Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy

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Abstract:

Most electoral democracies, including forty-three states in the United States, deny people the right to vote on the basis of intellectual disability or mental illness. Scholars in several fields have addressed these disenfranchisements, including legal scholars who analyze their validity under U.S. constitutional law and international-human-rights law, philosophers and political scientists who analyze their validity under democratic theory, and mental-health researchers who analyze their relationship to scientific categories. This Note reviews the current state of the debate across these fields and makes three contentions: (a) pragmatic political considerations have blurred the distinction between disenfranchisement provisions based on cognitive capacity and those based on personal status; (b) proposals that advocate voting by proxy trivialize the broad civic purpose of the franchise; and (c) the persistence of disenfranchisement on the basis of mental illness inevitably contributes to silencing socially disfavored views and lifestyles. Accordingly, the Note cautions reformers against advocating for capacity assessment or proxy voting, and emphasizes the importance of disassociating the idea of mental illness from voting capacity.

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INTRODUCTION

The majority of electoral democracies deny people the right to vote on the basis of intellectual disability or mental illness. A 2014 study of ninety-one democracies found that only sixteen maintain no suffrage restrictions for intellectual disability, while the seventy-five others maintain at least some restrictions.[1] Of the latter group, seventy-three states disenfranchise people by reference to certain statuses (e.g., retardation, legal incapacitation, guardianship, or detention in a psychiatric ward); and two states disenfranchise people using a more functional standard based on an individual's lack of capacity to understand the voting process, however they lack a defined procedure for ascertaining capacity.[2]

A 2016 study focusing on disenfranchisement of people with mental illness surveyed all 193 member states of the United Nations.[3] Its authors found that twenty-one states maintain no suffrage restrictions for mental illness, sixty-nine states disenfranchise all people "with any mental health problems . . . without any qualifier,"[4] nine states disenfranchise people detained under mental-health laws,[5] and fifty-six states authorize courts or magistrates to disenfranchise people for mental-health reasons.[6]

In the United States, where most voting qualifications are determined at the state level,[7] only eleven states maintain no suffrage restrictions on the basis of

1. Ludvig Beckman, *The Accuracy of Electoral Regulations: The Case of the Right to Vote by People with Cognitive Impairments*, 13 SOC. POL'Y & SOC'Y 221, 222–26 (2014). Beckman's study sample included democratic states with a population of at least one million people, identified by the author as "all major 'electoral democracies' in the world as of 2006." Guinea Bissau also meets the qualifications of population and democracy, but no data was available as to its suffrage restrictions. The sixteen nations without restrictions are Austria, Canada, Bolivia, Croatia, Ecuador, Finland, Ireland, Israel, Italy, Kenya, Mexico, the Netherlands, Norway, Slovenia, Sweden, and the United Kingdom.

2. *Id.* at 226.

3. Dinesh Bhugra et al., *Mental Illness and the Right to Vote: A Review of Legislation Across the World*, 28 INT'L REV. PSYCHIATRY 395 (2016).

4. *Id.* at 396.

5. *Id.* at 396–97 (noting that twelve other states disenfranchise all detained people, a group that presumably includes people detained for mental-health reasons but does not target them specifically).

6. *Id.* "Of the remaining, [the authors] had little or no information about the legal provisions with respect to right to vote for persons with mental illness in 24 Member States and legislative provisions were unclear in two Member States." *Id.* at 396.

7. Under U.S. law, states retain the power to regulate access to the franchise. Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 50–51 (1959) (upholding electoral literacy tests under the states' "broad powers to determine the conditions under which the right of suffrage may be exercised"). For more on *Lassiter* and its importance in the evolution of access to the franchise, see Part II.A below. Despite the states' general powers in this realm, the U.S. Constitution forbids

intellectual disability or mental illness.[8] Twenty-five states and the District of Columbia disenfranchise people found by a court to lack capacity to vote,[9] ten states and Puerto Rico disenfranchise any people "under guardianship,"[10] three states disenfranchise people considered *non compos mentis*,[11] and Montana disenfranchises people "adjudicated to be of unsound mind . . . unless the person has been restored to capacity as provided by law."[12]

Despite their ubiquity, suffrage restrictions based on intellectual disability and mental illness are controversial. This Note briefly sketches the current state of the controversy and advances three defined claims. Part I introduces the structure and terminology of the Note. Part II reviews criticisms of existing suffrage restrictions from the perspectives of U.S. law, international-human-rights law, and democratic theory. Part III criticizes the proposed shift to capacity-based restrictions, arguing that pragmatic political considerations have blurred the distinction between voting capacity and mental impairment status.

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disenfranchisement on the basis of "race, color, or previous condition of servitude," U.S. CONST. amend. XV, § 1, on the basis of sex, *id.* amend. XIX, or on the basis of age for citizens who are "eighteen years of age or older," *id.* amend. XXVI, § 1.

8. *VOTE. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities*, BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., 13 (2016), http://www.bazelon.org/portals/0/voting/voting%20rights%20guide%202016.pdf [https://perma.cc/3MPQ-SGPG] [hereinafter BAZELON CTR.]. The eleven states with no restrictions are Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont.

9. *Id.* The twenty-five states are Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Texas, Washington, West Virginia, Wisconsin, and Wyoming.

10. *Id.* at 12. Typically, people are placed under guardianship by court order for reasons incompetence or incapacity, but not specifically related to voting capacity. The ten states are Alabama, Louisiana, Massachusetts, Minnesota, Missouri, South Carolina, South Dakota, Tennessee, Utah, and Virginia. In some states, the restrictions have been interpreted to avoid any unconstitutional restrictions on the ability to vote. *Id.*

11. *Id.* at 13. The three states are Mississippi, Nebraska, and Rhode Island. The Rhode Island Constitution and the Mississippi statute both require a specific adjudication of *non compos mentis* status, but neither one defines the term. R.I. CONST. art. 2, § 1; MISS. CODE ANN. § 23-15-11 (2016). Nebraska law defines *non compos mentis* as "mentally incompetent." NEB. REV. STAT. § 32-312 (2016). While the Hawaii Constitution also prohibits individuals who are *non compos mentis* from voting, HAW. CONST. art. 2, § 2, the relevant statute requires a specific finding that the person is "incapacitated to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting," HAW. REV. STAT. § 11-23(a) (2016).

12. MONT. CODE ANN. § 13-1-111(3) (2015). For a detailed chart of all the states' and territories' relevant constitutional and statutory language, see BAZELON CTR., *supra* note 8, at 28–52. For a historical overview of the evolution of U.S. state law on the voting rights of people with mental impairments, see Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000); Benjamin O. Hoerner, Note, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's Potential*, 20 TEX. J. ON C.L. & C.R. 89, 107–16 (2015); Ryan Kelley, Note, *Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees*, 30 B.C. THIRD WORLD L.J. 359, 370–80 (2010).

Part IV criticizes the proposition of proxy voting, arguing that it trivializes the broad purposes of voting. Finally, Part V analyzes the concept of mental illness, and advocates disassociating mental illness and voting capacity. I argue that disenfranchising people on the basis of mental illness per se necessarily contributes to silencing socially disfavored views and lifestyles.

In the academic literature on the legitimacy of suffrage restrictions, "cognitive impairment," "intellectual disability," and "intellectual impairment" are often used interchangeably.[13] This leads to considerable confusion, because U.S. law draws fine distinctions among these terms.[14] For the sake of clarity, this Note will refer to all of these conditions as "intellectual disabilities," and to the collective category of intellectual disabilities and mental illnesses as "mental impairments."[15] In particular contexts, however, it will be necessary to distinguish disability from illness, and "status-based restrictions" from "capacity-based" ones.

This Note will not specifically address the implicit barriers to voting faced by people with mental impairments, caused by a systemic deficit of awareness and accommodation.[16] Many other writers have addressed this form of disenfranchisement,[17] some arguing that it violates the fundamental suffrage right protected under both U.S. and international law.[18] This Note will also leave aside

13. *See, e.g.*, Ludvig Beckman, *Political Equality and the Disenfranchisement of People with Intellectual Impairments*, 6 SOC. POL'Y & SOC'Y 13 (2007) (using the terms "intellectual impairments," "cognitive impairments," and "intellectual disabilities" alternately, in apparent reference to the same conditions); Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345 (2004) (using the terms "cognitive impairments" and "cognitive disabilities" alternately in apparent reference to the same conditions).

14. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2012) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual").

15. *See* Civil Rights Div., *ADA Basics: Statutes and Regulations*, U.S. DEP'T OF JUSTICE, 5 (2006), https://www.ada.gov/pcatoolkit/chap1toolkit.pdf [https://perma.cc/W7MN-X32X] (listing both "mental retardation" and "mental illness" as examples of "mental impairments").

16. Some examples of possible accommodations include designing ballot technology that does not require fine-motor coordination and is not difficult to read, relaxing voting-booth time limits, and providing direct assistance by polling-place staff in filling out registration forms. *See* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 921–23 (2007) (elaborating on these possibilities and calling the implicit barriers to voting "[a] far greater source of effective exclusion" than the explicit barriers).

17. *See, e.g.*, Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 METAPHILOSOPHY 331 (2009); Lisa Schur et al., *Enabling Democracy: Disability and Voter Turnout*, 55 POL. RES. Q. 167 (2002).

18. For claims regarding U.S. law, see, for example, Hoerner, *supra* note 12; Kelley, *supra* note 12. For claims regarding international law, see, for example, János Fiala-Butora et al., *The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, 55 HARV. J. INT'L L. 71 (2014); Marcus Redley et al., *The Voting Rights of Adults with Intellectual Disabilities: Reflections on the Arguments, and Situation in Kenya and England and Wales*, 56 J. INTELL. DISABILITY RES. 1026 (2012).

the special issues raised by Alzheimer's disease and other forms of mental impairment associated with aging—e.g. voting in long-term care facilities and the possibility of disenfranchisement on the basis of advanced age—although that topic is undoubtedly important and others have addressed it as well.[19] All the legal and philosophical deliberations below apply with equal relevance to elderly people but do not treat them as a distinct category. Rather, the analysis that follows will focus squarely on the state of, and the theoretical legitimacy of, existing laws that explicitly restrict suffrage on the basis of mental impairment.

I. CRITICISMS OF MENTAL-IMPAIRMENT-BASED SUFFRAGE RESTRICTIONS

A. United States Law

United States courts have considered the legality, under federal constitutional and statutory law, of state disenfranchisement of people with mental impairments. This section will first sketch the historical and doctrinal background of this debate, and will then summarize two important twenty-first century judicial decisions. Finally, the section will review legal scholars' predictions as to how the U.S. Supreme Court would assess state provisions that disenfranchise people with mental impairments.

Intellectual disability has never been considered a suspect classification under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[20] The Supreme Court announced this principle in *City of Cleburne v. Cleburne Living Center*, in a case challenging the constitutionality of the City of Cleburne's zoning policy. The City required Cleburne Living Center to obtain a special-use permit to operate a group home for people with intellectual disabilities in a residential neighborhood. Although the Court unanimously found an Equal Protection violation based on the particular facts under review,[21] a majority of the justices followed a rational-basis standard.[22] In Equal Protection Clause jurisprudence, legislative enactments and executive actions that classify among persons are subject to different levels of constitutional scrutiny depending on the nature of the classification. Classifications not deemed "suspect" are reviewed under the rational-basis standard—the lowest applicable standard—and are upheld as long as some set of facts exists which would provide a rational

19. *See, e.g.*, Paul S. Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094 (2005); Symposium, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 MCGEORGE L. REV. 843 (2007); Hoerner, *supra* note 12, at 111.

20. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985). The decision uses the term "mental retardation" to refer to intellectual disability. For the Equal Protection Clause, see U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of its laws.").

21. *Cleburne*, 473 U.S. at 447–56.

22. *Id.* at 448.

basis for the government's use of such a classification.[23]

The Court relied on four factors to determine that intellectual disability is not a suspect classification: (a) intellectual disability is a real, immutable difference, causing "a reduced ability to cope with and function in the everyday world," and states therefore have a legitimate interest in legal differentiation;[24] (b) evidence of legislative responses to the difficulties of people with intellectual disabilities disproves the contention that such people suffer from prejudice and need the assistance of the judiciary;[25] (c) evidence of legislative responses also suggests that this class has political power and does not require judicial interference to protect its interests;[26] and (d) it is difficult to distinguish this "large and amorphous class" of people from other disadvantaged groups—"the aging, the disabled, the mentally ill, and the infirm"—and the court did not want to undertake that complicated inquiry.[27] Therefore, legislation may separately classify people with intellectual disabilities as long as the particular classification is "rationally related to a legitimate governmental purpose."[28]

Some condemned that the Court's opinion labored to articulate a standard of review for a law that failed even rational-basis review, the most deferential of standards.[29] Furthermore, this particular brand of rational-basis review sounded far less deferential than that employed in other cases and more like "de facto heightened scrutiny."[30] Bornstein argues the Court wanted the law to fall, but chose its reasoning to account for: (a) widespread opposition of suburban communities to hosting group homes; (b) the Reagan Administration's scaling back of governmental accommodation to people with disabilities; and (c) Justice White's uniquely strong preference for rational-basis review.[31]

Three of the Court's four factors were widely criticized by Justice Marshall in his concurring opinion and by subsequent critics, for several reasons. First, in Equal Protection jurisprudence, the supposed immutability of intellectual

23. For a canonical statement of the rational-basis standard, see *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (internal citations omitted)).

24. *Cleburne*, 473 U.S. at 442–43.

25. *Id.* at 443–45.

26. *Id.* at 445.

27. *Id.* at 445–46.

28. *Id.* at 446.

29. *See* Laura C. Bornstein, *Contextualizing* Cleburne, 41 GOLDEN GATE U. L. REV. 91, 99 & n.66 (2010) (citing several articles that made this observation).

30. John D. Wilson, Comment, Cleburne*: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 188–89 (1986); *see also* Bornstein, *supra* note 29, at 99 & n.67 (citing several other articles that made this observation).

31. Bornstein, *supra* note 29, at 100–15.

disability would actually favor heightened scrutiny because people "should not be held responsible for traits over which they have no control," such as race or sex.[32] Moreover, prejudice has historically led legislators to misunderstand the relevance of immutable differences to the enjoyment of equal protection, as in the once-prevalent presumption that children with intellectual disabilities could not benefit from education.[33] Second, in considering legislative responses, the Court ignored a long history of exclusionary laws targeted at people with intellectual disabilities, such as eugenic-sterilization requirements, denial of education, and disenfranchisement.[34] Moreover, the Court's precedents on race and gender classifications have continued to apply higher levels of scrutiny despite the enactment of protective legislation for both categories.[35] Finally, the enactment of protective legislation does not suffice to establish that people with intellectual disabilities possess real political power.[36] For instance, in *Frontiero v. Richardson*, a 1973 gender-classification case, the Court found women lacked political power by noting their inadequate representation among elected officials.[37] The comparable lack of elected representatives with intellectual disabilities might therefore indicate that this group also lacks "political power" for Equal Protection purposes.[38]

Still, despite the lack of suspect-classification status for people with intellectual disabilities, a route to strict scrutiny remains open for mental-impairment-based suffrage restrictions because of the special nature of the right to vote. Even though this right is not explicitly mentioned in the U.S. Constitution, the Supreme Court recognizes it as "a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights[.]"[39] Thus, any state law abridging the right to vote on the basis of any

32. Wilson, *supra* note 30, at 176; *see also* Kay Schriner et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 PUBLIUS: J. FEDERALISM 75, 81 (1997).

33. Schriner et al., *supra* note 32, at 81; *see also Cleburne*, 473 U.S. at 462–63 (Marshall, J., concurring and dissenting) ("Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them.").

34. *Cleburne*, 473 U.S. at 461–65 (Marshall, J., concurring and dissenting); Bornstein, *supra* note 29, at 98; Schriner et al., *supra* note 32, at 82–83; Wilson, *supra* note 30, at 176–78.

35. Wilson, *supra* note 30, at 180–82.

36. Schriner et al., *supra* note 32, at 83 (pointing out that an important driving force behind such protective legislation is the sympathetic support of mental health professionals and others, which is not the same as autonomous political decision making on the part of the people with intellectual disabilities themselves).

37. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

38. *Id.*; *see also* Wilson, *supra* note 30, at 182–83.

39. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); *see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions,

classification—"suspect" or not—is subject to strict scrutiny under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and may only be upheld if necessary to achieve a compelling state interest.[40]

The extent of constitutional protection for this fundamental voting right was probed in the literacy-test controversies of the South. Following the ratification of the Fifteenth Amendment in 1870, which prohibited federal and state governments from disenfranchising on the basis of "race, color, or previous condition of servitude[,]"[41] every southern state enacted putatively colorblind measures to prevent black people from voting, including English literacy requirements for voters.[42] In *Lassiter v. Northampton County Board of Elections*, the Supreme Court upheld the constitutionality of North Carolina's English-literacy test, finding that "[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show."[43]

Congress responded to *Lassiter* in Section 4(e) of the Voting Rights Act of 1965, which prohibited states from using English-literacy tests to disqualify voters who had completed sixth grade in U.S.-accredited schools "in which the predominant classroom language was other than English," such as the schools of Puerto Rico.[44] In *Katzenbach v. Morgan*, the Supreme Court upheld Congress' decision to restrict state prerogatives in this way, finding that section 4(e) was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[.]"[45]

This history of the U.S. experience with literacy tests provides helpful background for recent constitutional challenges to mental-impairment-based suffrage restrictions. When, in the twenty-first century, U.S. courts came face-to-

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nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.").

40. Dunn v. Blumstein, 405 U.S. 330 (1972) (finding durational residency requirements invalid under strict scrutiny, since such requirements were not necessary to promote the state's interest in preventing fraudulent voting and ensuring a knowledgeable electorate).

41. U.S. CONST. amend. XV, § 1.

42. ERIC FONER, GIVE ME LIBERTY: AN AMERICAN HISTORY 652 (4th ed. 2014).

43. Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 51 (1959).

44. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 439 (codified as amended at 52 U.S.C. § 10303(e) (2008)).

45. Katzenbach v. Morgan, 384 U.S. 641, 646 (1966). Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article," including the Equal Protection Clause. U.S. CONST. amend. XIV § 5. The Court explained that under the Supremacy Clause, section 4(e) preempted New York's English-literacy law, and therefore made it unenforceable. Thus, even though the New York literacy requirement at issue was not itself found unconstitutional, "it is enough that we perceive a basis upon which Congress might predicate a judgment that [the law's application to the Puerto Rican community] constituted an invidious discrimination in violation of the Equal Protection Clause." *Katzenbach*, 384 U.S. at 656. The Voting Rights Act's literacy-test provision was deemed an appropriate legislative action to enforce the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 658.

face with another breed of state laws premised upon preventing people from voting for reasons of intelligence, they were naturally skeptical. Whether or not states have a compelling interest in an intelligent electorate,[46] laws designed to protect that interest are likely to be driven by prejudice and are susceptible to discriminatory application against disfavored groups.[47] Two federal court decisions address this concern.

First, in *Doe v. Rowe*,[48] Maine's district court became the first to directly address mental-impairment-based state suffrage restrictions. Three women and an advocacy organization challenged a provision in Maine's constitution that withheld suffrage from the individual plaintiffs and all others "under guardianship for reasons of mental illness."[49] Both the plaintiffs and the State Attorney General agreed on strict scrutiny as the appropriate test, and both agreed that Maine had a compelling interest in ensuring that voters have capacity "to understand the nature and effect of the voting act" (seemingly echoing the statutory language of the State of Washington).[50] The court struck down this provision on its face as violative of the Equal Protection Clause. Since the disenfranchisement reached only people with mental illness and not those with other forms of mental incapacity, such as intellectual disability, the provision was not tailored to meet the State's asserted interest.[51]

The court also struck down the provision on two other grounds. First, it found the provision facially unconstitutional under the Fourteenth Amendment's Due Process Clause because individuals subject to guardianship proceedings for mental illness were not provided "uniformly adequate notice regarding the potential disenfranchising effect" of a guardianship placement.[52] Second, the

46. *See infra* page 275 (explaining the theory that states' interest in an intelligent electorate justifies the exclusion of certain unintelligent voters).

47. *See* Schriner et al., *supra* note 32, at 87–92. The subject of rationales for disenfranchisement will be taken up in greater detail below. *See infra* Part I.C.

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

49. ME. CONST. art. II, § 1 (1965).

50. *Rowe*, 156 F. Supp. 2d, at 51. For the Washington statute, see WASH. REV. CODE § 11.88.010(5) ("Imposition of a guardianship for an incapacitated person shall 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.").

51. *Rowe*, 156 F. Supp. 2d at 56. In defense of the provision, Maine's Attorney General advanced a constitutional construction, broadly reading "mental illness" to include other forms of incapacity, but the court rejected that construction as archaic and regressive, resulting in the disenfranchisement of a great number of people who are sufficiently competent to vote. *Id.* at 53–56; *see also In re* The Guardianship of Erickson, 2012 Minn. Dist. LEXIS 193 (Minn. Dist. Ct. Oct. 4, 2012) (relying on *Rowe*'s constitutional holdings, the state court invalidated a provision of the Minnesota Constitution that states: "the following persons shall not be entitled or permitted to vote at any election in this state . . . a person under guardianship, or a person who is insane or not mentally competent," MINN. CONST. art. VII, § 1).

52. *Rowe*, 156 F. Supp. 2d, at 50–51. Here, too, the State attempted to save the provision by advancing a new construction under which an individual subject to guardianship proceedings

provision violated Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act[53] because plaintiffs were qualified individuals with disabilities who were discriminated against by a public entity by reason of their disabilities.[54]

Six years later, the United States Court of Appeals for the Eighth Circuit considered a challenge to Article VIII, Section 2 of the Missouri Constitution,[55] which provides that "no person who has a guardian of his or her estate or person by reason of mental incapacity . . . shall be entitled to vote." This claim, too, was brought against the State by three individuals under guardianship and an advocacy group. The court rejected a facial Equal Protection challenge, finding that Missouri probate courts' power to preserve a ward's right to vote avoids imposition of a categorical ban on all people under guardianship.[56] Instead, the court found the Missouri provision did no more than impose a case-specific capacity standard. Additionally, the court rejected the plaintiff's ADA/Rehabilitation Act claim, also for lack of proof of categorical restriction.[57]

Though the jurisdiction of these two courts reaches just a small percentage of the U.S. populace, *Rowe* and *Carnahan* provide tools for other courts to overturn categorical suffrage bans, while upholding those bans subject to a particularized process of finding incapacity to vote.[58]

Some scholars have attempted to forecast how the Supreme Court might rule on this issue by reference to a conceptual analysis of its prior election-law jurisprudence.[59] Adam Winkler has discerned in this jurisprudence an adoption of what he calls the "instrumental power" view, according to which voting is a "societal tool for exerting political power . . . protected only to the extent that it

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retains a right to suffrage unless this right is specifically challenged by a petitioner and considered by a probate judge in the course of guardianship proceedings. The court agreed that such a construction would satisfy procedural due process, but found that it had not been properly adopted as law. Rather, the attorney general's construction constituted an invalid "amendment to substantive state law" and failed to save the constitutional provision. *Id.* at 49–50.

53. Americans with Disabilities Act, Pub. L. No. 101-336, tit. II, 104 Stat. 337 (1990) (codified at 42 U.S.C. § 12132 (2012)); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (2012) (codified at 29 U.S.C. § 794 (2012)).

54. *Rowe*, 156 F. Supp. 2d, at 57–59. The state contested this finding by referring to its narrowing construction explained *supra* note 52. The court declined to consider the new construction in this context, clarifying that "there is no such thing as a facial challenge to the State's compliance with a federal statute." *Id.* at 59. Rather, the statutory claim concerns only previous and ongoing conduct. For more on the lasting impact of the *Rowe* decision, see the discussion of capacity-based suffrage restriction *infra* Part II.A.

55. Mo. Prot. & Advocacy Servs. v. Carnahan, 499 F.3d 803 (8th Cir. 2007).

56. *Id.* at 808–09.

57. *Id.* at 812.

58. *See* Hoerner, *supra* note 12, at 113–14 (identifying the categorical/particularized finding test as the only useful conclusion of *Rowe* and *Carnahan*).

59. Jennifer A. Bindel, Note, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 111–14 (2009).

can be used as a means of pursuing informed political choices."[60] This view seems to justify suffrage restrictions targeting those less capable of independent, informed choice, seeing such restrictions as a less-than-"severe" burden: "Disenfranchisement will be allowed for those in the electorate insufficiently intelligent . . . ."[61] Correspondingly, the Supreme Court has shied away from conceiving of voting as an "expressive" act,[62] in which it "is considered a means of communicating various political ends and desires."[63] However, if a future Supreme Court is willing to reconceive of the franchise as an individual right to participate expressively in a public ritual of civil society, that Court would be more likely to treat mental-impairment-based restrictions as a "severe" burden worthy of strict scrutiny.[64]

B. International Human Rights Law

As noted above, democracies across the world disenfranchise people on the basis of mental impairments. This phenomenon has received attention in the corpus of international human rights law. Generally speaking, just as the electoral regulations of individual U.S. states must comply with the U.S. Constitution and federal statutes, the electoral regulations of independent nations must comply with applicable international law. The following section will (a) address the United Nations' conventional response to the problem of voters with mental impairments; (b) review the relevant case law of judicial and quasi-judicial international tribunals; and (c) summarize a recent proposal for a new legal test for assessing the validity, under international human rights law, of various nations' disenfranchising provisions.

Article 29(a) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) requires states parties to "[e]nsure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others . . . including the right and opportunity for persons with disabilities to vote and be elected."[65] The Convention has 172 parties, and 15 additional states (including the United States) have signed the Convention but not yet ratified it.[66] Additionally, the Optional Protocol, allowing individual recourse

60. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 330–31 (1993).

61. *Id.* at 343.

62. *Id.* at 338 (noting "the failure of the Court's guiding conception of the right to vote to capture certain expressive values inherent in voting.").

63. *Id.* at 365.

64. *See* Bindel, *supra* note 59, at 114–21 (advocating strict-scrutiny review of mental-impairment-based suffrage restrictions on the basis of an expressive view of voting, in reliance upon the ideas of Winkler and other theorists).

65. Convention on the Rights of Persons with Disabilities art. 29(a), Mar. 30, 2007, 2515 U.N.T.S. 3.

66. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION 1, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-

to the Committee on the Rights of Persons with Disabilities (CRPD Committee) for allegations of Convention violations,[67] has ninety-two parties.[68] France,[69] Malta,[70] Romania,[71] and Singapore[72] entered Reservations and Declarations regarding the applicability of Article 29 to existing electoral regulations and to potential safeguards against manipulation of voters with mental impairments. However, the vast majority of states parties remain fully bound to the requirements of Article 29, and its plain meaning prohibits any law disenfranchising people on the basis of any disability.[73]

Article 29(a) has become the subject of international litigation in recent years. In *Kiss v. Hungary*, the European Court of Human Rights (ECtHR) considered the claim of a Hungarian national against his government after his diagnosis of manic depression and guardianship placement resulted in automatic loss of his right to vote.[74] Relying on both the European Convention on Human Rights' general guarantee of the right to vote and Article 29 of the CRPD,[75] the

15.en.pdf [https://perma.cc/WSR2-N2PR].

67. Optional Protocol to the Convention on the Rights of Persons with Disabilities art. 1.1, Mar. 30, 2007, U.N. Doc. A/61/611 ("A State Party to the present Protocol ("State Party") recognizes the competence of the Committee . . . to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the convention."); *id.* at art. 6 ("If the Committee receives reliable information indicating grave or systematic violations . . . the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations. . . . The State Party concerned shall, within six months of receiving the findings, comments, and recommendations transmitted by the Committee, submit its observations to the Committee.").

68. *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION 1, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15-a.en.pdf [https://perma.cc/3Q7Y-ARUD] (showing that the United States is not a party to the Optional Protocol).

69. *Convention on the Rights of Persons with Disabilities*, *supra* note 66, at 7.

70. *Id.* at 8.

71. *Id.* at 14.

72. *Id.* at 9.

73. *See, e.g.*, Redley et al., *supra* note 18, at 1027 ("States with laws declaring people legally incapacitated because of a disability . . . violate Article 29"); *see also* Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Revised Interpretive Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, COUNSEL OF EUR. CDL-AD (2011)045 ("People with disabilities may not be discriminated against in [suffrage matters], in conformity with Article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities . . . ."). Some authors have undertaken to assess individual states' compliance with established CRPD law in this matter. *See, e.g.*, Redley et al., *supra* note 18 (examining the situation in Kenya, England, and Wales); Jonathon Savery, Comment, *Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights*, 37 SYDNEY L. REV. 287 (2015) (examining the situation in Australia).

74. Alajos Kiss v. Hungary, App. No. 38832/06, Eur. Ct. H.R. ¶ 22 (2010), http://hudoc.echr.coe.int/eng#{"itemid":["001-98800"]} [https://perma.cc/A2FP-JBFV].

75. The ECtHR routinely refers to the CRPD in informing its own standards under the European Convention. *See* Fiala-Butora et al., *supra* note 18, at 83 & n.69.

Court rejected Hungary's practice of automatic disenfranchisement but explicitly allowed for disenfranchisement based upon individualized consideration of voter capacity.[76]

In line with this decision and with a pre-CRPD Human Rights Committee General Comment,[77] the European Commission for Democracy through Law (Venice Commission), a constitutional law advisory body of the Council of Europe, released an Interpretive Declaration allowing disenfranchisement on the basis of "individual decision of a court of law [finding] proven mental disability."[78] After a firestorm of criticism and a worldwide NGO campaign led by the UK-based Mental Disability Advocacy Centre,[79] the Venice Commission reversed course, announcing that "universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities[.]"[80] Subsequently, the Human Rights Commissioner for the Council of Europe, the U.N. Human Rights Council, and the U.N. Human Rights Committee have all affirmed this absolutist interpretation of Article 29.[81]

In 2013, the CRPD Committee considered an Optional Protocol complaint against Hungary in which, again, six individuals were automatically barred from voting as a consequence of being placed under guardianship.[82] In its defense, Hungary noted that it had amended its electoral legislation to bring it into compliance with the *Kiss* ruling,[83] but the Committee nevertheless found Hungary in violation of Article 29 and declared an obligation for Hungary to remedy the individuals' injury and take preventative steps against future

76. *Alajos Kiss*, App. No. 38832/06, Eur. Ct. H.R. ¶ 42. In *Gajcsi v. Hungary*, the ECtHR considered a set of facts "virtually identical to those of the *Alajos Kiss* judgment" and reached the same result. Gajcsi v. Hungary, App. No. 62924/10, Eur. Ct. H.R. ¶ 11 (2014), http://hudoc.echr.coe.int/eng#{"itemid":["001-146411"]} [https://perma.cc/26J3-7N6H].

77. Human Rights Comm., CCPR General Comment No. 25, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) ("[E]stablished mental incapacity may be a ground for denying a person the right to vote or to hold office.").

78. Venice Comm'n, *Interpretive Declaration the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, COUNSEL OF EUR. CDL-AD (2010)036.

79. *See* Oliver Lewis, *Two Years and Seven Minutes Ago*, MENTAL DISABILITY ADVOC. CTR.: OLIVER TALKS (June 18, 2013), http://www.mdac.info/en/olivertalks/2013/06/18/two-years-and-seven-minutes-ago [https://perma.cc/XY2W-PYWB]; *see also* Redley et al., *supra* note 18, at 1029–30.

80. Eur. Comm'n for Democracy through Law (Venice Comm'n), *supra* note 73, § II, ¶ 2.

81. For a more detailed account of these developments, see Redley et al., *supra* note 18, at 1030.

82. Comm. on the Rights of Persons with Disabilities, Views of the Committee on the Rights of Persons with Disabilities Under Article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (Tenth Session), ¶ 2, U.N. Doc. CRPD/C/10/D/4/2011 (Oct. 16, 2013).

83. *Id.* ¶¶ 4.1–4.7.

violations.[84] In response to Hungary's defense, the Committee noted: (a) legislative change notwithstanding, the six individuals had, in actuality, been automatically barred from voting; and (b) even the new legislation violated Article 29, as it provided for disenfranchisement on the basis of individualized determination of incapacity, while Article 29 bars all disability-based disenfranchisement.[85] The CRPD Committee thus rejected the ECtHR's interpretation of Article 29 in *Kiss*. The Committee has reinforced its absolutist interpretation of Article 29 in several "Concluding Observations" on reports of its states parties, urging elimination of all mental-impairment-based suffrage restrictions.[86]

In 2014, three Harvard Law School researchers published an international human rights law analysis of disabilities-related suffrage restrictions.[87] After recounting the judicial and quasi-judicial developments described above, the authors proposed an test to determine when states may, consistent with international law, restrict the exercise of human rights: "[E]ach abridgement must be prescribed by law and objectively justified on one or more specified grounds. Thus, the restriction must pursue an acceptable aim and must be necessary to achieve that objective without unduly restricting the right in question."[88] Disenfranchisement of people with disabilities, the authors argue, satisfies neither of these prongs.

First, the aim of protecting the integrity of the electorate from incompetent voters, although approved by *Kiss*,[89] is rendered illegitimate by the overarching purpose of the CRPD, which is to affirm the autonomy and equal legal capacity of persons with disabilities.[90] Second, even accepting *Kiss*'s conclusion that

84. *Id.* ¶ 10.

85. *Id.* ¶ 9.3.

86. For a partial listing and overview of these Concluding Observations, see Savery, *supra* note 73, at 292–94 & n.43.

87. Fiala-Butora et al., *supra* note 18.

88. *Id.* at 90. As precedent for this test, the authors refer to the International Covenant on Economic, Social and Cultural Rights; the Charter of Fundamental Rights of the European Union; the Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; and the European Convention on Human Rights. *See id.* & nn. 109–10. This test's "acceptable aim" sounds similar to the U.S. strict-scrutiny test's "compelling interest," and "necessary to achieve that objective without unduly restricting the right in question" sounds like strict scrutiny's "narrowly tailored to achieve" the interest. *See supra* notes 39–40 and accompanying text (describing the strict-scrutiny test).

89. Alajos Kiss v. Hungary, App. No. 38832/06, Eur. Ct. H.R. ¶ 38 (2010), http://hudoc.echr.coe.int/eng#{"itemid":["001-98800"]} [https://perma.cc/A2FP-JBFV].

90. Fiala-Butora et al., *supra* note 18, at 91 ("[This] is exactly what the CRPD aims to overcome, and therefore it is decidedly unclear whether the ECtHR's justification would prevail under an analysis grounded in the CRPD"). For additional substantiation of this claim regarding the purpose of the CRPD, see, for example, Convention on the Rights of Persons with Disabilities, *supra* note 65, at pmbl.(e) ("Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices . . . ."); *id.* at art. 12.2 ("States Parties shall recognize that persons with disabilities enjoy legal capacity on

protecting the integrity of the electorate is a legitimate aim, measures pursuing this aim must not unduly restrict individual suffrage rights.[91] For this second prong, the authors employ ECtHR's "proportionality" analysis as follows:[92] The number of individuals who are incapable of voting, or of doing so in a rational manner, is miniscule compared to the number of capable voters who cast votes in error or based on irrational considerations. "Thus, any gains to the legitimacy of a state's electoral system associated with disability-based restrictions . . . are marginal at best."[93]

States may respond that, though they cannot identify all irrational voters, they can identify those incapable of voting rationally.[94] Still, any system for assessing capacity, even if not based on a categorical exclusion, will inevitably impact some capable voters because no system is perfectly accurate.[95] Some overexclusion is permissible under international law, as in age and residency requirements for voting.[96] However, while age and residency are not "suspect classifications" under international law, disability is, and therefore is precluded as a basis for discrimination under both the CRPD and the jurisprudence of the ECtHR.[97] In addition, allowing individualized capacity assessments would be an ill-advised stance for international human rights law, because "international bodies are simply not in a good position to police assessment procedures."[98] Clear rules are preferable, and because a categorical disenfranchisement of all mentally impaired people is clearly prohibited under international law, eliminating all disability-related disenfranchisement is the only reasonable

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an equal basis with others in all aspects of life.").

91. *See supra* note 88 and accompanying text (describing the "unduly restricts" test).

92. Fiala-Butora et al., *supra* note 18, at 92 n.118. The authors do not elaborate on the principles of this ECtHR doctrine, but refer in a footnote to Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & ETHICS OF HUM. RTS. 3, 6 (2010).

93. Fiala-Butora et al., *supra* note 18, at 92–93 (using Hungary as an example, the authors present statistics placing the population of incapable voters at less than 0.15 percent of the electorate, and the population of capable voters who, in practice, vote in error or irrationally, at more than 3 percent).

94. *Id.* at 93–94.

95. *Id.* at 94. For this point, the authors cite Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 962 (2007) ("There is no scientifically determinable point on that spectrum at which we can say the person manifests sufficient capacity for the task.").

96. Fiala-Butora et al., *supra* note 18, at 94. These requirements, too, attempt to address voting capacity but do so by excluding a broad sector of the population.

97. *Id.* For their claim that age and residency are not "suspect classifications," the authors note the absence of these categories from the list of prohibited bases of discrimination in ECHR art. 14. The term "suspect classification" appears to be borrowed from U.S. jurisprudence, although the authors do not make this association explicit. As noted above, mental disability is not currently considered a suspect classification in U.S. constitutional law. *See supra* note 20 and accompanying text. For anti-disability discrimination's preclusion under the CRPD and ECtHR jurisprudence, see *supra* Part I.B.

98. Fiala-Butora et al., *supra* note 18, at 95–96.

option.[99]

Finally, the Harvard researchers' proportionality analysis requires states to consider "a less restrictive alternative."[100] Education and facilitation can effectively lower the rate of participation of voters incapable of voting rationally by helping more voters make rational decisions. Therefore, European states must undertake inclusive measures rather than resort to exclusion.[101]

C. Democratic Theory: Normative Rationales and Criticisms

In addition to the different streams of legal analysis addressed above, the political-science literature on the subject of mental-impairment-based suffrage restrictions features a lively normative debate. This literature advances, and disputes, several rationales for disenfranchising people on the basis of mental impairments. The rationales can be helpfully grouped into two categories: (1) enfranchising people with mental impairments is inherently problematic; and (2) voters with mental impairments can be easily manipulated to vote in a manner that endangers the electoral process. The following section will review each of these rationales and the various criticisms lodged against them by political scientists and philosophers.

1. Argument That Enfranchising Mentally Impaired Individuals Is Inherently Problematic

One popular position, elaborated in the following paragraphs, argues that membership in democratic society, or the demos, depends upon the capacity to make rational judgments. According to this view, the idea of democracy rejects the legitimacy of autocratic or oligarchic political power, in which all members of society are subject to the judgment of only a small number of them. Voting in a democratic system, by contrast, allows all members of the demos to collectively exercise power through their own independent judgment. To the extent that certain classes of individuals are incapable of independent judgment, then, any power they exercise is democratically illegitimate. Therefore, such people, though they are subject to the will of the demos, cannot themselves be included within it.

John Stuart Mill expressed this idea in 1861: "No one but those in whom an *à priori* theory has silenced common sense, will maintain, that power over others, over the whole community, should be imparted to people who have not acquired the commonest and most essential requisites . . . for pursuing intelligently their

99. *Id.* at 96.

100. *Id.* at 96 & n.145; *see also* Alajos Kiss v. Hungary, App. No. 38832/06, Eur. Ct. H.R. ¶ 33 (2010), http://hudoc.echr.coe.int/eng#{"itemid":["001-98800"]} [https://perma.cc/A2FP-JBFV].

101. Fiala-Butora et al., *supra* note 18, at 96.

own interests."[102] And Robert A. Dahl, a political scientist and theorist of political pluralism, wrote in 1989:

> That we cannot get around the principle of competence in deciding on the inclusiveness of the demos is decisively demonstrated by the exclusion of children . . . .[103] There are also the troublesome cases for which experience, even when joined with compassion, points to no clear solution. . . . *The demos must include all adult members of the association except transients and persons proved to be mentally defective.*[104]

Upon this theoretical basis, states may choose to utilize the electoral law to protect the legitimacy of the democratic process.[105] And states have indeed invoked this rationale in legal contexts. When challenged in court, Maine and Hungary referred to this argument, and neither court rejected it.[106] In another telling judicial pronouncement, a Minnesota state judge framed participation of incompetent voters as an actual injury suffered by the rest of the population,

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102. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), *reprinted in* 19 THE COLLECTED WORKS OF JOHN STUART MILL 371, 470 (John M. Robson ed., 1976).

103. For more on the question of enfranchising minors, see CLAUDIO LÓPEZ-GUERRA, DEMOCRACY AND DISENFRANCHISEMENT: THE MORALITY OF ELECTORAL EXCLUSIONS 61 (2014); Linda Barclay, *Cognitive Impairment and the Right to Vote: A Strategic Approach*, 30 J. APPLIED PHIL. 146 (2013); Joanne C. Lau, *Two Arguments for Child Enfranchisement*, 60 POL. STUD. 860 (2012); Nicholas John Munn, *Capacity Testing the Youth: A Proposal for Broader Enfranchisement*, 15 J. YOUTH STUD. 1048 (2012). The problem of suffrage for minors is certainly related to the problem of suffrage for people with mental impairments, but, because this Note leaves the issue of minors aside for another day.

104. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 126–29 (1989). For a more recent articulation of the illegitimacy of a democratic process that enfranchises people with mental impairments, see Karlan, *supra* note 16, at 918 ("And yet, there's something discomfiting about the idea that voters may be casting their ballots randomly or arbitrarily, without real comprehension of the issues or of the candidates' positions. The idea that voting reflects the citizenry's free and informed choices is central to the legitimacy of our political system.").

105. For more on the role of this rationale in the development of electoral law vis-à-vis people with mental impairments, see, for example, Hurme & Appelbaum, *supra* note 95, at 964.

106. *See* Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001) ("[T]he parties agree that Maine has a compelling state interest in ensuring that 'those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.' The only question left for the Court to resolve is whether Maine's restriction is narrowly tailored to meet this compelling interest.") (internal citation omitted); Alajos Kiss v. Hungary, App. No. 38832/06, Eur. Ct. H.R. ¶ 38 (2010), http://hudoc.echr.coe.int/eng#{"itemid":["001-98800"]} [https://perma.cc/A2FP-JBFV] ("[Hungary] submitted that the measure complained of pursued the legitimate aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. The applicant accepted this view and the Court sees no reason to hold otherwise."). The Committee on the Rights of Persons with Disabilities, however, rejected Hungary's defense as per se illegitimate because it is prohibited by international law. *See* Comm. on the Rights of Persons with Disabilities, supra note 82, ¶ 9.6.

declaring that voter-capacity assessment was the court "owes [to] the general electorate."[107]

Others frame this problem differently, and with decidedly lower stakes: Even if the participation of people with mental impairments does not undermine the legitimacy of the democratic process, society has a reasonable utilitarian interest in an intelligent electorate. To avoid "sub-optimal political outcomes," the majority of voters choose to enact constitutions or legislation excluding the minority whose judgment is devoid of rationality and untrained by a sophisticated education.[108] In the terminology of classical republicanism, ideal results follow when the "civic duty" of voting is preconditioned upon the "civic virtue of . . . capacity for critical understanding and rational choice."[109] Moreover, when people lacking civic virtue cast votes, they may negate the effect, vote-by-vote, of votes cast by individuals possessing civic virtue.[110]

Yet another formulation focuses on the "social contract" aspect of democracy. Individuals enter into the social contract by voting, an act that expresses their consent to be governed by people chosen through the electoral system. Because the chosen leaders have power to regulate and tax private property, an individual's consent to the social contract brings direct financial consequences. Thus, the social contract created by voting is also a commercial contract. Just as mental capacity is a fundamental element of any commercial contract—due to "the public policy of protecting an incapacitated person from assuming contractual duties to which she was not capable of assenting"—so must it be for the contract of voting.[111]

Recent scholarship has challenged the "inherent problem" rationales on several grounds. First, some note that there is simply insufficient evidence to show that enfranchising people with mental impairments hurts the quality of elections.[112] In fact, the available evidence cuts against this claim from two directions. As far as mental illness is concerned, multiple studies have shown that the voting behavior of psychiatric inpatients closely mirrors the votes of the

107. *In re* Guardianship of Erickson, 2012 Minn. Dist. LEXIS 193, *30 n.5 (Minn. Dist. Ct. Oct. 4, 2012).

108. Redley et al., *supra* note 18, at 1027; *see also* Schriner et al., *supra* note 32, at 87–92 (analyzing the "intelligent electorate" rationale's potential as a "compelling" state interest); Bindel, *supra* note 59, at 121 (conducting the same analysis).

109. James. T. McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values Within the Ohio Constitution*, 76 ALB. L. REV. 2189, 2209 (2012).

110. *Id.*

111. *Id.* at 2214–15 (construing E. ALLAN FARNSWORTH, CONTRACTS 3–7 (4th ed. 2004)). For a historical presentation of this rationale, see Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 DISABILITY STUD. Q. 61, *8 (2002), http://dsq-sds.org/article/view/345/438 [https://perma.cc/U3N2-YARU] ("Just as they could not enter into civil contracts neither could they take part in the political contract.").

112. *See, e.g.*, Paul S. Appelbaum, *"I Vote. I Count": Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVS. 849, 850 (2000); LÓPEZ-GUERRA, *supra* note 103, at 64–65.

patients' communities and socioeconomic strata.[113] At the same time, evidence shows that a significant percentage of presumptively rational voters make electoral decisions based on emotional, irrational factors and have little familiarity with the substantive policy issues at stake.[114] Political scientist Claudio López-Guerra has reasoned that defenders of disenfranchisement have to show that their logic "is so decisive—the risk [of people with mental impairments hurting the quality of electoral outcomes] would be too great—that it would be wrong to even give them a try. For indeed, the enfranchisement . . . can be undone if the results prove to be undesirable . . . [but they] cannot be shown to be so undesirable ex ante."[115]

Another version of the "inherent problem" rationale focuses on public perception. "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."[116] But, again, this fear is not substantiated by published evidence, and is in fact undermined—if not necessarily refuted—by the evidence that, despite the existing disenfranchisement of presumptively incompetent voters, presumptively competent voters often fail to approach the process with sufficient seriousness. Additionally, Linda Barclay has convincingly argued that this perception concern simply reflects society's discriminatory attitudes and should therefore not be entertained. "If we see the value of the vote being trashed only in the case where people with cognitive impairments are voting [despite a lack of evidence to that effect], then I would suggest that we should admit our prejudices and focus our energies on tackling those."[117]

Second, some argue that rational capacity is morally unrelated to the fundamental right to vote. Robert Goodin and others have proposed an "affected interests" model for suffrage, arguing that all individuals whose interests are at stake in a democratic polity's governmental decisions must be considered members of the demos entrusted with choosing the polity's leaders.[118] This

113. *See, e.g.*, George Howard & Robert Anthony, *The Right to Vote and Voting Patterns of Hospitalized Psychiatric Patients*, 49 PSYCHIATRIC Q. 124 (1977); Morris M. Klein & Saul A. Grossman, *Voting Competence and Mental Illness*, 127 AM. J. PSYCHIATRY 1562 (1971); Alfred N. Wellner & Lawrence S. Gaines, *Patients' Right to Vote*, 21 HOSP. & COMMUNITY PSYCHIATRY 163 (1970).

114. *See, e.g.*, Redley et al., *supra* note 18, at 1027–28; Schriner et al., *supra* note 32, at 89 & n.65; Bindel, *supra* note 59, at 115–16 & nn.169–73; *see also supra* notes 94–101 and accompanying text (applying this argument in a "proportionality" analysis to demonstrate the illegality of mental impairment-based suffrage restrictions under international human rights law).

115. LÓPEZ-GUERRA, *supra* note 103, at 65.

116. Hurme & Appelbaum, *supra* note 95, at 964; *see also* Barclay, *supra* note 103, at 157 ("[I]t might be argued that symbolic damage is done to value of voting and of democracy itself if we allow people without capacity to vote . . . .").

117. Barclay, *supra* note 103, at 157.

118. Robert E. Goodin, *Enfranchising All Affected Interests, and its Alternatives*, 35 PHIL. &

principle necessarily includes people with mental impairments. Whether or not they can express their interests rationally, and whether or not expression of their interests will hurt the quality of elections, "[i]t is not as if those interests are less deserving of consideration."[119, 120]

Goodin's argument explicitly includes enfranchisement for non-human animals whose interests are affected by government,[121] and Linda Barclay sees this point as a fatal flaw of Goodin's proposition. The comparison to animals is deeply insulting to people with disabilities, and is opposed by disability-rights advocates who see such an alignment as hurting the political viability of their cause.[122]

Third, focusing on the utility, or legitimacy, of participation of people with mental impairments in government ignores another important facet of suffrage. Voting is not only about electing leaders; voting is also a politically expressive act, a means of connecting the voter to the community, and an essential public ritual of democracy.[123] Mental health professionals, as well, have emphasized the therapeutic potential of voting as a form of social inclusion for people with various forms of mental impairment.[124]

Another important criticism of the "inherent problem" rationales focuses on the disconnect between the objectives of disenfranchisement and the actual legal provisions.[125] Many of the cognitive and mental statuses targeted by disenfranchising provisions around the world and in the United States are

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PUB. AFF. 40 (2007); *see also* Barclay, *supra* note 103, at 148 & n.11.

119. Robert E. Goodin, *Enfranchising the Earth, and its Alternatives*, 44 POL. STUD. 835, 841 (1996).

120. LÓPEZ-GUERRA, *supra* note 103, at 71–72 & n.25. This argument differs from the democratic legitimacy argument advanced by Mill and Dahl, *supra* notes 102 & 104 and accompanying text, in that it focuses upon the importance of rational thought for a person's ability to protect her own affected interests, rather than on the importance of rational thought for a person's right to exercise political power over other members of society.

121. Goodin's argument also necessarily includes enfranchisement for children and non-citizens. These subjects are beyond the scope of this article. For more on the question of enfranchising children, see *supra* note 103. For more on the question of non-citizen suffrage, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

122. Barclay, *supra* note 103, at 150.

123. Winkler, *supra* note 60 (noting that, as a matter of U.S. law, the Supreme Court has not endorsed the expressive view of the franchise); *see also*, Bindel, *supra* note 59, at 111–20 (explicitly applying Winkler's "expressive" voting theory to the mental impairment-based suffrage restriction context).

124. Michael Nash, *Voting as a Means of Social Inclusion for People with a Mental Illness*, 9 J. PSYCHIATRIC & MENTAL HEALTH NURSING 697 (2002); *see also* Bindel, *supra* note 59, at 120 & nn.193–94.

125. *See, e.g.*, Beckman, *supra* note 1, at 221 ("A basic problem with legal rules excluding people from the vote on the basis of cognitive status is that they are unlikely to achieve their goals.").

extremely vague and archaic.[126] Disenfranchisement of "idiots" or people with "unsound mind", or even of more contemporary statuses such as guardianship and intellectual disability, inevitably reaches large numbers of people who are fully capable of rational decision-making.[127]

Furthermore, the broader the classification targeted, the more likely it is that suffrage restrictions will be enforced arbitrarily against disfavored populations, as were the U.S. literacy tests addressed *supra* Part I.A.[128] Mental-status-based restrictions not only originate from stigmatization of people with mental impairments, but they help perpetuate such prejudiced and unscientific attitudes by enshrining these attitudes in the law.[129] As a result, scholars and courts have started to advocate shifting the focus of disenfranchising provisions from status to some more objective measure of voting capacity. This development, and the debate surrounding it, will be taken up in greater detail below.[130]

2. Manipulation of Voters with Mental Impairments

Many scholars have addressed the concern that people with mental impairments are especially susceptible to the influence and manipulation of their guardians, caregivers, and family members. Enfranchisement of people with mental impairment thus allows other people in their lives to quietly appropriate extra votes and obtain outsized political influence for themselves.[131]

Ludvig Beckman contends that this fear of vote misappropriation stems from the canon of democratic theory.[132] As explained above,[133] Mill, Dahl, and other political theorists saw capacity for independent, rational decision-making as the basis of democratic legitimacy. In Beckman's elaboration, independence is

126. For provisions around the world, see Bhugra et al., *supra* note 3, at 396 ("Varying and stigmatizing terminology is used in legislation to describe persons with mental health problems, e.g. insanity, weakness of mind, unsound mind, lunatic . . . ."). For provisions in the United States, see BAZELON CTR., *supra* note 8, at 13 ("Seven states have laws that use outmoded and stigmatizing terms such as 'idiots,' 'insane persons,' and 'of unsound mind' to describe who is barred from voting based on competence concerns. Such laws are rarely enforced because they are virtually impossible to understand and apply." (internal footnote omitted)).

127. *See* Appelbaum, *supra* note 112, at 849–50; Beckman, *supra* note 1, at 221; Hurme & Appelbaum, *supra* note 95; Schriner et al., *supra* note 32, at 93.

128. Appelbaum, *supra* note 112, at 849–50; Beckman, *supra* note 1, at 222.

129. Schriner et al., *supra* note 32, at 85–86, 95 ("Much progress has been made in recent decades in demythologizing mental illness and mental retardation, in recognizing and accommodating the rights of persons with disabilities, and in providing support and assistance to such persons as necessary. Abolishing legal barriers to voting by such persons would be a logical and appropriate extension of necessary rights protections, and an extension consistent with modern efforts to bring persons with disabilities into the mainstream of society.").

130. *See infra* Part II.

131. *See, e.g.*, Karlawish et al., *supra* note 13; McHugh, *supra* note 109, at 2194; Schriner et al., *supra* note 32, at 92; Hoerner, *supra* note 12, at 122.

132. Beckman, *supra* note 13, at 15–18.

133. *See supra* Part I.C.

essential because it ensures an equal distribution of political influence among the electorate. The extent to which individual voters possess an outsized influence undermines the legitimacy of the electoral outcome. It is easy to see, then, how people whose opinion formation is more dependent on others pose a serious threat to democracy. Even in the absence of outright voter fraud, people with mental impairments often live with and depend heavily upon caregivers, and these circumstances may easily lead them to substitute the caregiver's interests and political preferences for their own. The result is that certain individuals receive extra political influence, undermining the equal distribution of power essential to democratic legitimacy.[134] Upon this theoretical basis, states may choose to utilize the electoral law to "protect the integrity of the electoral process" by excluding those whose suffrage rights endanger the democratic endeavor.[135]

However, recent scholarship has questioned this rationale as well. First, Beckman argued that the traditional bases of democratic theory itself undermined the "integrity" claim.[136] Building on the works of earlier thinkers, he argued that one of the primary responsibilities of democratic society is to promote the "fair value of the political rights of its members."[137] To the extent that some members face obstacles in exercising their basic rights, democratic government must seek to provide them the means necessary to do so. If someone's "difficulties in making independent political judgments . . . [are] to be accounted for by reference to the absence of some opportunity that others should reasonably provide," society is called upon to provide those opportunities.[138] In other words, rather than disenfranchising people with mental impairments, the state should make an effort to socially include them and foster independent judgment, as well as to educate caregivers on the importance of cultivating their wards' independent judgment.[139]

Others have pointed out that the concern for the integrity of the vote, like the concern over the quality of electoral outcomes, is not borne out by any empirical evidence of manipulation.[140] Moreover, the problem of integrity, also like the outcome quality problem, is not actually particular to people with mental impairments. "[I]nfluencing a voter's intentions . . . is part of the culture of

134. Beckman, *supra* note 13, at 16.

135. For more on the role of this rationale in the development of electoral law vis-à-vis people with mental impairments, see, for example, Hurme & Appelbaum, *supra* note 95, at 964; Hoerner, *supra* note 12, at 108–19.

136. Beckman, *supra* note 13, at 18–20.

137. *Id.* at 18.

138. *Id.* at 19.

139. *Id.* at 19–20. In arguing for accommodation over disenfranchisement, Beckman borrows explicitly from "the language of American law," requiring a solution "necessary to further the interest in preventing manipulation." *Id.* at 19.

140. Fiala-Butora et al., *supra* note 18, at 86–89; Redley et al., *supra* note 18, at 1028.

politics, and is not something that can easily, or even should be, legislated against."[141] Citizens regularly seek to persuade each other regarding electoral politics through op-eds, social media, and ordinary conversation. No one would contend that these practices undermine the integrity of elections by providing outsized political power to the persuading party. Far from hindering the exercise of independent judgment, persuasion actually facilitates the development of such judgment. The difference between this sort of influence and a guardian's influence over her ward is one of degree, not kind.[142]

II. CAPACITY-BASED RESTRICTIONS VERSES STATUS-BASED RESTRICTIONS

One way to cure the vagueness and discriminatory potential of status-based suffrage restrictions is to legislate a functional standard. Under such a standard, disenfranchisement is triggered not by belonging to a certain category of individuals, but by failing to meet an objective test of capacity. People who successfully demonstrate capacity are presumptively competent to vote, while those who do not may be excluded for all the reasons that democratic societies wish to exclude incompetent people from the franchise.[143]

The various proposed capacity-assessment models have sought to balance a state's interests in the quality and integrity of its electorate with each individual's right to participate in the democratic process.[144] Moreover, these models strive to render an objective measure of capacity to understand the voting process, unlike assessments of literacy or education level, which inherently favor privileged classes and have historically been utilized to target poor people and disfavored racial groups.[145]

The following part will address the issue of capacity assessment. Part II.A

141. Redley et al., *supra* note 18, at 1028.

142. *See also* Nicholas John Munn, *Against the Political Exclusion of the Incapable*, 33 J. APPLIED PHIL. (forthcoming 2016) (manuscript at 9) (on file with the author) ("We neither ask nor care whether someone is voting through well considered deliberation, or as their religious leadership tells them to, as their political ideology requires, or simply as someone they admire has claimed to be voting. Discriminating against the incapable for doing what the devout, the ideologically compelled, and the unconfident do freely would not be defensible.").

143. *See supra* Part I.C.

144. Hoerner, *supra* note 12, at 125.

145. *See* Barclay, *supra* note 103, at 152 ("[S]urely one reason why education or literacy requirements for the right to vote are no longer countenanced is because historically they were often a thinly veiled excuse for racial discrimination or discrimination against the poor. For that reason educational levels and literacy levels are no longer considered relevant for possessing the capacity to vote. . . . Perhaps cognizant of the threat of discrimination, the few concrete proposals for capacity testing people with cognitive impairments that have been proposed do not set the bar high. . . . This kind of capacity testing is not designed to test whether a person casts her vote in a 'rational' or 'informed' manner (whatever is meant by those terms), but merely whether she understands the nature and purpose of voting."). For an explanation of the historical significance of literacy tests in the United States, see *supra* Part I.A.

reviews the existing capacity assessment model proposals, and Part II.B will argue that the failure of these proposals to become law stems from pragmatic political considerations.

A. Proposed Assesment Models

First, in response to the rising momentum of the disability-rights movement in the 1970s, the American Bar Association's (ABA) Commission on Mental and Physical Disability Law undertook an ambitious project to propose state-law reforms. In 1982, this project, christened the Developmental Disabilities State Legislative Project, advocated for the repeal of existing status-based disenfranchisement provisions, finding them to be likely unconstitutional.[146] For states that wished to exclude incompetent voters from the electorate, the Project recommended replacing the existing provisions with a universal, objective test, under which "[a]ny person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter of this state and shall be registered to vote[.]"[147]

However, critics viewed this standard as insufficient and simplistic. After all, basic information such as name, address, and age could potentially be memorized by someone lacking the capacity to rationally choose between candidates or ballot measures.[148] Voters suffering from Alzheimer's disease or other progressive cognitive impairments may have no trouble remembering this sort of information but a great deal of trouble making rational political decisions.[149] Simply put, "the ability to provide one's name and address does not speak directly to the task that a voter will undertake in the voting booth."[150]

Two propositions for a more relevant assessment model emerged from the McGeorge School of Law's 2007 symposium on *Facilitating Voting as People Age: Implications of Cognitive Impairment*.[151] The symposium's resolution, endorsed by the ABA's Commission on Mental and Physical Disability Law and its House of Delegates,[152] urged states to affirmatively codify a status-blind presumption of capacity to vote, in deference to principles of democracy: "To promote the democratic process to the fullest extent possible, no governmental entity should exclude any otherwise qualified persons from voting on the basis of medical diagnosis, disability status, or type of residence. A person's capacity to

146. Bindel, *supra* note 59, at 124–25.

147. BRUCE DENNIS SALES ET AL., DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 111 (1982).

148. Bindel, *supra* note 59, at 128.

149. *Id.*

150. *Id.* (quoting Karlawish et al., *supra* note 13, at 1346).

151. Symposium, *supra* note 19.

152. Bindel, *supra* note 59, at 129.

vote should be presumed regardless of guardianship status."[153] Exclusion on the basis of capacity was allowed only when accompanied by due process protections, including individualized determination by a court of competent jurisdiction and a "clear and convincing" evidentiary standard.[154]

The symposium endorsed a functional capacity definition (for those states that elect to retain a capacity standard), allowing exclusion only for people lacking the ability to "communicate, with or without accommodations, a specific desire to participate in the voting process."[155] Although this, too, is a low bar, expression of a desire to vote conveys a degree of understanding of the process and is arguably more relevant to the democratic endeavor than provision of name and address. California has recently adopted this standard. Although its state constitution allows "disqualification of electors while mentally incompetent,"[156] its statutory election code now presumes every voter to be competent unless, during conservatorship proceedings, the court finds lack of capacity using the symposium's substantive and evidentiary standards.[157]

However, two symposium participants refused to take the resolution's capacity standard at face value. According to Sally Burch Hurme and Paul Appelbaum, if the sole criterion for voting is the ability to respond "affirmatively to a query as to whether the person wants to vote . . . no meaningful capacity requirement would have been established."[158] A person with dementia who has little comprehension of political issues may very well respond affirmatively without understanding the question.[159] Rather than reject the resolution, though, Hurme and Appelbaum interpreted it in accordance with a more rigorous assessment model, first promoted by Appelbaum and two colleagues in *The American Journal of Psychiatry* in 2005.[160]

This model, the "Competence Assessment Tool for Voting" (CAT-V) is founded upon the competence definition enunciated in the Washington state statute and the *Rowe* ruling: ability to understand "the nature and effect of voting such that she or he [can] make an individual choice."[161] Hurme and Appelbaum explain that understanding nature and effect is more meaningful than expression of a desire to vote, and yet is also a significantly lower bar than the usual four-

153. *Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861, 862–63 (2007).

154. *Id.* at 863.

155. *Id.*

156. CAL. CONST. art. II, § 4.

157. CAL. ELEC. CODE § 2208(a) (Deering 2016).

158. Hurme & Appelbaum, *supra* note 95, at 966 n.209.

159. *Id.*

160. *Id.* at 967 n.210. For the *American Journal of Psychiatry* article, see Appelbaum et al., *supra* note 19.

161. WASH. REV. CODE § 11.88.010(5) (2017); *see also* Hurme & Appelbaum, *supra* note 95, at 964–74; *supra* notes 48–64 and accompanying text (describing *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001)).

part capacity standard for medical decision making.[162] This lower bar is amply justified by the special nature of the right to vote and the miniscule likelihood that enfranchisement of some incompetent voters will actually harm the quality of elections. In other words, the concern of over-enfranchisement calls for a meaningful, functional capacity standard, but the more powerful concern of under-enfranchisement dictates that this standard be easily met.[163]

Hurme and Appelbaum read this definition into the "specific desire to participate in the voting process" standard endorsed by the symposium Recommendations. "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."[164] If the voter does not understand the relationship between her vote and the election of a president, mayor, or other elected official, her desire to vote does not translate into a genuine desire to participate in this *specific* process.[165]

CAT-V "operationalizes" the *Doe*/Washington standard into a fixed system of questions and scoring. First, the would-be voter is asked a question about the nature of voting: "Imagine that two candidates are running for Governor of [subject's state], and that today is Election Day . . . What will the people of [subject's state] do today to pick the next Governor?"[166] Completely correct responses (e.g., "They will go to the polls and vote") receive two points, ambiguous responses (e.g., "That's why we have Election Day") receive one point, and incorrect responses (e.g., "There's nothing you can do; the TV guy decides") receive zero.[167] Next, the voter's understanding of the effect of voting is assessed: "When the election for governor is over, how will it be decided who the winner is?"[168] Again, correct responses (e.g., "The votes will be counted and the person with more votes will be the winner") receive two points, ambiguous responses (e.g., "By the numbers") receive one, and incorrect responses (e.g., "It all depends which sign they were born under") receive zero.[169]

The subject's capacity to choose between candidates is tested by providing the subject with a hypothetical about two candidates and their opposing platforms. The subject is asked to choose between two candidates. Clear indication of a choice receives two points, an ambiguous response (e.g., "I think I

162. Hurme & Appelbaum, *supra* note 95, at 965. The authors identify the four parts of the medical standard as "substantial abilities to understand, appreciate, reason, and choose." For a broader presentation of the law of capacity determinations and the place of voting capacity within that field, see *id.* at 962–66.

163. *Id.*

164. *Id.* at 966 n.209.

165. *Id.*

166. *Id.* at 967.

167. *Id.*

168. *Id.* at 968.

169. *Id.*

might go for the guy who doesn't like taxes, but I'm not sure because schools are important too") receives one, and total lack of a choice (e.g., "I don't know") receives zero.[170]

Hurme and Appelbaum did not take the position that any particular score from 0 to 6 represents minimum capacity for voting. Instead, they caution against drawing a firm capacity line among the possible scores and suggest that different decision-makers may use CAT-V data differently.[171]

The initial *American Journal of Psychiatry* study assessed thirty-three people with Alzheimer's disease.[172] Only four subjects (12%) failed to indicate a choice, but a greater number failed to understand the nature (fifteen subjects, or 45%) and/or effect (ten subjects, or 30%) of voting.[173] CAT-V performance correlated strongly with the severity of the subject's dementia, while expression of desire to vote—the alternative interpretation of the symposium's resolution—was not a good predictor of CAT-V performance.[174]

Subsequently, CAT-V has continued to attract interest among scientific researchers, who have tested its application to aging people with and without dementia,[175] as well as to psychiatric outpatients with serious mental illness.[176] Most of these studies supplemented the basic *Doe*/Washington criteria with additional questions to assess subjects' *appreciation* of the effect of voting and their *reasoning* underlying electoral choice.[177] Some researchers found that capacity to vote, as measured by CAT-V, does not correlate strongly with common measures of cognitive function,[178] lending scientific support to the

170. *Id.* at 968–69.

171. *Id.* at 973 ("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 . . . a screening instrument would appear to play a helpful role."); *id* at 971 ("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 . . . .").

172. Appelbaum et al., *supra* note 19, at 2096.

173. *Id.*

174. *Id.* at 2096–97.

175. *See* Luis Javier Irastorza et al., *Capacity to Vote in Persons with Dementia and the Elderly*, 2011 INT'L J. ALZHEIMER'S DISEASE 1 (2011), https://www.hindawi.com/journals/ijad/2011/941041 [https://perma.cc/3RW6-DG82]; Pietro Tiraboschi et al., *Evaluating Voting Competence in Persons with Alzheimer's Disease,* 2011 INT'L J. ALZHEIMER'S DISEASE 1 (2011), https://www.hindawi.com/journals/ijad/2011/983895 [https://perma.cc/CT5E-NJCF].

176. *See* Adiel Doron et al., *Voting Rights for Psychiatric Patients: Compromise of the Integrity of Elections, or Empowerment and Integration into the Community?*, 51 IS. J. PSYCHIATRY & RELATED SCIS. 169 (2014) (studying psychiatric inpatients); Raymond Raad et al., *The Capacity to Vote of Persons with Serious Mental Illness*, 60 PSYCHIATRIC SERVS. 624 (2009) (studying psychiatric patients residing in the community).

177. *See* Appelbaum et al., *supra* note 19, at 2095; Irastorza et al., *supra* note 175, at *2; Raad et al., *supra* note 176, at 625; Tiraboschi et al., *supra* note 175, at *2. *But see* Doron et al., *supra* note 176, at 172 (limiting the CAT-V component of study to assessment of understanding of nature and effect of voting).

178. *See* Raad et al., *supra* note 176, at 628 ("[I]t may be appropriate to assume that as a group,

contention that status-based disenfranchisement provisions are too broad.[179] In the same vein, all the studies that considered CAT-V recommended its usage, either for people with moderate Alzheimer's disease or for people with legal guardians.[180]

Demonstrating awareness of public policy concerns, some researchers noted that CAT-V studies of people without Alzheimer's disease or mental illness could help establish a capacity cutoff. Rather than arbitrarily choosing an intermediate CAT-V score as the cutoff, legislators can base their judgment on the range of scores attained by presumptively competent voters.[181] Nonetheless, the CAT-V procedure has apparently not been adopted into electoral law.[182]

Undoubtedly, a major reason for the staying power of status-based disenfranchisement is "the simple belief that the [capacity-based] standards that have been produced thus far . . . have been fundamentally too relaxed."[183] Assessments of ability to answer basic questions about the working of an election have not placated concerns over the quality and integrity of the vote. For this reason, Benjamin O. Hoerner has proposed the following hybrid standard: A state may legislate categorical disenfranchisement of all people under guardianship, but provide notice during guardianship proceedings of the ward's right to seek retention of suffrage via assessment of his or her voting capacity. The ward would have to undergo a court-administered capacity assessment designed to

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persons with serious mental illness do not manifest a substantial incidence of incapacity to vote."); Tiraboschi et al. *supra* note 175, at *5 ("[G]lobal measures of cognitive functioning . . . do not appear to be strong predictors of the capacity to vote."). *But see* Doron et al., *supra* note 176, at 174 ("Contrary to Raad et al., who did not find a significant correlation between CAT-V scores and cognition, we found a positive correlation between cognition and capacity to vote. In addition, patients with legal guardians performed worse than those without guardians." (footnote omitted)).

179. For this contention, see *supra* notes 125–130 and accompanying text.

180. Some researchers found that people with mild Alzheimer's disease can be presumed competent and those with severe Alzheimer's disease can be presumed incompetent, but that people with moderate Alzheimer's disease cannot be presumed one way or the other and could be assessed using CAT-V. *See* Appelbaum et al., *supra* note 19, at 2098–99; *see also* Irastorza et al., *supra* note 175, at *5 (recommending that CAT-V's choice assessment be made stronger by adding more information to the hypothetical choice question); Tiraboschi et al., *supra* note 175, at *5. Others recommended CAT-V usage for people whose capacity to vote is questioned (a helpful proxy for identifying people with questionable decision-making capacity). *See* Doron et al., *supra* note 176, at 174 (advocating CAT-V screening for individuals with a legal guardian); Raad et al., *supra* note 176, at 628.

181. Appelbaum et al., *supra* note 19, at 2098 (noting it could be helpful to have CAT-V studies of non-demented people for the purpose of establishing a cutoff); Raad et al., *supra* note 176, at 628 (urging CAT-V studies of people without mental illness, for the same purpose).

182. This author has not found any evidence of CAT-V's implementation into electoral law. Although no published sources state explicitly that CAT-V is not legally codified in any jurisdiction, some writers have suggested their own inability to find evidence of its implementation. *See* Beckman, *supra* note 1, at 229 (noting the CAT-V test "is not yet generally adopted"); Hoerner, *supra* note 12, at 127 (noting the CAT-V standards "have been largely ignored by both the [U.S.] federal government and the states").

183. Hoerner, *supra* note 12, at 127.

gauge his or her understanding of the voting process. Such a compromise would help placate electoral-integrity concerns by creating a hurdle for people under guardianship, but would also move away from over-exclusion and discrimination by providing notice and an opportunity to be enfranchised on capacity grounds.[184]

B. The Arbitrariness of Capacity Determinations

Alternatively, the failure of capacity-based standards to gain legislative traction may stem from a more essential problem. Drawing a legal voting-capacity line is "an exercise in policy, not science."[185] The best that assessment models could do is to illustrate a spectrum of capacity; translating this spectrum into distinct categories of competent and incompetent voters is a fundamentally arbitrary task. In contrast, statuses such as intellectual disability, mental illness, and guardianship are rooted in preexisting categories of law and science. Disenfranchisement of these well-defined "other" groups is more intuitive and more politically palatable than rearrangement of civil rights along the lines of newly constructed "capacity" categories.

Accordingly, status-based disenfranchisement remains on the books,[186] and, as will be shown below, even CAT-V, the gold standard for capacity assessment, fails to disregard status entirely. Moreover, as of the date of this writing, no electoral democracies have instituted universal cognitive capacity assessment as a prerequisite for voting.[187] The following section argues that, because political considerations favor focusing upon recognized statuses, scholars and legislators promoting the capacity assessment idea are unlikely to embrace objective assessment of all potential voters.

The ABA and McGeorge universal-capacity-screening proposals were shelved by Hurme and Appelbaum for their failure to sufficiently protect the electorate from incompetent voters,[188] and the more rigorous CAT-V standard has emerged as the favored capacity assessment mechanism in many subsequent analyses.[189] However, CAT-V assessment does not appear to have been seriously considered as a universal prerequisite for the franchise. Hurme and Appelbaum disapproved of such "indiscriminate screening" out of concern that it "may result

184. *Id.* at 127–29. Hoerner also notes that such a hybrid standard would meet the Due Process requirements announced in *Rowe* and *Carnahan*. *Id.* at 127–28.

185. Hurme & Appelbaum, *supra* note 95, at 962.

186. *See supra* Introduction.

187. For a survey of relevant electoral laws worldwide and in the United States, see *supra* Introduction.

188. *See supra* notes 158–165 and accompanying text (describing the concerns of Hurme & Appelbaum).

189. *See, e.g.*, Barclay, *supra* note 103, at 152; Beckman, *supra* note 1, at 229–30; Kelley, *supra* note 12, at 383.

in the disenfranchisement of the elderly in general."[190] The scientific studies of CAT-V considered only members of status groups (people with mental illness or Alzheimer's disease) and recommended CAT-V usage only for members of status groups (people with moderate Alzheimer's disease or under guardianship).[191] Some have recommended studying CAT-V performance in the general population, but only for the purpose of discerning a capacity cutoff line to be used in screening certain status groups.[192]

It may seem strange that the same scholars who advocate the relative desirability of capacity-based determinations would shy away from universal capacity screening out of fear that it would be taken too seriously and result in the disenfranchisement of people who are now permitted to vote. It may also seem strange that these scholars retain a discriminatory focus upon status groups by proposing to screen only members of such groups. Ludvig Beckman was troubled by this:

> The rationale for restricting the vote on the basis of capacity to vote is that people should not be disenfranchised simply because of their cognitive status. But the decision to test for capacity to vote is plausible only on the suspicion that people with a certain cognitive status may not be in possession of the capacity to vote. Hence, CAT-V testing is premised on the tenet that only people with some cognitive impairment should be tested. But once this is admitted, the problem of misclassification re-emerges . . . In the end, people denied the vote following a failed result on tests for capacity to vote are denied the vote also because . . . of their cognitive status.[193]

In international legal terms, singling out certain status groups for screening is likely prohibited under Article 12.2 of the CRPD, which declares that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." As Oliver Lewis of the Mental Disability Advocacy Centre argued before the Venice Commission,

Given that it is only people with actual or perceived mental or cognitive disabilities who will be subjected to the [capacity assessment] in the first place, it does not matter whether the word "disabled" appears in the [assessment] or not. No matter how elegant the legal formulation, and no matter whether it is legislation or a judge which removes the franchise, these measures will still constitute unlawful discrimination.

If I were legal counsel to the Venice Commission I would be advising you

190. Hurme & Appelbaum, *supra* note 95, at 971.

191. *See supra* notes 175–180 and accompanying text (describing the recommendations).

192. *See id.*

193. Beckman, *supra* note 1, at 230.

that the only way for a "proper judgment" to be non-discriminatory is for the test to be administered to people with disabilities and all other potential voters. As far as I know this proposal is—unsurprisingly—not on the table.[194]

What, then, has the voting-rights debate gained from the pivot from status toward capacity? It seems that even the most celebrated capacity-based proposal is equally discriminatory, equally arbitrary, and equally illegal to the existing status-based provisions.[195] Linda Barclay has argued that the small benefits to be gained from conducting a capacity-screening test on every voter do not justify the immense monetary and social costs of the screening process.[196] She proceeded to argue that the same logic applies to capacity screening of suspect groups and, in its place, proposed elimination of all mental impairment-based suffrage restrictions.[197]

As illustrated above, pragmatic politics help to explain the capacity advocates' retention of status-based discrimination. The scholars who created and promoted CAT-V want their ideas to be acceptable to policymakers and voters. A universal screening scheme that rearranges the fundamentals of citizenship and potentially disenfranchises large numbers of people is bound to be an unpopular proposition. Just as some have proposed a compromise that combines capacity screening with preliminary categorical disenfranchisement of people under guardianship,[198] the CAT-V scheme apparently has a built-in compromise leaving alone the masses of presumptively rational voters. This may also be the import of

194. Oliver Lewis, Exec. Dir., Mental Disability Advocacy Ctr., The Promise of Democracy—Why the Venice Commission Should Adopt Universal Suffrage for People with Disabilities 3 (June 18, 2011), http://mdac.info/sites/mdac.info/files/The%20Promise%20of%20Democracy%20%E2%80%93%20Why%20the%20Venice%20Commission%20should%20adopt%20universal%20suffrage%20for%20people%20with%20disabilities.pdf [https://perma.cc/8LEU-FT58]. Linda Barclay contested Lewis's claim that capacity screening members of certain status groups is discriminatory, on several grounds: (a) Since capacity-screening seeks to hold people with mental impairments to the same competence standard as other people, rather than to a higher standard, they are not actually discriminated against in any appreciable way; (b) even if differential treatment—namely screening—itself constitutes discrimination, it is done on the basis of a morally relevant difference—namely capacity—and is therefore justifiable; (c) Lewis' notion of discrimination is detrimental to the disability-rights movement, because it holds the provision of special resources to people with disabilities—a form of differential treatment—to be per se discriminatory; and (d) Lewis' notion of discrimination is also detrimental to the universal enfranchisement cause in particular, because it requires acceptance of the much-less-popular contentions that children should be enfranchised without capacity screening, and people with mental impairments should not be subjected to capacity screening with regard to medical and financial decision making. Barclay, *supra* note 103, at 152–53.

195. For arguments that status-based disenfranchisement of people with mental impairments is discriminatory and arbitrary, see *supra* Part I.C. For authority stating that such disenfranchisement violates U.S. constitutional law, see discussion of the *Doe v. Rowe* case, *supra* Part I.A. For authority stating that such disenfranchisement violates international-human-rights law, see discussion of CRPD Article 29 and related case law, *supra* Part I.B.

196. Barclay, *supra* note 103, at 153–54.

197. *Id.* at 154–57.

198. *See supra* note 184 and accompanying text.

Beckman's contention that "the decision to test for capacity to vote is *plausible* only on the suspicion that people with a certain cognitive status may not be in possession of the capacity to vote."[199] The concern is political, rather than theoretical, plausibility.

The proponents of capacity assessment have therefore not succeeded in eliminating traditional barriers to suffrage. And even if the political concerns were overcome and universal capacity assessment were instituted, the upshot would be to preserve the exclusivity of the electorate by evolving traditional barriers to meet modern standards of law and justice—capacity rather than status. Meanwhile, another recent reform proposal has sought to radically expand the boundaries of the electorate, making it far more inclusive of people with mental impairments than it has ever been. This idea, popularized by philosopher Martha Nussbaum in 2009, is the subject of Part IV.[200]

III. VOTING BY PROXY

Nussbaum's analysis began with the contention that, with regard to "core political entitlements" such as the right to vote, "adequacy of capability requires equality of capability."[201] If voting rights are not possessed by all citizens of the demos on the basis of total equality—if, for instance, the vote of each black citizen is worth half the vote of each white citizen—the system is fundamentally unjust, despite the fact that all adult citizens have some right to vote. No arrangement short of equality is adequate.[202]

Nussbaum then applied this model to the question of suffrage for people with mental impairments. She conceptualized this question into three cases: In Case A, a person is cognitively capable of voting, but has difficulty doing so alone on account of some disability, such as social anxiety or limited literacy. To ensure equal rights for such a person, society must spend "the money required to facilitate that person's full inclusion in . . . voting."[203] In Case B, a person cannot vote even with facilitation, but can make an electoral choice and convey it to his or her guardian. To ensure equal rights, society must allow that person's guardian to cast a vote based on the person's expressed preference.[204] In Case C, "the person's disability is so profound that he or she is unable to perform the function in question, even to the extent of forming a view and communicating that view to a guardian."[205] Nussbaum argues that the person's guardian should be allowed to

199. *See* Beckman, *supra* note 1, at 230 (emphasis added).

200. Nussbaum, *supra* note 17.

201. *Id.* at 343.

202. *Id.* Nussbaum's analysis also concerns jury service, but this Note will focus on her contentions regarding voting.

203. *Id.* at 345.

204. *Id.* at 346.

205. *Id.* at 345.

cast a vote "on the person's behalf and in her interests, just as guardians currently represent people with cognitive disabilities in areas such as property rights and contract."[206] Arguably, this contention is the logical conclusion of the analogy between the rules of the "social contract" of voting and the rules of ordinary commercial contracts, invoked above to justify exclusion of people with mental impairments from the electorate.[207] According to Nussbaum, nothing short of voting by proxy ensures equal voting rights for every person with mental impairments.

As to the concern that guardians may usurp their wards' votes to vote twice for their own preferences, Nussbaum contends that this problem is equally applicable to any function of guardianship. Just as some bad guardians will insert their own interests into their wards' health and contract decisions, some will do so for voting as well. "Instead, we [should] design procedures to authorize guardianship that try to weed out the incompetent or the selfish."[208] After briefly musing on the slim chance of the Case C voting right being recognized in U.S. courts, Nussbaum closes with a recognition of the firestorm she would soon engender: "Let the debate begin."[209]

The proxy voting idea had been previously, if very briefly, considered in a 2004 *Journal of the American Medical Association* article.[210] The nine authors rejected the idea with an uncited assertion that:

> Unlike medical and financial decisions, the act of voting in a democratic polity is an incident of citizenship and an inalienable right. Citizenship creates certain obligations and opportunities that cannot be delegated, such submitting to a military draft or serving on a jury. Although a person has the prerogative to vote as another person recommends, the person cannot "assign" his or her right to vote to someone else.[211]

That these authors gave the proxy voting idea such short shrift lends credence to Nussbaum's assertion that she, by seriously considering the merits of the issue, was beginning a new debate. As predicted, her 2009 proposition received many vehement responses,[212] and the exchange has helped develop contemporary approaches to the problem of suffrage for people with severe

206. *Id.* at 347.

207. *See supra* note 111 and accompanying text.

208. Nussbaum, *supra* note 17, at 348.

209. *Id.* at 350.

210. Karlawish et al., *supra* note 13.

211. *Id.* at 1347.

212. These responses will be considered at great length below. Benajmin O. Hoerner has responded more ambivalently, calling Nussbaum's proposition "too large of a legislative leap" on the one hand and "a simple solution to a complex problem" on the other. Hoerner, *supra* note 12, at 123.

mental impairments. The remainder of this section will review two important responses to Nussbaum and offer one original response.

Claudio López-Guerra argues that right to vote should depend on interest "in the value of the franchise."[213] Appointing proxy voters for fully competent people would not satisfy their interest in the franchise because "they understand and value the . . . opportunity to contribute to the making of a more just society through the election of the right kind of representatives."[214] In contrast, people with severe mental impairments, who do not understand or value this opportunity, correspondingly do not have the requisite interest in the franchise to justify receiving any right to vote, through proxy or otherwise.[215]

In the international human rights law analysis considered in Part II.B.,[216] the three Harvard authors raise four objections to Nussbaum's proposition. First, they argue that proxy voting violates core human-rights norms of "autonomy, dignity, and respect for the individual—precisely, and ironically, the values [Nussbaum] seeks to honor."[217] More particularly, the prevalence of substituted decision-making models for people with disabilities was a major impetus for the adoption of the CRPD. Article 12 of the CRPD guarantees people with disabilities "legal capacity on an equal basis with others" and commits states parties to facilitate free exercise of this capacity—the so-called "supported decisionmaking" model.[218]

Second, voting by proxy does not promote the dignity of people with mental impairments. Far from engendering social inclusion, this scheme holds no therapeutic value for the person uninvolved in casting his or her own vote,[219] and is likely to perpetuate the societal stigma of people with mental impairments as flawed and incapable. And since Nussbaum's "Case C" voters are a small minority, proxy voting on their behalf is unlikely to have a significant impact on advancing their policy preferences.[220]

Third, the process of identifying the people whose voting rights should be assigned to proxies is likely to suffer from the same vagueness problems that plague mental-impairment-based suffrage restrictions. People unjustly included in this class will simply lose their right to vote and see it pass to fellow citizens.[221]

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213. LÓPEZ-GUERRA, *supra* note 103, at 73.

214. *Id.*

215. *Id.*

216. Fiala-Butora et al., *supra* note 18.

217. *Id.* at 99.

218. *Id.*

219. For more on voting as a means of social inclusion and therapy, see *supra* notes 123–124 and accompanying text.

220. Fiala-Butora et al., *supra* note 18, at 101.

221. *Id.* at 102.

Fourth, as Nussbaum herself noted, the potential for abusive vote usurpation is clear. Contrary to Nussbaum's assertion, though, voting by proxy presents a greater opportunity for the guardian to substitute her own interests than do medical and financial decisions. Voting, unlike those other contexts, is done in secret, thus shielding the guardian's decision and the process by which she reached it from outside oversight.[222] Finally, governments with an instrumentalist view of the value of voting "would have a strong incentive to subject increasingly more persons to proxy voting because they consider guardians better educated and more knowledgeable than voters with disabilities.[223] In this way, Nussbaum's proposition for greater inclusion can be utilized as a tool to further the disenfranchisement rationales explored above.[224]

But Nussbaum's proposal suffers from an essential flaw, in addition to the valid problems raised by López-Guerra and the international law scholars: The decision of which candidates and which referenda to support depends on much more than a calculation of personal interests. When citizens vote, they are called upon not only to protect their own economic and physiological welfare, but to advocate for their vision of the proper course of society in terms of war and peace, social policy, and the economy. To suggest that a guardian—no matter how familiar and caring she may be—can fairly express another person's political view trivializes both the nature (ideological, rather than mathematical) and the effect (upon all of society, not just the self) of voting. No personal-interests-based determination can fairly approximate someone else's vision for society at large. Instead, in the absence of a clear indication as to the ward's political preference, many guardians will inevitably substitute their own preferences.

Because Nussbaum's proposal would transform the purpose of voting from civic duty to economic self-interest, it must not be adopted into law. And because the potential for guardians to vote their own preferences would raise familiar fears of vote misappropriation,[225] this proposal is not likely to find widespread acceptance in any electoral democracy.

Both Nussbaum and the advocates of capacity assessment have sought to revolutionize the subject of voting capacity. The advocates of assessment take a more conservative approach, acknowledging that people need a minimum

222. *Id.* The impact upon the ward of an improper medical or financial decision is arguably greater than the impact of an improperly cast vote. Nonetheless, the Harvard authors do not address this differential of impact and instead focus squarely on the question of opportunity. From their perspective, "the situation is more serious in the case of voting," because there is a greater opportunity for abuse in this case than there is in the case of other guardian-made decisions. Fiala-Butora, *supra* note 18, at 102.

223. *Id.* at 103.

224. *Id.* For the rationales, see *supra* Part I.C.

225. *See supra* Part I.B.2 (describing the concern of vote misappropriation and reviewing critiques of this concern).

cognitive capacity to participate in the democratic process, but arguing that that capacity must be defined and assessed in an objective, scientifically precise way. Nussbaum, on the other hand, contends that voting capacity is transferable; all people have a right to participate in self-government, and when capacity to do so is lacking, it may simply be supplied by proxy. Parts II and III have reviewed these two ideas, arguing that both are flawed and unlikely to achieve political acceptance. Still, both ideas are correct in their insistence that voting regulations across the world exclude too many people who are ready and able to contribute to the democratic process.

Part IV will advance a new proposal for reforming legal conceptions of voting capacity: removal of mental illness as a factor for disenfranchisement. This idea is admittedly only a first step and not an attempt to perfect the rules of voting. Still, it will address a basic problem that permeates the existing law and scholarship on voting capacity. Treating mental illness as a marker of incapacity both misunderstands the nature of mental illness and makes the democratic process into an instrument of stigmatization.

IV. DISENFRANCHISEMENT ON THE BASIS OF MENTAL ILLNESS

The *Rowe* case sheds light on the absurdity of disenfranchisement provisions founded upon mental illness. Two of the plaintiffs in that case had been placed under guardianship on account of their bipolar disorder, and the third on account of intermittent explosive disorder, antisocial personality disorder, and mild organic brain syndrome.[226] That their mood, personality, and behavior disorders had little bearing on the plaintiffs' ability to understand and rationally participate in voting is amply clear from the record. Evidence showed that all three women fully understood the nature and effect of voting and were capable of making an informed choice; two of them had previously voted on their own initiative before learning that the Maine Constitution prohibited them from doing so.[227]

As mentioned above, multiple studies have shown that the voting behavior of psychiatric inpatients closely mirrors the votes of the patients' communities and socioeconomic strata.[228] Although these data do not prove that the psychiatric inpatient voters engaged in rational consideration of the options, the similarity of their voting pattern to those of other citizens "tend[s] to refute" the presumption that people with mental illnesses are, as a group, less competent to vote than other people.[229] As one 1970 study explained:

226. Doe v. Rowe, 156 F. Supp. 2d 35, 39–41 (D. Me. 2001).

227. *Id.*

228. *See supra* note 113.

229. Klein & Grossman, *supra* note 113, at 1565; *see also* Howard & Anthony, *supra* note 113, at 132 ("[T]his study seems to clearly support the premise that the hospitalized mental patient is competent to vote and is capable of doing so in an informed and thoughtful manner.").

> Disenfranchisement of mental patients is based on the assumption that mental illness is synonymous with mental incompetence and that such incompetence is all-pervasive and covers all phases of human activity . . . [The findings show that w]hile people may at times manifest dysfunction in one area of activity, they may still be competent in other areas.[230]

Nonetheless, electoral laws around the world and related scholarship continue to treat "mental illness" as a significant factor vis-à-vis voting capacity. Although no U.S. states still disenfranchise people for reasons of mental illness,[231] still, as noted above,[232] sixty nine U.N. member states disenfranchise all people "with any mental health problems . . . without any qualifier,"[233] nine member states disenfranchise people detained under mental health laws,[234] and fifty six member states authorize courts or magistrates to disenfranchise people for mental health reasons.[235]

Moreover, at least two of the recent published studies to apply the CAT-V assessment method focused upon mental illness, one assessing the CAT-V scores of "persons with serious mental illness" and one assessing the scores of "psychiatric patients."[236] These researchers, seeking subject populations with questionable voting capacity, draw no distinction between illnesses known to affect cognition and illnesses not known to do so. This phenomenon suggests that even mental-health scientists continue to view mental illness as an indicator of impaired voting capacity.[237]

This Part argues that considering mental illness when determining voting capacity turns electoral law into an instrument of stigmatization and disempowerment. Framing this point, however, requires some background on the definition of the term "mental illness." For half a century, psychologists, psychiatrists, and philosophers have disputed the proper definition of this term.[238]

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230. Klein & Grossman, *supra* note 113, at 1565.

231. *See* BAZELON CTR., *supra* note 8, at 28–52 (detailing the relevant electoral law in U.S. states and territories). Maine's constitution still disenfranchises people "under guardianship for reason of mental illness," the state no longer enforces the provision, in compliance with *Rowe*. *See supra* Part I.A.

232. *See supra* notes 3–6 and accompanying text.

233. Bhugra et al., *supra* note 3, at 396.

234. *Id.* at 396–97. Twelve other member states disenfranchise all detained people, a group that presumably includes people detained for mental-health reasons but does not target them specifically. *Id.*

235. *Id.* at 396.

236. *See supra* note 176.

237. For an illustration of the CAT-V researchers' focus on subjects with mental illness, see the studies described in *supra* page 295 and notes 177–78.

238. For two overviews of the history of this dispute, see, for example, Valérie Aucouturier & Steeves Demazeux, *The Concept of Mental Disorder*, *in* HEALTH, ILLNESS AND DISEASE: PHILOSOPHICAL ESSAYS 75 (Havi Carel & Rachel Cooper eds., 2014); Steeves Demazeux, *The*

The subject has been very contentious, and an exhaustive treatment of the dispute is beyond the scope of this Note. Instead, the following paragraphs will briefly introduce some of the most important events, positions, and currents of the dispute.

First, psychiatrist Thomas Szasz declared war on the field of psychiatry in 1960 by questioning the reality of the concept of mental illness. He wrote:

> The concept of illness, whether bodily or mental, implies *deviation from some clearly defined norm.* In the case of physical illness, the norm is the structural and functional integrity of the human body. . . . What is the norm deviation from which is regarded as mental illness? This question cannot be easily answered. But whatever this norm might be, we can be certain of only one thing: namely, that it is a norm that must be stated in terms of *psycho-social, ethical,* and *legal* concepts. For example, notions such as "excessive repression" or "acting out an unconscious impulse" illustrate the use of psychological concepts for judging (so-called) mental health and illness. The idea that chronic hostility, vengefulness, or divorce are indicative of mental illness would be illustrations of the use of ethical norms (that is, the desirability of love, kindness, and a stable marriage relationship). Finally, the widespread psychiatric opinion that only a mentally ill person would commit homicide illustrates the use of a legal concept as a norm of mental health.[239]

Szasz's claim that the concept of mental illness draws upon values external to medicine has become emblematic of the anti-psychiatry movement, and it inspired attempts by others in the field to more precisely define, and defend, the term.[240] Another catalyzing event in this debate was the American Psychiatric Association's 1973 decision to remove homosexuality from its Diagnostic and Statistical Manual of Mental Disorders (DSM), which it made in response to a shift in popular attitudes toward homosexuality.[241]

Throughout the 1970s, mental health researchers sought to identify objective

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Function Debate and the Concept of Mental Disorder, *in* CLASSIFICATION, DISEASE, AND EVIDENCE: NEW ESSAYS IN THE PHILOSOPHY OF MEDICINE 63 (Philippe Huneman et al. eds., 2015).

239. Thomas S. Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGIST 113, 114 (1960); *see also* THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (revised ed., 1974) (expounding further upon the position announced in his 1960 article).

240. Aucouturier & Demazeux, *supra* note 238, at 83–84; Demazeux, *supra* note 238, at 65.

241. Aucouturier & Demazeux, *supra* note 238, at 84–85; *see also* Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOL. TODAY (Sept. 18, 2015), https://www.psychologytoday.com/blog/hide-and-seek/201509/when-homosexuality-stopped-being-mental-disorder [https://perma.cc/Z225-DFGG] ("The evolution of the status of homosexuality in the classifications of mental disorders highlights that concepts of mental disorder can be rapidly evolving social constructs that change as society changes.").

criteria for the concept of mental illness. Robert Spitzer and Jean Endicott emphasized suffering and distress, while Donald Klein insisted on the necessity of "actual dysfunction."[242] In a series of influential articles in the 1990s, Jerome Wakefield advocated a middle position: mental illness is characterized by "harmful dysfunction": "dysfunction" refers to a person's objective mental abnormality, but the abnormality is only considered "harmful" on the basis of subjective sociocultural values. In Wakefield's view, then, the concept of mental illness includes both an objective scientific element and a subjective value-laden one.[243]

This Note takes no position in this debate. However, it is very significant that recent literature reviewing the debate highlights the continuing prevalence of the idea, including among psychiatrists themselves, that "psycho-social, ethical, and legal values play a role in the classification of mental illnesses. Indeed, some writers now consider it a matter of "consensus" that mental illness is a value-laden concept.[244]

Accepting this "consensus" idea as true, even if just for the sake of argument, reveals a stunning problem in the use of mental illness as an indicator of voting incapacity. If diagnoses of mental illness inevitably incorporate elements of psychosocial, ethical, or legal disapproval, then disenfranchisement on the basis of mental illness reinforces that disapproval by excluding the voices of the marginalized group from the democratic process. This exclusion thereby inhibits the ability of people with mental illness to change social attitudes through the democratic process.

Government initiatives to reform psychiatric-care practices in Australia and the United States have noted the importance of political engagement by consumers/survivors of the psychiatric system to argue for change.[245] There is no

242. Aucouturier & Demazeux, *supra* note 238, at 86–88.

243. *See* Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM-III-R's Definition of Mental Disorder*, 99 PSYCHOL. REV. 232 (1992); Jerome C. Wakefield, *Limits of Operationalization: A Critique of Spitzer and Endicott's (1978) Proposed Operational Criteria for Mental Disorder*, 102 J. ABNORMAL PSYCHOL. 160 (1993); Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOLOGIST 373 (1992).

244. *See, e.g.*, RACHEL COOPER, PHILOSOPHY OF SCIENCE AND PSYCHIATRY 42 (2007) (concluding that "there is a general consensus that diseases are necessarily harmful conditions"); *id.* at 33 (using "harmful" in the same sense as Wakefield to refer to social difficulty); Aucouturier & Demazeux, *supra* note 238, at 91 ("Nowadays, if any general consensus has been reached on the concept of mental disorder, it is clearly in the sense of a general recognition that it is a value-laden concept.").

245. *See, e.g.*, *A National Framework for Recovery-Oriented Mental Health Services: Guide for Practitioners and Providers*, AUSTL. HEALTH MINISTERS' ADVISORY COUNCIL at iii (2013), https://www.health.gov.au/internet/main/publishing.nsf/Content/67D17065514CF8E8CA257C1D0 0017A90/$File/recovgde.pdf [https://perma.cc/AMZ3-T7D7] ("There was a terrific response during the consultations and submissions. The framework has benefited greatly from the wisdom and unique experience of many people with mental health issues in their own lives or in the lives of

reason, then, that people with mental illness should not also use the democratic process to change conceptions of what is or is not an illness. Just as homosexuality was considered a mental illness by the APA until 1973 and is today considered a healthy, normal sexual orientation,[246] it is also plausible that some other tendency now thought of as symptomatic of mental illness will one day achieve acceptance and respectability. This Note ventures no guess as to which tendency may undergo such a transformation. Being accustomed to today's notions of normality and abnormality restricts our ability to imagine an alternative.

Nevertheless, the possibility that symptoms of mental illness may one day be seen as normal cautions against disenfranchisement on the basis of mental illness. Voting is the most basic means of exercising political power; disenfranchisement on the basis of mental illness inhibits the ability of people to change popular attitudes and gain societal acceptance. Therefore, even for those electoral regimes that retain cognitive capacity as a requirement, the status of being mentally ill must not be considered an indicator of incapacity.

CONCLUSION

Regarding suffrage rights for people with mental impairments, some scholars have approached the debate from the perspective of law, others have done so from the perspective of philosophy, and still others from the perspective of cognitive psychology. Each discipline employs its own specialized language, but they all share a common objective: finding a way to respect the dignity of all individuals while ensuring that electoral results are meaningful, legitimate expressions of democratic self-rule.

This Note has attempted to contribute to the discussion by criticizing two recent reform proposals and advancing a third. The capacity assessment idea, which seeks to shed the injustice of status-based disenfranchisement, is not likely to see political success because voters fear the consequences of radically redefining cognitive capacity. The proxy voting idea, which seeks to include as many voters as possible, must be rejected because of the damage it does to the notion of voting as a civic responsibility; moreover it is not likely to see political

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their loved ones. This is their framework. The consultations have made a lasting contribution to the national dialogue on recovery-oriented practice and this was in evidence during the National Mental Health Recovery Forum in June 2012, which was an important step in the framework's progress."); U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 92 (Howard H. Goldman et al. eds., 1999) ("Through strong advocacy, consumer and family organizations have gained a voice in legislation and policy for mental health service delivery."); *see also* Nancy Tomes, *The Patient as a Policy Factor: A Historical Case Study of the Consumer/Survivor Movement in Mental Health*, 25 HEALTH AFF. 720, 720 (2006) ("Th[e] paper analyzes the history of the modern consumer/survivor movement and its impact on the policy-making climate in the mental health field.").

246. *See supra* note 241 and accompanying text (describing the 1973 change).

success because it raises fears of vote misappropriation. An appropriate alternative approach would be to fully dissociate mental illness from voting capacity. Such dissociation would allow all people who are capable of voting to do so, and would provide an avenue to increase the societal engagement of a group that is currently marginalized.