

2022

## Voting Rights for People with Diminished Mental Capacity

Courtney Schiffler

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Election Law Commons](#)

### Recommended Citation

Schiffler, Courtney (2022) "Voting Rights for People with Diminished Mental Capacity," *Mitchell Hamline Law Review*: Vol. 48 : Iss. 2 , Article 7.

Available at: <https://open.mitchellhamline.edu/mhlr/vol48/iss2/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

# VOTING RIGHTS FOR PEOPLE WITH DIMINISHED MENTAL CAPACITY

Courtney Schiffler<sup>‡</sup>

I.	INTRODUCTION .....	658
II.	TERMINOLOGY .....	659
	A. <i>Range of Diagnoses</i> .....	659
	B. <i>Medical Versus Legal Determinations</i> .....	660
	C. <i>Defining Capacity</i> .....	661
III.	DEMOGRAPHICS .....	661
	A. <i>Voter Turnout</i> .....	662
	B. <i>Aging Adult Population</i> .....	662
	C. <i>Importance of the Franchise</i> .....	663
IV.	FEDERAL LAWS .....	664
	A. <i>The United States Constitution</i> .....	664
	B. <i>Congressional Legislation</i> .....	665
V.	STATE LAWS .....	666
	A. <i>State Laws with Outdated and Stigmatizing Language</i> .....	666
	B. <i>Guardianship Determinations</i> .....	667
	C. <i>General Court Determinations</i> .....	668
	D. <i>States Without Mental Capacity Restrictions</i> .....	669
VI.	INTERNATIONAL CONSIDERATIONS .....	669
VII.	SCOPE OF DISENFRANCHISEMENT .....	670
	A. <i>Historical Context</i> .....	670
	B. <i>Rationales for Disenfranchisement</i> .....	671
	C. <i>Attitudinal Barriers in Practice</i> .....	675
	D. <i>Rationales Debunked</i> .....	676
VIII.	ISSUES WITH MEASURING CAPACITY .....	679
	A. <i>Similarity to Literacy Tests</i> .....	679
	B. <i>The Lack of Uniformity</i> .....	680
	C. <i>Arbitrary Results</i> .....	680
	D. <i>Should Capacity be Measured?</i> .....	681
IX.	PROPOSED SOLUTIONS AND RECOMMENDATIONS .....	682
	A. <i>The American Bar Association’s Recommendation</i> .....	682
	B. <i>The Doe Standard</i> .....	683
	C. <i>The Competency Assessment Tool for Voting (CAT-V)</i> .....	683
	D. <i>Suggested Congressional Legislation</i> .....	684

---

<sup>‡</sup> Courtney Schiffler is a 2022 Juris Doctor candidate at Mitchell Hamline School of Law. The author previously worked as an inpatient psychiatric social worker in Seattle, Washington. She thanks Lisa Schmokel for her advice and consistent encouragement to seek new perspectives.

E. Non-Legislative Measures.....	685
F. Recommendation .....	686
X. CONCLUSION .....	687

## I. INTRODUCTION

Voting is foundational to any democracy. In fact, “[v]oting provides citizens with an opportunity to make public decisions about policies that can impact their quality of life.”<sup>1</sup> Thus, when the government denies specific subsets of the population the right to vote, it “becomes less democratic.”<sup>2</sup> In the United States, the federal government permits states to disenfranchise people based on mental capacity.<sup>3</sup> This Article will analyze the extent of disenfranchisement for those with diminished mental capacity (“DMC”) in the United States,<sup>4</sup> including the variance in treatment among states,<sup>5</sup> and it will recommend how states should amend their laws to re-enfranchise people with DMC as they are wrongly denied this aspect of citizenship, which further perpetuates mental health stigma.<sup>6</sup> Given that citizens with DMC are wrongly being denied the right to vote, as described throughout this Article, state courts should adopt the model proposed by the American Bar Association (“ABA”) absent its third criterion regarding desire to vote.<sup>7</sup>

Section I of this Article serves as the introduction. Section II describes the various terminology that has been used regarding mental capacity and provides a basis of understanding for terms that are used throughout this Article.<sup>8</sup> Section III discusses the demographics of those impacted by disenfranchisement and why voting rights for this group should be protected.<sup>9</sup> Section IV gives a brief overview of the federal laws that are implicated when disenfranchising people with DMC.<sup>10</sup> Section V discusses the categories of state laws that disenfranchise those with DMC and the several states that have chosen not to disenfranchise this group.<sup>11</sup>

<sup>1</sup> Martin Agran, William MacLean & Katherine Ann Kitchen Andren, “*I Never Thought About It*”: *Teaching People with Intellectual Disability to Vote*, 50 EDUC. & TRAINING IN AUTISM & DEV’L DISABILITIES 388, 388 (2015).

<sup>2</sup> *Id.* at 388-89 (noting that in electoral democracies, individual citizens are recognized based on their vote or ability to vote).

<sup>3</sup> Jason H. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Constantine Lyketsos, Bryan James, David Knopman, Christopher Patusky, Rosalie A. Kane & Pamela S. Karlan, *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. AM. MED. ASS’N 1345, 1346 (2004). This discretion is in addition to voter qualifications based on residency, citizenship, and criminal record. *Id.*

<sup>4</sup> See discussion *infra* Parts III-IV.

<sup>5</sup> See discussion *infra* Part V.

<sup>6</sup> See discussion *infra* Part VI-IX.

<sup>7</sup> See discussion *infra* Section IX.A.

<sup>8</sup> See discussion *infra* Part II.

<sup>9</sup> See discussion *infra* Part III.

<sup>10</sup> See discussion *infra* Part IV.

<sup>11</sup> See discussion *infra* Part V.

Furthermore, Section VI briefly discusses how other electoral democracies around the world address voting rights for people with DMC.<sup>12</sup> Section VII discusses the scope of the disenfranchisement of people with DMC by initially looking at when these laws first began in American history.<sup>13</sup> Then the rationales for disenfranchisement will be discussed, followed by how those rationales manifest in society's attitudes, which act as barriers to voting.<sup>14</sup> Finally, this Section debunks society's purported rationales and expose their weaknesses, thus prompting necessary solutions.<sup>15</sup> Section VIII assesses the issues with measuring capacity and questions whether states should use capacity as a metric at all.<sup>16</sup> Section IX will discuss various solutions offered by the literature, followed by recommendations for how states should proceed to bolster enfranchisement for those with DMC.<sup>17</sup>

## II. TERMINOLOGY

There are various terms used to describe mental capacity that can lead to complications or unclear definitions. For example, in literature there are terms used often interchangeably, including "cognitive impairment," "intellectual disability," and "mental disability."<sup>18</sup> This variation is due to the number of different diagnoses that may apply, the convergence of medical and legal determinations, and the difficulty in defining capacity.

### A. Range of Diagnoses

This Article will use the term diminished mental capacity ("DMC") to describe a variety of mental health and medical diagnoses that can result in reduced mental competence. A court can deem an individual mentally incompetent to vote due to a wide range of diagnoses.<sup>19</sup> These diagnoses include: psychiatric diagnoses, like schizophrenia and bipolar disorder;

---

<sup>12</sup> See discussion *infra* Part VI.

<sup>13</sup> See discussion *infra* Part VII.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See discussion *infra* Part VIII.

<sup>17</sup> See discussion *infra* Part IX.

<sup>18</sup> Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy*, 17 YALE J. HEALTH POL'Y, L. & ETHICS 209, 213 (2017) (citing various journal articles in which authors use multiple terms interchangeably in an apparent reference to the same conditions, resulting in confusion to the reader).

<sup>19</sup> Kimberly Leonard, *Keeping the 'Mentally Incompetent' From Voting*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/> [<https://perma.cc/D77S-5YU8>] (explaining that a specific diagnosis does not necessarily mean that a person will automatically lose their right to vote; however, people can appear in front of a judge for reasons such as being found "not guilty" by reason of insanity or involuntary hospitalizations, which then could result in the loss of their voting rights).

intellectual disabilities, which replace “mental retardation” as a diagnosis;<sup>20</sup> developmental disabilities, such as Down Syndrome and autism; and cognitive impairments, like traumatic brain injuries and dementia.<sup>21</sup>

Apart from the wide range of diagnoses, another issue with using different categories of diagnoses is the variety of presentations that can occur in a single diagnosis. For example, with intellectual disabilities, there is a “spectrum of severity, ranging from mild to profound, with mild [cases] often going undiagnosed in society.”<sup>22</sup> Therefore, it is important to keep in mind that there is a wide range of medical diagnoses for those with DMC; each medical diagnosis includes a variety of attributes that may impact one’s capacity to vote at various points in the spectrum.

### *B. Medical Versus Legal Determinations*

While DMC is a term used to describe a wide variety of people who may be deemed to have mental incapacity, mental incapacity “is a legal determination made by a judge.”<sup>23</sup> The distinction is often discussed with regard to terms being used as a form of medical assessment while capacity is identified as a legal status.<sup>24</sup> Being deemed mentally incapacitated means the person is not able to make “specific life decisions,” which can include handling finances, “entering a contract, making medical decisions or caring for their children.”<sup>25</sup> The judicial determination of mental incapacitation for voting purposes is not enshrined in the law, leading to inconsistent applications.<sup>26</sup>

---

<sup>20</sup> Benjamin O. Hoerner, Note, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA’s Potential*, 20 TEX. J. ON C.L.’S & C.R.’S 89, 92 (2015).

<sup>21</sup> Leonard, *supra* note 19.

<sup>22</sup> Hoerner, *supra* note 20, at 92 (explaining the criteria used to make medical diagnoses within the Diagnostic and Statistical Manual of Mental Disorders for intellectual and cognitive disorders); *see generally* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS (5th ed. 2013).

<sup>23</sup> Jennifer A. Okwerekwu, James B. McKenzie, Katherine A. Yates, Renee M. Sorrentino & Susan Hatters Friedman, *Voting by People with Mental Illness*, 46 J. AM. ACAD. PSYCHIATRY & L. 513, 514 (2018) (distinguishing mental incapacity from labels outside of the legal realm such as mental disabilities and mental illness). “For example, a person with a mental illness may have a sudden head injury that results in an inability to perform the minimum requirements of voting, and could be determined ‘mentally incapacitated’ to vote.” *Id.*

<sup>24</sup> Ludvig Beckman, *The Accuracy of Electoral Regulations: The Case of the Right to Vote by People with Cognitive Impairments*, 13 SOC. POL’Y & SOC’Y 221, 228 (2014) (discussing the controversy of whether “capacity” and “competency” in legislation can also be distinguished between the medical and legal spheres and citing to laws in which the legal capacity of an individual with a cognitive impairment has been determined to indicate their legal status and not their functional ability).

<sup>25</sup> Leonard, *supra* note 19.

<sup>26</sup> Dinesh Bhugra, *Social Discrimination and Social Justice*, 28 INT’L REV. PSYCHIATRY 336,

### C. *Defining Capacity*

Capacity “is generally defined as whether the person possesses the necessary abilities to complete the task.”<sup>27</sup> Accordingly, capacity is “task-specific,” which means that a person who may not have capacity to pay bills may still have the capacity to vote.<sup>28</sup> Additionally, capacity can change over time, meaning that someone who once had the capacity to vote could lose that capacity as time progresses.<sup>29</sup> For example, one way to define capacity for voting is illustrated by Australia’s legislation, which states that one must “understand the nature and significance of elections” in order to vote.<sup>30</sup> However, capacity has not always been defined by ability but rather by categorical positions, like guardianship, detention, or being judged “insane,” and some state laws and constitutions still reflect this practice.<sup>31</sup>

Because of this wide scope of abilities for people with DMC, some argue there “is no scientifically determinable point on the spectrum” where an individual “manifests sufficient capacity.”<sup>32</sup> Thus, the issue regarding the disenfranchisement of those with DMC must acknowledge the roadblock presented when coming to a consensus regarding where exactly ability meets the threshold of capacity.

## III. DEMOGRAPHICS

The National Institute of Mental Health reported that in 2019 there were over fifty million Americans over age eighteen who were diagnosed with some form of mental, behavioral, or emotional disorder.<sup>33</sup> Some argue

---

339 (2016) (discussing how lack of uniform language leads to social discrimination due to individuals having to interpret terms based on their own ideas or conceptions to how those terms should be used).

<sup>27</sup> Okwerekwu et al., *supra* note 23, at 515.

<sup>28</sup> Dinesh Bhugra, Soumitra Pathare, Chetna Gosavi, Antonio Ventriglio, Julio Torres, João Castaldelli-Maia, Edgardo Juan L. Tolentino, Jr. & Roger Ng, *Mental Illness and the Right to Vote: A Review of Legislation Across the World*, 28 INT’L REV. PSYCHIATRY 395, 397–98 (2016).

<sup>29</sup> *Id.*

<sup>30</sup> Beckman, *supra* note 24, at 229.

A person who (a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrollment and voting . . . is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election. *Id.* (citing Commonwealth Electoral Act 1995 (Cth) (Austl.)).

<sup>31</sup> See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 960 (2007).

<sup>32</sup> *Id.* at 962 (noting that a capacity benchmark in policy is just the degree of importance society assigns the task measured against possible consequences if performance of the task was by someone without capacity).

<sup>33</sup> *Mental Illness*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness> [https://perma.cc/N9YR-W78R].

that these Americans have the “ability to be a powerful voting block that can direct attention to disability issues that affect millions.”<sup>34</sup> This Section will address the voter turnout amongst those with DMC;<sup>35</sup> the implication for aging adults specifically, as they are a growing subset of those with DMC;<sup>36</sup> and why protecting the franchise is important for this group more broadly.<sup>37</sup>

### A. Voter Turnout

Even for those with DMC who are legally eligible to vote, there is low voter turnout. Studies show that worldwide, people with DMC vote at a “reduced rate compared with the general population.”<sup>38</sup> Additionally, compared with other disability groups, voters with mental disabilities have the lowest voter turnout at just thirty percent.<sup>39</sup> Scholars note a number of factors that lead to low voter turnout, such as not being aware of their voting right,<sup>40</sup> not having the proper identification to vote,<sup>41</sup> and generally not being encouraged to participate in the electorate.<sup>42</sup> Arguably, if mobilization could occur for those with DMC, it “could have a dramatic effect on election outcomes.”<sup>43</sup>

### B. Aging Adult Population

As people age, new risks emerge for people with DMC. One source estimates that by 2050 there will be over fifteen million individuals in the United States with dementia.<sup>44</sup> Additionally, age is a significant risk factor for dementia, and voting rates in the United States are often highest for those

---

This statistic is based on the 2019 National Survey on Drug Use and Health conducted by the Substance Abuse and Mental Health Services Administration. *Id.* However, the survey did not cover persons who, for an entire year, had no fixed address. *Id.* Thus, homeless individuals, for example, were not included in the survey results. *Id.*

<sup>34</sup> Carli Friedman, “*Every Vote Matters*”: *Experiences of People with Intellectual and Developmental Disabilities in the 2016 United States General Election*, 14 REV. DISABILITY STUD.: AN INT’L.J. 1, 3 (2018).

<sup>35</sup> See discussion *infra* Section III.A.

<sup>36</sup> See discussion *infra* Section III.B.

<sup>37</sup> See discussion *infra* Section III.C.

<sup>38</sup> Agran et al., *supra* note 1, at 388. For example, two studies conducted after the 2001 and 2005 general elections in Great Britain revealed a forty percent difference in voting between individuals with intellectual disabilities and the general population. *Id.*

<sup>39</sup> Hoerner, *supra* note 20, at 106.

<sup>40</sup> Okwerekwu et al., *supra* note 23, at 519.

<sup>41</sup> Friedman, *supra* note 34, at 6.

<sup>42</sup> See *id.* at 7. Friedman’s study includes a quote from an individual with intellectual and developmental disabilities describing the staff at his group home as unwilling to drive him to his polling place because they “didn’t think it was important to [him].” *Id.*

<sup>43</sup> Agran et al., *supra* note 1, at 388 (noting this is especially true for elections in which a few votes in certain districts can change the results).

<sup>44</sup> Karlawish et al., *supra* note 3, at 1345. Estimates were based off data from the 2000 census. *Id.* at 1345 n.5.

in the sixty-five to seventy-four age bracket.<sup>45</sup> Further, dementia is a progressive disease, making it common for individuals with the diagnosis to gradually require more assistance with their daily living activities.<sup>46</sup> Put simply, as a subset of the population gets older, “it is likely that proportion of individuals with mental disabilities will also increase.”<sup>47</sup> Therefore, the cohort of the aging adult population could very likely lose their capacity to vote over time. This, in return, could have a significant impact on election outcomes and democratic participation. Given the growing population of aging adults, a critical examination of legislation impacting voting rights based on mental capacity has never been more essential.

### C. Importance of the Franchise

While exercising the right to vote, which is significant for everyone in a democracy, those with DMC face unique challenges. American disenfranchisement of individuals with DMC implies they are second-class citizens.<sup>48</sup> Voting is so vital in relation to citizenship that it is even considered to be “an important part of being acknowledged as a human being and is a precondition for agency.”<sup>49</sup> Further, it is argued that “exercis[ing] one’s right to vote is a central marker of citizenship and may play a significant role in creating an environment that supports recovery.”<sup>50</sup> Allowing those with DMC to vote provides additional benefits, including the normalization of mental illness and acceptance by the general public,<sup>51</sup> building a sense of community,<sup>52</sup> and overcoming social isolation.<sup>53</sup>

Furthermore, people with DMC operate as a group with individualized needs that policy can address and impact. These policies are of particular concern to those with DMC, and include the funding of community-based

---

<sup>45</sup> *Id.* at 1345. According to the Mayo Clinic, age is a significant risk factor that contributes to dementia, “especially after age 65.” *Dementia*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/dementia/symptoms-causes/syc-20352013> [https://perma.cc/4C7R-RYP3].

<sup>46</sup> *Id.* at 1347.

<sup>47</sup> Hoerner, *supra* note 20, at 132.

<sup>48</sup> Agran et al., *supra* note 1, at 389 (citing to low voter turnout as well as the importance of voting within a democracy).

<sup>49</sup> Sharon Lawn, John McMillan, Z. Comley, Ann Smith & John Brayley, *Mental Health Recovery and Voting: Why Being Treated as a Citizen Matters and How We Can Do It*, 21 J. PSYCHIATRIC & MENTAL HEALTH NURSING 289, 290 (2013).

<sup>50</sup> *Id.* (finding that mental health recovery revolves around agency and one’s personal journey and how agency often occurs when an individual is maximizing their positive rights).

<sup>51</sup> Jennifer A. Bindel, Note, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 120 (2009). The ability to vote would “symbolically express affiliation with the broader society,” physically represent integration of people with diminished mental capacities as part of the broader community, and move away from the past trends of isolating those individuals from society. *Id.* at 119.

<sup>52</sup> See Okwerekwu et al., *supra* note 23, at 516.

<sup>53</sup> See Kopel, *supra* note 18, at 229.



mental health services and employment affirmative action.<sup>54</sup> Such policies, which clearly impact those with DMC, further support the societal need to hear the voices of those individuals.<sup>55</sup> When people with DMC are denied the right to vote, elected officials are more likely to overlook the needs of those with DMC because they are not seen as part of their constituency.<sup>56</sup> Therefore, enfranchisement for those with DMC acts as an important symbol of societal inclusion and allows for the influence of policies that directly impact their specific needs through the expressive act of voting.

#### IV. FEDERAL LAWS

At the federal level, enfranchisement protections for those with DMC stem from the Fourteenth Amendment of the United States Constitution and various legislation passed by Congress.<sup>57</sup> While states have the authority “to define voter qualifications relating to residency, citizenship, criminal record, and mental capacity,”<sup>58</sup> all states must abide by constitutional limitations. Additionally, Congress may impose “time, place, and manner” regulations for federal elections.<sup>59</sup>

##### A. *The United States Constitution*

First, the Equal Protection Clause of the Fourteenth Amendment dictates that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>60</sup> Therefore, under the Equal Protection Clause, voters with DMC who otherwise meet the age and residency requirements “cannot be treated differently from other such voters” based on the fact that they have DMC or other such statuses, like guardianship.<sup>61</sup>

Second, the Due Process Clause of the Fourteenth Amendment states, “[N]or shall any State deprive any person of life, liberty, or property, without

<sup>54</sup> Bhugra et al., *supra* note 28, at 399 (noting the lack of funding for community mental health services in many states and localities).

<sup>55</sup> Agran et al., *supra* note 1, at 395 (indicating the policy decisions surrounding mental health that are often being made without input from the community directly impacted).

<sup>56</sup> Bhugra et al., *supra* note 28, at 399 (“If persons with mental health problems had the right to vote, politicians are likely to be interested in addressing their concerns.”).

<sup>57</sup> U.S. CONST. amend. XIV.

<sup>58</sup> Karlawish et al., *supra* note 3, at 1346.

<sup>59</sup> Naomi Doraisamy, *Out of Mind, Out of Sight: Voting Restrictions Based on Mental Competency*, 56 IDAHO L. REV. 135, 153 (2020) (citing to U.S. CONST. art I, § 4, which states the following: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”).

<sup>60</sup> U.S. CONST. amend. XIV, § 1.

<sup>61</sup> JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., ET AL., *VOTE. IT’S YOUR RIGHT: A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 1, 6 (2020), <http://www.bazelon.org/wp-content/uploads/2020/10/Bazelon-2020-Voter-Guide-Full.pdf> [<https://perma.cc/J6ZS-KHHK>] [hereinafter BAZELON].

due process of law . . . .”<sup>62</sup> This constitutional provision is especially important given that the legal designation of “mentally incapacitated” requires a judicial determination; therefore, due process must be met in accordance with the Due Process Clause.<sup>63</sup> Additionally, due process might be in question if a person’s right to vote is taken away through involuntary hospitalization or appointment of a court-ordered guardian, and the individual was not able to specifically challenge the potential loss of their right to vote.<sup>64</sup>

Because of these two constitutional provisions, heightened scrutiny is triggered, meaning that states must be able to adequately justify the disenfranchisement in order “to satisfy the rigors of the Equal Protection Clause and the procedural protections required for due process.”<sup>65</sup>

### *B. Congressional Legislation*

Various legislation has been passed that impacts people with DMC’s ability to vote. The legislation includes the Voting Rights Act (“VRA”), the Americans with Disabilities Act (“ADA”), the Help America Vote Act (“HAVA”), the Rehabilitation Act, and the National Voter Registration Act (“NVRA”).<sup>66</sup> However, it should be noted that these laws are often criticized for readily protecting the right to vote for those with physical disabilities while “failing to consider the voting rights of persons with mental disabilities,”<sup>67</sup> and the laws reflect the unwillingness of members of Congress to expressly include those with DMC as part of their constituencies.<sup>68</sup>

Under the VRA, literacy tests were banned, and the statute further reaffirms the principle that people with DMC cannot be treated differently based on their ability to complete a test.<sup>69</sup> And the ADA prohibits public entities “from excluding qualified people from voting based on disability if they meet the essential requirements for voting.”<sup>70</sup> Additionally, an

<sup>62</sup> U.S. CONST. amend. XIV, § 1.

<sup>63</sup> Doraisamy, *supra* note 59, at 147–48.

<sup>64</sup> BAZELON, *supra* note 61, at 7.

<sup>65</sup> Doraisamy, *supra* note 59, at 148 (referring to the narrow tailoring standard the Supreme Court established when addressing the infringement on a fundamental right).

<sup>66</sup> See generally Voting Rights Act of 1965, 52 U.S.C. § 10101; Americans with Disabilities Act, 42 U.S.C. § 12101; Help America Vote Act of 2002, 52 U.S.C. § 20901 [hereinafter HAVA]; Rehabilitation Act of 1973, 29 U.S.C. § 701; National Voter Registration Act of 1993, 52 U.S.C. § 20501.

<sup>67</sup> Hoerner, *supra* note 20, at 105 (discussing HAVA’s particularized attention to physical accessibility, especially for those with visual impairments that proved successful for this subgroup’s voting ability. But the law did not help establish standards for the much broader disability community that would improve access to the polls).

<sup>68</sup> See Kay Schriener & Lisa Ochs, “No Right is More Precious”: *Voting Rights and People with Intellectual and Developmental Disabilities*, 11 RSCH. & TRAINING CTR. ON CMTY. LIVING, UNIV. MINN. 1, 4–5 (2000).

<sup>69</sup> Okwerekwu et al., *supra* note 23, at 514 (citing 52 U.S.C. § 10301).

<sup>70</sup> BAZELON, *supra* note 61, at 8 (citing 42 U.S.C. §§ 12101–213).

individualized assessment is required before a public entity can exclude a voter based on disability under the ADA.<sup>71</sup> Under HAVA, “a person whose eligibility to vote is in doubt” is entitled “to cast a provisional ballot.”<sup>72</sup> Section 504 of the Rehabilitation Act “prohibits disability-based discrimination in programs or activities that receive federal financial assistance.”<sup>73</sup> Finally, the NVRA allows for legal disenfranchisement of those with DMC by explicitly permitting states to “enact laws authorizing removal of voters from the registration rolls based on ‘mental incapacity.’”<sup>74</sup>

## V. STATE LAWS

As indicated above, states are able to define voter qualifications with regard to mental capacity.<sup>75</sup> Because of this, states differ in criteria and use differing language that ultimately denies the franchise to those with DMC. For example, several state constitutions and state laws use outdated and stigmatizing terms. Some state provisions focus on the guardianship process; some states rely only on court determinations; and others use a combination of these tactics.<sup>76</sup> There are also a number of states that have chosen not to impose restrictions on voting with regard to mental capacity.<sup>77</sup>

### A. State Laws with Outdated and Stigmatizing Language

Eleven states use outdated terms, including “idiots, insane persons, and *non compos mentis*.”<sup>78</sup> *Non compos mentis* is a Latin term that means

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 10 (citing 42 U.S.C. §§ 15301–523).

<sup>73</sup> *Id.* (citing 29 U.S.C. § 794(a)).

<sup>74</sup> *Id.* at 12 (citing 42 U.S.C. §§ 1973gg–1973gg-10 (since recodified at 52 U.S.C. §§ 20501–11)).

<sup>75</sup> Karlawish et al., *supra* note 3, at 1346.

<sup>76</sup> See *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (noting Maine’s statute preventing individuals who were “under guardianship for reasons of mental illness” from registering to vote and voting was impermissibly broad); *The Right to Vote*, DISABILITY JUST., <https://disabilityjustice.org/right-to-vote/> [<https://perma.cc/AGN5-GD9E>] (providing seven states deny the right to vote to “idiots or insane persons”); BAZELON, *supra* note 61, at 14 (highlighting the use of outdated language present in state regulations regarding voting rights).

<sup>77</sup> See Matt Vasilogambros, *Thousands Lose Right to Vote Under ‘Incompetence’ Laws*, PEW (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws> [<https://perma.cc/T6L3-NZK4>] (providing a list of eleven states that do not restrict voting rights based on mental capacity); *Guardianship, Mental Incapacity and the Right to Vote*, SPECIAL NEEDS ANSWERS (Oct. 16, 2017), <https://specialneedsanswers.com/guardianship-mental-incapacity-and-the-right-to-vote-16317> [<https://perma.cc/2NLH-MAGX>] (providing there are eleven states that do not restrict voting rights based on disabilities).

<sup>78</sup> Okwerekwu et al., *supra* note 23, at 514. These states include Alaska, Arizona, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Ohio, and Rhode Island. See BAZELON, *supra* note 61, at 14.

“not master of one’s mind.”<sup>79</sup> This Latin phrase is used by four states (Hawaii, Massachusetts, Nebraska, and, Rhode Island), but it “has been interpreted differently from state to state.”<sup>80</sup> Other derogatory terms like “idiots,” “insane persons,” and “of unsound mind” are found to be stigmatizing and “virtually impossible to understand and apply.”<sup>81</sup> Further, these blanket terms “do not reflect the nuance” and spectrum that covers individuals with DMC.<sup>82</sup> The outdated and stigmatizing language used by various states creates a damaging rhetoric pertaining to individuals with DMC.

### *B. Guardianship Determinations*

Thirteen states “bar voting by individuals who are ‘under guardianship.’”<sup>83</sup> Guardianship proceedings are “the state court process by which someone is determined to be so incapacitated or mentally disabled that it is necessary to remove their rights to make some or all decisions about their person or property and delegate that decision-making authority to another person or entity.”<sup>84</sup> However, states have different definitions of “who is an incapacitated person,”<sup>85</sup> resulting in situations where a person with DMC could be appointed a guardian in one state but not in another under the same circumstances.<sup>86</sup> Of particular concern is that guardianship

---

<sup>79</sup> Bindel, *supra* note 51, at 95 (citing BLACK’S LAW DICTIONARY (8th ed. 2004)).

<sup>80</sup> BAZELON, *supra* note 61, at 14. Nebraska defines this phrase to mean “mentally incompetent.” *Id.* at 14 n.47 (citing NEB. REV. STAT. § 32-312). In Hawaii, “a person may be disenfranchised on competence grounds only if determined to lack capacity to vote” while not actually providing a definition for the term *non compos mentis*. *Id.* (citing HAW. REV. STAT. § 11-23(a)). Rhode Island also does not define the term, but the state’s election board has held that voters shall not be purged from voter rolls based on a finding of not guilty by reason of insanity in a prior criminal proceeding. *Id.* Mississippi law does not provide a definition for the term but has distinguished it from persons with mental illness and persons with intellectual disabilities. *Id.* (citing MISS. CODE ANN. § 1-3-57).

<sup>81</sup> *Id.* at 14.

<sup>82</sup> Hoerner, *supra* note 20, at 112.

<sup>83</sup> BAZELON, *supra* note 61, at 13. These states include Alabama, Arizona, Louisiana, Massachusetts, Minnesota, Missouri, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, and West Virginia. *Id.* at 13 n.45.

<sup>84</sup> Hurme & Appelbaum, *supra* note 31, at 946.

<sup>85</sup> *Id.* at 948. Some examples include one who “lacks sufficient understanding or capacity to make or communicate responsible decisions” or who “is in danger of substantially endangering the person’s own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons.” *Id.* at 948–49.

<sup>86</sup> See generally *Transferring Guardianship Across State Lines*, SPECIAL NEEDS ALLIANCE (Oct. 2016), <https://www.specialneedsalliance.org/the-voice/transferring-guardianship-across-state-lines/> [https://perma.cc/8VGE-A7CX] (acknowledging “laws between the states can vary considerably” and the difference in requirements for guardianship makes transferring guardianship between states difficult as the new home state may not grant the guardianship due to a difference in regulations). This indicates the differences in regulations between states mean that guardianship could be granted in one state and not another.

proceedings “rarely include inquiries into a person’s understanding of voting issues.”<sup>87</sup> This is often a result when the person with DMC and the person seeking guardianship are unaware that voting rights might be lost as a consequence of appointment.<sup>88</sup>

Even when voting rights are addressed in a guardianship hearing, some states require stricter inquiries for those with DMC to demonstrate their understanding of the voting process because each state can have differing procedures.<sup>89</sup> One example is a judge asking a person with DMC at a guardianship hearing “to provide the names of various federal, state, or local office holders, to explain the voting process, and to explain their political views.”<sup>90</sup> This arguably imposes greater expectations on those with DMC than of the general public.<sup>91</sup>

### C. General Court Determinations

Twenty-two states and the District of Columbia have “laws that bar voting *only* if a court has determined that an individual specifically lacks the capacity to vote.”<sup>92</sup> Some of these states bar voting for people with DMC when a court judges them “mentally incompetent,” but “other states require that judges specifically revoke voting rights” in order for disenfranchisement to occur.<sup>93</sup> However, just like with guardianship proceedings, judicial discretion can result in different standards depending on the jurisdiction.

There appear to be only four states that “give specific statutory direction as to what a judge is to consider when determining whether a person is ineligible to vote.”<sup>94</sup> Delaware requires a finding of “severe cognitive impairment which precludes exercise of basic voting judgement” by clear and convincing evidence.<sup>95</sup> Iowa courts must determine a person “lacks sufficient mental capacity to comprehend and exercise the right to vote.”<sup>96</sup> In Washington, the court must clarify whether the appointment of a guardian limits that individual’s right to vote and if so, state findings must

---

<sup>87</sup> BAZELON, *supra* note 61, at 13.

<sup>88</sup> *Id.* at 18. Challenging this type of ruling might have other collateral consequences. For instance, if a person “request[s] that the probate judge determine his competence to vote [it] may be viewed as concession that the state law allows individuals under guardianship to retain their voting rights,” thereby hindering their ability to challenge the state law itself. *Id.* at 18 n.59.

<sup>89</sup> *Id.* at 19.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 13. These states include Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Maine, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Texas, Washington, Wisconsin, and Wyoming. *Id.* at 13 n.46.

<sup>93</sup> Leonard, *supra* note 19.

<sup>94</sup> Hurme & Appelbaum, *supra* note 31, at 957.

<sup>95</sup> *Id.* (citing DEL. CODE ANN. tit. 15, § 1701 (2006)).

<sup>96</sup> *Id.* (citing IOWA CODE ANN. § 633.556(1) (2020)).

“support removing that right . . . includ[ing] a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process.”<sup>97</sup> Finally, in Wisconsin, a court must determine whether an individual “is incapable of understanding the objective of the elective process.”<sup>98</sup>

While judges must apply these arguably vague and arduous terms, their decisions are often complicated when there is an apparent conflict between a state’s constitution and legislation. For example, Minnesota’s constitution appears to provide that those “under guardianship cannot vote,” while statutes in Minnesota indicate that “people under guardianship retain the right to vote, unless the guardianship order takes it away.”<sup>99</sup> Thus, without clear standards in place, judicial decision-making is required to make sense of the contradictions, giving courts considerable discretion.

#### *D. States Without Mental Capacity Restrictions*

While states are allowed to impose voting restrictions for those with DMC, ten states have chosen not to impose voting restrictions and therefore have no mental capacity limitations: Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont.<sup>100</sup> However, the Kansas and Michigan state constitutions “give the legislature the authority to bar citizens from voting because of mental illness or mental incompetence,” but their states have never passed legislations that would accomplish this.<sup>101</sup>

## VI. INTERNATIONAL CONSIDERATIONS

The issue of whether to bar those with DMC from voting is not unique to the United States. In fact, countries with electoral democracies “around the world have recognized the importance of . . . voting rights” for those with DMC “and have made strides to protect these rights.”<sup>102</sup>

The United Nations’ (“UN”) International Covenant on Civil and Political Rights “protects the right of every citizen to vote ‘without unreasonable restrictions.’”<sup>103</sup> Additionally, in 2007 the UN held a Convention on Rights of Persons with Disabilities that aimed to reaffirm the

<sup>97</sup> WASH. REV. CODE ANN. § 11.130.310(1)(c) (2022).

<sup>98</sup> Hurme & Appelbaum, *supra* note 31, at 958 (citing WIS. STAT. ANN. § 54.25(2)(c)1.g (2019)).

<sup>99</sup> Elizabeth R. Schiltz, *The Ties That Bind Idiots and Infamous Criminals: Disenfranchisement of Persons with Cognitive Impairments*, 13 U. ST. THOMAS L.J. 100, 106-07 (2016) (first citing MINN. CONST. art. VII, § 1; and then citing MINN. STAT. §§ 201.014, subd. 2(b), 524.5-310, 524.5-120(14) (2010)).

<sup>100</sup> BAZELON, *supra* note 61, at 14.

<sup>101</sup> Hurme & Appelbaum, *supra* note 31, at 940.

<sup>102</sup> Okwerekwu et al., *supra* note 23, at 519.

<sup>103</sup> *Id.* at 515 (citing the International Covenant on Civil and Political Rights: General Assembly of the United Nations, art. 25, 179, 1966 and noting its 169 cosignatory parties).

right of those with DMC and physical disabilities to participate in the franchise.<sup>104</sup> Often UN member states were “quick to ratify international conventions” following the UN conventions with regard to voting rights for those with DMC but in practice “are extremely slow in ensuring that their citizens are able to enjoy the rights they have promised.”<sup>105</sup>

Of the 193 UN member states, sixty-nine “deny all persons with any mental health problems a right to vote without any qualifier.”<sup>106</sup> Additionally, nine member states “disenfranchise people detained under mental health laws,” and fifty-six member states “authorize courts or magistrates to disenfranchise people for mental health reasons.”<sup>107</sup>

Sixteen UN member countries have no voting rights restrictions for those with DMC.<sup>108</sup> In Sweden, its governing body granted all individuals with DMC the right to vote in 1989.<sup>109</sup> Since the change was made, total voter turnout for Swedish parliamentary elections has remained strong, eighty-six percent in 1991, and as high as eighty-seven percent in 2018.<sup>110</sup> Given that these electoral democracies have not ground to a halt by allowing those with DMC to vote, it calls into question whether an election process is benefited by disenfranchising this portion of the population.

## VII. SCOPE OF DISENFRANCHISEMENT

### A. *Historical Context*

Further exploration of the impact of disenfranchisement requires an understanding of both history and scope. In 1819, Maine became the first state to bar individuals “under guardianship” from voting.<sup>111</sup> Prior to 1820, only Maine and Vermont had legal barriers to disenfranchise people with DMC.<sup>112</sup> By 1860, twelve additional states had legislation or language in their state constitutions to exclude people with DMC from voting.<sup>113</sup> The prohibition allowing people with DMC to vote coincided with the expansion

<sup>104</sup> Bhugra et al., *supra* note 28, at 395.

<sup>105</sup> *Id.* at 397 (noting that over thirty percent of cosignatory countries continued to deny voting rights for persons with mental illness and some for even up to a decade later).

<sup>106</sup> *Id.* at 396.

<sup>107</sup> Kopel, *supra* note 18, at 246.

<sup>108</sup> Beckman, *supra* note 24, at 225. These sixteen countries include Austria, Bolivia, Canada, Croatia, Ecuador, Finland, Ireland, Israel, Italy, Kenya, Mexico, the Netherlands, Norway, Slovenia, Sweden, and the United Kingdom. *Id.* at 226.

<sup>109</sup> Anette Kjellberg & Helena Hemmingsson, *Citizenship and Voting: Experiences of Persons with Intellectual Disabilities in Sweden*, 10(4) J. POL’Y PRAC. INTELLECTUAL DISABILITIES 326, 331 (2013).

<sup>110</sup> *Voter Turnout by Election Type: Sweden*, INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/country-view/261/40> [https://perma.cc/9F4H-RNED].

<sup>111</sup> Bindel, *supra* note 51 at 102.

<sup>112</sup> Schriener & Ochs, *supra* note 68, at 3.

<sup>113</sup> *Id.*

of voting rights outside of White landowners.<sup>114</sup> Moreover, in order to further isolate individuals with DMC from society, large institutions or “insane asylums” were created to isolate people with DMC.<sup>115</sup> The practice of removing or isolating those with DMC from society is problematic. However, there are purported reasonings that suggest differently, as explained below.

### *B. Rationales for Disenfranchisement*

As explained below, the five most prominent rationales for disenfranchising individuals with DMC include: (1) a paternalistic attitude, (2) preventing fraud, (3) promoting election legitimacy, (4) promoting an intelligent electorate, and (5) serving political advantages.

With regard to paternalism, there is a deeply rooted history of believing that people with DMC are “not morally fit to vote, cannot be trusted, or are insane.”<sup>116</sup> Children with DMC were believed to be “uneducable and dangerous.”<sup>117</sup> Moreover, there were general notions of viewing people with DMC as “undesirables” within society.<sup>118</sup> These archaic beliefs continued into the early twentieth century, with society looking down on those with DMC with pity, concern, and fear.<sup>119</sup> Thus, by restricting people with DMC from voting, the general public was protected from the results of their choices,<sup>120</sup> while also ensuring that people with DMC could still be “kept safe and cared for” within institutions outside the mainstream.<sup>121</sup>

Additionally, the institutionalization of people with DMC bolstered the belief that other people can and should represent their best interests.<sup>122</sup> Many have argued that people with DMC, especially those under guardianship, have more capable people in their lives who are responsible

<sup>114</sup> Bindel, *supra* note 51, at 102.

<sup>115</sup> See *id.* at 106. See also Nicholas F. Brescia, *Modernizing State Voting Laws That Disenfranchise the Mentally Disabled with the Aid of Past Suffrage Movements*, 54 ST. LOUIS U. L.J. 943, 946 (2010).

<sup>116</sup> Martin Agran & Carolyn Hughes, “You Can’t Vote – You’re Mentally Incompetent”: *Denying Democracy to People with Severe Disabilities*, 38 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 58, 59 (2013).

<sup>117</sup> Brescia, *supra* note 115, at 943, 946 (citing to the language used by Justice Marshall in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in part and dissenting in part) in which he details the history of prejudice for children with diminished mental capacity).

<sup>118</sup> Doraisamy, *supra* note 59, at 139–40.

<sup>119</sup> Schriener & Ochs, *supra* note 68, at 4 (identifying that these notions were coupled with “social disorder, deviancy, and criminality”).

<sup>120</sup> Bindel, *supra* note 51, at 105.

<sup>121</sup> Leonard, *supra* note 19.

<sup>122</sup> Schriener & Ochs, *supra* note 68, at 4 (describing the viewpoint that it is unnecessary to allow people with DMC to participate in the electorate).



and thus can politically represent the individual with DMC.<sup>123</sup> Another modern rationale for disenfranchisement is that people with DMC cannot consent to contracts.<sup>124</sup> This idea stems from the notion that voting is a social contract of democratic government. But because the electors have the power to create financial consequences through taxes, voting is also a commercial contract. Consequently, it must mean that people with DMC should be protected from assuming the contractual duties because they lack the ability to assent.<sup>125</sup> In other words, restricting the voting rights of a person with DMC is protecting them due to their inability to consent in other situations.

Another widely used rationale for disenfranchising those with DMC is preventing fraud or protecting people with DMC from fraud.<sup>126</sup> Similar to the paternalism argument, the prevention of fraud rationale argues that voting bans need to be in place so that people with DMC are not taken advantage of or exploited.<sup>127</sup> Of particular concern is that those who live in long-term care facilities or other group settings, such as nursing homes, will be vulnerable to absentee ballot abuse by staff or other deceitful persons.<sup>128</sup> Some residents in such facilities never see their ballot because staff will vote for them, or if they are given their opportunity to vote, staff do not mail the ballots.<sup>129</sup> Additionally, many argue that people with DMC are more susceptible to undue influence.<sup>130</sup> If people with DMC are enfranchised and persuaded by others, extra votes will be cast in favor of the views of the influencer.<sup>131</sup> Thus, the reasoning is that society must prohibit those with DMC from voting, otherwise malicious influencers will ultimately end up with extra votes.

However, even if votes are not fraudulently cast, some argue that allowing people with DMC to vote threatens the legitimacy of elections.<sup>132</sup> In fact, in 2012, a Minnesota district court judge emphasized the importance of individually identifying competence to vote for each person under

---

<sup>123</sup> Brescia, *supra* note 115, at 960-61. Additionally, those with DMC will be able to have their best interests represented because voters and elected officials will be “motivated by compassion and sympathy” to do so. *Id.* at 961.

<sup>124</sup> *Id.* at 962.

<sup>125</sup> Kopel, *supra* note 18, at 227.

<sup>126</sup> Brescia, *supra* note 115, at 964.

<sup>127</sup> Okwerekwu et al., *supra* note 23, at 516.

<sup>128</sup> See Charles P. Sabatino & Sally Hurme, *Who Has the Capacity to Vote?*, 19 EXPERIENCE 23, 24 (2009); see also Doraisamy, *supra* note 59, at 142.

<sup>129</sup> Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1505-06 (2016).

<sup>130</sup> Doraisamy, *supra* note 59, at 142. See Okwerekwu et al., *supra* note 23, at 516 (stating that undue influence may stem from a desire to please others).

<sup>131</sup> Kopel, *supra* note 18, at 230 (“Enfranchisement of people with mental impairment thus allows other people in their lives to quietly appropriate extra votes and obtain outsized political influence for themselves.”).

<sup>132</sup> *Id.* at 226.

guardianship because the court “owes the general electorate at least that much.”<sup>133</sup> It has been argued that if people with DMC routinely vote, the general public’s level of seriousness for which they perceive voting would greatly diminish.<sup>134</sup> Some argue that participation by people with DMC in the political process undermines the integrity and legitimacy of elections due to a lack of understanding and appreciation of voting.<sup>135</sup> These beliefs support the notion that society should prevent incompetently cast ballots from influencing the results in close elections by disenfranchising those with DMC.<sup>136</sup>

Underlying the concept of incompetent voting is the belief that people with DMC lack the intelligence required to participate in voting. Historically, laws disenfranchising people with DMC occurred under the idea that this subset of the population was neither morally nor intellectually capable of voting.<sup>137</sup> The concept of electing representatives was deemed “too complicated” for individuals who had “simple” or “demented” minds.<sup>138</sup> Today, there is not a push for enfranchisement because general consensus is that “the laws are correct,” and that those with DMC should not participate in democracy due to having their rationality impaired.<sup>139</sup> The public may believe that in order to vote, one must “retain information, weigh details, and make calculated decisions,” and people with DMC are viewed categorically as not being able to do.<sup>140</sup>

The final rationale that is mentioned, though not widely cited, is that disenfranchising people with DMC serves political advantages.<sup>141</sup> The history of laws disenfranchising people with DMC can also not be overlooked. The institutionalization of those with DMC took place around the same time as limitations to their voting rights occurred.<sup>142</sup> Those institutions could house large numbers of people, thus increasing the population within the districts they were located.<sup>143</sup> Residents in the district that house the institution may control the outcomes of elections through the

---

<sup>133</sup> *In re the Guardianship of Erickson*, No. 27-GC-PR-09-57, 2012 Minn. Dist. LEXIS 193, at \*30 n.5 (Minn. Dist. Ct. Oct. 4, 2012).

<sup>134</sup> Hurme & Appelbaum, *supra* note 31, at 964.

<sup>135</sup> Doraisamy, *supra* note 59, at 145. “[O]vercom[ing] the inertia of a disinterested voter, may be eroded if the opportunity to vote is not perceived as significant enough, or if their comparatively ‘more rational’ vote may be canceled by a vote by a mentally incompetent voter.” *Id.* at 146.

<sup>136</sup> Hurme & Appelbaum, *supra* note 31, at 964.

<sup>137</sup> See Hoerner, *supra* note 20, at 107-08; see also Schriener & Ochs, *supra* note 68, at 4.

<sup>138</sup> Schriener & Ochs, *supra* note 68, at 4 (echoing the justifications used between the mid-nineteenth and early twentieth centuries).

<sup>139</sup> Leonard, *supra* note 19.

<sup>140</sup> Hoerner, *supra* note 20, at 108-09.

<sup>141</sup> Bindel, *supra* note 51, at 105-06.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

displacing of individuals with DMC into their district.<sup>144</sup> Furthermore, decreasing the overall electorate has commonly been used as a strategy to advance political parties.<sup>145</sup> A 2004 study of the voting patterns for individuals with mental illness in Germany found that those living in residential facilities had preferences for left-wing candidates.<sup>146</sup> If this information can be applied to those with DMC in the United States (though more research is necessarily required), it is possible that right-wing candidates and supporters are thus benefiting from the disenfranchisement.

Overall, many of the five rationales discussed above parallel the reasoning for previously disenfranchising other groups, such as women and Black voters.<sup>147</sup> The intelligent electorate rationale was used as women and Black people were often categorized as “too unintelligent” to vote.<sup>148</sup> Women were intentionally excluded from democratic participation for being deemed “more suitable for domestic life than . . . politics,” and it was best to allow the men in their lives to vote for their best interests.<sup>149</sup> With regard to political advantage, Black people were excluded from voting systematically in the South for partisan gain.<sup>150</sup> A sense of paternalism lingers throughout the rationales used to disenfranchise these aforementioned groups by the nuanced indication that they are insufficient advocates of their own needs.<sup>151</sup>

---

<sup>144</sup> *Id.*

<sup>145</sup> Doraisamy, *supra* note 59, at 139–40. “Originally these exclusions came in the form of race, gender, and financial or social status restrictions, e.g., property ownership, but as voting qualifications were increasingly relaxed, states began to specifically target mentally ill persons or persons under guardianship.” *Id.* at 139.

<sup>146</sup> Bhugra et al., *supra* note 28, at 398 (citing Jens Bullenkamp & Burkhard Voges, *Voting Preferences of Outpatients with Chronic Mental Illness in Germany*, 55 *PSYCHIATRIC SERVS.* 1440 (2004)).

<sup>147</sup> *See* Brescia, *supra* note 115.

<sup>148</sup> *Id.* at 954, 960 (discussing the inferior education rationalization for suppressing Black votes and the historical perception that women were “too uninformed” to engage in politics).

<sup>149</sup> *Id.* at 958 (drawing comparisons to the isolation women faced in their own homes with the isolation of those with DMC or severe mental illness within hospitals).

<sup>150</sup> Bindel, *supra* note 51, at 105. “The constriction of the electorate was notorious in the deep South, where Democrats successfully excluded African-Americans from voting for decades in an attempt by one faction of the Party to maintain its dominance over both the Republican Party and populist elements within the Democratic Party itself.” *Id.*

<sup>151</sup> While there are parallels between voter suppression based on race and voter suppression based on DMC, it should also be noted the possibility of intersectionality as it pertains to disenfranchisement. Individuals who identify as two or more races have the highest prevalence of having any mental illness among adults in the United States. NAT’L INST. MENTAL HEALTH, *supra* note 33. Thus, the treatment or detainment of people of color for mental health purposes is not something this Article addresses but would be worth analyzing in order to establish more context for voting rights issues. Disparities in mental health diagnoses could point to overarching systemic racism that ultimately impacts one’s ability to participate in the electorate, not dissimilar to mass incarceration, though more research is needed.

### C. Attitudinal Barriers in Practice

The rationales discussed above manifest as attitudinal barriers that further prevent people with DMC from voting. These barriers occur when society fails to accommodate people with DMC and curbs voter participation, even in situations where people with DMC would be legally permitted to do so. Limiting physical access to voting evidences attitudinal barriers permitting disadvantages in the voting process, and most significantly, people acting as informal gatekeepers.<sup>152</sup>

Physically getting to a polling place can be difficult for those with DMC. Oftentimes, people with DMC require transportation assistance and once at a polling place, the location might not accommodate wheelchairs or other mobility devices that people with DMC sometimes use.<sup>153</sup> Relying on others for transportation could prove difficult especially for those with DMC who are hospitalized or in group home settings.<sup>154</sup> Furthermore, being in a provider-managed group home could restrict physical access to things people with DMC would need for registration purposes, such as state identification, birth certificates, or utility bills.<sup>155</sup>

Regarding disadvantages in the voting process, a 2012 study found that half of voters with intellectual developmental disorders reported difficulties at the polling place.<sup>156</sup> While polling places might not always be physically accessible, there is also the need for more accessible materials. Voters with DMC often have difficulty understanding ballots or voting machines<sup>157</sup> and would benefit from a superficial change, such as including the pictures of candidates.<sup>158</sup>

Finally, informal gatekeepers may take it upon themselves to bar people with DMC from voting. Because people with DMC often rely on others to assist in activities of daily living,<sup>159</sup> there are opportunities for those people to either encourage and facilitate voting or to discourage and prevent voting.<sup>160</sup> People who provide services to those with DMC sometimes share

---

<sup>152</sup> See Friedman, *supra* note 34, at 6-7 (describing how attitudinal barriers “played a role in the voting process of the participants in the 2016 general election”).

<sup>153</sup> *Id.* at 2.

<sup>154</sup> Okwerekwu et al., *supra* note 23, at 519 (explaining the role support staff at these locations can have in helping facilitate access to the polls).

<sup>155</sup> Friedman, *supra* note 34, at 6.

<sup>156</sup> *Id.* at 2 (citing to LISA SCHUR, MEERA ADYA & DOUGLAS KRUSE, DISABILITY, VOTER TURNOUT, AND VOTING DIFFICULTIES IN THE 2012 ELECTIONS (2013)).

<sup>157</sup> *Id.*

<sup>158</sup> Karlawish, *supra* note 3, at 1348. “[S]uch a change might be particularly useful for persons with mild to severe Alzheimer disease, who are better able to recognize pictures of the candidates in the US presidential election than to identify the candidates based on free recall.” *Id.*

<sup>159</sup> Hoerner, *supra* note 20, at 115.

<sup>160</sup> Friedman, *supra* note 34, at 8 (finding in their study that the biggest roadblock to voting for individuals with intellectual developmental disabilities was the attitudes of individuals and institutions around them).

a belief that it is legally permissible for them to prevent people with DMC from voting.<sup>161</sup> While staff at long-term care facilities are required to respect residents' voting rights due to federal regulations, there is little guidance on what the standard is and if the standard is not met, how people with DMC can participate despite the barrier.<sup>162</sup> For example, in 2008, the staff at a Philadelphia nursing home did not allow people with cognitive impairments to vote unless they could name candidates or current office holders and describe voting procedures, even though there are no mental capacity restrictions under Pennsylvania law.<sup>163</sup>

Further, poll workers and election officials have prevented people with DMC from voting by "imposing their own voter competence requirements."<sup>164</sup> This occurs when election officials refuse to let people vote, obtain absentee ballots, or receive voting assistance.<sup>165</sup> Election officials and poll workers have sometimes required people with DMC to "take examinations" and thus improperly bar them from voting based on their own judgments.<sup>166</sup> Another gatekeeping strategy that was used occurred shortly before the 2004 election when political party officials in Ohio were "training thousands of recruits to challenge voters suspected of being ineligible to vote" and were "taught how to challenge mentally disabled voters who [were] assisted by anyone other than their legal guardians."<sup>167</sup> Gatekeeping contributes to the societal narrative that people with DMC should be prevented from voting and raises concerns for the ways a person with DMC may vote.

#### *D. Rationales Debunked*

A common misconception is that individuals with DMC are not capable of casting an adequate vote on their own behalf.<sup>168</sup> This misconception stems from paternalistic beliefs that people with DMC

<sup>161</sup> BAZELON, *supra* note 61, at 17.

<sup>162</sup> Hoerner, *supra* note 20, at 115-16. "This means that if caregivers decline or fail to provide assistance in spite of an individual's request, there is no inviolable or invocable right that the individual with a mental disability can call upon to demand participation in the federal electoral process." *Id.* at 116.

<sup>163</sup> BAZELON, *supra* note 61, at 16. Bazelon notes two other examples that occurred prior to the 2004 election, which include a California nursing home refusing to allow volunteers to educate residents on registration requirements and a staff member at an Ohio nursing home barring a resident from registering to vote due to only being able to sign using an "X" instead of his full signature. *Id.*

<sup>164</sup> *Id.* at 15.

<sup>165</sup> *Id.* at 15-16.

<sup>166</sup> *Id.* at 15. However, when challenged in the courts, those actions are deemed unconstitutional. *See id.*

<sup>167</sup> *Id.* at 22 (citing Michael Moss, *Big G.O.P. Bid to Challenge Voters in Key State*, N.Y. TIMES (Oct. 23, 2004), <https://www.nytimes.com/2004/10/23/politics/campaign/big-gop-bid-to-challenge-voters-at-polls-in-key-state.html> [<https://perma.cc/AX2M-MGHHC>]).

<sup>168</sup> Brescia, *supra* note 115, at 946.

cannot be trusted to vote in their own best interest, but many individuals with DMC who require assistance to care for themselves can still make decisions and understand concepts.<sup>169</sup> In fact, a study found that people with DMC recognize the impact their elected representative has on the issues they care about and use that in making determinations on who to vote for.<sup>170</sup> Additionally, there is the issue of holding people with DMC to the unnecessary standard of “rationality” to vote. This is especially true when many people are presumed mentally capable of voting despite making what could be viewed as “irrational” decisions at the ballot box, yet their right to vote is respected.<sup>171</sup> DMC voters should not be held to a higher standard if those with presumed capacity are not held to the same rationale.

Concerning fraud or undue influence, there is no data to support the claim that people with DMC would be more susceptible to undue influence than the average voter.<sup>172</sup> Voters are routinely bombarded with op-eds, social media posts, or conversations attempting to influence them to vote in a particular way.<sup>173</sup> People with DMC should not be singled out and disenfranchised when other groups are just as likely to receive impermissible influence with regard to voting.<sup>174</sup> Moreover, attempts to measure votes that may be “unduly influenced by family members, well-meaning friends, or even strangers with partisan agendas present[] a massive black hole of zero data at worst, and anecdotal at best.”<sup>175</sup>

Meanwhile, other methods prevent fraud. Studies show that providing systematic instruction to people with DMC could lessen impermissible influence.<sup>176</sup> Additionally, there are already laws in place that seek to prevent fraud that applies to everyone, including anti-fraud and anti-bribery laws.<sup>177</sup> However, studies show that voter fraud is actually rare and “not a widespread phenomenon.”<sup>178</sup> Thus, preventing fraud is not an issue that necessarily needs to be addressed, and some argue that even if there is a fraudulent vote cast, disenfranchising an entire group of people would

---

<sup>169</sup> *Id.* at 959.

<sup>170</sup> Friedman, *supra* note 34, at 8. “Many discussed key issues such as services and supports, domestic violence, and international relations as factors that determined who they voted for in the 2016 presidential election.” *Id.*

<sup>171</sup> Karlawish et al., *supra* note 3, at 1346.

<sup>172</sup> Leonard, *supra* note 19.

<sup>173</sup> Kopel, *supra* note 18, at 232 (emphasizing that people are not suggesting that these types of practices give unfair advantages to the persuader).

<sup>174</sup> Bindel, *supra* note 51, at 122.

<sup>175</sup> Doraisamy, *supra* note 59, at 144 (emphasizing the difficulty in distinguishing what would be impermissible or undue influence on another person and what is allowed with regard to persuading someone to vote a certain way).

<sup>176</sup> Agran et al., *supra* note 1, at 389.

<sup>177</sup> Schriener & Ochs, *supra* note 68, at 5.

<sup>178</sup> Doraisamy, *supra* note 59, at 142.

simply be penalizing those who were victimized.<sup>179</sup>

Along those lines, if the danger of fraud is minuscule, then it can be inferred that the threat of illegitimate elections also does not warrant the continued disenfranchisement of those with DMC. The harm in allowing those “marginally incapable people to vote is small compared to the harm of preventing capable people from exercising their fundamental right to vote.”<sup>180</sup> Additionally, scholars state that there is no evidence that suggests that allowing those with DMC to vote negatively impacts the quality of elections.<sup>181</sup> Further, evidence suggests that those who are presumed to be mentally competent to vote often fail to take the task seriously<sup>182</sup> and thus would just as likely produce illegitimate voting results. Therefore, disenfranchisement seems unnecessary given the weak evidence supporting legitimacy concerns.

Finally, there is the concern of those with DMC lacking the intelligence to participate in the electorate.<sup>183</sup> But simply falling within the category of being a person with DMC does not mean having reduced intelligence levels.<sup>184</sup> Many studies support this finding that people with DMC can intelligently participate in the political process. First, there is the previously mentioned study from Germany that those with mental illness tend to vote for the left-wing candidate.<sup>185</sup> The authors of this study concluded that this preference showed that those with mental illness voted for the candidate that they believed would represent their best interests being that they were of low socioeconomic status.<sup>186</sup>

Second, a Canadian study found that inpatient psychiatry patients had high levels of political knowledge.<sup>187</sup> Other studies have found that people

---

<sup>179</sup> Agran & Hughes, *supra* note 116, at 61 (noting that this type of rationalization is not used in other contexts. For example, elderly individuals are still allowed phone plans even though this group is more susceptible to scams conducted via their phone.).

<sup>180</sup> Brescia, *supra* note 115, at 951 (citing to language used by the Supreme Court in *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) that stressed the importance of preserving one’s right to vote).

<sup>181</sup> Kopel, *supra* note 18, at 227–28 (pointing out evidence to the contrary, such as studies showing psychiatric patients mirroring votes of the general public based on class and studies showing those with presumed capacity voting based on emotional or irrational factors).

<sup>182</sup> *Id.* at 228.

<sup>183</sup> Brescia, *supra* note 115, at 959.

<sup>184</sup> *Id.* “While some severe mental disabilities can inhibit individuals from making basic decisions or comprehension, by no means do the vast majority of people with mental disabilities lose these functions.” *Id.*

<sup>185</sup> Bhugra et al., *supra* note 28, at 398 (citing the study of Jens Bullenkamp & Burkhard Voges, *Voting Preferences of Outpatients with Chronic Mental Illness in Germany*, 55 PSYCHIATRIC SERVS. 1440 (2004)).

<sup>186</sup> *Id.* and accompanying text.

<sup>187</sup> Okwerekwu et al., *supra* note 23, at 516 (citing Jaychuk G, Manchanda R, *Psychiatric Patients and the Federal Election*, 36 CAN. J. PSYCHIATRY, 124 (1991) (finding that the laws restricting voting rights were thereby unnecessary)).

with DMC can make “reasoned judgments about political issues,”<sup>188</sup> and their voting patterns often mirror that of the general public who share the same socioeconomic status.<sup>189</sup> Given this evidence, it seems that stigma and societal attitudes play a large role in preventing people with DMC from voting. Thus, the prevalence of these counterarguments, supported by the counterevidence, suggests that the continued exclusion of people with DMC from their fundamental right to vote is unjustified.

### VIII. ISSUES WITH MEASURING CAPACITY

Even ignoring the weak rationales that support disenfranchising people with DMC, measuring capacity to vote, in itself, is fundamentally problematic. Problems arise due to the similarity to literacy tests, the lack of uniformity in applying tests that measure capacity to vote, and the arbitrary results that appear to ensue.<sup>190</sup> This raises the question as to whether a capacity metric should be employed in any circumstance.

#### A. *Similarity to Literacy Tests*

In the mid-1800s, literacy tests were adopted by Northern states “to produce a more competent electorate and effectively weed out sizeable numbers of poor immigrant voters.”<sup>191</sup> Southern states quickly adopted literacy tests in an effort to suppress Black voters.<sup>192</sup> Moreover, literacy tests methodically targeted people of low socioeconomic status and racial minorities to the advantage of privileged classes of people.<sup>193</sup> Literacy tests became a tool of disenfranchisement until abolished by the VRA of 1965.<sup>194</sup>

The history of literacy tests in the United States “demonstrates that any standard that probes more deeply into a person’s electoral understanding carries with it an inherent risk of subjective and arbitrary application.”<sup>195</sup> Presumptions, or standards put in place to subject certain people to a test that determines their capacity to vote, have a striking resemblance to the literacy tests that systematically disenfranchised Black voters.<sup>196</sup> Additionally, “voters who are not identified and labeled as cognitively disabled are not

---

<sup>188</sup> Brescia, *supra* note 115, at 959.

<sup>189</sup> Kopel, *supra* note 18, at 227–28.

<sup>190</sup> *Id.* at 230.

<sup>191</sup> Brescia, *supra* note 115, at 953–54 (citing Cristina M. Rodríguez, *From Litigation, Legislation: A Review of Brian Landsberg’s Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 YALE L.J. 1132, 1142–43 (2008) (book review)).

<sup>192</sup> *Id.* at 954.

<sup>193</sup> Kopel, *supra* note 18, at 232.

<sup>194</sup> Voting Rights Act of 1965, 52 U.S.C. § 10101(c) (stating that literacy tests are allowed only if the agency can show the relevance of such a requirement and that even in that case there is a rebuttable presumption of literacy for anybody who has completed the sixth grade in an English-speaking school in the United States or one of its territories).

<sup>195</sup> Karlawish et al., *supra* note 3, at 1346.

<sup>196</sup> Brescia, *supra* note 115, at 954.



subject to any standards of competency to perform the act of voting.”<sup>197</sup> Thus, given the similarity to literacy tests that were abolished by the VRA, a metric to measure capacity must not act as a guise for a revival of literacy tests to once again benefit the privileged.

### *B. The Lack of Uniformity*

As illustrated above, states across the country differ in their laws regarding mental capacity to vote. Absent consistent competency criteria or standardized words being used, “it is unclear that the fundamental right to vote will be protected uniformly for all citizens.”<sup>198</sup> Moreover, states often do not define their stated standard for capacity,<sup>199</sup> resulting in misinterpretation given the varying context of mental capacity presentations.<sup>200</sup> In fact, “little attention has been given in most jurisdictions to considering by what standard a person’s voting capacity should be determined.”<sup>201</sup> Without clear definitions and standards, interpretation and application will likely be unpredictable<sup>202</sup> and more susceptible to “the subjective judgments made by the relevant public officials.”<sup>203</sup> For example, some states during guardianship proceedings will require the person to be able to “provide the names of various federal, state or local office holders, to explain the voting process, and to explain their political views,” which are questions not asked of other voters.<sup>204</sup>

Additionally, another implication with the lack of uniformity across the United States is that it further perpetuates the disenfranchisement of those with DMC. The “patchwork” effect means that “challenges to these restrictions must be highly individualized” and “conducted state-by-state,” which limits the ability for widespread organization to advocate against the various legislation that could be wrongly denying those with DMC the right to vote.<sup>205</sup>

### *C. Arbitrary Results*

Generally, laws should be applied to avoid “arbitrary decisions in

---

<sup>197</sup> Schiltz, *supra* note 99, at 130. “Targeting persons with intellectual disabilities for such screening is arguably an appropriate object of enhanced scrutiny” in the effort of equal protection. *Id.*

<sup>198</sup> Bindel, *supra* note 51, at 96.

<sup>199</sup> Doraisamy, *supra* note 59, at 148.

<sup>200</sup> Bhugra et al., *supra* note 28, at 340.

<sup>201</sup> Hurme & Appelbaum, *supra* note 31, at 961 (referencing that only four states attempt to provide a standard within their statutes).

<sup>202</sup> Beckman, *supra* note 24, at 224.

<sup>203</sup> *Id.* at 222 (emphasizing the risks involved when norms are relied on instead of standards and procedures).

<sup>204</sup> BAZELON, *supra* note 61, at 19.

<sup>205</sup> Doraisamy, *supra* note 59, at 139 (noting the organizational impact of nationwide campaigns).

individual cases.”<sup>206</sup> There “is no scientifically determinable point” along the scope of capacity “at which we can say that the person manifests sufficient capacity for the task” at hand.<sup>207</sup> Moreover, “people who successfully demonstrate capacity are presumptively competent to vote, while those who do not may be excluded” unnecessarily.<sup>208</sup> Denying the right to vote from those with capacity thereby produces arbitrary results in various jurisdictions. Additionally, establishing a point of capacity where one is able to vote is also arbitrary when there are individuals with presumed capacity to vote who are not subject to a capacity measurement.

#### *D. Should Capacity be Measured?*

Given that measuring capacity can have risks, such as being similar to a literacy test, lacking uniformity, and producing arbitrary results, it begs the question of whether its risks outweigh its rewards. If there are not any limitations related to mental capacity on the right to vote, there would be an increase in votes by those without capacity, but simultaneously, there would be no one wrongly denied their fundamental right to vote, thereby “erring on the side of generosity.”<sup>209</sup> However, even when people without capacity are voting, the consequences are minimal. In states without a mental capacity voter requirement, there is no data that suggests their elections are jeopardized due to people with DMC voting.<sup>210</sup> A “single incompetently cast ballot is not likely to affect the course of an election, and even a larger number of such ballots, assuming that the errors they reflect are distributed randomly, are unlikely to have a substantial impact.”<sup>211</sup>

Alternatively, it is argued that, because there are “standardized instruments . . . developed to assess a person’s capacity to consent to treatment,” there should be “a similar instrument to assess capacity to vote.”<sup>212</sup> However, given the high importance of voting rights and the fact that all other rights inherently flow from them, many argue that if a state must impose a capacity test, it should favor more people voting than less

---

<sup>206</sup> Beckman, *supra* note 24, at 223–24. It is worth repeating that people with DMC may have a wide range of diagnoses that covers a spectrum of presentations or manifestation.

<sup>207</sup> Hurme & Appelbaum, *supra* note 31, at 962. “Essentially, this is a determination regarding allocation of the risk of error.” *Id.*

<sup>208</sup> Kopel, *supra* note 18, at 232.

<sup>209</sup> Beckman, *supra* note 24, at 231 (while also noting that “to err due to generosity is still to err”).

<sup>210</sup> BAZELON, *supra* note 61, at 19.

<sup>211</sup> Hurme & Appelbaum, *supra* note 31, at 964. “Hence, even if the well-being of the person casting an incompetent vote would be better served by the candidate for whom he or she would have voted if competent, but by virtue of incompetence did not, the likelihood that the incompetently cast ballot will affect the outcome of the election, and thus harm the person in a material way, is slight.” *Id.*

<sup>212</sup> Karlawish et al., *supra* note 3, at 1346–47.

and be determined on an individual basis.<sup>213</sup>

## IX. PROPOSED SOLUTIONS AND RECOMMENDATIONS

### A. *The American Bar Association's Recommendation*

The American Bar Association (“ABA”) proposed a solution to this issue in 2007, in which it recommended that a state court should only take away a person’s right to vote due to mental incapacity if:

- (1) [t]he exclusion is based on a determination by a court of competent jurisdiction;
- (2) [a]ppropriate due process protections have been afforded;
- (3) [t]he court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- (4) [t]he findings are established by clear and convincing evidence.<sup>214</sup>

The ABA’s recommendation aims to prevent the issue of unqualified third parties from imposing those attitudinal barriers and not allowing people with DMC to vote based on “societal prejudice and misconceptions.”<sup>215</sup> Additionally, it appears the ABA is attempting to create uniformity in the way capacity can be assessed by the courts.

But the ABA’s model is not without weaknesses. Requiring a voter to communicate a “specific desire” to vote is “arbitrary” considering “so many eligible voters choose not to vote.”<sup>216</sup> Additionally, it would be difficult to differentiate “between a capable voter who has no desire to vote but has the right to do so, and an incapable voter who has no desire to vote but does not have the right to do so.”<sup>217</sup> This argument reflects that the choice to withhold one’s vote can be a form of expression and that those with DMC should not be held to a different standard, especially when many people with presumed capacity vote “irrationally.”<sup>218</sup> Additionally, implementing this model would likely burden courts, and the risk of judicial discretion being used differently across jurisdictions still exists.

As addressed below, the ABA’s model should be utilized by states that

---

<sup>213</sup> See Hurme & Appelbaum, *supra* note 31, at 932 (advocating for capacity limitations to be “narrowly circumscribed” and avoid “categorical exclusions”); see also Kopel, *supra* note 18, at 235 (arguing for a “functional capacity standard” but one that can “be easily met”).

<sup>214</sup> AM. BAR ASS’N, RECOMMENDATION AND REPORT OF THE SYMPOSIUM: FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT (2007), [https://www.americanbar.org/content/dam/aba/directories/policy/2007\\_am\\_121.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.pdf) [<https://perma.cc/9W59-72M5>].

<sup>215</sup> Brescia, *supra* note 115, at 963. Unqualified third parties could include “partisan poll workers or local election officials.” *Id.*

<sup>216</sup> Doraisamy, *supra* note 59, at 149.

<sup>217</sup> *Id.*

<sup>218</sup> Karlawish et al., *supra* note 3, at 1346.

opt for voting restrictions based on mental capacity. Apart from the third criterion, the ABA's model would likely be the most successful as it keeps determinations to a neutral decision-maker, applies legal standards of due process and an evidentiary burden on the party challenging capacity, and does not require Congress to mandate a federal standard.

### *B. The Doe Standard*

*Doe v. Rowe*, Maine's constitutional provision that disenfranchised those with mental illness who were "under guardianship," was struck down for violating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>219</sup> Additionally, the statute that implemented Maine's constitutional provision was also struck down for violating the ADA and Section 504 of the Rehabilitation Act.<sup>220</sup> Maine's district court found that the laws were not narrowly tailored because mental illness was interpreted broadly to include those capable to vote, and not every individual without capacity to vote is under guardianship.<sup>221</sup> After *Doe*, "restrictions that arbitrarily distinguish" between categories of people's capacity are subject to challenges on Equal Protection grounds.<sup>222</sup>

*Doe* suggested a uniform standard for evaluating capacity for voting. Under the *Doe* standard, a court determines on an individual basis whether the person is "(1) understanding the process and (2) understanding the effect of the vote."<sup>223</sup> The *Doe* standard is meant to "protect the integrity of voting" while ensuring that those who are capable of voting are able to do so.<sup>224</sup> However, the *Doe* standard is criticized for not being specific enough about what would "pass" this standard and where the line for capacity should be before a court takes away this fundamental right for an individual.<sup>225</sup> This proposed solution is therefore not recommended due to its vague language that would likely continue to perpetuate arbitrary results if applied.<sup>226</sup>

### *C. The Competency Assessment Tool for Voting (CAT-V)*

The Competency Assessment Tool for Voting ("CAT-V") was based off of the *Doe* holding.<sup>227</sup> The CAT-V is a structured interview "designed to address the subject's understanding of the nature of voting, the effects of voting and the capacity to make a choice."<sup>228</sup> Research regarding the CAT-

<sup>219</sup> *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 55–56.

<sup>222</sup> Doraisamy, *supra* note 59, at 147.

<sup>223</sup> Hoerner, *supra* note 20, at 126.

<sup>224</sup> Okwerekwu et al., *supra* note 23, at 516.

<sup>225</sup> Hoerner, *supra* note 20, at 126.

<sup>226</sup> *Id.*

<sup>227</sup> Okwerekwu et al., *supra* note 23, at 516.

<sup>228</sup> Beckman, *supra* note 24, at 229.

V instrument found that the results suggest “correlation is weak between cognitive status and capacity to vote,”<sup>229</sup> and thus “status-based disenfranchisement provisions are too broad.”<sup>230</sup> In other words, legislation is likely excluding more people than necessary from their right to vote.

The developers of CAT-V recommended that the instrument “should only be considered in exceptional circumstances as a guide when the person’s capacity to vote is called into question.”<sup>231</sup> Further, the developers believed CAT-V would be most useful in “long-term care facilities as a trigger for referral to a neutral decision-maker.”<sup>232</sup> Thus, if a third party suspects a person lacks capacity to vote, CAT-V should be used to determine whether their voting rights should be legally challenged. However, only administering the CAT-V to certain categories of individuals would be vulnerable to the risks addressed above similar to literacy tests or challenged on Equal Protection grounds.

Other critiques of this proposed solution stem from the way in which the CAT-V is scored.<sup>233</sup> The score ranges from zero to six, with six demonstrating high capacity to vote and zero demonstrating no capacity to vote.<sup>234</sup> The developers “did not take the position that any particular score . . . represents minimum capacity for voting.”<sup>235</sup> Accordingly, when a subject receives an intermediate score, discretionary judgments still need to be made.<sup>236</sup> This discretion leaves open the possibility for certain groups of people with DMC to be subject to discrimination resulting in attitudinal barriers as previously mentioned. For those reasons, the CAT-V is not recommended as a capacity metric.

#### *D. Suggested Congressional Legislation*

Some scholars argue that Congress should pass legislation to protect the right to vote for those with DMC because “[o]nce states have

---

<sup>229</sup> *Id.* at 230. “Recorded cognitive ability turns out to be a poor predictor of capacity to vote, as measured by the ability to choose and to understand the nature of elections.” *Id.* (citing Pietro Tiraboschi, Erica Chitò, Leonardo Sacco, Marta Sala, Stefano Stefanini & Carlo Alberto Defanti, *Evaluating Voting Competence in Persons with Alzheimer Disease*, 2011 INT’L J. ALZHEIMER’S DISEASE 1, 1–6 (2011)).

<sup>230</sup> Kopel, *supra* note 18, at 236–37.

<sup>231</sup> Lawn et al., *supra* note 49, at 294. “They also suggest that we would be safe to presume capacity, given that their study confirmed that even persons with serious mental illness are capable of voting.” *Id.*

<sup>232</sup> Doraisamy, *supra* note 59, at 150.

<sup>233</sup> *Id.* “The simplicity of the CAT-V questions and potential scores is a double-edged sword.” *Id.*

<sup>234</sup> Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, *The Capacity to Vote of Persons with Alzheimer’s Disease*, 162 AM. J. PSYCHIATRY 2094, 2098 (2005).

<sup>235</sup> Kopel, *supra* note 18, at 236. “Instead, they caution against drawing a firm capacity line among the possible scores and suggest that different decision-makers may use CAT-V data differently.” *Id.*

<sup>236</sup> Hurme & Appelbaum, *supra* note 31, at 970.

disenfranchised persons with diminished mental capacities, they are reluctant to reverse course and enfranchise them later absent judicial intervention.”<sup>237</sup> Moreover, it is difficult to amend state constitutions, and there is “a lack of widespread popular and legislative support for altering statutory provisions.”<sup>238</sup> Additionally, as previously discussed, the jurisdiction-by-jurisdiction differences make it difficult to mobilize the general public around this issue of disenfranchisement for people with DMC.

Even though states generally have the authority to regulate elections, Congress may be able to “frame a uniform mental competency standard as a *manner* in which a qualification is determined.”<sup>239</sup> Creating uniformity in standards and definitions that would “preempt all state disenfranchisement definitions” not consistent with federal legislation<sup>240</sup> has been argued to be a step in the right direction to protect the right to vote for those with DMC and possibly restore their franchise.<sup>241</sup> Federal uniformity could ensure that states are not defining capacity in a way that limits more people with DMC from voting than necessary to serve its rationales.

However, congressional legislation could be counterintuitive, as setting a federal standard might galvanize disenfranchisement in states that currently have no mental capacity restrictions on the right to vote. There is concern among scholars that universal capacity measures “would be taken too seriously and result in the disenfranchisement of people who are now permitted to vote.”<sup>242</sup> Therefore, because this proposal risks more widespread disenfranchisement for those with DMC, it is not recommended.

### *E. Non-Legislative Measures*

The suggested, non-legislative measures mainly address the attitudinal barriers that result in the disenfranchisement of those with DMC. One proposition is to provide more information for election officials about what the law is in their jurisdiction and what is permissible regarding the voting rights of people with DMC.<sup>243</sup> Caregivers and guardians of those with DMC are another target for education in order to help them understand the importance and benefits in allowing those with DMC to participate in the

---

<sup>237</sup> Bindel, *supra* note 51, at 92-93 (alluding to the procedural barriers states may have in amending their constitutions).

<sup>238</sup> *Id.* at 88.

<sup>239</sup> Doraisamy, *supra* note 59, at 151 (referring to U.S. CONST. art. I, § 4 (granting Congress power to regulate “times, places and manner” of holding federal elections)).

<sup>240</sup> Hoerner, *supra* note 20, at 124.

<sup>241</sup> Doraisamy, *supra* note 59, at 151.

<sup>242</sup> Kopel, *supra* note 18, at 239. For example, states that currently have no laws disenfranchising people with DMC might follow the path laid out by Congress and adopt state legislation limiting voting to those with “capacity” as defined by Congress.

<sup>243</sup> Karlawish et al., *supra* note 3, at 1348.

voting process.<sup>244</sup> Thus, with education and awareness surrounding this issue, the public at large can take methods to encourage those with DMC to vote, thereby normalizing their participation in society.

There are other initiatives that make the process of voting more accessible for those with DMC. Oftentimes, people with DMC “may have difficulty understanding ballots or voting machines,” thus making adjustments could increase their ability to cast votes.<sup>245</sup> Additionally, providing pictures of candidates would be particularly helpful for people whose DMC stems from dementia and struggle with free recall.<sup>246</sup>

### *F. Recommendation*

Given the scope of disenfranchisement for individuals with DMC and the state legislation that enables it, some action must be taken to protect, or reinstate, the right to vote for this marginalized group.

Ideally, states should amend their constitutions and laws to remove all restrictions based on mental incapacity. As previously addressed, the rationales for disenfranchisement are weak and the consequences for allowing those who “lack capacity” to vote are minimal, especially when fraud laws act as a precautionary measure to deter improper behavior.<sup>247</sup> Moreover, a number of states already practice this, which arguably demonstrates the needlessness of mental capacity disenfranchisement laws elsewhere.

However, given the difficulty in passing constitutional amendments, the “lack of public support for repealing disenfranchising laws,”<sup>248</sup> and the pervasiveness of stigma surrounding those with DMC, a combination of judicial intervention and non-legislative measures is more plausible. Congressional legislation again is not appropriate as it could be counterproductive. Legislation in this area would be highly political, which could draw more negative attention to the issue, all while having a small likelihood of successful passage.

Therefore, the best course of action would be to impose the ABA’s recommendation for courts across the country to apply without the third criterion of requiring a person to express a “specific desire” to vote.<sup>249</sup> Providing a standardized judicial process that only disenfranchises a person with DMC in individualized circumstances would provide protections for

---

<sup>244</sup> Kopel, *supra* note 18, at 231 (emphasizing collective action in providing people with opportunities who may lack necessary resources that underlies a democratic society).

<sup>245</sup> Friedman, *supra* note 34, at 2 (advocating for the need for more accessible materials to assist voting).

<sup>246</sup> Karlawish et al., *supra* note 3, at 1348.

<sup>247</sup> See *supra* Section VII.B.

<sup>248</sup> Schiltz, *supra* note 99, at 114. “[P]erhaps because, by definition, the affected parties are not able to reward these candidates with their vote.” *Id.*

<sup>249</sup> See *supra* Section IX.A.

people with DMC as a group. Further, providing the evidentiary standard of clear and convincing evidence placed on the proponent of disenfranchisement is likely a reasonable threshold to protect the voting rights of those with DMC.

In addition, providing education about the relevant law and making the voting process simpler for those with DMC are initiatives that can be introduced immediately. Allowing those with DMC to participate in the electorate would decrease stigma and increase democracy by the inclusion of this voting bloc. Encouraging people to exercise their right to vote should be done regardless of perceived capacity.

## X. CONCLUSION

In sum, people with DMC constitute a large portion of the United States through a wide variety of diagnoses, which includes a spectrum of presentations that may, at some point, deem them ‘incapable’ of voting.<sup>250</sup> States are legally allowed to disenfranchise people based on mental incapacity, but standards vary depending on the jurisdiction, which results in some people with DMC being denied voting rights while others are not.<sup>251</sup> Even where legal restrictions are not in place, attitudinal barriers stemming from prejudice and unjustified rationales prevent people with DMC from exercising their fundamental right to vote.<sup>252</sup>

Implementing a capacity metric for those with DMC comes with inherent risks.<sup>253</sup> Ideally, states should amend their constitutions and statutes to remove voting restrictions based on mental incapacity.<sup>254</sup> Realistically, for states that wish to continue implementing voting restrictions based on mental incapacity, they should implement the ABA’s recommendation absent the third criterion.<sup>255</sup> This method would serve to create uniform standards implemented by the judiciary and deter informal gatekeeping.<sup>256</sup> Finally, mobilization and advocacy through education and non-legislative initiatives should occur to promote enfranchisement and encourage those with DMC to vote, thereby cementing their inclusion in society and dismantling the continuation of stigma.<sup>257</sup>

---

<sup>250</sup> Leonard, *supra* note 19.

<sup>251</sup> *See supra* Part V.

<sup>252</sup> *See supra* Section VII.C.

<sup>253</sup> *See supra* Part VIII.

<sup>254</sup> *See supra* Section IX.F.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*