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LENGTH: 39986 wordsSYMPOSIUM: FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT:
ARTICLE: **Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters****NAME:** Sally Balch Hurme* and Paul S. Appelbaum****BIO:** * Ms. Hurme is a Senior Project Manager for AARP Financial Security and an associate professorial lecturer at George Washington University School of Law, Washington, DC.

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SUMMARY:

... Voting is a fundamental right protected by the federal and state constitutions, and it is a hallmark of our democracy. ... In Part V, the positive reforms in state guardianship laws preserving the rights of persons under guardians are overlaid on negative state constitutional and election law provisions that restrict the right to vote. ... When the guardianship law provisions that favor limits on the removal of rights are examined, the argument can be made that persons in thirty-two states found to be sufficiently incapacitated to need a guardian may be eligible to vote under certain circumstances. ... It may find the person under guardianship incompetent to vote only if it determines "that the person lacks sufficient mental capacity to comprehend and exercise the right to vote. ... Given the references to the voting rights of persons under guardianship in statutory and case law requiring some sort of individualized determination of voting capacity, it might be expected that the criteria for capacity to vote by now would be consensually agreed to and clearly defined. ...

TEXT:

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I. Introduction

Voting is a fundamental right protected by the federal and state constitutions, and it is a hallmark of our democracy. However, the states have authority to regulate their election processes, including defining who is eligible to vote. In determining eligibility, states cannot fix voter qualifications that "invidiously discriminate."¹ When a state allows some to vote but not others, the exclusion must be necessary to promote a compelling state interest.² This high constitutional standard has required voting reforms to eradicate discrimination by race, previous servitude, class, and gender.³ One category of persons whose right [*932] to vote deserves closer attention is those with cognitive disabilities.⁴ While federal election law permits state laws to disenfranchise persons "by reason of ... mental incapacity,"⁵ serious questions are raised as to who is mentally incapable of voting and whether existing laws address any genuine state interest in protecting the electoral process from fraud or reaching the goal of an intelligent electorate.⁶ Rather than the concerns about incompetent voting and fraud prevention, the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for all persons who are capable of voting. If there is to be any limitation based on incapacity, it should be narrowly circumscribed in terms of a specific focus on the capacity to un-

derstand the nature and effect of voting, rather than on categorical exclusions. Further, the assessment of voting capacity, if necessary, must be made in a judicial proceeding that affords challenged voters their due process rights.ⁿ⁷

A predicate to examining the voting rights of persons with cognitive impairments is an understanding of the current status of the law. This article examines state constitutional provisions and electoral laws that pertain to excluding persons with cognitive impairments, superimposes recent reforms in guardianship law that elucidate a more contemporary understanding of the nature of mental impairments, calls for specific judicial assessment of an individual's ability to participate in the electoral process, and provides the courts with an approach to the nondiscriminatory assessment of the ability of a person with diminished capacity in other areas to retain the fundamental right to vote.

While states have an interest in protecting the electoral process from fraud and encouraging an intelligent electorate, excluding the broad and indefinite category of persons with mental incapacities is not consistent with either the constitutional right to vote without discrimination or the current understanding of mental capacity. Part II of this article examines the extent to which state constitutions do or do not exclude persons with cognitive impairments from voting. Part III analyzes state election laws. Although previous authors tend to present a bleak picture of the extent of disenfranchisement of those with cognitive disabilities,ⁿ⁸ a closer examination of the constitutional and electoral law provisions reveals positive movement toward expanding the right to vote to **[*933]** include some persons who previously would have been excluded because of their categorization as mentally disabled. The glass may be half-full rather than half-empty.

Contributing to the half-full approach of this article are the reforms appearing in guardianship laws discussed in Part IV. Over the past decade, guardianship law has undergone a substantial transformation and now recognizes that mental capacity is not an all or nothing, black or white categorization. In a wave of legislative reform beginning in the 1990s, states have developed more refined definitions of those who need to be identified as legally "incapacitated." Most guardianship reforms have recognized that individuals who may need the protection of the state in some decision-making areas can retain their rights in other areas. Guardianship courts have turned to tailoring their orders to allow for a more limited deprivation of rights than the previous wholesale relegation of an incompetent person to the legal status of an infant. In most states, before a person can be placed under guardianship, there must be a fairly comprehensive assessment of what they can or cannot do and why their disability puts them at a sufficient risk for harm, such that the appointment of a guardian is necessary.

In a growing number of states, part of the guardianship process requires a determination of what rights the individual can retain, including the right to vote. In Part V, the positive reforms in state guardianship laws preserving the rights of persons under guardians are overlaid on negative state constitutional and election law provisions that restrict the right to vote. This opens avenues for advocates to argue that while an "idiot or insane person"ⁿ⁹ cannot vote, a person who is incapable, under guardianship law, to make decisions about person or property is not disenfranchised. The state-by-state analysis intertwines constitutional provisions, election laws, and guardianship statutes to determine the likelihood that persons with cognitive impairments retain the right to vote under current law. Thirty-two states now specifically provide for some judicial determination of whether an individual has the capacity to vote. The laws in an additional eleven states and the District of Columbia can be interpreted as giving persons with cognitive disabilities an implied right to a determination that they retain the right to vote. In the remaining seven states, if the individual has been judicially determined to be incapacitated, that person loses the right to vote without an opportunity to argue that he or she understands the voting process and wants to exercise the franchise.

Although a total of forty-four jurisdictions could be making determinations of whether persons with cognitive impairments may vote, Part VI highlights the scarcity of direction as to when and how this right is adjudicated. In addition to determining whether the individual does not have the capacity to make decisions about where she lives, what medical care she should receive, and whether she can manage her money, guardianship courts may be called upon to determine **[*934]** whether the individual should lose the constitutional right to vote. Determining whether someone can competently vote entails a different assessment than whether the person can manage personal finances, make a medical decision, or care for personal safety.

Part VII of this article provides courts with a mechanism to enable them to make that specific determination when necessitated by current law. The Competence Assessment Tool for Voting (CAT-V) was designed

to provide a consistent standard that can be relied upon to evaluate whether the individual understands the nature and purpose of casting a ballot. This Section concludes by raising important questions about the circumstances that should trigger such screening, the contexts in which it should occur, and the identity of the persons who should conduct it. Underlying these questions are concerns that indiscriminate screening may result in the general disenfranchisement of the elderly and other persons with cognitive impairments, or in selective deletion of persons from the voting rolls for partisan gain.

II. Constitutional Provisions Regarding Capacity to Vote

The constitutions of every stateⁿ¹⁰ except Pennsylvania and Connecticutⁿ¹¹ have articles that exclude certain categories of persons from eligibility to register and vote.ⁿ¹² Along with criminalsⁿ¹³ who have been convicted of treason,ⁿ¹⁴ bribery,ⁿ¹⁵ **[*935]** election fraud,ⁿ¹⁶ and other infamous crimes,ⁿ¹⁷ are those persons deemed to have a mental condition or status that precludes them from voting. Nine state constitutions exclude from voting those who are "idiots or insane,"ⁿ¹⁸ two bar those of unsound mind,ⁿ¹⁹ and three prevent persons who are non compos mentis from voting.ⁿ²⁰ Missouri's constitution excludes those who have been adjudged incapacitated or are involuntarily admitted to a mental institution,ⁿ²¹ while the Kansas constitution permits the legislature to prevent those with mental illness from voting.ⁿ²² Similarly, Wisconsin's constitution allows the legislature to disenfranchise voters that are adjudged mentally incompetent.ⁿ²³ Sixteen states constitutionally bar those who are or who have been adjudged mentally incompetent or incapacitated.ⁿ²⁴ Four constitutions exclude those who are "under **[*936]** guardianship."ⁿ²⁵ Under Oregon's constitution, "[a] person suffering from a mental handicap is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law."ⁿ²⁶ Vermont excludes those who are not "of quiet and peaceable behavior."ⁿ²⁷

From a rote examination of state constitutional provisions, it would appear that sweeping, yet imprecise, categories of persons are disenfranchised. Looking solely at constitutional provisions, only California, Connecticut, Idaho, Illinois, Indiana, Maine, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Vermont have no constitutional disenfranchisement provision for persons with a category of mental impairment or disability.ⁿ²⁸ However, the states' election laws outline a somewhat different profile of those who are prevented from voting because of a mental status.

III. Election Law Provisions Regarding Capacity to Vote

The state election laws that contain provisions for voter disenfranchisement on cognitive grounds do not necessarily track the categories of excluded voters mentioned in state constitutions. Some states narrow their constitutional disenfranchisement provisions, and one state adds mental incapacity as an ineligibility category.ⁿ²⁹ In all but fourteen states, different terminology is used in state election laws and state constitutions to describe persons ineligible to vote because of cognitive impairment.ⁿ³⁰ A possible explanation for this divergence **[*937]** between constitution and statute may be that states have found it easier to legislate improvements to enfranchisement criteria than to amend constitutions.

Only Mississippi excludes "idiots" as eligible voters in its election laws,ⁿ³¹ even though nine state constitutions use that term.ⁿ³² For example, Nevada's election law ignores its constitutional phrasing of "idiot" and directs the county clerk to "cancel the [voter] registration ... if the insanity or mental incompetence of the person registered is legally established."ⁿ³³ Kentucky's statute directs its election officials to remove from the voter rolls any person who has been declared incompetent,ⁿ³⁴ but the statute does not use the constitutional terminology of "idiots and insane persons."ⁿ³⁵ New Mexico has bypassed the "idiot" classification found in its constitutionⁿ³⁶ and has the county clerk cancel certificates of registration for the reason of the voter's legal insanity.ⁿ³⁷

Two states appear to ignore constitutional provisions in their election laws that specifically delineate those who are ineligible to vote. North Dakota's constitution states that "no person who has been declared mentally incompetent by order of a court ... shall be qualified to vote."ⁿ³⁸ However, its election law only bars voting by persons convicted and sentenced for treason or felony.ⁿ³⁹ Likewise, Utah's constitution provides that "any mentally incompetent person ... may not be permitted to vote at any election or be eligible to hold office in this State until the right to vote or hold elective office is restored as provided by statute."ⁿ⁴⁰ In its election law, Utah allows any person to apply to register to vote who "is a citizen of the United States; ... has

been a resident of Utah for at least the [thirty] days immediately before the election; ... and will be at least [eighteen] years old on the day of the election." ⁿ⁴¹ It then specifically states in the exception section that:

A person who is involuntarily confined or incarcerated in a jail, prison, or other facility within a voting precinct is not a resident of that voting precinct and may not register to vote in that voting precinct unless the person was a resident of that voting precinct before the confinement or incarceration... . A person who has been convicted of a felony whose **[*938]** right to vote has not been restored as provided by law may not register to vote. ⁿ⁴²

No mention is made of mentally incompetent persons in the exceptions to eligibility for registration.

In 1996, Alaska repealed its election law that disqualified voters for unsound mind, ⁿ⁴³ despite its constitutional provision that "no person may vote who has been judicially determined to be of unsound mind unless the disability has been removed." ⁿ⁴⁴ Florida's constitution states that "no person ... adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." ⁿ⁴⁵ However, the election law on voter registration qualifications narrows the exclusion only to those who have been adjudicated mentally incapacitated with respect to voting. ⁿ⁴⁶

Comparing West Virginia's constitutional phrasing to its election law wording raises the question whether there was any intentional effort to distinguish whom it is making ineligible to vote. The constitution states that "no person who ... has been declared mentally incompetent by a court of competent jurisdiction ... shall be permitted to vote while such disability continues" ⁿ⁴⁷ Under the election laws, no person who is "of unsound mind ... shall be permitted to vote at such election while such disability continues." ⁿ⁴⁸ Without the legislative history, it is difficult to ascertain whether the legislature equated "mental incompetence" with being of "unsound mind," a variation on the same theme, or separate categories of ineligible voters were intended. ⁿ⁴⁹

[*939] What should be made of election statutes that ignore or modify constitutional provisions restricting the franchise for certain classifications of ineligible voters? Are the election statutes of Alaska, Florida, Kentucky, Nevada, New Mexico, North Dakota, Utah, and West Virginia vulnerable to constitutional challenge because they do not specifically exclude "idiots" or "incompetent persons" as disqualified voters, because they narrow or modify the exclusion, or because they use different terminology than their constitutions? ⁿ⁵⁰ It is left to the respective state courts to resolve any challenges on these grounds, as none have been made to date. ⁿ⁵¹ Advocates who seek to limit the categories of persons who are disenfranchised may argue that the antiquated and pejorative "idiot" terminology ⁿ⁵² in the constitutions is so non-definitive and archaic that the legislatures in enacting more specific and contemporary language have better reflected the will of the people in defining who should or should not vote. ⁿ⁵³ Likewise, those states that have narrowed or modified the broad category of "mental incompetent" persons in their election statutes are perhaps subtly avoiding constitutional challenge on equal protection grounds by bringing their constitutions up to date with more acceptable and precise categorizations of persons deemed unable to vote. Society's perception and treatment of the mentally disabled and the elderly have changed substantially since the time that most constitutions and election statutes were written. As discussed below, several states are expanding and even encouraging the right of democratic participation to persons who only a few decades ago would have been categorically deemed unqualified to express their choice at the polling place. ⁿ⁵⁴

On the other hand, the precise wording of state constitutions or statutes can be decisive in identifying who is intended to be excluded from voting. For example, under a Maine law, before it was held unconstitutional in *Doe v. Rowe*, persons under guardianship for mental illness could not register or vote. However, persons under guardianship for reasons other than mental illness, such **[*940]** as mental retardation, or who were mentally ill but not under guardianship, were eligible to vote. ⁿ⁵⁵

Twenty-eight states' election laws do not comment on voter eligibility due to mental status. ⁿ⁵⁶ This may well be because the constitutional statement is deemed to be dispositive of who is or is not eligible to vote in the state without further legislative statement in the election laws. Of note are two states where the constitutions give the legislature the authority to bar citizens from voting because of mental illness or mental incompetence, but the legislature has failed to do so. The Kansas constitution permits the legislature to "exclude persons from voting because of mental illness" ⁿ⁵⁷ The legislature has not so done, requiring voters to be

U.S. citizens and age eighteen and older.ⁿ⁵⁸ Similarly, under the Michigan Constitution, "the legislature may by law exclude persons from voting because of mental incompetence" ⁿ⁵⁹ The legislature has not defined "mental incompetence" for the purpose of voting.ⁿ⁶⁰

Of those twenty-eight states with no mental-status criteria in their election law provisions, eight have no constitutional mention of ineligibility due to mental status.ⁿ⁶¹ The remaining twenty do have some constitutional bar to voting by persons who may be considered unqualified voters because of a mental classification.

Court Interpretation of Voter Disqualification. Much of the analysis of constitutions and statutes depends on a close examination of the precise wording used. Further, elections officials need to be able to identify those who may be categorically ineligible to register or cast a ballot. Who is an idiot or of unsound mind? What does non compos mentis mean? Who determines that someone is mentally incapacitated? Is a person with dementia insane, mentally ill, mentally incapacitated, or cognitively impaired? And do any of those categorizations have any relationship to the ability to exercise the right to vote? The vagueness of the terms "insane," "non compos mentis," and "idiocy" in describing those disqualified from voting creates uncertainty in the law governing voting capacity. There is little case law interpreting these vague provisions that can deny the mentally incapacitated the right to vote.ⁿ⁶²

[*941] Non Compos Mentis. In 1878, an Illinois court refuted a challenge that a voter was "non compos mentis" by "stating that a person who is capable of doing ordinary work and transacting business, who knows the value of money, makes his own contracts and does his own trading cannot be denied the privilege of the elective franchise" ⁿ⁶³ The court went on to note that "the right to vote cannot be denied on account of mental incapacity ... merely because [the person] is easily persuaded, or ... laboring under some kind of illusion, given that the illusion did not incapacitate him [from] the general management of business or extend to political matters."ⁿ⁶⁴

Illinois courts returned to the issue of voter disqualification in 1907 in *Welch v. Shumway*.ⁿ⁶⁵ The court held that when a voter was challenged on the ground of being "non compos mentis," it was necessary to establish, "by competent evidence, the alleged want of intelligence."ⁿ⁶⁶ The court suggested that the test for capacity to vote would probably be similar to the test used to determine whether a testator was of unsound mind when executing a will. If a voter knows enough to understand the nature of his act of voting and understands what he is doing, the voter would not be excluded from voting as being non compos mentis.ⁿ⁶⁷

In a Wisconsin case involving a petition to annex a state-owned facility for mentally deficient persons and raising the question of whether the facility's residents were qualified to vote, the court construed the then-used wording "non compos mentis" "as a generic term that included mental deficiency as well as insanity."ⁿ⁶⁸ It noted that the dictionary definition of "non compos mentis" referred to a complete lack of "mental capacity to understand the nature, consequences, and effect of a situation or transaction."ⁿ⁶⁹ By excluding from voting persons who are non compos mentis, "the constitution and the statute intended that [all] persons who are mentally incapable of knowing or understanding the nature and objective of the elective question should not be eligible to vote."ⁿ⁷⁰ The court went on to find that because all of the voters in question had either been committed or voluntarily admitted to a state-owned **[*942]** facility for the care, custody, and training of mentally deficient persons, there was a rebuttable presumption of incompetence. Because there was no evidence that any one of them was not mentally deficient, all resident-patients were ineligible electors.ⁿ⁷¹

Idiot and Insane. In 1905, an Ohio court examined the terms "idiot" and "insane person" in a challenge to a referendum approving the sale of intoxicating liquors. A vote was cast by a person who had "all conditions attendant upon complete imbecility ... [and who] showed an absolute lack of knowledge of the proper way to mark his ballot" ⁿ⁷² At the time this case was decided in the early twentieth century, "idiocy" referred to "mental feebleness due to disease or defect of brain, congenital or acquired during development" causing lack of understanding from nativity.ⁿ⁷³ "Insanity" was a general term that included idiocy, lunacy, imbecility, weak-mindedness, and feeble-mindedness, as well as disease or defect of the brain, or the inability to distinguish between right and wrong.ⁿ⁷⁴ The court held that the voter in question was disqualified as an "idiot or insane person."ⁿ⁷⁵ It was undisputed, according to the court, that the voter was "a person of diseased mind, of limited mental capacity, incapable of carrying on in an intelligent manner the ordinary affairs of life, having no distinct ideas upon the question of morality, ... and one who would probably not be [held] responsible for any criminal act" ⁿ⁷⁶

In 1962, an Ohio court returned to the question of the meaning of "idiot and insane," a century after the 1851 Ohio Constitution selected that terminology to identify persons disqualified from voting.ⁿ⁷⁷ Under Ohio law, a juror must have the qualifications of an eligible voter. Voters were disqualified if they were an idiot or insane.ⁿ⁷⁸ A jury's decision was challenged in a motion for a new trial on the ground that one of the jurors should have been disqualified because he had a record of hospitalization for mental illness. The court began its analysis by noting that the common meaning of idiot - a person who has been without understanding from his nativity and who the law presumes is never likely to attain any - had not significantly changed over time.ⁿ⁷⁹ "Insane person" referred to "a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life."ⁿ⁸⁰ Moving beyond the historical definitions of those terms, the [*943] court applied contemporary understandings of mental illness. Some persons, who once had normal reason, may become permanently insane, while for others, the loss of their perception or reason can fluctuate over time. "During ... lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties."ⁿ⁸¹ In any event, an accurate diagnosis of a person's mental illness or capacity requires the "help of a highly trained professional - usually a psychiatrist, although the highly qualified psychologists and social workers on the staffs of mental health clinics and family service agencies can do quite competent preliminary diagnostic work where physical ailments are not involved in the emotional or mental disease."ⁿ⁸² The court also noted that the Ohio mental illness statutes, largely rewritten and modernized during the ten years prior to the decision, no longer used the terminology of idiot or insane person.ⁿ⁸³ Although the juror in question had previously been hospitalized for manic-depressive reaction, he had never been adjudicated incompetent nor had a guardian been appointed for him.ⁿ⁸⁴ Therefore, he had the qualifications of an elector and should not have been excluded as a juror.ⁿ⁸⁵

Feeble-mindedness. Although no constitution or electors' statute currently uses "feeble-mindedness due to old age," this ageist concept was rejected by two courts long before discrimination against older voters became a concern. In 1869, Ohio recognized that old age was not a legal disqualification from voting, holding that the challenged voter was neither "a lunatic nor an idiot, but simply a man whose mind [was] greatly enfeebled by age."ⁿ⁸⁶ In a 1907 challenge to the rejection of an elderly man's vote on account of his mental enfeeblement because of his age, an Illinois court noted "that many persons who are failing mentally on account of old age are some days very much brighter than at other times."ⁿ⁸⁷ Because the voter knew what he was doing on the day he voted, could understand the nature of his act, and indicated a sound mind in answering questions at the polling place, he was entitled to vote.ⁿ⁸⁸

Under Guardianship. Although the phrasing "under guardianship" currently only appears in four state constitutions,ⁿ⁸⁹ its historical use has been subjected to interpretation by several courts. In all but one case, the courts have restricted its definition to the specific application of guardianship law. In *Town of Lafayette v. [*944] City of Chippewa Falls*, in addition to finding that the residents of a state facility for mentally deficient persons were presumed to be incompetent, the Wisconsin court further deemed that the residents were "under guardianship," although there was no evidence that they had been appointed guardians.ⁿ⁹⁰ Because the guardianship provisions were in a separate section of the code, the court deemed the statutory definition of guardianship requiring a court appointment to be inapplicable to the electors' statute.ⁿ⁹¹ The court resorted to what it considered the common and ordinary meaning of "guardian" - a person invested with the power of taking care of the property and rights of another who is incapable of administering his own affairs.ⁿ⁹² Because the residents were under the care and custody of the state, they were "under guardianship" and ineligible to sign the annexation petition being challenged.ⁿ⁹³

In contrast, the Massachusetts Supreme Judicial Court determined that "under guardianship" was a term of art that required strict adherence to the prescribed guardianship process. In *Boyd v. Board of Registrars of Voters*, residents of a state facility for the mentally retarded challenged the board of registrars' decision that they were ineligible to register because the constitution and election laws disqualified persons "under guardianship."ⁿ⁹⁴ The court noted the significant distinction between guardianship and involuntary commitment. Guardianship required a determination by a probate court that fixed the status of the person as "an insane person incapable of taking care of himself," while commitment justified the restraint of a person and did not fix his status or declare him unable to manage his affairs.ⁿ⁹⁵ With regard to the hopeful registrants, they neither had been declared incapable of managing their affairs nor involuntarily committed for mental health treatment, and their admission to a residential facility for those with mental retardation was wholly voluntary.ⁿ⁹⁶ Thus, they were held to be eligible voters.ⁿ⁹⁷

New Jersey came to a similar conclusion that admission to a facility for the mentally retarded raised no presumption of incompetency that would disqualify the residents from voting. In *Carroll v. Cobb*, residents of a state school for the mentally retarded filed a class action to compel the town clerk and board of elections to process their voter registration applications and allow them to vote.ⁿ⁹⁸ The New Jersey Constitution and election laws withdraw suffrage from any idiot [*945] or insane person.ⁿ⁹⁹ The *Carroll* court found that it was not within the municipal clerk's authority or discretion to determine whether an applicant for registration lacks sufficient mental capacity to vote. "It should be abundantly evident that a lay person is completely un-equipped to determine whether an applicant [registering to vote] is either an 'idiot' or an 'insane person' Indeed, we suspect that those imprecise terms may be troublesome to experts in the fields of psychiatry or psychology."ⁿ¹⁰⁰ Additionally, mere residency at an institution for the mentally retarded did not raise a presumption of idiocy.ⁿ¹⁰¹ The challenged voters were eligible to vote.

Arizona also had the opportunity to determine if Native Americans living on reservations were "under guardianship" as wards of the federal government and thus among the categories of residents who were ineligible to vote.ⁿ¹⁰² The court stated, "to ascribe to all Indians residing on reservations the quality of being 'incapable of handling their own affairs in an ordinary manner' would be a grave injustice" ⁿ¹⁰³ According to the court, whatever the relationship between the Native Americans and the federal government, they did not have the status of being "under guardianship" as the term was used in denying the right to vote.ⁿ¹⁰⁴

IV. Guardianship Law Reform

When state guardianship laws are added to the analysis of whether a person with any type of mental disability is eligible to vote, the puzzle becomes more complex. In addition to the variables found in constitutional provisions and election laws, guardianship statutes add a third variable that must be taken into account. As discussed above, looking only at constitutional provisions or only at elections laws does not adequately reveal whether someone with cognitive impairments is eligible to vote.ⁿ¹⁰⁵ State guardianship laws open up an additional [*946] avenue to address who is to be disenfranchised. Further, they provide the process by which the actual determination of capacity to vote is made.

The guardianship court is one forum that makes the designation of mental incapacity that can determine whether the individual may not vote. An additional forum where the right to vote may be determined is in a civil commitment proceeding that decides whether a person is dangerous to self or society and in need of involuntary treatment in a mental institution. In those states that exclude as voters those who are found to be insane, the finding of a need for mental health treatment may lead to voter disqualification. Criminal proceedings in which individuals are found mentally incapable of assisting in their defense or being unable to form the necessary intent to commit a crime are another legal avenue by which capacity is assessed and the right to vote may be lost.

The Guardianship Process. Guardianship is the state court process by which someone is determined to be so incapacitated or mentally disabled that it is necessary to remove their rights to make some or all decisions about their person or property and delegate that decision-making authority to another person or entity. The need for guardianship centers on the ability of allegedly incapacitated persons to manage their own financial affairs and to make their own decisions about their personal care. A central tension in each guardianship case is between an individual's rights to self-determination and the appropriateness of society stepping in to protect that individual, often from improvident actions and irrational behaviors, by taking away decision-making rights.

Bearing in mind the caveat that guardianship laws and procedures vary substantially from state to state, if not court to court, a basic description of how a person is placed under the protection of the court provides a foundation for examining these voting issues.ⁿ¹⁰⁶ Someone must file a petition with a court stating the belief that the person is at risk, meets the state's definition of "incapacity," and needs the protection of a guardianship.ⁿ¹⁰⁷ Most states require some medical documentation of the person's condition that puts the person or the person's property at risk of harm. Many states have some pre-hearing procedures that examine the allegations in the petition to verify that guardianship may be appropriate and no less restrictive alternative is available. In most cases, counsel is appointed and a hearing is held. The purpose of the hearing is to determine whether the person's circumstances meet the state's definition of who is [*947] "incapacitated" or in need of a guardianⁿ¹⁰⁸ and then to identify who should be appointed to make decisions on behalf of that individual. If the hearing determines a guardian is required, an order is entered. In some states, this order grants

the guardian full authority to make all decisions and terminates all rights of the individual. Other states recognize that the individual has the capacity to make some decisions, but not others, and limit the guardianship. The guardian's authority may be limited to personal matters, such as residential placement or medical decisions, or financial matters, such as the sale of real property, management of investments, and expenditure of funds. In limited guardianships, the guardian may be granted specific powers. Depending on the state's statutory framework, all rights may be removed and delegated to the guardian except those specifically remaining with the person found to be incapacitated (a ward),ⁿ¹⁰⁹ or the ward may retain all rights except those specifically removed or granted to the guardian.ⁿ¹¹⁰ The right to vote may be one of those rights adjudicated by the court.

The right to vote is personal and can never be delegated to another individual. Under no guardianship theory, statute, or practice can the guardian vote on behalf of his or her ward. The person under guardianship either has the right to vote or it is lost. The Florida guardianship statute is one example that explicitly recognizes that the right to vote cannot be delegated to the guardian.ⁿ¹¹¹

[*948] Definitions of Incapacity. Within the realm of guardianship law, each state has a specific definition of who is an incapacitated person, and thus in need of the appointment of a guardian.ⁿ¹¹² These definitions pertain to guardianship and do not contemplate the capacity to vote. For example, the Uniform Guardianship and Protective Proceedings Act defines an "incapacitated person" as

any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.ⁿ¹¹³

Delaware imposes guardianship if the person:

by reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially **[*949]** endangering [the] person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing personsⁿ¹¹⁴

In Maryland, being a disabled person in need of a guardian means:

[the] person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.ⁿ¹¹⁵

These selected definitions illustrate the point that, in determining the need for a guardian, the court focuses on the individual's ability to make decisions about how to manage their property or take care of their personal or medical affairs. Such emphasis on lack of self-care or financial management skills is not dispositive of whether the individual understands the nature of the election process.ⁿ¹¹⁶

Limited Guardianship. One wave of guardianship reform over the past two decades has been to recognize that a person's abilities and capacities are variable as to time and as to degree. For example, the person with developmental disabilities, with proper training and habilitation, may be able to gain the ability to make decisions about where to live and how to make appropriate monetary decisions. A person with traumatic brain injury can regain the ability to make medical decisions. Similarly, the person with early dementia may not be able to make complex investment decisions, but can make personal decisions about daily activities, what to eat, and whether to get a flu shot. In writing guardianship laws, legislatures have moved away from

plenary guardianships that reduce the adult to the status of the "legally dead"ⁿ¹¹⁷ or of an infant.ⁿ¹¹⁸ Practically every state that has revised its guardianship statute has favored limited guardianship,ⁿ¹¹⁹ with some **[*950]** states mandating a preference for orders that are tailored to the specific needs and circumstances of the individual, that encourage maximum self-reliance and independence, and that are necessitated by the protected person's limits.ⁿ¹²⁰ Nebraska's guardianship scheme goes beyond a preference for limited guardianship and mandates that all guardianships must be limited "unless the court finds by clear and convincing evidence that a full guardianship is necessary."ⁿ¹²¹

V. Guardianship Law and Retaining the Right to Vote

Augmenting the reform movement requiring or allowing states to limit the scope of authority delegated to a guardian, nineteen states have specific provisions that persons under full or limited guardianship retain all legal and civil rights not specifically taken away, which at least by implication would include the right to vote.ⁿ¹²² When the guardianship law provisions that favor limits on the removal of rights are examined, the argument can be made that persons in thirty-two states found to be sufficiently incapacitated to need a guardian may be eligible to vote under certain circumstances.ⁿ¹²³ In these states, there is an implied **[*951]** right to have the guardianship court make a determination of the individual's voting capacity.

That number is increased by provisions in the guardianship statutes or case law that specifically articulate a requirement to determine capacity to vote.ⁿ¹²⁴

. Alaska, in addition to providing that a ward retains all legal and civil rights except those expressly limited, specifically requires guardians to assure that their wards enjoy all personal, civil, and human rights, including the provision that they may not prohibit their wards from registering to vote or from casting a ballot.ⁿ¹²⁵

. Montana law specifically states, "no incapacitated person may be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's order specifically provides for such limitations."ⁿ¹²⁶

. In Washington, the imposition of a guardianship does not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor.ⁿ¹²⁷

. Florida guardianship law requires judges to determine which of several enumerated rights may be removed, including specifically the right to vote.ⁿ¹²⁸

. If an Iowa court appoints a guardian, it must make a separate determination as to the competency to vote. It may find the person under guardianship incompetent to vote only if it determines "that the person lacks sufficient mental capacity to comprehend and exercise the right to vote."ⁿ¹²⁹

[*952]

. Under Minnesota law, the ward retains the right to vote unless the court orders otherwise.ⁿ¹³⁰

. Wisconsin guardianship law requires the court to make a specific finding as to which legal rights the person is competent to exercise, including the right to vote. ⁿ¹³¹

. The New Jersey decision in *Carroll v. Cobb* requires an individualized inquiry to determine whether the incapacitated person retains the right to vote. ⁿ¹³² A constitutional amendment removing idiot or insane person language and substituting a specific adjudication of capacity to understand the act of voting will be offered for ratification in November 2007.

. North Dakota has a specific provision in its guardianship laws that no ward may be deprived of the legal right to vote, except upon specific finding of the court. ⁿ¹³³

. Connecticut law allows the guardian or conservator to petition the probate court to determine a ward's competency to vote. The court must hold a privileged hearing within fifteen days. ⁿ¹³⁴

. Oklahoma's election laws specify that a person who has been adjudged an incapacitated person is ineligible to register to vote. However, any person who is adjudged to be partially incapacitated is not prohibited from registration unless the order restricts such person **[*953]** from being eligible to register to vote. ⁿ¹³⁵ The Oklahoma guardianship law further provides that the court may assign to the limited guardian the duty to assist the ward in fulfilling his civic duties, which impliedly includes the right and responsibility to vote. ⁿ¹³⁶

. In 2001, Arkansas changed its law concerning the presumption of an incapacitated person's right to vote. A guardian appointed before that date could not prohibit a ward from voting without filing a petition. ⁿ¹³⁷ However, guardians appointed after October 1, 2001 may not allow a ward to vote without filing a petition and receiving express court approval authorizing the ward to vote. ⁿ¹³⁸

. Although the right to vote is not specifically mentioned in Maryland's guardianship law, it does state that the "appointment of a guardian of the person: (1) is not evidence of incompetency of the disabled person; and (2) does not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, and rights relating to licensure, permit, privilege, or benefit under any law." ⁿ¹³⁹ The right to vote could be, but has not been, interpreted as a "privilege under any law."

. California's conservatorship law for incapacitated adults assigns the county's Court Investigator the responsibility to recommend whether the conservatee is capable of completing an affidavit of voter registration at the initiation of the conservatorship and then at the Court Investigator's annual or biennial review. If the court finds the person is not capable of completing the affidavit, the elections official must cancel the registration. If, during its review, the Court Investigator recommends that the person has regained the capacity to complete the affidavit, the court must hold a hearing. If the court finds the person capable of voting, the right to register is restored. The conservatee may contest any disqualification from voting and can specifically petition for the restoration of voting privileges. ⁿ¹⁴⁰

The Maine constitutional provision that prohibited registering and voting by persons under guardianship for mental illness was held in *Doe v. Rowe* to be unconstitutional under the Fourteenth Amendment Due Process and Equal [*954] Protection Clauses.ⁿ¹⁴¹ The state constitution was found to be fatally deficient because the persons subject to guardianship proceedings were "not specifically advised that they could be disenfranchised if they [were] placed under full guardianship" and that their capacity to vote was not specifically addressed during guardianship proceedings.ⁿ¹⁴² No proffered interpretation of the state constitution or guardianship disenfranchising process allowed for the consistent and specific finding of the individual's ability to vote.ⁿ¹⁴³

Guardianship statutes are not the only place to look in state codes for provisions relating to the right to vote by persons with cognitive impairments. Four states' statutes specifically refer to the right to vote of persons with mental illness or mental retardation. Every institutionalized, mentally-ill person in Idaho has the right to vote unless that right has been limited by prior order.ⁿ¹⁴⁴ Louisiana's law warrants specific attention because of its effort to enable and encourage persons with mental retardation to exercise their voting privileges. Its election law voices

the policy of the state of Louisiana to encourage the full participation in voting by all citizens of this state, including persons with mental retardation who have not been declared to be mentally incompetent pursuant to a full interdiction, or whose right to vote has not been suspended by a limited interdiction, regardless of such person's living arrangements, which include but shall not be limited to a group home, institution, or treatment facility.ⁿ¹⁴⁵

The Department of Health and Hospitals is directed to "promulgate rules and regulations ... to insure that persons with mental retardation for whom the department provides care and treatment ... are permitted to [register and vote] in compliance with federal and state laws and regulations."ⁿ¹⁴⁶

Connecticut has similar provisions that encourage voting by persons with mental retardation who are institutionalized in state facilities. It has a detailed election process that encourages voting opportunities for persons in mental health institutions, residential facilities for the mentally retarded, or community residences,ⁿ¹⁴⁷ as well as supervised absentee voting in an inclusive list of [*955] institutions.ⁿ¹⁴⁸ The facility administrators must use their best efforts to give written notice to guardians and conservators that their wards have voting opportunities, unless a court has determined that the resident is incompetent to vote, or unless "registrars ... conclude at a supervised voting session that the resident declines to vote ... or they are unable to determine how the resident desires to vote."ⁿ¹⁴⁹

New Jersey has recently amended its mental health law to indicate that no patient should be deprived of any civil right by reason of treatment, including the right to register or vote.ⁿ¹⁵⁰ Prior to the 2006 election, the Public Advocate sent a letter to all New Jersey voters with a disability advising them that the "right to vote is protected by the laws of the United States and the State of New Jersey... . [and] to make sure that voters with disabilities in [New Jersey] know about their right to vote in person at the polls on Election Day."ⁿ¹⁵¹ The letter continued, "by law, voters with disabilities have the same legal right to vote as everyone else."ⁿ¹⁵² It explained that a person cannot be denied the right to vote because they have a certain type of disability, because they have a legal guardian, or because they live in an "institution, group home, supported apartment, or other residential facility that serves people with disabilities."ⁿ¹⁵³ In bold and underlined print, the letter states, "Only a judge can stop a person from voting because of a disability."ⁿ¹⁵⁴ It explains that

the judge must first hear evidence from a doctor or other expert that proves that the person is not able to understand what voting is and cannot form an opinion about the choices on the ballot. This does not mean that a person with a disability has to prove that he or she understands how government works or has a good reason for voting a certain way. A voter with a disability may not be asked those types of questions.ⁿ¹⁵⁵

The letter concludes by recommending that the voter take the letter to the polls "in case any questions arise" and provides a phone number to call if the voter has any problems on Election Day.ⁿ¹⁵⁶

[*956] Although not found within either the guardianship code or the mental health laws, Delaware's election laws require "a specific finding in a judicial guardianship ... proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes [the] exercise of basic voting judgment."ⁿ¹⁵⁷

The Massachusetts Secretary of State has issued an opinion that although according to the constitution and election laws persons "under guardianship" are not eligible to vote, only those persons whose guardianship specifically addresses incompetence to vote cannot vote.ⁿ¹⁵⁸

Cross Analysis of the Right to Determination of Voting Capacity. When guardianship codes and other provisions specifically concerning voting are examined, a clear majority of the states could enable persons who are incapacitated in their ability to make their own decisions regarding their financial or personal affairs to retain the right to vote. This could happen in those states with two provisos: the court must give broad effect to guardianship provisions limiting the deprivation of right and the court must make a specific determination concerning capacity to vote. When all provisions regarding voting by persons with cognitive impairments are examined, states fall into three groupings: 1) thirty-two states with a specific right to have the court determine capacity to vote or no constitutional bar to voting by reason of mental impairment,ⁿ¹⁵⁹ 2) twelve jurisdictions with an implied right to such a determination,ⁿ¹⁶⁰ and 3) seven states that categorically restrict the right to vote for persons with cognitive impairments.ⁿ¹⁶¹

The "implied" right to vote states are those where there is a difference in terminology between the constitution, election laws, and guardianship provisions defining incapacity.ⁿ¹⁶² Also included are those states that prefer or require limited guardianship and where wards retain rights except those specifically removed. The analysis that is set out in Appendix B considers whether the terminology used in constitutions or election laws is equivalent to that used in guardianship codes and could be interpreted to exclude from voting a different category of persons. Applying typical statutory construction, a person found to be "incapacitated" under guardianship law is not necessarily a person who is **[*957]** mentally incompetent to vote. Additionally, applying the constitutional reasoning of *Doe v. Rowe*, a general bar by reason of mental incompetence must be augmented by a specific judicial finding of the individual's inability to understand the nature and effect of voting.ⁿ¹⁶³

VI. Court Determination

A court, rather than an election official, must make the determination of whether an individual has the capacity to vote. In *Carroll v. Cobb*, a New Jersey court has specifically found that such determinations are outside of the authority or ability of election officials.ⁿ¹⁶⁴ In most cases, the determination will be made in the context of a guardianship proceeding.ⁿ¹⁶⁵ Wisconsin appears to be the only state that has established a specific judicial procedure for an election official to challenge a voter's capacity to vote.ⁿ¹⁶⁶ Although guardianship laws define who is incapacitated and in need of a guardian,ⁿ¹⁶⁷ few states give specific guidance to their courts as to how to determine if a person does not have the capacity to vote.

Only four states give specific statutory direction as to what a judge is to consider when determining whether a person is ineligible to vote. In Delaware, the standard is clear and convincing evidence of "severe cognitive impairment which precludes exercise of basic voting judgment."ⁿ¹⁶⁸ An Iowa court may find that a person is incompetent to vote only upon determining that the individual "lacks sufficient mental capacity to comprehend and exercise the right to vote."ⁿ¹⁶⁹ In Washington, the court must determine "that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot **[*958]** make an individual choice."ⁿ¹⁷⁰ The Wisconsin court must find that the person "is incapable of understanding the objective of the elective process."ⁿ¹⁷¹

The standards used by courts to determine incapacity to manage personal or financial matters may not coincide with the criteria for voting competency. The Ohio Constitution disqualifies those who are "idiots" or "insane" persons.ⁿ¹⁷² In a case involving a person who was not under guardianship, the court defined the term "idiot" as a person who has "suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life" and "insane person" as one "who has been without understanding from his nativity."ⁿ¹⁷³ By contrast, the Ohio definition of an "incompetent person" in a guardianship proceeding is

any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within [the] state.ⁿ¹⁷⁴

This comparison of terminology raises the question whether an Ohioan's ability to vote would be determined using different criteria depending on whether the case was brought as part of a guardianship proceeding (whether incompetent) or a challenge to elector status (whether insane).

The pending case of Missouri Protection and Advocacy, Inc. v. Carnahan illustrates the complexities created by the differing criteria for the appointment of a guardian and the due process conundrums raised by classifying a person incompetent to vote without any specific judicial consideration.ⁿ¹⁷⁵ The case was originally brought by Steven Prye, a former law professor at the University of Illinois at Urbana-Champaign, who was diagnosed with schizoaffective disorder and placed under a full Illinois guardianship with the Office of State Guardian.ⁿ¹⁷⁶ He was found in need of a guardian because he was unable to dress, maintain **[*959]** personal hygiene, or manage money.ⁿ¹⁷⁷ Illinois does not bar persons under guardianship from voting; thus, during the guardianship proceeding, no determination was made of his ability to vote.ⁿ¹⁷⁸ Under Illinois law, he suffered no legal disability to vote. He then moved to Missouri and attempted to register to vote.ⁿ¹⁷⁹ He was denied that right because under Missouri law persons under guardianship cannot vote.ⁿ¹⁸⁰ Prye's motion for a preliminary injunction requiring him to be allowed to register and to vote was denied on the basis that he had "the opportunity to demonstrate that he retains the capacity to vote and is entitled to a limited guardianship."ⁿ¹⁸¹ He was given the options to pursue limitation of the Illinois guardianship or "to argue that the petition for guardianship pending in Missouri should be a limited guardianship"; either option, if successful, would allow him to vote.ⁿ¹⁸²

Subsequently, Professor Prye died. Secretary of State Matt Blunt became governor and was replaced as named defendant by Robin Carnahan, the new Missouri Secretary of State. The case proceeded on appeal with the Missouri Protection and Advocacy agency as the organizational plaintiff, representing its constituents who were under full guardianship and had never had their capacity to vote adjudicated in Missouri. The new plaintiffs argued that although the guardianship proceeding was aimed at determining if an individual was "incapacitated" because of an inability to manage money or attend to physical needs, these impairments did not necessarily have any relation to the ability or capacity to vote. Nevertheless, a finding that the person is incapacitated automatically triggers the Missouri voting ban.

Co-author Dr. Paul S. Appelbaum evaluated specific constituents of the appellant Missouri Protection and Advocacy agency and concluded that they had the capacity to vote despite being under full guardianship. According to his expert testimony, they were "typical of a substantial group of persons under guardianship in every state, who whatever their other functional limitations remain competent to vote."ⁿ¹⁸³ Appellants also noted that "Public Administrators **[*960]** of four separate counties testified that the subject of voting rarely, if ever, is raised in guardianship hearings, even though a guardianship order results in disenfranchisement."ⁿ¹⁸⁴ The court additionally heard testimony about the "extensive barriers that stand in the way of wards [under full guardianship] seeking restoration of their voting rights."ⁿ¹⁸⁵

In granting summary judgment to the state on constitutional due process and equal protection claims, as well as claimed violations of the Americans with Disabilities Act and the Rehabilitation Act, the district court reasoned that individuals under full guardianship can retain the right to vote if they persuade a probate court that they are not incapacitated with respect to their ability to vote. Despite constitutional and statutory language indicating that a person under a full order of protection is presumed incompetent and cannot vote, as long as "Missouri affords an individualized determination of a person's abilities and limitations and denies the right to vote to those who lack the mental capacity to exercise that right," the scheme sufficiently differentiates between those who should and should not vote.ⁿ¹⁸⁶ The Eighth Circuit, with retired Justice Sandra Day O'Connor sitting by designation, heard oral arguments on February 12, 2007, as this article was being finalized.

VII. Assessing Capacity to Vote

Defining a Standard. As the preceding discussion makes clear, even in the face of a presumption that persons are competent to vote, it will at least sometimes be necessary to assess directly their capacity to do so. This was not always the case, since the older constitutional provisions, statutes, and case law tended to define incapacity by status (e.g., whether a person was under guardianship, had been committed to a mental facility, or was insane) rather than by functional ability.ⁿ¹⁸⁷ Although such language remains in some states' constitutions and statutes, most jurisdictions with explicit language have moved to a functional standard, which requires an individualized determination of a person's abilities to vote, rather than relying on some other aspect of their legal or medical status.ⁿ¹⁸⁸ At a minimum, and least controversially, these individualized assessments may occur in guardianship proceedings under those statutes that either require or permit judicial determinations of whether an alleged incompetent person should retain the right to vote. Discussed below is the more difficult question of whether such determinations may be acceptable at other **[*961]** locations in which decisions about access to the polls may be made - de jure or de facto - such as at registration or voting sites, or in long-term care facilities.

Given the references to the voting rights of persons under guardianship in statutory and case law requiring some sort of individualized determination of voting capacity, it might be expected that the criteria for capacity to vote by now would be consensually agreed to and clearly defined. However, as should be clear from the review above of the law on voting by persons with mental impairments, relatively little attention has been given in most jurisdictions to considering by what standard a person's voting capacity should be determined. Of the four states whose statutes attempt to define a standard, two definitions are essentially circular and hence of limited use to assessors, judicial or otherwise: Delaware's "severe cognitive impairment which precludes exercise of basic voting judgment"ⁿ¹⁸⁹ and Iowa's "lacks sufficient mental capacity to comprehend and exercise the right to vote."ⁿ¹⁹⁰

Some assistance in the definition of a standard, though, can be obtained from the Washington and Wisconsin statutes, which echo each other in helpful ways. Washington characterizes incompetence to vote as "lacking the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice";ⁿ¹⁹¹ Wisconsin similarly looks to whether the person is "incapable of understanding the objective of the elective process."ⁿ¹⁹² What they have in common is a focus on a person's ability to understand something of what voting and the electoral process entail, i.e., their "nature and effect" or "objective." Washington adds the requirement that the person be able to make an "individual choice," an addition of questionable impact, since a potential voter who cannot make a choice is not likely to cast a ballot, rendering moot the assessment of their capacity to vote.

This focus in formulating a standard for voting capacity on understanding the nature of voting has been reflected in the sparse case law on this question as well. An early twentieth-century Illinois case, *Welch v. Shumway*, rejected a challenge to the competence with which a ballot was cast because the voter understood the nature of his act and had interacted in a rational fashion with persons at the polling site.ⁿ¹⁹³ More recently, when the Maine Federal District Court in *Doe v. Rowe* struck down the state's constitutional provision that automatically disenfranchised persons under guardianship by reason of mental illness, it adopted a functional standard identical to that found in the Washington statute, again underscoring the importance of the ability to understand the nature and purpose of casting a ballot.ⁿ¹⁹⁴

[*962] Although neither the case law nor the statutes are particularly informative with regard to the policy considerations that may have entered into the selection of a functional standard for capacity to vote, an attempt to situate the Washington State/Doe standard in the broader context of tests of capacity may clarify some of the considerations here. Two preliminary points should be underscored. First, the definition of the criteria for capacity is an exercise in policy, not science.ⁿ¹⁹⁵ Second, persons' capacities for most tasks range along a spectrum from greater to lesser proficiency. There is no scientifically determinable point on that spectrum at which we can say that the person manifests sufficient capacity for the task. How much capacity we require for any given task reflects the weight we give to 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.ⁿ¹⁹⁶ Essentially, this is a determination regarding allocation of the risk of error. A relatively low standard for capacity allows more people to perform the task in question but increases the risk that persons with some significant degree of impairment will do so in a less-than-optimal fashion. In contrast, a high standard for capacity re-

stricts the number of people who can perform the task, offering greater assurance that those who exceed the required threshold are capable of performing the task adequately, but heightening the risk that some persons capable of carrying out the task will not be permitted to do so.

In resolving these conflicting policy considerations, it also must be recognized that capacities for legal purposes generally fall into two categories: the capacity to decide something and the capacity to do something. Examples of decisional capacities include the capacities to decide about medical treatment, enter into a contract, write a will, and marry. Decisional capacities such as these rest on an essentially cognitive foundation, i.e., each requires a person to grasp enough of the relevant data so as to be able to consider at least two options (and often many more) and to arrive at a choice that he or she favors. In contrast, examples of capacities to do something include the capacities to drive an automobile, parent a child, and stand trial for a criminal offense. Like decisional capacities, these performance-oriented capacities incorporate a cognitive component; indeed, most require not one but a sequence of decisions to be made. However, they also require physical actions or behaviors that are essential to the task at hand. For example, a person who is cognizant of relevant traffic laws and appreciates the need for caution on the road may nonetheless be said to lack capacity to drive if he or she has such impaired visual acuity as to be unable to see oncoming traffic or, as the consequence of a stroke, cannot turn the steering wheel or step on the brake. The capacity to vote is a decisional capacity. That is, [*963] although there is a physical aspect to casting a ballot (e.g., flipping a lever, completing a paper form, or touching a computer screen), it is not an intrinsic part of the voting process that must be accomplished by the voter himself or herself. So long as a decision about voting can be made and communicated, someone else can carry out the necessary physical acts to ensure that a ballot is cast.

So the drafters of state constitutions, the authors of legislation, and the crafters of judicial opinions are making what is inescapably a policy decision about a decisional capacity when they attempt to define an appropriate standard for the capacity to vote. In this context, they are not writing on a clean slate. Decisional capacities have been the subject of a great deal of legislation, case law, and commentary, and a rough consensus has evolved on the usual framework of decisional capacity criteria.ⁿ¹⁹⁷ Typically, standards for decisional capacities incorporate one or more of the following elements, requiring a person to have the ability to: understand the information relevant to the decision to be made, appreciate the implications of that information for his or her own situation, reason about the information in a manner that compares the options, and choose the desired option from the list of possibilities.ⁿ¹⁹⁸ As more of these elements are added to a compound standard of capacity, the test becomes more rigorous.ⁿ¹⁹⁹ The threshold can also be raised by requiring more information to be understood, appreciated, and reasoned with. Thus, policymakers have a good deal of latitude in crafting decisional capacity standards based on the previously noted considerations of whether to encourage free exercise of the decisional right in question or to protect the allegedly impaired person or others from the consequences of a less-than-optimal decisional process.

How do these considerations apply to the issue of capacity to vote? As described in other contributions to this Symposium, the right to vote is a basic, inalienable right of citizenship, albeit one that has not always been widely extended in the United States.ⁿ²⁰⁰ Indeed, at present, the right to vote could be said to be the defining characteristic of a democratic polity. Hence, there would appear to be strong reasons to allow persons to exercise the franchise except in the clearest cases of substantial incapacity to do so. Moreover, the countervailing considerations are weaker here than in the case of many other decisional capacities. Should an incompetent individual be allowed to cast a ballot by virtue of an unduly lax standard, the harm to that person is minimal and indirect. If the person's choice is different than what he or she would competently have chosen, [*964] there might be said to be an intangible injury to his or her broader interests in exercising an authentic, autonomous choice. But it is more difficult to identify potential concrete harms to the polity. A single incompetently cast ballot is not likely to affect the course of an election, and even a larger number of such ballots, assuming that the errors they reflect are distributed randomly, are unlikely to have a substantial impact.ⁿ²⁰¹ Hence, even if the well-being of the person casting an incompetent vote would be better served by the candidate for whom he or she would have voted if competent, but by virtue of incompetence did not, the likelihood that the incompetently cast ballot will affect the outcome of the election, and thus harm the person in a material way, is slight.

If this is the case, it might be asked whether there is any substantial counterbalance at all to the interest of persons in voting, sufficient to justify denying anyone who desires to vote access to the ballot box on the grounds of incompetence, at least so long as there is the attendant possibility of error in excluding a poten-

tially competent voter. Why, in other words, is there a state interest in ensuring that voters are competent to vote? The ubiquity and long presence of provisions excluding persons believed to be incompetent from exercising the franchise suggest that policymakers have been able to identify reasons for such a requirement. Indeed, even in the absence of concrete harm to incompetent voters or a likely impact on the outcome of an election, the state would appear to have an interest in protecting the perception of the integrity of the voting process. Were the voting public to perceive that incompetent persons routinely cast ballots, the seriousness with which competent voters approach the process of selecting candidates and issues for their support might be diminished. Why is it worth spending time analyzing the choices on the ballot, a competent voter might ask, when the state is willing to allow even clearly incompetent people to participate in what one might conclude is not a terribly important process? In addition, although small, the possibility cannot be excluded that incompetently cast ballots could affect the outcome of close elections, especially at local levels, where the pool of voters is restricted.ⁿ²⁰² Moreover, if incompetent voters are susceptible to systematic manipulation of their votes, which may be the case when they live in congregate facilities, the state has an added incentive to exclude them from the list of eligible voters.

Given a rationale for excluding some clearly incompetent persons from voting, it seems evident that the standards identified in those jurisdictions that have provided specific guidance on the question are intended to set a relatively low threshold for capacity to vote and to maximize the number of persons who are eligible to cast a ballot. The emphasis on understanding the nature and effect **[*965]** of voting and on making a choice, as seen in Washington State's statute,ⁿ²⁰³ the decision in *Doe v. Rowe*,ⁿ²⁰⁴ and similar sources, is clearly intended to constitute a minimal impediment to access to the polls. Compare, for example, the usual standards applied to medical treatment decision-making, which require substantial abilities to understand, appreciate, reason, and choose.ⁿ²⁰⁵ Taken together, these criteria represent a relatively rigorous standard, which appears to have evolved from concerns that lesser standards would allow patients with considerable decisional impairment to make medical treatment decisions that would not be in their best interests (e.g., refusing highly beneficial medical treatment). Indeed, the rigor of this four-part standard is increased further in practice by requiring higher cut-offs on each ability when the risks associated with the patient's putative choice are substantial.ⁿ²⁰⁶

In contrast, there is general agreement in the context of voting that the risks associated with allowing marginally incapable voters of casting a ballot are small, and the harms of excluding persons who might in fact be capable are substantial. Thus, there is every reason to whittle down the required abilities to a bare minimum, as evidenced by the Washington State/*Doe* standard. By excluding appreciation and reasoning components, voting competence standards eliminate two possible tests of decisional abilities that would likely increase the rigor of the standard; data from studies of competence in decision-making for medical purposes demonstrate that each component added to a capacity standard identifies some non-overlapping portion of subjects as impaired.ⁿ²⁰⁷ In contrast, the modest abilities required by the Washington State/*Doe* standard make it less likely that potential voters will be denied access to the polls. Moreover, the information that must be understood under the Washington State/*Doe* and similar standards does not relate to specific candidates or issues in a particular election but to the general nature of casting a ballot and the consequence of doing so. Thus, even in retaining the understanding standard, those legislatures and courts that have spoken to this issue require only a modicum of knowledge about voting in general and disallow a particularized inquiry into the specifics of a given election.

The majority of jurisdictions currently lack clear law, either statutory or case law, defining their standards for capacity to vote; hence, anticipating how those standards may evolve in the future is necessarily speculative. However, the policy considerations that motivate the adoption of a low-threshold standard for capacity to vote would appear to be generally applicable. It would not be surprising if the decision in *Doe v. Rowe* and the Washington State standard **[*966]** came to be reflected more broadly in case law and, as revisions occur, in statutes as well. Thus, it is worthwhile to consider how this standard - and by extension other standards of voting capacity - can be operationalized for the purpose of determining whether a particular voter meets the necessary criteria.

Operationalizing a Standard. Standardized assessment of decisional capacities has developed rapidly since roughly 1990, with a proliferation of reliable and validated assessment instruments for decisions ranging from selecting medical treatment to managing one's financial affairs.ⁿ²⁰⁸ The results of these assessments are usually displayed as quantitative scores on one or more scales that reflect the degree of capacity

of the subject. Viewed properly, these instruments are best seen as tools that generate data to be taken into account by an assessor rather than as determinants in their own right of a person's competence or incompetence. That is, although cut-off scores may be set, below which further careful evaluation might be indicated, the instrument itself should not yield a yes/no judgment on a person's competence. A decision to abrogate the right to make one's own decisions is sufficiently weighty that there should be an opportunity for an evaluator to take into account considerations that may modify or negate the findings of a structured assessment instrument. Nonetheless, it can be of obvious use to a decision-maker, especially in close cases, to know whether a particular person scores in the range usually associated with capacity or incapacity.ⁿ²⁰⁹

Relying on the standard enunciated in *Doe v. Rowe* for guidance, an instrument called the Competence Assessment Tool for Voting, or CAT-V, has **[*967]** been developed and tested.ⁿ²¹⁰ The core sections of the CAT-V pose tasks to subjects designed to probe their understanding of the nature and effect of voting and their ability to choose among candidates.ⁿ²¹¹ The script for the introduction to the assessment is structured as follows:

I'm going to ask you some questions about elections. This should take about five minutes. If you don't understand something I say or ask, please tell me and I will repeat it. Some of the questions may seem very simple to you, but don't worry about that. We are just looking for straightforward answers. Do you have any questions before we begin?ⁿ²¹²

Once any questions are answered, subjects' understanding of the nature of voting is then probed.

"Imagine that two candidates are running for Governor of [subject's state], and that today is Election Day in [subject's state]. What will the people of [subject's state] do today to pick the next Governor?" [Note to interviewer: If subject describes how he/she or people in general would choose between the two choices for governor (i.e., watch TV ads, listen to their campaign issues, etc.), ask: "Well that's how you might decide who you think should be governor. But how would you actually indicate your choice?"ⁿ²¹³

Responses to this question are scored in the following fashion:

Score of 2: completely correct response, e.g., "They will go to the polls and vote." "Each person will cast his/her vote for one or the other." Score of 1: Ambiguous or partially correct response, e.g., "That's why we have Election Day." Score of 0: Incorrect or irrelevant response, e.g., "There's nothing you can do; the TV guy decides."ⁿ²¹⁴

The interviewer and subject then move to assessment of the subject's understanding of the effect of voting.

[*968] "When the election for governor is over, how will it be decided who the winner is?"ⁿ²¹⁵

Scoring is as follows:

Score of 2: Completely correct response, e.g., "The votes will be counted and the person with more votes will be the winner." Score of 1: Ambiguous or partially correct response, e.g., "By the numbers." Score of 0: Incorrect or irrelevant response, e.g., "It all depends on which sign they were born under." [Note to interviewer: it is likely that some subjects will answer both of these questions in response to the first question. If so, they should be given a full score for each, and the second question may be omitted.]ⁿ²¹⁶

Finally, the subject's ability to choose among the candidates is explored. The subject is handed a card with the information in the following paragraph in large print and is allowed to retain and consult this card for the remainder of the interview.

Let me ask you to imagine the following about the two candidates who are running. Candidate A thinks the state should be doing more to provide health insurance to people who don't have it, and should be spending more money on schools. He is willing to raise taxes to get the money to do these things. Candidate B says the government should not provide health insurance but should make it easier for employers to offer it. He believes that the schools have enough money already but need tighter controls to make sure they use it properly. He is against raising taxes. ⁿ²¹⁷

The subject is then asked:

Based on what I just told you, which candidate do you think you are more likely to vote for: A or B?" ... If subject cannot choose a candidate or is vacillating, [he or she is] asked: "If you had to make a choice based on the information you have before you, who would you pick?" ⁿ²¹⁸

Responses are scored:

Score of 2: Clearly indicates choice. Score of 1: Choice is ambiguous or vacillating, e.g., "I think I might go for the guy who doesn't like taxes, [***969**] but I'm not sure because schools are important too." Score of 0: No choice is stated, e.g., "I don't know. I can never make up my mind." ⁿ²¹⁹

Subjects' scores from the three questions are cumulated for a total CAT-V score that ranges from 0-6.

In an initial test of the instrument, the CAT-V was administered to thirty-three persons with Alzheimer's disease recruited from the Memory Disorders Clinic at the University of Pennsylvania. If the caregiver (usually an adult child) who accompanied the subject to the clinic agreed to the subject's participation in an interview, the subject provided either verbal informed consent or assent (in which case their caregiver provided verbal informed consent) after disclosure of the nature of the study. The project was approved by the Institutional Review Board at the University of Pennsylvania. Of the subjects, the severity of dementia was very mild for five (fifteen percent), mild for eight (twenty-four percent), moderate for eleven (thirty-three percent), and severe for nine (twenty-seven percent), reflecting a wide range of severity, which is desirable in testing the properties of a new assessment tool. ⁿ²²⁰ The CAT-V items reported here took an average of 3.6 minutes to administer, indicating the instrument could be used efficiently for large-scale screening, and showed good interrater reliability, i.e., different raters scoring the same subjects had quite similar scores, a critical determinant of whether an instrument is feasible for general use.

Table 1 below shows the distribution of scores on the CAT-V. Although few subjects reflected impairment in choice (not unexpected in this group, since they needed to be able to indicate a choice to participate in the study), close to half failed to understand the nature of voting and roughly one-third could not understand the effect of voting. Performance correlated strongly with the degree of dementia affecting the subject: all persons with severe dementia scored a 2 or lower on the CAT-V standard, and all persons with very mild and most with mild dementia scored a 6. In contrast, persons with moderate stage dementia showed substantial variability in their CAT-V scores, ranging from 2 to 6. Interestingly, an expressed intention to vote in the next election was not a good predictor of CAT-V scores; eight of the fourteen subjects who scored four or less (including two of the three with scores of 0) expressed a desire to vote.

[*970]

Table 1. Summary of CAT-V scores (n=33)

CAT-V item	Score	N (%)
Understands the nature of voting	0	15 (45%)
	2	18 (55%)
Understands the effect of voting	0	10 (30%)
	1	3 (9%)
	2	20 (61%)
Ability to make a choice	0	4 (12%)
	2	29 (88%)

Although this study reports only an initial test of the CAT-V with a relatively small sample of persons from a single clinic who were not selected randomly, the results suggest that structured screening of elderly persons' capacities to vote can be performed relatively efficiently and with very good reliability. Moreover, if the tight correlation found here between CAT-V scores and degree of dementia is replicated in larger-scale studies, it would suggest that assessment should be targeted at those persons with moderate dementia; less severely afflicted persons would almost certainly score well on the CAT-V, and more impaired persons would score poorly.

Whatever its virtues, the CAT-V is by no means the only approach that could be taken to structured assessment of capacity to vote. Some observers may differ over the choice of questions or their wording. It has been noted that the current version of the CAT-V focuses exclusively on elections for office, whereas voters are often called on as well to make decisions about ballot referenda. Although it seems likely that voters who meet the Washington/Doe standard with regard to elections for public office will display similar abilities where referenda are concerned, that correspondence remains to be demonstrated empirically. Certainly one could imagine an expanded version of the CAT-V that explicitly addressed both elections to office and referenda.

Using a structured interview like the CAT-V offers advantages over unstructured or clinical assessments. It focuses an assessor on the specific abilities needed for the capacity to vote and also may provide a basis for educating the person being evaluated so that they might acquire sufficient understanding to achieve capacity. What an instrument cannot do is determine which scores represent adequate capacity. The extremes of performance are not controversial: a score of 0 clearly indicates lack of ability, and a score of 6 on the CAT-V questions indicates adequate capacity. But intermediate scores require a judgment to be made, the basis of which is not clear at this point. Data on the performance of samples without dementia may be helpful in identifying appropriate cut-offs to aid decision-makers.

[*971] Implementing Assessment of Capacity to Vote. The existence of capacity-screening instruments raises important questions about the circumstances that should trigger such screening, the contexts in which it should occur, and the identity of the persons who should conduct it. Underlying these questions are concerns that indiscriminate screening may result in the disenfranchisement of the elderly in general or in the selective deletion of elderly persons from the voting rolls for partisan gain.ⁿ²²¹ More optimistically, used properly, there is the potential for instruments like the CAT-V to identify persons likely to have impaired capacities to vote so that they can be helped to achieve higher levels of functioning, as has been demonstrated for decisions about medical treatment and research. Although we cannot thoroughly consider all of these issues here, this Section is intended to open the discussion.

The least controversial use of assessments (whether structured or not) of capacity to vote will occur in the context of guardianship proceedings in the courts. As noted above, some states require that voting capacity be determined in the course of adjudicating the need for a guardian, while others appear to permit such judgments to be made. With criteria for assessing capacity to vote now available, attorneys and judges will be able to direct assessors (usually physicians, including psychiatrists, or non-physician mental health professionals, such as psychologists or social workers) to concrete guidelines on which to base their determinations of an allegedly incompetent person's ability to vote. In turn, rather than relying on impressionistic judgments, inappropriately basing an opinion about competence to vote on criteria related to global functioning, or determining competence on the basis of a person's status (e.g., suffering from a mental illness, mental retardation, or dementia, or being under guardianship), the assessors will have available the CAT-V, and perhaps other instruments, to assist in their task. To the extent that there is disagreement over a person's capacity to vote, the argument will turn on the interpretation of a common set of data, rather than each side relying on disparate impressions gathered in different ways. Ultimately, it will be up to a judge to make a de-

cision regarding whether a person who may be subject to guardianship will also be deprived of his or her right to cast a vote.

How else might efforts to assess voting capacity be triggered? In theory, a person's appearance or behavior at the time of registering to vote or casting a ballot might raise questions about his or her competence. For example, a person could arrive at the registrar's office or polling place looking confused and disheveled, such that a reasonable person would question the person's capacity to vote even under the minimally demanding criteria defined by Washington State and Doe. Should registrars of voters or polling officials be given copies of a screening instrument, such as the CAT-V, and instructed to administer it in such **[*972]** circumstances? The risk of decisions being made by persons untrained in the clinical assessment of mental states, with possible partisan motivations to exclude particular persons from the voting booth, suggests that the answer to this question should be "No." In the event of questions being raised at the time of registration or voting about a person's voting capacity, registration should be permitted to take place or a vote to be cast, but the registration form or ballot should be impounded until such questions are resolved.ⁿ²²² Jurisdictions should have mechanisms in place for neutral decision-makers to determine voters' competence and to decide on the legitimacy of their registration or ballot.ⁿ²²³

Perhaps still more difficult are the questions that arise routinely in congregate living settings for the elderly, including long-term care facilities, such as assisted living residences and nursing homes. Although little empirical work has been done to describe the dynamics of voting in these facilities, an initial study of long-term care facilities in Philadelphia is instructive.ⁿ²²⁴ This survey of staff at forty-five nursing homes and thirty-nine assisted living settings revealed that in approximately two-thirds of these facilities, staff members assessed whether residents were capable of voting before deciding whether to take them to the polls or to assist them in completing absentee ballots.ⁿ²²⁵ The standards used for this assessment were often idiosyncratic and not in keeping with legally prescribed approaches (e.g., "We can assess if a resident is aware who the president is, who the mayor is. Then I will ask if they want to vote. They can vote based on their answers and the ability to answer the questions.").ⁿ²²⁶ As one participant described the process in her facility, staff members asked, "Is this person aware there is an election going on? What it's for? Is it for the mayor, for the president, or whatever? The irony is that a lot of people who are able to vote would also fail this test... It's pretty subjective on my part."ⁿ²²⁷ The people involved were most often activities therapists, recreational therapists, or social workers, who are not likely to be trained in applicable election law.ⁿ²²⁸

[*973] As a threshold question, it might be asked whether any screening at all ought to take place at long-term care facilities. If residents are registered voters, why should they not be permitted to vote, or at least attempt to do so? The answer relates to the realities of long-term care at several levels. First, since most long-term care facilities are not polling places, and many residents (perhaps most) will not be able to get to a polling place on their own, staff time and resources are required to transport them there and back. It would be wasteful and costly to ask facilities to transport to the polls all residents who said they wanted to be taken there, regardless of their degree of mental impairment, and it is unlikely that facilities would do so. Even for residents who are casting absentee ballots, some staff assistance frequently will be required, either in alerting them to the existence of deadlines or in helping them to complete the ballot forms. Again, particularly in facilities with a large percentage of severely demented residents, it seems wasteful of scarce resources to instruct staff members to assist every resident in this process, perhaps taking many hours of time, even when it appears clear that the residents are too confused to be able to understand what their participation is about. Finally, facility staff members are themselves citizens who have certain opinions about the integrity of the electoral process that may be at odds with a directive to assist every person in voting, regardless of that person's level of impairment. Not only are staff members' views about the electoral process likely to be impacted negatively, but in the real world they are simply unlikely to comply with requirements of this sort.

To suggest that some sort of screening may be necessary in long-term care facilities, however, is not necessarily to indicate that such procedures should be entrusted to the staff members of the facilities. It would seem preferable for election officials to visit facilities to conduct registration and voting, as now occurs in some states. Should questions arise in this process about the competence of a potential voter, election staff and not staff members of the facility would be in a position to make initial judgments. In this context, screening instruments like the CAT-V might be used to help identify persons for whom more formal determinations of capacity might be required, whether judicial or administrative, according to the law in that jurisdic-

tion. Although even this use of a screening test might be questioned on the usual grounds that it might lead to the identification of persons who otherwise would not be excluded from the polls, such a challenge seems difficult to defend. In facilities with a substantial number of mentally impaired persons, at least some of whom are likely to have lost the capacity to vote, election officials will need assistance in efficiently identifying those at highest risk of impaired capacity. So long as a CAT-V score in itself is not the ultimate determinant of whether a person can vote, but merely triggers a referral of the question to a neutral decision-maker, and the process has appropriate protections for the resident's rights, a screening instrument would appear to play a helpful role. And if residents are truly incompetent to vote, then excluding them from doing so in fact protects the integrity of the electoral process.

[*974] Experience with competence assessment instruments in medical settings suggests another way in which screening instruments for voting capacity could advance the interests of voters whose capacity to vote is being challenged and simultaneously guard the electoral process. Studies have shown that patients with impaired capacities, usually persons with mental illnesses, can sometimes be assisted to regain functionality by remedial interventions.ⁿ²²⁹ For example, patients who cannot understand a recommended medical procedure or appreciate its implications with the usual disclosure of information may be able to learn the facts and appreciate their significance if more strenuous efforts at education are made. In this regard, many such impaired patients can be thought of as similar to persons with learning disabilities, who may find it hard to learn new material but can do so if extra time is available and alternative approaches (i.e., making use of other sensory modalities) are employed. Similarly, it will be worth exploring whether persons identified as likely to have impaired voting capacity can be helped by remedial efforts to regain an understanding of the nature and effect of voting or the ability to make a choice. Should that prove to be the case, it may mitigate some of the concerns that have been expressed about the impact of screening tests for capacity to vote.

VIII. Conclusion

Protecting the integrity of voting by excluding persons who are thought to be incompetent to vote has a long history, dating back to the earliest days of the Republic. Modern conceptions of the right to vote as a bedrock of democracy, however, imply that only persons so impaired as to be unable to understand the nature and effect of voting should be susceptible to exclusion. And even such persons are entitled to rigorous procedural protections before being deprived of the right to vote. Given that state standards for voting competence are often circular, archaic, and vague, clearer definitions of voting capacity would allow more focused assessments to be conducted and more valid determinations to be made. Structured assessment instruments may have a role to play here, as part of a procedure aimed at maximizing the involvement of all persons with adequate capacity in the electoral process.

[*975]

IX. Appendix A: Comparison of voting Capacity Provisions

Alabama	Limited guardianship is permitted for "incapacitated persons" but the constitution bars the "mentally incompetent" from voting.
Alaska	The "incapacitated person" retains all rights, and the guardian may not prohibit the ward from voting. The constitutional voting bar to those with "unsound mind" has been repealed.
Arizona	Limited guardianship is permitted for "incapacitated persons," but the constitution bars "incapacitated persons" from voting.
Arkansas	The "incapacitated person" retains all civil rights, and the guardian must petition to authorize the "incapacitated person" to vote, while the constitution bars "idiots and insane" persons.
California	The court may limit adult conservatorship for a

	conservatee who is unable to properly care for personal needs or manage finances. The probate court investigator must recommend for or against voting disqualification by a conservatee with a biennial review of the conservatee's capability to complete an affidavit of voter registration, and there is a specific provision for restoration of voting rights. The constitution allows for the disqualification while "mentally incompetent," and the election law cancels registration of those "mentally incompetent."
Colorado	Limited guardianship is preferred, and there is no constitutional or election law bar because of incapacity.
Connecticut	Limited guardianship is allowed. The guardian or conservator may petition to determine voting competency. Institutionalized persons with mental retardation are encouraged to vote and assisted in voting.
Delaware	The court must specifically find that a person adjudged "mentally incompetent," based on clear and convincing evidence, has a severe cognitive impairment that precludes exercise of basic voting judgment.
District of Columbia	Those judged "mentally incompetent" may not vote, while "incapacitated persons" retain all rights except those specifically taken away.
Florida	Guardianship court must determine if the "incapacitated person" retains the right to vote. The constitutional bar to persons adjudicated to be "mentally incompetent" is limited by election law to those adjudicated "incapacitated with respect to voting."
Georgia	Limited guardianship is preferred for an adult who lacks sufficient "capacity" to make or communicate significant responsible decisions concerning his or her health or safety. Appointment of a guardian is not a determination of the right to vote, although the constitution bars those who are "mentally incompetent."
Hawaii	Limited guardianship is preferred for "incapacitated persons"; persons "non compos mentis" may not vote.
Idaho	Limited guardianship is encouraged, and the constitutional bar for incompetents has been removed. Mentally ill patients and developmentally disabled individuals are encouraged and assisted in voting.
Illinois	Limited guardianship is preferred, and there is no constitutional bar.
Indiana	Limited guardianship is preferred, and there is no constitutional bar.
Iowa	Limited guardianship is available, if appropriate, with a separate judicial determination as to competency to vote; constitutional bar for "idiots and insane persons."
Kansas	Limited guardianship is allowed. The constitution allows exclusion for mental illness, but such exclusion has not been statutorily enacted.
Kentucky	Partial guardianship is preferred for "disabled persons," but there is a constitutional bar for "idiots or insane persons," and voters are removed

	from election rolls if "incapacitated."
Louisiana	Limited interdictee retains all rights not taken away, and there is a state policy to encourage voting by persons with mental retardation.
Maine	An "incapacitated person" with limited guardianship retains all civil rights except those removed. It is unconstitutional to bar those "under guardianship with mental illness" without a specific finding of incapacity to vote.
Maryland	The appointment of a guardian for a "disabled person" is not evidence of incompetency and does not modify any civil right, although the constitution bars those under care of guardianship for "mental disability."
Massachusetts	Guardianship is permitted for those "mentally ill or mentally retarded or spendthrift," and there is a constitutional bar for persons "under guardianship." However, a Secretary of State Opinion only excludes those whose guardianship specifically addresses incompetency to vote.
Michigan	A person of limited "incapacity" retains all rights. The Legislature has not the defined constitutional term "mental incompetency."
Minnesota	A ward retains the right to vote unless judicially removed. The constitution bars persons "under guardianship" from voting.
Mississippi	A guardianship proceeding is used to determine whether persons are of "unsound mind," while the constitution and election law bars "idiots and insane persons."
Missouri	The adjudication of full "incapacity or disability" imposes legal disabilities provided by law but is not a presumption of incompetency. Those found partially incapacitated or disabled are presumed competent with no legal disabilities. The constitution bars persons with a guardian of estate or persons of "mental incapacity." Litigation is pending regarding the constitutionality of disenfranchisement provisions. ⁿ²³⁰
Montana	The "incapacitated person" retains all civil and political rights except those expressly limited; constitutional bar of those of "unsound mind."
Nebraska	Guardianships for "incapacitated persons" are to be limited, but there is a constitutional bar of those who are "non compos mentis" and an election law requirement to affirm at the time of voter registration that the voter has not been officially found "non compos mentis (mentally incompetent)."
Nevada	An "incompetent person" is defined to include mentally incapacitated persons. The constitution bars "idiots or insane" persons. The election law requires the elections clerk to cancel the registration of a voter if "insanity or mental incompetence" is legally established.
New Hampshire	Limited guardianship for incapacitated individuals is preferred with no constitutional bar.
New Jersey	Case law requires an individualized inquiry of "incapacity to vote." The constitution bars "idiots or insane persons" from voting, but amendment is pending

	voter ratification. No mental health patient may be denied right to vote. The Public Advocate has advised all persons with disabilities that they have the same right to vote as everyone else and that only a judge can remove their right to vote.
New Mexico	The "incapacitated person" retains all rights except those expressly limited; the constitutional bars "idiots or insane persons" from voting. "Legal insanity" is ascertained by certification by the guardianship court.
New York	Limited guardianship for "incapacity" is available, and there is no constitutional bar, but individuals adjudged "incompetent" are not allowed to register under election law.
North Carolina	A ward with limited incompetence may retain certain rights. There is no constitutional or election bar.
North Dakota	No "incapacitated" person may be deprived of right to vote, although the constitution bars "incompetent" persons.
Ohio	Limited guardianship is available for "incompetent" persons. There is a constitutional voting bar to "idiots or insane" persons.
Oklahoma	The limited guardian of an incapacitated person may assist the ward in fulfilling his or her civic duties, and election law does not prohibit the partially incapacitated person from voting unless specifically restricted.
Oregon	"Protected persons" retain all civil rights unless expressly limited, and persons with "mental handicap" are entitled to vote unless they are adjudicated "incompetent to vote."
Pennsylvania	Partially incapacitated persons retain all rights, and there is no constitutional bar.
Rhode Island	The appointment of a limited guardian is preferred for the person who "lacks capacity to make decisions," and that person retains all rights unless suspended. There is a constitutional bar of persons "non compos mentis."
South Carolina	Limited guardianship is allowed for "incapacitated" persons, but the constitution and election laws disqualify persons by reason of "mental incompetence."
South Dakota	The appointment of a guardian or conservator does not constitute a finding of "legal incompetence" unless specified, and the ward retains all rights. There is a constitutional dis-qualification for "mental incompetence."
Tennessee	Limited guardianship is preferred, and there is no constitutional bar.
Texas	The "incapacitated" person retains all rights except those granted to a guardian. There is a constitutional bar for those determined to be "mentally incompetent."
Utah	Limited guardianship is preferred for "incapacitated" persons. The constitution bars those who are "mentally incompetent" but no such restriction is enacted within the election law.
Vermont	A person with limited guardianship retains all civil rights unless specifically granted to a guardian. There

Virginia	is no constitutional bar. The "incapacitated person" under guardianship law is specifically defined as a person "mentally incompetent" under the constitution. Guardianship courts may enter a specific order allowing the right to vote.
Washington	The "incapacitated" person does not lose the right to vote unless the court finds the individual lacks capacity to understand nature and effect of voting such that she or he cannot make an individual choice. There is a constitutional bar if a person is declared "mentally incompetent."
West Virginia	A protected person is defined as "mentally incompetent, mentally retarded, or mentally handicapped," and limited guardianship is available. But there is a constitutional bar for those who are "mentally incompetent" and an election law bar for those of "unsound mind."
Wisconsin	The court must make a specific finding in separate proceeding as to "competence to vote." There is a constitutional bar for those found to be "incompetent or partially incompetent" unless they are found to be capable of understanding the objective of the elective process.
Wyoming	The term "incompetent person" is used consistently in guardianship law, constitution, and election law as a person ineligible to vote.

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X. Appendix B: State Provisions Regarding Voting:
Constitutions, Election Laws, and Guardianship Statutes

A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	Possible Implied Right to Vote	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Alabama	Mentally incompetent not qualified to vote until restored. Ala. Const. art. VIII, § 177 (amended)		An incapacitated person is "any person who is impaired by reason of mental illness, mental deficiency, physical			The court may make orders only as necessary. Ala. Code §§26-2A-105(a), 26-2A-136(a).	

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responsible
decisions."

Ala.

Code
§ 26-
2A-20(8).

Alaska	"No person may vote who has been judicially determined to be of unsound mind unless	Disqualifica- tion for unsound mind was repealed in 1996. See former Alaska Stat. § 15.05.040.	""Incapaci- tated person' means a person whose ability to receive and evaluate information	Incapacitated person retains all rights except those "expressly limited by court order."	Guardian may not prohibit registering to vote or casting a vote. Alaska Stat. § 13.26.150(e)(6).
	the disability has been removed." Alaska		or to communicate decisions is impaired	Alaska Stat. § 13.26.090. "Guardian	

Const. art. 5, § 2. for reasons other than minority to the extent that the person lacks the ability shall assure. . .that ward enjoys all. . .civil rights." Alaska Stat. § 13.26.150(c)(4).

to provide the essential requirements for the person's physical health or safety without court-ordered assistance" Alaska Stat. § 13.26.005(5).

Arizona	"No person who is adjudicated an incapacitated person shall be qualified to vote. . .unless restored to civil rights." Ariz. Const. art. VII, § 2(c) (amended 2000).	Adjudicated an incapacitated person. Ariz. Rev. Stat. § 16-101(A).	Incapacitated person includes any person who "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." Some	As appropriate, guardians will "encourage maximum self-reliance and independence." Ariz. Rev. Stat. § 14-5312(A)(7). The court can appoint a general	Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (holding that Indians are not under guardianship).
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A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Arkansas	"No idiot or insane person shall be entitled to the privileges of an elector." Ark. Const. art III, § 5.	"Incapacitated person' means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity	Incapacitated person "is not presumed to be incompetent and retains all legal and civil rights except those. . .expressly limited by court order." Ark. Code Ann. § 28-65-106.	Guardianship ordered only to extent necessary. Ark. Code Ann. § 28-65-105.	Guardian must file a petition and receive court approval to authorize an incapacitated person to vote. Ark. Code Ann. § 28-65-302(a)(2)(E).	
			listed disorders include mental illness, deficiency or disorder, physical illness, and chronic use of drugs. Ark. Rev. Stat. § 14-5101.		or limited guardian. Ariz. Rev. Stat. § 14-5304.	

		to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate." Ark. Code Ann. § 28- 65- 101(5)(A).			
California	"The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualifica- tion of electors while mentally incompetent." Cal. Const. art. II, § 4 (amended 1974 and 1976).	Cancel registration of person "legally established" as mentally incompetent. Cal. Elec. Code § 2201(b). Deemed mentally incompetent if court finds that person is not capable of completing affidavit of voter registration and has a court appointed conservator.	Conservator may be appointed for persons unable to manage personal and physical needs or "substantially unable to manage financial resources." Cal. Prob. Code § 1801(a)- (b). Limited conservator refers only to developmen- tally disabled. See Cal. Prob. Code	Court may limit powers and duties of conservator. Cal. Prob. Code § 2351(b).	Conservator recommends for or against disqualifica- tion from voting. Cal. Welf. & Inst. Code § 5357(c). Court investigator reviews the person's capability of completing affidavit of voter registration. Must hold a hearing to determine capability. Cal. Elec.

Cal. Elec. Code § 2208. § 1801(d). Code § 2209. The person may contest disqualification (Cal. Elec. Code § 2210) or petition to contest voting rights (Cal. Welf. & Inst. Code § 5358.3).

A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Colorado	Silent as to disqualification. See, e.g., Colo. Const. art. VII, § 1.	The election code states that the "code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in	"'Incapacitated person' means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the	"The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage		

		order to prevent fraud and corruption in elections." Colo. Rev. Stat. § 1-1-103(1).	ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance." Colo. Rev. Stat. § 15-14-102(5).	the development of the ward's maximum self-reliance and independence." Colo. Rev. Stat. § 15-14-311(2).		
Connecticut	Silent as to disqualification. See, e.g., Conn. Const. art. VI, § 1 (amended 1976).	"No mentally incompetent person shall be admitted as an elector." Conn. Gen. Stat. § 9-12(a).	Plenary or limited guardian of person with mental retardation supervises all or specified aspects of care of a person, "who by reason of the severity of his mental retardation, has been determined to be totally unable to meet essential requirements	"Legally competent' means having the legal power to direct one's personal and financial affairs. All persons in this state eighteen years of age and over are legally competent unless determined otherwise by a court." Conn. Gen. Stat.	May assign to limited guardian limited duties and powers to assist ward in achieving self-reliance. Conn. Gen. Stat. § 45a-677(d).	"No patient hospitalized or treated in any public or private facility for the treatment of persons with psychiatric disabilities shall be deprived of . . . the right to vote, . . . except in accordance with due process of law, and unless such

for his physical health or safety and totally unable to make informed decisions about matters related to his care." Conn. Gen. Stat. § 45a-669(a), (c). "Conservator of the person" means a person appointed by the probate court "to supervise the personal affairs of a person found to be incapable of caring for himself or herself." Conn. Gen. Stat. § 45a-644(b).

§ 45a-669(b).

patient has been declared incapable Any finding of incapability shall specifically state which civil or personal rights the patient is incapable of exercising." Conn. Gen. Stat. § 17a-541. "The guardian or conservator of an individual may file a petition in probate court to determine such individual's competency to vote" Conn. Gen. Stat. § 45a-703. Mental health: Administrator of institution for mentally

retarded shall use best efforts to provide written notice to guardian or conservator of voting opportunity, that resident is entitled to vote or register unless court determines resident is incompetent to vote or unless registrars conclude at supervised voting session that resident declines to vote or are unable to determine how the resident desires to vote. Conn. Gen. Stat. § 9-159s.

A. State

B. Constitutional Terms

C. Election Law Terms

D. Guardianship Terms

E. Keep Legal Rights Unless Expressly

F. Remove Legal Rights only as Necessary

G. Specific Finding of Voter Eligibility

				limited		
Delaware	Persons "adjudged mentally incompetent" may not vote. Del. Const. art. V, § 2 (amended 2001).	Adjudged mentally incompetent with specific finding of "a severe cognitive impairment which precludes exercise of basic voting judgment." Del. Code Ann. tit. 15, § 1701.	A disabled person is any person who "by reason of mental or physical incapacity is unable properly to manage or care for their own person or property," and, as a result may lose the property or become a victim of "designing persons." Del. Code Ann. tit. 12, § 3901(a)(2).		The court shall grant a guardian "such powers, rights and duties which are necessary to protect, manage and care for the disabled person." Del. Code Ann. tit. 12, § 3922.	Need specific finding in guardianship on voting. However, there must be "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" before a person is disqualified as a voter. See Del. Code Ann. tit. 15, § 1701.
District of Columbia	No constitution.	Adjudged mentally incompetent. D.C. Code § 1-1001.02(2)(C)	"'Incapacitated individual' means an adult whose ability to receive	Retains all legal rights and abilities other than those	The court shall make "orders only to the extent necessitated	

			and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court- ordered assistance or the appointment of a guardian or conservator." D.C. Code § 21- 2011(11).	expressly limited or curtailed by court order. D.C. Code § 21-2004.	by the incapacitated individual's ... limitations." D.C. Code § 21-2044.
Florida	Persons adjudicated to be mentally incompetent	Adjudicated to be mentally incapacitated with	""Incapaci- tated person' means a person who has		Right to vote may be removed. Fla.

<p>may not vote. Fla. Const.</p>	<p>respect to voting. Fla.</p>	<p>been judicially determined to lack</p>	<p>Stat. Ann. § 744.3215(2)(b).</p>
<p>art. VI, § 4.</p>	<p>Stat. Ann. § 97.041. "Persons with disabilities' means individuals who have a physical or mental impairment that substantially limits one or more major life activities." Fla. Stat. Ann. § 97.021(24).</p>	<p>the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person." Fla. Stat. Ann. § 744.102(12).</p>	

A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited Court determines which powers retained by ward. Ga. Code Ann. § 29-4-12(d)(5).	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Georgia	<p>"No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability</p>		<p>"The court may appoint a guardian for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant</p>		<p>Guardianship shall "encourage the development of maximum self-reliance and independence in the adult and shall be ordered only to the</p>	<p>"The appointment of a guardian is not a determination regarding the right of the ward to vote." Ga. Code Ann. § 29-4-20(b).</p>

	has been removed." Ga. Const. art. II, § 1, P 3(b).	responsible decisions concerning his or her health or safety." Ga. Code Ann. § 29-4-1(a).	extent necessitated by the adult's actual and adaptive limitations after a determination that less restrictive alternatives to the guardianship are not available or appropriate." Ga. Code Ann. § 29-4-1(f). Ward has right to least restrictive form of guardianship. Ga. Code Ann. § 29-4-20(a)(6). Grant
Hawaii	"No person who is non compos mentis shall be qualified to vote." Haw. Const. art. II, § 2.	"'Incapacitated person' means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent	only those powers necessitated and shall make orders that encourage self-reliance and independence. Haw. Rev. Stat. § 560:5-311(b).

that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance." Haw. Rev. Stat. § 560:5-102.

A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Idaho	<p>Legislature may prescribe qualifications. Idaho Const. art. VI, § 4. Idaho Const. art. VI, § 3 (amended in 1998 to remove provision banning vote for people who are under guardian-</p>		<p>"'Incapacity' means a legal, not a medical disability and shall be measured by function limitations and it shall be construed to mean or refer to any person who has suffered, is suffering,</p>		<p>Court shall order "only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." Idaho Code</p>	<p>Every mentally ill patient in institution shall have the right to "vote unless limited by prior order." Idaho Code Ann. § 66-346(a)(6). Every developmentally disabled person</p>

	<p>ship). Until 1982 this provision also prohibited idiotic or insane persons from voting.</p>	<p>or is likely to suffer, substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care, or safety, or an inability to manage his or her property or financial affairs"</p> <p>Idaho Code Ann. § 15-5-101(a)(1). ""Disabled</p>	<p>Ann. § 15-5-304(a). Provide guardianship form that least interferes with person's legal capacity. Idaho Code Ann. § 15-5-303(a).</p>	<p>has the right to vote unless limited by prior court order. Idaho Code Ann. § 66-412(3)(j).</p>
Illinois	<p>Silent as to incapacity. Only prohibits felon or those in jail from voting. Ill. Const. art. III, § 2.</p>	<p>person' means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or</p>	<p>Order appointing limited guardian removes only that authority specifically conferred by order. 755 Ill. Comp. Stat. 5/11a-14(a).</p>	<p>"Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." 755 Ill. Comp. Stat. 5/11a-3(b).</p>

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A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Indiana	Silent as to incapacity. Renders ineligible those "convicted of infamous crimes." Ind. Const. art II, § 8.		An incapacitated person is unable to manage his or her property and/or to provide self-care "because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or (3) has a		Court may issue order for limited guardianship. Ind. Code § 29-3-5-3(b). Guardian may exercise all powers required to perform duties. Ind. Code § 29-3-8-4.	

Iowa	<p>"No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector." Iowa Const. art. II, § 5.</p>	<p>developmental disability ..." Ind. Code § 29-3-1-7.5. Any petition to request guardianship must state that the person's "decision-making capacity is so impaired that the person is unable to care for the person's personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur." Iowa Code §</p>	<p>Count considers if limited guardianship or conservatorship is appropriate. Iowa Code § 633.551(3).</p>	<p>If the court appoints a guardian, it "shall make a separate determination as to the ward's competency to vote. The court shall find a ward incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote." Iowa Code § 633.556.</p>
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			633.552(2)(a)	
Kansas	The legislature may exclude persons from voting because of mental illness. Kan. Const. art. V, § 2.	Silent. See Kan. Stat. Ann. § 25-2309.	An individual who needs a guardian "means a person . . . whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both, even with the use of assistive technologies or other supports, is impaired such that the person lacks the capacity to manage such person's estate, or to meet essential needs for physical health, safety or welfare, and who is in need of a guardian or a conservator, or both."	Guardian shall exercise authority only as necessitated by ward's limitations, encourage the ward to participate in decision making, and encourage the ward to act on their own behalf. Kan. Stat. Ann. § 59-3075(a)(2).

Kentucky	Prohibits	Removal	Kan. Stat. Ann. § 59-3051(a). Disabled	"Guardianship and conservatorship for disabled persons shall be utilized only as is necessary to promote their well-being" and partial guardianship or partial conservatorship is the preferred form of protection. Ky. Rev. Stat. Ann. § 387.500.		
	"idiots and	from rolls if	refers to a person			
	insane persons" from voting. Ky. Const. § 145.	a person is declared incompetent. Ky. Rev. Stat. Ann. § 116.113(2).	who is "unable to make informed decisions with respect to his personal affairs to such an extent that he lacks the capacity to provide for his physical			
			health and safety, including but not limited to health care, food, shelter, clothing, or personal hygiene . . ."			
			Ky. Rev. Stat. Ann. § 387.510(8).			
A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility

Louisiana	Right to vote suspended if "person is interdicted and judicially declared mentally incompetent." La. Const. art. I, § 10(a) (amended 1997).	"A court may order the full interdiction of a natural person of the age of majority, or an emancipated minor, who due to an infirmity, is unable consistently to make reasoned decisions regarding the care of his person and property, or to communicate those decisions, and whose interests cannot be protected by less restrictive means." La. Civ. Code Ann. art. 389.	May order limited interdiction when interests cannot be protected by less restrictive means. La. Civ. Code Ann. art. 390.	Policy to encourage full participation in voting: "The Department of Health and Hospitals shall promulgate rules and regulations . . . insure that persons with mental retardation . . . who are not subject to a full interdiction or a limited interdiction in which the right to register and vote has specifically been suspended are permitted to do so" La. Rev. Stat. Ann. § 18:102.1.		
Maine	Those "under guardianship for mental illness" are	Class C crime for person to vote or attempt to vote "knowing	"'Incapacitated person' means any person who is impaired by reason	"A person for whom a limited guardian has been appointed retains	The court shall "encourage the development of maximum	See Doe v. Roe, 156 F. Supp. 2d 35 (D. Me. 2001) ("The

<p>prohibited from voting. Me. Const. art. II, § 1 (amended 1998). But see Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001) (holding that Article two, section one of the Maine Constitution violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that "the State's disenfranchisement of those persons under guardianship by reason of mental illness is unconstitutional").</p>	<p>that the person is not eligible to do so" Me. Rev. Stat. Ann. tit. 21-A, § 674(3)(B).</p>	<p>of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person" Me. Rev. Stat. Ann. tit. 18-A, § 5-101(1).</p>	<p>all legal and civil rights except those which have been suspended by the decree or order." Me. Rev. Stat. Ann. tit. 18-A, § 5-105.</p>	<p>self reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." Me. Rev. Stat. Ann. tit. 18-A, § 5-304(a).</p>	<p>State's disenfranchisement of those persons under guardianship by reason of mental illness is unconstitutional.").</p>
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A. State

B. Constitutional Terms

C. Election Law Terms

D. Guardianship Terms

E. Keep Legal Rights

F. Remove Legal Rights

G. Specific Finding

				Unless Expressly limited	only as Necessary	of Voter Eligibility
Maryland	The General Assembly may "prohibit the right to vote	"An individual is not qualified to be a registered voter if	"A guardian of the person shall be appointed if the	Appointment of guardian is not evidence of incompetency,	May grant only those powers necessary. Md. Code Ann. Est.	
	of a person . . . under guardianship for mental disability." Md. Const. art. I, § 4.	the individual . . . is under guardianship for mental disability . . ." Md. Code Ann. Elec. Law § 3-102(b)(2).	court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive	does not modify any civil right under the court orders, including rights relating to privilege or benefit under any law. Md. Code Ann. Est. & Trusts § 13-706(b).	& Trusts § 13-708(a)(1).	

			form of intervention is available which is consistent with the person's welfare and safety." Md. Code Ann. Est. & Trusts § 13-705.	
Massachusetts	Those under guardianship are prohibited from voting. Mass. Const. amend art. III.	Under guardianship. Mass. Gen. Laws ch. 51, § 1.	Court may appoint guardian for a person who is mentally ill, mentally retarded, a spendthrift or a person who is unable to make or communicate informed decisions due to physical incapacity or illness. See Mass. Gen. Laws ch. 201, §§6-6B, 8.	According to the Secretary of State, guardianship must specify ineligible to vote. See William Francis Galvin, Sec'y of the Commonwealth of Mass., How to Apply for an Absentee Ballot, http://www.sec.state.ma.us/ele/eleifv/howabs.htm (last visited Sept. 23, 2007) (on file with the McGeorge Law Review).

Michigan	Legislature	Silent in	"'Incapacitated individual' means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." Mich. Comp. Laws § 700.1105(a).	"The court shall grant a guardian only those powers and only for that period of time as is necessary to provide for the demonstrated need of the incapacitated individual. The court shall design the guardianship to encourage the development of maximum self-reliance and independence in the individual." Mich. Comp. Laws § 700.5306(2).	Grants guardian only those powers as necessary; order specifies any limitations. Mich. Comp. Laws § 700.5306.
	may exclude because of mental incompetence. Mich. Const. art. II, § 2.	regards to mental incompetence. See Mich. Comp. Laws § 168.10.			

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| A. State | B. Constitutional Terms | C. Election Law Terms | D. Guardianship Terms | E. Keep Legal Rights Unless Expressly | F. Remove Legal Rights only as Necessary | G. Specific Finding of Voter Eligibility |
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Minnesota	Under guardianship or insane or not mentally competent. Minn. Const. art. VII, § 1.	"Incapacitated person' means an individual who, for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance." Minn. Stat. § 524.5-102(6).	limited "Any power not specifically granted to the guardian . . . is retained by the ward." Minn. Stat. § 524.5-310(c).	"The court shall grant to a guardian only those powers necessary to provide for the demonstrated needs of the ward." Minn. Stat. § 524.5-313(b).	"Unless otherwise ordered by the court, the ward retains the right to vote." Minn. Stat. § 524.5-313(c)(8).
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Missis- sippi	Idiot and insane persons. Miss. Const. art. XII, § 241 (amended 1968 and 1972).	Idiots and insane persons. Miss. Code Ann. § 23-15-11.	Persons of unsound mind. Miss. Code Ann. § 93-13- 125.			
Missouri	"No person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction and no person who is involuntarily confined in a mental institution pursuant to an adjudication of a court of competent jurisdiction shall be entitled to vote." Mo. Const. art. VIII, § 2 (amended 1958 and 1974).	Person adjudicated incapacitated may not register to vote. Mo. Rev. Stat. § 115.133.2.	"'Incapaci- tated person,' one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur." Mo. Rev. Stat.	"An adjudication of incapacity or disability does operate to impose upon the ward or protectee all legal disabilities provided by law, except to the extent specified in the order of adjudication" Mo. Rev. Stat. § 475.078. Persons adjudicated incapacitated are presumed to be incompetent; persons adjudicated partially incapacitated or partially disabled are presumed	The court shall appoint a limited guardian for a person who is partially incapacitated. The order shall "shall specify the powers and duties of the limited guardian[,]" and "the court shall impose only such legal disabilities and restraints on personal liberty as are necessary to promote and protect the well- being of the individual."	New v. Corrough, 370 S.W.2d 323, 327 (Mo. 1963) (holding that a resident of nursing home who had been adjudged insane but never had a guardian was not disqualified from voting).

			§ 475.010(9).	competent, and the adjudication imposes no legal disabilities. Mo. Rev. Stat. § 475.078.	Mo. Rev. Stat. § 475.080.1.	
Montana	Unsound mind as determined by a court. Mont. Const. art. IV, § 2.	"No person adjudicated to be of unsound mind has the right to vote, unless he has been restored to capacity as provided by law." Mont. Code Ann. § 13-1-111(3).	"Incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or which cause has so impaired	Incapacitated person retains all legal and civil rights except those expressly limited by court order. Mont. Code Ann. § 72-5-306; Mont. Code Ann. § 72-5-316(3).	Guardianship order should be used only to extent that person's actual mental and physical limitations require it. Mont. Code Ann. § 72-5-306.	"No incapacitated person may be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's order specifically provides for such limitations." Mont. Code Ann. § 72-5-316(3).

			the person's judgment that he is incapable of realizing and making a rational decision with respect to his need for treatment." Mont. Code Ann. § 72-5- 101(1).	
Nebraska	Non	The	"Incapaci- tated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understand-	The court may appoint a guardian if incapacitation is established by clear and convincing evidence. Will be limited guardianship unless full guardianship is necessary. If limited, the court will specify "specify the authorities and responsibili- ties which the
	compos mentis. Neb. Const. art. VI, § 2.	individual must affirm that he or she has not been "officially found to be non compos mentis (mentally incompe- tent)." Neb. Rev. Stat. Ann. § 32- 312(3).		

			ing or capacity to make or communicate responsible decisions concerning himself or herself." Neb. Rev. Stat. § 30- 2601(1).	guardian and ward, acting together or singly." Neb. Rev. Stat. § 30- 2620.		
Nevada	Adjudicated incompetent. Nev. Const. art. II, § 1 (amended 2004).	The clerk will cancel voter registration if insanity or mental incompetence is legally established. Nev. Rev. Stat. § 293.540.	""Incompe- tent' means an adult person who, by reason of mental illness, mental deficiency, disease, weakness of mind or any other cause, is unable, without assistance, properly to manage and take care of himself or his property, or both. The term includes a mentally incapacitated person." Nev. Rev. Stat. § 159.019.	"If court finds the proposed ward to be of limited capacity and in need of a special guardian, court shall enter an order and specify the powers and duties of the special guardian." Nev. Rev. Stat. § 159.054(2).		
A. State	B. Constitutional	C. Election	D. Guardianship	E. Keep Legal	F. Remove Legal	G. Specific

	Terms	Law Terms	Terms	Rights Unless Expressly limited	Rights only as Necessary	Finding of Voter Eligibility
New Hampshire	Convicted of treason, bribery, or willful violation of election laws. N.H. Const. pt. 1, art. 11.	Silent. See N.H. Rev. Stat. Ann. § 654:1.	Incapacity means the person is suffering or likely to suffer substantial harm due to an inability to provide for his or her personal needs. N.H. Rev. Stat. Ann. § 464-A:2(XI).	A ward shall enjoy "the greatest amount of personal freedom and civil liberties consistent with his or her mental and physical limitations." N.H. Rev. Stat. Ann. § 464-A:2(XIV). For	Only those limitations necessary to provide the ward with needed care and rehabilitative services. N.H. Rev. Stat. Ann. § 464-A:2(XIV).	No deprivations, "except as provided for by law," which includes the right to vote. N.H. Rev. Stat. Ann. § 135-C:56(I)-(II).
New Jersey	"No idiot or insane person shall enjoy the right of suffrage." N.J. Const. art. II, § 1, P 6.		"'Incapacitated individual' means an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs." The term is also used "to designate an	limited guardianship, the court must make specific findings regarding areas the individual "retains sufficient capacity to manage." N.J. Stat. Ann. § 3b:12-24.1(b).	The court may appoint limited guardian if it finds the individual lacks capacity to do some tasks "necessary to care for himself." N.J. Stat. Ann. § 3b:12-24.1(b).	"No patient shall be deprived of any civil right solely by reason of his receiving treatment . . . including but not limited to right to register for and vote at elections." N.J. Stat. Ann. § 30:4-24.2(a).

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New Mexico	Prohibits idiots and insane persons from voting. N.M. Const. art. VII, § 1.	County is required to cancel registration based on the "legal insanity of the voter." N.M. Stat. Ann. § 1-4- 24(B). Court files certification of legal	"Incapaci- tated person' means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency,	Incapacitated person retains civil and legal rights except those expressly limited by court order or those that the court specifically grants to the	Guardianship "as necessary to promote and protect the well being of the person." N.M. Stat. Ann. § 45- 5-301.1.
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insanity with elections clerk. N.M. Stat. Ann. § 1-4-26(A). physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he is unable to manage his personal affairs or he is unable to manage his estate or financial affairs or both . . . " N.M. Stat. Ann. § 45-5-101(F). guardian. N.M. Stat. Ann. §§45-5-301.1, 45-5-312.

New York

Only prohibits those "convicted of bribery or any infamous crime" from voting. N.Y. Const. art. II, § 3 (amended 2001).

"No person adjudged incompetent by order of a court shall have the right to register for or vote at any election." N.Y. Elec. Law § 5.106(6).

"Determination of incapacity based on clear and convincing evidence and a determination that a person is likely to suffer harm" for a variety of reasons. N.Y. Mental

Guardian "shall be granted only those powers which are necessary to provide for personal needs and/or property management." N.Y. Mental Hyg.

			Hyg. Law § 81.02(b)(1)- (2).	Law § 81.02.
North Carolina	Prohibits only felons from voting. N.C. Const. art. VI, § 2(3).	Prohibits only felons from voting. N.C. Gen. Stat. § 163-55.	""Incompetent adult' means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A- 1101(7).	"If the clerk orders a limited guardianship . . . the clerk may order that the ward retain certain legal rights and privileges to which the ward was entitled before being adjudged incompetent." N.C. Gen. Stat. § 35A- 1215(b).

North Dakota	Persons declared mentally incompetent may not vote. N.D. Const. art. II, § 2.	Those convicted and sentenced of a felony prohibited from voting. N.D. Cent. Code § 16.1-01-04(4).	Defines incapacitated person as an adult impaired by illness, deficiency, disability, or chemical dependence, such that "the person lacks capacity to make or communicate responsible decisions." N.D. Cent. Code § 30.1-26-01(2).	No ward can be denied the right to vote and he or she may retain other rights. N.D. Cent. Code § 30.1-28-04(3)-(4).	The court may make orders only to extent necessitated by actual mental and adaptive limitations or other conditions. N.D. Cent. Code § 30.1-28-04(1).	Court is required to make specific findings before depriving a ward of various rights, including the right to vote. N.D. Cent. Code § 30.1-28-04(3).
Ohio	"No idiot, or insane person, shall be entitled to the privileges of an elector." Ohio Const. art. V, § 6.		Defines incompetent as any person incapable of taking care of self or property due to physical illness or disability, mental illness or disability or mental retardation resulting from substance abuse. Ohio Rev. Code		The probate court may appoint limited guardian if in best interest of an incompetent. Ohio Rev. Code Ann. § 2111.02(B).	Baker v. Keller, 237 N.E.2d 629 (Ohio Ct. Com. Pl. 1968) (holding in voting context that "insane person" means a person who has "suffered such a deprivation of reason that he is no longer capable of understand-

			Ann. § 2111.01(D).		ing and acting	
					with discretion and judgment in the ordinary affairs of life").	
Okla- homa	"Subject to such exceptions as legislature may prescribe." Okla. Const. art. III, § 1.	Those adjudged incompetent may not register to vote. Those adjudged "partially incompetent" are not prohibited from registering unless the court orders such a restriction. Okla. Stat. tit. 26 § 4-101.	Defines incapacitated person as one who lacks capacity to "meet essential requirements for physical health or safety or unable to manage his financial resources" due to "mental illness, mental retardation, physical illness or disability, drug or alcohol dependence." Okla. Stat. tit. 30 § 1- 111(12).	The court should make appointments and orders "only to the extent necessitated by the mental and adaptive limitations." Okla. Stat. tit. 30 § 1- 103.	Those adjudged "partially incompetent" are not prohibited from registering unless the court orders such a restriction. Okla. Stat. tit. 26, § 4-101. Limited guardian shall assist ward in fulfilling civic duties. Okla. Stat. tit. 30, § 3-114.	
A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility

Oregon	<p>"A person suffering from a mental handicap is entitled to the full rights of an elector . . . unless the person has been adjudicated incompetent to vote." Or. Const. art. II, § 3 (amended 1944 and 1980).</p>	<p>"'Incapacitated' means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety." Or. Rev. Stat. § 125.005(5).</p>	<p>"A protected person retains all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to the guardian by the court." Or. Rev. Stat. § 125.300(3).</p>	<p>Court may order guardianship "only to the extent necessitated by the person's actual mental and physical limitations." Or. Rev. Stat. § 125.300(1).</p>	<p>Eligible unless adjudicated incompetent to vote. Or. Const. art. II, § 3 (amended 1944 and 1980).</p>
Pennsylvania	<p>Every person is entitled to vote, subject to laws requiring and regulating voter registration. Pa. Const. art. VII, § 1</p>	<p>Eligible so long as not confined in a penal institution for felony within the last five years. 25 Pa. Cons. Stat.</p>	<p>"'Incapacitated person' means an adult whose ability to receive and evaluate information effectively and communicate decisions</p>	<p>"Except in those areas designated by court order . . . a partially incapacitated person shall retain all legal rights." 20 Pa.</p>	

	(amended 1967).	§ 1301(a).	in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." 20 PA. Cons. Stat. § 5501.	Cons. Stat. § 5512.1(g).	
Rhode Island	Prohibits from voting persons adjudged to be "non compos mentis." R.I.		"The court shall authorize the guardian to make decisions for the individual	"The appointment of a limited guardian shall not constitute a finding of legal incompe- tence.	"The court must strike a delicate balance between providing the protection
	Const. art. II, § 1.		in only those areas where the court finds, based on one or more decision making assessment tools, that the individual	An individual for whom a limited guardian is appointed shall retain all legal and civil rights except those which	and support necessary to assist the individual and preserving, to the largest degree possible, the liberty, property

			lacks the capacity to make decisions." R.I. Gen. Laws § 33-15-4.	have been specifically suspended by the order." R.I. Gen. Laws § 33-15-4(a)(1).	and privacy interests of the individual." R.I. Gen. Laws § 33-15-4(a)(1).
South Carolina	"The General Assembly shall establish disqualifications for voting by reason of mental incompetence" S.C. Const. art. II, § 7.	A person is disqualified if "mentally incompetent as adjudicated by a court." S.C. Code Ann. § 7-5-120(b)(1).	A person is incapacitated if "he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property" due to "mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority)." S.C. Code Ann. § 62-5-101.		The court may make "orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions." S.C. Code Ann. § 62-5-304.
South Dakota	Those "disqualified by law	The clerk must deliver	Guardian may be appointed	"The appointment of a	

<p>for mental incompetence" may not vote. S.D. Const. art. VII, § 2 (amended 1974).</p>	<p>to the auditor "the names of persons declared mentally incompetent." S.D. Codified Laws § 12-4-18.</p>	<p>to an individual "whose ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian." S.D. Codified Laws § 29A-5-302.</p>	<p>guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders, and the protected person shall otherwise retain all rights which have not been granted to the guardian or conservator." S.D. Codified Laws § 29A-5-118.</p>
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Tennes-see

<p>"Laws may be passed excluding from the right of suffrage persons who may be convicted of</p>	<p>Judgment of infamy required to disqualify a person from voting. Tenn. Code Ann. § 2-2-102.</p>	<p>"Disabled person' means any person eighteen (18) years of age or older determined by the</p>	<p>"The court has an affirmative duty to ascertain and impose the least restrictive alternatives</p>
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infamous crimes." Tenn. Const. art. IV, § 2.

court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity" Tenn. Code Ann. § 34-1-101(7).

upon the disabled person." Tenn. Code Ann. § 34-1-127.

Texas	Persons	A	Defines	"Incapacitated person for whom appointed retains all legal and civil rights and powers except those designated by court orders as legal disabilities by virtue of having been specifically granted to the guardian."	The court may appoint a guardian "only as necessary to promote and protect the well-being of the person." Tex. Prob. Code Ann. § 602.
	determined "mentally incompetent by a court, subject to legislative exceptions" are prohibited from voting. Tex. Const. art. VI, § 1.	qualified voter must not have "not been determined mentally incompetent by a final judgment of a court." Tex. Elec. Code § 11.002(3).	incapacitated person as "an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's	person for whom appointed retains all legal and civil rights and powers except those designated by court orders as legal disabilities by virtue of having been specifically granted to the guardian."	The court may appoint a guardian "only as necessary to promote and protect the well-being of the person." Tex. Prob. Code Ann. § 602.

			<p>own physical health, or to manage the individual's own financial affairs"</p> <p>Tex. Prob. Code Ann. § 675.</p>	
Utah	<p>Mentally incompetent persons are prohibited from voting. Utah Const. art. IV, § 6.</p>	<p>Regarding eligibility of registration, refers only to those convicted of a felony. Utah Code Ann. § 20A-2-101.</p>	<p>""Incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." Utah Code Ann. § 75-</p>	<p>Tex. Prob. Code Ann. § 675.</p> <p>The court may appoint a guardian for an incapacitated person if "the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person." Utah Code Ann. § 75-5-304(1). "The court shall prefer a limited guardianship and may only grant a full guardianship</p>

			1-201(22).		if no other alternative exists." Utah Code Ann. § 75-5-304(2).
Vermont	<p>"Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior . . . " may vote. Vt. Const. ch. II, § 42.</p>	<p>Any person who is a citizen, a resident, has taken oath, and is eighteen or older may register to vote. Vt. Stat. Ann. tit. 43, § 2121.</p>	<p>"'Mentally disabled person' means a person who has been found to be: (A) at least 18 years of age; and (B) mentally ill or developmentally disabled; and (C) unable to manage, without the supervision of a guardian, some or all aspects of his or her personal care or financial affairs." Vt. Stat. Ann. tit. 14, § 3061(l).</p>	<p>A person with a limited guardian "retains all legal and civil rights except those specifically granted to the limited guardian by the court." Vt. Stat. Ann. tit. 14, § 3070(b).</p>	
Virginia	<p>"No person adjudicated to be mentally incompetent shall be</p>	<p>"The general registrar shall cancel the registration</p>	<p>"A finding that a person is incapacitated shall be construed</p>		<p>Incapacitated means mentally incompetent unless court order</p>

<p>qualified to vote." Va. Const. art. II, § 1 (amended 1996 and 1998).</p>	<p>of those disqualified to vote by . . . adjudication of incapacity." Va. Code Ann. § 24.2-427(b).</p>	<p>as a finding that the person is "mentally incompetent" as that term is used in [the constitution and election laws] unless the court order entered pursuant to this chapter specifically provides otherwise." Va. Code Ann. § 37.2-1000.</p>	<p>entered specifically provides otherwise. Va. Code Ann. § 37.2-1000.</p>
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Washington

<p>Persons "judicially declared mentally incompetent are excluded from" voting. Wash. Const. art. VI, § 3 (amended 1988).</p>	<p>The court must determine that "the individual has a significant risk of personal harm based upon . . . inability to adequately provide for nutrition, health, housing, or physical safety," or that "the</p>	<p>"A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities</p>	<p>The court may appoint limited guardian as it "finds necessary for such person's protection and assistance." Wash. Rev. Code §§11.88.005, 11.88.010(2).</p>	<p>Limited guardianship will not result in the loss of the right to vote "unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity</p>
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individual is at significant risk of financial harm based upon a specifically set forth in the court order." Wash. Rev. Code § 11.88.010(2).

to understand the nature and effect of voting such that

demonstrated inability to adequately manage property or financial affairs." Wash. Rev. Code § 11.88.010(1)(

she or he cannot make an individual choice." The court order must specify the individual's voting rights,

a)-(b). "For purposes of the terms 'incompetent,' 'disabled,' or 'not legally competent,'

and the court must notify the county auditor. Wash. Rev. Code § 11.88.010(5).

... shall be interpreted to mean 'incapacitated' persons for purposes of this chapter." Wash. Rev. Code § 11.88.010(1)(f).

- A. State
- B. Constitutional
- C. Election
- D. Guardianship
- E. Keep Legal
- F. Remove Legal
- G. Specific

	Terms	Law Terms	Terms	Rights Unless Expressly limited	Rights only as Necessary	Finding of Voter Eligibility
West Virginia	<p>Those declared mentally incompetent</p> <p>are prohibited from voting.W. Va. Const. art. IV, § 1 (amended 1994).</p>	<p>No person who is "of unsound mind" may vote. W. Va. Code § 3-1-3.</p>	<p>Protected person is one who "unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to</p>		<p>"A guardianship or conservatorship appointed under this article shall be the least restrictive possible, and the powers shall not extend beyond what is absolutely necessary for the protection of the individual." W. Va. Code § 44A-2-10(c).</p>	

provide for his or her support or for the support of legal dependents A finding that the individual displays poor judgment, alone, is not sufficient evidence that the individual is a protected person." W. Va. Code § 44A-1-4(13).

Wisconsin	Persons	To be	"'Incapacity'	Court may	Individual	"Any
	"adjudged by a court to be incompetent or partially incompetent" are prohibited from voting	denied the right to register or vote, the individual must be adjudicated incompetent. If determination	means the inability of an individual effectively to receive and evaluate information or to make or	declare that individual has incapacity to exercise the right to vote. Wis. Stat. § 54.25(2)(c)(g)	may not register or vote if "if the court finds that the individual is incapable of understand-	elector of a municipality may petition the circuit court for a determination that an individual
	"unless the judgment specifies that the person is capable of	of incompetency or limited incompetency without specific finding	communicate a decision with respect to the exercise of a		the objective of the elective process." Wis. Stat. § 54.25(2)(c)(1)	residing in the municipality is incapable of understanding the

					(g).	
	understand- ing the objective of the elective process or the judgment is set aside." Wis. Const. art. III, § 2.	that individual may vote, then "no determination of incapacity of understand- ing the objective of the elective process is required." Wis. Stat. § 6.03(3).	right or power." Wis. Stat. § 54.01(15).			objective of the elective process and thereby ineligible to register to vote or to vote in an election." Wis. Stat. § 54.25(2)(c)(g)
A. State	B. Constitutional Terms	C. Election Law Terms	D. Guardianship Terms	E. Keep Legal Rights Unless Expressly limited	F. Remove Legal Rights only as Necessary	G. Specific Finding of Voter Eligibility
Wyoming	Persons adjudicated mentally incompetent are prohibited from voting. Wyo. Const. art. VI, § 6 (amended 1996).	Persons currently adjudicated mentally incompetent may not register to vote. Wyo. Stat. Ann. § 22- 3-102(a).	"'Mentally incompetent person' means an individual who is unable unassisted to properly manage and take care of himself or his property as the result of mental illness, mental deficiency or mental		A ward under guardianship has the right to least restrictive and most appropriate guardianship suitable to circum- stances. Wyo. Stat. Ann. § 3-1- 206(a)(i).	

retardation."
Wyo.
Stat.
Ann. § 3-
1-
101(xii).
"Incompetent
person'
means an
individual
who, for
reasons
other
than
being a
minor, is
unable
unassisted
to
properly
manage
and take
care of
himself
or his
property
as a
result of
the
infirmities
of
advanced
age,
physical
disability,
disease,
the use
of
alcohol
or
controlled
substances,
mental
illness,
mental
deficiency
or mental
retardation."
Wyo.
Stat.
Ann. § 3-1-
101(ix).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Voting Rights Disability Discrimination Civil Rights Law Voting Rights Voting Rights Act General Overview Constitutional Law Equal Protection Scope of Protection

FOOTNOTES:

n1. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (holding that Virginia's poll tax violated the Equal Protection Clause of the Fourteenth Amendment).

n2. Dunn v. Blumstein, 405 U.S. 330 (1972) (holding that durational residency requirements violate the Equal Protection Clause because they were unnecessary to promote a compelling interest, either to prevent fraudulent voting by non-residents or to further the goal of having knowledgeable voters).

n3. Kay Schriener et al., The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities, 27 Publius 75, 75 (1997).

n4. Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979). Cognitive disabilities could include any of a number of disabilities that affect mental function, including mental illness, mental retardation, developmental disabilities, brain injuries, and the dementias.

n5. 42 U.S.C. § 1973gg-6(a)(3)(B) (2000).

n6. Other articles prepared for this Symposium on voting and persons with cognitive disabilities more closely examine the constitutional ramifications of discriminating against persons with mental incapacity. See, e.g., Pamela S. Karlan, The Voting Rights of Cognitively Impaired Individuals, 38 McGeorge L. Rev. 917 (2007).

n7. Recommendations of the Symposium, 38 McGeorge L. Rev. 861 (2007).

n8. See Kingshuk K. Roy, Note, Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly, 11 Elder L.J. 109 (2003); Schriener et al., supra note 3; Note, supra note 4.

n9. See infra note 18.

n10. The District of Columbia does not have a constitution.

n11. Pa. Const. art. VII, § 1 ("Every citizen twenty-one years of age [who is a citizen of the United States, resided in the state, and resided in the election district] shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact."). The General Assembly has provided that individuals "confined in a penal institution for a conviction of a felony within the last five years" are not eligible to register to vote. 25 Pa. Cons. Stat. Ann. § 1301(a) (West 2007). "Every citizen of the United States who has attained the age of eighteen years, who is a bona fide resident of the town in which he seeks to be admitted as an elector and who takes such oath, if any, as may be prescribed by law, shall be qualified to be an elector." Conn. Const. art. 6, § 1, amended by Conn. Const. amend. IX.

n12. See Appendix A, col. B.

n13. Most states impose some voting restrictions on people with felony convictions, ranging from a prohibition from voting while incarcerated to a virtual lifetime ban. In 2004, these laws were responsible for directly denying 5.3 million Americans their right to vote ... [Thirteen] states disenfranchise their citizens after completion of their sentences... . Seven states require permanent disenfranchisement under certain circumstances. Twelve states and the District of Columbia allow those on parole and probation to vote and another five states disenfranchise parolees, but allow probationers to vote In August 2001, the National Commission on Federal Election Reform ... recommended that all states restore voting rights to citizens who have fully served their sentences In July 2006, the United Nations Human Rights Committee condemned the U.S.'s disenfranchisement policies and called for the extension of voting rights to all individuals upon release from prison... . Sixteen states have implemented reforms since 1997 resulting in the restoration of voting rights to approximately 621,400 individuals.

Demos, Challenges to Fair Elections 4, The Case Against Felony Disfranchisement (2006), http://www.demos.org/pubs/CFE_felonydis_102406.pdf (on file with the McGeorge Law Review).

n14. See, e.g., Ariz. Const. art. VII, § 2(C) ("No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.").

n15. See, e.g., N.H. Const. pt. I, art. XI ("No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States ...").

n16. See, e.g., Ky. Rev. Stat. Ann. § 116.025(1) (West 2006) ("Any person who shall have been convicted of any election law offense which is a felony shall not be permitted to vote until his or her civil rights have been restored by executive pardon."). Until amended in 1996, the Alabama Constitution had an extensive list of persons barred from voting.

The following persons shall be disqualified both from registering, and from voting, namely: All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

Ala. Const. art. VIII, § 182, repealed by Ala. Const. amend. 579. Under the current constitution, "no person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability." Ala. Const. art. VIII, § 177(b).

n17. See, e.g., Iowa Const. art. II, § 5 ("No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.").

n18. See Ark. Const. art. III, § 5; Iowa Const. art. II, § 5; Ky. Const. § 145, cl. 3; Minn. Const. art. VII, § 1; Miss. Const. art. XII, § 241; Nev. Const. art. II, § 1 (amended 2005); N.J. Const. art. II, § 1, para. 6; N.M. Const. art. VII, § 1; Ohio Const. art. V, § 6.

n19. See Alaska Const. art. V, § 2; Mont. Const. art. IV, § 2.

n20. See Haw. Const. art. II, § 2; Neb. Const. art. VI, § 2; R.I. Const. art. II, § 1.

n21. See Mo. Const. art. VIII, § 2.

n22. See Kan. Const. art. V, § 2. However, the legislature has not done so.

n23. Wis. Const. art. III, § 2.

n24. See Ariz. Const. art. VII, § 2(C); Cal. Const. art. II, § 4; Del. Const. art. V, § 2; Fla. Const. art. VI, § 4; Ga. Const. art. II, § 1, para. 3(b); La. Const. art. I, § 10(A); Minn. Const. art. VII, § 1; N.D. Const. art. II, § 2; S.C. Const. art. II, § 7; S.D. Const. art. VII, § 2; Tex. Const. art. VI, § 1; Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Wash. Const. art. VI, § 3; W. Va. Const. art. IV, § 1; Wyo. Const. art. 6, § 6.

n25. See Me. Const. art. II, § 1; Mass. Const. art. III; Minn. Const. art. VII, § 1; Mo. Const. art. VIII, § 2. Maine's constitutional provision removing persons under guardianship for reasons of mental illness from qualification as an elector, Me. Const. Art. II, § 1, was held unconstitutional by *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001).

n26. Or. Const. art. II, § 3.

n27. Vt. Const. ch. II, § 42 ("Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the

following oath or affirmation, shall be entitled to all the privileges of a voter of this state ..."). Vermont Secretary of State Deborah Markowitz stated in informal remarks at the Symposium that this was not a competency standard; rather, it was designed to facilitate peaceable conduct at town meetings.

n28. See Appendix A, col. B. Idaho's constitution originally barred an "idiot or insane person" from voting. The prohibition was changed to "under guardianship" in 1982. In 1998, the constitution was again amended to drop any reference to mental capacity. See Idaho Const. art. VI, § 3.

n29. See Appendix A, col. C. New York's election law expands the constitutional categories of those who are unqualified to vote. Under New York's constitution, "the legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime." N.Y. Const. art. II, § 3. New York's election law includes the additional provision that "no person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law." N.Y. Elec. Law § 5.106(6) (McKinney 1998) (emphasis added).

n30. The fourteen states in which terminology is consistent are: Arizona (adjudicated incapacitated), California (mentally incompetent), Maryland (under guardianship for mental disability), Massachusetts (under guardianship), Mississippi (idiot, insane), Missouri (mentally incapacitated), Montana (unsound mind), Nebraska (non compos mentis), South Carolina (mental incompetence), South Dakota (mental incompetence), Texas (mentally incompetent), Virginia (mentally incompetent), Wisconsin (specifically incompetent to vote), and Wyoming (mentally incompetent).

n31. Miss. Code Ann. § 23-15-11 (1972 & Supp. 2003).

n32. See supra note 18.

n33. Nev. Rev. Stat. Ann. § 293.540 (LexisNexis 2002).

n34. See Ky. Rev. Stat. Ann. § 116.113 (West 2006).

n35. See Ky. Const. § 145.

n36. See N.M. Const. art. VII, § 1.

n37. See N.M. Stat. Ann. §§1-4-26, 1-4-24(B) (West 2003).

n38. N.D. Const. art. II, § 2.

n39. See N.D. Cent. Code § 16.1-01-04.4 (2004).

n40. Utah Const. art. IV, § 6.

n41. Utah Code Ann. § 20A-2-101(1) (2003).

n42. Id. § 20A-2-101(2).

n43. Alaska Stat. § 15.05.040 (repealed 1996).

n44. Alaska Const. art. 5, § 2.

n45. Fla. Const. art. VI, § 4 (emphasis added). Florida's constitution was amended in 1868 to remove "under guardianship, non compos mentis or insane" as persons prohibited from voting. Schriener et al., supra note 3, at 77.

38 McGeorge L. Rev. 931, *

n46. See Fla. Stat. Ann. § 97.041(2) (West 2002) ("The following persons, who might be otherwise qualified, are not entitled to register or vote: (a) A person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.") (emphasis added).

n47. W. Va. Const. art. IV, § 1 (emphasis added).

n48. W. Va. Code Ann. § 3-1-3 (West 2002) (emphasis added).

n49. To add to the variety of terminology, the West Virginia guardianship code uses the terminology of "protected person."

"Protected person" means an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, is not sufficient evidence that the individual is a protected person within the meaning of this subsection.

W. Va. Code Ann. § 44A-1-4(13) (LexisNexis 1997 & Supp. 2003). Kentucky, similarly, uses different terminology in its constitution, election laws, and guardianship laws. Compare Ky. Const. § 145 ("idiots and insane persons"), with Ky. Rev. Stat. Ann. § 116.113(2) (West 2006) (removal from rolls if "declared incompetent"), and *id.* § 387.510(8) ("Disabled ... refers to any person fourteen ... years of age or older who is: ... unable to make informed decisions with respect to his personal affairs to such an extent that he lacks the capacity to provide for his physical health and safety, including but not limited to health care, food, shelter, clothing, or personal hygiene ...").

n50. See Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People under Guardianship*, 62 Ohio St. L.J. 481, 484 n.7 (2001).

n51. The Missouri Constitution is currently being challenged, but on different grounds. See *infra* Part VI (discussing *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, No. 06-3014 (8th Cir. 2007), on appeal sub. nom. from *Prye v. Carnahan*, No. 04-4248- CV-C-ODS, 2006 U.S. Dist. LEXIS 46176 (W.D. Mo. July 7, 2004)).

n52. See *Doe v. Rowe*, 156 F. Supp. 2d 35, 54 (D. Me. 2001) (rejecting the State's suggestion that "probate courts can properly place persons with modern day diagnoses within the stigmatizing confines of terms such as "idiotic," "lunatic," or "unsoundness of mind").

n53. Schriener et al., *supra* note 3, at 77 ("Some states have revised earlier constitutional or statutory language either to reflect more modern perspectives on the nature of incompetency or to defer to changing terminological preferences.").

n54. See *infra* Part V (discussing various state provisions related to guardianship and the right to vote).

n55. *Doe*, 156 F. Supp. 2d at 44.

n56. Alabama, Alaska, Arizona, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington.

n57. Kan. Const. art V, § 2.

n58. Kan. Stat. Ann. § 25-2309(b)(15)-(16) (2000 & Supp. 2006).

n59. Mich. Const. art II, § 2.

n60. See Mich. Comp. Laws Ann. § 168.10 (West 1989).

n61. Colorado, Idaho, Illinois, Indiana, New Hampshire, Pennsylvania, Tennessee, and Vermont.

n62. See Joel E. Smith, Annotation, Voting Rights of Persons Mentally Incapacitated, 80 A.L.R.3d 1116, 1119-20 (1977).

n63. *Id.* at 1124 (discussing *Clark v. Robinson*, 88 Ill. 498 (1878)). In a case involving the question as to whether a voter was an idiot or an insane person, an Arkansas court used a similar functional test of what the voter could do. Although the voter was regarded by the community as mentally deficient and could not read or write, "he had voted in previous elections, had a bank account, and had transacted business without the aid of a guardian." *Id.* at 1127. Even with very low mentality, he was not an idiot or insane. *Youngblood v. Thorn*, 224 S.W. 962 (Ark. 1920).

n64. *Clark v. Robinson*, 88 Ill. 498 (1878); Smith, *supra* note 62, at 1124.

n65. 83 N.E. 549 (Ill. 1907).

n66. *Id.* at 558.

n67. See *id.*

n68. *Town of Lafayette v. City of Chippewa Falls*, 235 N.W.2d 435, 441 (Wis. 1975). This terminology is no longer used in Wisconsin. "Laws may be enacted ... excluding from the right of suffrage persons ... adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside." Wis. Const. art. III, § 2.

n69. *Town of Lafayette*, 235 N.W.2d at 441.

n70. *Id.*

n71. *Id.* at 443. See *infra* note 131 and accompanying text (discussing Wisconsin's new statutory provisions regarding voter eligibility).

n72. *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) 373, 389 (Prob. Ct. 1905).

n73. See *id.* at 386.

n74. See *id.* at 387.

n75. *Id.* at 388-90.

n76. *Id.* at 388-89.

n77. See *Baker v. Keller*, 15 Ohio Misc. 215 (Ct. Com. Pl. 1968).

n78. *Id.* at 219.

n79. *Id.* at 229.

n80. *Id.*

n81. *Id.*

n82. *Id.* at 228.

n83. *Id.* at 231.

n84. *Id.* at 232.

n85. *Id.* at 231.

n86. *Sinks v. Reese*, 19 Ohio St. 306, 320 (1869).

n87. *Welch v. Shumway*, 83 N.E. 549, 558 (Ill. 1907).

n88. *Id.*

n89. Maryland, Massachusetts, Minnesota, and Missouri.

n90. 235 N.W.2d 435, 440-41 (Wis. 1975).

n91. *Id.* at 440.

n92. *Id.*

n93. *Id.* at 441.

n94. 334 N.E.2d 629 (Mass. 1975). The exclusion of "persons under guardianship" was added to the Massachusetts Constitution in 1821. *Schriner & Ochs*, *supra* note 50, at 490.

n95. *Id.* at 632 (citations and quotations omitted).

n96. *Id.* at 630.

n97. *Id.* at 633.

n98. 354 A.2d 355 (1976).

n99. New Jersey voters will have the opportunity during the November 2007 elections to consider amending the Constitution to delete "idiot or insane person" and substitute "person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting." S. Con. Res. 134, 212th Leg., 2d Ann. Sess. (N.J. 2007).

n100. *Id.* at 359.

n101. According to state law in effect at the time of the decision regarding patients in state hospitals or schools, "there shall be no presumption of his incompetency or unsoundness of mind merely because of his admission to a mental hospital." *Id.* at 359-60 (citing N.J. Stat. Ann. § 30:4-24.2). See *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 750 A.2d 790 (N.J. Super. App. Div. 2000) (holding that involuntarily committed residents of a psychiatric hospital are presumed competent to vote and burden was on the challenger to prove incompetency).

n102. *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (holding that American Indians were not "persons under guardianship" and were eligible to register to vote).

n103. *Id.* at 463.

n104. *Id.* at 461.

n105. The Federal Elections Commission provides a state-by-state summary of voter eligibility, but in some instances it inaccurately reflects constitutional or state election law. Fed. Elections Comm'n, Register to Vote in Your State By Using This Postcard Form and Guide 3-27, <http://www.fec.gov/votregis/pdf/nvra.pdf> (last visited May 31, 2007) (on file with the McGeorge Law Review).

n106. See, for example, the discussion of Maine's guardianship process in *Doe v. Rowe*, 156 F. Supp. 2d 35, 42 (D. Me. 2001) ("This background will lay the foundation for the Court's discussion of legal issues in dispute."). The court noted that "Maine probate judges appear to disagree over their authority to reserve the right to vote to a person placed under full guardianship." *Id.* at 43 ("Under the current system, it appears that the probability of a mentally ill person under guardianship having the right to vote reserved depends more on the individual probate judge hearing the case than on the ward's actual capacity to understand the nature and effect of voting.").

n107. See Appendix A, col. D for the terminology used in guardianship statutes to define the person in need of guardianship.

n108. See Charles P. Sabatino & Suzanna L. Basinger, *Competency: Reforming Our Legal Fictions*, 6 J. Mental Health & Aging 119 (2000). This article offers an intriguing analysis of the many components and their various combinations within states' definitions of "incapacity." The authors categorize definitions of incapacity as 1) Status-based Tests: judicial determinations that the individual is a lunatic, insane person, person of unsound mind, non compos mentis, or spendthrift; 2) Disabling Condition Tests: a medical approach that requires the finding of a medical condition, such as mental illness, mental retardation, chronic use of drugs, physical illness, or advanced age; 3) Functional Behavior Linked to Disability Condition Tests: link an inability to manage one's property or person to the diagnosis; 4) More Finely Tuned Functional Behavior Tests: add tests of inability to meet essential needs, or endangerment potential if no state intervention; 5) Cognitive Functioning Tests: define inability in cognitive terms. Some states "mix and match" elements of various tests into the definition of incapacity. See, e.g., N.D. Cent. Code § 30.1-26-01(2) (1996). No current state guardianship law retains the status-based test, or terminology of lunatic, insane, persons or unsound mind, or non compos mentis in the definition of incapacity. Only five states retain "advanced age" as a disabling condition. See Ala. Code § 26-2A-20(8) (LexisNexis 1996); Miss. Code Ann. § 93-13-251 (1994); N.C. Gen. Stat. § 35A-1101 (2003) (senility); S.C. Code Ann. § 62-5-101 (1987 & Supp. 2006); Wyo. Stat. Ann. § 3-1-101(a)(ix) (2003 & Supp. 2007).

n109. See Appendix A, col. F.

n110. See Appendix A, col. E.

n111. The Florida guardianship statute categorizes rights that can be affected by a determination of incapacity into those rights that the ward retains even under full guardianship, those rights that can be delegated to the guardian, and those that may be removed from the ward, but not delegated to the guardian. See Fla. Stat. Ann. § 744.3215 (West 2005 & Supp. 2007).

(1) A person who has been determined to be incapacitated retains the right: (a) To have an annual review of the guardianship report and plan. (b) To have continuing review of the need for restriction of his or her rights. (c) To be restored to capacity at the earliest possible time. (d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation. (e) To have a qualified guardian. (f) To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable. (g) To be properly educated. (h) To receive prudent financial management for his or her property and to be informed how his or her property is being managed, if he or she has lost the right to manage property. (i) To receive services and rehabilitation necessary to maximize the quality of life. (j) To be free from discrimination because of his or her incapacity. (k) To have access to the courts. (l) To counsel. (m) To receive visitors and communicate with others. (n) To notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice. (o) To privacy. (2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right: (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval. (b) To vote. (c) To personally apply for government benefits. (d) To have a driver's license. (e) To travel. (f) To seek or retain employment. (3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right: (a) To contract. (b) To sue and defend lawsuits. (c) To apply for government benefits. (d) To manage property or to make any gift or disposition of property. (e) To determine his or her residence. (f) To consent to medical and mental health treatment. (g) To make decisions about his or her social environment or other social aspects of his or her life. (4) Without first obtaining specific authority from the court, ... a guardian may not: (a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding ... (b) Consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure or to the participation by the ward in any

biomedical or behavioral experiment. The court may permit such performance or participation only if: 1. It is of direct benefit to, and is intended to preserve the life of or prevent serious impairment to the mental or physical health of the ward; or 2. It is intended to assist the ward to develop or regain his or her abilities. (c) Initiate a petition for dissolution of marriage for the ward. (d) Consent on behalf of the ward to termination of the ward's parental rights. (e) Consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.

Id.

n112. See Appendix A, col. D.

n113. See, e.g., Ariz. Rev. Stat. Ann. § 14-5101 (2005); Mich. Comp. Laws Ann. § 700.1105(a) (West 2002); Unif. Guardianship & Protective Proceeding Act § 102(5).

n114. Del. Code Ann. tit. 12, § 3901(a)(2) (2001).

n115. Md. Code Ann. Est. & Trusts § 13-705(b) (LexisNexis 2001).

n116. In the related circumstance of whether an incapacitated person under guardianship is an incompetent witness, the Texas Court of Appeals has held that the guardianship statute's definition of "incapacity" does not equate with "insanity or incompetency" under the state's evidence code. *Kokes v. Angelina Coll.*, 148 S.W.3d 384, 389 (Tex. Ct. App. 2004) (holding that the existence of a guardianship does not automatically render a witness incompetent to give testimony).

n117. Associated Press, *Guardians of the Elderly: An Ailing System* (1987). This series of articles by AP reporters instigated many of the significant reforms to guardianship laws and coined the phrase "legally dead" to refer to the status of many persons then under guardianship.

n118. See, e.g., Ariz. Rev. Stat. Ann. § 14-5312(A) (2005) ("A guardian of an incapacitated person has the same powers, rights and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child ...").

n119. Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* 152-53 (Helvi Gold & Brian Black eds., 2005); Sally Balch Hurme, *Limited Guardianship: Its Implementation is Long Overdue*, 28 *Clearinghouse Rev.* 660, 660-69 (1994).

n120. See, e.g., Ala. Code § 26-2A-105(a) (LexisNexis 1996) ("The court shall exercise the authority conferred in this division so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure."). In addition, Alabama, Arizona, California, Colorado, Idaho, Indiana, Iowa, Ohio, South Carolina, and Tennessee permit limited guardianships.

n121. Neb. Rev. Stat. § 30-2620 (2002) ("If the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the court finds by clear and convincing evidence that a full guardianship is necessary. If a limited guardianship is created, the court shall, at the time of appointment or later, specify the authorities and responsibilities which the guardian and ward, acting together or singly, shall have ...").

n122. See Appendix D, col. E. All incapacitated persons in Alaska, Arkansas, Florida, Maryland, Minnesota, Missouri, Montana, New Mexico, Oregon, South Dakota, Texas, and Utah retain all rights except those specifically removed. Persons under limited guardianship in Illinois, Louisiana, Maine, Michigan, Pennsylvania, Rhode Island, and Vermont retain all rights except those specifically removed. The guardianship laws in Georgia and North Carolina reverse the presumption of retained rights, and allow the guardianship courts to determine which rights a ward retains. See Ga. Code Ann. § 29-4-12(d)(5) (Supp. 2007); N.C. Gen. Stat. § 35A-1215(b) (2003).

n123. See Appendix A, cols. E-F. Alabama (court may limit guardianship), Alaska (ward retains all legal and civil rights), Arizona (may limit guardianship), Arkansas (retains all rights), California (may limit conservatorship), Colorado (may limit guardianship), Florida (retains rights not removed), Georgia (determines rights removed), Idaho (may limit guardianship), Illinois (removes specific rights), Indiana (may limit guardianship), Iowa (may limit guardianship), Louisiana (limited interdictee retains all rights), Maine (limited ward retains all rights), Maryland (retains all rights), Michigan (limited ward retains all rights), Minnesota (retains all rights), Missouri (retains all rights), Montana (retains all rights), New Hampshire (may limit guardianship), New Mex-

ico (retains all rights), North Carolina (determines rights removed), Ohio (may limit guardianship), Oregon (retains all rights), Pennsylvania (limited retains all rights), Rhode Island (limited retains all rights), South Carolina (may limit guardianship), South Dakota (retains all rights), Tennessee (may limit), Texas (retains all rights), Utah (retains all rights), and Vermont (limited ward retains all rights).

n124. See Appendix B, col. G.

n125. Alaska Stat. §§13.26.090, 13.26.150(c)(4), 13.26.150(e)(6) (2006).

n126. Mont. Code Ann. § 72-5-316(3) (2005). Note that the guardian's powers could never include the personal right of the ward to vote.

n127. Wash. Rev. Code Ann. § 11.88.010(5) (West 2006).

n128. Fla. Stat. Ann. § 744.3215(2)(b) (West 2005 & Supp. 2007).

n129. Iowa Code Ann. § 633.556 (West 2003 & Supp. 2007).

n130. Minn. Stat. Ann. § 524.5-313(c)(8) (West Supp. 2007).

n131. Wis. Stat. Ann. § 54.25(2)(c)1 (West Supp. 2006). This provision is noteworthy as the most recent legislative enactment regarding the rights of a person under guardianship. Enacted in 2005, the legislature identified the right to vote as one of seven personal rights that can be removed, including the right to consent to marriage, to execute a will, to serve on a jury, to apply for an operator's license, to consent to sterilization, and to consent to organ, tissue, or bone marrow donation. The standard the court is to apply is if the "individual is incapable of understanding the objective of the elective process." *Id.* The statute also establishes a separate procedure by which a municipality elector may petition the circuit court for a determination that an individual is incapable of understanding the objective of the elective process and thereby is ineligible to register or vote. No guardian need be appointed and the determination may be reviewed. *Id.*

n132. *Carroll v. Cobb*, 354 A.2d 355 (N.J. 1976). See *infra* text accompanying notes 150-56.

n133. N.D. Cent. Code § 30.1-28-04(3) (1999 & Supp. 2003).

n134. Conn. Gen. Stat. § 45a-703 (West 2004) ("The guardian or conservator of an individual may file a petition in probate court to determine such individual's competency to vote in a primary, referendum or election. The probate court shall hold a hearing on the petition not later than fifteen days after the filing of the petition and the hearing shall be privileged with respect to assignment."). Prior to its enactment a probate court held that it did not have jurisdiction to consider voting capacity for persons with mental retardation because it only had jurisdiction over the rights of persons with psychiatric disabilities. The plenary guardian/sister of Dorothy Beers, a mentally retarded resident of a group home who could neither read or write, sought to have the probate court remove Ms. Beers, a registered voter, from the list of eligible voters. Although the probate court could determine if a person with psychiatric disabilities should have the right to vote removed, it did not have jurisdiction to deprive a person with mental retardation of such right. *In re Dorothy Beers*, (Conn. Prob. Ct., Feb. 17, 1998), discussed in Lawrence Berliner, *In the Matter of Dorothy Beers: Connecticut Probate Courts' Authority to Curtail the Right of Persons with Disabilities to Vote*, 13 *Quinnipiac Prob. L.J.* 49 (1998).

n135. Okla. Stat. Ann. tit. 26, § 4-101 (West 1997 & Supp. 2007).

n136. Okla. Stat. Ann. tit. 30, § 3-114 (West 1991).

n137. Ark. Code Ann. § 28-65-302(a)(1)(E) (2004).

n138. *Id.* § 28-65-302(a)(2)(E).

n139. Md. Code Ann. Est. & Trusts § 13-706(b) (LexisNexis 2001).

n140. Cal. Welf. & Inst. Code §§5357(c), 5358.3 (West 1998 & Supp. 2007) (providing for a petition to contest rights denied a conservatee, specifically including the right to vote); Cal. Elec. Code §§2209-2210 (West 2003).

n141. *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001). The disenfranchisement process also violated the Americans with Disabilities Act, 42 U.S.C. §§12131-12134 and Section 504 of the Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of 29 U.S.C.).

n142. *Doe*, 156 F. Supp. 2d at 43.

n143. *Id.* at 51, 56.

n144. Idaho Code Ann. § 66-346(a)(6) (2007) ("Every patient shall have the following rights: ... to exercise all civil rights, including the right to dispose of property ... , execute instruments, make purchases, enter into contractual relationships, and vote unless limited by prior court order").

n145. La. Rev. Stat. Ann. § 18:102.1.A (2004 & Supp. 2007).

n146. *Id.* § 18:102.1.B.

n147. Conn. Gen. Stat. § 9-159q to 159s (West 2002 & Supp. 2007).

n148. *Id.* § 9-159q(1) ("'Institution' means a veterans' health care facility, residential care home, health care facility for the handicapped, nursing home, rest home, mental health facility, alcohol or drug treatment facility, an infirmary operated by an educational institution for the care of its students, faculty and employees or an assisted living facility").

n149. *Id.* § 9-159s(b).

n150. N.J. Stat. Ann. § 30:4-24.2(a) (West 1997).

n151. Letter from Ronald K. Chen, Public Advocate, N.J. Dep't of the Pub. Advocate, to N.J. Voters with Disabilities (Sept. 29, 2006), [http://www.state.nj.us/publicadvocate/reports/pdfs/Letter to PW D on voting 2006.pdf](http://www.state.nj.us/publicadvocate/reports/pdfs/Letter%20to%20PW%20D%20on%20voting%202006.pdf) (on file with the McGeorge Law Review).

n152. *Id.*

n153. *Id.*

n154. *Id.* (emphasis omitted).

n155. *Id.* (emphasis omitted).

n156. *Id.* In the November 2007 elections, New Jersey voters will have the opportunity to ratify a constitutional amendment requiring a specific judicial determination of capacity to understand the act of voting.

n157. Del. Code Ann. tit. 15, § 1701 (1999 & Supp. 2006).

n158. Opinion of the [Massachusetts] Elections Division reprinted in John. H. Cross et al., *Guardianship and Conservatorship in Massachusetts* 149 (2000) (on file with authors).

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n159. Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, and Wisconsin.

n160. Alabama, District of Columbia, Kentucky, Maryland, Michigan, Nebraska, New Mexico, New York, Ohio, South Carolina, Texas, and Utah.

n161. Arizona, Hawaii, Mississippi, Nevada, Virginia, West Virginia, and Wyoming.

n162. Compare Appendix B, cols. B, C, & D.

n163. See *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001).

n164. 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976). During the 1853 debate at the Massachusetts constitutional convention over whether to use the words "idiot or insane person" or "person under guardianship," one of the delegates raised the concern that the solemn adjudication by a competent tribunal was the only criterion to settle the question of insanity or idiocy. He distrusted the ability of selectmen to make a proper determination "because they might believe a person to be idiotic or insane who was not so." Schriener & Ochs, *supra* note 50, at 525-26.

n165. When an election result is challenged on the basis that specific individuals were disqualified from voting because of their mental capacity, a court of general jurisdiction would hear the challenge. Whether the court also has guardianship jurisdiction depends on state court jurisdiction provisions. See, e.g., *Carroll v. Cobb*, 354 A.2d 355 (N.J. 1976) (election challenge heard in the Law Division, not in the court that would determine guardianship); *Town of Lafayette v. City of Chippewa*, 235 N.W.2d 435 (Wis. 1975) (Circuit Court interpreted guardianship law in context of annexation challenge); *New v. Corrough*, 370 S.W.2d 323 (Mo. 1963) (Circuit Court considered whether residents of a private nursing home were residents of a county-funded poor house).

n166. A municipal elector may petition the court in a specific proceeding to determine capacity to vote that does not involve the appointment of a guardian. See Wis. Stat. Ann. § 54.25(2)(c)1.g (West Supp. 2006).

n167. See Appendix B, col. D.

n168. Del. Code Ann. tit. 15, § 1701 (1999 & Supp. 2006).

n169. Iowa Code Ann. § 633.556(1) (West 2003 & Supp. 2007).

n170. Wash. Rev. Code Ann. § 11.88.010(5) (West 2006).

n171. Wis. Stat. Ann. § 54.25(2)(c)1.g (West Supp. 2006). The new statutory language tracks the standard previously adopted by the Wisconsin Supreme Court. See *Town of Lafayette v. City of Chippewa Falls*, 235 N.W.2d 435, 441 (Wis. 1975) (holding that "persons who are mentally incapable of knowing or understanding the nature and objective of the elective question should not be eligible to vote").

n172. See Ohio Const. art. V, § 6.

n173. *Baker v. Keller*, 237 N.E.2d 629, 638 (Ct. Com. Pl. Ohio 1968).

n174. Ohio Rev. Code. Ann. § 2111.01(D) (LexisNexis 2002).

n175. *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, No. 06-3014 (8th Cir. 2007), on appeal sub. nom. from *Prye v. Carnahan*, No. 04-4248- CV-C-ODS, 2006 U.S. Dist. LEXIS 46176 (W.D. Mo. July 7, 2004).

n176. Anya Litvak, *Lawsuit Challenges Missouri Voting Laws*, *Missourian* (Columbia), Oct. 21, 2004 (on file with the McGeorge Law Review).

n177. Order Denying Plaintiffs' Motion for Preliminary Injunction at 1, *Prye v. Blunt*, No. 04-4248-CV-C-ODS, (W.D. Mo. Oct. 26, 2004), http://www.uphs.upenn.edu/adc/old_site/news/Prye%20v%20Missouri%20case%20denial%20of%20voting%20rights.pdf [hereinafter Order Denying Preliminary Injunction] (on file with the McGeorge Law Review).

n178. *Id.* at 5.

n179. *Id.* at 2.

n180. " No person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court ... shall be entitled to vote" Mo. Const. art. VIII, § 2. By statute, persons "adjudged incapacitated" cannot vote. Mo. Ann. Stat. § 115.133.2 (West 1997 & Supp. 2007). An adjudication of full incapacity imposes legal disabilities provided by law. *Id.* § 475.078.2. A person adjudicated partially incapacitated or disabled is presumed competent and the adjudication imposes no legal disabilities. *Id.* § 475.078.1.

n181. Order Denying Preliminary Injunction, *supra* note 177, at 7.

n182. *Id.* at 8.

n183. Opening Brief of the Plaintiffs-Appellants at 11, *Mo. Prot. & Advocacy Servs., Inc., v. Carnahan*, No. 06-3014 (8th Cir. Sept. 28, 2006), <https://www.wulaw.wustl.edu/news/documents/OpeningBr.pdf> (last visited July 6, 2007) (on file with the McGeorge Law Review).

n184. *Id.* at 12-13.

n185. *Id.* at 14.

n186. *Prye v. Carnahan*, 2006 U.S. Dist. LEXIS 46176, No. 04-4248-CV-C-ODS, at 20 (W.D. Mo. July 7, 2006).

n187. See *supra* notes 18-27 and accompanying text.

n188. See generally *supra* Part III.

n189. Del. Code Ann. tit.15, § 1701 (1999 & Supp. 2006).

n190. Iowa Code Ann. § 633.556 (West 2003 & Supp. 2007).

n191. Wash. Rev. Code Ann. § 11.88.010(5) (West 2006 & Supp. 2007).

n192. Wis. Stat. Ann. § 54.25(2)(c)1.g (West Supp. 2006).

n193. 83 N.E. 549, 558 (Ill. 1907).

n194. 156 F. Supp. 2d 35 (D. Me. 2001).

n195. See Paul S. Appelbaum & Thomas G. Gutheil, *Clinical Handbook of Psychiatry & the Law* 183-84 (4th ed. 2007).

n196. Thomas Grisso & Paul S. Appelbaum, *Assessing Competence to Consent to Treatment* 127-40 (1998).

n197. Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 Rutgers L. Rev. 345, 348-62 (1996).

n198. *Id.*

n199. See, e.g., Thomas Grisso & Paul Appelbaum, *Comparison of Standards for Assessing Patients' Capacities to Make Treatment Decisions*, 152 Am. J. Psychiatry 1033 (1995).

n200. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 316-24 (2000).

n201. See Roy, *supra* note 8, at 117-18.

n202. See, e.g., John Stromnes, *Provisional Vote May Swing Election*, Billingsgazette.com, Nov. 8, 2004, http://www.billingsgazette.net/articles/2004/11/08/state/export_180410.txt (on file with the McGeorge Law Review); *Democrats' Handling of Election Protest Draws Fire*, The State (Columbia, S.C.), Aug. 8, 2004, at B3.

n203. Wash. Rev. Code Ann. § 11.88.010(5) (West 2006).

n204. *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001).

n205. Grisso & Appelbaum, *supra* note 196, at 31-58.

n206. Allen E. Buchanan & Dan W. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* 51-57 (1989).

n207. Grisso & Appelbaum, *supra* note 196.

n208. See generally Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (2d ed. 2003) (on file with authors).

n209. *Recommendations*, *supra* note 7. The standard embodied in the Recommendations of the conference that engendered this Symposium, appearing elsewhere in this issue, might appear on its face to take a different approach to defining what constitutes capacity to vote. A person is considered to have capacity, according to the Recommendations, so long as he or she "expresses a specific desire to participate in the voting process." Given that formulation, it might be supposed that any person who responds affirmatively to a query as to whether the person wants to vote will be considered to have the capacity to do so. However, understood in that way, no meaningful capacity requirement would have been established. For example, under such an approach, a person with dementia who reflexively responded "Yes" to any question that was asked, even without understanding its content (sadly, not an unusual phenomenon among persons with Alzheimer's disease and other types of dementia), would be judged to have capacity to vote, though the person might believe that touching the computer screen at the polling place was a means of ordering dinner.

Closer inspection of the language of the Recommendations suggests a more reasonable interpretation, and one that the authors believe reflects the intent of its drafters. A "specific desire to participate in the voting process" (emphasis added) indicates that something more than a random affirmative response is required. To have a specific desire to participate in a process implies knowledge of the nature and purpose of the process, as well as an intentional choice to participate. Under this interpretation, a competent voter would need to have some modicum of understanding that by expressing his/her preferences, the voter is helping to select (but not definitively determining) the president, governor, mayor, legislators, or other governing officials. This more natural interpretation of the recommendation, which bears a strong resemblance to the Washington State/Doe standard (though the two standards may not be identical), retains for the capacity criterion a role in ensuring that voters are playing a meaningful part in the electoral process. It also suggests a standard that can be operationalized in a manner that would allow reliable determination of voting capacity.

n210. See Paul Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 Am. J. Psychiatry 2094 (2005). The description of the CAT-V study in this section is drawn from this article.

n211. The initial version of the CAT-V also included sections on Appreciation and Reasoning that were included solely for research purposes. These abilities are not encompassed by the Washington State/Doe standard, and hence are not included

here. As expected, when operationalized in the study described below, these additional criteria identified a larger number of subjects as potentially impaired.

n212. Appelbaum et al., *supra* note 210, at 2099 app. 1.

n213. *Id.*

n214. *Id.*

n215. *Id.*

n216. *Id.*

n217. *Id.*

n218. *Id.*

n219. *Id.*

n220. Categories were determined by standard scores on the most widely used measure of cognitive impairment, the Mini Mental State Examination or MMSE. *Id.* at 2095.

n221. Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345 (2004).

n222. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C. §§15301 to 15545). The Act required provisions for provisional ballots for persons whose names do not appear on the voting list at their polling place or who cannot produce the necessary identification. *Id.*

n223. Referral to a court of appropriate jurisdiction is one obvious mechanism to accomplish this end, but more efficient non-judicial approaches might also be imagined, and could be preferable so long as potential voters' due process rights were protected and adverse decisions could be appealed to the courts. In 2006 Wisconsin established the process for a municipal elector to petition the court in a specific proceeding to determine capacity to vote that does not require the appointment of a guardian. See Wis. Stat. Ann. § 54.25(2)(c)1.g (West Supp. 2006).

n224. See Jason H. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. Aging & Soc. Pol'y (forthcoming 2007).

n225. *Id.*

n226. *Id.*

n227. *Id.*

n228. *Id.*

n229. See William T. Carpenter et al., *Decisional Capacity for Informed Consent in Schizophrenia Research*, 57 Archives Gen. Psychiatry 533 (2000); Laura B. Dunn et al., *Enhancing Comprehension of Consent for Research in Older Patients with Psychosis: A Randomized Study of a Novel Consent Procedure*, 158 Am. J. Psychiatry 1911 (2001).

n230. *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, No. 06-3014 (8th Cir. 2007), on appeal sub. nom. from *Prye v. Carnahan*, No. 04-4248- CV-C-ODS, 2006 U.S. Dist. LEXIS 46176 (W.D. Mo. July 7, 2004).

