-2-216(b) (Michie 2003) (disqualifying from voting any person convicted of a felony involving moral turpitude except upon completion of "the sentence"). See also Shepherd v Trevino, 575 F2d 1110, 1115 (5th Cir 1978) (upholding a statute disenfranchising those who have not completed their probation period against an equal protection challenge).

16 Miles, 33 J Legal Stud at 85 (cited in note 4).

17 See Ala Const Amend 579, Art VIII(b) (disqualifying from voting persons convicted of a felony involving moral turpitude "until restoration of civil and political rights"); Fla Const Art VI, § 4 (disqualifying from voting persons convicted of a felony "until restoration of civil rights"); Fla Stat Ann § 944.292(1) (West 2001) ("Upon conviction of a felony . . . the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution."). See also Ky Const § 145 (disqualifying from voting persons in confinement under the judgment of a court for some penal offense and persons convicted of treason, felony, bribery in an election, or a high misdemeanor designated by the General Assembly); Va Code Ann § 24.2-101 (Michie 2003) (disqualifying from voting any person convicted of a felony, "unless his civil rights have been restored by the Governor or other appropriate authority").

18 See Carla Crowder, State's Ex-Felons Start to Regain Voting Rights, Birmingham News (Apr 16, 2004). See also Ala Code § 17-3-10 (Michie 1995 & Supp 2004) ("Any person who is disqualified by reason of conviction . . . may be restored to his citizenship with [the] right to vote by the State Board of Pardons and Paroles.")
that restores the right to vote on a discretionary basis. A pardon from the administrative board restores civil rights, including the right to vote. While the clemency power exists in all fifty states, at least Alabama, Florida, and Virginia use clemency as a means for restoring voting rights on a discretionary basis. Part I.A discusses the origins, purposes, and uses of clemency, while Parts I.B and I.C describe how the clemency authority is exercised in Alabama, Florida, Virginia, and Kentucky. In Alabama, Florida, and Virginia, clemency is specifically used to restore an individual's voting rights, and in Florida and Virginia, individuals seeking reenfranchisement undergo a separate process from those seeking ordinary clemency. In Kentucky, however, there is no distinction between petitions for general pardons and petitions for the restoration of voting rights, nor is there an opportunity for an oral hearing. Therefore, the clemency regime in Kentucky more closely approximates traditional clemency, where due process might not apply.

A. Clemency

1. Clemency generally.

Clemency powers have existed at the state level since the founding. In Virginia, for example, the colonial charter provided for executive clemency, and most state constitutions still vest the clemency power in the governor. The executive model of clemency has three

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19 See Fla Const Art IV, § 8(a) (permitting the governor to “suspend collection of fines and forfeitures, grant reprieves . . . and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures”); Fla Stat Ann § 940.01 (West 2001 & Supp 2005) (stating that the governor can pardon with the approval of just two cabinet members); Fla Stat Ann § 940.03 (West 2001 & Supp 2005) (requiring the approval of just two cabinet members to set rules for clemency applications); Fla Stat Ann § 940.05 (West 2001):

Any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him or her prior to conviction if the person has: (1) Received a full pardon from the board of pardons; (2) Served the maximum term of the sentence imposed upon him or her; or (3) Been granted his or her final release by the Parole Commission.


21 For the source of the clemency power in these states, see Ala Const Amend 579, Art VIII; Fla Const Art IV, § 8; Fla Stat Ann § 97.041(2)(b) (West 2002); Va Code Ann § 24.2-101 (Mitchie 2003).

22 Kobil, 69 Tex L Rev at 589 (cited in note 20) (describing clemency in several colonial charters).

23 Michael Heise, Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure, 89 Va L Rev 239, 255–58 (2003) (noting that 84 percent of clemency-granting states use some sort of executive clemency authority). See also Kobil, 69 Tex L Rev at 605 (cited in note 20) (noting that twenty-nine states invest clemency authority solely with the governor and sixteen more have the governor share power with an administrative board). While certain states like
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generic forms: the governor makes clemency decisions after a non-binding recommendation from a designated authority; the governor grants clemency only if there is a recommendation from a designated authority, such as a court or an administrative board; or the governor has complete authority over clemency decisions. Alternatively, the administrative model has two forms: in the executive-administrative model, the governor participates as a member of the board, whereas in the pure administrative model, the executive's only role is to appoint members of the board.

Traditionally, clemency was used rather sparingly as part of the sovereign prerogative to treat subjects mercifully. In fact, clemency was often used as an extraordinary form of relief for vindicating claims of actual innocence. While use of the clemency authority has waned, some states have revived the obsolescent power and are now purposefully and systematically using clemency to restore suffrage.

Alabama vest the clemency authority in administrative panels, other states use administrative panels to conduct an initial review of applications and make recommendations to the governor. See Heise, 89 Va L Rev at 256 (noting that 19 percent of states give the governor clemency authority only after a nonbinding recommendation). These latter states still vest ultimate authority to exercise the clemency power in the governor alone. But see id at 256 (noting that 31 percent of states do not allow clemency absent a positive recommendation from a panel and gubernatorial action).


See Harold Krent, Conditioning the President's Conditional Pardon Power, 89 Cal L Rev 1665, 1671-79 (2001) (describing the historical origins and constitutional basis for the presidential pardon power); Kobil, 69 Tex L Rev 583-611 (cited in note 20) (analyzing the use of the pardon by era).

Herrera v Collins, 506 US 390, 411-12 (1993) (explaining that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted"); Heise, 89 Va L Rev at 243 (cited in note 23):

[If] clemency were truly administered on a basis wholly outside of law ... one would expect to find the outcome of clemency petitions to distribute randomly. As I demonstrate, however, clemency decisions in the death row setting are not randomly distributed. At a more practical level, although clemency seeks to accomplish a wide array of goals, correction of error is surely among the most important and obvious of them.

As a former pardon attorney in the Department of Justice has noted, clemency enables the executive to "intercede directly to change the outcome of a case that he believes was wrongly handled by his subordinates, where no judicial remedy is available." Margaret Colgate Love, Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful, 27 Fordham Urban L J 1483, 1507 (2000).


For one governor's account of the bases for determining when to grant clemency, as well as the burdens associated with clemency decisions, see Edmund G. (Pat) Brown with Dick Adler, Public Justice, Private Mercy: A Governor's Education on Death Row 163 (Weidenfeld & Nicholson 1989). For an examination of the philosophical justifications for various types of pardons, see generally Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest (Oxford 1989).
This innovation gives new incentive to individuals who have already served their sentence to seek clemency. As a result, the number of clemency petitions has increased since 2003, which in turn has led to structural changes: in Alabama, the same system for granting parole petitions is now utilized to restore voting rights; although in Florida, the paper review process is streamlined and the Department of Corrections is required to facilitate the application process. Despite the long history of the clemency power, Alabama and Florida have only begun to use this power for wholesale restoration of suffrage within the last four years.30

2. Clemency in Kentucky and Virginia: executive models.

In Kentucky and Virginia, an individual who is denied suffrage on account of a criminal conviction may have suffrage restored through executive clemency.31

Like most states, Kentucky follows the pure executive model, vesting the entire clemency-granting authority in the governor.32 In Kentucky, clemency petitioners do not have an opportunity for an oral hearing, and the entire decisionmaking process happens behind the closed doors of the governor’s office. The number of pardons issued by each of the past eight governors has ranged from four to twenty-four,33 a small number compared to the 14,828 petitions granted in Florida in one year alone.34 This sparing use is in line with the traditional exercise of clemency powers.35 Kentucky has not changed its use of the pardoning power to restore voting rights, and almost all applications for civil pardons are denied.36

Like Kentucky, Virginia vests final decisionmaking authority in the governor; and as in Kentucky, the clemency authority in Virginia also entails the authority to restore civic rights, such as the right to

30 See notes 44, 123–28 and accompanying text.
31 Ky Const § 145 (noting that those excluded from voting on account of conviction “may be restored to their civil rights by executive pardon”); Va Code Ann § 24.2-101 (disqualifying from voting any person convicted of a felony, “unless his civil rights have been restored by the Governor or other appropriate authority”).
32 Ky Const § 77 (“[The governor] shall have power to remit fines and forfeitures, commute sentences, [and] grant reprieves and pardons, except in case of impeachment.”).
33 Andrew Wolfson and Al Cross, Patton Plans No Additional Pardons or Commutations, Louisville Courier-J 1A (Nov 26, 2003) (noting that Governor Paul Patton did not intend to pardon anyone beyond the four he already had, and that former Governor Wallace Wilkinson had pardoned twenty-four people).
34 See text accompanying notes 126–28.
35 See note 27.
36 See Wolfson and Cross, Patton Plans No Additional Pardons or Commutations, Louisville Courier-J at 1A (cited in note 33) (reporting that Governor Patton granted four of about 1,250 requested pardons).
vote." However, Virginia uses a mixed model of clemency: although the governor decides whether to grant or deny a petition for reenfranchisement, petitions may be granted only after a circuit court has recommended the petition. To restore voting eligibility, an individual may petition the circuit court of the county or city of conviction or permanent residence. The court may "approve the petition for restoration" if the petitioner has had no criminal convictions since the completion of his sentence and if the petitioner has "demonstrated civic responsibility through community or comparable service." The court’s approval does not restore the petitioner’s voting rights unless the governor also approves the petition within ninety days. If the governor denies a petition, denial is a "final decision and the petitioner shall have no right of appeal."

As a practical matter, the restoration process in Virginia has been streamlined due to changes in the governor’s internal policies. Before 2002, petitioners had to submit a thirteen-page application along with other supporting documents; applications often “lingered for years with no official action.” Applications are now one page long, and the governor has promised that decisions will be made within six months of application.


Currently, Alabama uses the pure administrative model of clemency, vesting full clemency authority in the State Board of Pardons and Paroles. In 2003, Alabama passed a law allowing felons to petition the Board for the restoration of civil and political rights. The law was spurred by popular support and passed over the objections of the governor. Previously, voting rights were restored only if the governor

37 See Va Const Art V, § 12.
38 See Va Code Ann § 53.1-231.2 (Michie 2002). The petition must be brought at least five years after completion of the sentence, including probation or parole. Id.
39 Id. A circuit court may approve a petition for restoration of the right to be eligible to register to vote if the petitioner has completed the entire sentence, including probation, parole, or suspension of sentence, five or more years previously. Id.
40 Id.
41 Id.
43 Id.
45 See Crowder, State's Ex-Felons Start to Regain Voting Rights, Birmingham News (cited in note 18) ("Gov. Bob Riley vetoed a similar bill earlier in 2003, spurring a backlash from black lawmakers.")
personally issued a pardon. Under the current regime, individuals may apply for reenfranchisement after completing their sentence or serving at least three years of parole, but political rights are restored only through affirmative action by the Board.

Under Alabama’s pure administrative model, Board members in favor of restoration enter their reasons in the applicant’s file, and if the Board restores the applicant’s voting rights, the order becomes public record. Otherwise, all information pertaining to applicants is confidential, except for the Board’s minute books and docket information, which contains a record of the action taken. As of April 2004, about eight hundred ex-felons have had their rights restored under the new discretionary system. Conversely, because the state does not maintain systematic records of all petitions, it is unclear how many petitions have been filed and how many petitions have been denied. Nor is it clear why petitions are denied, or what factors are relevant to the Board’s determination.

Florida also uses an administrative model of clemency, but unlike Alabama, all petitions must be approved by the governor, who is a member of the Executive Clemency Board.

Applicants are given the opportunity to speak for five minutes before the governor and the other members of the Executive Clemency Board. During these hearings, applicants are frequently emotional, possibly because of the perception that applicants must confess contrition and implore the pity of the Board in order to be successful. Like Alabama, Florida does not require the Clemency Board

47 See id at Art 8, ¶ 7.
48 Id.
49 Id at Art 8, ¶ 10. See also Ala Code § 15-22-36(b) (1995 & Supp 2004) (noting that the entry of reasons for an order and the order itself are excepted from the general rule that “all other portions of the file shall be privileged” and not public).
51 Id at Art 15, ¶ 2.
52 See Crowder, State’s Ex-Felons Start to Regain Voting Rights, Birmingham News (cited in note 18). Alabama’s previous disenfranchisement laws were invalidated in Hunter v Underwood, 471 US 222, 227–32 (1985) (holding that the Alabama disenfranchisement law violated the Fourteenth Amendment because it could not have been enacted in the absence of a racially discriminatory motivation).
53 Fla Stat Ann § 940.01.
54 See Olson, Barred for Life, Miami New Times (cited in note 6).
55 See Tamara Lush, A Call for Clemency: Felons Take Their Case to Bush, St Petersburg Times 1B (June 18, 2004) (“[In a hearing,] [o]ne man—the former mayor of a small, Brevard County community convicted of cocaine charges—was crying so much he was barely able to speak.”).
56 Compare David Margolick, Evgenia Peretz, and Michael Shnayerson, The Path to Florida, Vanity Fair 310, 363–64 (Oct 2004) (reporting that a case involving a woman who spoke with
to provide a reason for rejecting applications. Since records relating to
clemency are confidential,\textsuperscript{57} individuals petitioning for reenfranchise-
ment have no way of knowing—or proving—why their request was
granted or denied.

B. Disenfranchisement

In the past, courts have denied due process challenges to disen-
franchisement generally and, on occasion, to reenfranchisement. In
1974, the Supreme Court upheld the practice of disenfranchising those
with criminal convictions in \textit{Richardson v Ramirez}.\textsuperscript{58} Section 2 of the
Fourteenth Amendment reduces a state’s representation in Congress
by the number of males in a state not permitted to vote, except when
ineligibility arises from “participation in rebellion, or other crime.”\textsuperscript{59}
\textit{Ramirez} held that because § 2 does not punish states for disenfran-
chising criminals by reducing representation, § 1 could not have in-
tended the more drastic sanction of banning criminal disenfranchise-
ment altogether.\textsuperscript{60} Thus, disenfranchisement is not inconsistent with
the Fourteenth Amendment.

Since § 1 of the Fourteenth Amendment contains both the Equal
Protection Clause and the Due Process Clause, one reading of \textit{Ram-
irez} would suggest that criminal disenfranchisement is also exempt
from due process requirements. This reading would be consistent with
an earlier case, \textit{Beacham v Braterman},\textsuperscript{61} where a federal district court
dismissed challenges to disenfranchisement and to discretionary reen-
franchisement based on the Equal Protection and Due Process
clauses. These dismissals were summarily affirmed by the Supreme
Court.\textsuperscript{62} Given that felons did not have a cognizable claim that disen-
franchisement violated equal protection after \textit{Ramirez}, it seemed an
inevitable result that felons would not have a cognizable claim for due
process either, precisely the holding in \textit{Beacham}.

\textsuperscript{57} See Fla Stat Ann § 14.28 (West 2003). But, “such records may be released upon the
approval of the Governor.” Id.
\textsuperscript{58} 418 US 24 (1974).
\textsuperscript{59} US Const Amend XIV, § 2.
\textsuperscript{60} See Ramirez, 418 US at 55.
\textsuperscript{61} 300 F Supp 182 (SD Fla 1969) (three judge panel), affd without opinion, 396 US 12 (1969).
\textsuperscript{62} Beacham, 396 US 12.
However, under the Court's decision in *Hunter v Underwood,* those disenfranchised for criminal convictions now have a cause of action when they challenge not the bare fact of disenfranchisement, but the *means* of disenfranchisement based on some other obligation of the state. Specifically, the *Underwood* Court held that states may not purposefully target minorities when disenfranchising ex-felons and use § 2 of the Fourteenth Amendment as a safe harbor. A corresponding argument could be made for due process claims: if disenfranchised felons had standing to bring an equal protection challenge against a state's electoral scheme, there should also be standing to bring a due process challenge, provided that the means being challenged violate an independent duty. While *Underwood* clears the way for due process claims, it does not provide an independent basis for one; the authority for this must come from somewhere else. Whether there is a liberty interest in reenfranchisement proceedings that garners the protection of due process is the subject of Part II.

II. DOES DUE PROCESS APPLY?

Due process challenges implicate two questions. First, courts determine whether due process applies by inquiring whether there is a life or liberty interest at stake that falls within the protection of the Fourteenth Amendment. If there is a protectable interest, courts then examine whether the procedures afforded were constitutionally sufficient. This Part discusses the threshold question: whether reenfranchisement petitioners have a protectable liberty interest that triggers due process protection.

An essential guarantee of the Due Process Clause is the procedural safeguard of a fair hearing. The procedural aspect of due process does not place a blanket prohibition on government action, but only limits the conditions under which deprivations may occur. In that

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64 See id at 233. See also *Rogers v Lodge,* 458 US 613, 615–16 (1982).
65 *Mathews v Eldridge,* 424 US 319, 335 (1976) (holding that due process inquiries require consideration of three factors: the private interest affected by official action, the risk of erroneous deprivation of the interest, and the government's interest in avoiding administrative burdens); *Cafeteria & Restaurant Workers Union v McElroy,* 367 US 886, 895 (1961) (noting that due process inquiries begin with a “determination of the precise nature of the government function involved as well as of the private interest that has been affected”).
66 See, for example, *Board of Regents of State Colleges v Roth,* 408 US 564, 571 (1972).
67 See, for example, *Goldberg v Kelly,* 397 US 254, 262–64 (1970) (considering “the extent to which procedural due process must be afforded”).
68 See *Carey v Piphus,* 435 US 247, 259 (1978) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”). See also *First English Evangelical Lutheran Church v Los Angeles*
regard, procedural due process is more concerned with the fairness of
the method of decisionmaking, than the fairness of the decision itself. It
embodies the idea that there is value in having the government
reach its decisions in a uniform, fair, and transparent way. For exam-
ple, if a hearing is constitutionally deficient, a new hearing would cure
the procedural defects in the first hearing and legitimize the second
decision, even if the second hearing reached the same decision. As
John Hart Ely said, "We don’t regard the system as having failed when
a person whose conviction was reversed because the jury was biased is
reconvicted by an unbiased jury on remand: indeed we regard it as
vindicated." Accordingly, due process may be seen as the paradigm
for adjudicatory action, setting constitutional standards for judicial
and quasi-judicial processes even when the state is not required to
provide a judicial forum.

The reenfranchisement regimes in Alabama, Florida, and Virginia
seem to break this paradigm by providing petitioners with access to a
judicial-type setting for making their case, without providing the at-
tendant procedural guarantees that are necessary for a fair hearing. If
due process applies to elective state proceedings such as discretionary
criminal appeals, postconviction proceedings, and parole hearings, one
might expect to find a parallel liberty interest in reenfranchisement
hearings. However, the Supreme Court has considered the constitutionality of traditional clemency procedures in the past, and on
each occasion the Court has denied due process challenges to clem-
ency. Yet due to the fact-specific nature of due process inquiries, the
precedent concerning traditional clemency may not necessarily dictate
the same result for reenfranchisement. If any decision made under the
clemency authority is insulated from judicial review, then a procedural
challenge to reenfranchisement would be foreclosed. If, on the other

County, 482 US 304, 314 (1987) (holding that the Fifth Amendment “does not prohibit the taking
of private property, but instead places a condition on the exercise of that power”).
69 See Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 171 (1951) (Frank-
furter concurring) (“The validity and moral authority of a conclusion largely depend on the
mode by which it was reached.”).
70 See, for example, Mayberry v Pennsylvania, 400 US 455, 466 (1971) (concluding that a
defendant in criminal contempt proceedings could not be convicted after the fact by the judge he
had contemned but that he could be retried by a different judge).
71 Ely, Democracy and Distrust at 139 (cited in note 14).
72 See Yates v Aiken, 484 US 211, 217–18 (1988) (state postconviction proceedings); Board
of Pardons v Allen, 482 US 369, 381 (1987) (hearings on initial grants of parole); Evitts v Lucey,
(parole revocation proceedings).
73 See, for example, Ohio Adult Parole Authority v Woodard, 523 US 272, 279–85 (1998)
(plurality) (considering due process inapplicable to clemency petitions); Connecticut Board of
Pardons v Dumschat, 452 US 458, 464–67 (1981) (holding due process inapplicable to commuta-
tion decisions).
hand, reenfranchisement is sufficiently distinct from traditional clemency, perhaps due process may be applicable after all.

A. Direct Appeals and Postconviction Proceedings

Although the state is under no duty to consider petitions to restore voting eligibility, once the state implements such a process, it must ensure that the procedure for rendering decisions is not “arbitrary with respect to the issues involved.” Under Evitts v Lucey, when a state implements a system of discretionary appeals, it creates an interest in having a fair proceeding; this interest in a fair hearing includes due process protection. At issue in Lucey was whether states must provide assistance of counsel to indigent criminal defendants on appeal. The Supreme Court answered in the affirmative. If the state wanted to provide discretionary appeals, it needed to ensure that all appellants had the legal assistance necessary to make those appeals effective. Having established an opportunity for a hearing, the state was required to offer appellants a “fair opportunity to obtain an adjudication on the merits” under the Due Process Clause.

Just as due process applies to appeals, due process also applies to state postconviction proceedings. In Yates v Aiken, the Supreme Court unanimously held that postconviction proceedings must comport with due process if the state holds any proceedings at all. States have the authority to decide whether to institute these hearings in the first instance, because there is no constitutional duty to provide collateral review. However, states do not have the concomitant “authority to establish the scope” of such proceedings, but must conform their hearings to the requirements of due process. Once a decision is made

74 Lucey, 469 US at 404 (using this language with respect to direct criminal appeals). See also Douglas v California, 372 US 353, 357–58 (1963) (holding that the Constitution forbids a state to require indigent defendants on direct criminal appeals as of right to make a showing that counsel would be of assistance to them before appointing counsel, as the procedure would impermissibly give the poor only a “meaningless ritual, while the rich man has a meaningful appeal.”); Griffin v Illinois, 351 US 12, 18 (1956) (“[A] State that does grant appellate review [cannot] do so in a way that discriminates against some convicted defendants on account of their poverty.”).
76 See id at 401 (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”).
77 Id at 369 (noting that appellate rules are “hopelessly forbidding” to laypersons and that without counsel an appellant “is unable to protect the vital interests at stake”).
78 Id at 405.
80 See id at 214–15 (holding that the state court had a duty to apply the federal law on the retroactivity of new federal rules in a collateral proceeding).
81 Id at 217 (finding that South Carolina had not placed any limit on the issues that it would entertain in collateral proceedings).
to provide a judicial forum, the states are required to ensure that the judicial forum follows constitutional standards.

B. Parole Revocation Hearings

In a similar vein, states are not obligated to provide parole privileges, and may rescind the entire system of parole; nevertheless, due process applies to parole revocation hearings. Eliminating the distinction between rights and privileges, *Morrissey v Brewer* held that a parolee's interest in continued release constitutes a protectable liberty interest as defined by the Due Process Clause. *Gagnon v Scarpelli* applied the same principle to probation revocation, where the probationer's limited interest in the fair administration of probation was considered sufficient to trigger due process protection.

*Lucey, Yates, Morrissey,* and *Scarpelli* suggest that due process also applies to clemency proceedings, and that reenfranchisement hearings carry the attendant right to a fair hearing. If due process applies to discretionary appeals, collateral proceedings, and parole proceedings, then due process should also apply to the process of restoring voting rights in Alabama, Florida, and Virginia.

C. Clemency-Related Hearings

However, the Supreme Court has never held that due process applies either to clemency or commutation. If the scope of constitutional protection for individuals seeking commutation or clemency is the same as for individuals seeking reenfranchisement, it will be extraordinarily difficult to require even minimal due process. Nevertheless, the conclusion is not inescapable, because reenfranchisement differs markedly from traditional clemency in both purpose and procedure.

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82 408 US 471 (1972).
83 Id at 484 ("[T]here is no interest on the part of the State in revoking parole without any procedural guarantees at all."). See also *Graham v Richardson*, 403 US 365, 374 (1971) (rejecting "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'").
85 Id at 781-82 ("[W]e hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*.").
86 See *Woodard*, 523 US at 276 (plurality) ("Pardon and commutation decisions ... are rarely, if ever, appropriate subjects for judicial review."), quoting *Dumschat*, 452 US at 464 (holding that due process does not require states to provide a statement of reasons for denying commutation since there is no constitutional right to be released before the expiration of a valid sentence).

The Supreme Court has considered the applicability of due process to clemency-related matters on two occasions. The first, *Connecticut Board of Pardons v Dumschat*, involved Connecticut’s procedure for commutation. Commutation, which is a form of clemency, merely reduces an individual’s sentence. In *Dumschat*, the Court held that due process does not require states to provide a statement of reasons for denying commutation, since there is no constitutional right to be released before expiration of a valid sentence. The Court found that the conviction, “with all its procedural safeguards,” extinguished any liberty rights pertaining to the prisoner’s continued confinement.

However, the Court subsequently held in *Board of Pardons v Allen* that inmates seeking parole have a constitutionally protected expectation interest. Thus due process applies prior to the inmate’s release. When the state conducts hearings to determine whether an inmate should be released on parole, the hearings must follow the procedural requirements of the Fourteenth Amendment. According to *Allen*, the interest protected by the Due Process Clause is an expectation interest created by state statute.

Provided that there are some substantive constraints on state action, the individual may expect a certain course of action if the statutory criteria are met. This expectation interest is not defeated simply because the individual is not entitled to a specific outcome, or because the decisionmaker has “very broad” discretion in reaching a determination. The state undoubtedly retains broad discretion in initially granting parole, and the decision must rest on a multiplicity of factors (including subjective measures of the applicant’s ability to reintegrate into society), but neither the breadth of discretion nor the subjective

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88 For example, commutation converts a death sentence into a term of imprisonment, or reduces the time left to be served on a criminal sentence. See note 3.
89 452 US at 467 (“We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond the right to seek commutation.”).
90 Id at 464, quoting *Greenholtz v Inmates of the Nebraska Penal and Correction Complex*, 442 US 1, 7 (1979).
92 Id at 373–81.
93 Id at 380–81 (finding a liberty interest where there are “significant limits on the discretion of the [Parole] Board”). Compare *Cleveland Board of Education v Loudermill*, 470 US 532, 541 (1985) (holding that due process applies to rights issuing from an independent source, such as state law); *Roth*, 408 US at 576 (“[A] person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process.”).
nature of the determination offsets the individual's constitutionally protected expectation interest.95

Unlike ordinary clemency, reenfranchisement entails sufficient substantive constraints to trigger due process. In Florida, legislative and judicial constraints limit official discretion in the reenfranchisement process; although there is still wide discretion in rendering the final decision, the limitations provide the substantive and procedural constraints that ordinarily give rise to procedural guarantees.96 The Department of Corrections, a part of the executive, must provide applications for civil rights restoration to inmates upon release, as well as assistance and instruction in the restoration process.97 Access to the clemency process must be meaningful, not merely nominal,98 and once the individual serves the maximum term of the sentence or completes his parole term, he “may be entitled to the restoration of all the rights of citizenship”99.

To the extent that individuals are encouraged to apply for reenfranchisement and the process is touted as a vehicle for restoring voter eligibility to deserving individuals,100 it is not difficult to identify an expectation interest created by judicially imposed constraints and public official statements.101 As a result of these statutory provisions and official public statements, petitioners in Florida have a limited expectation of reenfranchisement.102 This expectation interest, though limited, should be protected by the Due Process Clause, just as it is in the conduct of parole revocation hearings and in the administration of parole.

In Virginia and Alabama, on the other hand, the employment of judicial and quasi-judicial processes, rather than the individual’s ex-

95 Allen, 482 US at 381 (considering the decision to release an inmate on parole “necessarily subjective . . . and predictive”), quoting Greenholtz, 442 US at 13.
96 In both Allen and Wolff v McDonnell, 418 US 539 (1974), the “limitations” upon discretion or upon the process of reaching a decision were not considerable, yet in both cases, the Court deemed the limitations an indication of legislative intent as to the availability of the privilege. The legislative assurance gives rise to the individual’s expectation, which in turn requires procedural safeguards under the Due Process Clause before the expectation may be defeated. See Allen, 482 US at 376–77 (initial grants of parole); McDonnell, 418 US at 548 n 8.
98 See Florida Caucus of Black State Legislators v Crosby, 877 S2d 861,864 (Fla App 2004).
99 See Fla Stat Ann § 940.05(2)–(3).
100 See, for example, Letter from Governor Jeb Bush to Ledger, State Eases Clemency Help, quoted in Letters to the Editor; Voice of the People, Ledger A16 (July 30, 2004).
101 But compare Dumschat, 452 US at 465 (an expectation interest cannot “be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generously in the past”), quoting Leis v Flynt, 439 US 438, 444 n 5 (1979).
102 See Goodnough, Felons Struggle to Regain Rights, NY Times at A1 (cited in note 5).
103 But see Dumschat, 452 US at 467 (holding that the Connecticut Board of Pardons’s power to commute sentences conferred no rights upon inmates beyond the right to seek commutation).
pectations, should trigger due process protection. In Alabama, the same procedure for granting parole petitions is used for considering reenfranchisement petitions, such that due process already constrains the Board's actions under *Allen*. Moreover, the use of the quasi-judicial procedures of parole revocation should also invoke the interests in a fair hearing under *Lucey*. The process in Virginia should elicit the same due process protection because of the involvement of the circuit court.

2. Clemency and reenfranchisement.

After *Dumschat*, the Supreme Court had another occasion to consider whether due process applies to clemency. In *Ohio Adult Parole Authority v Woodard*, the Court upheld Ohio's clemency procedure against a due process challenge. Because a pardon is considered a to be "matter of grace" by the executive, pardon decisions warrant substantial judicial deference. The *Woodard* Court agreed that the clemency procedures—which provided some notice and an opportunity for the petitioner to be heard, but no assistance of counsel during the interview—did not violate due process, but the Court disagreed as to why. The plurality found due process to be inapplicable to clemency, while the concurring justices concluded that due process did apply to clemency but that the process provided by Ohio was all that was required.

Still, the concurring and dissenting justices recognized the danger that the clemency power might be abused. Justice O'Connor's concurrence, joined by Justices Souter, Ginsburg and Breyer, held open the possibility that due process may apply in extraordinary cases where the exercise or denial of clemency is completely arbitrary. Justice Stevens went even further in his dissenting opinion, finding that due process should apply to all clemency hearings, just as it does in post-conviction proceedings. Thus, a majority of the justices in *Woodard*

105 Id at 285.
106 Id. See also *Beacham*, 300 F Supp at 184 ("The historic executive prerogative to grant a pardon as an act of grace has always been respected by the Courts. Where the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention.") (emphasis added).
108 See id at 290 (O'Connor concurring).
109 See id at 289 ("Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency.").
110 Id at 292 (Stevens dissenting) ("If a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.").
Some Kind of Process for Felon Reenfranchisement

considered due process applicable to clemency proceedings, even if it requires only a minimal amount of procedure.

Because reenfranchisement is grounded in the clemency power, due process might be inapplicable to reenfranchisement hearings because the petitioner does not have a legitimate expectation of having suffrage restored. Like clemency, the decision to restore a petitioner’s right to vote could be considered an act of grace, placing the decision beyond the reach of due process. However, such a facile analysis ignores critical distinctions between reenfranchisement and ordinary clemency. Indeed, the Supreme Court has repeatedly stated that restoring suffrage is not an act of grace but a fundamental right.111

First, reenfranchisement carries civic and political implications that distinguish it from clemency and weigh in favor of judicial vigilance. It would be problematic if the elected officials of a democracy were permitted to choose the voters, instead of allowing voters to choose officials. If nothing else, the participatory value of a fair hearing is more important in hearings that decide the voting fate of petitioners, since voting is itself an expressive, participatory act.112 In Morrissey, the extension of constitutional protection for parolees was fueled in large part by the recognition that fair proceedings contribute to institutional legitimacy.113 In the parole system, where the individual’s situation is precarious, and where the government has an interest in integrating the individual into the rest of society, the perception of fairness is of paramount importance.

This notion of institutional legitimacy is as important in the realm of suffrage rights as in parole. In a representative government, the individual voter adds his own vote to the votes of others to elect a representative every several years; this representative then participates in the respective legislative body. When an individual act of voting is so attenuated from the legislative process, the ability of any one voter to control substantive policy decisions is negligible.

However, irrespective of the value of voting as a means to an end, voting is also valuable in se, and it is for this reason that restrictions on

111 See, for example, Reynolds v Sims, 377 US 533, 561–62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society.”).
112 See McGrath, 341 US at 170 (“The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”).
113 See Morrissey, 408 US at 484 (“And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”).
the right to vote are generally subject to strict scrutiny.\footnote{See Harper v Virginia Board of Elections, 383 US 663, 668 (1966). In Harper, the Court invalidated the poll tax for state elections despite its obvious connection to legitimate administrative ends—paying for the cost of elections—and despite the paltry amount of the tax. See id at 670. There was no claim that anyone who wanted to vote could not afford the tax. Still, the Court considered the tax to present an irrelevant and capricious factor for determining voter eligibility because wealth is not "germane to one's ability to participate intelligently in the electoral process." Id at 668. See also Reynolds, 377 US at 561–62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").} As the hallmark of representative government,\footnote{Reynolds, 377 US at 561–62 ("As long as ours is a representative form of government ... the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.").} voting allows individuals to express policy preferences and to take part in a collective, communal act.\footnote{See Adam Winkler, Note, Expressive Voting, 68 NYU L Rev 330, 331 (1993): [T]he vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity. See also Alice E. Harvey, Comment, Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need For a Second Look, 142 U Pa L Rev 1145, 1170–73 (1994) (discussing the negative psychological effects of voter disqualification).} If anything, the fact that reenfranchisement implicates the right to vote should elicit greater judicial involvement, in order to preserve the legitimacy of government action vis-à-vis petitioners.\footnote{In this regard, consider Judge Friendly's argument that decisionmakers must provide a written statement of reasons after reaching a decision: "The necessity for justification is a powerful preventive of wrong decisions ... A statement of reasons may even make a decision somewhat more acceptable to a losing claimant." Friendly, 123 U Pa L Rev at 1292 (cited in note 7).} Inasmuch as procedural fairness contributes to institutional legitimacy and enhances the state's ostensible purpose, due process should apply to reenfranchisement just as it does to parole proceedings.

Second, the concern that additional procedures at the clemency stage would denigrate the finality of decisions is not a relevant concern for reenfranchisement. At some point in the criminal process, after the layers of appeals, state postconviction proceedings, federal habeas review, and consideration for state clemency, the shining principles of due process lose their lustre, and the goals of fairness, consistency, and accuracy give way to finality. But the decision to disenfranchise a particular individual is not constitutionally scrutinized at any earlier point in the criminal process. Given that the loss of the franchise is not considered part of the sentence, voter ineligibility is treated as a collateral consequence of conviction, rather than a direct one. If an individual is ignorant of the fact that he may lose his right to vote, he cannot have his plea vacated as he can for ignorance of other
direct consequences. Like parole, reenfranchisement considers the character of the petitioner both before and after the conviction, an issue not previously litigated. Since reenfranchisement hearings do not operate simply as a review or re-review of the individual’s innocence, the justifications for staying the judicial hand in clemency do not apply with the same force for discretionary reenfranchisement.

Moreover, unlike ordinary clemency, which may eliminate or reduce a criminal sentence, every reenfranchisement petitioner in Alabama, Florida, and Virginia has already completed his or her sentence, and seeks only to mitigate the legal consequences stemming from conviction. In this sense, petitioners are more comparable to individuals seeking state privileges than seeking mercy. For example, even if individuals are not entitled to receive a professional license, due process ensures a fair procedure for determining how licenses will be distributed. The Supreme Court has held due process applicable to the distribution of important privileges, such as parole, professional licenses, and security clearance. Additionally, several U.S. Courts of Appeals have required a principled basis for determining how to distribute state privileges that involve rights that are far less fundamental than employment or freedom from physical restraint. As due process

118 For a plea to be a knowing and voluntary waiver of trial rights, the accused must be “fully aware of the direct consequences” of the plea, Brady v United States, 397 US 742, 755 (1970), including the permissible range of sentences, Boykin v Alabama, 395 US 238, 244 n 7 (1969). However, the loss of voting rights is considered a collateral, rather than a direct, result of conviction. See, for example, Meaton v United States, 328 F2d 379, 381 (5th Cir 1964) (upholding a denial of a motion for leave to withdraw a plea even though “the appellant failed to understand the collateral effects such as the loss of civic rights”). Compare Hill v Lockhart, 474 US 52, 56, 60 (1985) (holding that counsel’s failure to properly advise the client as to the parole eligibility date under a plea agreement did not vitiate the voluntariness of the plea and did not constitute ineffective assistance of counsel in derogation of the Sixth Amendment).

119 Compare Goldsmith v United States Board of Tax Appeals, 270 US 117, 123 (1926) (distinguishing between entitlement to a hearing and entitlement to a certain course of action).

120 Allen, 482 US 369 (holding that due process is applicable to procedures granting parole privileges); Willner v Committee on Character and Fitness, 373 US 96 (1963) (holding due process applicable to procedures granting licenses to practice law); Joint Anti-Fascist Refugee Committee, 341 US 123 (holding due process applicable to the method for revoking security clearances for government contractors). See also Green v McElroy, 360 US 474 (1959) (holding that legislative and presidential delegation could not have authorized the Department of Defense to revoke a person’s security clearance without the traditional safeguard of fair procedure). Consider Sperry v Florida, 373 US 379 (1963) (holding that due process does not allow states to prevent persons authorized by the United States Patent Office from preparing and prosecuting patents, though the activities would otherwise constitute the practice of law).

121 Soglin v Kauffman, 418 F2d 163 (7th Cir 1969) (invalidating a university policy for suspension and expulsion because the basis for finding misconduct was too broad and undefined); Holmes v New York City Housing Authority, 398 F2d 262 (2d Cir 1968) (holding that due process requires a city agency to use ascertainable standards in determining eligibility for public housing); Hornsby v Allen, 326 F2d 605 (5th Cir 1964) (holding that due process requires a city to use ascertainable standards in determining eligibility for liquor licenses).
applies to the distribution of privileges, so too should it apply to the petitioner's request for the right to vote, a right more fundamental than the right to practice any one profession in particular.

Third, Alabama, Florida, and Virginia use a more judicialized process for reenfranchisement than for traditional clemency. The process in these states, including the use of judicial hearings in Virginia, and administrative hearings in Alabama and Florida, bears little resemblance to the review of paper applications in Kentucky. Certainly states are not obligated to implement reenfranchisement regimes: because the Constitution permits felony disenfranchisement, there is no requirement that states review franchise eligibility on an individual basis. However, the elective nature of reenfranchisement does not automatically relieve states of the requirements of due process. Just as criminal appellants and parole petitioners have a liberty interest in having a meaningful opportunity to be heard, reenfranchisement petitioners in states like Alabama, Florida, and Virginia (which have created an expectation interest in reenfranchisement) may have a liberty interest in a fair hearing on the merits of their request. If states choose to utilize judicial-type processes for reenfranchisement, states should ensure that the processes are consonant with the requirements of the Fourteenth Amendment.

The adoption of judicial processes for reenfranchisement has also resulted in greater numbers of people subject to the discretionary process, which is a further distinction from traditional clemency. Until the current administration in Florida, governors chose not to exercise much discretion in restoring civil rights, choosing instead to make reenfranchisement decisions that applied across the board. From 1975 to 1978 under Governor Rubin Askew, and from 1979 to 1987 under Governor Bob Graham, civil rights were automatically restored when individuals were released and their parole terms had expired. After

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122 See Lucey, 469 US at 405 (referring to cases where “due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal”).

123 See Olson, Barred for Life, Miami New Times (cited in note 6). Graham stated:

The restoration of rights, for which we followed the practice that I think had been followed by several governors prior to us, was that if a person served their time and any post-incarceration parole and they lived an upstanding life, they were granted their rights without a formal hearing, unless there was some unusual circumstance.

Id. When asked how unusual, Graham answered, “Quite unusual,” and went on to say, “I’m sitting here trying to think. There’s not a case which comes to mind. There might have been one, but I can’t think of one that was not handled in essentially a paper-review process.” Id.
1991, exercise of the clemency power languished for several years, with only nine hundred applications granted in 1998. Then in 1999, the current governor, Jeb Bush, took office. From 1999 through 2001, the state restored the rights of 1,550 people a year, on average. In 2002, Florida reenfranchised 6,649 people, and in 2003, the state reenfranchised 14,828 people. In 2004, more than 10,000 people were reenfranchised between January 1 and May 31 alone. By contrast, traditional clemency is exercised sparingly, obviating the need for procedural regularity. After all, procedural uniformity is inappropriate when the entire purpose of traditional clemency is to act as an extrajudicial check.

Conversely, offering a judicial forum for reenfranchisement makes procedural uniformity wholly appropriate, and the number of people undergoing the process makes it even more imperative to ensure that the process is evenhanded and transparent. In Florida, the number of persons reenfranchised each year has grown dramatically since 1999, and when the state's high rate of disenfranchisement is publicly criticized, the volume of successful petitioners is often used as a defense. As reenfranchisement broadens its reach, as it has in Alabama, Florida, and Virginia, it becomes increasingly difficult to apply the pardon with any uniformity or any justice. Without procedural safeguards, there is nothing that can prevent the possibility of abuse and the public perception of inequity. Accordingly, as the use of reenfranchisement has grown in Florida, it has also been increasingly regulated since 2002. Changes in internal policies and court-ordered remedies now place legislative and judicial limitations upon the

124 Legislation was passed in December 1991 that required a hearing before the governor and the cabinet for applicants who had been convicted of two felonies, or of one of the felonies enumerated in the statute. See id.
125 Id. This number represents the total number of petitions granted for clemency and commutation, not just petitions to have civil rights restored.
126 See Goodnough, Felons Struggle to Regain Rights, NY Times at A1 (cited in note 5).
127 Id.
128 Id.
129 See notes 26–28 and accompanying text.
131 See Goodnough, Felons Struggle to Regain Rights, NY Times at A1 (cited in note 5) ("While other states have scaled back [permanent disenfranchisement] in recent years, Governor Bush and the Legislature call their law a necessary consequence for citizens who commit crimes, and point out that many are eventually granted clemency.").
132 In 2002, for example, the Florida legislature passed a law requiring the Department of Corrections to provide applications for civil rights restoration to inmates upon release, as well as assistance and instruction in the restoration process. See Fla Stat Ann § 944.293.
133 Recently, a Florida court interpreted Fla Stat Ann § 944.293 as requiring the Department of Corrections to make applications more than nominally available. Florida Caucus, 877 S2d at 864 (ordering the issuance of a writ of mandamus on remand to require that the Department of Corrections provide the clemency forms to individuals upon discharge because making such forms available electronically is insufficient). Because of this requirement and the assis-
Board’s discretion; under *Allen* these limitations should trigger due process protection.

Because the purpose and scope of reenfranchisement in Alabama, Florida, and Virginia differ from traditional clemency, the *Woodard* Court’s reluctance to apply due process to traditional clemency is inappropriate for reenfranchisement. Rather, the provision of a judicial forum should invoke due process guarantees to ensure that the judicial process is a fair process.

Finally, even if due process applies, the procedures for reenfranchisement in Alabama, Florida, and Virginia may not necessarily fall short of constitutional standards. Since due process does not always require full trial-type procedures, it may be that the procedures in Alabama, Florida, and Virginia provide all the process that is due. In *Woodard*, for instance, the Court could not agree on whether due process applied to clemency in general. However, a majority of the justices agreed that the petitioner was not denied due process in the case at bar. Whatever due process requires of clemency, the justices agreed that it did not require the state to provide the benefit of counsel during the informal interview before the clemency board, nor did it require the state to promise immunity for statements made during the interview. Part III discusses what procedural safeguards are required by the Fourteenth Amendment in the reenfranchisement setting.

### III. WHAT PROCESS IS DUE?

In the second step of the due process analysis, courts balance the benefits of more formal procedure with its financial and administrative burdens: to determine what process is due, courts evaluate the nature of the public and private interests affected, weighing the risk of an erroneous deprivation against the burden of additional procedure to the government. As the Supreme Court has remarked in a different context, even when pursuing legitimate interests, states must regulate precisely when the regulation concerns the precious freedom of

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134 *McDonnell*, 418 US at 555, 560 (holding that “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime,” but that “one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison”); *Cafeteria & Restaurant Workers Union*, 367 US at 895 (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”).


voting. For reenfranchisement, it is important to provide procedures that would promote fairness, improve consistency, and transmit the legitimacy of the entire electoral process, including determinations of voter eligibility.

Judge Friendly identified eleven procedural elements of a fair hearing: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against one; (6) the right to have the decision based only on the evidence presented; (7) the right to counsel; (8) the making of a record; (9) a statement of reasons; (10) a public hearing; and (11) the availability of judicial review. These elements roughly correspond to the "minimum requirements of due process" identified in Morrissey.

Once liberty interests are recognized, courts independently evaluate what procedures are required by due process. Therefore, clemency boards do not automatically satisfy due process by acting in conformity with statutory requirements, if the statute mandates only minimal procedure. Although courts have repeatedly emphasized the flexible nature of the balancing test, certain minimal procedures are recognized as the foundation of fair process.

A. Fundamental Procedures that Facilitate Judicial Review

At a minimum, due process requires (1) advance notice, and (2) a written statement as to the evidence relied upon and the reasons for the action taken. Advance notice and a statement of reasons are fundamental procedures because they allow reviewing courts to determine whether due process was afforded in the first proceeding. Since Alabama and Florida do not provide these minimal procedural safeguards, reenfranchisement in these states falls short of constitutional requirements.

139 408 US at 489 (requiring "(a) written notice of the claimed violations"; (b) disclosure of adverse evidence; "(c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body ... members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on" and the reason for the decision).
140 See, for example, Cleveland Board of Education v Loudermill, 470 US 532, 542–48 (1985).
141 See id at 547–48.
142 Wolff v McDonnell, 418 US 539, 563 (1974); Morrissey, 408 US at 485–88; Willner v Committee on Character and Fitness, 373 US 96, 103–05 (1963) (requiring an opportunity for rejected applicants to be informed of the bases for rejection and an opportunity to rebut them).
1. Advance notice of the standards governing each decision.

The procedures in Alabama and Florida are inconsistent with due process because they fail to give advance notice of the standards governing each decision. Decisions should be tied to standards that provide reasonable guidance to petitioners and decisionmakers. Reasonably clear standards discourage officials from pursuing "their personal predilections," or rendering arbitrary or capricious decisions.

Although due process requires reasonably clear standards for rendering decisions, it is not at all clear what standards govern the Board's determinations in Florida. Board members view traffic violations and blame-passing negatively, and urge applicants not to drink. Because the standards for reenfranchisement are inherently subjective (and therefore malleable), it is even more important for the government to pre-commit to the factors they will consider and the bases upon which petitions will be judged. Whereas parole eligibility may be linked to lack of future dangerousness or other identifiable criteria, there is no readily apparent standard for determining who is worthy of suffrage. The criteria will obviously reflect a policy judgment, and therefore should not be imposed by a reviewing court. Nevertheless, requiring states to identify the relevant criteria does not denigrate the authority of the states or the discretion of the officers. In altering civic and political rights, it is important that the state do so "openly and democratically, as the Constitution requires, rather than by silent erosion."

Moreover, if the objective of criminal disenfranchisement is to express community disapproval of antisocial behavior, the advanced publication of factors considered by the Board would seem to advance rather than to impede this objective. A clear model for rendering deci-

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143 See, for example, City of Chicago v Morales, 527 US 41, 56 (1999) (plurality) (invalidating a gang loitering ordinance as void for vagueness); Kolender v Lawson, 461 US 352, 361 (1983) (invalidating a law as "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute").


145 See Goodnough, Felons Struggle to Regain Rights, NY Times at A1 (cited in note 5).

146 For an examination of the Constitution's veil of ignorance rules for the legislative, executive, and judicial branches, as well as an evaluation of the tradeoff between increased information and pre-commitment, see generally Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L J 399 (2001).

147 See, for example, Woodard, 523 US 272 (considering clemency to be unfit for judicial review because of the lack of identifiable criteria).

sions preserves the dignity of the individual and legitimizes the re-
sults. These standards would also form the rubric for judicial review.

2. A record and statement of reasons.

The procedures in Alabama and Florida also fail to provide a re-
cord of the evidence relied upon and a statement of reasons for ren-
dering the decision, thus derogating from constitutional process. In
Florida, petitioners may ask why they are denied, but have no right
to a response: Florida does not require the Clemency Board to pro-
vide a reason for rejecting applications. In Alabama as well, a state-
ment of the basis for decision is required when the executive grants a
petition, but not required when the executive denies a petition. Under
the Court’s decision in Allen, the failure to adequately explain the
reasons for denial violates due process.12

Alabama and Florida have already undertaken the heavy cost of
oral hearings; there is therefore little reason to deny written deter-
minations that include the bases for the determination. As Judge
Friendly suggested, fulfilling this requirement might be as simple as
“checking a list on a card.” Providing a statement of reasons would
shed light on the decisionmaking process. Indeed, it may even make
denials “somewhat more acceptable” to an unsuccessful petitioner, by
making decisions seem less arbitrary. More importantly, a statement
of reasons allows courts to understand the rationale for a decision,
making it essential for meaningful judicial review.

Neither Alabama nor Florida makes records of proceedings; this
absence of a record impairs the integrity of the process and precludes
meaningful judicial review. Although hearings in Florida are open to
the public, records relating to clemency are confidential. The gover-

149 See Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 171–72 (1951) (“The
validity and moral authority of a conclusion largely depend on the mode by which it was
reached.”).

150 See Olson, Barred For Life, Miami New Times (cited in note 6) (“To the surprise of
many, Wilder boldly inquired, ‘Could I ask why I was denied?’ ‘The reason is a simple one,’ Bush
replied stonily. ‘The lack of remorse. Come back in two years.’”).

151 See, for example, Ala Bd of Pardons and Paroles Rules, Regulations, and Procedures Art
8, ¶ 8 (cited in note 46).

152 482 US at 371.

153 Compare Mathews, 424 US at 343–49 (holding that when triable issues can be resolved
through paper hearings, the high cost of oral hearings coupled with the small incremental gain in
accuracy do not justify additional procedural requirements).

154 Friendly, 123 U Pa L Rev at 1292 (cited in note 7).

155 Id.

156 See Fla Stat Ann § 14.28.
nor can,157 and often does,158 deny requests to review records. Access to records is similarly restricted in Alabama.159 These documentary deficiencies violate due process.

The procedural remedy is not a difficult one, and the expense of creating a record need not be great. A summary of the proceedings might satisfy the need for an evidentiary record without unduly burdening the administration. The summary could simply list the reason(s) for the petition, the witnesses heard in the case, and the reason(s) for denying or granting the petition.160 Though the burden of creating records would not be great, the benefits would be substantial. If administrative records are inadequate, judicial review cannot be very meaningful.161 Additionally, a reviewing court could not compare the manner in which clemency is exercised from decision to decision. Without a record, officials could confer or deny the right to vote based on caprice, and a court would have inadequate means of discerning whether the process is arbitrary.162 The ambiguous methodology of reenfranchisement casts a pall over the legitimacy of every decision, and the absence of systematic recordkeeping only exacerbates the perception of unfairness.

B. Neutral Decisionmakers

Besides requiring procedures that facilitate judicial review, due process also requires a meaningful opportunity to be heard by a neutral decisionmaker.163 Without a neutral decisionmaker there can be no

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157 See, for example, Asay v Florida Parole Commission, 649 S2d 859, 860 (Fla 1994) (holding that petitioners whose requests for review of clemency files are denied are entitled to no relief other than that found in federal law applicable to Florida via the Fourteenth Amendment).

158 See, for example, Stockfisch, Long Path to Clemency, Tampa Trib at 1 (cited in note 6) ("A spokeswoman in the governor's office recently denied a reporter's request to see an applicant's file, a sample file with sensitive information redacted, or even a decades-old cold file.").

159 See Ala Code Ann § 15-22-36(b) (imposing strict limits on the Board of Pardons and Paroles's ability to share information with the public from its parole consideration files); id § 15-22-53(b) (imposing similarly stringent limits upon the courts); Ala Admin Code r 640-X-5-.01 (2003) (reiterating confidentiality of records).

160 Compare McDonnell, 418 US at 564 (considering an agency's written statement as to the evidence relied on and the reasons for the disciplinary action to satisfy due process).


164 Compare McDonnell, 418 US at 564 (considering an agency's written statement as to the evidence relied on and the reasons for the disciplinary action to satisfy due process).
confidence in the reliability of the decision or in the integrity of the institution.\textsuperscript{164} Neutrality requires that the decisionmaker be both unbi-
ased and nonarbitrary.

1. Unbiased decisionmakers.

In Florida and Virginia, the fact that the governor may select eli-
gible voters presents an open question as to whether the decision-
makers are neutral. If restoration is contingent upon some factor that
would make the applicant more attractive as an elector, such as mem-
bership in the governor's party, the governor could no longer be
deemed a neutral decisionmaker. When the decisionmaker is in a posi-
tion to engage in self-dealing, the hearings are invalid—irrespective
of the existence of actual bias, and irrespective of whether a conflict of
interest actually affected the outcome of the case.\textsuperscript{165} For example, tying
the judge's compensation to the number of cases he handles compro-

mises the integrity of the process, because the judge has a stake in the
outcome.\textsuperscript{166} As a result, every case determined under the compensation
scheme violates due process on account of the structural conflict.

When an administrative panel is charged with clemency-granting au-
thority, as in Alabama and Florida, members of the board are appointed
by the governor and have only a tenuous interest in shaping the elec-
torate so as to enhance their chances of continued employment. The
selection structure does not render board members so clearly self-
interested in a particular outcome that prejudice can be assumed. In
other words, board members should generally be considered neutral
decisionmakers, unless a member has a specific tie to a case.

The same could not be said for the governor in Florida or in Vir-
ginia. By restoring any one individual's right to vote, the governor cre-
ates a new constituent. For example, suppose a governor only granted
the petitions of registered Republicans. Because elected officials will
always have a stake in the outcome, their neutrality is at least ques-

\textsuperscript{164} See Peters v Kiff, 407 US 493, 502–03 (1972) (holding that, though there is no require-
ment for states to indict by grand jury, an indictment by a grand jury that has been selected in an
arbitrary and discriminatory manner violates due process, regardless of any showing of actual bias);
Turner v Louisiana, 379 US 466, 474 (1965) (holding that a jury trial violates due process
when the jury's official guardians, who are continuously in the jurors' company, also testify for
the prosecution); Irvin v Dowd, 366 US 717, 725–28 (1961) (invalidating a death sentence in part
because jurors were influenced by newspaper publicity about the case); Tumey v Ohio, 273 US 510,
531–34 (1927) (overturning a conviction because the trial judge had a financial stake in the
outcome); Moore v Dempsey, 261 US 86 (1923) (remanding to determine whether jurors had
been intimidated by threat of mob violence).

\textsuperscript{165} See note 164.

\textsuperscript{166} See Tumey, 273 US 510 (invalidating a conviction where the judge was paid for his ser-
vice only where he convicted the defendant).
tionable. Granting clemency to a handful of individuals might not pose a serious threat, but when governors have the ability to reenfranchise hundreds, or even thousands of individuals, as is the case in Virginia and Florida, self-interest becomes a real concern.

The potential for one-party reenfranchisement notwithstanding, the clemency structures in Florida and Virginia incorporate sufficient safeguards to promote neutral decisionmaking. In Virginia, the governor may act only on the recommendation of a circuit court. Since the court acts as the factfinder and compiles the record for clemency review, the involvement of an independent body counteracts the governor's potential self-dealing. In Florida, the requirement that two other members of the board approve a petition also acts as a check against the governor's potential bias. Thus the concern that an elected official takes part in deciding who is eligible to vote does not rise to the level of a constitutional violation, because the governor is not the only decisionmaker.

2. Nonarbitrary decisionmakers.

At the core of the Due Process Clause is the concern for fundamental fairness, a concern that is in obvious tension with arbitrary decisionmaking. As Justice O'Connor observed in Woodard, due process does not allow important decisions to be made at the flip of a coin.

The proceedings in Florida, where emotional appeals seem to be rewarded, have a similar quality of arbitrariness that is inconsistent with due process. One applicant conveyed his disquietude with the process: "You're pretty much begging for their mercy to see your way, to see that you are a changed person. That was probably one of the hardest things that I've ever done." The process is also discomfiting for observers, as one journalist noted: "In a spectacle that left the average person squirming in his seat, men and women of all ages wept before the governor for a chance to vote once again." The apparent arbitrariness of the proceedings in Florida deprives petitioners of their Fourteenth Amendment right to a fair process. As noted above, the publication of reasonably clear standards governing decisions, as well

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167 See In re Oliver, 333 US 257, 278 (1948) ("It is ‘the law of the land’ that no man’s life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."); Dent v West Virginia, 129 US 114, 124 (1889) ("The great purpose of the [Due Process Clause] is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.").

168 523 US at 289 (O'Connor concurring) ("[S]ome minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency.").

169 Stockfisch, Long Path to Clemency, Tampa Trib at 1 (cited in note 6) (reporting the experience of Bill Dalacos).

170 Olson, Barred for Life, Miami New Times (cited in note 6).
Some Kind of Process for Felon Reenfranchisement

as the provision of a written record and statement of reasons, could cure the present arbitrariness of proceedings and restore the fundamental fairness of the process.

C. Evidentiary Procedures

In addition to the basic requirements of a neutral decisionmaker, a record, and a statement of reasons, courts also have recognized that certain evidentiary procedures may be required to ensure a fair hearing. In contrast to Alabama, Florida, and Virginia's failure to provide fundamental procedures necessary for judicial review, all three states satisfy constitutional requirements regarding evidentiary procedures, including the right to call witnesses and present documentary evidence, and the right to cross-examine adverse witnesses.

1. Right to call witnesses and present documentary evidence.

Alabama and Florida permit witness statements and supporting documents to be used in reenfranchisement proceedings, but they do not allow testamentary witnesses. However, this does not suggest a deprivation of procedural rights. Because the petitioner's character and progress towards rehabilitation play a large role in determining whether to restore voting rights, witnesses from the community and statements made on behalf of a petitioner can be critical. Witness statements and other supporting documents may aid the state in forming a better picture of the petitioner's situation.

However, the participation of witnesses would indubitably cause complications and delay, and the benefit of live testimony is marginal. It might be helpful for decisionmakers to observe the demeanor of the petitioner, but it is far less important to observe the demeanor of witnesses. In determining the appropriate weight to be given to a “witness” statement, the decisionmaking body may instead rely on written information about the witness, such as the witness's title or background. Since this information can be presented in documentary form, simply allowing the petitioner to bring letters of commendation enables petitioners to demonstrate community support without lengthening or complicating the proceedings. Thus, states should not be required to ensure that petitioners have an opportunity to present

171 In Florida, applicants may submit letters of reference or character affidavits from past or current employers, clergy, neighbors, or others. See Applying for Restoration of Civil Rights in Florida, online at http://www.aclufl.org/issues/voting_rights/applying_for_rights_restoration.cfm (visited Aug 1, 2005).
witnesses at the hearings, because the benefit of live testimony is outweighed by the potential for disruption and delay.172

2. Right to cross-examine adverse witnesses.

Florida permits victims to testify but does not explicitly permit petitioners to address victims. Whether the procedure in Florida deprives petitioners of the right to cross-examine adverse witnesses is an open question.173 Although *Morrissey* listed the right to cross-examination as a requirement of minimal process, it was with the qualification that there might be good cause for not allowing confrontation.174 If states deny petitioners an opportunity to cross-examine victims, and simultaneously exclude rebuttal witnesses, it might be difficult for petitioners to present their cases. Still, the exclusion of all witnesses besides victims and their families may contribute to the informality of the procedure, and tend to streamline the length of hearings, which are both legitimate state objectives.175 In addition, cross-examining former victims or survivors of crimes will do little to advance the petitioner's claim, because voter eligibility turns on the present character and fitness of the petitioner and not on actual innocence.

One could imagine circumstances where states would have to afford an opportunity for cross-examination in order to ensure a fair hearing. Surely a state could not allow numerous witnesses to testify on behalf of the state yet prohibit any form of cross-examination. At some point, the use of testimonial evidence would transform the proceeding into an adversarial process and consequently trigger trial-type procedures. However, Florida's simple procedure, which allows victims and survivors to testify without also allowing petitioners an opportu-

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172 See *Goss v Lopez*, 419 US 565, 583 (1975) ("We stop short of construing the Due Process Clause to require [ ] that hearings in connection with short suspensions must afford the student the opportunity . . . to confront and cross-examine witnesses . . . or to call his own witnesses to verify his version of the incident."); *McDonnell*, 418 US at 566 ("Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption."). According to Judge Friendly, "there is a substantial chance that the individual [in *Goss*] may be more interested in disruption than in proving his case." Friendly, 123 U Pa L Rev at 1282 n 80 (cited in note 7), citing *Goss*, 419 US at 583.

173 Of course when no testimonial evidence is allowed at all, as in Virginia, there is no attendant right to cross-examination.

174 408 US at 489.

175 Similarly, neither the right to have appointed counsel nor the right to have the assistance of counsel are considered essential for meaningful participation in an administrative setting. *Mathews*, 424 US 319; *Ross v Moffit*, 417 US 600, 609 (1974). Therefore, neither right should be required for reenfranchisement hearings. Although petitioners could conceivably benefit from having a professional advocate present the cases and participate in proceedings, the participation of counsel would destroy the informality of the proceedings and thus was considered unnecessary by the *Woodard* plurality. See notes 104–08 and accompanying text.
nity to cross-examine witnesses, does not seem to rise to the level of a constitutional violation.

IV. ADVERSE CONSEQUENCES OF ADDITIONAL PROCEDURES

It is of course important to bear in mind the potentially adverse consequences of imposing additional procedures. If due process applies to reenfranchisement, states may be put off by the "constant administrative burden." Additional procedural requirements carry real costs and make inroads on state authority. Added procedures may not only antagonize these states, but also threaten the existence of reenfranchisement, since the process would become more formal, more regulated, and subject to scrutiny. As a result, states like Alabama and Florida may consider the cost of additional procedures to be too high and decide to forego reenfranchisement hearings altogether.

However, deterring states from using a discretionary regime of reenfranchisement is not necessarily undesirable. It might be said that the current system, which allows some people to be reenfranchised through inconsistent or arbitrary hearings, is preferable to a state of the world where no hearings were held at all, a world where no individuals, however worthy, could be restored to the franchise. The idea is that some process might be better than none. But this idea is inconsistent with procedural due process, which requires fairness in the conduct of proceedings, whether the proceedings are constitutionally required or elective. If judicial-type processes are to be used, they must be used fairly. By foreclosing the use of sham proceedings, procedural due process guarantees that judicial-type fairness must exist for all adjudicatory processes.

The fair-or-nothing approach is also consistent with voting rights jurisprudence, which does not require all matters to be submitted to vote, but requires that voting be fair. When state action concerns voting, it may be better for the state to deny voting across the board than for a state to determine in an arbitrary manner who gets the right to vote.

Courts are careful to ensure that electoral schemes are governed by equitable and evenhanded rules because of the symbolic nature of

178 Rice v Cayetano, 528 US 495 (2000); Chisolm v Roemer, 501 US 380 (1991) (holding that states are not required to conduct elections for judicial posts, but that eligibility to vote in judicial elections is still governed by constitutional standards); Gray v Sanders, 372 US 368, 380–81 (1963).
election rules. Correlatively, courts are wary of discretionary schemes because of the risk that an individual officer's action might be biased or arbitrary. Legislatures may restrict suffrage according to clearly established criteria such as infancy, incompetency, or felony conviction; however, "once a class is chosen and the qualifications specified," courts are reluctant to allow state officials the discretion to discriminate within each class. Thus in *Louisiana v United States*, the Court struck down a literacy test that gave voting registrars "virtually uncontrolled discretion as to who should vote and who should not." The *Louisiana* Court denounced the broad authority conferred upon officials, which left "the voting fate of a citizen to the passing whim or impulse of an individual registrar."

The danger in discretionary reenfranchisement, as with other election rules, is that it vests officials with symbolic authority while concealing the state's message from the public and the judiciary. The individual is without recourse because he is unable to point to the law's unequal treatment of individuals, or to discriminatory intent, there being no record if he is denied. At the same time, the voting public remains ignorant of the way the law operates, and therefore has no opportunity to express disapproval by contacting elected representatives or voting out of office the culpable officials.

Yet without procedural safeguards, there is nothing to prevent reenfranchisement proceedings from being decided on the whim or impulse of the presiding officers. Traditionally, there were powerful natural constraints on the use of the clemency power. Most often, the executive acted alone in exercising the power, and pardons were doled out sparingly, both of which led to intense public scrutiny of pardon decisions. Whether pardons were extraordinary or whether they were

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182 Id at 150. Under La Const Art VIII, § 1(c)–(d), applicants for voter registration were required to understand and give a reasonable interpretation of any section of the state or federal constitution.
183 380 US at 153. In fact, the Court found the literacy tests were used to deter blacks from voting.
184 See *Smith v Goguen*, 415 US 566, 572 (1974); *Grayned v City of Rockford*, 408 US 104, 108–09 (1972) (collecting cases). Compare Ely, *Democracy and Distrust* at 97 (cited in note 14) (law enforcement has a good deal of "low visibility discretion" in conducting searches and seizures and for that reason the Fourth Amendment requires not only a "certain quantum of probability," but through the warrant requirement it also requires an independent determination by a neutral magistrate when possible).
185 See note 57 and text accompanying notes 48–51.
given as a matter of course, the clemency power was exercised in a principled, consistent manner. Now that a great number of people participate in clemency proceedings, the nature of the expectation has changed. However, the danger of placing voter eligibility determinations in the discretion of officials has not.

It is therefore essential that states provide the procedural safeguards necessary for fair, evenhanded, and transparent decisionmaking, if they are to make provisions for reenfranchisement at all. Procedural safeguards will not only achieve fairer results, but will also ensure greater respect for the results and the responsible institutions. In this regard, it is also fitting that the clemency power be used in a fair and just manner. Because clemency “is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,” it seems particularly troubling that judicial process could be used under the clemency authority and that the process would create rather than correct injustice. At the broad level at which reenfranchisement operates, the risk is apparent. While he was governor, Paul Patton made a similar observation about clemency in general: “[T]here is no way that we can utilize this authority—this responsibility—on a broad scale and promote justice in Kentucky. . . . In fact, it would appear to me (that) the more we use this authority, the more injustice, or the more perception of injustice, would result.”

CONCLUSION

The new use of the clemency power for reenfranchisement should elicit new inquiry as to its constitutionality. At the heart of the issue is the individual’s ability to participate in the political process. The importance of the individual’s right to vote should garner constitutional protection not only to promote fairer and more transparent decisionmaking, but also to preserve the dignity of the individual and the legitimacy of the institution. Though states may choose not to provide criminal appeals, all appeals must be consistent with due process. Though states may forego postconviction proceedings, due process applies with equal force to postconviction proceedings as well. And though states may choose not to offer a system of parole privileges,
how the state operates parole must be consistent with due process, including how it makes affirmative grants of parole privileges.

Though the Supreme Court has never held that due process applies to traditional clemency, there is no reason to make a similar exception for reenfranchisement. Unlike traditional clemency, reenfranchisement implicates the right to vote, which is not considered an act of grace, and the petitioner has never had a prior opportunity to argue his fitness for the franchise. Moreover, the frequent use of reenfranchisement in Alabama, Florida, and Virginia is not at all like the sparing use of traditional clemency in Kentucky.

Thus, the reluctance to interfere with executive clemency decisions should not hold for reenfranchisement. Rather, individuals participating in the judicial-type processes of reenfranchisement should be constitutionally protected by the same procedural guarantees that attend other adjudicatory processes. Reenfranchisement hearings, though elective, should provide a fair and impartial forum for petitioners to present their cases. Where there are statutory limitations on state authority, as there are in Alabama, Florida, and Virginia, due process should apply.

Because of the symbolic nature of voting, it is essential that reenfranchisement procedures foster transparent, unbiased, and nonarbitrary decisionmaking. At a minimum, due process requires the fundamental safeguards that enable judicial review: advance notice of the criteria for decisions; a record of the hearing, even if it is just a summary of the proceedings; and a written determination, including the reason(s) for granting or denying the petition. Since Alabama and Florida do not provide these procedural safeguards, reenfranchisement procedures in Alabama and Florida violate due process.

Further, due process mandates that decisionmakers be neutral. Since the decisionmaking structures in Alabama, Florida, and Virginia prevent a single official from ruling in his or her self-interest, the decisionmakers of these states are sufficiently impartial to satisfy due process. Still, the method for reaching decisions must not be arbitrary. This casts doubt on the constitutionality of the proceedings in Florida.

Finally, due process requires sufficient evidentiary procedures to ensure that petitioners are able to present their cases in a neutral forum, which is also satisfied in all three states. Though due process applies to all three states that use the clemency authority for the express purpose of reenfranchisement, only Virginia provides all the process that is due.

Procedural due process holds out the promise that government institutions will be fair, consistent and disciplined in rendering judgment. To apply these same guarantees to reenfranchisement does not depart from prior case law, but follows our best traditions and protects the liberty that is the foundation of our government.