Notes

Mental Disability and the Right to Vote

In an era of judicial hostility toward restrictions of the franchise, those involving mental disability have escaped judicial scrutiny. Most states disqualify mentally ill and retarded individuals from voting. Yet the premise of such disfranchisement—that certain citizens lack the capacity to vote rationally—has gone unquestioned.

This Note argues that the mental-disability restrictions violate the equal protection clause. An examination of the electoral provisions and of the constitutional standards that they must satisfy suggests that efforts to disfranchise irrational persons infringe upon fundamental rights without furthering a compelling state interest. The Note contends that even if the state objectives were compelling, the existing voting classifications would be unconstitutional because they are both overinclusive and underinclusive. The Note acknowledges that states


2. This Note uses the term "mentally disabled" as a generic reference to persons suffering, or legally declared to be suffering, from any mental health problem, whether due to deficiency or disease, that subjects them to special laws regulating their personal, social, or civil rights. See American Bar Foundation, The Mentally Disabled and the Law (rev. ed. S. Brakel & R. Rock eds. 1971) (similar definition) [hereinafter cited as S. Brakel & R. Rock].


5. That premise has been accepted by writers on the democratic process, see, e.g., H. Gosnell, Democracy—The Threshold of Freedom 110 (1948); D. McGovney, The American Suffrage Medley I, 56 (1949), and by mental-health commentators, see, e.g., R. Allen, supra note 3, at 366; Note, Mental Illness: A Suspect Classification? 83 Yale L.J. 1237, 1267 (1974).

6. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")
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could develop a disfranchisement mechanism aimed at ensuring voter rationality that would be sufficiently precise. It concludes, however, that adoption of such a mechanism would be unwise and that states should not disfranchise any persons on the grounds of mental disability.

I. Statutes and Standards

A. Electoral Disqualification Provisions

Confusion is the common characteristic of state laws that disfranchise the mentally disabled. A state's definition of the disqualified group often varies from its constitution to its mental health law to its election code. Some statutory disqualifications conflict with state constitutions.

Only ten states permit citizens to vote irrespective of mental disability. Twenty-six states proscribe voting by persons labeled idiotic.

7. In some states, the constitution disfranchises idiots, insane persons and the like, but the statutes disfranchise persons under guardianship or adjudicated incompetent. E.g., compare IOWA CONST. art. 2, § 5 with IOWA CODE ANN. § 48.31(6) (West Supp. 1978) and WYO. CONST. art. 6, § 6 with WYO. STAT. ANN. § 22-1-102(k) (1977). In Missouri, the constitution disfranchises persons under guardianship or involuntarily committed, Mo. Const. art. VIII, § 2, but the statute disqualifies only incompetents, Mo. ANN. STAT. § 115.153(2) (Vernon Supp. 1978). After a series of confusing amendments in California, the state Attorney General declared that, although the constitution required the legislature to disqualify incompetents, no such statute was in force. See Bolinger, California Election Law During the Sixties and Seventies, in CAL. ELEC. CODE [55], [93]-[98] (West 1977); cf. id. §§ 707.5-.7 (West Supp. 1979) (new disfranchisement provisions).

8. Connecticut, for example, provides that incompetents may not vote, CONN. GEN. STAT. § 9-12(a) (1979), but the state constitution establishes only four qualifications for electors, none of which is related to incompetence, CONN. CONST. art. 6, § 1. In New York, the constitution permits every citizen meeting age and residence requirements, except certain criminals, to vote, N.Y. CONST. art. II, §§ 1, 3, but the election code disqualifies persons adjudicated incompetent or committed, N.Y. ELEC. LAW § 5-106(6) (McKinney 1978).

insane, or non compos mentis ("general-disability classifications").

Twenty-four states and the District of Columbia disfranchise persons adjudicated incompetent or placed under guardianship ("guardianship classifications").

Four states disqualify from voting persons committed to mental institutions ("commitment classifications").

10. States that refer to idiots or insane persons include: Alabama (Ala. Const. art. VIII, § 182); Arkansas (Ark. Const. art. 3, § 5); Delaware (Del. Const. art. V, § 2); Georgia (Ga. Const. art. II, § 2, para. 1); Idaho (Idaho Const. art. VI, § 3); Iowa (Iowa Const. art. 2, § 5); Kentucky (Ky. Const. § 145); Mississippi (Miss. Const. art. 12, § 241); Nevada ( Nev. Const. art. 2, § 1); New Jersey (N.J. Const. art. II, para. 6); New Mexico (N.M. Const. art. VII, § 1); Ohio (Ohio Const. art. V, § 6); Texas (Tex. Const. art. VI, § 1); Tex. Elec. Code Ann. art. 5.01 (Vernon Supp. 1978) (idiots and lunatics); Washington (Wash. Const. art. VI, § 3); Wyoming (Wyo. Const. art. 6, § 6).

States that refer to persons non compos mentis or mentally diseased include: Alaska (Alaska Const. art. V, § 2); Arizona (Ariz. Const. art. VII, § 2 (non compos mentis or insane)); Hawaii (Haw. Const. art. II, § 2); Minnesota (Minn. Const. art. VII, § 1); Minn. Stat. Ann. § 200.02(25)(b) (West Supp. 1978); Montana (Mont. Const. art. IV, § 2); Nebraska (Neb. Const. art. VI, § 2); North Dakota (N.D. Const. § 187 (non compos mentis or insane)); Oregon (Or. Const. art. II, § 5 (idiot or mentally diseased)); Rhode Island (R.I. Const. amend. 38, § 1); West Virginia (W. Va. Const. art. IV, § 1); Wisconsin (Wis. Const. art. III, § 2 (non compos mentis or insane)).


Four other states indirectly establish incompetence as a ground for disfranchisement. The constitutions and election laws of these states do not disqualify incompetents, but their mental health codes provide that mental patients may not be disfranchised because of institutionalization unless adjudicated incompetent. Kentucky (compare Ky. Const. § 145 with Ky. Rev. Stat. § 202A.170 (1977)); Nevada (compare Nev. Const. art. 2, § 1 and Nev. Rev. Stat. § 295.540 (1977) with id. § 433A.460(1) (1977)); Oregon (compare Or. Const. art. II, § 3 with Or. Rev. Stat. § 426.385(1) (1977)); West Virginia (compare W. Va. Const. art. IV, § 1 and W. Va. Code § 3-1-3 (Supp. 1978) with id. § 27-5-9(a)). These mental health code provisions appear to have been adopted as part of the Draft Act Governing Hospitalization of the Mentally Ill, reprinted in S. Brakel & R. Rock, supra note 2, at 454, 461-62. By their terms, these provisions apply only to institutionalized persons. The states that have adopted the Draft Act may not have meant to amend their election laws sub silentio. These four states might not, therefore, actually use incompetence as a criterion for disfranchisement.

Because guardianship and incompetence are usually adjudicated in the same proceeding, the two classifications are sometimes used indistinguishably. E.g., compare Mo. Const. art. VIII, § 2 with Mo. Ann. Stat. § 115.133(2) (Vernon Supp. 1978).

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other laws in three of those states provide that commitment alone does not justify disfranchisement. 13

Although few states use the commitment classifications explicitly, officials in other states sometimes attempt to draw presumptions of disqualification from the fact of institutionalization. 14 Some courts have disfranchised mentally disabled persons without any statutory authorization. 15

B. Equal Protection Standards for Voting Restrictions

The states unquestionably possess the authority to establish voter qualifications. 6 The distinctions that states adopt, however, may not violate the equal protection clause. 17

The constitutional guarantee of equal protection requires that classifications that infringe on fundamental rights or interests must withstand rigorous judicial scrutiny. 18 The right to vote is a fundamental

13. See Ariz. Rev. Stat. § 96-506 (1974); N.Y. Mental Hyg. Law § 33.01 (McKinney 1978); Okla. Stat. Ann. tit. 43A, § 64 (West 1979). The mental health codes containing those provisions have generally been adopted more recently than the electoral disqualifications. Whether the legislatures intended to overturn the disqualifications sub silentio is questionable. See note 11 supra.


18. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). Statutes that rely on suspect classifications are also subject to strict scrutiny, but no court has held that
Although the Supreme Court has subjected limitations that are constitutionally authorized or that restrict voting in limited-purpose elections to more lenient standards, most absolute denials of the franchise must survive strict scrutiny. The essence of strict scrutiny is suspension of judicial deference toward legislative choices. Employing a two-part analysis, the court first evaluates the importance of the statutory objective and the necessity of the legislative scheme chosen to achieve it. Second, the court

mental disability is a suspect classification. See Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1229 n.153 (1974) [hereinafter cited as Developments]. But see Burgdorf & Burgdorf, A History of Unequal Treatment, 15 Santa Clara L. Rev. 855, 905-10 (1975) (arguing mental illness should be suspect classification); Note, supra note 5, at 1258-59 (same).


It might be contended that the concept of voting as a fundamental right presumes a capacity for rationality on the individual's part. Because mentally disabled individuals lack such capacity, the argument would continue, voting is not a fundamental right for them; therefore, state restrictions involving mental capacity are subject to minimal scrutiny. The defect with that analysis is two-fold. First, it would enable the state to evade scrutiny of the precision of its classifications. Even assuming that the interest in voting is "fundamental" only for rational persons, many rational individuals may be disfranchised by overinclusive classifications. Such individuals need to protect their interests through the political process at least as much as do nondisabled citizens. See Wald, The Legal Rights of People with Mental Disabilities in the Community, in 2 Legal Rights of the Mentally Handicapped 1036 (B. Ennis & P. Friedman eds. 1973). These persons, at least, are entitled to strict scrutiny of the disfranchisement mechanisms. Second, the argument would have dangerous implications even for irrational persons. It would enable the state, without being subjected to close scrutiny, to use an individual's lack of capacity to appreciate or exercise a right as justification for depriving him of it. See Developments, supra note 18, at 1211 n.65.

20. See Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (disfranchisement of felons subject to minimal scrutiny because implicitly authorized by Fourteenth Amendment); note 72 infra (age restrictions exempt from strict scrutiny because constitutionally authorized).


22. See, e.g., Hill v. Stone, 421 U.S. 289, 295-98 (1975); Dunn v. Blumstein, 405 U.S. 330, 336 (1972). Three decisions have appeared to depart from the strict scrutiny principle. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 66-70 (1978) (statute subjecting persons on city's outskirts to "police jurisdiction" without permitting them to vote upheld under minimal scrutiny); Rosario v. Rockefeller, 410 U.S. 752, 757 (1973) (primary enrollment deadline subjected to minimal scrutiny; requirement "did not absolutely disfranchise" any voter); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807-08 (1969) (relaxed standards applied to denial of absentee ballots to jail inmates; inmates failed to prove they could not vote otherwise, Hill v. Stone, 421 U.S. 289, 300 n.9 (1975)).


24. See pp. 1649-50 infra. Because strict scrutiny requires that restrictions satisfy both the "fit" and "compelling interest" inquiries, the Court often finds it necessary to reach only one of the two issues. See Kramer v. Union Free School Dist., 395 U.S. 621, 632 n.14 (1969).
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examines the fit between the statutory objective and the particular classification.\textsuperscript{25}

Under the first prong of the strict scrutiny test, restrictions placed on voting in nonspecial-interest elections on grounds other than citizenship, residence, or age are invalid unless necessary to achieve a compelling state interest.\textsuperscript{26} The compelling interest test requires three inquiries: Is the statutory objective legitimate? Is the interest that the statute purports to serve sufficiently important in principle and in fact? Is the particular qualification the least restrictive means of furthering that interest?\textsuperscript{27}

Of the three inquiries, the second is the most problematic, for the Supreme Court has not enunciated a test for determining whether an interest is sufficiently important.\textsuperscript{28} The Court has often made that inquiry unnecessary by invoking a relaxed level of scrutiny,\textsuperscript{29} declaring the objective illegitimate,\textsuperscript{30} or invalidating the classification on grounds of fit.\textsuperscript{31} When it has been forced to rule on an interest's importance,
the Court has provided little insight into the process by which it reached the particular conclusion.32

One method of assessing the importance of an interest is to examine the state's treatment of that interest in analogous situations.33 This approach would leave the ultimate evaluation of an interest's importance to the legislature, but at least would enable courts to ascertain whether the purported value was genuine or merely an attorney's post hoc rationalization.34

Once it has found that a statute is necessary to achieve a compelling interest, the court will examine the fit between the objective and the particular classification. Strict scrutiny requires that the classification be carefully tailored, not just reasonably related, to the statutory objective.35 Courts are extremely intolerant of overinclusive classifications, because they indicate that the state has needlessly deprived some persons of a fundamental right.36 Courts have voided statutes for underinclusivity much less frequently. But underinclusivity signifies that, although various persons are similarly situated with respect to a legislative aim, the state has singled out only some to bear a particular burden.37 If the underinclusivity is great enough, it may justify invalidation of the statutory mechanism.38 Classifications that are over-


33. The Court has occasionally engaged in such analysis, but has never articulated the basis for this approach. See, e.g., Hill v. Stone, 421 U.S. 289, 299-300 (1975) (property-rendering qualification not compelling because not strict enough to accomplish purported purpose); Dunn v. Blumstein, 405 U.S. 330, 359-60 (1972) (implying promotion of informed voting not compelling because state maintains other provisions "not consistent with its claimed compelling interest"); Evans v. Cornman, 398 U.S. 419, 421 (1970) (declaration of nonresidence not compelling because state treats federal-enclave inhabitants as residents for other purposes); Carrington v. Rash, 380 U.S. 89, 95 (1965) (implying permanent presumption of nonresidence for voting by military personnel not compelling because state overcomes presumption in other matters and for other transient groups).


38. Although the Supreme Court has not invalidated a voting restriction for underinclusivity alone, it has occasionally invalidated other classifications on that ground. See,
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inclusive are often underinclusive as well.\textsuperscript{39}

The stringency of the standards that the mental-disability restrictions must satisfy is justified by the fact that preservation of other civil rights is largely dependent upon access to the ballot.\textsuperscript{40}

II. Is a Rational Electorate Compelling?

A court reviewing the mental-disability restrictions would first need to identify their objective and determine whether it was compelling.

A. The Statutory Objective

The state disfranchisement provisions do not contain statements of purpose. Courts\textsuperscript{41} and commentators\textsuperscript{42} agree, however, that the statutory objective is to exclude from electoral participation persons incapable of making rational voting decisions.\textsuperscript{43} Most other objectives would fail to meet the legitimacy requirement of the compelling state interest test.\textsuperscript{44} For example, the Supreme Court would most likely reject a state's attempts to disfranchise mentally disabled voters because

\textit{e.g.}, Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (prohibition of contraceptive distribution); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (sterilization of habitual criminals). In several decisions that overturned voting classifications for imprecision, the Court criticized the classifications' apparent underinclusivity, though the rulings rested on overinclusivity. \textit{See, e.g.}, Dunn v. Blumstein, 405 U.S. 330, 358-60 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969); \textit{cf.} Zablocki v. Redhail, 434 U.S. 374, 390 (1978) (restriction of marital rights invalid because "grossly underinclusive" as well as "substantially overinclusive").

Under minimal scrutiny, underinclusivity is rarely fatal to a statutory scheme. \textit{See} L. Tribe, \textit{supra} note 21, § 16-4; \textit{Developments in the Law—Equal Protection}, 82 Harv. L. Rev. 1065, 1084-86 (1969). But strict scrutiny requires a more precise fit between end and means. As the degree of underinclusivity becomes greater, so does the likelihood that the real legislative objective is discriminatory or illegitimate. This is especially true with respect to disfranchisement, because the included group lacks direct political power. Substantial underinclusivity in a voting classification should therefore be constitutionally intolerable.

\textsuperscript{39} \textit{See Developments in the Law—Equal Protection, supra} note 38, at 1087 n.48.

\textsuperscript{40} \textit{See, e.g.}, Evans v. Cornman, 398 U.S. 419, 422 (1970); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

\textsuperscript{41} \textit{See, e.g.}, Washington v. State, 75 Ala. 582, 585 (1884) (dictum); Town of Lafayette v. City of Chippewa Falls, 70 Wis. 2d 610, 621, 235 N.W.2d 435, 441 (1975).


\textsuperscript{43} This Note takes such incapacity to mean that an individual could not minimally understand the nature and effect of the electoral process. \textit{See} note 100 \textit{infra} (deriving that meaning). Hereinafter, the term "rational voters" refers to those who can satisfy this minimal standard. If the state intended a higher threshold of voting competence, such as, for example, ability to evaluate and differentiate between candidates' positions, the underinclusivity discussed at pp. 1659-60 \textit{infra} would be greatly exacerbated, because many voters might lack the requisite sophistication. \textit{See} note 114 \textit{infra}.

\textsuperscript{44} \textit{See note 27 supra} (discussing requirement that objective be legitimate).
of the possibility that they might outvote other local residents, because they had an insufficient stake in the elections, or because disqualification was administratively convenient.

B. The Harm of Irrationality

In order to satisfy strict scrutiny, the restriction must be necessary to achieve a compelling interest. States have never been required to explain what interests would be endangered if citizens incapable of rationality were permitted to vote. Like the commentators, the states have simply assumed the importance of rationality. Although the Supreme Court has held that promotion of informed and intelligent voting is a legitimate aim, it has not said whether it is compelling. No court has ruled on whether exclusion of irrational voters furthers a compelling interest.

A state forced to justify the disqualification provisions might first insist that they represent a fundamental and longstanding feature of the political system. The government is concerned only that its citizens be capable of voting rationally; whether they vote wisely or foolishly is their own business.

It is questionable whether the rationality requirement is indeed so basic. By exempting only age, residence, and citizenship qualifications from strict scrutiny, the Supreme Court has implied that only those

45. See Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969) (per curiam) (may not disfranchise nonproperty taxpayers because of their attitude toward expansion of utilities); Carrington v. Rash, 380 U.S. 89, 94 (1965) (may not disfranchise soldiers because they might outvote civilians).
46. The Supreme Court has never decided whether a group could in theory be excluded from general-purpose elections because it had an insufficient stake in the outcome, consistently avoiding that argument by finding that excluded citizens are in fact substantially affected by the electoral decisions. See, e.g., Evans v. Cornman, 398 U.S. 419, 422-26 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704 & n.5 (1969) (per curiam).
48. See Mass. Research Council, supra note 3, at 56 (cases involving mental-disability disfranchisement have not reached validity of purpose).
49. See note 5 supra.
51. The only restriction directed to the quality of a voter's decisionmaking process upheld by the Court is the literacy test. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Because the Court applied only minimal scrutiny in evaluating the equal protection challenge, see id. at 51, the Court's subsequent application of strict scrutiny to voting restrictions has undermined Lassiter's authority. See L. Tribe, supra note 21, § 13-15, at 770 (Lassiter could not survive strict scrutiny).
52. Indeed, the state could not constitutionally concern itself with the wisdom of a voter's choice. See note 100 infra.
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requirements are basic to the political system. The fact that ten states do not require rational capacity as a prerequisite to voting also casts doubt on its fundamental character. More important, the state's argument fails to explain why such a tradition of exclusion is compelling; the Court and Congress have overridden other voter qualifications that were longstanding. The state could not avoid the compelling interest test by appealing to tradition.

The state might alternatively argue that two interests underlie the quest for rationality: promotion of effective government and prevention of manipulation. With respect to the former interest, the state could contend that, as a group, voters capable of rationality make "better" decisions than do voters incapable of rationality, thereby selecting better officials. Better officials, the argument would continue, result in more effective government, and this difference in result is sufficient to justify exclusion of persons who cannot vote rationally.

The interest in promoting effective government is certainly legitimate, but it is not sufficiently important in principle or in fact to satisfy the compelling interest test. If the state took seriously the relationship between individual votes and effective government, it would be concerned about other components of the voting decision, such as the availability of meaningful campaign information and the ability of voters to use it. Rational capacity alone may not lead to selection of effective officials if voters base their choices on inadequate information.

Yet states do not require that voters be capable of informed

53. See note 26 supra (citing cases). Arguably, the Court has not mentioned rationality in this context because it has never been presented with a challenge to that requirement.
54. See note 9 supra (citing statutes).
55. See note 1 supra (citing cases); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 87-88 (1978) (Brennan, J., dissenting) (practice that violates equal protection not justified by fact "great many States" authorize it or that it is "of venerable age").
56. See note 60 infra (citing statute).
57. The state might offer a nonconsequentialist justification for the restrictions. It could argue that permitting irrational persons to vote is inconsistent with the notion that democracy requires participants able to reason and exercise free will; thus, irrational persons should be prevented from voting even if such voting would not tangibly harm society or the government. This purist approach is unpersuasive because the equal protection clause itself embodies a nonconsequentialist position: citizens should be permitted to vote unless the state can justify preventing them from voting. To oppose this tenet, one must posit a consequentialist result that justifies overriding the constitutionally embodied value.
58. Cf. Simson, supra note 28, at 684 (similar argument with respect to importance of informed electorate).
59. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) (dictum) ("The electoral process . . . depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed."); Simson, supra note 28, at 684 (effectiveness of state government "depends in large measure on the extent to which the people cast knowledgeable votes").
voting, nor have they undertaken concerted efforts to ensure that voters base their choices on reasoned analysis.60 States voice little concern over the quality of a voter's choice and its relationship to effective government—except with respect to mentally disabled persons.

The empirical assumption of the impact-on-government rationale—that voters incapable of rationality make "worse" decisions—is also questionable. Many citizens vote "irrationally," basing their decisions on factors other than investigation and reasoned analysis.61 The impact on government is the same whether the voter cannot choose rationally or can, but simply does not. Studies have found that mental patients' voting patterns are similar to those of "normal" voters and have concluded that permitting all mental patients to vote would have no significant effect on the outcome of elections.62 Thus, neither in principle nor in fact is the impact-on-government rationale compelling.

A second state argument could rest on the supposed susceptibility of the mentally disabled to manipulation. A candidate's agent or a staff member at a mental institution could, the argument would run, assemble a group of patients, tell them for whom to vote and then drive them to the polls. An unscrupulous individual could thereby control elections wherever mentally disabled persons constituted a significant portion of the electorate.63

Prevention of voter manipulation unquestionably satisfies the first two compelling interest inquiries: it is legitimate and sufficiently important. The state consistently pursues that interest through the secret

60. Congress appears to believe that the impact-on-government rationale is not compelling, for it has proscribed disfranchisement of illiterate, uneducated and non-English speaking persons, even though they may be less capable than other voters of acquiring the information necessary for a "good" choice. See 42 U.S.C. § 1973aa (1976) (proscribing literacy and education requirements); id. § 1973aa-1a (facilitating voting by non-English speaking citizens); cf. Dunn v. Blumstein, 405 U.S. 330, 337 n.29 (1972) (by prohibiting devices that would assure voter knowledgableness, Congress declared "people should be allowed to vote even if they were not well informed"); Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) (Congress may have concluded need to promote intelligent voting failed to justify English-literacy requirement).


63. A study of community opposition to voting by mental patients in Pennsylvania found that such fears were widespread. See Civil Rights Comm'n, supra note 9, at 5, 21.
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ballot and antibribery and anticoercion laws. But disqualification of irrational voters fails to satisfy the third inquiry: it is not necessary to further the interest in preventing manipulation. Courts consistently have held that, although prevention of voter fraud and manipulation is important, it does not justify blanket disfranchisement.64

The state's assumption that irrational voters are peculiarly subject to manipulation is based on a stereotypical view of mentally disabled persons. Even if that stereotype were accurate, however, there would be less drastic means of preventing the manipulation.65 The fear of manipulation relates primarily to irrational voters confined to institutions66 and could not justify disfranchisement of irrational voters residing in the community. Yet only four states focus on presence in an institution as the criterion for disfranchisement.67 Furthermore, the state could institute a variety of measures to minimize the danger that mental patients would be manipulated. It could provide freer access to institutionalized voters for all candidates, thereby reducing the opportunity for one-sided influence. It could discourage institutional staff from telling patients how to vote.68 It might even encourage patients to vote in the community in which they resided prior to institutionalization.69 In addition to controls aimed at the voter, the state could adopt stringent penalties for coercion.70


66. This would be true for three reasons. First, a party intent on manipulation would not know which voters in the community were incapable of rationality. Second, an irrational person in the community would have greater exposure to various candidates than would a confined person. Third, the costs of manipulating scattered voters might well be prohibitive.

67. See note 12 supra (citing statutes).

68. Such restrictions might infringe upon the staff's First Amendment rights, but if carefully drafted could be analogized to bans on political involvement by state employees. Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973) (government may restrict employees' political involvement).

69. See Civil Rights Comm'n, supra note 9, at 27-29 (discussing similar recommendations). Such dispersed voting would reduce the incentive for manipulation by minimizing the impact of the patients' votes on any one local contest. Although some election officials have refused to recognize mental patients as local residents, courts generally have overturned such refusals. See, e.g., Coulombre v. Board of Registrars of Voters, 326 N.E.2d 560, 562-63 (Mass. App. 1975); Iafrate v. Suffolk County Bd. of Elections, 54 A.D.2d 769, 387 N.Y.S.2d 893 (1976), aff'd, 42 N.Y.2d 991, 368 N.E.2d 35, 398 N.Y.S.2d 413 (1977). But see In re 223 Absentee Ballot Appeals, 81 York Legal Rec. 137, 145-46 (C.F. York County, Pa. 1967) (patient in asylum fails to meet residence requirement).

Ensuring that only rational persons vote may be a reasonable goal, but the manner in which the states regulate the voting process casts doubt upon the depth of their concern. Moreover, the fact that the disfranchisement procedures are severely underinclusive\(^7\) suggests that the states' objective is not of utmost importance—if it were, the states would have adopted procedures better suited to detecting irrational voters. Under the first stage of strict scrutiny analysis, therefore, legislative attempts to disqualify irrational voters are invalid because they are unnecessary to attain a compelling state interest.\(^7\)

III. Precision of the Disfranchisement Classifications

Even if promotion of rational voting were a compelling interest, the second stage of equal protection analysis would require that the disfranchisement mechanisms be carefully tailored to satisfy that objective in order to survive strict scrutiny.\(^3\) Because the existing classifications presume that irrationality is a necessary and exclusive concomitant of mental disability, they are both overinclusive and underinclusive.

A. The Existing Mechanisms

1. Overinclusivity

The general-disability, guardianship, and commitment classifications all rest on the assumption that a person suffering from any mental

\[^{71}\text{See pp. 1659-60 infra.}\]

\[^{72}\text{The conclusion that promotion of rational voting is not compelling need not invalidate electoral age qualifications. Courts have assumed that age requirements must pass only minimal scrutiny. See, e.g., Hill v. Stone, 421 U.S. 289, 297 (1975) (dictum); Gaunt v. Brown, 341 F. Supp. 1187, 1192 (S.D. Ohio 1972), aff'd mem., 409 U.S. 809 (1972). Adoption of the Twenty-Sixth Amendment arguably provided a basis for that assumption: by forbidding exclusion only of persons eighteen or older, the Amendment implicitly approved disfranchisement of minors and therefore insulated it from strict scrutiny. Cf. Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (disfranchisement of felons subject to minimal scrutiny because implicitly authorized by § 2 of Fourteenth Amendment). Absent the Twenty-Sixth Amendment authorization (or if the Amendment were interpreted as barring disqualification of the older group absolutely while leaving intact the requirement that disqualification of minors must pass strict scrutiny), the age qualifications might be difficult to distinguish from the mental-disability restrictions. Cf. L. Tribe, supra note 21, § 16-29 (suggesting age-based presumptions should be rebuttable).}\]

\[^{73}\text{See p. 1650 supra. Quantification of over- or underinclusivity is impossible, and the Supreme Court has acknowledged that there is not a fixed point at which imprecision becomes intolerable. See Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972). Accordingly, the discussion that follows focuses on why the mechanisms are conceptually, rather than numerically, imprecise.}\]
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disability is incapacitated for all purposes, including voting. That presumption of blanket incapacity has been widely rejected. Medical and legal commentators, as well as some judges, have emphasized that an individual incapable of making particular types of decisions may be fully capable of making others. In many areas of the law, courts will not single out a mentally disabled person for distinct treatment unless his disability is shown to affect the capacity in question. One psychiatric study has concluded that mental patients may be competent to vote despite their illness.

The substantive issues involved in the proceedings that trigger disfranchisement are rarely related to capacity for rational voting.


77. See Klein & Grossman, Voting Competence, supra note 62, at 702.

78. B. SWADRON & D. SULLIVAN, supra note 74, at 79; see Hsu v. Mt. Zion Hosp., 259 Cal. App. 2d 562, 572, 66 Cal. Rptr. 659, 664 (1968) (purpose of commitment proceeding not to determine whether "person is incapable of . . . understanding the nature or effects of his acts"); 59 Op. ATT'Y GEN. CAL. 265, 266 (1976) (purpose of guardianship proceeding "is to protect the incompetent's estate, not to take away his voting right").
Guardianship proceedings focus on whether an individual is incapable of managing his financial affairs. Commitment proceedings focus on whether an individual is dangerous or in need of treatment. Most states, in fact, now require more than mere institutionalization to establish a presumption of incompetence to vote. A person in need of guardianship or institutionalization may be competent for many purposes.

The disfranchisement mechanisms also ignore the fact that a person’s capacity may vary over time. An individual once committed as men-

79. See, e.g., In re Estate of Langford, 50 Ill. App. 3d 623, 627, 364 N.E.2d 735, 737 (1977); In re Guardianship of Cornia, 546 P.2d 890, 892 (Utah 1976).
82. See Symposium on Guardianship, supra note 75, at 15 (because blanket presumption of incompetence invalid, disfranchisement “should not be an automatic consequence of the appointment of a guardian”); Plotkin, supra note 3, at 11 (need for guardian unrelated to voting capacity).
83. See, e.g., Boyd v. Board of Registrars of Voters, 334 N.E.2d 692, 692 (Mass. 1975) (commitment cannot be equated with general incompetence); Carroll v. Cobb, 139 N.J. Super. 493, 448-49, 354 A.2d 355, 359 (App. Div. 1976) (same); H. Davidson, Forensic Psychiatry 196 (1952) (no necessary relationship between comittability and competence); Grawits, Discharge from State Hospital in Relation to Competency, 113 AM. J. PSYCH. 448, 448 (1956) (estimating 75% of mental patients are competent).
84. See Constitutional Rights of the Mentally Ill: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d Sess. 222
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tally ill may remain disfranchised even after recovery. Psychiatrists who have studied mental patients' voting habits confirm that any general disfranchisement will be overinclusive: "[A]n unselected patient population hospitalized for mental illness is able to comprehend the task of voting and fulfill requirements of the task just as the general population does."86

2. Underinclusivity and Arbitrariness

The disfranchisement mechanisms are underinclusive because they do not focus on the critical factor: capacity for rationality. The classifications encompass only those individuals who may be incapable of voting rationally and who satisfy the particular criteria of the disfranchisement mechanisms. Some persons incapable of voting rationally will not fit into any of the statutory categories. The general-disability classifications may reach only persons declared insane in the course of criminal proceedings. The guardianship classifications cannot encompass all irrational persons. Mentally disabled individuals seldom will be subjected to competence inquiries if they have few assets, can manage their financial affairs, or receive informal family supervision. The commitment classifications do not reach irrational persons who

(1969-70) [hereinafter cited as Hearings] (testimony of Arthur E. Cohen) (although psychiatrists recognize that competence varies over time, periodic reviews of mental patient's condition overlook the variations); Ellis, Should Some People be Labeled Mentally Ill? 31 J. CONSULTING PSYCH. 435, 445 (1967) (mental dysfunction commonly fluctuates).

85. See Crawfis, supra note 83, at 449-50 (because hospitals are conservative in certifying restoration of competence, presumption of incapacity often continues until contrary judicial determination). Some authorities hold that the continuing presumption of incompetence, see, e.g., Spaulding v. Miller, 221 Or. 503, 509-10, 350 P.2d 1073, 1075 (1960), requires disfranchisement of discharged patients until they convince a court that they are competent to vote, see, e.g., 1959 Op. ATT'Y GEN. N.Y. 28; 1950-52 Op. ATT'Y GEN. OR. 208 (No. 1800) (1951).

86. Klein & Grossman, Voting Competence, supra note 62, at 702; see note 62 supra (citing similar studies).

87. See 59 Op. ATT'Y GEN. CAL. 263, 265 (1976) ("legal determination as to competency to vote . . . limited to those persons who have been found 'insane' as a result of criminal proceedings"). The states generally have no proceedings other than criminal trials in which a person can be labeled insane, because that label has become obsolete. See, e.g., ALA. CODE tit. 17, § 4-61 (Supp. 1978) (repealing reference to findings of lunacy inquisition); Hardisty, Mental Illness: A Legal Fiction, 48 Wash. L. Rev. 735, 737-39 (1973) ("insanity" obsolete).

88. See, e.g., Fazio v. Fazio, 378 N.E.2d 951, 955 (Mass. 1978) (finding of mental illness not sufficient for appointment of guardian); New v. Corrough, 370 S.W.2d 323, 327 (Mo. 1963) (refusing to disqualify person declared insane and committed, because not under guardianship).

89. See, e.g., Mass. Research Council, supra note 3, at 15, 58 (guardianship usually stems from proceeding "unrelated" to voting competence, such as disposition of estate); R. Slovenko, PSYCHIATRY AND LAW 330 (1973) (competence seldom challenged unless family desires protection of assets).
enter institutions voluntarily or who, for various reasons, are not subject to commitment.

In short, the disqualification classifications are underinclusive because a person's lack of rational capacity—the basis of the state's concern—is not sufficient to trigger them. The Attorney General of California has concluded that the number of persons who fall within that state's disfranchisement provision is "infinitesimal when related... to all the possible number of voters who may be mentally incompetent for voting purposes."

The manner in which the disfranchisement mechanisms operate, moreover, makes arbitrary application inevitable. A state generally will ignore mentally disabled persons who avoid drawing attention to their disabilities. Even if the mentally disabled are correctly identified, only a handful of states provide for notifying election officials that an individual has been disqualified from voting. Because most states have no procedure for enforcing the statutes, disfranchisement is often fortuitous. Such arbitrary discrimination in determining who may not vote is constitutionally impermissible.

B. Specific Adjudications of Voting Competence

Although the imprecision of the disfranchisement provisions could be reduced by altering the method of identifying unqualified voters, such an approach would be unwise.

90. See Klein & Grossman, Voting Competence, supra note 62, at 702 ("many patients are disenfranchised by chance, depending on whether they are committed by court or admitted on a voluntary basis").
91. See H. Davidson, supra note 83, at 196 (person could be incompetent but not require hospitalization).
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1. The Model

Critics have urged that blanket determinations of an individual’s mental incapacity be replaced by adjudications of specific competence. To disfranchise an individual, the court would have to find that he was incompetent to vote, not merely that he was generally incompetent. A few states already require specific competence adjudications before mental patients can be deprived of any rights.

Assuming that the underlying interest is compelling, specific competence adjudications could in theory avoid the constitutional infirmities of the existing disfranchisement mechanisms. The test of competence would be whether the individual could understand the nature and effect of the electoral process. Presumably, an individual

97. See, e.g., R. Allen, supra note 3, at 252; Symposium on Guardianship, supra note 75, at 15; Limited Guardianships, supra note 75, at 531; cf. N.C. Gen. Stat. § 85-1.6(5) (Supp. 1977) (incompetent individual should be permitted to exercise “those rights that are within his comprehension and judgment”).


99. The states are: Connecticut (Conn. Gen. Stat. § 17-206b (1977)); Iowa (Iowa Code Ann. § 229.27 (West Supp. 1978)); Nevada ( Nev. Rev. Stat. §§ 433.003, 433A.460(1) (1977)); Wisconsin (Wis. Stat. Ann. §§ 6.09(1), 880.39(5) (West Supp. 1978)). All the provisions but Wisconsin’s are contained in declarations of the rights of persons committed to mental institutions, not in chapters on voting or guardianship. General findings of incompetence, therefore, may still be sufficient to justify disfranchisement of persons who have not been institutionalized. The frequency of adjudications of voting incompetence, and the manner in which they operate, are unclear, because no such adjudications have been reported. In many matters, however, the law has long focused on specific incompetence. See note 76 supra.

100. Of the states that provide for specific competence determinations, only Iowa specifies a test of competence. See Iowa Code Ann. § 229.27 (West Supp. 1978) (“whether the person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act”). Courts have focused, similarly, on whether particular voters “are mentally incapable of knowing or understanding the nature and objective of the elective question. . . . “ Town of Lafayette v. City of Chippewa Falls, 70 Wis. 2d 610, 621, 225 N.W.2d 435, 441 (1975); accord, Welsh v. Shumway, 232 Ill. 54, 75, 83 N.E. 549, 558 (1907); In re 223 Absentee Ballot Appeals, 81 York Legal Rec. 137, 147 (C.P. York County, Pa. 1967); cf. R. Allen, supra note 3, at 222-23 (discussing competence form with similar criteria of voting ability).

Three alternative standards of voting competence are less appropriate than the “understanding” test. The state might use a “reasonable person” standard, i.e., whether the voting choice of the individual in question would be one that a reasonable person might make. But the Supreme Court has forbidden such inquiry into the content of a particular voting decision. See, e.g., Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969) (per curiam) (exclusion for fear of how person will vote impermissible); Carrington v. Rash, 380 U.S. 89, 94 (1965) (same). Focusing on content creates a danger that the decisionmaker’s preferences will color his views of competence. Few elections, moreover, present choices that a reasonable person could not select.

A second standard would look to the reasons a suspect voter offered for his choices. But the trier of fact might impose his own substantive beliefs in evaluating the voter's
could request reexamination whenever he sought to vote. By disfranchising only those persons found incapable of such basic understanding, the mechanisms would not be overinclusive.

The state could minimize underinclusivity by expanding the groups subject to competence inquiries to include persons whose personal histories indicated a substantial likelihood that they could not vote rationally. The state might, for example, test any individual who had received treatment in a public or private mental health facility, been placed under guardianship, or been enrolled in a special education program. The fit would not be perfect: some persons incapable of voting rationally may not suffer from any mental disability that would subject them to the competence test. But if the state added enough triggering devices, it would reach substantially more incompetent voters than the existing mechanisms reach and could reduce underinclusivity to constitutionally tolerable levels.

2. The Defects

Though in theory a system of specific competence adjudications could be developed that would not be voidable on grounds of fit, four considerations militate against adoption of such a system. First, the test of competence, even if straightforward in form, would be difficult to apply. The issue of whether a person understood the voting process could almost never be answered objectively. The reviewer would have great discretion in determining what it meant to understand the process and whether the individual’s degree of understanding was sufficient. The perception of rationality would often hinge on the quality of a voter’s explanations of his choices. The proceeding would enable the reviewer to impose his own manner of thinking and reasons. A choice might be rational, moreover, even though the voter could not articulate the basis for it.

A minimal standard of competence would require that the voter be capable of evidencing some choice. That standard is probably lower than the states that adopted the disfranchisement provisions intended. It would render the provisions pointless, since virtually every person who desired to vote could designate some preference.

101. A provision for periodic reexamination would be necessary to avoid overinclusivity because a person’s competence can vary over time. See pp. 1658-59 supra.

102. Such adjudications would also avoid many of the due process deficiencies of the existing mechanisms. See note 17 supra.

103. A particular system of competence adjudications might still be underinclusive, because states might be unwilling to extend the mechanisms far enough. The point is simply that a state could develop classifications of persons subject to the tests, short of universal application, without violating equal protection, given that a minimal degree of underinclusivity is constitutionally tolerable. See note 38 supra.

104. Even carefully tailored adjudications, however, would be invalid because unnecessary to achieve a compelling state interest. See pp. 1652-56 supra.
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value preferences on the determination of competence.¹⁰⁵

Second, the requirement of specificity might in practice often be ignored. In the few cases that have adjudicated individual voting capabilities, the determinations rested on appearances of incapacity rather than on serious psychological investigations.¹⁰⁶ The tendency of courts to presume blanket incompetence from mental disability might continue; a judge confronted with an incoherent person labeled psychotic or retarded and confined to an institution might simply check off voting, along with other activities, as inappropriate. It is unrealistic to assume that judges can or will investigate carefully each of an individual's separate capacities.¹⁰⁷ They may instead effectively delegate to mental health professionals the power to grant or withhold the franchise. These practical problems of implementation, along with the inherent subjectivity of the inquiry, could render disfranchisement through specific competence hearings as arbitrary as it is under the existing systems.

Third, the Voting Rights Act¹⁰⁸ might bar a state from subjecting only certain individuals to a competence test. Congress has prohibited states from determining a person's voting qualifications pursuant to any standard, practice, or procedure different from that applied to other individuals.¹⁰⁹ Arguably, federal law would require the state to subject all voters, not merely those with a history of mental disability, to the competence inquiries.¹¹⁰

The Voting Rights Act might, in addition, bar any competence test-


¹⁰⁶. See, e.g., Youngblood v. Thorn, 145 Ark. 466, 468-71, 224 S.W. 962, 962-63 (1920) (weighing testimony that voter "had a peculiar shaped head and face" against testimony that "[w]itness had seen him buy cigars, candy, and other little things"); Town of Lafayette v. City of Chippewa Falls, 70 Wis. 2d 610, 622-23, 235 N.W.2d 435, 442 (1975) ("[T]his Court cannot make sufficient distinctions . . . . to determine which ones if any were capable intelligence-wise to be an elector . . . .") (quoting trial court); Comment, "Civil Insanity": The New York Treatment of the Issue of Mental Incapacity in Non-Criminal Cases, 44 Cornell L.Q. 76, 89-93 (1958) (courts focus on lay opinions of apparent rationality in competence adjudications).

¹⁰⁷. Cf. Hearings, supra note 84, at 453 (exhibit of Arthur E. Cohen) (District of Columbia officials continue making blanket assessments of incompetence based on financial incapacity, though law divides competence into six specific areas).


¹¹⁰. No systematic inquiry into voting competence now occurs. See B. Swadron & D. Sullivan, supra note 74, at 81-82. Although informal scrutiny may occur when individuals attempt to vote, see, e.g., 1973 Rep. Atty Gen. N.M. 84, 90 (No. 73-44), some decisions have stated that election officials have no authority to examine a voter's competence, see note 95 supra.
ing, whether applied to all voters or only to some. The Act prohibits states from disfranchising persons for failure to "demonstrate the ability to . . . understand, or interpret any matter." Competence tests fall within the language of this proscription, and application of the ban to mental-disability tests is appropriate even if unforeseen by the drafters. Congress outlawed understanding tests because they granted local officials broad discretion to determine whether an individual was fit to vote; that discretion was often used to discriminate against particular groups. In administering understanding tests as part of competence adjudications, officials might be more harsh in judging persons whose appearance was abnormal, who acted strangely, or who were labeled mentally ill or retarded.

Finally, adoption of a broad system of competence adjudications would erect a substantial barrier between citizens and the ballot box, especially as the state's criteria for subjecting persons to the tests became more inclusive. Many persons, whether mentally disabled or not, might be unable to pass the understanding test. Others might simply be unwilling to try. Much of the suffrage expansion of recent decades would be undone as citizens were once again forced to prove that they were intellectually qualified to vote.

Conclusion

States have adopted mental-disability restrictions on voting as convenient alternatives to serious voter-competence inquiries. Though the states might overhaul the disfranchisement mechanisms to reduce their over- and underinclusivity, specific competence adjudications would themselves be problematic. Disfranchisement would still be unnecessary to further any compelling state interest. Having expanded the franchise so broadly, the states should discard all devices that single out mentally disabled citizens for exclusion from political participation.

113. If Congress amended the Voting Rights Act to permit universal competence tests to be administered, officials in some areas might employ the tests as a means of disfranchising members of minority groups. Creating such a loophole in the Act could undermine much of its protection.
114. See R. Allen, supra note 3, at 366 (understanding requirement "might exclude a substantial portion of the electorate"); B. Swabron & D. Sullivan, supra note 74, at 81 ("[m]any persons who are not considered mentally incompetent" lack capacity for rational voting).