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# TOWARD AN UNCONDITIONAL RIGHT TO VOTE FOR PERSONS WITH MENTAL DISABILITIES: RECONCILING STATE LAW WITH CONSTITUTIONAL GUARANTEES

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**Abstract:** Casting a ballot is a primary form of community participation in the United States. This exercise provides citizens with a means to safeguard their legal rights and effectuate change. Nevertheless, some citizens, such as people with mental disabilities, are often denied this fundamental right solely based upon their status. These citizens have faced a long history of pernicious discrimination at the hands of their communities, legislators, and even the courts. Yet, social policy has begun to evolve in light of more nuanced understandings of mental disabilities. This knowledge has also spurred the reform of state and federal law. While the prospect of change looms high, in the context of voting, some states lag behind and recent jurisprudence demands that they reform voter eligibility requirements. This Note calls for all states to ensure that the right to vote is a presumptive right of the mentally disabled, to facilitate its exercise, and to deny it by a clear and fair standard that only excludes the mentally incapacitated when there is a clear lack of understanding of the nature and effect of voting.

## INTRODUCTION

Liz Glenn is a forty-four year old woman living in Quincy, Massachusetts.<sup>1</sup> She commutes to work daily at a catering and gift establishment, and she attends church and socializes with friends on the weekends.<sup>2</sup> She is an active member of her community, and like all members, she faces the challenges life throws her.<sup>3</sup> Liz is mentally retarded, a quadriplegic, has use of only one arm, and uses an electric wheelchair.<sup>4</sup>

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<sup>1</sup> The Arc of Mass., Meet Liz Glenn: A Person Making it in the Community, <http://www.arcmass.org/MeetLizGlenn/tabid/353/Default.aspx> (last visited Mar. 23, 2010).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

She has been found unable to protect herself from harm without assistance by reason of physical disability.<sup>5</sup>

L.C. is a thirty-one year old woman living in a state institution in Georgia.<sup>6</sup> She loves to draw and write.<sup>7</sup> She suffers from schizophrenia and lives with mild mental retardation.<sup>8</sup> L.C. has lived for more than half her life in state-run institutions despite the fact that, at least once, professional staff has determined she could be appropriately served in a community residential setting and that her presence in an acute psychiatric unit was harmful to her habilitation.<sup>9</sup>

Liz and L.C. share much in common.<sup>10</sup> Each has unique interests and talents; each is dealing with the challenges life sends them one by one.<sup>11</sup> Each also has a disability—mental retardation.<sup>12</sup> However, these women's stories diverge in one key way.<sup>13</sup> Although Liz Glen's community has resolved to ensure that her disability does not preclude her from participating fully, L.C.'s community has used her disability as a reason to exclude her from such participation.<sup>14</sup>

Across the United States, communities today are guilty of discriminatorily excluding people like L.C. from voting, a fundamental area of civic participation.<sup>15</sup> Although voting can best be understood as a right "preservative of all rights," many states have formally barred persons with mental disabilities from exercising the right of suffrage through their constitution or statutes.<sup>16</sup> Communities often amplify this exclusion through informal barriers, such as refusing assistance to those in need.<sup>17</sup> The ability "to exercise legal rights and to have a voice in gov-

<sup>5</sup> See *id.*

<sup>6</sup> Brief of Respondent at 5–6, *Olmstead v. L.C.*, 527 U.S. 581 (1999) (No. 98-536), 1999 WL 144128, at \*5–\*6.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *id.*

<sup>10</sup> See Brief of Respondent, *supra* note 6, at 5–6; The Arc of Mass., *supra* note 1.

<sup>11</sup> See Brief of Respondent, *supra* note 6, at 5–6; The Arc of Mass., *supra* note 1.

<sup>12</sup> See Brief of Respondent, *supra* note 6, at 5–6; The Arc of Mass., *supra* note 1.

<sup>13</sup> See Brief of Respondent, *supra* note 6, at 5–6; The Arc of Mass., *supra* note 1.

<sup>14</sup> See Brief of Respondent, *supra* note 6, at 5–6; The Arc of Mass., *supra* note 1.

<sup>15</sup> See *Tennessee v. Lane*, 541 U.S. 509, 525 (2004); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 336–337, 337 n.26 (1993).

<sup>16</sup> See Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 McGEORGE L. REV. 917, 919–23 (2007); Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 836 (2005).

<sup>17</sup> See *Reynolds v. Sims*, 377 U.S. 553, 561–62 (1964) (striking down inequality in state senate representation on the principle of "one person, one vote"); Karlan, *supra* note 16, at 922–23 (2007); Waterstone, *supra* note 16, at 825–28. One commentator remarked,

ernment” are core elements of democracy.<sup>18</sup> Without access to their own political or governmental system, the mentally disabled are surreptitiously denied these rights and branded as outsiders.<sup>19</sup>

“When a single person, who has not broken any laws, is excluded from the mainstream . . . of community life, all of society becomes vulnerable.”<sup>20</sup> Throughout history, persons with mental disabilities have been systematically denied fundamental personal rights and thereby precluded from full and functional participation in society.<sup>21</sup> Beginning in 1898, states sought to enact legislation providing for the compulsory sterilization of persons with mental disabilities.<sup>22</sup> Fear and societal disdain led to the exclusion of most individuals with disabilities from edu-

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It is . . . surprising to discover that the Supreme Court has evidenced in its right-to-vote jurisprudence what may be characterized as a limited view of the value of voting. The Court tends to rely implicitly on an “instrumental” view of the franchise in which voting is seen solely as a societal tool for exerting political power.

Winkler, *supra* note 15, at 330–31. This “instrumental” view narrowly places the core value of suffrage on the act of casting a vote and having it counted. See Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 364–65 (2003). Even under a strict “instrumentalist” view, the right to vote is critical. See *id.* Aside from this legal hurdle, Karlan noted that informal barriers could be established based upon public officials making on-the-spot judgments about voter eligibility, the absence of affirmative accommodations for those in need (for example, assistance for the illiterate), and individual private caregivers who often serve as “gatekeepers to the outside world” for the disabled community. See Karlan, *supra* note 16, at 922–23.

<sup>18</sup> See LAURA F. ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* 652 (3d ed. 2006).

<sup>19</sup> See *id.*; BRUCE DENNIS SALES ET AL., *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* 5 (Joel Feinberg et al. eds., 1982).

<sup>20</sup> Susan Stainback & William Stainback, *Inclusive Schooling*, in *SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING* 3, 7 (William Stainback & Susan Stainback eds., 1990).

<sup>21</sup> SALES ET AL., *supra* note 19, at 5.

<sup>22</sup> ROBERT L. HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 243 (1998). The Supreme Court had upheld the practice ostensibly reasoning that sacrifice was a civic duty. See *Buck v. Bell*, 274 U.S. 200, 207 (1927). Justice Oliver Wendell Holmes for the Court stated:

We have seen more than once that public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

*Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905))

cation until the nineteenth century.<sup>23</sup> Some philanthropic efforts later established “asylums” for children with disabilities through which they gained some education at the expense of being alienated from community life.<sup>24</sup> This history of discrimination does not limit itself to education, in fact, prejudice persists in the areas of employment, health care, insurance and family law.<sup>25</sup> Even today, many individuals with mental disabilities remain wards of state, locked in segregated institutions and prevented from participating in community life.<sup>26</sup>

Along with this grim history of pervasive and systematic isolation, segregation, and discrimination, persons with mental disabilities have faced unique challenges in their battle for civil rights.<sup>27</sup> First, the very definition of disability is a source of controversy.<sup>28</sup> While many believe that the problems persons with disabilities face arise from internal characteristics, a growing portion of the disabled community finds that those problems actually come from their external environment.<sup>29</sup> By focusing solely on the organic impairment, the non-disabled tend to be unaware of the extent that social perception and environment can contribute to the disability.<sup>30</sup> In addition, disabled people lack a sense of shared history that has helped some minority groups “disseminat[e] . . . information about prejudice and oppression.”<sup>31</sup> Until the disability rights movement, many could not overcome feelings of humiliation and

<sup>23</sup> Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1423–24 (2007).

<sup>24</sup> *See id.* Even when compulsory education laws forced public schools to accept children with disabilities, they were segregated by classroom or school. *See id.* at 1425–26. Large public schools arose in urban areas of the United States at the start of the nineteenth century and later adopted grade placement through which ungraded classes were soon created for the “uncooperative, or unsuccessful” *See id.* Consequently, by 1932, seventy-five thousand children with mental retardation were segregated in public schools. *Id.*

<sup>25</sup> SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* 4, 19–22 (2001).

<sup>26</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999) (holding unjustified institutionalization is discrimination based on disability).

<sup>27</sup> *See* 42 U.S.C. § 12101(a) (2), (3), (5) (2006); *Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring); HARLAN HAHN, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, in *BACKLASH AGAINST THE ADA REINTERPRETING DISABILITY RIGHTS* 26, 28–31 (Linda Hamilton Kreiger ed., 2003) (distinguishing challenges faced by the disability rights movement from those experienced by African Americans and women).

<sup>28</sup> *See* HAHN, *supra* note 27, at 28, 32–35.

<sup>29</sup> *See id.* at 28.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 36.

shame, thus preventing them from drawing upon their own experiences to investigate broader patterns of oppression.<sup>32</sup>

Inspired by the examples of the African-American civil rights and women's rights movements, which experienced great victories in the late 1960s, the disability rights movements began to take root in the 1970s.<sup>33</sup> Advocacy arose in response to historical practices of segregation.<sup>34</sup> Thus a key focal point was institutionalization, a tool used to both "hide and degrade individuals with disabilities" under the guise of providing them with treatment.<sup>35</sup> The practice of institutionalization further estranged the disabled from their community by impeding their right to vote and, in some cases, disenfranchising them because of their residence in facilities.<sup>36</sup> Accordingly, advocates have focused their efforts on de-institutionalization and integration.<sup>37</sup>

While the disability rights movement has progressed on several fronts—including ensuring persons with disabilities opportunities for employment, education and defining further their rights—the fundamental right to vote remains egregiously undervalued and abused.<sup>38</sup> Although federal and state constitutions protect voting, "a hallmark of

<sup>32</sup> *Id.* Hahn's notion can be gleaned from personal testimonies given in reflection on living with a disability prior to the movement. See NAT'L COUNCIL ON DISABILITY, VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA 23–24 (1995). Disabled persons testified that they felt like prisoners in their own homes, burdened, and suffered anxiety with regard to asking for assistance. See *id.* Mental disability advocate Susan Stefan considered the complex nature of discrimination against person with mental disabilities, noting:

Discrimination is not only occasioned by psychiatric disability, it can cause disability. It is like an infection striking and already vulnerable and struggling soul. . . . Discrimination saps people's strength and their ability to struggle through each day—hence causing the very depression, hopelessness, anxieties, and suspicions that become the basis for further discrimination.

STEFAN, *supra* note 25, at xiii–xiv.

<sup>33</sup> DAVID FRUM, HOW WE GOT HERE: THE 70s, THE DECADE THAT BROUGHT YOU MODERN LIFE (FOR BETTER OR WORSE) 250–51 (2000).

<sup>34</sup> See Colker, *supra* note 23, at 1419.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* Deinstitutionalization is "the release of institutionalized individuals (as mental patients) from institutional care to care in the community." WEBSTER'S NEW COLLEGIATE DICTIONARY 335 (9th ed. 1991).

<sup>38</sup> See 42 U.S.C. § 12101 (2006); Colker, *supra* note 23, at 1430–34; *Developments in the Law—the Law of Mental Illness, VII. Voting Rights and the Mentally Incapacitated*, 121 HARV. L. REV. 1179, 1181–85 (2008) [hereinafter *Developments in the Law*]; see also *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (holding a Georgia apportionment statute to be unconstitutional and reasoning that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live").

our democracy”, there are limits on this right.<sup>39</sup> Notably, states are allowed to define who is eligible to vote and manage the election process.<sup>40</sup> A 2000 study found that forty-four states disenfranchised the mentally incompetent, some by constitution and some by statute.<sup>41</sup> Though denial of the right of suffrage may be constitutionally and statutorily sound, when an individual is mentally incapacitated, indiscriminate denial due to *some* mental incapacity should not be tolerated.<sup>42</sup> Modern policies, enlightened by a contemporary understanding of disability and more developed structured capacity assessments, accept that a basic understanding of the nature and effect of voting is a sufficient standard to establish the capacity to vote.<sup>43</sup>

In response to zealous advocacy on the part of disability advocates, several states have begun to consider efforts that would ensure the right to vote for persons with mental disabilities.<sup>44</sup> State constitutions have been amended and election laws have been adopted to limit the effect of constitutional provisions which categorically deny this group suffrage.<sup>45</sup> While successes are being achieved incrementally, discriminatory language persists in state constitutions, and several states still maintain elections laws that violate the federal constitutional guarantee of equal protection under the law.<sup>46</sup>

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<sup>39</sup> Sally Bach Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 28 MCGEORGE L. REV. 931, 931 (2007); see *Wesberry*, 376 U.S. at 17 (concluding that Article I, Section 2 of the Constitution “gives persons qualified to vote a constitutional right to vote and to have their vote counted”); *Developments in the Law*, *supra* note 38, at 1181–85.

<sup>40</sup> See U.S. CONST. art. I, § 2, cl. 1; art. II, § 1; Hurme & Appelbaum, *supra* note 39, at 931.

<sup>41</sup> *Developments in the Law*, *supra* note 38, at 1181.

<sup>42</sup> See National Voter Registration Act of 1993, Pub. L. 103–31, § 8, 107 Stat. 77, 83 (1993) (codified as amended at 42 U.S.C. § 1973gg–6 (2006)) (providing states can exclude individuals from registering to vote by reason of mental incapacity); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 808–09, 812 (8th Cir. 2007). While states may exclude the mentally incapacitated, they cannot exclude those with sufficient mental capacity to vote. *Cf. Carnahan*, 499 F.3d at 808–09 (noting categorical prohibition of a ward from voting would not withstand close equal protection scrutiny).

<sup>43</sup> See, *eg.*, WASH. REV. CODE § 11.88.010(5) (2009); WIS. STAT. § 54.25(2)(c) l.g (2008); *Doe v. Rowe*, 156 F. Supp. 2d 35, 56 (D. Me. 2001) (holding Maine’s constitutional and statutory provisions unconstitutionally excluded voters by reason of mental disability); Paul Appelbaum et al., *The Capacity to Vote of Person’s with Alzheimer’s Disease*, 162 AM. J. PSYCHIATRY 2094, 2099 (2005); Thomas Grisso & Paul S. Appelbaum, *Comparison of Standards for Assessing Patient Capacity to Make Treatment Decisions*, 152 AM. J. PSYCHIATRY 1033, 1037 (1995).

<sup>44</sup> *Developments in the Law*, *supra* note 38, at 1182.

<sup>45</sup> See *id.* at 1183–84.

<sup>46</sup> U.S. CONST. amend. XIV; see *Doe*, 156 F. Supp. 2d at 56; *Developments in the Law*, *supra* note 38, at 1181–85.

Federal laws have also attempted to address the challenges faced by persons with mental disabilities.<sup>47</sup> The Americans with Disabilities Act of 1990 (ADA) is perhaps the most recent major civil rights statute.<sup>48</sup> Despite achieving this legislative success, disabled persons have not experienced forceful judicial successes similar to those seen by African Americans and women during the Civil Rights Era of the 1960s.<sup>49</sup> Moreover, an unsettled definition of disability, pervasive discrimination, and a general skepticism of the ADA itself plague ADA plaintiffs.<sup>50</sup>

The short-comings of the ADA led Congress to enact the ADA Amendments Act of 2008 (ADAAA), which went into effect January 1, 2009.<sup>51</sup> The ADAAA aims to broaden the class of persons protected by the ADA and to strengthen the effect of such protection by giving courts express instructions on statutory interpretation.<sup>52</sup> The effects of this legislation remain to be seen, but court precedent under the original ADA may pose a continued challenge to achieving the purposes intended by the new ADAAA.<sup>53</sup> If these enhancements of the act are given full effect, Title II, which protects the right to vote from discrimination as a service, program or activity provided by a public entity, could serve as a powerful tool for restoring the franchise to persons with mental disabilities.<sup>54</sup>

This Note will argue that persons with mental disabilities have a presumptive right to vote—the use of which should be facilitated rather than impaired. States that exclude those who lack capacity to vote should only rely upon a judicial finding of such incapacity to ensure equal protection and due process. Part I will introduce the law of elections and survey the current status of state law concerning voter eligibility for mentally disabled persons. Part II will discuss the national trend

<sup>47</sup> See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)); Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended at 42 U.S.C. § 15301); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended at 42 U.S.C. §§ 1973gg–10).

<sup>48</sup> See Anita Silvers & Leslie Pickering Francis, *A New Start on the Road Not Taken: Driving with Lane to Head Off Disability-Based Denials of Rights*, 23 WASH. U. J. L. & POL'Y 33, 33 (2007).

<sup>49</sup> See *id.*

<sup>50</sup> *Id.*

<sup>51</sup> ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 (2008), §§ 1, 2, 8, 122 Stat. 3553, 3553–3554, 3559 (to be codified at 42 U.S.C. §§ 12101–12213).

<sup>52</sup> See *id.* §§ 2, 4.

<sup>53</sup> See *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370, 374 (2001) (holding Title I of the ADA unconstitutional to the extent which it allowed private citizens to sue states for money damages).

<sup>54</sup> See 42 U.S.C. § 12132; *Developments in the Law*, *supra* note 38, at 1185–89.

in the contemporary understanding of mental disability. It will examine the federal and state legislation that is moving in the direction of broadening the exercise of the right of suffrage and guarding against discrimination of those with mental disabilities by states in their administration of elections. Part III will use recent cases to demonstrate that despite this hopeful reform, some states cling to policies that violate the constitutional rights of citizens with mental disabilities and must be held accountable for this wrong. This Note will conclude that states should facilitate the right to vote of those with mental disabilities and that if states declare the mentally incapacitated ineligible, they should do so only after a court has determined the incapacity by a clear and fair standard for the sake of our national guarantee of equal protection under the law.

#### I. THE LAW OF ELECTIONS: STATE LAW AND ITS EFFECT ON THE VOTING RIGHTS OF PERSONS WITH MENTAL DISABILITIES

The Supreme Court has generally expressed an “instrumentalist” view of the significance of the right to vote under which the right is characterized by an “ability to cast a ballot and to have that ballot counted.”<sup>55</sup> Although the Court’s interpretation establishes the fundamental nature of the right to vote, this limited definition grants states broad authority to administer elections in the manner they see fit.<sup>56</sup> This administrative license has led some states to adopt eligibility criteria that plainly discriminates against mentally disabled individuals who would otherwise be qualified to vote.<sup>57</sup> Furthermore, from state to state and even within each state’s various sources of law, inconsistent and often archaic terminology leads to ambiguity and amplifies the potential for discrimination—a problem that increased clarity of definition and understanding could dispel.<sup>58</sup>

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<sup>55</sup> See Waterstone, *supra* note 17, at 364–65.

<sup>56</sup> See *id.*; Winkler, *supra* note 15, at 336–37, 337 n.26.

<sup>57</sup> See *Developments in the Law, supra* note 38, at 1181–85; Hurme & Appelbaum, *supra* note 39, at 934–39.

<sup>58</sup> See HAYMAN, *supra* note 22, at 121; Hurme & Appelbaum, *supra* note 39, at 934–36, 939. One advocate for persons with mental disabilities recognizes that the very fact that the law requires definitions of disability amplifies the discrimination of those with mental impairments by affording and abridging rights based upon these categorizations. See STEFAN, *supra* note 25, at xiii. Stefan laments that the law’s reliance on definitions has been unkind to those with mental disabilities because such terms construct mutually exclusive categories and the law demands that individuals fit into one category or the other: disabled-not disabled, competent-incompetent, mentally ill-not mentally ill. See *id.* Such rigidity is dia-

### A. *Mental Disability Defined*

Despite the many significant legal developments in the area of disability rights over the past century, the lack of stable definitions in the area of mental disability law is a significant impediment to the progress of the rights of person with disabilities.<sup>59</sup> Although disagreement exists over the definition, the American Bar Association has suggested a few possibilities.<sup>60</sup> First, mental disability is a catchall term which encompasses impairments of both mental and cognitive functioning.<sup>61</sup> These disabilities are often reduced to several different categories including mental illness, developmental disabilities, communication disorders and substance abuse.<sup>62</sup> These categorizations, however, cannot be heavily relied upon because a particular impairment may not fit well within one or the other and, oftentimes, problems occur in tandem.<sup>63</sup> Despite these differences, each type of mental disability is generally treated similarly in the context of law.<sup>64</sup>

Dementias are defined as organic mental disorders evidenced by a failure “to understand events and people, make plans, and take care of oneself.”<sup>65</sup> Distinct from dementias, developmental disabilities are mental, cognitive and physical impairments that begin in early adulthood and are likely to continue to impose functional impairments on the individual.<sup>66</sup> The definition of one developmental disability, mental retardation, is hotly contested.<sup>67</sup> For the purpose of this Note, mental retardation is defined as substantially subaverage intelligence coupled with limitations in two adaptive skill areas.<sup>68</sup>

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metrically opposed to the very nature of psychiatric disability which is episodic and may be triggered or worsened by environmental or interpersonal factors. *Id.*

<sup>59</sup> See Hurme & Appelbaum, *supra* note 39, at 934–36, 939; see also ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110–325, § 4, 122 Stat. 3553, 3555–56 (to be codified at 42 U.S.C. §§ 12102–12103) (amending the definition of disability from that of the original ADA).

<sup>60</sup> See JOHN PARRY, *MENTAL DISABILITY LAW: A PRIMER 2* (5th ed. 1995); Hurme & Appelbaum, *supra* note 39, at 934–36, 939.

<sup>61</sup> PARRY, *supra* note 60, at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 4. Dementias caused by Alzheimer’s disease are believed to afflict one out of every twenty-five adults between the ages of sixty-five and seventy-four. *Id.* Alzheimer’s disease progressively erodes cognitive and functional abilities over time. *Id.*

<sup>66</sup> PARRY, *supra* note 60, at 5.

<sup>67</sup> See HAYMAN, *supra* note 22, at 121.

<sup>68</sup> See PARRY, *supra* note 60, at 5. Adaptive skill areas include communication, self care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. *Id.* Anywhere from one to three percent of the population is

Although these definitions can facilitate our discussion, they derive from the medical model of disability that focuses narrowly on assessments of the degree of a person's functional limitations.<sup>69</sup> A more contemporary definition understands disability not merely as a physical or mental impairment but a result of discrimination in the social order based upon environmental factors and "narrow assumptions about what constitutes the normal range of human functioning."<sup>70</sup>

The problem of mental disability has been scrutinized in the legal context when making determinations of competency and capacity either in criminal or testamentary proceedings.<sup>71</sup> Competency considerations within the context of civil law can be traced to the origins of the laws of guardianship and wills in ancient Roman and English common law.<sup>72</sup> At one point, the presence of a mental disability itself was sufficient to deny an individual decision-making rights and privileges, but today lawmakers have begun to realize that competency is a nuanced concept, and thus some jurisdictions are increasingly requiring more thorough adjudication of competency before rights are revoked.<sup>73</sup>

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classified as mentally retarded. *Id.* This definition accords with that accepted by the psychiatric community. See AM. PSYCHIATRIC ASS'N, DESK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-IV-TR, at 52 (4th ed. 2000).

<sup>69</sup> See ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Education and Labor, 110th Cong. 25, 28 (2008) [hereinafter *ADA Restoration Act Hearing*] (statement of Robert L. Burgdorf, Jr., Professor of Law, University of the District of Columbia); Mary Johnson, *Before Its Time: Public Perception of Disability Rights, the Americans with Disabilities Act, and the Future of Access and Accommodation*, 23 WASH U. J.L. & POL'Y 121, 138 (2007).

<sup>70</sup> See Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214–15 (2000); see also *ADA Restoration Act Hearing*, *supra* note 69, at 28.

<sup>71</sup> See MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW FROM LEGAL THEORY TO CLINICAL APPLICATION 5 (2008).

<sup>72</sup> See *id.* Guardianship is an involuntary procedure in which an individual is deemed incapable of making day-to-day decisions and is either put under the authority of another person or into a state run facility. See BLACK'S LAW DICTIONARY 726 (8th ed. 2004). This guardian "assumes the power to make decisions about the ward's person or property." See *id.*

<sup>73</sup> See PARRY, *supra* note 60, at 98; see, e.g., WASH. REV. CODE § 11.88.010(5) (Supp. 2009) ("Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise . . ."); WIS. STAT. § 54.25(2)(c) 1.g (2008) ("if the court finds that the individual is incapable of understanding the objective of the elective process").

### B. *The Law of Elections: An Overview*

The guarantee of a voice in government and the free exercise of legal rights are central features of democratic society.<sup>74</sup> Accordingly, the design of electoral systems in modern democratic nations features two key objectives: “increasing enfranchisement and voting [as well as] assuring the integrity of the vote.”<sup>75</sup> Some scholars have argued that “universal suffrage is essential if citizens are to recognize a government as legitimate.”<sup>76</sup> They further reason that minority groups need the vote in order to protect themselves from powerful insiders who use government power to subordinate them.<sup>77</sup> Regardless, the various franchising amendments in the United States did not establish the broad principle of universal suffrage.<sup>78</sup> Thus, in the United States, the right to vote is not per se constitutionally protected.<sup>79</sup> Yet, implicit in our constitutional system is a protected right to participate in state elections on an equal basis with other qualified voters.<sup>80</sup> States have exercised broad discretion in the administration of elections but this discretion was bound by a constitutional prohibition of discrimination.<sup>81</sup> Though the Supreme Court has found certain restrictions on the right to suffrage

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<sup>74</sup> See ROTHSTEIN & ROTHSTEIN, *supra* note 18, at 652.

<sup>75</sup> Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879, 880 (2007).

<sup>76</sup> Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1486 (1998).

<sup>77</sup> *See id.* at 1488.

<sup>78</sup> *See id.* While some may still argue for universal suffrage, the last of the voting rights amendments, the Twenty-Sixth Amendment did not incorporate this principle. U.S. CONST. amend. XXVI, § 1.

<sup>79</sup> *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (recognizing a constitutional guarantee of equal participation for qualified voters in state elections but also holding absolute equality of education funding is not mandated).

<sup>80</sup> *See id.*

<sup>81</sup> *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959). The Supreme Court has recognized that states have a legitimate interest in assuring “intelligent exercise of the franchise.” *See* Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) (ruling English language voter literacy tests unconstitutional and discriminatory). The Court has also held that states may consider residence, age, and prior criminal record in determining voter eligibility. *See* Lassiter, 360 U.S. at 51. Lassiter upheld literacy tests on the basis that such tests were neutral on race, creed, color, and sex. *See id.* Where it was reasoned that literacy tests were designed to ensure “independent and intelligent” exercise of the right of suffrage, the Court found the requirement constitutionally permissible. *See id.* at 52–53. Under the Equal Protection Clause, however, more recent Supreme Court jurisprudence has given varying degrees of “close constitutional scrutiny” to voter eligibility requirements and eradicated many eligibility requirements that states once imposed. *See* Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 808 (8th Cir. 2007); *see, e.g.,* Carrington v. Rash, 380 U.S. 89, 94–95 (1965) (holding unconstitutional a restriction prohibiting active members of Armed Forces from voting in state).

withstand even heightened scrutiny, it has consistently required that any such restriction be justified by a compelling state interest.<sup>82</sup>

The Court has recognized “preserving the political community and preventing voter fraud” as compelling government goals warranting restrictions on the right to vote in some circumstances.<sup>83</sup> Thus, as states have excluded persons with mental disabilities, they have sought to preserve the political community by distinguishing voters who intend to express some preference and affect the election results from those who do not understand the nature of voting, and whose votes could become subject to fraud.<sup>84</sup> Nonetheless, in considering restrictions, the Supreme Court has been wary that “to the extent that a citizen’s right to vote is debased, he is that much less a citizen.”<sup>85</sup>

### C. State Law Restrictions on the Voting Rights of Persons with Mental Disabilities

Kristopher Willis, a twenty-six year old developmentally disabled man from Iowa and Adam Folsom, a twenty-eight year old suffering from velocardiocardial syndrome and some mental retardation both cast a ballot in the most recent presidential election.<sup>86</sup> Parents of the men

<sup>82</sup> See *Richardson v. Ramirez*, 418 U.S. 24, 54–55, 56 (1974) (rejecting a challenge to California laws denying ex-felons the right to vote); *Dunn v. Blumstein*, 405 U.S. 330, 344–46 (1972). In rejecting a durational residency requirement as unconstitutional, the Court, in *Dunn*, suggested compelling state interests might include preventing electoral fraud and guaranteeing the existence of “knowledgeable voters” within the state. *Dunn*, 405 U.S. at 345–60. The Court criticized a branch of the “knowledgeable voter” standard, which made “intelligent” voting a criterion, reasoning that this prong was “an elusive one and susceptible of abuse.” See *id.* at 356. The Court refused to decide “the extent to which a State [could] bar less knowledgeable or intelligent citizens from the franchise.” See *id.*

<sup>83</sup> See Karlan, *supra* note 16, at 925.

<sup>84</sup> See *id.*

<sup>85</sup> *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (striking down inequality in state senate representation on the principle of “one person, one vote”). History itself is evidence that a lack of political power can both reflect and magnify societal subordination. See Rutherford, *supra* note 76, at 1478–85 (summarizing the struggles of African Americans and women in achieving equal rights). Nevertheless, under our current system “the outsiders must demonstrate that they are sufficiently like the insiders who can vote” to obtain this right. See *id.* at 1488. To the extent that “outsiders,” such as persons with mental disabilities, are actually different from current voters, “they are caught in a bind” because current voters are unlikely to represent the interests of the mentally disabled. See *id.*

<sup>86</sup> Steve Gravelle, *Mother Wants to Limit Voting for Disabled: Disabled People Entitled to Cast Ballots*, GAZETTE (Cedar Rapids, Iowa), Nov. 18, 2008, at A1; Beth Velliquette, *Mother to Challenge Vote Cast by Her Disabled Son*, HERALD-SUN (Durham, NC), Nov. 4, 2008, at C1. Velocardiofacial syndrome (VCFS) is a disorder characterized by a cleft palate (opening in the roof of the mouth), heart defects, characteristic facial appearance, minor learning problems and speech and feeding problems. See Nat’l Inst. on Deafness and Other Com-

claimed that they were taken advantage of by their caregivers who facilitated their voting; therefore, they have sought redress under state law.<sup>87</sup> By contrast, in 2004, Floridian Kamal Samar was fighting for an opportunity for his twenty-three year old son, David, to cast a vote.<sup>88</sup> Kamal argued, “He is a citizen of this country. He should be able to vote.”<sup>89</sup> Yet, based on state law, David’s legal guardianship likely posed a bar to his father’s efforts.<sup>90</sup>

Despite their different situations, Kristopher, Adam, and David each fell victim to state election laws that did not adequately protect their right to vote.<sup>91</sup> David’s right was impeded by a legal system that failed to emphasize the importance of that right and follow a clear process to exclude only the truly mentally incapacitated from participating.<sup>92</sup> Kristopher and Adam actually did vote but their ballot may have been fraudulently interfered with, and, like David, their right may be compromised in the future by a general lack of clarity in state election laws.<sup>93</sup>

A key challenge and the probable reason for the failure of universal suffrage efforts for the mentally disabled is the inability to agree upon a single definition of the capacity to vote.<sup>94</sup> The hodgepodge of voting standards we see today was all but guaranteed when the Constitutional Convention compromised by adopting state standards for voting.<sup>95</sup> Currently, forty-eight state constitutions exclude certain categories of people

munication Disorders, *Statistics on Voice, Speech, and Language*, <http://www.nidcd.nih.gov/health/statistics/vsl.asp> (last visited Mar. 30, 2010).

<sup>87</sup> See Gravelle, *supra* note 86; Velliquette, *supra* note 86.

<sup>88</sup> Deborah Circelli, *Poised for the Polls: Disabled Cherish Voting Rights, Say Advocates*, DAYTONA NEWS-J., Aug. 12, 2004, at C1.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* Although no follow-up article was published, Samar’s father had admitted that David would not likely understand the elections even if he were shown photos of the candidates, thus he argued for the opportunity to vote on his son’s behalf. *See id.* The outreach director from the Volusia County Supervisor of Elections spoke firmly against such proxy voting explaining that voter assistance is appropriate but that the disabled individual must understand and make the choice. *See id.* Further, the judge responsible for guardianship determinations in the county indicated at the time the article was published that, if the disabled person lacked any understanding, he would consider denying the person the right to vote. *See id.*

<sup>91</sup> See Circelli, *supra* note 88; Gravelle, *supra* note 86; Velliquette, *supra* note 86.

<sup>92</sup> See Circelli, *supra* note 88; Gravelle, *supra* note 86; Velliquette, *supra* note 86.

<sup>93</sup> See Circelli, *supra* note 88; Gravelle, *supra* note 86; Velliquette, *supra* note 86.

<sup>94</sup> See Rutherford, *supra* note 76, at 1485. In 1963, Congress declined to pass a proposed constitutional amendment that aimed “to establish a free and universal franchise throughout the United States.” H.R. J. Res. 3, 88th Cong., 109 CONG. REC. 57 (1963); see H.R.J. Res. 231, 88th Cong., 109 CONG. REC. 1672 (1963).

<sup>95</sup> See Rutherford, *supra* note 76, at 1486.

from eligibility to register and vote.<sup>96</sup> Criminal convictions and mental status are persistent exclusions.<sup>97</sup>

A simplified way of grasping the far from consistent state exclusions of the mentally disabled is to picture the voting right spread along a continuum measuring the extent of disenfranchisement.<sup>98</sup> "At one end are the states that specifically encourage voting," states that categorically bar voting at the other, and a mid-range that allow for a reservation of the right in some manner.<sup>99</sup>

Unclear exclusionary language led seven state constitutions deny the right to vote to "idiots or insane" persons.<sup>100</sup> A number of states prohibit voting by those of unsound mind, non compos mentis, or those who are not of "quiet and peaceable behavior."<sup>101</sup> The constitutions of sixteen states bar those adjudged mentally incompetent or incapacitated from voting.<sup>102</sup> In addition, four states prohibit persons

<sup>96</sup> Hurme & Appelbaum, *supra* note 39, at 934.

<sup>97</sup> *See id.* at 934-35.

<sup>98</sup> Kyle Sammin & Sally Balch Hurme, *Guardianship and Voting Rights*, BIFOCAL, Fall 2004, at 1, 11.

<sup>99</sup> *See id.*

<sup>100</sup> *See, e.g.*, ARK. CONST. art. III, § 5; IOWA CONST. art. II, § 5; KY. CONST. § 145, cl. 3; MINN. CONST. art. VII, § 1; MISS. CONST. art. XII, § 241; N.M. CONST. art. VII, § 1; OHIO CONST. art. V, § 6; Hurme & Appelbaum, *supra* note 39, at 935. Idiocy has been understood to refer to "mental feebleness due to disease or defect of brain, congenital or acquired during development" resulting in lack of understanding. *See In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) 373, 386 (Prob. Ct. 1905). The term insanity generally included idiocy and referred to "a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life." *See Baker v. Keller*, 237 N.E.2d 629, 638 (Ohio Ct. Com. Pl. 1968).

<sup>101</sup> *See* Hurme & Appelbaum, *supra* note 39, at 935. Two constitutions refuse suffrage to those of unsound mind. ALA. CONST. art. V, § 2; MONT. CONST. art. IV, § 2; *see* Hurme & Appelbaum, *supra* note 39, at 935. Those who are not of "quiet and peaceable behavior" are barred from the franchise in Vermont. VT. CONST. art. II, § 42; *see* Hurme & Appelbaum, *supra* note 39, at 936. Yet, the Vermont Secretary of State has indicated informally that this is not used as a competence standard but rather "to facilitate peaceful conduct at town meetings." *See* Hurme & Appelbaum, *supra* note 39, at 936 n. 27. Three states exclude persons of non compos mentis. *See id.* at 935. Non-compos mentis has been defined loosely as a complete lack of "mental capacity to understand the nature, consequences, and effect of a situation or transaction." *See Town of Lafayette v. City of Chippewa Falls*, 235 N.W.2d 435, 441 (Wis. 1975). The constitution of Kansas allows the legislature to deny those with "mental illness" the franchise. KAN. CONST. art. V, § 2; *see* Hurme & Appelbaum, *supra* note 39, at 935.

<sup>102</sup> *See* Hurme & Appelbaum, *supra* note 39, at 935. Likewise, Wisconsin allows for the disenfranchisement of those adjudged mentally incompetent. *See* Wis. CONST. art. III, § 2; Hurme & Appelbaum, *supra* note 29, at 935. Missouri and New Jersey exclude those adjudged incapacitated. MO. CONST. art. VIII, § 2; N.J. CONST. art. II, § 1, ¶ 6; Hurme & Ap-

“under guardianship” from the electorate.<sup>103</sup> These provisions reveal not only that a wide array of individuals across the nation are denied suffrage by state constitutional provisions, but also that this denial is based on imprecise categorizations.<sup>104</sup> Moreover, these constitutional provisions often fail to clearly define the categorizations used, thereby making them difficult to interpret and enforce.<sup>105</sup>

In addition to state constitutions, state election laws also address issues of cognitive impediments.<sup>106</sup> To frustrate matters further, when elections laws coincide with a state constitutional provision, criteria for exclusion do not always coincide.<sup>107</sup> Election laws of some states seem to overlook the fact that they even have a state constitutional provision barring persons by reason of a mental disability.<sup>108</sup> Other states present a narrower basis for exclusion, while others still use entirely different language causing difficulty in determining who is subject to exclusion and on what basis.<sup>109</sup> Twenty-eight states’ election laws do not comment

pelbaum, *supra* note 39, at 936. Missouri further excludes those involuntarily admitted to mental institutions. *See* Hurme & Appelbaum, *supra* note 39, at 935.

<sup>103</sup> *See* Hurme & Appelbaum, *supra* note 39, at 943. This restriction has been held to refer strictly to the guardianship process of the state. *See, e.g.,* *Boyd v. Bd. of Registrars of Voters*, 334 N.E.2d 629, 632 (Mass. 1975). However, one state reads the term broadly enough to include all residents of a state facility for the mentally disabled. *See Lafayette*, 235 N.W.2d at 441–43.

<sup>104</sup> *See* Hurme & Appelbaum, *supra* note 39, at 936.

<sup>105</sup> *See id.* at 940.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* In West Virginia, for example, the state constitution bars persons “declared mentally incompetent by a court of competent jurisdiction,” while the election law prohibits persons of “unsound mind.” *See* W. VA. CONST. art. IV, § 1; W. VA. CODE § 3–1–3 (2006). This inconsistency is not elucidated by the state’s guardianship law which uses neither categorization but instead refers to a ward as a “protected person.” *See* W. VA. CODE § 44A-1-4(13).

<sup>108</sup> *See* Hurme & Appelbaum, *supra* note 39, at 939–40. Twenty states that have a constitutional bar do not mention mental status within their election laws, perhaps because the constitution is deemed dispositive. *See id.* at 940. Yet, in Kansas and Wisconsin, the constitution merely permitted the state legislatures to develop a standard for exclusion and the states failure to legislate must mean they have chosen not to exclude. KAN. CONST. art. V, § 2; Wis. CONST. art. III, § 2; Hurme & Appelbaum, *supra* note 39, at 940. Nevertheless, the lack of consistency and clarity in the determination of voter eligibility can foster improper exclusions of individuals with mental disabilities based upon an ill-defined status rather than capacity. *See, e.g., Doe v. Rowe*, 156 F. Supp. 2d 35, 38, 51, 56, 59 (D. Me. 2001) (demonstrating that differences between a state constitutional provision and election law created confusion resulting in denials which violated the constitution’s guarantees of equal protection and due process).

<sup>109</sup> *See* Hurme & Appelbaum, *supra* note 39, at 937–39.

on exclusion due to mental disability at all; yet, twenty of those have some state constitutional bar.<sup>110</sup>

Significantly, the creation of a majority of these bars to voting coincided with the creation of asylums and institutions which removed whole classes of persons who were deemed disabled from communities across the country in the nineteenth century.<sup>111</sup> Vermont and Maine led the way in disenfranchising voters because of intellectual and developmental disabilities.<sup>112</sup> Vermont excluded those “not of peaceable behavior,” while Maine denied “persons under guardianship.”<sup>113</sup> Only in 1831 did states adopt explicit methods of such disenfranchisement using the terms “idiot[s]” and “insane.”<sup>114</sup> This shift in language demonstrates an important development in public opinion.<sup>115</sup> While emphasis was initially placed upon the fact that persons with disabilities were financially dependent or under guardianship, a growing focus on cognitive aptitude reflected a developing trend to exclude those with “intellectual and moral incompetency.”<sup>116</sup>

## II. TREND TOWARD HEIGHTENED RESPECT FOR THE INDIVIDUAL CAPACITIES OF PERSONS WITH MENTAL DISABILITIES

Beginning as early as 1966, disability advocates began to argue for individuals with disabilities to have a right to live in an integrated

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<sup>110</sup> See *id.* at 940. Even more confusing is the law in Massachusetts. See *id.* at 956. Massachusetts has both constitutional provisions and election law indicating that persons “under guardianship” cannot vote; however, the Secretary of State of Massachusetts issued an opinion that persons under guardianship should be able and encouraged to vote unless found incompetent to do so. See Opinion of the Elections Division, Persons Subject to Guardianships That Do Not Specifically Forbid Voting Are Eligible Voters, reprinted in 8 JOHN CROSS ET AL., GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS 149 (2d ed. 2000); Hurme & Appelbaum, *supra* note 29, at 956.

<sup>111</sup> See Colker, *supra* note 23, at 1449.

<sup>112</sup> See *id.*

<sup>113</sup> ME. CONST. art. II, § 1; VT. CONST. of 1793, ch. II, § 21; Colker, *supra* note 23, at 1449.

<sup>114</sup> See Colker, *supra* note 23, at 1449.

<sup>115</sup> See *id.* at 1450.

<sup>116</sup> See *id.* Interestingly, women in the nineteenth century were similarly characterized. Rutherford, *supra* note 76, at 1481–82. They were labeled “morally inferior, emotional, irrational, delicate, passive, simple-minded, weak, timid, and child-like, and these stereotypes reinforced the opposition to suffrage.” See *id.* “Even those who placed women on a pedestal did so to create a separate private sphere outside of politics: women were simply too sweet, naive, and sentimental to vote.” *Id.* at 1482. Later, “positive stereotypes enabled women to prevail.” See *id.* at 1483.

world.<sup>117</sup> Since then, the law of disability discrimination developed under this integrationist approach and enhanced the access of disabled individuals to education, housing, and even voting.<sup>118</sup>

This revolution in social policy has as its goal “making available to . . . people patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of society.”<sup>119</sup> In line with this trend, some states have begun to revise their laws to respect the autonomy of persons with mental disabilities.<sup>120</sup> The federal government has also enacted legislation aimed at reducing discrimination and enforcing equal treatment, and new legal standards, informed by a contemporary understanding of mental disability have arisen.<sup>121</sup> These changes are facilitating a movement toward not just extending the right to vote to mentally disabled persons who are able but actually promoting its exercise.<sup>122</sup>

#### A. *State Law Changes Toward Recognition of the Individual Capacities of Mentally Disabled Persons*

States have a compelling interest in ensuring that voters comprehend the voting process and make an independent choice when casting a vote but this interest does not change the fact that not all persons with

<sup>117</sup> RUTH COLKER, *WHEN IS SEPARATE UNEQUAL?: A DISABILITY PERSPECTIVE* 24 (2009); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 917 (1966).

<sup>118</sup> See COLKER, *supra* note 117, at 24–25.

<sup>119</sup> MARTHA A. FIELD & VALERIE A. SANCHEZ, *EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION* 13 (1999).

<sup>120</sup> See *Developments in the Law, supra* note 38, at 1182–83.

<sup>121</sup> See, e.g., ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110–325, 122 Stat. 3553 (to be codified at 42 U.S.C. §§ 12101–12213); Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 328 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

<sup>122</sup> See, e.g., N.J. CONST. art. II, § 1(6); 42 U.S.C. §§ 12102–12103; WASH. REV. CODE § 11.88.010(5) (Supp. 2009); WIS. STAT. § 54.25(2)(c)1.g (2008); *ADA Restorative Act Hearing, supra* note 69, at 12 (citing the George W. Bush administration’s commitment to promoting the rights of people with disabilities and their participation “in all aspects of American life”); NAT’L COUNCIL ON DISABILITY, *PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 1* (2000) (noting an “increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities” and describing the ADA as “a vehicle through with people with disabilities have made their political influence felt”).

a mental disability are incompetent to vote.<sup>123</sup> States have already begun to narrow disenfranchisement based on an individual's capacity.<sup>124</sup>

Most states achieved this end by creating forms of limited guardianship and narrowly interpreting constitutional and election law provisions to exclude only those under full guardianship.<sup>125</sup> Traditionally, almost all guardianships were "broad and all inclusive"; this began to change in the 1960's.<sup>126</sup> In contrast, the modern emphasis "has been to establish more precise limits on the guardian's powers and to make procedures stricter" for both creation and monitoring of the arrangement.<sup>127</sup> In 1980, the American Bar Association endorsed a resolution which urged states to help persons with mental disabilities live self-sufficiently to the maximum extent practicable by developing limited or partial guardianships.<sup>128</sup> Although at the time of this endorsement few states recognized limited guardianships, today at least forty-two states do.<sup>129</sup> State probate laws have essentially attempted to grapple with the reality that "when people start sliding downhill they often slide slowly, almost imperceptibly. They have good days and bad days. They can manage some things and not others."<sup>130</sup> Accordingly, in excluding the mentally incapacitated, several states have come to reflect upon

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<sup>123</sup> *Developments in the Law, supra* note 38, at 1181-82.

<sup>124</sup> *See id.*

<sup>125</sup> *See id.* at 1182-83.

<sup>126</sup> *See* John W. Parry & Sally Balch Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 304, 304 (1991). Gradually, states have come to appreciate the far-reaching consequences of guardianship which restricts the liberty and forecloses certain legal and civil rights of a ward. *See id.*; Phillip B. Tor & Bruce D. Sales, *Research on the Law and Practice of Guardianship*, in MENTAL HEALTH AND LAW: RESEARCH POLICY AND SERVICES 75, 75-79 (Bruce D. Sales & Salim A. Shah eds., 1996). Guardianship is rooted in the feudal English doctrine of *parens patriae* by which the English crown would assume the role of parent for those who lacked discretion to manage their own affairs. *See* Tor & Sales, *supra*, at 75-79. In the United States, guardianship is similarly a means by which the state assumes custody of a child or mentally or physically disabled person who is unable to protect his or her self. *Id.*

<sup>127</sup> *See* Tor & Sales, *supra* note 126, at 75-79. Initially, a guardianship hearing could consist of little more than a doctor's letter of medical diagnosis; today, however, demands of substantive due process, the availability of less restrictive alternatives and a general tendency to grant power no greater than necessary to protect the ward result in a more rigorous process. *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See* Lawrence M. Friedman & June O. Starr, *Losing It in California: Conservatorship and the Social Organization of Aging*, 73 WASH.U. L.Q. 1501, 1524 (1995). This trend sharply contrasts the "sharp, brittle, black-and-white distinctions between competence and incompetence" imposed by older legal doctrine. *See id.* at 1523.

whether the probate judge found the person incompetent for the specific purpose of voting.<sup>131</sup>

Another route to change has been to remove over-inclusive terms from state laws.<sup>132</sup> New Jersey's 2007 elimination by referendum of the phrase "idiot or insane person" is an example of this trend.<sup>133</sup> Similarly, some states have eliminated old terminology which promoted imprecise categorization and was plainly offensive but did not replace these terms with a clear standard.<sup>134</sup> Such uncertainty as to who a standard excludes provides fertile ground for violations of constitutional guarantees of equal protection due to categorical rather than necessary and proper exclusion.<sup>135</sup>

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<sup>131</sup> *Developments in the Law, supra* note 38, at 1183.

<sup>132</sup> *See id.*

<sup>133</sup> *See* N.J. CONST. art. II, § 1(6); *Election Results 2007*, BALLOTWATCH (Initiative & Referendum Inst., Univ. of S. Cal., L.A., Cal.), Nov. 13, 2007, at 2. The new provision excludes only a "person who has been adjudicated by a court of competent jurisdiction to lack capacity to understand the act of voting." N.J. CONST. art. II, § 1(6). New Jersey state senate president Richard Codey proposed the bill noting that the archaic language of the state's standard was not only "insensitive, but it [did] not take into account the individual circumstances of people with varying degrees of disabilities." *See* Susan K. Livio, *Pushing to Scrap a Lawful Indignity*, STAR-LEDGER (Newark, N.J.), Jan. 8, 2007, at 13. While a majority of voters agreed with Codey and the referendum passed, some criticized the change implying allowing persons with mental disabilities to vote would allow "crooked people to grab power by rigging elections." *See* Seth Grossman, Op-Ed, *It's Not About Stigmas, It's About Politics*, N.J. REC. (Bergen County, N.J.), Oct. 25, 2007, at L9.

<sup>134</sup> *See, e.g.*, 2005 Wash. Sess. Laws 776-79; 73 Del. Laws 321 (2001) (amending DEL. CONST. art. V, § 2). In amending its guardianship law provision the Washington legislature found:

[T]he right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections should include clear notice and a meaningful opportunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest.

2005 Wash. Sess. Laws 776.

<sup>135</sup> *See* Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d at 808-09 (8th Cir. 2007) (reasoning categorical prohibition of a ward from voting would not withstand close equal protection scrutiny); *see also* Doe v. Rowe, 156 F. Supp. 2d at 56 (D. Me. 2001) (finding inconsistent and unclear terminology in a state constitution and election law resulted in unconstitutional exclusion from the electorate of otherwise capable persons with mental disabilities).

B. *The Americans with Disabilities Act of 1990, the ADA Amendments Act of 2008, and Court Precedent*

Only with the passage of the ADA, did the disabled minority gain the kind of legislative ground for civil rights that women and blacks achieved during the civil rights era of the 1960s.<sup>136</sup> In enacting the ADA, Congress intended to provide a comprehensive national mandate for the “elimination of discrimination against individuals with disabilities.”<sup>137</sup> Congress found that “mental disabilities in no way diminish a person’s right to fully participate in all aspects of society,” though such participation is often inhibited as a result of “prejudice, antiquated attitudes, or failure to remove societal and institutional barriers” that exist against the mentally disabled.<sup>138</sup> Yet, the ADA’s ambitious objective was thwarted when the Supreme Court narrowly construed its definition of disability, thereby denying protection to individuals Congress intended to protect.<sup>139</sup> The Court’s precedent has led lower courts to follow suit

<sup>136</sup> See Silvers & Francis, *supra* note 48, at 33.

<sup>137</sup> ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (to be codified at 42 U.S.C. §§ 12101).

<sup>138</sup> See *id.* § 2(a)(2).

<sup>139</sup> See *id.*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 486–87 (1999). In *Sutton v. United Air Lines, Inc.*, the Court rejected the claims of two women who were denied employment as pilots for an airline because their uncorrected vision did not meet the acuity requirement. See 527 U.S. at 475–76. The Court reasoned that Congress could not have intended “disabled” to apply to cover individuals when their limitations could be reduced by mitigating measures. See *id.* at 486–87. In this way, a court could deny a person with severe disabling depression protection under the Act if it can be shown that a treatment regimen would reduce the limitations on his functioning. See *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (focusing narrowly on whether the petitioner was disabled and reasoning “whether petitioner is ‘disabled’ due to limitations that persist despite his medication or the negative side effects of his medication”). The scope of protection intended by the bill has been even further curtailed by the Court in subsequent decisions; for example, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court reversed the circuit court’s finding that the plaintiff was disabled and required on remand that the court determine whether the plaintiff’s disability “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” See 534 U.S. 184, 198 (2002). Yet, the ADA itself does not contain this “severely restricts” requirement, but rather a lesser “substantial limitation” standard. See 42 U.S.C. § 12101(2)(a); Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM & MARY L. REV. 1, 61 (2007). Moreover, the Court refused to apply Title I against the states for money damages because Congress had not relied on evidence sufficient to provide a rational basis for concluding that states were engaged in patterns of employment discrimination against disabled persons that required such prophylactic legislation. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001). Although in recently finding that Congress’s prophylactic legislation was supported by sufficient evidence, the Court upheld Title II against the states; it did so narrowly, however, with regard to the right of access to courts. See *Tennessee v. Lane*, 541 U.S. 509, 524–25, 527–28 (2004).

and ignore the more comprehensive congressional intent and understanding of disability discrimination that was codified in the ADA.<sup>140</sup>

In light of this history, Congress recently passed the ADA Amendments Act of 2008, to provide “clear, enforceable standards addressing discrimination.”<sup>141</sup> The ADAAA specifically rejects a narrow definition of disability and therefore affords protection to a broad scope of persons.<sup>142</sup> The definition adopted consists of three prongs: “a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; a record of having such an impairment; or being regarded as having such an impairment.”<sup>143</sup> Congress carefully elucidated major life activities listing among them, “caring for oneself, performing normal tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” but also qualified this list as non-exclusive.<sup>144</sup> Additionally, the third prong of the definition provides protection where an individual has been subjected to a prohibited action “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a substantial life activity.”<sup>145</sup> Notably, this definition encourages courts to broadly construe the scope of its protections.<sup>146</sup>

Congress also provided courts with specific rules of construction.<sup>147</sup> The first of these rules colors the rest, mandating that the Act’s definition of disability be construed in favor of broad coverage of individuals to the maximum extent permitted by its terms.<sup>148</sup> The other rules clarify the terms of the Act to broaden the disabled class, with the last providing that determination of whether a person is disabled should “be made without regard to the ameliorative effects of mitigating measures.”<sup>149</sup> Consequently, the ADAAA has reaffirmed the congressional intent behind the ADA and re-established the scope of its protection to ensure that persons with disabilities are treated equally.<sup>150</sup>

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<sup>140</sup> See generally ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110–325, § 2, 122 Stat. 3553, 3553–3554 (to be codified at 42 U.S.C. §§ 12101–12213); *Toyota*, 534 U.S. at 198.

<sup>141</sup> See ADAAA § 2(b)(1).

<sup>142</sup> See *id.*

<sup>143</sup> 42 U.S.C. § 12102 (1).

<sup>144</sup> See ADAAA § 4(a)(2)(A).

<sup>145</sup> See *id.* § 4(a)(3)(A).

<sup>146</sup> See *id.* § 4(a)(4)(A).

<sup>147</sup> See *id.* § 4.

<sup>148</sup> See *id.* § 4(a)(4)(A).

<sup>149</sup> See ADAAA § 4(a)(4). This last rule specifically reverses the result in *Sutton*. See *id.* § 4(a)(4)(E); *Sutton*, 527 U.S. at 486–87.

<sup>150</sup> See ADAAA §§ 2–4.

If successful, the focus will shift away from an individual's inherent differences and onto the practices of society "examined in light of latent flexibility in structuring and modifying tasks, programs, facilities, and opportunities."<sup>151</sup>

Title II of the ADA, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."<sup>152</sup> Although the Eleventh Amendment has posed a bar to private suits seeking money damages due to state violations under Title I of the ADA, the Supreme Court held that in at least one circumstance, Title II permits private suits for money damages.<sup>153</sup> Title II states that voting falls within the rights protected from discrimination by the ADA as a service, program or activity provided by a public entity such as any state or local government.<sup>154</sup> Further, discriminatory denial of voting rights should likewise give rise to a right to sue privately for money damages under Title II.<sup>155</sup>

*C. Contemporary Understanding of Mental Disability with Regard to  
Voting Capacity: An Incentive to Develop Less Restrictive  
Voter Eligibility Requirements*

Even in the face of a strong presumption that persons are competent to vote, contemporary disability advocates recognize that, at times, it may be necessary to directly assess that capacity.<sup>156</sup> As discussed earlier, such a standard was not necessary in the past because incapacity was often defined solely by status, that is, for example, persons under guardianship, institutionalized or insane.<sup>157</sup>

Fortunately some jurisdictions, influenced by contemporary understandings of mental disability, are adopting more individualized functional assessments rather than categorical definitions of capacity.<sup>158</sup>

<sup>151</sup> ADA Restorative Act Hearing, *supra* note 69, at 26.

<sup>152</sup> See 42 U.S.C. § 12132 (2006).

<sup>153</sup> See *Lane*, 541 U.S. at 531; *Garrett*, 531 U.S. at 374. *Lane* held "that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 531.

<sup>154</sup> See 42 U.S.C. §§ 12101, 12132.

<sup>155</sup> See *id.* § 12132; *Lane*, 541 U.S. at 530–31.

<sup>156</sup> See Hurme & Appelbaum, *supra* note 39, at 960.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.* at 936–45, 961.

Four states have attempted to define a standard.<sup>159</sup> Washington, for example, excludes from voting only those persons who “lack[] capacity to understand the nature and effect of voting such that he or she cannot make an individual choice.”<sup>160</sup> Wisconsin provides that incapacity for purposes of voting is established when a person is found “incapable of understanding the objective of the elective process.”<sup>161</sup> Both the Washington and Wisconsin standards share a basic requirement that the person have some understanding of the electoral process.<sup>162</sup> Even as early as 1907, courts searching for a standard of voting capacity recognized knowledge of the nature and effect of one’s act in casting a vote as the generally accepted rule.<sup>163</sup>

Although scientific knowledge can assist in the formulation of a standard for voting capacity, the end result will always be a policy measure, not scientific itself.<sup>164</sup> The capacities of persons with mental disabilities range from greater to lesser proficiency with no scientifically determinant point at which a mark of sufficient capacity can be established.<sup>165</sup> Accordingly, where the mark is placed must be derived from balancing the importance of allowing the person to exercise the right with the potential adverse outcomes of such an allowance.<sup>166</sup>

At law, capacities generally fall within two categories, decisional (capacity to decide something) and performance-oriented (capacity to do something).<sup>167</sup> Voting is essentially a decisional capacity, it rests on the cognitive function of grasping data and choosing between op-

<sup>159</sup> See DEL. CODE. ANN. tit. 15, § 1701 (2007); IOWA CODE § 633.556 (2003 & Supp. 2009); WASH. REV. CODE § 11.88.010(5) (Supp. 2009); WIS. STAT. § 54.25(2)(c)1.g (2008).

<sup>160</sup> WASH. REV. CODE § 11.88.010(5). Similarly, Delaware excludes those with “severe cognitive impairment which precludes exercise of basic voting judgment.” DEL. CODE. ANN. tit. 15, § 1701. Iowa denies any person that “lacks sufficient mental capacity to comprehend and exercise the right to vote” IOWA CODE § 633.556.

<sup>161</sup> WIS. STAT. § 54.25(2)(c)1.g.

<sup>162</sup> See WASH. REV. CODE § 11.88.010(5); WIS. STAT. § 54.25(2)(c)1.g.

<sup>163</sup> See *Welch v. Shumway*, 83 N.E. 549, 558 (Ill. 1907). The Federal District Court for the District of Maine recently reaffirmed this general rule and all but adopted the Washington standard. See WASH. REV. CODE § 11.88.010(5); *Doe*, 156 F. Supp. 2d at 56; Hurme & Appelbaum, *supra* note 39, at 962.

<sup>164</sup> See Hurme & Appelbaum, *supra* note 39, at 962.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.* Adverse outcomes would include the harms suffered by a state and the disabled person when a person who does not understand the nature and effect of voting casts a vote or someone else takes advantage of a person’s disability to cast a fraudulent vote. See 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).

<sup>167</sup> See Hurme & Appelbaum, *supra* note 39, at 962.

tions.<sup>168</sup> Decisional capacity analysis is not new to the law, so states can rely upon its well-developed foundations in creating a standard.<sup>169</sup> Over time consideration of decisional capacity has come to rely upon four main elements: a person's ability to (1) understand relevant information, (2) appreciate the effects of one's own decisions, (3) compare options and (4) make choices.<sup>170</sup> Thus, legislatures can craft capacity standards out of all or some of these elements and the degree to which any one element is emphasized will tailor the rigor of the test.<sup>171</sup>

The states that have offered guidance to elections administrators have adopted a low standard for voting capacity in order to maximize the number of people eligible to vote.<sup>172</sup> Their decision likely relies upon the strong weighing of policy in favor of extending the right to vote, "a defining characteristic of democratic polity," against the small and uncertain risk for abuse, fraud, or otherwise improper ballot casting by the marginally incapacitated.<sup>173</sup>

Furthermore, the creation of a standard is aided by the substantial development of standardized assessments of decisional capacity over the last few years.<sup>174</sup> These new tools produce quantitative measures that can be considered when assessing capacity but are not given determinate weight.<sup>175</sup> Knowing the typical range associated with capacity and incapacity based upon statistical data can aid a professional in tough cases, but any score that falls below an established cut-off would

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<sup>168</sup> See *id.* at 962–63. Even though voting requires some physical act like flipping a lever or filling in a bubble on the ballot, that action is not intrinsic to the act of voting itself and no longer needs to be completed by the person himself. See *id.*

<sup>169</sup> See *id.* Examples of recognized decisional capacities include the ability to contract, marry, create a will and make decisions regarding one's medical treatment. See *id.*

<sup>170</sup> See Grisso & Appelbaum, *supra* note 43, at 1033. When more elements are included in the standard, the more rigorous the test of capacity becomes. See *id.* at 1034–35, 1036–37.

<sup>171</sup> See *id.* A difficult test would require the person to understand the act of voting, be able to reason between candidates and ballot measures and appreciate his own choice and the effect of his casting a ballot, thereby incorporating all four legal standards of decisional capacity. See *id.* at 1034–35, 1036–37.

<sup>172</sup> See WASH. REV. CODE § 11.88.010(5) (Supp. 2009); WIS. STAT. § 54.25(2)(c)1.g (2008).

<sup>173</sup> See Hurme & Appelbaum, *supra* note 39, at 963–64. This inference and the modern trend toward extending the right to vote are reinforced by the fact that only the understanding element of the decisional capacity test has been adopted even though medical evidence has shown that each additional element added to such a test will narrow the class considered capable. Grisso & Appelbaum, *supra* note 43, at 1035–36. Further, in retaining this element, legislatures and courts require only a "modicum of knowledge" of voting and forbid any more particularized inquiry. See Hurme & Appelbaum, *supra* note 39, at 965.

<sup>174</sup> See Grisso & Appelbaum, *supra* note 43, at 1033–34; Hurme & Appelbaum, *supra* note 39, at 966.

<sup>175</sup> See Hurme & Appelbaum, *supra* note 39, at 963–64, 966.

simply indicate the need for more careful evaluation, not a categorical exclusion.<sup>176</sup>

The Competence Assessment Tool for Voting (CAT-V) is one such test that poses certain tasks to the subject in order to probe his or her understanding of the nature and effect of voting and ability to choose between options.<sup>177</sup> The CAT-V was tested on a small group of Alzheimer's patients at the Memory Disorders Clinic at the University of Pennsylvania and revealed tight correlation between scores and the degree of dementia.<sup>178</sup> Nevertheless, these results remain to be demonstrated on a wide scale.<sup>179</sup> Regardless, the advantage of such a tool is that it "focuses the interviewer's attention on the specific abilities requisite to voting and may even provide a basis for educating the person being evaluated so that they might[sic] acquire sufficient understanding to achieve capacity."<sup>180</sup>

Contemporary understanding of mental disability has evolved substantially and now encourages and assists the expansion of the right to vote.<sup>181</sup> Some states have already begun to establish standards to assess a person's capacity to vote.<sup>182</sup> Additionally, structured assessment instruments have substantially developed to such an extent that they can assist in providing a spectrum upon which states can mark at what point

<sup>176</sup> See Appelbaum et al., *supra* note 43, at 2094–95, 2097.

<sup>177</sup> See *id.* at 2095. The exam itself features an assessor asking various questions, such as "Imagine that two candidates are running for Governor of [subject's state], and today is Election Day in [subject's state]," "What will the people of [subject's state] do today to pick the next Governor?" (testing the subject's understanding of the nature of voting), and "When the election for governor is over, how will it be decided who the winner is?" (testing the subject's understanding of the effect of voting). *Id.* at 2099. The second part of the test concerns the subject's ability to choose between candidates posing a choice between two hypothetical candidates with different platforms. See *id.*

<sup>178</sup> See *id.* at 2095, 2096 tbl.1. This element of the test makes the test arguably more rigorous than what would be required by the standard states and courts have been inclined to adopt as mentioned above. See WASH. REV. CODE § 11.88.010(5) (Supp. 2009); WIS. STAT. § 54.25(2)(c)1.g (2008); *Doe*, 156 F. Supp. 2d at 56; *Welch*, 83 N.E. at 558; Appelbaum et al., *supra* note 43, at 2095, 2096 tbl.1. Regardless, the actual test data seemed to indicate that this "choice" element of the decisional test was more frequently met than the "understanding" element by the group tested. See Appelbaum et al., *supra* note 45, at 2095, 2096 tbl.1.

<sup>179</sup> See Hurme & Appelbaum, *supra* note 39, at 970.

<sup>180</sup> See *id.*

<sup>181</sup> See Karlawish et al., *supra* note 166, at 1346; Charles P. Sabatino & Edward D. Spurgeon, *Facilitating Voting as People Age: The Implications of Cognitive Impairments*, 38 McGEORGE L. REV. 843, 850–52 (2007).

<sup>182</sup> See WASH. REV. CODE § 11.88.010(5); WIS. STAT. § 54.25(2)(c)1.g.

mental incapacity is sufficient to deny persons the right.<sup>183</sup> Thus, in accordance with this trend, all states should create measurable standards for voting capacity based upon the low threshold of a person's ability to understand the nature and effect of voting.<sup>184</sup>

### III. REFORM AMONG STATES LAGS BEHIND DESPITE RECENT COURT DECISIONS

Despite advances in understanding mental disability and the creation of tests that provide reliable measurements of mental capacity, some states have not changed their constitutions or election laws to remedy this unjustified disenfranchisement.<sup>185</sup> Without modification, these laws allow for summary denial of the right of suffrage to persons with mental disabilities, who nevertheless understand the nature and effect of voting and have the ability to make choices, in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>186</sup> Even worse, informal barriers that prevent access to the polls or absentee voting may persist despite the most inclusive state constitutions and election laws.<sup>187</sup>

#### A. *Tennessee v. Lane: Affirming Title II Protection for Certain Fundamental Rights*

*Tennessee v. Lane*, a recent case under Title II, was brought by plaintiffs who were paraplegics who used wheelchairs for mobility claiming "they were denied access to, and the services of, the state court system by reason of their disabilities."<sup>188</sup> Although the plaintiffs did not contest their voting eligibility, the Supreme Court referred to voting at least five times in its opinion.<sup>189</sup> Particularly, the Court recognized the harm Congress sought to redress by enacting Title II—the "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."<sup>190</sup> Moreover, the Court noted that "[a]s of 1979, most States still categorically disqualified

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<sup>183</sup> See Appelbaum et al., *supra* note 43, at 2099; Grisso & Appelbaum, *supra* note 43, at 1034.

<sup>184</sup> See *Doe*, 156 F. Supp. 2d at 56; Karlawish et al., *supra* note 166, at 1346; see also WASH. REV. CODE § 11.88.010(5); WIS. STAT. § 54.25(2)(c)1.g; *Welch*, 83 N.E. at 558; Appelbaum et al., *supra* note 43, at 2099; Grisso & Appelbaum, *supra* note 43, at 1033.

<sup>185</sup> *Developments in the Law*, *supra* note 38, at 1184–85.

<sup>186</sup> See U.S. CONST. amend XIV; *Doe v. Rowe*, 156 F. Supp. 2d 35, 56 (D. Me. 2001).

<sup>187</sup> See Colker, *supra* note 23, at 1451.

<sup>188</sup> See 42 U.S.C. § 12132 (2006); *Tennessee v. Lane*, 541 U.S. 509, 513 (2004).

<sup>189</sup> See *Lane*, 541 U.S. at 513, 524, 529.

<sup>190</sup> See *id.* at 524.

'idiots' from voting, without regard to individual capacity."<sup>191</sup> The opinion seemed to lament that many of these laws "remain on the books" and recognized that one such law was recently challenged in 2001.<sup>192</sup>

Notably, *Lane* found that Title II sought to enforce not only a prohibition on disability discrimination but also "a variety of other basic constitutional guarantees."<sup>193</sup> The Court emphasized that such rights were "subject to more searching judicial review" and some were "protected by the Due Process Clause of the Fourteenth Amendment."<sup>194</sup> Under this review, the Court found Title II to be congruent and proportional to its object of enforcing the right of access to the courts, a fundamental right.<sup>195</sup> The *Lane* opinion recognized that the ADA demanded states remove such barriers because failure to do so would have the same practical effect of outright exclusion.<sup>196</sup>

Therefore, Title II could prove to be a tool to enforce other fundamental rights that have been subject to a similar history of discrimination, like the right to vote.<sup>197</sup> At the very least, *Lane* is strong precedent that allegations of discriminatory denial of the right to vote will be evaluated at a closer level of scrutiny than rational basis.<sup>198</sup> At best, *Lane* supports the proposition that "ordinary considerations of cost and convenience alone" will not justify a state's denial of a fundamental liberty interest such as the right to vote and, on the other hand, may oblige the state to provide for that right's meaningful exercise.<sup>199</sup>

### B. *Doe v. Rowe: Holding States Accountable for Discriminatory Voting Laws*

*Lane* referred to a 2001 voting rights case that was a significant victory for persons with mental disabilities in the state of Maine.<sup>200</sup> In *Doe v. Rowe*, the U.S. District Court of Maine considered whether Maine's

<sup>191</sup> *See id.* (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in part and dissenting in part) (stating that a requirement of a special use permit for a group home for the mentally retarded violated the Equal Protection Clause of the Fourteenth Amendment)).

<sup>192</sup> *See id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See Lane*, 541 U.S. at 522–23.

<sup>195</sup> *See id.* at 533–34. The Court justified its conclusion saying, "[T]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *See id.* at 531.

<sup>196</sup> *See id.*

<sup>197</sup> *See id.* at 530–32.

<sup>198</sup> *See id.* at 522–23.

<sup>199</sup> *See Lane*, 541 U.S. at 533–32.

<sup>200</sup> *Doe*, 156 F. Supp. 2d at 38, 51, 56, 59.

constitution and its state election law violated the Due Process and Equal Protection Clauses, the ADA and the Rehabilitation in prohibiting “persons under guardianship for reasons of mental illness” from registering to vote and voting in any election.<sup>201</sup> The case included three individual plaintiffs and the Disability Rights Center of Maine, Inc., which represented each plaintiff as well as the rights of all Maine residents who had been denied the right to vote as a result of being placed under guardianship for mental illness.<sup>202</sup>

The first plaintiff was Jane Doe, a thirty year old placed under full guardianship as a result of bipolar disorder.<sup>203</sup> At her guardianship proceedings, the probate court did not consider her capacity to vote or notify her that she would lose the right to vote as a result of the placement.<sup>204</sup> Just before the November 2000 election, Jane desired to vote, but the constitution of Maine prohibited her from engaging in that activity.<sup>205</sup> She sought a preliminary injunction to allow her to vote and, in so doing, learned that the State of Maine’s position was “that a person under full guardianship by reason of mental illness could vote if the Probate Court specifically reserved this individual’s right to vote.”<sup>206</sup> Accordingly, Jane Doe filed a petition with the Aroostook County Probate Court to modify her guardianship order and was granted the motion.<sup>207</sup>

The next plaintiff, Jill Doe, was a seventy-five year old woman also diagnosed with bipolar disorder and placed under guardianship upon being classified as incapacitated by reason of her mental illness.<sup>208</sup> Jill averred that no one raised the issue of her capacity to vote at her guardianship proceeding.<sup>209</sup> Like Jane, Jill filed a motion with the Pe-

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<sup>201</sup> *See id.* The court found that “pursuant to Maine’s Constitution and the relevant implementing statute, persons who are ‘under guardianship for reasons of mental illness’ are prohibited from registering to vote or voting in any election.” *Id.* at 38. Further, the state criminalized the act of voting if the person had knowledge he or she was prohibited. *See* ME. REV. STAT. ANN. tit. 21-A, § 674(3)(B) (2009).

<sup>202</sup> *See Doe*, 156 F. Supp. 2d at 39.

<sup>203</sup> *See id.* The court adopted the Department of Health and Human Services understanding of bipolar disorder as “a recurrent mood disorder featuring one or more episodes of mania or mixed episodes of mania and depression.” *Id.* at 39 n.4; U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 246 (1999).

<sup>204</sup> *See Doe*, 156 F. Supp. 2d at 39.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *Doe*, 156 F. Supp. 2d at 40. Jill contested that she was incapacitated at the guardianship proceeding and in the alternative argued that she should be placed under limited

nobscot County Probate Court asking her order be revised so she could vote in the November 2000 election.<sup>210</sup> In support of her motion, Jill offered an affidavit from her psychiatrist, indicating that the doctor believed Jill “understood the nature and effect of voting such that she could make an individual choice about the candidates and questions on the ballot.”<sup>211</sup> Although her motion was unopposed, the probate judge denied it summarily based on his reading of the law, specifically “under the provisions of Article II, Section I of the Constitution of the State of Maine.”<sup>212</sup>

The third plaintiff, June Doe, was under guardianship as a result of being diagnosed with mild organic brain syndrome, intermittent explosive disorder, and antisocial personality.<sup>213</sup> Just like Jane and Jill, June’s capacity to vote was not considered at her guardianship proceeding.<sup>214</sup> June wanted to vote but could not file a motion because she was hospitalized; her motion, however, would have been heard by the same probate judge who summarily dismissed Jill’s motion and would likely have faced a comparable fate.<sup>215</sup> Her doctor testified that “based on his . . . 32 years of experience [he] generally believe[d] that a person under guardianship for severe mental illness ‘is more likely to be monitored and receive treatment which will help restore him or her to capacity in areas such as voting’ compared to [other mentally ill persons] not under guardianship.”<sup>216</sup> The *Doe* court related this doctor’s observation to what the U.S. Supreme Court had described as a “common phenomenon” among mental disorders, that the patient functions well with medication but because of the illness, lacks the capacity to follow the treatment regime.<sup>217</sup> This logic, if accepted, may undercut the reasoning behind any limitation on the voting rights for persons under

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guardianship only to ensure she take her medication. *See id.* at 39–40. The probate judge nonetheless placed her under a full guardianship arrangement. *See id.*

<sup>210</sup> *See id.* at 40. In support of her motion, Jill gave a sworn affidavit attesting that she had voted in the past by absentee ballot being unaware that she was not allowed. *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *Doe*, 156 F. Supp. 2d at 40; *see* ME. CONST. art. II, § 1.

<sup>213</sup> *Doe*, 156 F. Supp. 2d at 40. Antisocial personality disorder is a “pattern of disregard for and violation of the rights of others.” AM. PSYCHIATRIC ASS’N, *supra* note 75, at 685. Organic brain syndrome describes “any of various disorders of cognition caused by permanent or temporary brain dysfunction and characterized especially by dementia.” AM. HERITAGE DICTIONARY 1239 (4th ed. 2000).

<sup>214</sup> *See Doe*, 156 F. Supp. 2d at 40.

<sup>215</sup> *See id.* at 41.

<sup>216</sup> *See id.* at 41 n.7.

<sup>217</sup> *See id.* (citing *Olmstead v. L.C.*, 527 U.S. 581, 610 (Kennedy, J., concurring)).

guardianship for reasons of mental illness and likely supports the converse.<sup>218</sup>

The State of Maine argued that it was a duty of probate court judges to determine a person's capacity at the guardianship hearing.<sup>219</sup> Yet, the record itself evidenced confusion among the probate judges as to whether they were bound by such a duty, let alone whether they had the authority to make such a determination in the first place.<sup>220</sup> Moreover, the court observed that individuals with mental illness subjected to guardianship proceedings were not specifically advised that "they could be disenfranchised if they are placed under full guardianship."<sup>221</sup>

In addition, neither the Maine Constitution nor the relevant statute set forth a definition of "mental illness."<sup>222</sup> In 1980, the Deputy Secretary of State advised that the restriction only applied to "a person under guardianship for reasons of mental illness."<sup>223</sup> He also stated that it did not include those mentally ill but not under guardianship or those who appeared "senile" or "retarded" or who had another physical or mental handicap.<sup>224</sup> During the *Doe* litigation, the defendants realized that this view disenfranchised an "arbitrarily defined group of citizens."<sup>225</sup> Consequently, they argued that the court should read the term broadly to include all persons under full guardianship.<sup>226</sup>

The *Doe* court considered Maine's drastic re-interpretations of the definition of mental illness and the proffered due process protections as a desperate attempt to cover up constitutional infirmities in the state's law.<sup>227</sup> Accordingly, the court found that the manner by which Maine disenfranchised persons with mental illness violated guarantees of due process and equal protection, both facially and as applied, as well as Title II of the ADA.<sup>228</sup> Significantly, the opinion derided the state's definition of mental illness saying that it "singles out, for no le-

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<sup>218</sup> *See id.*

<sup>219</sup> *See Doe*, 156 F. Supp. 2d at 43.

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See id.* at 44.

<sup>224</sup> *See Doe*, 156 F. Supp. 2d at 44. The Office of the Maine Secretary of State again adopted a similar position in 1999. *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.* The court was skeptical of this position because there was no evidence of attempts to advise or educate municipal officials and there was no indication that voters had been advised of this new broad meaning of "mental illness" when they re-affirmed the restriction by referendum in November 2000. *See id.* at 44-45.

<sup>227</sup> *See id.* at 45-46.

<sup>228</sup> *Id.* at 49, 50-51, 52, 56, 59.

gitimate basis, people with psychiatrically based diagnos[e]s as opposed to all those who may be under guardianship for reasons of mental incapacity.”<sup>229</sup> Most importantly, the court warned that adding more diagnoses to the category of mental illness increases the risk that people who understand the nature and effect of voting will be wrongfully denied their right.<sup>230</sup> In sum, *Doe* established that a categorical exclusion of persons with mental disabilities that did not distinguish between persons who understood the nature and effect of voting and those who did not was unconstitutional and in violation of federal law.<sup>231</sup> Moreover, the court found that the manner by which this exclusion was effectuated particularly offended the procedural due process guarantees.<sup>232</sup>

C. Missouri Protection & Advocacy Services, Inc. v. Carnahan:  
*A Bump on the Road*

In *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, residents and an advocacy organization challenged a Missouri constitutional provision and its implementing statute, which denied the right to vote to residents under guardianship by reason of mental incapacity.<sup>233</sup> The court recognized that Missouri’s prohibition had “a long history.”<sup>234</sup> Like other states, Missouri originally barred from voting persons kept at poorhouses or other asylums at public expense and only later added to the prohibition any “idiot” or “insane person.”<sup>235</sup> In 1958, the state passed an amendment which provided “no person who has a guardian . . . by reason of mental incapacity, appointed by a court of competent

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<sup>229</sup> *See id.* at 52. The court was particularly disturbed by the fact that a person under guardianship because of mental retardation would unconditionally be allowed to vote regardless of whether his mental disability diminished his capacity to understand the nature and effect of voting. *See id.*

<sup>230</sup> *See Doe*, 156 F. Supp. 2d at 55. The court related that in 1999, the United States Department of Health and Human Services released the first Surgeon General’s Report on Mental Illness, which defined mental illness as “a term that collectively refers to all diagnosable mental disorders.” *See id.* at 54 (quoting U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 203, at 5) The court continued, “Mental disorders are health conditions that are characterized by alteration in thinking, mood or behavior (or some combination thereof) associated with distress and/or impaired functioning.” *Id.* (quoting U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 203, at 5). The court reasoned that should a state adopt such a broad modern definition as its basis for exclusion from voting eligibility it would risk excluding those who have *some* disorder, such as an eating disorder, but nonetheless possess a genuine understanding of the nature and effect of voting. *See id.* at 55.

<sup>231</sup> *Id.* at 56.

<sup>232</sup> *See id.* at 50–51.

<sup>233</sup> *See* 499 F.3d 803, 805 (8th Cir. 2007).

<sup>234</sup> *See id.*

<sup>235</sup> *See id.* at 806; Colker, *supra* note 23, at 1449.

jurisdiction . . . shall be entitled to vote.”<sup>236</sup> The amendment’s aim was to give polling officials a concrete standard for determining who could be disqualified.<sup>237</sup> The state’s implementing statute, however, provided a different standard that prohibited persons, “adjudged incapacitated” from registering to vote.<sup>238</sup>

The named plaintiff, Robert Scaletty, had been diagnosed with schizophrenia and, in 1999, was placed under a full order of protection in accordance with procedures established in Missouri law.<sup>239</sup> Although his guardianship order reserved his right to vote, he was subsequently denied the right by election officials who explained that state law does not allow individuals under such an order to vote.<sup>240</sup> After Scaletty became party to the case in January 2005, however, the Kansas City Board of Election Commissioners sent his guardian a voter identification card and advised that he would be eligible to vote in the future.<sup>241</sup>

The plaintiffs mounted a facial attack against the Missouri constitutional and statutory provisions, arguing that they constituted a categorical ban on voting for persons under guardianship.<sup>242</sup> They argued that the bare term, “adjudged incapacitated,” of the statute could be read to implicate a far broader class of individuals than those excluded by Article VIII § 2 of the Missouri Constitution, including those placed under guardianship by reason of physical disability.<sup>243</sup>

The district court in this case explained that “difficulty arises in determining whether people who have been adjudged incompetent can, with or without accommodation, meet the essential eligibility requirements for voting,” and it concluded that some could, and some could not.<sup>244</sup> The court examined the totality of Missouri law to reach its conclusion.<sup>245</sup> It found that Missouri law requires an “individualized determination of the individual’s mental capacity and entry of an order that is no more limiting than necessary to protect the individual.”<sup>246</sup>

<sup>236</sup> See *Carnahan*, 499 F.3d at 805.

<sup>237</sup> See *id.* at 806.

<sup>238</sup> See MO. ANN. STAT. § 115.133.2 (2008); *Carnahan*, 499 F.3d at 806.

<sup>239</sup> See *Carnahan*, 499 F.3d at 811.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* at 808.

<sup>243</sup> See *id.* at 806.

<sup>244</sup> See *Prye v. Carnahan*, No. 04-4248-CV-C-ODS, 2006 WL 1888639, at \*5 (W.D. Mo. July 7, 2006).

<sup>245</sup> See *id.*

<sup>246</sup> See MO. REV. STAT. § 475.078.3 (2008) (allowing the probate court to find and enter an order recognizing that a person is incompetent as to some matters and competent as to others); *Carnahan*, 2006 WL 1888639, at \*6. In reaching this conclusion, the court was

The court grounded its logic upon a provision that empowered and obligated a probate judge to tailor an order of protection to the needs of the ward and not impose limits that are greater than necessary.<sup>247</sup> Yet, the opinion noted that its conclusion might have been different “if the entire sum and substance of Missouri law dictated that any person with a legally appointed guardian” could not vote.<sup>248</sup> The court believed that such a situation might violate the ADA.<sup>249</sup>

On appeal to the United States Court of Appeals for the Eighth Circuit, the plaintiffs renewed their argument that Missouri’s constitution and implementing statute had created a categorical ban on voting for persons under guardianship.<sup>250</sup> The court recognized that if the plaintiffs’ contentions were true, the statute would not fare well under close equal protection scrutiny.<sup>251</sup> Yet, the court was confident that the Missouri Supreme Court would read the inconsistent statutory terms the same in light of a firm state policy to construe liberally the right of suffrage.<sup>252</sup> It observed that, taken together, the statutes cited preserve the right to vote for partially incapacitated individuals, unless the court specifies otherwise, and deny the right to vote for totally incapacitated individuals, unless the court specifies otherwise.<sup>253</sup> Further, as written,

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persuaded that “the net effect is to afford the person the protection needed and allow him or her to operate without the strictures of an order of protection with respect to those aspects of life for which protection is not required—including, if appropriate in a given case, the right to vote.” *See id.*

<sup>247</sup> *See Carnahan*, 2006 WL 1888639, at \*4. The court relied on the Missouri statute which read:

A person who has been adjudicated incapacitated . . . shall be presumed to be incompetent. A person who has been adjudicated partially incapacitated . . . shall be presumed to be competent. The court . . . may determine that an incapacitated . . . or particularly incapacitated . . . person is incompetent for some purposes and competent for other purposes.

MO. REV. STAT. § 475.078.3.

<sup>248</sup> *See Carnahan*, 2006 WL 1888639, at \*6. In which case the law would not account for the individual’s unique abilities and limitations upon making a decision resulting in the denial of the right to vote. *See id.*

<sup>249</sup> *Id.*

<sup>250</sup> *See Carnahan*, 499 F.3d at 808.

<sup>251</sup> *See id.*

<sup>252</sup> *See id.* at 806.

<sup>253</sup> *See* MO. REV. STAT. §§ 475.010, 475.078 (2008); *Carnahan*, 499 F.3d at 806. Like the district court, the circuit court considered that the Missouri Probate Code contains different provisions for an “incapacitated person” and a person only “partially incapacitated,” the main distinction being that full incapacity imposes “all legal disabilities provided by law, except to the extent specified in the order of adjudication.” *See Carnahan*, 499 F.3d at 806. This convinced the court that the partially incapacitated individual would be subject

the law creates a presumption that one has the right to vote until adjudged incapacitated.<sup>254</sup>

Unfortunately, due to standing, the court refused to address the plaintiffs' proffered evidence of the very same type of categorical exclusion that was present in *Doe*.<sup>255</sup> The court held that the Missouri Protection and Advocacy Services, Inc. (MOPAS) had no standing to bring these allegations of discrimination, despite representing four individuals who were denied the right to vote because they were under full guardianship orders.<sup>256</sup> Nevertheless, the court did not hesitate to condemn categorical denials of the right to vote based solely on one's status without considering one's actual understanding of the nature and effect of voting.<sup>257</sup>

#### D. Lane, Doe, and Carnahan Provide a Strong Incentive for States to Develop a Clear and Fair Standard for Voter Eligibility

Even if the states that categorically exclude persons based upon their mental disabilities choose to ignore the trend toward facilitating the inclusion of the mentally disabled in communities, they must now reconcile their election law with the demands of the Constitution and federal government in light of the foregoing court decisions.<sup>258</sup> *Lane* equipped advocates with a powerful tool which bolsters the historically denigrated right to vote of persons with mental disabilities.<sup>259</sup> *Lane* also sent a clarion call to states, informing them that failing to accommodate persons with disabilities by removing barriers to their participation in society and full enjoyment of our Constitution's guarantees can constitute discrimination.<sup>260</sup> Further, *Doe* struck down a state's election law and demanded that a new standard for eligibility be developed based

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only to "such legal disabilities and restraints on personal liberty as are necessary to promote and protect the well-being of the individual." *See id.*

<sup>254</sup> *See Carnahan*, 499 F.3d at 806–07.

<sup>255</sup> *See id.* at 810.

<sup>256</sup> *See id.* 809–10. Dr. Paul S. Appelbaum, cited *infra* for his work toward the development of a structured assessment of voting capacity, conducted the evaluation of the MOPAS constituents and concluded that they met the criteria suggested by *Doe*. *See* Brief of Appellants at 8, 11, *Mo. Prot. & Advocacy Serv., Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (No. 06-3014). Further, there was evidence that even if the state provided a means by which the wards could seek restoration of their right, guardians often forbade or failed to help them do so. *See id.* at 13.

<sup>257</sup> *See Carnahan*, 499 F.3d at 808.

<sup>258</sup> *See Lane*, 541 U.S. at 524, 531–34; *Carnahan*, 499 F.3d at 808; *Doe*, 156 F. Supp. 2d at 38, 51, 56, 59.

<sup>259</sup> *See* 42 U.S.C. § 12132; *Lane*, 541 U.S. at 524.

<sup>260</sup> *See Lane*, 541 U.S. at 531.

upon an individual's actual understanding of the nature and effect of voting.<sup>261</sup> Finally, *Carnahan* reaffirmed that states will not be able to rely upon election laws which in effect categorically exclude persons based upon their status.<sup>262</sup> States cannot remain blind to the change embodied in these recent cases; they must affirmatively work toward facilitating the right to vote for persons with mental disabilities and exclude only individuals a court finds incapacitated because the potential voters genuinely lack an understanding of the nature and effect of voting, as determined by a clear and fair standard.<sup>263</sup>

### CONCLUSION

Today, mentally disabled people who retain a fundamental understanding of the nature and effect of voting such that they are able to make choices are barred from doing so in several states.<sup>264</sup> Consequently, these people are denied the means by which to effectuate their legal rights and a voice in government—rights guaranteed in the Constitution. These denials violate equal protection as well as Title II of the Americans with Disabilities Act and cannot persist.<sup>265</sup>

A national trend away from this pernicious discrimination has been given force through opinions like *Lane*, *Doe*, and *Carnahan*.<sup>266</sup> The law of this country demands a right to vote even for those suffering from mental disabilities. States should facilitate the independent exercise of voting. Though states have some discretion to exclude those who are mentally incapacitated, they must create clear and fair standards based on a low threshold that take into account the ability to understand the nature and effect of voting.<sup>267</sup> These standards should be applied by courts in order to guarantee due process and equal protection under the law. Accordingly, all states *should* assist those who desire to exercise the right to vote and *must* assure that they are not arbitrarily denied and excluded.

<sup>261</sup> See *Doe*, 156 F. Supp. 2d at 56.

<sup>262</sup> See *Carnahan*, 499 F.3d at 808.

<sup>263</sup> See *Lane*, 541 U.S. at 524, 531–34; *Carnahan*, 499 F.3d at 808; *Doe*, 156 F. Supp. 2d at 33, 51, 56, 59; *ADA Restoration Act Hearing*, *supra* note 69, at 12, 26.

<sup>264</sup> See Hurme & Appelbaum, *supra* note 39, at 956. Hurme and Appelbaum found, as of 2007, that the laws of Arizona, Hawaii, Mississippi, Nevada, Virginia, West Virginia, and Wyoming resulted in categorical exclusions. See *id.* at 61 n.161.

<sup>265</sup> See *Doe*, 156 F. Supp. 2d at 56.

<sup>266</sup> See *Lane*, 541 U.S. at 524; *Carnahan*, 499 F.3d at 808; *Doe*, 156 F. Supp. 2d at 33, 51, 56, 59.

<sup>267</sup> *Doe*, 156 F. Supp. 2d at 33, 51, 56, 59.

