

May 2017

The Ties That Bind Idiots and Infamous Criminals: Disenfranchisement of Persons With Cognitive Impairments

Elizabeth R. Schiltz

University of St. Thomas School of Law, erschiltz@stthomas.edu

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Constitutional Law Commons](#), and the [Disability Law Commons](#)

Recommended Citation

Elizabeth R. Schiltz, *The Ties That Bind Idiots and Infamous Criminals: Disenfranchisement of Persons With Cognitive Impairments*, 13 U. ST. THOMAS L.J. 100 (2017).

Available at: <https://ir.stthomas.edu/ustlj/vol13/iss1/5>

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

**THE TIES THAT BIND IDIOTS⁺
AND INFAMOUS CRIMINALS:
DISENFRANCHISEMENT OF PERSONS
WITH COGNITIVE IMPAIRMENTS**

ELIZABETH R. SCHILTZ*

IDIOTS AND INSANE, AND THOSE EXCLUDED FROM SOCIETY BY
INFAMOUS CRIMES, ARE MANIFESTLY NOT A
PART OF THE ACTING SOCIETY. . . .”
– MASSACHUSETTS STATE DELEGATE (1853)¹

“THE VOTE IS THE MOST POWERFUL INSTRUMENT EVER DEvised
BY MAN FOR BREAKING DOWN INJUSTICE AND DESTROYING
THE TERRIBLE WALLS WHICH IMPRISON MEN
BECAUSE THEY ARE DIFFERENT.”
– PRESIDENT LYNDON B. JOHNSON,
AT THE SIGNING OF THE VOTING RIGHTS ACT OF 1965²

⁺ The use of the word “idiots” in the title of this work reflects the outmoded language used by the Massachusetts State Delegate in 1853 in the quote directly following the title. As this Article makes clear, the author declaims, rather than endorses, the use of such language to refer to persons with cognitive disabilities.

* This Article grew out of my work with U.S. District Court Judge Donovan W. Frank and Dr. Colleen Wieck, Executive Director of the Minnesota Governor’s Council on Developmental Disabilities, collaborating with Twin Cities Public Television to create a website resource for those interested in disability justice: <http://disabilityjustice.org/>. The website project was supported by a *cy pres* fund established in the settlement of a class action law suit brought by a group of people with disabilities in a residential facility in the state of Minnesota. *Jensen v. Minnesota Dept. of Human Services*, No. 09–1775, 2011 WL 6178845 (D. Minn. December 5, 2011). I would like to thank Judge Frank and Dr. Wieck for their untiring dedication to the cause of disability justice throughout their careers. I would also like to thank Julie Cayemberg for her excellent research assistance on the entire website project, in particular on the topic of voting rights. Finally, I would also like to thank the brilliant and dedicated student editors of the University of St. Thomas Law Journal for organizing this symposium and working so hard to memorialize the contributions of all its participants in this symposium issue.

1. Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 *DISABILITY STUD. Q.* 61 (2002), <http://www.dsq-sds.org/article/viewFile/345/438>.

2. Lyndon B. Johnson, U.S. President, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650806.asp>.

In the story of the gradual triumph of Professor tenBroek's vision of the integration of people with disabilities in the United States,³ our protagonists spend a good deal of time fighting to differentiate themselves from persons imprisoned for criminal offenses. The most dramatic chapter in this story was opening the doors of the prison-like institutions in which people with disabilities had been incarcerated, a chapter that, sadly, is not yet fully written.⁴ Many of the incremental steps in the process of integrating people with disabilities were achieved on the backs of legal victories for convicted criminals, based on arguments that people with disabilities deserve to be treated *at least as well as* those incarcerated for criminal offenses—with respect to the right to decent living conditions, freedom from torture, freedom from unwarranted restraints, and the right to treatment or habilitation.⁵

The association of convicted felons with persons who have cognitive disabilities is most blatantly and persistently fixed, however, in connection with the right to vote. The U.S. Constitution affords neither group any protection against disenfranchisement. Furthermore, the Federal Voting Rights Act specifically permits states to deny the right to vote to people for only two reasons: “by reason of criminal conviction or mental incapacity.” The majority of the states exercise that power by disenfranchising both categories of people.⁶ Analysis of the legitimacy of the disenfranchisement of felons is a complex issue, raising significantly different historical, statutory, and policy issues than those at stake in the disenfranchisement of people with cognitive disabilities.⁷ This Article will not address the legitimacy of disenfranchisement of convicted criminals. Instead, this Article will focus on the disenfranchisement of persons with cognitive disabilities and the entrenched presumptions that justify the general conflation of people with cognitive disabilities and convicted felons as the only two groups of adult citizens denied the right to vote.

3. Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. (forthcoming 2016).

4. At the time of the writing of this Article, the State of Minnesota and Minnesota's Department of Human Services are working under the oversight of a court-appointed monitor to implement a settlement reached in 2011 with people in a residential program for persons with developmental disabilities, addressing allegations of unwarranted use of restraints and other unjustified aversive practices in state-run facilities. See *Jensen v. MN Dept. of Human Services*, DISABILITYJUSTICE.ORG, <http://disabilityjustice.org/jensen-case/> (last visited June 21, 2016).

5. See *infra*, notes 125–39 and accompanying text.

6. The disenfranchisement of people with cognitive disabilities is described *infra*, notes 13–72 and accompanying text. For a survey of felony disenfranchisement laws, see The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, <http://pantheon.hrw.org/legacy/reports98/votel/>.

7. For an introduction to the issues raised by felon disenfranchisement, see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).

This Article will explore the question of whether denying the right to vote to persons with cognitive impairments is justified. Should the right to vote be added to Professor Bagenstos's list of issues coming to the fore in disability law and policy that might best be addressed by employing tenBroek's abolitionist understanding of equal protection?⁸ Understanding the Equal Protection Clause as "an integral part of the doctrines of the social compact and natural rights [entitled to protection] by government"⁹ might provide an argument for amending the Voting Rights Act. It might also support subsequent actions of Congress that would likely be necessary to "make up a state's deficiency and give protection" in situations where "persons are not protected in their natural rights at all, or are not as well protected as others, or if citizens are not protected in their privileges and immunities."¹⁰

In Part I of this Article, I will describe the legal basis for the disenfranchisement of persons with cognitive impairments in the United States under which a majority of states retain such restrictions. I will then discuss the area in which there is currently the most movement, namely, challenging state laws that establish guardianship as a proxy for mental incapacity justifying disenfranchisement. Developments in this area appear to be approaching a consensus that laws categorically disenfranchising those with cognitive impairments, without considering the individual's ability to comprehend the nature and act of voting, are neither constitutionally defensible, nor compatible with evolving trends toward empowering people with cognitive disabilities to the extent feasible. At the same time, though, this emerging consensus is not fueling any widespread movement toward amending state constitutions or laws to remove legal impediments to voting. Indeed, informal barriers to voting, often taking the form of private actions that effectively disenfranchise people with cognitive disabilities, persist. This ambivalence about voting rights for people with cognitive disabilities raises the underlying question of whether mental incapacity is, in fact, a valid reason to deny a person the vote, regardless of the level of impairment.

In addressing that question, Part II will explore the rationales for denying that right to a person with a cognitive disability, demonstrating that they do not, in fact, hold up to careful scrutiny. I will argue that the history of the conflation of the rights of people with disabilities with the rights of convicted felons reveals longstanding historic biases about people with disabilities. These biases linger in our reflexive acceptance of largely unsound arguments for denying the vote to people with cognitive disabilities. Other countries, such as Canada, Italy, Ireland, Israel, and

8. Bagenstos, *supra* note 3, at 9.

9. JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 177 (1951).

10. *Id.* at 204–05.

Sweden, impose no mental incapacity requirements on the right to vote. Even short of enfranchisement, there are many reforms that could be adopted to eliminate some of the existing barriers to voting by persons with cognitive impairments. I will conclude that it is time to confront our biases directly, and to offer our fellow citizens with cognitive impairments more robust protections to their access to the fundamental power of the vote.

I. THE DISENFRANCHISEMENT OF PEOPLE WITH “MENTAL DEFICIENCIES”

Part I of this Article will describe the current legal landscape of the voting rights of U.S. citizens with cognitive disabilities. Federal law delegates to the states the authority to disenfranchise people with cognitive disabilities. The majority of the states exercise that authority through constitutional provisions and statutes. Those restrictions have begun to be challenged in some states. In some states, the validity of using guardianship as a proxy for lack of mental capacity to vote has been successfully challenged as a violation of the federal constitution. Other states, likely influenced by arguments made in these lawsuits, have repealed or reformed restrictive voting provisions. Despite this emerging consensus among these states, courts, scholars, and organizations such as the American Bar Association, there appears to be little public support for widespread enfranchisement of people with cognitive impairments; indeed, there is growing evidence of informal barriers to voting being imposed on this segment of the population. By describing the current legal landscape, Part I will set the stage for Part II’s exploration of the validity of the underlying rationales for disenfranchising people with cognitive disabilities.

A. *State Authority over Voting Rights under the U.S. Constitution*

The U.S. Constitution provides that the right of a citizen of the U.S. to vote cannot be denied by the federal government or by any state on account of race, color, previous condition of servitude,¹¹ sex,¹² or age, provided the voter is at least 18.¹³ Otherwise, the Constitution gives states the power to set qualifications for voting.¹⁴ However, the right to vote has been recognized by the Supreme Court as a liberty interest protected under the 14th Amendment to the Constitution.¹⁵ Thus, a state may not deprive a citizen of the right to vote without “due process,” or in a way that violates the “equal protection” clause of the 14th Amendment.¹⁶

The federal Voting Rights Act specifically gives states permission to enact laws to deny the right to vote to people for only two reasons: “by

11. U.S. CONST. amend. XV, § 1.

12. U.S. CONST. amend. XIX, § 1.

13. U.S. CONST. amend. XXVI, § 1.

14. U.S. CONST. art. I, § 4.

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

16. U.S. CONST. amend. XIV, § 1.

reason of criminal conviction or mental incapacity.”¹⁷ And, indeed, the majority of states exercise that authority by denying the right to vote to people with mental incapacities in some form.¹⁸

B. *State Restrictions on Voting Rights of People with Mental Incapacities*

Forty states disenfranchise people with mental incapacity, using a wide variety of constitutional and statutory provisions described in the following sections.

1. *Constitutional Disenfranchisement*

According to a recent survey, the only states with “no constitutional disenfranchisement provision for persons with a category of mental impairment or disability” are California, Connecticut, Illinois, Indiana, Maine, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Vermont.¹⁹ The existing disenfranchisement provisions in state constitutions of the other states were typically added in the late 19th and early 20th centuries, around the same time that the people with disabilities (along with the impoverished) were being isolated in large institutions and subjected to eugenic practices and policies.²⁰ Although the poorhouses and asylums into which these populations were segregated have been closed, and constitutional disenfranchisements of the poor have been removed, many states retain the restrictions dealing with mental incapacity, in the offensive and demeaning language of times in which they were enacted. According to one recent survey of these provisions:

[S]even state constitutions deny the right to vote to ‘idiots or insane’ persons. A number of states prohibit voting by those of unsound mind, non compos mentis, or those who are not of ‘quiet and peaceable behavior.’ The constitutions of sixteen states bar those adjudged mentally incompetent or incapacitated from vot-

17. 52 U.S.C. § 20507(a)(3)(B) (2012).

18. For a detailed description of the specific language of the various constitutional and statutory provisions restricting the right to vote for those with cognitive impairments, see 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, 934 (2007); see also Kay Schriener, Lisa Ochs, & Todd Shields, *Democratic Dilemmas: Notes on the ADA & Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKLEY J. EMP. & LAB. L. 437, 439 (2000); see also *Addendum to the 2008 Voting Rights Guide for People with Mental Disabilities*, BAZELON CENTER FOR MENTAL HEALTH LAW AND SCHULTE ROTH & ZABEL LLP (Aug. 30, 2012), <http://www.bazelon.org/LinkClick.aspx?fileticket=SZZfSzi8U0%3d&tabid=543>.

19. Hurme & Appelbaum, *supra* note 18, at 936.

20. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1449–51 (2007).

ing. In addition, four states prohibit persons ‘under guardianship’ from the electorate.²¹

These offensive characterizations of people with cognitive disabilities clearly reflect outmoded attitudes about people with disabilities, and about acceptable language for referring to people with disabilities. Furthermore, these terms are typically not defined, giving rise to litigation to clarify their meaning,²² as well as inconsistent and arbitrary application by untrained election officials and caregivers.²³

2. *Statutory Disenfranchisement*

In addition to state constitutional prohibitions, many state election laws specifically address the right of persons with mental disabilities to vote. Some of these state laws ignore the state constitutional provisions,²⁴ and some are inconsistent with the state constitutions.²⁵ Let us examine two states with confusing state disenfranchisement schemes, both of which were recently subject to judicial review: Maine and Minnesota. The struggles of the judges forced to bring some sort of legal clarity to the inconsistent constitutional, statutory, and practical interpretations being applied in these states illustrates the issues raised in other states with similarly confused schemes.

a. *Maine.*

The Maine Constitution, reflecting the trend of the late 19th century, originally disenfranchised “paupers and persons under guardianship.”²⁶ In 1965, Maine amended its Constitution to prohibit only persons who are “under guardianship for reasons of mental illness” from voting.²⁷ For about twenty years, Maine’s Secretary of State interpreted this to mean that people who were mentally ill, but not under guardianship, could vote; and that people under guardianship for reasons other than mental illness could vote.

21. Ryan Kelley, *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, 372–73 (2010).

22. See *infra* notes 39–72 and accompanying text; see also Hurme & Appelbaum, *supra* note 18, at 940–45.

23. See *infra* notes 83–93 and accompanying text.

24. Hurme and Appelbaum identify North Dakota, Utah, Alaska, and Florida as jurisdictions in which the voting laws “appear to ignore constitutional provisions in their election laws that specifically delineate those who are ineligible to vote.” Hurme & Appelbaum, *supra* note 18, at 937.

25. Hurme and Appelbaum note that “[i]n all but fourteen states, different terminology is used in state election laws and state constitutions to describe persons ineligible to vote because of cognitive impairment.” *Id.* at 936.

26. *Doe v. Rowe*, 156 F. Supp. 2d 35, 39 (D. Me. 2001) (citing Chapter 34 of the Resolves of 1965 at 1065).

27. ME. CONST. art. 2, § 1; 21-A M.R.S.A. § 115(1) (2001), *repealed by* P.L. 2001, ch. 516, § 1 (effective July 5, 2002).

Only people placed under guardianship for “mental illness” by court order were denied the right to vote.²⁸ When this interpretation was challenged as arbitrary, the State modified its interpretation, claiming that the constitutional prohibition applied to everyone under full guardianship for any reason—not just a psychiatric mental illness, but also mental retardation or other unsoundness of mind.²⁹

Adding to the confusion were seemingly contradictory provisions of Maine’s voting and guardianship codes. In 2011, Maine enacted a law that specifically provided that “[a] person with mental retardation or autism may not be denied the right to vote for reasons of mental illness, as provided in the Constitution of Maine, Article II, Section 1, unless under guardianship.”³⁰ Meanwhile, the Maine Probate Code, which directs the court to establish guardianships only “to the extent necessitated by the incapacitated person’s actual mental and adaptive limitations,”³¹ was being interpreted by some probate judges to grant limited guardianships to people with mental illness, specifically preserving the right to vote.³² Other probate judges were deciding that the Constitution prohibited them from granting the right to vote when the guardianship was the result of a mental illness.³³

The Maine law thus illustrates one typical situation: language in a state constitution or voting law raising issues that would seem to adversely impact the voting rights of people with developmental disabilities, and practices in guardianship proceedings that are inconsistent with the constitutional provisions.³⁴

b. Minnesota.

Minnesota’s Constitution disenfranchises people convicted of treason or felonies, people under guardianship, and people who are insane or not mentally competent.³⁵ Minnesota’s voting law³⁶ and guardianship laws,³⁷ on the other hand, both specifically say that people under guardianship retain the right to vote unless under a guardianship in which the court order revokes the ward’s right to vote. So, there would seem to be a direct conflict between Minnesota’s *constitutional* provision that people under guardianship cannot vote, and Minnesota *statutes* that say people under

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

29. *Id.* at 45–46.

30. 34-B M.R.S.A. § 57-5605(5) (2011).

31. 18-A M.R.S.A. § 5-304(a) (2010).

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

33. *Id.*

34. Hurme and Appelbaum identify many states in which similar developments in guardianship practices can raise conflicts with constitutional or statutory disenfranchisements statutes. *See supra* note 18, at 950–56.

35. MINN. CONST. art. VII, § 1.

36. Minn. Stat. § 201.014, Subd. 2(b) (2005).

37. Minn. Stat. §§ 524.5-310, 524.5-120(14) (2010).

guardianship retain the right to vote, unless the guardianship order takes it away.

The Minnesota law thus illustrates yet another typical situation: language in a state constitution that would seem to adversely impact the voting rights of people with developmental disabilities, and language in state laws that is inconsistent with the state's constitution.³⁸

C. *Contradictory Interpretations of the Constitutionality of State Disenfranchisement Provisions*

Both the Maine and the Minnesota disenfranchisement provisions have been challenged recently for violating the U.S. Constitution.³⁹ While the results of these challenges have, in all cases, been to expand the right to vote for some people with cognitive impairments, the reasoning has been wildly inconsistent, raising many questions about the continued viability of similar restrictions in other states with similar patterns of inconsistent constitutional and statutory disenfranchisement provisions and practices. A close look at how the different ways in which these courts responded to challenges to state laws and practices based on the Due Process Clause and the Equal Protection Clause of the U.S. Constitution illuminates how ten-Broek's expansive understanding of equal protection is implicated by these state laws.

1. *Maine: Doe v. Rowe*⁴⁰

In 2001, a federal district court judge held that Maine's disenfranchisement laws violated both the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.⁴¹ The Court held that, because voting is a "fundamental liberty," the Due Process Clause requires that the process a state uses to take it away from someone has to follow basic procedural protections that ensure "fundamental fairness."⁴² When a court reviews such procedures, it must weigh the competing interests of the State and the individual losing the right to vote, and strike a balance that will minimize the State's risk of erroneously disenfranchising people who have the capacity to vote.⁴³ The Court found that Maine's guardianship procedures vio-

38. Hurme & Appelbaum identify this pattern in the following additional states: Nevada, Kentucky, New Mexico, and West Virginia. *Supra* note 18, at 937–38.

39. *See, e.g., Doe*, 156 F. Supp. 2d at 35; *see also* Minnesota Voters Alliance v. Ritchie, 890 F. Supp. 2d 1106 (2012); *see also* In re Guardianship of Brian W. Erickson, No. 27-GC-PR-09-57 (Minn. Dist. Ct. Oct. 4, 2012), http://www.mncourts.gov/Documents/4/Public/Court_Administration/Orders/Erickson_Brian_WStanding_Order_re_Right_To_Vote_in_Guardianship_Cases.pdf.

40. *Doe*, 156 F. Supp. 2d at 35.

41. *Id.* at 51–52. The Court also held that these laws violated ADA & Section 504 of Rehabilitation Act. *Id.* at 58–59.

42. *Id.* at 48 (citing *Lassiter*, 452 U.S. at 24).

43. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under the Constitution, when a court reviews a state's procedures for such a disenfranchisement, it must weigh the following

lated due process because the wards did not require any advance notice that a guardianship could lead to loss of the right to vote. This led to an inadequate opportunity to be heard, with a high risk of people being deprived of a fundamental right. Providing specific notice as part of guardianship would not be overly burdensome to the State.⁴⁴

The Court also found that these provisions violated the Constitution's Equal Protection Clause. Because a restriction on voting restricts a fundamental right, the Court held that the laws a state passes to restrict that right are subject to careful scrutiny; they have to: (1) promote a compelling state interest, and (2) be written in a way that only promotes that interest and is not overbroad.⁴⁵ The Court accepted that the State had a compelling interest: 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."⁴⁶ But, the Court held that the provision was not narrowly enough tailored so as to promote only that interest.⁴⁷ The phrase "under guardianship for mental illness" was not a permissible surrogate for "mental incapacity to vote."⁴⁸ Maine defines those excluded as being limited to those under guardianship for "traditional psychiatric disorders", "while permitting incapacitated persons diagnosed with mental retardation or senility to vote as they choose."⁴⁹ But plenty of people with traditional psychiatric disorders, such as the plaintiffs in *Doe v. Rowe* (who were diagnosed with bipolar disorder) can understand the nature and effect of voting. Conversely, many people permitted to vote under this standard (those with mental retardation or senility) might not understand the nature and effect of voting. The Court wrote: "In short, the State has disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity. Such state action cannot survive strict scrutiny because there is no factually valid correlation between the ends and the means."⁵⁰

factors: the person's interest in participating in the democratic process through voting; the risk of erroneous deprivation of the right to vote under the procedures the state uses; and the state's interest, including any extra administrative or financial burden on the state from requiring additional procedures. *Mathews*, 424 U.S. at 335.

44. *Doe*, 156 F. Supp. 2d at 49.

45. *Id.* at 51.

46. *Id.*

47. *Id.* at 56.

48. *Id.* at 55.

49. *Id.* at 52.

50. *Doe*, 156 F. Supp. 2d at 52.

2. *Minnesota: Minnesota Voters Alliance v. Ritchie*⁵¹ and *In re Guardianship of Brian W. Erickson*⁵²

In 2012, two challenges in Minnesota state and federal courts resulted in the enfranchisement of the citizens bringing the claims, but under different reasoning.

In *Minnesota Voters Alliance v. Ritchie*, United States District Court Judge Donovan Frank held that the Minnesota Constitution and the state statutes could be interpreted together consistently in a way that did not violate due process.⁵³ Though the Constitution's plain language prohibits individuals "under guardianship" from voting, it does not define "person under guardianship."⁵⁴ Thus, the Minnesota Supreme Court has held that the regulation of guardianship is left to the state legislature.⁵⁵ Minnesota's state guardianship laws do not categorically deny the right to vote for those under guardianship. "[N]otwithstanding the state constitution's apparent categorical ban on the rights of persons 'under guardianship' to vote, under Minnesota law 'persons under guardianship are presumed to retain the right to vote unless otherwise ordered by a court. . . . Thus, the constitutional prohibition against voting based on guardianship status applies only when there has been an individualized judicial finding of incapacity to vote.'"⁵⁶

The Court carefully examined the procedures for guardianship in Minnesota, noting the notice required in petitioning for guardianship and the proposed wards' right to be represented by counsel and right to appointed counsel if none is otherwise provided.⁵⁷ Minnesota voting statutes also require the Statewide Voter Registration System to be updated when guardianship of a ward previously registered to vote is lifted or removed. Thus, in contrast to the situation in Maine, the Minnesota court found that the procedures for disenfranchising voters did not violate the Due Process Clause.⁵⁸

In *In re Guardianship of Brian W. Erickson*, Probate Judge Jay M. Quam was faced with a petition by the guardian of a person who was placed under guardianship due to a diagnosis of schizophrenia.⁵⁹ The guardian asked the court for a declarative judgment about whether people under guardianship retained the right to vote, unless it was specifically denied in the guardianship order.⁶⁰ The judge discussed the inconsistency between the Minnesota Constitution, which specifically says people under guardian-

51. *Minnesota Voters Alliance*, 890 F. Supp. 2d at 1106.

52. *In re Guardianship of Brian W. Erickson*, *supra* note 39.

53. *Minnesota Voters Alliance*, 890 F. Supp. 2d at 1117.

54. *Id.* at 1115.

55. *Id.* (citing *State of MN ex re. Pearson v. Probate Court of Ramsey Cnty.*, 205 Minn. 545, 287 N.W. 297, 299 (1939)).

56. *Id.* at 1117 (citing Minn. Stat. § 201.014, Subd. 2(b); Minn. Stat. §§ 524.5–313(c)(8)).

57. *Id.* at 1118.

58. *Id.*

59. *In re Guardianship of Brian W. Erickson*, *supra* note 39, at 3.

60. *Id.* at 2.

ship do not have the right to vote, and the Minnesota statutes, which say that persons under guardianship have the right to vote unless it is specifically taken away by the court in the guardianship order.⁶¹ Contrary to Judge Frank, Judge Quam did not think that it was so clear that the Minnesota Constitution delegated to the legislature the power to decide who under guardianship could vote, and who could not vote.⁶² Instead, he determined that this provision in Minnesota's Constitution violated the federal Constitution.⁶³

He reasoned that since voting is a fundamental right under both federal and state constitutions, restrictions to it are subject to strict scrutiny.⁶⁴ Citing *Doe v. Rowe*, he held that Minnesota's constitutional provision denying all under guardianship the right to vote violated the Equal Protection Clause:

Just as the *Rowe* court found that Maine's 'mental illness' category could not serve as a synonym for voting incapacity, neither can Minnesota's 'under guardianship' category. There are simply too many people under guardianship who are fully capable of exercising sound electoral judgment for the Court to conclude that the Minnesota Constitution can categorically disenfranchise those under guardianship as uniformly lacking the capacity to vote. Indeed, the Minnesota Legislature seems to recognize this fact by virtue of the current statutes which ensure that those subject to guardianships retain the right to vote unless a court takes that right away. Thus, just as in *Rowe*, the language in Article VII is not narrowly tailored to the degree necessary to pass federal constitutional muster.⁶⁵

He also found that it violated the Due Process Clause, because:

[T]here is no uniform notice provided to proposed wards in Minnesota that their capacity to vote will be evaluated and their right to vote may be taken away if they are placed under guardianship. Moreover, the Court is not aware of any common practice among petitioners of providing such notice to proposed wards, even on a voluntary basis. This lack of notice that such a fundamental right will be analyzed—and may be taken away by the Court—is unquestionably a violation of Due Process.⁶⁶

61. *Id.* at 5–6.

62. Judge Quam rejected the argument based on *Pearson*, on which Judge Frank had relied, because it dealt with sex offenders, not voting; he argued that the legislature cannot amend the Constitution by statute; and rejected the argument that the MN Constitution is intended only to disenfranchise persons under guardianship who are *also* incompetent (that would render portions of the Constitution superfluous—bans both those under guardianship and persons not mentally competent from voting). *Id.* at 8–9.

63. *Id.* at 19–20.

64. *Id.* at 14.

65. In re Guardianship of Brian W. Erickson, *supra* note 39, at 20.

66. *Id.*

In a footnote, Judge Quam disagreed with *Rowe*'s suggestion that probate court should only evaluate voting capacity if a petitioner raises the issue: "As much as the Court respects the judgment of petitioners who come into court, the Court believes that it has an independent obligation to assess the voting capacity of each ward. It owes the general electorate at least that much."⁶⁷

Judge Quam announced that henceforth, in Hennepin County Probate Court, proposed wards in all guardianship proceedings would have the right to be specifically informed that a ward's capacity to vote will be analyzed by the Court and that the right to vote may be taken away.⁶⁸ Furthermore, probate judges would specifically inquire at each guardianship proceeding into a proposed ward's capacity to vote and make an individual determination of whether the ward's right to vote would be taken away.⁶⁹ With respect to persons presently under guardianship, they would retain their right to vote unless it is specifically taken away.⁷⁰ In that particular case, testimony from a guardian was held to demonstrate that the ward *did* have sufficient capacity and understanding to make an informed and intelligent vote, and he thus retained the right to vote.⁷¹ Judge Quam concluded:

At least as it pertains to those under guardianship, Article VII of the Minnesota Constitution is a vestige of a bygone era. That era was one that did not recognize the many talents & capabilities of those under guardianship, including the ability of many to properly exercise the fundamental right to vote. Rather than leaving that vestige intact and with illusory vitality, it is best to declare its day done. Accordingly, this Court declares Article VII of the Minnesota Constitution unconstitutional insofar as it categorically restricts those under guardianship from voting.⁷²

The current landscape of state laws disenfranchising people with cognitive disabilities thus reveals a confusing array of constitutional provisions (sometimes retaining language that is unacceptably offensive under contemporary standards of respect for the dignity of persons with cognitive disabilities), often contradictory statutes governing voting rights and guardianship procedures, and practices in administering those statutes that are often inconsistent with both the constitutional and the statutory mandates. Courts that have been asked to make sense of this confusion have taken widely differing approaches to applying the Equal Protection and Due Process clauses of the U.S. Constitution to reach the same substantive result: upholding a state's right to disenfranchise persons who lack the ability to

67. *Id.* at 22 n.5.

68. *Id.* at 25.

69. *Id.*

70. *Id.* at 22.

71. *In re Guardianship of Brian W. Erickson*, *supra* note 39, at 23–24.

72. *Id.* at 24.

comprehend the nature and act of voting, but requiring a procedurally-protected and individualized determination of each person's ability before imposing such a disenfranchisement. In the next section, we will examine what appear to be the limits to this growing unease with blanket disenfranchisement of all persons with cognitive disabilities.

D. The Limits of the Current Discourse on Protecting the Right to Vote of the Cognitively Impaired

This section will examine the nature of the emerging consensus with respect to blanket disenfranchisement of all persons with cognitive disabilities, as well as the limits to this consensus: (1) continued resistance to changing offensive constitutional language or revising statutes; and (2) informal practices in which private parties, rather than the state, effectively disenfranchise persons with cognitive disabilities.

1. The Emerging Consensus: Individualized Determinations of Capacity to Vote are Required

The struggle of the Maine and Minnesota courts to find workarounds to outdated constitutional language described in the previous section signals an essential fundamental unease with the bald-faced disenfranchisement that people with cognitive impairments found in many state constitutions and statutes. In 2007, the state of New Jersey passed a referendum eliminating its constitutional restriction on voting by an "idiot or insane person."⁷³ Idaho's constitutional provision barring an "idiot or insane person" from voting was changed in 1982 to apply only to persons "under guardianship"; in 1998, this disenfranchisement provision was eliminated entirely.⁷⁴ Case law in other states has accomplished similar results,⁷⁵ and jurisdictions such as Washington, Wisconsin, Delaware, and Iowa have enacted laws "adopting more individualized functional assessments rather than categorical definitions of capacity."⁷⁶ Many of these changes have flowed from the revolution in guardianship laws since the 1990s, based on the recognition that "mental capacity is not an all or nothing, black or white categorization."⁷⁷ A growing number of states now require specific determinations of which rights a ward can retain under guardianship, including the right to vote.⁷⁸

73. Kelley, *supra* note 21, at 377 n.133.

74. Hurme & Appelbaum, *supra* note 18, at 936 n.28.

75. See, e.g., *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 806 (8th Cir. 2007) (signaling its approval of an analysis of Missouri law similar to that in *Doe v. Rowe*, but denying the standing of the Missouri Protection and Advocacy Services to bring the case).

76. Kelley, *supra* note 21, at 380 (citing Del. Code Ann. tit. 15 § 1701; Iowa Code § 633.556; Wash. Rev. Code § 11.88.010(5), Wis. Stat. § 54.25(2)(c)1.g).

77. Hurme & Appelbaum, *supra* note 18, at 932.

78. *Id.* at 951–56.

These questions are garnering increased attention with the aging of the population and growing numbers of people with cognitive impairments due to dementia. As one scholar has noted, “Voting rates are highest among persons aged 65 to 74 years, and age is the chief risk factor for dementia. Estimates suggest that by 2050, there will be about 15 million persons with dementia in the United States.”⁷⁹ In 2007, the American Bar Association used the occasion of a symposium on “Facilitating Voting as People Age: Implications of Cognitive Impairment” to release a set of recommendations that seem to capture the emerging consensus:

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

- (1) The exclusion is based on a determination by a court of competent jurisdiction;
- (2) Appropriate due process protections have been afforded;
- (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- (4) The findings are established by clear and convincing evidence.⁸⁰

These changes in state constitutions, voting laws, and guardianship laws and procedures appear to reflect the growing awareness of the reality that cognitive impairment is not a condition exclusive to the previously-segregated populations of state institutions, but is instead a condition that awaits a growing number of us, with the aging of the population.

2. *Continued Obstacles to Implementing that Emerging Consensus*

Despite this apparent emergence of scholarly and judicial sensitivity to the injustice of blanket disenfranchisement due to cognitive disabilities, significant obstacles remain to the widespread enfranchisement: continued public resistance to changing constitutions and laws and informal gate-keeping practices by private individuals with control over the lives of people with cognitive disabilities.

(a) *Public Resistance to Changing Constitutions and Laws*

There has been little progress in eliminating clearly outdated and offensive language from state constitutions in order to conform to modern

79. Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. AM. MED. ASS'N. 1345, 1345 (2004).

80. American Bar Association Recommendation and Report, from *Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment* (Aug. 13, 2007), http://www.abanet.org/aging/docs/Voting_Rec_FINAL_approved.doc.

sensibilities. In both 1997 and 2000, the citizens of Maine rejected referendums to remove from its Constitution the language disenfranchising persons under guardianship for mental illness that was found unconstitutional in *Doe v. Rowe*.⁸¹ The lack of any movement towards repealing such patently offensive language from state constitutions is notable, given our culture's persistent efforts to address similar language affecting other minority groups such as African-Americans or the LGBTQ community. Scholars have noted the general lack of public support for repealing disenfranchising laws.⁸² This does not appear to be an issue that has galvanized enough political support to make it worth the attention of any candidates running for public office—perhaps because, by definition, the affected parties are not able to reward these candidates with their vote.

(b) *Informal Gate-keeping at Other Points in the Voting Process*

Even if legal reform is effective, many of the voting barriers facing people with cognitive impairments occur through informal, and often private, actions that are taken without any regard to legal standards. One study observes:

There are several points in the path to casting a ballot at which one of these disqualification provisions might disenfranchise an individual. First, registration forms may ask for information—such as whether an individual is under guardianship—that then leads to the application being rejected. Second, when a person attempts to register or to vote, a voting official might doubt his capacity and refuse to supply a registration form or a ballot. Third, staff at long-term care facilities or family caregivers may serve as gatekeepers, deciding whether to inform individuals of their right to vote and whether and how to assist them in registering or voting. Such gatekeepers might systematically assume that some or all persons with dementia lack the capacity to vote based on legal status, stereotypical judgments, or family preferences. Alternatively, these persons might assume that everyone who expresses a desire to vote is competent to do so.⁸³

Informal gate-keeping of the type described above is much more difficult to address than the more blatant disenfranchisement displayed in state constitutions and laws and is thus perhaps an even more significant obstacle than even the most offensive constitutional provision. It is, of course, impossible to identify the extent to which such gate-keeping is conducted by family caregivers who make assumptions about voting desires or capacities.

81. *Doe*, 156 F. Supp. 2d at 38 n.3.

82. Schriener, *supra* note 1.

83. Karlawish et al., *supra* note 79, at 1346; see also Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 922 (2007).

It is equally difficult to quantify the amount of such gatekeeping taking place by voting officials, or by caregivers in institutional settings.

However, a few recent studies offer some insight. In 2003, one survey was conducted of support personnel for people with cognitive disabilities, asking a series of questions such as:

how many of the clients expressed an interest in voting; how often their parents or guardians requested that voting skills should be taught; how many of their clients were registered to vote; how many of their clients had voting included in their service plans; how often respondents provided voting instruction to their clients; whether clients were ever shown polling places; and whether the respondent was aware that his/her state had a disenfranchisement provision?⁸⁴

The findings suggested that very few clients had expressed an interest in voting, had voting included in their service plans, or had been provided any instruction in voting.⁸⁵ A couple of studies have also been done of long-term care facilities in Pennsylvania and Virginia that revealed some screening for capacity to vote resulting in determinations about which residents should be permitted to vote or should be provided assistance in voting.⁸⁶

Perhaps the strongest proof that informal screening of this type is being conducted in long-term care facilities lies in the growing scholarly attention to the appropriate mechanisms for conducting such screening for aging residents with dementia.⁸⁷ Indeed, an instrument for such screening has been developed, known as the “Competence Assessment Tool for Voting” (CAT-V).⁸⁸ It sets the stage for a series of questions with the following script:

I’m going to ask you some questions about elections. This should take about five minutes. If you don’t understand something I say or ask, please tell me and I will repeat it. Some of the questions may seem very simple to you, but don’t worry about that. We are just looking for straightforward answers. Do you have any questions before we begin?⁸⁹

84. Martin Agran & Carolyn Hughes, “*You Can’t Vote—You’re Mentally Incompetent*”: *Denying Democracy to People with Severe Disabilities*, 38 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 58, 59 (2013).

85. *Id.* at 60.

86. Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CANADIAN J. OF ELDER LAW 29, 39 (2008) (citing Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL’Y 65 (2008); Richard Bonnie & Colleagues, *How Does Voting Occur in Long-Term Care*, Interview Script and Responses (Spring 2005) (unpublished manuscript, on file with the author)).

87. *See, e.g.*, Symposium, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, *supra* note 80, at 851.

88. Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, *The Capacity to Vote of Persons With Alzheimer’s Disease*, 162 AM. J. PSYCHIATRY 2094, 2099 (2005).

89. *Id.*

The following question tests understanding of the nature of voting:

Imagine that two candidates are running for Governor of [subject's state], and that today is Election Day in [subject's state]. What will the people of [subject's state] do today to pick the next Governor?" [Note to interviewer: If subject describes how he/she or people in general would choose between the two choices for governor (i.e., watch TV ads, listen to their campaign issues, etc.), ask: "Well that's how you might decide who you think should be governor. But how would you actually indicate your choice?"⁹⁰

The following question tests understanding of the effect of voting: When the election for governor is over, how will it be decided who the winner is?⁹¹ To assess the subject's ability to choose among the candidates, the subject receives a card with the following information in large print:

Let me ask you to imagine the following about the two candidates who are running. Candidate A thinks the state should be doing more to provide health insurance to people who don't have it, and should be spending more money on schools. He is willing to raise taxes to get the money to do these things. Candidate B says the government should not provide health insurance but should make it easier for employers to offer it. He believes that the schools have enough money already but need tighter controls to make sure they use it properly. He is against raising taxes.⁹²

The subject is then asked: Based on what I just told you, which candidate do you think you are more likely to vote for: A or B?⁹³

Thus, informal gatekeeping mechanisms administered by voting officials and caretakers, family or otherwise, are clearly being used to determine whether some voters with cognitive impairments should be allowed to vote. These mechanisms pose significant obstacles to voting by persons with cognitive impairments. These obstacles are more difficult to identify and address than the more obvious obstacles of disenfranchisement laws. The growing legal and scholarly consensus about the need to conduct an individualized assessment of a person's capacity to understand the act of voting is meaningless if the assessments are conducted by people who are not aware of the need to conduct such assessments or the appropriate standards for doing so.

3. *Evidence of Lack of Social Consensus on Enfranchising People with Cognitive Disabilities*

The lack of movement on changing disenfranchisement laws to reflect the growing recognition of the need to do individualized assessments of the

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

voting capabilities of a person with cognitive impairments evidences a lack of a widespread social consensus about the enfranchisement of people with cognitive disabilities. Indeed, the widespread practice of, and growing attention to establish standards for, informal gate-keeping mechanisms reflects a general support for such disenfranchisement. Let us now turn to a closer look at the arguments that support the continued disenfranchisement of persons with cognitive impairments.

II. PROBING BELOW THE SURFACE: IS MENTAL INCAPACITY A VALID REASON FOR DISENFRANCHISEMENT?

The current state of the disenfranchisement of voters with cognitive impairments thus reveals a general acceptance of the presumption expressed in the Voting Rights Act—that mental incapacity is a legitimate reason to denying a person the right to vote at all. This presumption underlies the emerging consensus on the path to reforming unconstitutionally arbitrary state constitutional and statutory disenfranchisement schemes by limiting the voting restriction to cases where some determination has been made that a person’s developmental disability disqualifies her from exercising the right to vote. It underlies our acceptance of the growing practice of informal administration of cognitive screens for voting in institutions such as long-term care facilities.

But is this fundamental presumption justified? Why should mental incapacity—even if established by a probate judge in a guardianship hearing—cause a person to lose the right to vote? Why is voting so categorically different from other fundamental rights that have been found to inhere to people with cognitive disabilities, such as the right to a free and appropriate public education, the right to live in the community, or the right to get a job?⁹⁴ Why do we have no statutory scheme to provide more support for the person with a cognitive disability to understand the act of voting, rather than barring them from voting? Let us now consider the rationales for disenfranchising people with cognitive impairments—historic and contemporary—and assess their strength as responses to the foregoing questions.

A. *Rationales for Disenfranchising Persons with Cognitive Impairments*

Most of the laws disenfranchising people with cognitive impairments were enacted in the late 19th and early 20th centuries, based on rationales that we would largely find unacceptable today. These laws are largely retained, though based on more contemporary rationales. In this section of the Article, I will briefly examine the now-discredited rationales for enactment of the original disenfranchisement laws. Then, I will analyze the contempo-

94. Bagenstos, *supra* note 3, at n.8–31 and accompanying text.

rary rationales for retaining these disenfranchisement laws: (1) preserving the political community, (2) ensuring an intelligent electorate, and (3) preventing voter fraud. I will offer a critical analysis of all three of these rationales, concluding that their assertion may mask the persistence of historic rationales for disenfranchising persons with cognitive impairments.

1. Historical Rationales for Disenfranchising Persons with Cognitive Impairments

Legal scholar Jennifer Bindel has identified three broad categories of rationales for the enactment of the original disenfranchisements statutes. The first is the assumption that a person with diminished mental capacity had no intellect and was thus disqualified from participation in civic society.⁹⁵ Rationality was held to be a prerequisite to giving consent to the formation of the social contract underlying the selection of elected representatives in a democratic government. The interests of this population would be adequately protected by the paternalistic benevolence of rational voters.⁹⁶

The second rationale was based on Social Darwinist theory. Bindel explains:

Prohibiting persons with diminished capacities from voting was one way to shield society from the negative consequences Social Darwinists theorized would follow from allowing this population to participate fully in society. By keeping persons with diminished mental capacities from voting, legislators both protected society from the results of their decisions and symbolically excluded them from the civic body of America.⁹⁷

The third rationale identified by Bindel is more practical—namely, the protection of the electoral advantage of the inhabitants of the localities where large insane asylums and institutions were being built as segregated housing for persons with mental illness and developmental disabilities.⁹⁸ Bindel notes that large concentrations of residents of such institutions might have been able to control the outcome of local elections, motivating the enactment of disenfranchisement laws for persons with diminished capacities.⁹⁹

95. 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, 103 (2009).

96. *Id.*

97. *Id.* at 105.

98. *Id.* at 106.

99. Bindel notes a more recent indication of the same impulse when twenty-five mentally challenged persons' voter registration forms were rejected by Ohio election workers when the upcoming local election involved a bond issue for a new mental retardation facility and workshop that had failed by only four or five votes in the previous election. *Id.* (citing Barbara Armstrong, *The Mentally Disabled and the Right to Vote*, 27 HOSP. & COMMUNITY PSYCHIATRY 577, 580 (1976)).

Legal scholar Nicholas Brescia identifies three derivative versions of the historical arguments described above that are often used to support the continued disenfranchisement of persons with cognitive impairments:

- (1) their disability prevents them from being full participatory members of society;
- (2) they lack the mental capacity to participate in politics; and
- (3) their interests are vicariously represented by other individuals and groups acting in their best interests.¹⁰⁰

He argues persuasively, however, that “each of these arguments resembles similar judgments women’s suffrage activists had to overcome.”¹⁰¹ Indeed, none of these rationales can survive the widespread ascendance of tenBroek’s principal of integrationism described by Professor Bagenstos.¹⁰² So what does sustain the disenfranchisement laws that survive?

2. *Contemporary Rationales for Disenfranchising Persons with Cognitive Impairments*

Three contemporary rationales for disenfranchising persons with cognitive disabilities that have been asserted are (1) preserving the political community, (2) ensuring an intelligent electorate, and (3) preventing voter fraud. This section will first examine the Supreme Court’s assessment of the validity of those arguments generally and will then consider more critical scholarly assessment of the validity of those arguments in the context of the disenfranchisement of people with cognitive disabilities.

(a) *The Supreme Court’s Assessment of Articulated Rationales for Disenfranchising Persons with Cognitive Impairments in Other Contexts*

Three rationales asserted for disenfranchisement of persons with cognitive impairments have been considered by the Supreme Court in other contexts. The rationales were accepted, to varying degrees, as compelling enough state interests to withstand heightened scrutiny.¹⁰³ The first rationale is the need to preserve the political community, by distinguishing voters who intend to express some preference and affect the results of an

100. Nicholas F. Brescia, Comment, *Modernizing State Voting Laws that Disenfranchise the Mentally Disabled with the Aid of Past Suffrage Movements*, 54 ST. LOUIS U. L.J. 943, 956–57 (2010).

101. *Id.* at 957.

102. Professor tenBroek distinguished between the historical attitude toward people with disabilities, custodialism (“in which the goal was to protect and maintain people with disabilities as essentially wards of the state”) and the more modern principle of “integrationism” (“in which the goal was to provide people with disabilities the support to enable them to participate fully in the life of the community”). Bagenstos, *supra* note 3, at 2; *see also id.* at notes 8–31 and accompanying text.

103. *See generally* Karlan, *supra* note 83, at 923–25; *Mathews*, 424 U.S. at 319.

election from those who do not understand the nature of the act of voting.¹⁰⁴ The second is preventing voter fraud by ensuring that others do not use a cognitively impaired person's vote for their own preferences.¹⁰⁵ The third is ensuring an intelligent electorate.¹⁰⁶

Legal scholar Pamela Karlan understands the first two reasons as related aspects of a state's power "to preserve the basic conception of a political community"—one conceptual, and one practical.¹⁰⁷ She writes, "As a matter of democratic theory, courts might discern a difference between voters who intend to express some preference—however that preference is derived—and voters who have no conscious intention of expressing a preference designed to affect electoral outcomes."¹⁰⁸ Preventing voter fraud, on the other hand, is recognition of the practical reality that "including within the electorate individuals who do not understand the nature of voting creates a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals' ballots."¹⁰⁹ Both of these interests have been upheld by the Supreme Court as compelling government interests, justifying disenfranchisement in some circumstances.¹¹⁰

The third interest—that of ensuring an intelligent electorate—has been met with more skepticism. Karlan notes:

[A]lthough the Supreme Court once suggested that fairly administered literacy tests might be constitutional because they "promote intelligent use of the ballot, that decision antedated the application of heightened scrutiny to restrictions on the franchise. The Court has both subsequently upheld federal statutes barring such prerequisites and, applying heightened scrutiny, rejected a jurisdiction's claim that it could limit participation in school board elections to a subgroup of the citizenry that was more likely to 'understand the whys and wherefores of the detailed operations of the school system' in light of' the ever increasing complexity of the many interacting phases of the school system and structure." Thus, the mere fact that some citizens labor under cognitive impairments that preclude them from casting their ballots in optimally intelligent ways cannot by itself justify disenfranchisement. Regardless of our republican aspirations about citizens engaging in public decision-making, we have recognized since the time of the Federalist Papers that voters will often behave selfishly, prejudicially, and irrationally. The fact that voters who are cognitively impaired may not process information in a sophisticated or en-

104. Karlan, *supra* note 83, at 924.

105. *Id.*

106. *Id.*

107. *Id.* at 925.

108. *Id.*

109. *Id.*

110. *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

tirely rational manner may separate them only in degree-if even that-from the remainder of the electorate.¹¹¹

(b) *Assessing the Validity of the Articulated Rationales*

Since disenfranchisement is such a serious deprivation of a citizen's rights, scholars have been critically examining the rationales described above in the context of disenfranchisement of persons with cognitive disabilities. This subsection will examine the critiques of each of these rationales in turn.

(i) *Preserving political community*

Some of the anxiety about preserving the political community is arguably a version of the historical concerns about preserving the electoral advantage of a community against voting by large blocks of voters with interests that diverge from those of the general population. As a practical matter, Professor of Psychiatry Paul Appelbaum notes that this should not be a significant concern in light of the closing of large institutions and integration of people with disabilities throughout the community.¹¹² Further, some studies have suggested that extending the right to vote to people with cognitive disabilities is unlikely to have a significant impact on the outcome of most elections.¹¹³ Appelbaum describes the results of these studies as follows:

When patients at a New York state hospital in the early days of deinstitutionalization were asked to cast mock ballots for a mayoral contest on election day, the results closely resembled the outcome in the district surrounding the hospital. A larger-scale study from three Maryland state hospitals in a presidential election year similarly showed that patients' choices mapped those made in the state's urban areas, from which most of the patient population was drawn. Thus it seems unlikely that extending the franchise more broadly to persons with mental disabilities would alter the outcome of many elections.¹¹⁴

In an article jointly written with legal scholar Sally Hurme, Appelbaum adds that, conceptually, it is difficult to identify the harm from incompetent voting:

Should an incompetent individual be allowed to cast a ballot by virtue of an unduly lax standard, the harm to that person is mini-

111. Karlan, *supra* note 83, at 924–25 (citations omitted); see *Dunn*, 405 U.S. at 356.

112. Paul S. Appelbaum, "I Vote. I Count": *Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVICES 849, 850 (2000).

113. *Id.*

114. *Id.* (citing Morris M. Klein & Saul A. Grossman, *Voting Pattern of Mental Patients in a Community State Hospital*, 3 COMMUNITY MENTAL HEALTH J. 149 (1967); Alfred M. Wellner & Lawrence S. Gaines, *Patients' Right to Vote*, 21 PSYCHIATRIC SERVS., 163 (1970)).

mal and indirect. If the person's choice is different than what he or she would competently have chosen there might be said to be an intangible injury to his or her broader interests in exercising an authentic, autonomous choice. But it is more difficult to identify potential concrete harms to the polity. A single incompetently cast ballot is not likely to affect the course of an election, and even a larger number of such ballots, assuming that the errors they reflect are distributed randomly, are unlikely to have a substantial impact. Hence, even if the well-being of a person casting an incompetent vote would be better served by the candidate for whom he or she would have voted if competent, but by virtue of incompetence did not, the likelihood that the incompetently cast ballot will affect the outcome of the election, and thus harm the person in a material way, is slight.¹¹⁵

Appelbaum and Hurme do note, however, that:

Were the voting public to perceive that incompetent persons routinely cast ballots, the seriousness with which competent voters approach the process of selecting candidates and issues for their support might be diminished. Why is it worth spending time analyzing the choices on the ballot, a competent voter might ask, when the state is willing to allow even clearly incompetent people to participate in what one might conclude is not a terribly important process?¹¹⁶

The legitimacy of this concern, however, assumes that the voting public does have confidence that competent voters are casting their ballots seriously, which is related to the rationale of ensuring an intelligent electorate.

(ii) *Ensuring an Intelligent Electorate*

As noted above, the Supreme Court has demonstrated increasing hostility to constitutional validity of rationale of ensuring an intelligent electorate as a legitimate state interest that could justify disenfranchisement of people with cognitive impairments.¹¹⁷ But it is also practically suspect as a rationale for disenfranchising persons with diminished mental capacity. Karlan describes a study by neurologist Oliver Sacks, who observed a ward of neurology patients watching a televised address by President Ronald Reagan.¹¹⁸ Saks found that his aphasiac patients, who could not understand the meaning of the words, responded negatively to the false tones and cadences of President Reagan's voice; at the same time, a patient with agnosia, who could not process tone or feeling, but only words, responded negatively to the deceptive message in the words.¹¹⁹ Only people without

115. Hurme & Appelbaum, *supra* note 18, at 963–64 (2007).

116. *Id.*

117. *See Dunn*, 405 U.S. 330; *see also Purcell*, 549 U.S. 1.

118. Karlan, *supra* note 83, at 917.

119. *Id.*

aphasia or agnosia were fooled by the combination of deceptive word-use combined with deceptive tone.¹²⁰ Karlan concludes that “much of our political discourse, for better or worse, bypasses the conscious mind altogether, and that a large number of citizens’ views and choices are driven by a range of irrelevant factors and fortuities—such as a candidate’s height, whether he uses a nickname, or the format of the ballot.”¹²¹

The Supreme Court’s growing discomfort with literacy tests¹²² rests on our long history of the abuse of such tests. One group of scholars notes:

The US experience with “literacy” tests inquiring about detailed issues of constitutional law and political science amply demonstrates that any standard that probes more deeply into a person’s electoral understanding carries with it an inherent risk of subjective and arbitrary application. Moreover, even if such a standard could be consistently and fairly applied, contemporary legal doctrine rejects restrictions based on factors such as education or particular knowledge as incompatible with our commitment to a universal franchise. Many individuals who are entirely competent may base their votes on what others may regard as “irrational” considerations, but their choices are respected nonetheless.”¹²³

(iii) *Preventing Voting Fraud*

Of the three rationales for disenfranchising persons with cognitive disabilities, the state’s interest in preventing voting fraud would thus seem to be the sole remaining legitimate rationale. Given the significance of the deprivation of liberty entailed in disenfranchisement, however, this would not seem to support disenfranchisement standing on its own. The area of consumer law presents a wide panoply of actions that can be taken by governments which protect vulnerable populations against fraud, rather than denying them access to the instruments of commerce that make such fraud possible, such as television, telephones, and the internet. Why is the default position—with respect to voting—to disenfranchise the person with cognitive disabilities rather than devise means of protecting them against fraud?

Is it possible that the rationale of the prevention of voting fraud is not a legitimate, free-standing rationale, but rather an excuse that masks the persistence of the now unfashionable, historic rationales for disenfranchising persons with cognitive disabilities such as those noted by Brescia?¹²⁴ The history of the eventual victory of tenBroek’s integrationist theories, leading to the eventual inclusion of persons with disabilities into most aspects of

120. *Id.*

121. *Id.*

122. *See Dunn*, 405 U.S. 330; *see also Purcell*, 549 U.S. 1.

123. Karlawish et al., *supra* note 79, at 1346.

124. Brescia, *supra* note 100 and accompanying text; *see also Agran & Hughes*, *supra* note 84, at 60–61.

society, as described in the following paragraphs, reveals a persistent identification of persons with disabilities with the other group of disenfranchised Americans—convicted felons.

In the seminal case leading to the closure of the Willowbrook State Developmental Center in New York,¹²⁵ federal District Court Judge Judd found that the conditions in Willowbrook violated the constitutional right of persons living in state custodial institutions to be protected from harm.¹²⁶ According to Judge Judd, the plaintiffs' constitutional right to protection from harm in a state institution meant that the residents of Willowbrook were "entitled to at least the same living conditions as prisoners,"¹²⁷ meaning not only that the state had an affirmative obligation not to abuse the residents, but also to provide medical, therapeutic, and recreational care.

In the Alabama case of *Wyatt v. Stickney*,¹²⁸ U.S. District Court Judge Johnson articulated a "right to habilitation," for the patients involuntarily committed to two state mental hospitals, as well as those in the Partlow School because of developmental disabilities.¹²⁹ He noted that these people had been "involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings."¹³⁰ He continued, "Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'"¹³¹ Judge Johnson's remedies came to be known as the "Wyatt Standards," a set of minimum constitutional standards for the adequate treatment of people with mental illness and developmental disabilities.¹³² The focus in the Wyatt Standards on the obligation of the state to assist each resident to "acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment"¹³³ constituted an important step to the eventual adoption of the tenBroek's integration mandate.¹³⁴

In *Halderman v. Pennhurst State School & Hospital*,¹³⁵ involving the Pennhurst school in Pennsylvania, U.S. District Court Judge Broderick

125. N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (1973).

126. *Id.* at 764–65.

127. *Id.* at 764.

128. 325 F. Supp. 781 (M.D. Ala. 1971).

129. *Id.* at 784–85; *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972).

130. *Wyatt*, 325 F. Supp. at 784.

131. *Id.* (citing *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960)).

132. *Wyatt*, 344 F. Supp. at 395–407. See generally Norman S. Rosenberg & Paul R. Friedman, *Developmental Disability Law: A Look into the Future*, 31 STAN. L. REV. 817 (1979) (describing the history and application of the Wyatt Standards).

133. *Wyatt*, 344 F. Supp. at 395.

134. See generally Rosenberg & Friedman, *supra* note 132 (describing impact of the Wyatt Standards).

135. 446 F. Supp. 1295 (E.D. Pa. 1977).

found that three, distinct constitutional rights of the residents had been violated, including the constitutional right to be free from physical harm.¹³⁶ Judge Broderick wrote: “The retarded at Pennhurst have been physically abused. Lack of adequate supervision has produced an atmosphere of danger to the residents. Occasionally, there have been incidents of staff abuse of residents, including rape and beatings. Hundreds of injuries, both major and minor, are reported every month.”¹³⁷ Judge Broderick held that residents of state institutions for the retarded have both an Eighth and Fourteenth Amendment right to freedom from harm.¹³⁸ Quoting Judge Judd in the New York case, Judge Broderick wrote:

Since [the residents] are for the most part confined behind locked gates, and are held without the possibility of a meaningful waiver of their right to freedom, they must be entitled to at least the same living conditions as prisoners. . . . One of the basic rights of a person in confinement is protection from assaults by fellow inmates or by staff. . . . Another is the correction of conditions which violate basic standards of human decency.¹³⁹

The thread of analogies between persons with disabilities and convicted felons that runs through these cases evidences a persistent identification of persons with disabilities and imprisoned felons, which persists most glaringly in the Voting Rights Act’s continued identification of the two populations. However, as we have seen in our discussion of the rationales for disenfranchising persons with cognitive impairments in Section II.A.2 of this Article, there are serious reasons to doubt the legitimacy of two of those rationales: preserving the political community and ensuring an intelligent electorate. The third rationale, preventing voter fraud, could be addressed through an approach analogous to that adopted in preventing consumer fraud—that is, empowering the vulnerable population to protect itself, rather than denying the vulnerable population access to consumer goods and services, or to the vote. Indeed, that approach would be more consistent with the triumph of tenBroek’s integrationist principle detailed by Professor Bagenstos in his article to this symposium issue.¹⁴⁰ Surely the right to vote is more important than the right to purchase consumer goods or obtain credit cards. I would argue that it is time to acknowledge the growing judicial consensus described in Section I.D.1. of this Article—that barriers to voting by persons with cognitive impairments raise serious constitutional and policy concerns—and to attempt to address the continued obstacles to implementing the emerging consensus identified in Section

136. *Id.* at 1321.

137. *Id.* at 1320.

138. *Id.*

139. *Id.* at 1321.

140. Bagenstos, *supra* note 3.

I.D.2 of this Article. The following section explores ways in which this might be done.

B. Exploring Ways to Remove Obstacles to Voting by Those with Cognitive Impairments

In order to disrupt the seemingly entrenched assumption it is legitimate to deny persons with cognitive disabilities the right to vote, it is necessary to remember that this assumption is nothing more than one possible policy choice. The chaotic and contradictory constitutional, statutory, and practical implementation schemes displayed by the various states described in Sections I.B and C of this Article vividly illustrates the wide range of possibilities with respect to voting that different sets of policy makers in different states have adopted. Hurme and Appelbaum explain this vividly:

[T]he definition of the criteria for the capacity [to vote] is an exercise in policy, not science. . . . There is no scientifically determinable point on that spectrum at which we can say that the person manifests sufficient capacity for the task. How much capacity we require for any given task reflects the weight we give to the importance of allowing persons to perform the task even in the face of some degree of impairment, tallied against the weight of concerns regarding the possible adverse outcomes of the task if performed by someone whose capacity may be impaired. Essentially, this is a determination of how to allocate the risk of error.

So the drafters of state constitutions, the authors of legislation, and the crafters of judicial opinions are making what is inescapably a policy decision about a decisional capacity when they attempt to define an appropriate standard for the capacity to vote. . . . Thus, policymakers have a good deal of latitude in crafting decisional capacity standards based on the previously noted considerations of whether to encourage free exercise of the decisional right in question or to protect the allegedly impaired person or others from the consequences of a less-than-optimal decisional process.¹⁴¹

Different countries have enacted voting laws based on different assumptions about voting rights for persons with cognitive disabilities, and scholars have proposed many imaginative ways to address obstacles to voting. The next two sections will explore these alternatives.

1. Options Adopted by Other Countries

In her classic book *Frontiers of Justice*, Martha Nussbaum singles out the deprivation of the right to vote (along with the deprivation of religious liberty) as particularly offensive to the recognition of equal dignity of all. She points out that many nations, including Sweden and Israel, have guardi-

141. Hurme & Appelbaum, *supra* note 18, at 962–63.

anship structures that are much more protective of the right to self-determination for people with developmental disabilities than those of the United States, preserving the right to vote for those with developmental disabilities.¹⁴²

Other countries that impose no mental capacity requirements on the right to vote include Ireland, Italy, and Canada.¹⁴³ Legal scholar Nina Kohn tells the following story of Canada's relatively recent enfranchisement of the cognitively impaired.¹⁴⁴ The Canadian Elections Act excluded any person "restrained of his liberty of movement or deprived of the management of his property by reason of mental disease" from voting.¹⁴⁵ In 1998, Madam Justice Reed of the Federal Court of Canada, Trial Division held that this provision conflicted with the Canadian Charter of Rights and Freedoms, which guarantees the right to vote to "every citizen of Canada."¹⁴⁶ She argued that the exclusion in the Elections Act was overbroad (excluding people whose disability might not affect their voting judgment) and arbitrary (excluding only a subset of persons whose voting judgment might be affected by mental disease).¹⁴⁷ The Royal Commission on Electoral Reform and Party Financing studied this case, and in its final report agreed that the exclusion in the law was too broad. But the Commission also insisted that some citizens were "clearly incapable" of voting because of their mental incapacity, and that the "integrity of the vote and the dignity of citizens who cannot function as voters for reasons of mental incapacity demand that there be some restrictions on the franchise."¹⁴⁸ The Commission recommended maintaining voting restrictions for (1) "a person subject to a regime established to protect the person or the person's property, pursuant to the law of a province or territory, because the person is totally incapable of understanding the nature and consequences of his or her acts" and (2) "a person confined to a psychiatric or other institute as a result of being acquitted of an offence under the Criminal Code by reason of insanity."¹⁴⁹ However, Parliament chose to repeal the Election Act provision entirely. As a result, mental incapacity is no longer a basis for voter disqualification in Canada in federal elections.¹⁵⁰

142. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 195–99 (2006).

143. Kohn, *supra* note 86, at 36.

144. *Id.* at 45–46.

145. *Canada Elections Act*, R.S.C., c. 14 (1985).

146. *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622, 624.

147. *Id.*

148. Royal Commission on Electoral Reform & Party Financing, *Final Report* 39 (1992).

149. *Id.* at 39–41.

150. *An Act to Amend the Canada Elections Act*, s. 23(3) (assented May 6, 1993) in Acts of the Parliament of Canada, 41-42 Eliz. II, Vol. 1 (1993). However, one province, Nunavut, currently allows for voter disqualification on the basis of mental incapacity. *Nunavut Elections Act*, S. Nu. 20002, c. 17, § 7.

2. *Possible Reforms of Voting Rights of Persons with Cognitive Disabilities*

The possible options for reform of voting rights of persons with cognitive disability considered by scholars in recent years ranges from abolishing any restrictions, to reforming state constitutions and laws to conform to the emerging consensus against blanket restrictions, to protections against informal gate-keeping mechanisms, to reforming voting policies and procedures to offer support for voting by persons with cognitive impairment, to emphasizing education about voting in special education curriculums, individualized education plans, and service plans.

(a) *Abolishing Restrictions on Voting by People with Cognitive Impairments*

A number of scholars have begun to question legitimacy of any restriction on voting based on mental incapacity. Kohn argues:

While the argument that healthy democracies require intelligent and informed electorates appears, at first glance, to be a compelling reason for imposing mental capacity requirements, further examination is warranted. Although it is certainly desirable for voters to be able to intelligently and rationally evaluate candidates and issues, it does not necessarily follow that there should be a threshold level of capacity legally required of voters. Such capacity requirements pose a myriad of problems, including those associated with selective enforcement and those associated with the potential disenfranchisement of individuals who do understand the nature and consequences of their votes. Thus, at least in some democracies, the costs imposed by such requirements may outweigh their benefits. In reexamining such requirements, countries would fare well to examine the Canadian experience with the repeal of such requirements in order to determine what effect, if any, the repeal has had on the Canadian system of government.¹⁵¹

Legal scholar Stephen Schwarz explores the implications of abolishing the doctrine of competency in a number of areas of disability law, including voting. He argues:

The doctrine of legal competency is perhaps the most pervasive and invasive distinction between persons with disabilities and those who temporarily lack such conditions. It classifies all citizens into two distinctly separate and differently entitled groups: those who are deemed capable of acting knowingly, and those who are deemed unable to do so. The doctrine establishes a hierarchy of personhood, with the attributes of full citizenship vested only in those who satisfy a standard of mental fitness. For those declared less capable, elementary choices concerning liberty,

151. Kohn, *supra* note 86, at 45–46 (citations omitted).

property, and bodily privacy can be, and frequently are, wholly restricted. Political rights and civic responsibilities can be effectively nullified. In the guise of benevolent protectionism, people with disabilities may be rendered nonpersons and relegated to a status of dependency, with full assurance that their views and actions will not implicate them in difficulty nor subject them to any consequences—even those which they reasonably seek and understandably prefer.¹⁵²

With respect to voting rights, Schwarz argues:

Arguably, in promoting a regime of equality under the law, no compelling state interest exists in denying the vote to persons with disabilities who are possibly or even clearly incapable of comprehending all aspects of the electoral process. Using a standard of the average voter as the reference for assessing the acceptability of an exclusionary rule, one would have to determine what level of information and understanding is the bare minimum to qualify for becoming a qualified voter.

There is, of course, an important value in safeguarding the democratic process against corruption or undue influence. But the means selected for achieving this legitimate goal should be equally applicable to all citizens and not have a discriminatory impact on a selected subgroup. This concern, even if specially relevant to persons with mental disabilities, can be addressed through less restrictive means which do not wholly preclude persons with more severe impairments from all participation in the political process.

The high value traditionally placed on civic responsibility and membership in the body politic is directly undermined by denying any class of citizens the franchise. The minimal cost to the democratic process of an occasional uninformed or even unintelligible vote by a person with a serious mental disability is outweighed by the stated societal interest in including *all* persons with disabilities in the political process. Thus, abolishing the doctrine of competency as a standard for restricting the affirmative exercise of the fundamental right to vote would result in little burden to the efficient operation of the government and would significantly facilitate the equal citizenship of persons with disabilities. Where an individual can participate in the electoral process by selecting a candidate or position, the issue of competency should be irrelevant to the person's right to vote.¹⁵³

152. Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867, 868–69 (1993).

153. *Id.* at 871–72 (citations omitted).

Professors of Education Martin Agran and Carolyn Humes argue that any minimal comprehension tests of any voters should apply to all voters, not just those with cognitive disabilities. They contend that:

Existing assumptions and beliefs about denying voting to individuals with an intellectual disability has only prevented these individuals from receiving systematic instruction on how to vote and achieving a rightful identity as a citizen. . . . [T]his is a denial of an individual's identity as an adult and an unwittingly forced perpetuation of childhood. This is at base discriminatory and in violation of federal law and is contrary to current disability policy, civil rights legislation, and a commitment to ensuring the self-determination of individuals with intellectual disability. The basis for this denial is neither grounded in research nor thorough critical analysis. No U.S. state subjects voters without disabilities to any type of standard to measure voting capacity. . . . voters with an intellectual disability cannot legally be held to a higher standard than that held for others.¹⁵⁴

All of these scholars make the same argument: uncritical acceptance of the legitimacy of denying the vote to those with cognitive impairments ignores the fact that voters who are not identified and labelled as cognitively disabled are not subject to any standards of competency to perform the act of voting. Targeting persons with intellectual disabilities for such screening is arguably an appropriate object of enhanced scrutiny, along with the other issues identified by Professor Bagenstos as appropriately addressed by employing tenBroek's abolitionist understanding of equal protection.¹⁵⁵

(b) *Implementing Reforms to Support Voting by Persons with Cognitive Disabilities*

If it is not realistic to entirely eliminate voting restrictions based on cognitive disabilities, some measures can certainly be taken to eliminate some of the existing barriers to voting. As Appelbaum notes, people with cognitive disabilities have strong interests in preserving the right to vote:

Deprivation of the right to vote sends a message to mentally ill and retarded citizens that they are not like other people and are not wanted as part of the broader polity. Conversely, encouraging patients to vote can be a "therapeutic and normalizing experience." More concrete benefits may ensue as well. The sustained neglect of the needs of persons with mental disabilities—reflected in a paucity of institutional and community-based services and in discriminatory health insurance benefits—is the result, in part, of their lack of political clout. With patients and their families regis-

154. Agran & Hughes, *supra* note 84, at 60–61.

155. See *supra* notes 8–10 and accompanying text.

tered and voting, their needs are likely to be taken more seriously in the political process.¹⁵⁶

First, state constitutions and voting statutes that do not conform to the emerging consensus concerning the need to make individualized assessments of the ability to understand the act and nature of voting should be repealed.

Second, efforts should be made to ensure that the informal gate-keeping mechanisms are eliminated or regulated so that they do not violate the requirements of due process and equal protection. Kohn notes that:

While the notion of empowering long-term care staff or others to assess properly the mental capacity of suspect individuals before permitting them to vote has received some support, such approaches are likely to deny would-be voters both due process and equal protection of the law. Moreover, singling out certain citizens for such assessments is likely to unfairly target already marginalized and stigmatized populations, thus further marginalizing them and limiting their ability to exert political power. Moreover, informal assessments – even when done using a standardized assessment tool – invite fraud by providing justification for both good faith and bad faith disenfranchisements of persons whom the evaluator believes will vote in a manner of which or for a candidate of whom the evaluator disapproves.¹⁵⁷

Third, voting policies and procedures should be reformed to support voting by those with cognitive impairments. There will inevitably be some costs associated with these measures, as described by Kohn:

Mobile voting, for example, has the potential to heighten the possibility of undue influence or ballot tampering, may reduce the sense of community as voting becomes a personal rather than a public act, and may reduce the public visibility of persons with disabilities if such persons disproportionately elect to vote at home. Some techniques that may reduce the cognitive burden associated with voting may encourage disfavored voting behaviors. For example, placing candidates' photos alongside their names on the ballot page may assist voters with memory deficits, but may also encourage racially-based voting. Accordingly, jurisdictions at times will need to balance the interest in increasing the cognitive accessibility of elections against other important governmental interests.¹⁵⁸

But, Kohn notes, these costs may be balanced by benefits to the electorate as a whole:

156. Appelbaum, *supra* note 112, at 850.

157. Kohn, *supra* note 86, at 48–49; *see also* Karlawish et al., *supra* note 79, at 1346–47.

158. Kohn, *supra* note 86, at 50 (citations omitted).

In balancing the value of election reform against its costs, it is important to recognize that improving the cognitive accessibility of elections has the potential to help a broad range of voters, not merely those who have diagnosed cognitive impairments. Confusing ballot designs, for example, can lead to unintentional undervotes and overvotes among both the cognitively impaired and the cognitively intact. Both the cognitively intact and the cognitively impaired may be disenfranchised as a result of failing to comply with complex absentee balloting procedures. Distracting polling conditions may confuse the non-disabled as well as the disabled. While those with cognitive impairments are likely to benefit disproportionately from changes to election systems which reduce confusion and complexity, the general electorate stands to benefit as well.

Moreover, creating less cognitively demanding voting systems may have the advantage of decreasing opportunities for fraud and undue coercion of voters. Where voting systems are confusing, voters are more likely to require third-party assistance in order to record their votes. This, in turn, opens the door for third parties to exert undue coercion or otherwise manipulate the voting process. While those with cognitive impairments may be particularly susceptible to such manipulation, the cognitively unimpaired may also be impacted. In short, improving the cognitive accessibility of election systems is likely to enhance the legitimacy of elections by making it more likely that both the cognitively impaired and the cognitively non-impaired will be able to vote successfully for the candidates and positions that they prefer.¹⁵⁹

Fourth, schools, parents, and guardians should incorporate education about voting in special education curriculums of the schools, in the individualized service plans that guide special education services, and in the service plans that guide the provision of state services after graduation from school.¹⁶⁰

III. CONCLUSION

The Federal Voting Rights Act permits states to deny the right to vote to convicted criminals and persons with cognitive disabilities, offering a persistent manifestation of the troubling historical identification of these two groups of citizens. The history of the liberation of persons with cognitive disabilities from prison-like institutions reveals that their constitutional arguments were often based on prior victories by prisoners to humane treat-

159. *Id.* at 50–51 (citations omitted).

160. See Agran & Hughes, *supra* note 84, at 60 (offering evidence that voter education is not a subject of service plans or concerted education by support personnel serving persons with cognitive disabilities).

ment while institutionalized. Ultimately, due largely to the triumph of Professor tenBroek's bold vision of full integration of people with disabilities of all types into our communities, persons with cognitive disabilities, for the most part, have been released from prison-like institutions. But, as President Lyndon Johnson recognized, the most powerful instrument for "destroying the terrible walls which imprison men because they are different" is the right to vote.¹⁶¹ That right continues to be denied to persons with cognitive disabilities by states who choose to continue to exercise their prerogatives under the Voting Rights Act.

Existing state constitutional provisions and disenfranchisement laws present a chaotic mess of undefined terms, inconsistent laws, and arbitrary practices imposed on persons with cognitive disabilities. Recent challenges to these laws and practices reveal a growing consensus that many of these disenfranchisement laws pose significant concerns under both the U.S. Constitution, and emerging notions of empowerment of persons with cognitive disabilities to the greatest extent possible, even in guardianship proceedings. Still, this growing consensus toward enfranchisement encounters limits based on a lack of appetite for constitutional or legal reform, and informal practices that lead to disenfranchisement. A critical examination of the contemporary rationales for disenfranchisement suggests that the rationales are not strong, perhaps offering cover for lingering prejudices against persons with cognitive disabilities that justify their continued exclusion from our most fundamental democratic processes.

Perhaps adding the right to vote to the list of issues in disability law and policy that might be addressed with tenBroek's abolitionist understanding of equal protection will lead to a re-assessment of the Voting Rights Act's delegating to the states the right to disenfranchise persons with "mental incapacity" or of individual states' exercise of that right.

161. Johnson, *supra* note 2 and accompanying text.