

MODERNIZING STATE VOTING LAWS THAT DISENFRANCHISE THE MENTALLY DISABLED WITH THE AID OF PAST SUFFRAGE MOVEMENTS

INTRODUCTION

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.¹

If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our founders is alive in our time, who still questions the power of our democracy, tonight is your answer. . . . It's the answer spoken by young and old, rich and poor, Democrat and Republican, black, white, Hispanic, Asian, Native American, gay, straight, disabled and not disabled—Americans who sent a message to the world that we have never been just a collection of individuals or a collection of Red States and Blue States; we are and always will be the United States of America.²

Justice Black's and President Barack Obama's words cited above implicate the power of voting in America's democracy. Their words highlight the dual nature of voting as an independent, personal right to express an opinion and as an opportunity to participate as part of a community, diverse yet united, in support of democracy. The right to vote is one of the most basic representations of the core values the American Founders believed in when they devised the Constitution.³ Yet, even today, the right to vote is not universally extended to adult American citizens.⁴

The states have the province to establish voter qualifications that are "not discriminatory and which do not contravene any restriction that Congress,

1. *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

2. Barack Obama, U.S. President, Election Night Victory Speech in Grant Park (Nov. 4, 2008), in *N.Y. TIMES*, November 5, 2008, at A1, available at <http://elections.nytimes.com/2008/results/president/speeches/obama-victory-speech.html>.

3. See *Wesberry*, 376 U.S. at 17–18 (discussing the Founders' conception of how important voting rights were).

4. See 42 U.S.C. § 1973gg-6(a)(3)(B) (2006) (permitting states to remove an individual's name from the eligible voter list "by reason of criminal conviction or mental incapacity").

acting pursuant to its constitutional powers, has imposed.”⁵ Federal law specifically permits states to disenfranchise two classes of adults: convicted criminals and those with “mental incapacity.”⁶ While there are arguably public policy justifications for restricting the voting rights of criminals and the mentally disabled, any qualification or condition imposed on these individuals’ right to vote must pass a strict scrutiny constitutional analysis and comport with federal law.⁷

This Comment focuses on the restricted voting rights of the mentally disabled and highlights the need to modernize over-inclusive state voting laws rooted in antiquated understandings of mental illness and general prejudice that disenfranchise the mentally disabled. It briefly surveys the varying, current state voting laws that apply to the mentally disabled and outlines the strict scrutiny constitutional analysis applied to restrictive voting laws.

Within the framework of the strict scrutiny test, the Comment addresses some common arguments in support of restricting mentally disabled individuals’ voting rights and reveals the arguments’ likeness to false arguments made in support of denying women the right to vote in the early twentieth century. Also within the test’s framework, the Comment discusses the difficulty of defining a “capacity to vote” and the problem of discrimination facing the mentally disabled while highlighting parallels to the discrimination faced by African-Americans in the early to mid-twentieth century. The women’s and African-American suffrage movements are historical examples that can help educate our understanding of the destructive effects of disenfranchisement and encourage individuals to seriously consider the merits of broadly restricting the mentally disabled from exercising the fundamental right to vote.⁸

After identifying the difficulties states face in drafting a constitutional, restrictive voting law and the inaccuracies of common conceptions and stigma regarding the abilities of mentally disabled individuals, the Comment ultimately argues for broader voting rights for the mentally disabled. The Comment endorses, in large part, a recent ABA recommendation that proposes taking away a mentally disabled individual’s right to vote only if a court finds

5. *Lassiter v. Northampton County Bd. Elections*, 360 U.S. 45, 51 (1959).

6. 42 U.S.C. § 1973gg-6(a)(3)(B).

7. *See, e.g., Doe v. Roe*, 156 F. Supp. 2d 35, 51 (D. Me. 2001) (applying strict scrutiny analysis to a voting restriction against those under guardianship).

8. The author recognizes policy arguments disenfranchising women over eighty years ago do not provide perfect comparisons to arguments today disenfranchising the mentally disabled. Similarly, the discriminatory practices African-Americans faced that prevented their vote do not perfectly align with discrimination against the mentally disabled today. But the underlying themes and societal impressions embodied in the policy arguments against allowing women the right to vote and the discriminatory practices against African-Americans are reflected today in the disenfranchisement of the mentally disabled.

by clear and convincing evidence the individual cannot communicate, with or without accommodation, a specific desire to participate in the electoral process.⁹ The Comment goes on to suggest that eliminating language that welcomes discriminatory discretion is vital to an improved standard and that federal governmental action may be necessary to ensure broader voting rights for the mentally disabled.

Section I gives a brief evolution of social stigmas and prejudices at the root of original restrictive state voting laws, many of which still linger today. It also reviews common aspects of various current state voting laws, including how some restrict the franchise. Lastly, it outlines the strict scrutiny constitutional analysis courts apply to state laws that restrict voting rights of a particular class.

Section II discusses the problems of defining a “capacity to vote” standard under the strict scrutiny requirements and in the face of discretionary discrimination when the standard is implemented. It details the historical voting discrimination African-Americans faced and the policy enacted to fight it.

Section III addresses common arguments against expanding voting rights for the mentally disabled and whether they implicate compelling state interests under the strict scrutiny analysis. It also highlights the arguments’ similarities to early twentieth-century arguments against granting voting rights to women.

Lastly, Section IV offers a policy recommendation to extend the franchise to a broader group of mentally disabled individuals. It suggests mentally disabled individuals should be presumed able to vote and only lose the right if the individual cannot communicate, with or without accommodations, a desire to participate in the electoral process. It also indicates effective reform may require federal action.

I. VOTING BARRIERS FACING THE MENTALLY DISABLED AND THE STRICT SCRUTINY CONSTITUTIONAL ANALYSIS

A. *State Law Disenfranchisement*

United States history has been characterized by granting voting rights to increasing numbers of the population.¹⁰ Individuals with mental disabilities, however, remain one of the few groups singled out for disenfranchisement.¹¹

9. See American Bar Association Recommendation and Report, from *Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment* 1 (Aug. 13, 2007), www.abanet.org/aging/docs/Voting_Rec_FINAL_approved.doc [hereinafter ABA Recommendation].

10. Paul S. Appelbaum, “*I Vote. I Count*”: *Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVICES 849, 849 (2000).

11. *Id.*

As noted above, federal law specifically identifies convicted criminals and the mentally disabled as two classes a state can choose to disenfranchise.¹² Most states restrict the franchise for certain mentally disabled individuals.¹³ Many of those state laws use antiquated, vague, or broad categorical language reflecting century-old prejudices and misconceptions about the abilities of mentally disabled individuals.¹⁴

The current disenfranchisement of the mentally disabled stems from a history of “grotesque” societal treatment.¹⁵ In the late nineteenth and early twentieth centuries, medical authorities portrayed the mentally disabled as a “menace to society and civilization” who were “responsible in a large degree for many, if not all, . . . social problems.”¹⁶ Large “institutions” were built to isolate the mentally disabled and prevent them from reproducing.¹⁷ Mentally disabled children were believed to be uneducable and dangerous.¹⁸ In the voting realm, politicians sought to exclude the mentally disabled based on a desire to ensure the voting public made “informed and intelligent political decisions.”¹⁹ In fact, “As of 1979, most States still categorically disqualified ‘idiots’ from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.”²⁰

The vast majority of states today have constitutional provisions or statutes that deny certain mentally disabled individuals the right to vote.²¹ Idaho, Illinois, Indiana, and Pennsylvania are among the few states that do not disqualify any residents from voting based on a mental disability.²² Most

12. 42 U.S.C. § 1973gg-6(a)(3)(B).

13. See BAZELON CENTER FOR MENTAL HEALTH LAW, STATE LAWS AFFECTING THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES (2008), http://www.bazelon.org/pdf/voter_qualification_chart6-08.pdf [hereinafter BAZELON STATE LAWS].

14. See *id.*; see, e.g., CONN. GEN. STAT. § 9-12(a) (2008) (“No mentally incompetent person shall be admitted as an elector.”); HAW. CONST. art. II, § 2 (“No person who is non compos mentis shall be qualified to vote.”).

15. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in part and dissenting in part).

16. *Id.* at 462.

17. *Id.*

18. *Id.* at 462–63.

19. Leonard Holmes, *Voting Laws Discriminate Against Mentally Disabled*, Oct. 2000, <http://mentalhealth.about.com/cs/legalissues/a/vote1000.htm> [hereinafter *Voting Laws Discriminate*].

20. *Cleburne*, 473 U.S. at 464.

21. BAZELON STATE LAWS, *supra* note 10.

22. *Id.*; see IDAHO CODE ANN. § 66-412(3)(j) (2007) (allowing developmentally disabled individual to vote); 10 ILL. COMP. STAT. 5/3 (2006) (governing “Qualification of Voters”); IND. CODE ANN. § 12-26-2-8(a)(1)(F) (LexisNexis 2006) (“Detention or commitment of an individual under this article does not deprive the individual of . . . the right to . . . vote.”); 48 Pa. Op. Att’y Gen. 128 (1973) (“The mentally retarded or mentally ill cannot be disenfranchised merely because they are undergoing treatment for a mental disability.”). An employee of the Illinois

states label ineligible individuals “mentally incompetent,”²³ “*non compos mentis*,”²⁴ or “of unsound mind.”²⁵ But a number of state laws still include old, stigmatic terms such as “idiots” and “insane persons.”²⁶

The procedure to determine which mentally disabled individuals may and may not vote varies widely by state. In Florida, all individuals placed under guardianship²⁷ must be evaluated for voting disqualification.²⁸ In other words, Florida residents under guardianship are categorically presumed not capable to vote. In Hawaii, a “clerk” must investigate whether a person deemed “incapacitated . . . lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting” before the person retains his or her right to vote.²⁹ In Iowa, a court must decide whether each individual under guardianship “lacks sufficient mental capacity to comprehend and exercise the right to vote.”³⁰ Lastly, in California, a court must find that an

Cook County Clerk’s office noted, “Voting is a personal right and we don’t erect any prohibitions [related to mental capacity].” Erin G. Edwards, *Group Pushes Voting Rights for Mentally Impaired*, Jan. 15, 2008, <http://news.medill.northwestern.edu/chicago/news.aspx?id=74603>.

23. DEL. CONST. art. V, § 2; *see, e.g.*, CONN. GEN. STAT. § 9-12(a) (2008).

24. *See, e.g.*, HAW. CONST. art. II, § 2; NEB. CONST. art. VI, § 2.

25. BAZELON STATE LAWS, *supra* note 10; *see, e.g.*, MONT. CONST. art. IV, § 2.

26. *See, e.g.*, MINN. CONST. art. VII, § 1 (disqualifying “insane or not mentally competent”); MISS. CONST. art. 12, § 241 (“Idiots and insane persons [are not] qualified elector[s].”). Interestingly, Kentucky differentiates between the terms “incompetent” and “insane,” noting an incompetent person can register to vote as long as the person has not been declared insane. KY. CONST. § 145, cl. 3 (“Idiots and insane persons shall not have the right to vote.”). Also, Vermont’s Constitution is particularly unique requiring that persons must be of “quiet and peaceable behavior” to be able to vote. VT. CONST. ch. II, § 42.

27. A “guardian” is “one who has the legal authority and duty to care for another’s person or property.” BLACK’S LAW DICTIONARY 725 (8th ed. 2004). A guardian may be appointed to a mentally disabled individual for all or for specific decision-making purposes. *Id.*

28. FLA. STAT. ANN. § 744.331(3)(d)(2) (West 2005).

29. HAW. REV. STAT. ANN. § 11-23(a) (LexisNexis 2006). In a unique provision that requires “understand[ing],” all Wisconsin residents must be able to “understand[] the elective process” in order to vote. *Id.* All Wisconsin residents are presumed to have this understanding except those under guardianship. WIS. STAT. § 6.03(3) (2009). A court must “expressly” find an individual under guardianship capable of understanding the elective process. *Id.* § 6.03(1)(a). New Jersey also has an understanding requirement that was instituted as part of a 2007 constitutional amendment. N.J. CONST. art. 2, § 1, ¶ 6.

30. IOWA CODE ANN. § 633.556 (West 2003). Delaware law also requires a court finding to take away the right to vote. DEL. CODE ANN. Tit. 15, § 1701 (2007). It defines “adjudged mentally incompetent” as “a specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment.” *Id.*

individual under conservatorship³¹ cannot complete a voter registration affidavit before taking away the individual's right to vote.³²

This brief review of current state voting laws reveals many laws contain vague terms and sweeping categorizations and require individual voting officials to make difficult discretionary determinations. Recent referenda to amend older state voting laws have mostly failed.³³ As a result, many current voting laws play a role in perpetuating prejudices, stigmas, and misconceptions that were at the root of the original state voting prohibitions.³⁴ Yet, most of these impressions do not reflect the current, widely accepted medical understandings of the capabilities of many mentally disabled individuals.³⁵ Furthermore, the laws' vagaries and broad categorizations threaten the laws' constitutionality under a strict scrutiny analysis.

B. Strict Scrutiny Constitutional Framework

In *Lassiter v. Northampton County Board of Elections*,³⁶ the Supreme Court stated the federal Constitution "established and guaranteed" the right to vote.³⁷ But the Court also asserted the individual states have the power to establish voting standards as long as they are not discriminatory and do not contravene any congressionally-made law.³⁸

In *Harper v. Virginia State Board of Elections*,³⁹ the Supreme Court announced for the first time it would apply a strict scrutiny test when it assessed the constitutionality of a law limiting an individual's right to vote.⁴⁰ The Court stated, "[O]nce the franchise [to vote] is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."⁴¹ The Court also recognized the evolving nature of the Constitution stating, "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what

31. A "conservator" and a "guardian" are synonymous as are a "conservatorship" and a "guardianship." BLACK'S LAW DICTIONARY 324 (8th ed. 2004).

32. CAL. ELEC. CODE §§ 2008, 2209 (West 2003).

33. Voting Laws Discriminate, *supra* note 16. One notable judicial exception is *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), where the court found a Maine constitutional provision categorically denying voting rights to individuals under guardianship unconstitutional under a strict scrutiny analysis. *Id.*

34. Holmes, *supra* note 19.

35. Kay Schriener et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 PUBLIUS: J. FEDERALISM 75, 88 (1997).

36. 360 U.S. 45 (1959).

37. *Id.* at 51.

38. *Id.*

39. 383 U.S. 663 (1966).

40. *Id.* at 670; see Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1176 (2007).

41. *Harper*, 383 U.S. at 665.

lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”⁴² Noting the right to vote is “precious” and “fundamental,” the *Harper* Court ruled, “[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”⁴³

In *Kramer v. Union Free School District No. 15*,⁴⁴ the Court more clearly outlined the requirements of the Equal Protection strict scrutiny test and reasons why the test applied to voting laws.⁴⁵ The Court set out the first part of the test stating: “[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling state interest*.”⁴⁶ Subsequently, the Court articulated the second part of the test stating that the “classification” of those excluded from voting “must be *tailored* so that the exclusion of [those individuals] is *necessary* to achieve the articulated state goal.”⁴⁷ The Court went on to explain the reason the strict scrutiny test applied to restrictive voting laws:

[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.⁴⁸

In *Dunn v. Blumstein*,⁴⁹ the Court further delineated its Equal Protection strict scrutiny analysis into three primary foci: (1) “the character of the classification in question;” (2) “the individual interests affected by the classification;” and (3) “the governmental interests asserted in support of the classification.”⁵⁰

42. *Id.* at 669 (emphasis added).

43. *Id.* at 670.

44. 395 U.S. 621 (1969).

45. *Id.* at 626.

46. *Id.* at 627 (emphasis added).

47. *Harper*, 383 U.S. at 632 (emphasis added). The Court in *Dunn v. Blumstein*, described this part of the test stating, “Statutes affecting constitutional rights must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives.” 405 U.S. 330, 343 (1972) (citations omitted).

48. *Kramer*, 395 U.S. at 626 (citations omitted).

49. 405 U.S. 330 (1972).

50. *Id.* at 335.

In sum, to pass an Equal Protection strict scrutiny test and be found constitutional, state laws that classify certain individuals ineligible to vote must be necessarily or narrowly tailored to promote a compelling state interest.⁵¹ Furthermore, if the state's goals can be achieved in other reasonable ways that lessen the voting restrictions, the state must implement the less restrictive option.⁵² It is essential to know the high burden states must meet to disenfranchise a class of voters in order to fairly analyze the legitimacy and appropriateness of state voting laws restricting the voting rights of the mentally disabled.

II. NARROWLY TAILORING THE DEFINITION OF CAPACITY AND THE PROBLEM OF DISCRIMINATION

This section analyzes specific issues that arise when the strict scrutiny standard is applied to voting laws restricting the rights of the mentally disabled. First it explains the difficulty of defining the "capacity" one must possess to be able to vote. Second, it points out that a well-defined, narrowly tailored capacity standard may pass constitutional scrutiny but is vulnerable to discretionary discrimination by individuals implementing the standard. The voting discrimination faced by African-Americans during the early and middle-twentieth century provides a useful parallel to discrimination against the mentally disabled and a guide for how the discrimination problem has been mitigated in the past.

A. *Defining the Capacity to Vote—An Exercise in Policy, Not Science*

Defining what it means to be capable to vote is a major difficulty embedded in most state voting laws. As already discussed, most states are sufficiently concerned about mentally disabled voters that they have passed voting laws with capability standards.⁵³ Yet, a broad standard will likely result in over-inclusion and be unconstitutional under the strict scrutiny test.⁵⁴ Thus, states must develop a standard that satisfies their interests in restricting the franchise while avoiding over inclusion as much as possible.

Throughout the legal system, capacity standards vary by area of law and the function regulated, resulting in individuals being "legally capable" of

51. See *supra* notes 36–50 and accompanying text.

52. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

53. See *supra* notes 21–26 and accompanying text. However, Idaho, Illinois, Indiana and Pennsylvania have avoided the "capacity" policy dilemma by not restricting voting rights based on mental disability. See *supra* note 22 and accompanying text.

54. See *supra* note 48 and accompanying text explaining the utmost importance of preserving an individual citizen's right to vote.

performing certain functions but not others.⁵⁵ The particular level of capacity required to perform a certain legal function often depends on the type of transaction involved or the nature of the decision-making authority required.⁵⁶ For example, a person can be placed under guardianship when deemed incapable of entering into various transactions but still retain the legal authority “to exercise certain core decision-making authority” without further court rulings.⁵⁷

In essence, defining the criteria for “voting capacity” is an exercise in policy, not science.⁵⁸ There is “no scientifically determinable point” on the spectrum of people’s capacities where one can say a person has sufficient capacity to vote.⁵⁹ Thus, when a state establishes a capacity requirement, it should reflect “the importance of allowing persons to perform the task even in the face of some degree of impairment, tallied against the weight of concerns regarding the possible adverse outcomes of the task if performed by someone whose capacity may be impaired.”⁶⁰ This is essentially a determination of how to allocate the risk of error.⁶¹

In the context of restricting the right to vote, the Supreme Court in *Kramer* succinctly conveyed the utmost importance of preserving an individual’s right to vote.⁶² Meanwhile, it has been argued that any harm in allowing marginally incapable people to vote is small compared to the harm of preventing capable people from exercising their fundamental right to vote.⁶³ Support for this claim comes from studies showing a substantial portion of Americans’ political discourse circumvents the conscious mind altogether.⁶⁴ Indeed, “a range of irrelevant factors and fortuities—such as a candidate’s height, whether he uses a nickname, or the format of the ballot” drive many citizens’ political views and choices.⁶⁵

55. Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 325–26 (2003). Standards regulating capacity are not monolithic—just because one does not have the capacity to contract does not mean the individual cannot write a will or refuse life-sustaining medical treatment. *Id.* at 323.

56. *Id.* at 325.

57. *Id.* at 325–26.

58. Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 962 (2007).

59. *Id.*

60. *Id.*

61. *Id.*

62. See *supra* note 48 and accompanying text.

63. See Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867, 871–72 (1993).

64. Pamela S. Karlan, *Framing Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 917 (2007).

65. *Id.*

State laws categorically denying voting rights to persons under guardianship seemingly are not narrowly tailored and in all likelihood are drastically overinclusive.⁶⁶ Other state laws that avoid categorical restrictions provide less restrictive alternatives that, under the strict scrutiny analysis, must be implemented in place of the more restrictive option.⁶⁷

The great harm of an overinclusive capacity definition, the limited harm of an underinclusive capacity definition, and the constitutional requirement to narrowly tailor the disenfranchised class push states to whittle voting capacity requirements to a bare minimum.⁶⁸ But even if a state establishes a suitable, precise voting capacity standard, it still must present a compelling interest to warrant the voting rights restriction.⁶⁹ This Comment will consider potential compelling state interests in a later section. It will now address the problem of discrimination destroying the intended protections of a narrowly tailored voting law.

B. Discriminatory Discretion Preventing the Exercise of Voting

As explained above, many states currently require individual capacity assessments to determine whether a mentally disabled individual has the requisite mental capacity to vote.⁷⁰ Depending on the state, these determinations may be made by a clerk, judge, or some other professional.⁷¹

Pervasive attitudes and stigmas that mentally disabled individuals, as a class, cannot think independently or make basic decisions have a strong likelihood of influencing a clerk's or a judge's determination.⁷² Vague capacity definitions are particularly susceptible to discretionary abuse and,

66. See, e.g., *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (holding Maine's categorical disenfranchisement of individuals under guardianship "is not narrowly tailored" because it would disenfranchise "many more persons under guardianship" than it intended). The Court indicated individuals may be placed under guardianship for reasons that would not bring their ability to vote into question. *Id.* at 54–55.

67. See *supra* note 52 and accompanying text. Of course, a state only has to implement a less restrictive policy if it will serve its professed compelling interest.

68. Hurme & Appelbaum, *supra* note 58, at 965.

69. See *supra* notes 44–48 and accompanying text.

70. See *supra* notes 28–32 and accompanying text.

71. See *supra* notes 28–32 and accompanying text. See also Schriener, *supra* note 35, at 93–94 (noting that allowing any professional, including psychiatrists and psychologists, to determine when an individual is capable to vote does not remove the influence of bias or prejudice—professional judgments in this respect are merely "sanctified version[s] of the same underlying prejudice" held by lay persons).

72. See Appelbaum, *supra* note 10, at 849; see also Schriener, *supra* note 35, at 90 (highlighting the American historical tendency to apply "objective" voting requirements discriminatorily, particularly with regard to African-Americans and women).

historically, have operated as “exclusionary project[s].”⁷³ Accordingly, “A supposedly neutral finding of incapacity can be driven by bias and used instrumentally by a court or [other entity] to insure the individual in question behaves in a prescribed manner.”⁷⁴

Similarly, during the African–American suffrage movement in the early and mid-twentieth century, stigma, misconceptions about ability, and general distaste for African–Americans motivated the discriminatory efforts of local voting officials.⁷⁵ The frequency and scope of voting discrimination against African–Americans was generally greater and more pronounced than it is against the mentally disabled,⁷⁶ but the movement still provides a useful comparison for multiple reasons. First, the African–American suffrage movement highlights the devastating power discrimination can have over a minority trying to exercise its rights. Second, it reveals public policy options to address the problem of discrimination and modernize state voting laws.

1. Discretionary Discrimination—Literacy Tests and Beyond

All African–American men were granted the constitutional right to vote with the passage of the Fifteenth Amendment in 1870.⁷⁷ However, African–Americans, particularly in the South, were systematically denied the right to vote through coercion and legal obstructions.⁷⁸ It was not until 1965 and the passage of the Voting Rights Act that the legal barriers of literacy tests and discriminatory practices were directly addressed and African–Americans had a legitimate voice at the polls.⁷⁹

Literacy tests gained popularity well before the 1960’s Civil Rights Movement.⁸⁰ Northern states adopted literacy tests in the mid to late 1800s to “produce a more competent electorate” and effectively “weed out sizeable

73. Knauer, *supra* note 55, at 324. Knauer notes: “The concept of legal capacity has traditionally been an exclusionary project under which certain classes of individuals were by definition incapable of legal agency.” *Id.* She also states feminism and critical race studies have brought out a deep skepticism for the state’s protective impulses expressed through the concept of legal capacity. *Id.*

74. *Id.* at 342.

75. *See infra* notes 77–91 and accompanying text.

76. MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 58 (2000).

77. U.S. CONST. amend. XV, §§ 1, 2; Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 525 (1973) [hereinafter Derfner, *Racial Discrimination*].

78. Celinda Lake, *Muted Voices: A Comparative Perspective of Women’s and Blacks’ Voting Participation*, in *VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION* 129, 131 (Karen McGill Arrington & William L. Taylor eds., 1992).

79. *Id.*

80. Cristina M. Rodríguez, *From Litigation, Legislation: A Review of Brian Landsberg’s Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 YALE L.J. 1132, 1142–43 (2008) (book review).

numbers of poor immigrant voters.”⁸¹ However, in the South, literacy tests became a “psychological obstruction” that suppressed African–American voting rights because of the discriminatory practices of Southern voting officials and African–Americans’ inferior education.⁸²

Literacy tests were adopted essentially by every southern state except Texas and Florida.⁸³ The tests required voter applicants to read or write any section of the applicable state constitution or the U.S. Constitution to the satisfaction of the registrar.⁸⁴ Faced with concerns that literacy tests would disenfranchise many illiterate whites, the tests—admittedly—were never intended to operate honestly.⁸⁵ The key to their “success” was that they were designed to give the local registrar “an elastic standard to implement the avowed intention of disenfranchising blacks but not whites.”⁸⁶

Before and during the 1960s, Southern African–Americans faced what has been described as “[t]he grim determination of the southern politician never to allow [them] to take part in politics—[their] education, economic progress and moral fitness, notwithstanding . . .”⁸⁷ Local “princes and dukes,” the registrars and clerks, had total discretion to discriminate as they pleased.⁸⁸ Local white registrars would closely review African–American citizens’ applications and deny them for technical errors that bore no relation to the applicant’s qualifications.⁸⁹ The same registrars that discriminated against African–Americans would help illiterate white voters fill out an application and then approve it.⁹⁰ Tactics like these continued until Congress finally intervened.⁹¹

81. *Id.* at 1143. Literacy tests were justified because voters who could not read “labor[ed] . . . under mental incapacity” and thus should not vote. *Id.*

82. *Id.* at 1144.

83. Derfner, *Racial Discrimination*, *supra* note 77, at 537.

84. *Id.*

85. *Id.* at 537–38. Senator Carter Glass was noted as saying white Southerners obey the letter of the Fifteenth Amendment but “frankly evade the spirit thereof—and propose to continue doing so. White supremacy is too precious a thing to surrender for the sake of a theoretical justice that would let a brutish African deem himself the equal of white men and women in Dixie.” Mary Frances Berry, *Voting, Voting Rights, and Political Power in American History*, in *VOTING RIGHTS IN AMERICA*, *supra* note 78, at 63, 69.

86. Derfner, *Racial Discrimination*, *supra* note 77, at 538.

87. Berry, *supra* note 85, at 69.

88. Armand Derfner, *Development of the Franchise: 1957–1980*, in *VOTING RIGHTS IN AMERICA*, *supra* note 78, at 91, 92 [hereinafter Derfner, *Development of the Franchise*].

89. Rodríguez, *supra* note 80, at 1143. Some registrars failed African–American applicants for misspellings. *Id.* Others were prevented from voting for not reporting their age to the day, rather than the year. Derfner, *Development of the Franchise*, *supra* note 88, at 92. In Virginia, a state law required that individuals fill out their registration without assistance, so Virginia registrars would not let African–Americans read the questions. *Id.*

90. Rodríguez, *supra* note 80, at 1139.

91. Derfner, *Development of the Franchise*, *supra* note 88, at 92.

2. Federal Action and Changing Priorities

The Department of Justice voting rights litigation that preceded the Voting Rights Act of 1965 revealed such rights for African-Americans could not be secured unless the value of access to a ballot was prioritized above other objectives, such as ensuring an intelligent electorate.⁹² The litigation also made clear that protecting African-American voters from discrimination required a regulatory system that applied to all jurisdictions, rather than trying to protect rights in case-by-case litigation.⁹³

Congress directly addressed Southern officials' intentional discrimination through the Voting Rights Act of 1965.⁹⁴ The Act outlawed literacy tests and any other "test or device" to determine voter eligibility for five years.⁹⁵ Also, and perhaps more importantly, the Act authorized the Attorney General to designate federal examiners to register voters and federal observers to attend elections if the Attorney General felt local officials were not complying with the Act.⁹⁶ The Act's provisions reflect the first time Congress acknowledged the intended discriminatory purpose of instituting literacy tests in the South.⁹⁷

While banning literacy tests was at the heart of the Voting Rights Act of 1965, the key to the Act was taking the control of the voting process out of the hands of local officials that had overtly discriminated for decades.⁹⁸ The Act acknowledged African-Americans' right to vote was a national concern that had to be protected at a national level.⁹⁹

92. Rodríguez, *supra* note 80, at 1146.

93. *Id.*

94. Voting Rights Act, Pub. L. 89-110, § 2, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973 *et seq.* (1970)); Derfner, *Racial Discrimination*, *supra* note 77, at 550.

95. Voting Rights Act, § 2, 79 Stat. 438; Derfner, *Racial Discrimination*, *supra* note 77, at 551.

96. Voting Rights Act, § 2, 79 Stat. 439, 439-41; Derfner, *Racial Discrimination*, *supra* note 77, at 551.

97. Derfner, *Racial Discrimination*, *supra* note 77, at 552.

98. Derfner, *Development of the Franchise*, *supra* note 88, at 94.

99. *Id.* President Lyndon B. Johnson was a strong advocate for the passage of the 1965 Voting Rights Act. STATES' RIGHTS AND AMERICAN FEDERALISM 205 (Frederick D. Drake & Lynn R. Nelson eds., 1999). Upon writing to Congress urging them to pass the Act, he noted the Constitution prohibits withholding the right to vote based on race and stated:

We have all sworn an oath before God to support and to defend [the] Constitution This bill will strike down restrictions to voting in all elections . . . which have been used to deny Negroes the right to vote. This bill will establish a simple, uniform standard which cannot be used, however ingenious the effort, to flout our Constitution There is no constitutional issue here. The command of the Constitution is plain. There is no moral issue. It [sic] is wrong—deadly wrong—to deny any of your fellow Americans the right to vote. There is no issue of states' rights or national rights. There is only the struggle for human rights.

Id. at 206.

The Act not only outlawed tests that were discriminatory in purpose but also those discriminatory in effect.¹⁰⁰ The Supreme Court reaffirmed Congress's intent in *Gaston County v. United States*,¹⁰¹ ruling North Carolina's fairly administered literacy test had a discriminatory effect on African-Americans because the county had systematically deprived African-Americans equal educational opportunities, leaving them unequally prepared to meet the test's requirements.¹⁰² The Court held literacy tests, used as a voting requirement, were unconstitutional in voting districts that operated segregated schools.¹⁰³ One could argue the *Gaston* decision indicated the Court prioritized African-Americans' access to the ballot above ensuring an intelligent electorate.

Just after *Gaston*, Congress passed an extension of the Voting Rights Act in 1970.¹⁰⁴ The extension temporarily (and later permanently) banned literacy tests nationwide.¹⁰⁵ This provision reflected the changing and increased appreciation for an individual's right to vote.¹⁰⁶ It also signified that illiterate people have as much right and ability to vote as anyone else.¹⁰⁷

Thus, two themes characterize the response to the widespread, discretionary voting discrimination in the early and mid twentieth century. First, it became clear that there was a need for a federal standard to curb the discriminatory exercise of discretion by local officials against African-Americans. Second, states and society in general recognized that ensuring an "educated electorate" was not, or should not be, its highest priority when framing voting laws. Next, this Comment considers whether popular arguments for restricting the voting rights of the mentally disabled, like an interest in an "educated electorate," may be a compelling state interest under strict scrutiny analysis.

III. ARGUMENTS AGAINST EXPANDING THE VOTING RIGHTS OF THE MENTALLY DISABLED—COMPELLING STATE INTERESTS?

Common arguments made to deny broader voting rights for the mentally disabled include: (1) their disability prevents them from being full

100. Derfner, *Racial Discrimination*, *supra* note 77, at 563.

101. 395 U.S. 285 (1969).

102. *Id.* at 296–97; *see* Derfner, *Racial Discrimination*, *supra* note 77, at 563.

103. *Gaston County*, 395 U.S. at 296–97; *see* Rodríguez, *supra* note 80, at 1144.

104. 42 U.S.C. § 1973 (1970); *see also* Derfner, *Racial Discrimination*, *supra* note 77, at 565.

105. 42 U.S.C. § 1973a; *see also* Derfner, *Development of the Franchise*, *supra* note 88, at

95. In *Oregon v. Mitchell*, the Supreme Court upheld Congress's power to suspend literacy tests nationwide. 400 U.S. 112, 118 (1970). All the Justices agreed Congress could use a broad remedy for a widespread problem even if literacy tests in some areas may not be discriminatory. *See id.*; Derfner, *Racial Discrimination*, *supra* note 77, at 566.

106. *See* Derfner, *Development of the Franchise*, *supra* note 88, at 95.

107. *See id.*

participatory members of society; (2) they lack the mental capacity to participate in politics; and (3) their interests are vicariously represented by other individuals and groups acting in their best interests.¹⁰⁸

Each of these arguments resembles similar judgments women's suffrage activists had to overcome.¹⁰⁹ While some of these arguments may be more valid when applied to the mentally disabled rather than women, they still contain important deficiencies. Ultimately, the arguments would not likely constitute or support a compelling state interest under a strict scrutiny constitutional analysis.

A. *Challenging Traditional Notions of Societal Placement*

The historical treatment and resulting public perceptions of the mentally disabled gave rise to the widely held notion that mentally disabled persons cannot be full members of society.¹¹⁰ The General Provisions of the Americans with Disabilities Act (ADA) broadly summarize some of these treatments and perceptions.¹¹¹ Congress noted that the disabled have historically been isolated and segregated from the rest of society¹¹² and have been subjected to "purposeful unequal treatment."¹¹³ Congress also concluded that the disabled have been "relegated to a position of political powerlessness . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."¹¹⁴

The Supreme Court has also acknowledged and recounted the "historic mistreatment, indifference, and hostility" resulting from notions that the mentally disabled could not contribute to society.¹¹⁵ In *Olmstead v. L.C.*, the Court recognized that the institutionalization of individuals, who can receive appropriate treatment in a community setting, merely perpetuates unwarranted historical assumptions that those in institutions "are incapable or unworthy of participating in community life."¹¹⁶ Furthermore, the Court noted that the

108. See Holmes, *supra* note 19.

109. See *infra* Part III.A–C.

110. See *supra* notes 10–20 and accompanying text.

111. See 42 U.S.C. §12101(a) (2006).

112. *Id.* §12101(a)(2).

113. *Id.* §12101(a)(7).

114. *Id.*

115. *Olmstead v. L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring).

116. *Olmstead*, 527 U.S. at 600 (majority opinion). Interestingly, and perhaps to add perspective, the Court, like this Comment, supported its assertion regarding discrimination against the mentally disabled by citing comparisons, quoting *Allen v. Wright*, 468 U.S. 737 (1984), which highlighted the stigmatizing injury of racial discrimination, and *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), which discussed the harmful affects of gender discrimination arising from gender stereotypes. *Olmstead*, 527 U.S. at 600.

practical consequences of institutionalization, including diminished “social contacts, work options, economic independence, [and] educational advancement,” continue to engender stigmas against the mentally disabled.¹¹⁷

The Court in *City of Cleburne v. Cleburne Living Center, Inc.*¹¹⁸ addressed the “‘lengthy and tragic’ history of segregation and discrimination” of the mentally disabled in relation to racial discrimination against African-Americans.¹¹⁹ The Court referenced state mandated “segregation and degradation” of the mentally disabled that “rivalled, and . . . paralleled, the worst excesses of Jim Crow” in “virulence and bigotry,”¹²⁰ specifically citing a 1920 Mississippi law deeming the mentally disabled “unfit for citizenship.”¹²¹ Ultimately, the Court concluded: “Most important[ly], lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.”¹²²

Like the mentally disabled, women faced isolation and limited citizenship in their struggle for voting rights. Women and men who opposed women’s suffrage often claimed a woman’s “sphere of influence was primarily domestic” and politics and voting were strictly a male concern.¹²³ Women’s isolation, rather than in hospitals or wards, was in their home. Confining women to the “domestic sphere” was justified by arguments that women’s childbearing nature made them more suitable for domestic life than the contentious world of politics.¹²⁴ The traditional conception of the family required a woman’s attention to children and the home while her husband engaged in civil activities.¹²⁵

Under this conception, women did not need to be involved in matters outside the home, and if they were, it “would harm the marriage relationship” and the entire family unit.¹²⁶ Even when “suffragists invoked American traditions of individualism, ‘self-government,’ and ‘self-representation’ in

117. *Olmstead*, 527 U.S. at 601.

118. 473 U.S. 432 (1985).

119. *Id.* at 461–64.

120. *Id.* at 462.

121. *Id.* at 463.

122. *Id.* at 464. The Court further compared the lasting nature of racial discrimination to discrimination against the mentally disabled citing *University of California Regents v. Bakke*, 438 U.S. 265, 303, 395 (1978), for its discussion of Jim Crow-era discrimination and then asserting, “[p]rejudice, once let loose, is not easily cabined.” *Cleburne*, 473 U.S. at 461, 464.

123. STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra* note 99, at 148.

124. Ellen Carol DuBois, *Taking Law into Their Own Hands: Voting Women During Reconstruction*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 67, 68 (Donald W. Rogers ed., 1990).

125. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002). Historically, the chief purpose of American women in general was to be a wife, mother, and homemaker. DuBois, *supra* note 124, at 68.

126. Siegel, *supra* note 125, at 951.

defense of the right to vote,” they were met with traditional concerns about maintaining familial roles.¹²⁷

B. *Insufficient Mental Capacity*

Many believe someone with a mental health diagnosis is intrinsically irrational and incapable of participating in civic functions, but mental disabilities do not necessarily reduce a person’s intelligence.¹²⁸ Many mental disabilities that affect social skills or ability to care for one’s self have no relation to a person’s ability to make decisions or understand concepts.¹²⁹ While some severe mental disabilities can inhibit individuals from making basic decisions or comprehension, by no means do the vast majority of people with mental disabilities lose these functions.¹³⁰

It is unclear whether the Supreme Court would consider ensuring an “intelligent” electorate a compelling interest.¹³¹ In *Dunn*, the Court indicated there would be problems associated with such an interest stating, “We note that the criterion of ‘intelligent’ voting is an elusive one, and susceptible of abuse.”¹³² The Court also referenced the 1970 Voting Rights Act and stated, “Congress declared [it] federal policy that people should be allowed to vote even if they were not well informed about the issues.”¹³³

Regardless, studies and other evidence show that persons with mental disabilities can make reasoned judgments about political issues, which calls into question the validity of whether excluding them would make the electorate any more intelligent.¹³⁴ This point gains further credence, knowing that many

127. *Id.* at 981.

128. Appelbaum, *supra* note 10, at 850.

129. *See, e.g.*, Schriener et al., *supra* note 35, at 88–89 (giving multiple examples of evidence that the mentally disabled are capable of making sound political decisions); *see also* Robert M. Levy & Leonard S. Rubenstein, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 292 (1996) (citing a study that showed almost all individuals in a psychiatric hospital who had diagnoses of psychotic or major affective disorders held opinions about the 1991 Gulf War similar to those of the American public). For example, Sebastian Go registered to vote and researched political races when he turned eighteen despite being under guardianship for bipolar disorder, Asperger’s syndrome, and brain injury. Pam Belluck, *States Face Decisions on Who Is Mentally Fit to Vote*, N.Y. TIMES, Jun. 19, 2007, at A1. His mother noted just because he needs someone to manage his money and make his medical decisions does not mean Sebastian cannot make a political decision. *Id.*

130. Appelbaum, *supra* note 10, at 850.

131. Schriener, *supra* note 35, at 87.

132. *Dunn v. Blumstein*, 405 U.S. 330, 356 (1972). The Court explicitly stated it was not “deciding as a general matter the extent to which a state can bar less knowledgeable or intelligent citizens from the franchise.” *Id.*

133. *Id.* at 357 n.29.

134. Schriener et al., *supra* note 35, at 89. Examples include institutionalized individuals endorsing a candidate for governor due in part to his commitment to disability rights, and a study

voters have little knowledge of the issues and make choices based on emotional reactions and other “irrational judgments.”¹³⁵

Women also faced arguments that they were “too unintelligent, [and] too uninformed” to exercise political judgment.¹³⁶ Those spearheading the women’s suffrage movement, like Elizabeth Cady Stanton, asserted that women were not intellectually inferior to men and could participate in politics.¹³⁷ Yet, to many, women “lacked the capacity for managing public affairs.”¹³⁸ Only citizens with the “requisite degree of independence to vote their own judgment” had the “capacity” to vote responsibly.¹³⁹ Women, beholden to their husbands and relegated to a strict familial role, were not so “independent.”¹⁴⁰ There were additional concerns that, if burdened with duties outside the home, women could not fulfill their obligations in the home.¹⁴¹

These broad characterizations about women’s capabilities are now “almost entirely absent from public thought” but still bear a striking resemblance to “the assumptions underlying voting prohibitions on persons with cognitive and emotional impairments.”¹⁴²

C. *Virtual Representation*

Finally, people have argued that persons under guardianship can be politically represented by their guardian, who is professionally responsible for working in the individual’s best interest. This argument guarantees mentally disabled persons the status of a second-rate citizen and ignores the

that found the voting patterns of mentally disabled individuals were strongly related to socioeconomic factors. *Id.* at 88–89.

135. *Id.* at 89. The government has recognized since the Federalist Papers that voters often behave selfishly, prejudicially, and irrationally. Karlan, *supra* note 64, at 925. The fact that mentally disabled individuals may not process information in a sophisticated or entirely rational manner may separate them only in degree, if at all, from the rest of the electorate. *Id.* Schriener, Ochs, and Shields thus conclude: “It cannot be argued, therefore, that people with cognitive or emotional disabilities should be prevented from voting simply because they are presumed to be incapable of gathering, comprehending, and applying the information necessary to act intelligently, given that the vast majority of other voters appear to be similarly ‘handicapped.’” Schriener et al., *supra* note 35, at 89. See also Appelbaum, *supra* note 10, at 850 (“During the 1992 presidential campaign, 86 percent of the American people knew that George Bush’s dog’s name was Millie, but only 15 percent were aware that both he and Bill Clinton supported the death penalty.”).

136. Schriener et al., *supra* note 35, at 90.

137. STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra* note 99, at 147–48. In fact, to prove her point, Ms. Stanton ran for Congress. *Id.* at 148.

138. Siegel, *supra* note 125, at 979.

139. *Id.* at 980.

140. *Id.*

141. *Id.* at 979.

142. Schriener et al., *supra* note 35, at 90.

foundational American value of individual independence.¹⁴³ Ordway concludes that “a democratic government’s authority derives from the people,” and voting is the vehicle to grant such authority.¹⁴⁴ Displacing the right to vote not only limits the accountability of elected officials to the people, but it “undermines the people’s ability to check the performance of their elected officials.”¹⁴⁵ Absent this safeguard, “the entire democratic enterprise loses its legitimacy.”¹⁴⁶

Also, professionals acting politically on behalf of the mentally disabled are often motivated by compassion and sympathy rather than for advocacy of rights based protections against majoritarian action.¹⁴⁷ It is short sighted to believe that guardians or other professionals would provide a suitable democratic check on elected officials from the minority group perspective of a mentally disabled individual.¹⁴⁸

In the women’s suffrage context, the theory of virtual representation arose from the traditional conception that the family was a “reasonable unit of political representation.”¹⁴⁹ The notion that women’s political interests were represented by their husbands was the impetus for the women’s suffrage movement.¹⁵⁰ This belief reflected societal norms from the time of the Founding Fathers, which extended well into the twentieth century, that women only tended to intra-family matters.¹⁵¹ In 1866, a United States Congressman stated: “[T]he women of America vote by faithful and true representatives, their husbands, their brothers, their sons; and no true man will go to the polls and deposit his ballot without remembering the true and loving constituency that he has at home.”¹⁵²

It was understood that if the men in a family had a right to vote, the women were represented.¹⁵³ Ultimately, despite sharing a lack of voting rights with African-Americans, women were viewed to be in a much better position than African-Americans: “[White women] are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their

143. *Id.* at 82 (discussing the “troubling” suggestion that professionals could serve as political proxies for the mentally disabled).

144. Ordway, *supra* note 40, at 1188.

145. *Id.*

146. *Id.*

147. Schriner et al., *supra* note 35, at 83. *See also* Appelbaum, *supra* note 10, at 850 (stating broadening the franchise would increase the political clout of the mentally disabled as a class which could help improve the terribly insufficient institutional and community-based mental health services).

148. Schriner, *supra* note 35, at 83.

149. Siegel, *supra* note 125, at 984.

150. *Id.* at 948.

151. *Id.*

152. *Id.* at 985–86 (citation omitted).

153. *Id.* at 981.

interests in every vote they give, and therefore communities get along very well without conferring [voting rights] upon the female.”¹⁵⁴

Uncomforted, the leaders of the suffrage movement challenged the notion of virtual representation.¹⁵⁵ In an 1871 Petition to Congress to appear in person and claim their right to vote, the suffragists stated: “[W]omen who are allowed no vote and therefore no representation cannot truly be heard except as congress shall open its doors to us in person.”¹⁵⁶ The suffragists focused on the Fourteenth Amendment’s grant of citizenship to “all persons born or naturalized in the United States.”¹⁵⁷ They argued, as persons, women were equal citizens to men and that voting was one of the “privileges and immunities” of citizenship under the Fourteenth Amendment.¹⁵⁸ But this argument and the others were generally rebuked until the Nineteenth Amendment was finally ratified in 1920, granting women the equal right to vote.¹⁵⁹

IV. RECOMMENDATIONS TO MODERNIZE RESTRICTIVE VOTING LAWS

This Comment has identified some of the major problems with current state laws that disenfranchise the mentally disabled under a strict scrutiny constitutional analysis: (1) the difficulties of trying to define capacity, (2) vague categorical language susceptible to discretionary discrimination, and (3) deficient arguments supporting broad disenfranchisement. It has also repeatedly highlighted the general public’s deeply rooted prejudices and misconceptions regarding the mental abilities of the mentally disabled that underlie many current restrictive voting laws.

In 2007, the American Bar Association (ABA) House of Delegates approved a Voting Recommendation that combats many of the problems noted above.¹⁶⁰ The ABA writes:

154. Siegel, *supra* note 125, at 985.

155. STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra* note 99, at 148–49.

156. *Id.* at 149.

157. DuBois, *supra* note 124, at 70.

158. *Id.* at 72. The anti-suffragists tried to keep Congress from paying attention to the suffragists’ requests as long as possible. STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra* note 99, at 163. During World War I, anti-suffragists petitioned Congress to ignore the suffrage issue until after the war, claiming the suffrage movement was “harassing . . . its public men and . . . distracting . . . its people from work for the war . . .” *Id.* at 163.

159. Siegel, *supra* note 125, at 952–53. In addition to their constitutional arguments focused on individualism, suffragists argued that virtual representation effectively created a status inequality based on sex, making “all men sovereigns and all women subjects.” *Id.* at 990. While the focus of suffragists’ arguments changed to a degree as the movement evolved, *id.* at 993, their underlying message steadfastly remained consistent: that “men could not and did not represent women” at the polls. *Id.* at 991.

160. ABA Recommendation, *supra* note 9, at 1.

State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where the following criteria must be met:

- (1) The exclusion is based on a determination by a court of competent jurisdiction;
- (2) Appropriate due process protections have been afforded;
- (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- (4) The findings are established by clear and convincing evidence.¹⁶¹

First, this Recommendation eliminates categorical disenfranchisement based on guardianship. Mentally disabled persons who have successfully registered to vote are presumed, like all other registered citizens, to have the right to vote unlike those current state laws that presume individuals under guardianship do not have the right to vote.¹⁶²

Second, the Recommendation requires a court order to take away an individual's right to vote. This provision prevents partisan poll workers or local election officials from refusing to allow registered individuals to vote, mitigating the potential affects of discriminatory discretion rooted in societal prejudice and misconceptions.¹⁶³

Third, the ABA's Recommendation further limits the potential affects of prejudice and misconception by requiring a relatively simple, straightforward judicial determination. Whether one can communicate a specific desire to participate in the electoral process is surely easier to decipher than whether one has the "capacity to vote" as defined by most current state laws. But this standard is still susceptible to some discretionary discrimination, particularly with regard to what constitutes a "specific" desire to participate. Nonetheless, this standard is a clear improvement over most current states' capacity requirements.¹⁶⁴

161. *Id.*

162. *See supra* notes 22–24 and accompanying text.

163. *See supra* notes 62–66 and accompanying text. Most states have laws that allow certain individuals to challenge the qualifications of a potential voter prior to or on the day of an election. *See* BAZELON CENTER FOR MENTAL HEALTH LAW, VOTER CHALLENGE STATUTES BY STATE, (2008), <http://www.bazon.org/pdf/voterchallengelaws10-08.pdf>; *see also* Heather S. Heidelbaugh et al., *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 219 (2009) (focusing on private "poll watchers" and arguing they play a useful role on election process). A discussion of "voter challenge" laws is beyond the scope of this Comment.

164. *See supra* notes 22–27 and accompanying text. Furthermore, the potential for discrimination can never be completely eliminated. Discrimination efforts will change depending on how people determine they can best get around the law. *See* Derfner, *Racial Discrimination*,

The Recommendation also would seemingly come closer to meeting the “narrowly tailored” requirement of the strict scrutiny test than most current state laws.¹⁶⁵ It incorporates protective language from the ADA, “with or without reasonable accommodation,”¹⁶⁶ a less ambiguous standard than “capacity to vote,” and imparts a high evidentiary burden, “clear and convincing evidence,” to take away the individual’s right to vote. These provisions would appear to greatly limit the over-inclusion that is a hallmark of many current state laws.

Lastly, the Recommendation serves a state’s interest to preserve the integrity of the electoral process.¹⁶⁷ The recommendation simply requires a reaffirmation of the desire to vote that every citizen gives each time he or she registers to vote or visits the polls. Thus, the general requirements that states enforce on all voters are uncompromised. Furthermore, state laws that prohibit fraud and coercion would continue to operate as the least restrictive methods, as required under the strict scrutiny analysis, guarding against contamination of the electoral process.¹⁶⁸

In general, the ABA Recommendation appears to make reasonable improvements upon the problems most current state voting laws present. Yet in light of the African-American and women’s suffrage historical examples, two additional recommendations are worthy of consideration.

First, the term “specific,” as noted above, seemingly presents a good opportunity for judicial discretion affected by prejudice and misconception to rear its ugly head. Though the ABA recommendation does not offer particular guidance regarding what may be considered a “specific desire” to participate, its stated objective is “to *not* treat people any differently in voting rights based on any perceived impairment or other personal characteristic.”¹⁶⁹ Yet, despite this clearly stated non-discriminatory intent, the experiences of African-Americans and women remind us of the destructive power discrimination can have when discriminatory efforts are rooted in traditional prejudices and misconceptions. Differentiating between a “general desire” and a “specific desire” provides a convenient vehicle for continued discriminatory discretion.

supra note 77, at 552–53 (noting discrimination against African-Americans “shifted” after The Voting Rights Act of 1965 from voter registration to vote dilution).

165. See *supra* notes 40–43 and accompanying text.

166. See 42 U.S.C. § 12111(8) (2006).

167. The Supreme Court has ruled that states have a compelling interest under the strict scrutiny analysis to ensure elections are free from undue influence and fraud. Schriener et al., *supra* note 35, at 92.

168. See *supra* note 44 and accompanying text; see also Schriener, *supra* note 35, at 92 (noting prohibiting mentally disabled individuals from voting for fears their votes will be easily influenced or manipulated is not the least restrictive method available for combating these improprieties).

169. ABA Recommendation, *supra* note 9, at 4–5.

Thus, given the widely held prejudice and misconceptions regarding the abilities of the mentally disabled, the Recommendation would likely better serve its stated objective if it removed the term “specific” from its provision.

Second, the ABA Recommendation is an initial step in the direction the African-American and women’s suffrage movements took to ultimately achieve their goals—that is, to garner federal attention and seek federal legislative action. This same direction may be the path to effectively broaden the voting rights of the mentally disabled. Trying to secure voting rights for African-Americans through litigation proved largely unsuccessful compared to the change brought by The Voting Rights Act of 1965.¹⁷⁰ Women lobbied vehemently to appear before Congress knowing the federal legislature was the key to attaining the right to vote.¹⁷¹ The mentally disabled face widespread prejudice amongst local citizens and restrictive laws with deep roots, which mirror the barriers African-Americans and women have faced. Similarly, federal action may have to replace litigation and state referenda in an effort to overcome deeply ingrained prejudices and misconceptions overly restricting the voting rights of the mentally disabled.¹⁷²

CONCLUSION

“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different.”¹⁷³ The mentally disabled is one of two classes of individuals that states are specifically permitted by federal law to disenfranchise. Many current state laws contain antiquated, stigmatic terms, and overly broad provisions that perpetuate prejudices and misconceptions about the mentally disabled and unduly restrict their right to vote.

All restrictive state voting laws must be narrowly tailored to serve a compelling state interest to be constitutional under a strict scrutiny analysis. The discrimination faced by African-Americans seeking to vote during the early and mid-twentieth century and the arguments made to prevent women from voting prior to the Nineteenth Amendment parallel discrimination and

170. Derfner, *Racial Discrimination*, *supra* note 77, at 550.

171. *See supra* note 145 and accompanying text.

172. Congressional action regarding voting issues is not relegated to the distant past. Congress recently addressed voting issues related to the disabled in the 2002 Help America Vote Act which provides for educating election officials, poll workers, and volunteers about the voting rights of the disabled as part of a broad effort to improve voting systems nationwide. *See* 42 U.S.C. § 15301 (2006); Arlene Kanter & Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 852 (2006).

173. Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 1 (2006) (quoting Lyndon Baines Johnson’s comments at the signing of the Voting Rights Act in 1965) (citation omitted).

arguments faced by the mentally disabled seeking the right to vote today. These themes reflect the underlying impetus of many states' voting laws that overly restrict mentally disabled individuals from voting and would likely not pass the strict scrutiny test.

The ABA recently published a Recommendation for modernizing state laws that restrict the voting rights of the mentally disabled. While the Recommendation provides a step towards positive reform, additional efforts, likely from the federal government, will be required to overcome traditional prejudices and misconceptions about the abilities of the mentally disabled. Ultimately, "the equal right to vote will be protected only if our nation believes in it."¹⁷⁴

NICHOLAS F. BRESCIA*

174. Derfner, *Racial Discrimination*, *supra* note 77, at 584.

* 2010 J.D. Candidate at Saint Louis University School of Law. Special thanks to Professor Elizabeth Pendo, Susan Stefan, and Jennifer Mathis for their assistance as I developed this Comment. I also greatly appreciate the opportunity to publish in the *Saint Louis University Law Journal* and the staff's hard work preparing the Comment for publication. Lastly, and most importantly, I extend my heartfelt gratitude towards my parents, family, and friends for their ongoing support in all areas of my life.