OUT OF MIND, OUT OF SIGHT: VOTING RESTRICTIONS BASED ON MENTAL COMPETENCY

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ABSTRACT

A vast majority of states allow for the right to vote to be stripped based on an individual's mental status. However, the United States Constitution largely leaves voting qualifications to the states, so in practical effect the right to vote is largely determined by mental competency standards that vary between states. In this essay, I explore why mental competency voting restrictions persist, given the historical trend toward expanding the vote to vulnerable populations. Further, I question the "fraud prevention" justification for disenfranchisement based on mental status, given mixed reports on the actual prevalence of voter fraud. I conclude that the perception—not reality—of electoral integrity remains a compelling government interest recognized in election law, arguably served by restricting the vote from those who may not be making an individual, meaningful choice. I discuss proposed mental competency standards that may be narrowly tailored enough to gauge an individual's actual ability to participate in the electoral process. Finally, I conclude by suggesting that the lack of nationwide uniformity supports the establishment of a national standard for competency-based disenfranchisement. I contend that a workable, constitutionally sound standard eliminates categorical disenfranchisement, and requires individualized judicial inquiry into a voter's capacity to understand and participate in the electoral process.

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I. INTRODUCTION

Greg Demor, a bright, autistic young man in Los Angeles, lost his right to vote at eighteen when a California judge granted his mother conservatorship over him.[1] Greg's mother had requested conservatorship because she was concerned that upon turning eighteen he would be unable to make the necessary complex healthcare and financial decisions for his life, but because California law dictates that anyone with a legally appointed guardian loses the right to vote by default,[2] Greg was automatically deemed unfit to vote.[3]

His story is not novel. Tens of thousands of Americans with mental disabilities lose the right to vote every year.[4] All but nine states explicitly provide some means to restrict voting rights of those with mental disabilities.[5] Eleven states do not require individualized judicial inquiry before automatically revoking the right to vote "upon adjudication of mental incapacity or guardianship."[6] As common as these restrictions are, there is no uniform standard for mental competence to vote.[7] (Several states do not clearly define what will disqualify a voter with mental disabilities).[8] A person with a mental disability acknowledged by a court in Idaho, here fully permitted to vote, may relocate to Montana and find herself barred from voting.[9]

At a time when Congress has considered serious sweeping changes "to expand Americans' access to the ballot box,"[10] at first blush it is troubling that mental disability restrictions are *not* being challenged. Consider the definition of "individual with a disability" in the current proposed text of H.R. 1: "an individual with an impairment that substantially limits any major life activities *and who is*

1. Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW CHARITABLE TR.: STATELINE (Mar. 21, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws.

2. *See* CAL. CONST. art. II, § 4 (West, Westlaw through 2020); *see also* CAL. ELEC. CODE §§ 2201(b), 2208 (West 2020). In order to retain or regain the right to vote, a conservator (guardian) must make a recommendation of fitness to vote, and then a hearing must be held to adjudicate capability based on the ability to complete a voter registration affidavit. *See* CAL. WELF. & INST. CODE § 5357(c) (West 2020); CAL. ELEC. CODE § 2209 (West 2020).

3. Vasilogambros, *supra* note 1.

4. Id.

5. See Michele J. Feinstein & David K. Webber, Voting Under Guardianship: Individual Rights Require Individual Review, 10 NAELA J. 125, 142 (2014); Elizabeth R. Schiltz, The Ties That Bind Idiots and Infamous Criminals: Disenfranchisement of Persons with Cognitive Impairments, 13 U. ST. THOMAS L.J. 100, 104 (2016); Jennifer Bindel, Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities, 65 N.Y.U. ANN. SURV. AM. L. 87, 92 (2009).

6. Feinstein & Webber, *supra* note 5, at 133–34.

7. 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, 961 (2016).

8. For example, Nebraska's Constitution bars a person from voting if she is "non compos mentis," which is defined in statute as "mentally incompetent." *See* NEB. CONST. art. VI, § 2 (West, Westlaw through Mar. 26, 2020); NEB. REV. STAT. ANN. § 32-312 (West 2020). However, "mental competency" is not the same as "mental incapacity," which is the touchstone for guardianship. NEB. REV. STAT. ANN. § 32-312 (West 2020). Ohio's Constitution still bars voting by an "idiot" or "insane person." OHIO CONST. art V, § 6 (West, Westlaw through 2020).

9. *See* MONT. CONST. art. IV, § 2 (West, Westlaw through 2019) (restricting the vote from someone deemed to have "unsound mind" by court).

10. For the People Act of 2019, H.R. 1, 116th Cong. (2019).

otherwise qualified to vote in elections for Federal office."[11] This definition inheres in it the states' ability to define voter qualifications within the Elections Clause.[12]

In Part One of this essay, I lay out the background of mental competency restrictions as a voting qualification within the purview of individual states, setting out the constitutional framework and the fractured landscape of restrictions. Then the essay turns to the historical and modern justifications for restricting the vote based on mental competency.[13] This Part identifies voter fraud prevention as the strongest state justification at play.[14] The Third Part finally asks what is so compelling about these interests, given the difficulty of determining how often voter fraud actually occurs.[15] This Part concludes that this compelling interest shores up the integrity of the electoral process by reinforcing *perception* of electoral integrity. Part Four then asks what a constitutionally sound standard for voting competence might look like, given various recommendations and proposed methods of testing capacity, and asks if there is room for Congress to bring uniformity to the fractured landscape of state restrictions.[16]

II. THE CONSTITUTIONAL FRAMEWORK AND A PATCHWORK OF RESTRICTIONS

The right to vote has been called fundamental, but it is not absolute.[17] Congress's constitutional powers are limited to regulating the "times, places and manner" of holding federal elections.[18] Accordingly, within the constraints of constitutional amendments guaranteeing that the vote will not be abridged by race, color, previous condition of servitude,[19] sex,[20] failure to pay poll tax,[21] or age above 18,[22] individual states are free to set their own qualifications to vote.[23] (Federal law

11. *Id.* at § 305(g) ("Access to voter registration and voting for individuals with disabilities") (emphasis added).

12. U.S. CONST. art. I, § 2 (fixing the qualifications of voters for federal candidates as the same as voters for the largest house of the state legislature, as defined by each state); U.S. CONST. art. I, § 4 (granting Congress power to regulate "times, places and manner" of holding federal elections); *see also infra* Part I (discussing provision to states for voter qualifications).

13. *See infra* notes 17–28 and accompanying text (discussing the conditional nature of the fundamental right to vote).

14. *See infra* notes 62–66.

15. *See infra* Part III.A (discussing voter fraud).

16. *See infra* Part IV.C (discussing Congress's potential role in bringing uniformity).

17. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (quoting Lassiter v. Northampton Election Bd., 360 U.S. 45, 51 (1959) ("[T]he right of suffrage 'is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.'")).

18. U.S. CONST. art. I, § 4.

19. U.S. CONST. amend. XV; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (focusing on literacy tests as a proxy for racial disenfranchisement).

20. U.S. CONST. amend. XIX.

21. U.S. CONST. amend. XXIV.

22. U.S. CONST. amend. XXVI.

23. U.S. CONST. art. I, § 2; *see also* Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives . . . . States have 'broad powers to determine the conditions under which the right of suffrage may be exercised.' (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)).

already acknowledges "mental incapacity" as a reason for states to remove registered voters from their voter rolls).[24]

Much has been written regarding the right to vote and the level of scrutiny applied when this right is limited or denied.[25] While the Supreme Court has treated the right to vote as nearly sacrosanct,[26] perhaps the right to vote is better described as conditional: once granted, any attempt to withdraw this right is treated with incredible suspicion.[27] Because restrictions based on mental competence constitute a full denial of the right to vote for those who do not qualify, these restrictions are likely subject to strict scrutiny.[28] Lower courts have followed suit.[29] In the context of a challenge to a mental competency restriction, the issue would be whether the distinction between competent and incompetent voters serves a compelling state interest and that this classification is necessary to achieve that compelling state interest.[30] If proven, the state must then demonstrate that the means of classification is narrowly tailored to achieve that intended result.[31]

The state-by-state patchwork of mental competency restrictions ranges from statutory to constitutional, or some combination of both. Only thirteen states do not have statutory or constitutional restrictions on a person's right to vote based on mental disability.[32] Many states have both constitutional and legislative restrictions, some of which differ in language.[33] Other states have legislation expanding or restricting the franchise beyond the state constitution's delineation of voter eligibility.[34] Some restrictions are based solely on general categorizations of "mental competence."[35] Yet other states require specific judicial determinations as part of criminal, probate, or guardianship proceedings.[36]

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24. 52 U.S.C. § 20507(a)(3)(B) (2018).

25. *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 147–50 (2008).

26. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to the "political franchise of voting" as a "fundamental political right, because preservative of all rights"); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .").

27. Douglas, *supra* note 25, at 147–50.

28. *See, e.g.*, *Harper*, 383 U.S. at 670 (striking down poll tax as directly restricting fundamental right to vote in state elections); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (striking down property ownership or parenthood requirement to vote in school board elections as not serving compelling interest); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (striking down durational residency requirement as directly restricting right to vote).

29. *See* Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 808 (8th Cir. 2007) (acknowledging "close constitutional scrutiny" as the level of review for denial of the right to vote); Doe v. Rowe, 156 F. Supp. 2d 35, 48 (D. Me. 2001) ("[T]he Court bases its due process analysis on a finding that the denial of the right to vote is a denial of a fundamental liberty."); Minn. Voters All. v. Ritchie, 890 F. Supp. 2d 1106, 1115–17 (D. Minn. 2012) (avoiding Due Process challenge but acknowledging that "careful scrutiny" is required when the right to vote is threatened).

30. *See* Dunn, 405 U.S. at 343.

31. Id.

32. Feinstein & Webber, *supra* note 5, at 142.

33. Hurme & Appelbaum, *supra* note 7, at 936–37.

34. *Id.* at 937–40. North Dakota, Utah, Alaska, and Florida are jurisdictions where voting laws "appear to ignore constitutional provisions in their election laws that specifically delineate those who are ineligible to vote." *Id.* at 937.

35. Bindel, *supra* note 5, at 93.

36. *Id.* at 94–97.

This patchwork of mental competency restrictions is heavily fractured even within state law, as pointed out by scholars.[37] For example, the Alaska constitution states, "No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed."[38] However, the corresponding election law that disqualified voters for being of "unsound mind" was repealed in 1996.[39] Alaska's guardianship statutes also reflect the opposite goal of preserving wards' legal and civil rights, including a provision preventing guardians from keeping their wards from voting.[40] Layers of restrictions also raise serious questions about consistency: is the guardianship adjudication of "unsound mind" in Mississippi the same as the determination of "idiots and insane persons" used in Mississippi's constitution and election law?[41]

Scholars have exhaustively catalogued these various restrictions and recent challenges,[42] and any attempt to replicate the quality of that work here would be futile. However, the practical effect of this patchwork is that challenges to these restrictions must be highly individualized, conducted state-by-state, and are thus difficult to bring as part of a national campaign of impact litigation. The next Part seeks to look past this patchwork of restrictions to the justifications that may be asserted by a state in response to a challenge under strict scrutiny.

III. WHY RESTRICT THE VOTE BASED ON MENTAL COMPETENCE?

The Constitutional framework provides space for mental competency restrictions in federal and state law. Accordingly, it is not surprising that so many states have these restrictions. This Part examines historical justifications for mental competency restrictions, and then the interests identified by legal scholars: preserving the political community, ensuring an intelligent electorate, and preventing voter fraud.

Advocates for expanding the franchise to the mentally disabled are quick to point to the origin of mental competency restrictions. Bindel writes,"[P]ersons with diminished mental capacities were disenfranchised since colonial America."[43] 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.[44] The historic justifications were rooted in deeply held

37. Hurme & Appelbaum, *supra* note 7, at 961; Schiltz, *supra* note 5, at 102, 105.

38. ALASKA CONST. art. V, § 2 (West, Westlaw through 2020).

39. *See* Hurme & Appelbaum, *supra* note 7, at 938 n.43.

40. *Id.* at 951 n.125.

41. *Id.* at 977 app. A; *Id.* at 998 app. B. Notably, this lack of clarity leaves these provisions vulnerable to challenges of arbitrariness. *See, e.g.*, Schiltz, *supra* note 5, at 106.

42. See generally 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 (2010); Benjamin O. Hoerner, Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's Potential, 20 TEX. J. ON C.L. & C.R. 89 (2015); Bindel, supra note 5; Feinstein & Webber, supra note 5; Hurme & Appelbaum, supra note 7; Schiltz, supra note 5.

43. Bindel, *supra* note 5, at 101.

44. *Id.* at 102. In 1819, Maine became the first state explicitly prohibiting mentally disabled individuals from voting. *Id.* "[B]y 1880, twenty-six of the thirty-eight states had such provisions." *Id.*

principles, such as the idea that only those of sufficient intelligence should be allowed to vote,[45] that disenfranchising socially undesirable people (*i.e.*, the persons with diminished mental capacity) protected both the would-be voter and society from the negative ramifications of their choices,[46] and that decreasing the total electorate would provide political parties with electoral advantages.[47]

As civil rights and disability rights have progressed, historic justifications for disenfranchisement have eroded, but evidently mental disabilities stand apart from other disabilities as applied to voting rights. The United States Supreme Court has acknowledged a "'lengthy and tragic history' of segregation and discrimination" of the mentally disabled.[48] Federal laws also have provided more protection to individuals with disabilities through legislation like the Voting Rights Act,[49] the Nursing Home Reform Act of 1987,[50] the National Voter Registration Act of 1993,[51] and the Americans with Disabilities Act.[52] These laws have focused on accessibility for those otherwise qualified to vote.[53] But at the same time, federal law continues to carve out room for state-based restrictions on voting registration based on mental capacity.[54] "[W]e believe that we are throwing off the yokes of prejudice and myth by adopting broad federal antidiscrimination protections such as the ADA," write Schriner et al., "But we cling to distinctions when we believe they really 'matter,' such as those found in the state laws governing electoral participation."[55]

Why? Today, mental competency restrictions on the right to vote are likely to be justified by three rationales considered by the Supreme Court in other contexts.[56] Scholars have examined justifications presented in election law cases decided by the United States Supreme Court,[57] and have identified compelling

45. *Id.* at 104. *See also* Brescia, *supra* note 42, at 953–54; Hoerner, *supra* note 42, at 108 ("[W]hile the debate around the intellectual and moral capacity of voters primarily centered around women and African-Americans, it is likely that the states' adoption of disability-centric exclusions was a political consequence of concerns about the persons with mental disabilities' capacity to intelligently, and thus legitimately, vote").

46. Bindel, *supra* note 5, at 103–04; *see also* Brescia, *supra* note 42, at 957–59 (observing that historical treatment and public perception reflect the notion "that mentally disabled persons cannot be full members of society").

47. Bindel, *supra* note 5, at 105–06.

48. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461 (1985) (Marshall, J., concurring) (quoting Univ. of Cal. Regents v. Bakke, 438 U.S. 265, (1978) (opinion of Powell, J.)).

49. 52 U.S.C. §§ 20101–07 (1965); Voting Rights Act of 1965, 52 U.S.C. § 10301 (1971); 52 U.S.C. § 10508 (2020).

50. *See* 42 C.F.R. §§483.10(a)(1)–(2) (2019) (implementing the Nursing Home Reform Act of 1987, which was passed as part of the Omnibus Budget Reconciliation Act of 1987).

51. National Voter Registration Act, 52 U.S.C. §§ 20501–11 (1993).

52. Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (2008).

53. *See, e.g.*, Voting Accessibility for Elderly and Handicapped Act of 1984, 52 U.S.C. § 20101 (2018); *See also* Rabia Belt, *Contemporary Voting Rights Controversies through the Lens of Disability*, 68 STAN. L. REV. 1491, 1499–1505 (2016) (describing the various federal statutory protections for people with disabilities in exercising voting rights).

54. *See* 52 U.S.C. § 20507(a)(3)(B) (2018) (allowing voter registration to be canceled "as provided by State law, by reason of criminal conviction or mental incapacity").

55. Kay Schriner, Lisa Ochs & Todd Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 BERKELEY J. EMP. & LAB. L. 437, 439 (2000).

56. Pamela S. Karlan, Framing the Voting Rights Claims of Cognitively Impaired Individuals, 38 MCGEORGE L. REV. 917, 924 (2007).

57. Burdick v. Takushi, 504 U.S. 428 (1992); Dunn v. Blumstein, 405 U.S. 330 (1972); Purcell v. Gonzalez, 549 U.S. 1 (2006).

government interests justifying disenfranchisement: ensuring an intelligent electorate; and the preservation of the political community, including prevention of voter fraud.[58]

As a preliminary matter, the government interest of ensuring an intelligent electorate was approved of in cases *predating* the Voting Rights Act's restriction on literacy tests.[59] Accordingly, the validity of this interest is suspect in the context of heightened scrutiny.[60] "[W]e have recognized since the time of the Federalist Papers that voters will often behave selfishly, prejudicially, and irrationally," Karlan writes, "The fact that voters who are cognitively impaired may not process information in a sophisticated or entirely rational manner may separate them only in degree—if even that—from the remainder of the electorate."[61] It is unclear how a voter's knowledgeability or intelligence on election issues or candidates is a compelling interest under heightened scrutiny.

The remaining, more legitimate interest is rooted in preserving the integrity of the election process.[62] Professor Karlan calls this interest preservation of the political community, and considers this interest to subsume two goals: identifying whether voters have (or appreciate) an electoral preference at all, and preventing voter fraud.[63] "Permitting individuals with cognitive impairments so severe that they are unaware of the very nature of the process in which they are participating to vote may undermine that conception [of a political community] in two ways, one conceptual and one practical."[64] Conceptually, a participant in the political process who does not understand or appreciate the significance of participation—a voter with "no conscious intention of expressing a preference designed to affect electoral outcomes"—appears unable to cast a vote meaningful to her.[65] On the other hand, there is also a "practical" goal in preventing voter fraud: "Including within the electorate individuals who do not understand the nature of voting creates a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals' ballots . . . ."[66] These two goals reflect a state's need to preserve a political community where voters are invested in the outcome of the electoral process. The political community needs voters who have a preference which they intend to express by participating, and whose expression is not hijacked by others' preferences.

Of course, just because the Supreme Court identified the goal of preserving electoral integrity as a compelling government interest does not mean this interest will automatically justify competency-based restrictions. Justifications previously relied upon to deny the vote have been found to no longer be compelling, if even

58. Karlan, *supra* note 56, at 924–25.

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

60. *Lassiter* predated the application of strict scrutiny. *See* Karlan, *supra* note 56, at 924.

61. *Id.* at 925.

62. *See, e.g.*, *Burdick*, 504 U.S. at 441 ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); *Purcell*, 549 U.S. at 4 ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (quotation omitted).

63. Karlan, *supra* note 56, at 925.

64. Id.

65. *Id.* at 925.

66. Id.

legitimate.[67] The next Part examines voter fraud and the perception of electoral system integrity, asking whether and how mental competency restrictions do further the governmental interest of preserving electoral integrity.

IV. (HOW) DO MENTAL COMPETENCY RESTRICTIONS PRESERVE ELECTORAL INTEGRITY?

If the integrity of the election process is threatened by allowing persons to vote without restriction based on mental capacity, a vital question is *whether and how* the election process is threatened by voters deemed mentally incompetent. As Karlan highlights, a practical goal is voter fraud prevention.[68] The most obvious form of voter fraud may be the abuse of absentee ballots earmarked for elderly or disabled residents in long-term care facilities.[69] A more nuanced form of voter fraud is the threat of undue influence, intentional or otherwise, resulting in duplicated votes based on the views of those who assist or influence the voter.[70] But a number of studies indicate that voter fraud itself is not a widespread phenomenon.[71] There must be something *more* than the threat of stolen votes.

The United States Supreme Court has not yet been asked to decide if electoral integrity is eroded simply by allowing someone with diminished mental capacity to vote.[72] Scholarship is quick to recite that the interest of preserving the integrity of the election process is tied to voter fraud prevention.[73] But as the Court wrote in *Purcell*, what is key to the integrity of the election process is the *perception* thereof: "*Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy* . . . . '[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'"[74] This Part will briefly discuss how voter fraud is measured, examine perception of electoral integrity as the true measure of electoral integrity, and conclude that for the act of voting to retain meaning, the electoral system must appear sound, regardless of its actual susceptibility to voter fraud.

A. Voter Fraud and Competency-Based Voting Restrictions

To call voter fraud controversial would be an immense understatement. Voter fraud has been a concern for years and galvanizes voters, policymakers, and the

67. *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954–60 (2002) (describing the legal paradigm justifying systemic discrimination against women).

68. Karlan, supra note 56, at 925; see also Steven J. Schwartz, Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities, 47 U. MIAMI L. REV. 867, 871 (1993) ("There is, of course, an important value in safeguarding the democratic process against corruption or undue influence.").

69. Belt, *supra* note 53, at 1505–06.

70. Karlan, *supra* note 56, at 925.

71. Belt, *supra* note 53, at 1505 n.90 and accompanying text.

72. See Nina A. Kohn, Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity, 38 MCGEORGE L. REV. 1065, 1089 (2007).

73. *Id.* (citing Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006)).

74. *Purcell*, 549 U.S. at 4 (italics added) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

press alike.[75] On one hand, some claim that voter fraud is widespread and being covered up.[76] On the other hand, scholarly sources assert that allegations of noncitizen voting, "dead voters," or other voter registration fraud simply do not pan out.[77]

Social scientists Hood and Gillespie have acknowledged the difficulty of measuring voter fraud: "[T]he very nature of the subject matter, of course, like other illegal, immoral, or irregular activities, makes it unlikely that conclusive documentary evidence of fraud will be found."[78] Nevertheless, "[i]f fraud exists, however, it is potentially observable."[79] Hood and Gillespie, for example, studied voter fraud in the 2006 general election in Georgia, focusing on 66 votes allegedly cast by "dead voters."[80] Hood and Gillespie were able to narrow questionable votes to a mere 5, a tiny fraction of the total ballots cast in the election.[81] "Most serious studies agree that instances of in-person voter fraud are exceedingly rare and that there have not been very many convictions for fraudulent voting. But these studies do not claim that voter fraud is totally non-existent; rather, they claim that instances of it are minuscule in number."[82]

Even given a way to measure (and prevent) voting fraud, specific contexts such as long-term care facilities or nursing homes pose a high risk.[83] Professor Belt notes the phenomenon of "'granny farming,' where people with disabilities and the elderly are signed up to vote with premarked ballots without their consent."[84] This kind of voter fraud has triggered more founded allegations than the kinds that Hood

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75. *See, e.g.*, Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP NEWS: POLITICS (Aug. 22, 2016), https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx; PUB. INTEREST LEGAL FOUND., ALIEN INVASION IN VIRGINIA: THE DISCOVERY AND COVERUP OF NONCITIZEN REGISTRATION AND VOTING, VIRGINIA VOTERS ALLIANCE (2016), https://publicinterestlegal.org/files/Report_Alien-Invasion-in-Virginia.pdf; Hans A. von Spakovsky, *Justice Department Blind to Virginia Voter Fraud*, HERITAGE FOUND. (May 30, 2014), https://www.heritage.org/election-integrity/commentary/justice-department-blind-virginia-voter-fraud; Debbie Siegelbaum, *GOP Says 5,000 Non-Citizens Voting in Colorado a 'Wake-Up Call' for States*, HILL (Mar. 31, 2011), https://thehill.com/homenews/house/153079-gop-says-5000-non-citizens-voting-in-colorado-a-wake-up-call-for-states.

76. *See* sources cited *supra* note 75.

77. Justin Levitt, The Truth About Voter Fraud, Brennan Ctr. for Justice 14 (2007), http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf; Christopher Famighetti et al., Noncitizen Voting: The Missing Millions, Brennan Ctr. for Justice (2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf; *see also Resources on Voter Fraud Claims*, Brennan Ctr. for Justice (June 26, 2017), https://www.brennancenter.org/analysis/resources-voter-fraud-claims.

78. M.V. Hood III & William Gillespie, *They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud*, 93 SOC. SCI. Q. 76, 77 (2012) (quoting Howard W. Allen & Kay Warren Allen, *Vote Fraud and Data Validity*, *in* JEROME M. CLUBB, ANALYZING ELECTORAL HISTORY: A GUIDE TO THE STUDY OF AMERICAN VOTING BEHAVIOR 155–56 (Jerome M. Clubb, William Flanigan, and Nancy Zingale, eds., 1981)).

79. *Id.* at 77.

80. *Id.* at 81–84.

81. *Id.* at 84, 82–92.

82. Eugene D. Mazo, *Finding Common Ground on Voter ID Laws*, 49 U. MEM. L. REV. 1233, 1246 (2019).

83. See, e.g., Amy Smith & Charles P. Sabatino, Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations, 26 BIFOCAL 1, 1 (2004).

84. Belt, *supra* note 53, at 1505–06.

and Gillespie studied in Georgia.[85] These types of voter fraud are harder to measure and address; distinguishing "proper" from "improper assistance" given to elderly voters is difficult without statutory guidelines for voting assistance.[86] Scholars reiterate that this type of voter fraud can still be prevented by better education, greater presence and supervision by election officials, stricter compliance with existing statutory protections in federal law,[87] and creative solutions like "mobile voting."[88]

The difficulty of distinguishing between "proper" and "improper assistance" gives rise to the hardest question about voter fraud and mental competency: does preserving the vote for those with mental disabilities preserve votes for others to take advantage of through undue influence? This question raises with it very subjective inquiries: *does* the voter have an opinion or preference? Does the voter *want* to express it? Does the voter understand that her expression may change the outcome? This is almost impossible to measure,[89] especially for voters who may be nonverbal or only have limited vocabulary.[90] Nevertheless, even as remedies are proposed in the context of voter fraud in long-term care facilities, some scholars agree that the capacity of these voters should be assessed.[91] This is an "underlying" assumption "that someone must or will capacity-test residents in order to ensure the integrity of the electoral process and that the primary questions are who should do it and how."[92] Measuring how many votes were unduly influenced by family members, well-meaning friends, or even strangers with partisan agendas presents a massive black hole of zero data, at worst, and anecdata at best.

B. Houston, We Have a Perception Problem: Electoral Integrity

Despite the difficulty of measuring voter fraud connected with persons with diminished mental capacity, concern about this kind of voter fraud appears merited to the extent that others may take advantage of another's vote. This concern reflects a significant concept about the American democratic process: the inalienability of an individual's vote.[93] Scholars like Cass Sunstein propose that delegating, selling, or assigning the legal right to vote undermines the value of this right itself.[94] Practically speaking, allowing even the well-meaning family member

85. See Jessica A. Fay, Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters, 13 ELDER L.J. 453, 454–55 (2005).

86. *Id.* at 464–65, 467 (citing Womack v. Foster, 8 S.W.3d 854 (2000)).

87. Kohn, *supra* note 72, at 1092.

88. *Id.* at 1100–03.

89. Hurme and Appelbaum have proposed capacity tests to try to measure this, elaborated on *infra* notes 133–37, but these tests focus solely on gauging decisional capacity, not measuring the chance or rate of fraudulent voting. *See* Hurme & Appelbaum, *supra* note 7, at 960–74.

90. Nonverbal voters have reported discrimination at polling places. Belt, *supra* note 53, at 1498 (describing an experience by a nonverbal Michigan voter with a physical disability where poll workers questioned his right to vote).

91. *See, e.g.*, Denise Grady, *Change Urged for Nursing-Home Voters*, N.Y. TIMES (Sept. 15, 2004), https://www.nytimes.com/2004/09/15/politics/campaign/change-urged-for-nursinghome-voters.html; Fay, *supra* note 85, at 483–84.

92. Kohn, *supra* note 72, at 1098–99.

93. *See, e.g.*, Andrew Tutt, *Choosing Representatives by Proxy Voting*, 116 COLUM. L. REV. SIDEBAR 61, 77–79 (2016).

94. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964–65 (1996).

to influence a diminished-capacity voter's choice threatens to offend this concept. The ethical considerations presented by members of the American Medical Association focus on the voter's autonomy of the voter and a deep concern about "proxy" voting: "Although a person has the prerogative to vote as another person recommends, the person cannot 'assign' his or her right to vote to someone else."[95] That undue influence may affect the outcome of an election itself simply adds insult to psychic injury.[96] As Hurme and Appelbaum note, "[T]he possibility cannot be excluded that incompetently cast ballots could affect the outcome of close elections, especially at local levels, where the pool of voters is restricted."[97]

Further, even if a voter is *not* unduly influenced, his ability to understand and appreciate his participation in the political process contributes to the overall perception of the legitimacy and integrity of the electoral process. Mental competency restrictions draw a line between a competent voter and an incompetent voter, shoring up system confidence. The Supreme Court explicitly stated in *Purcell v. Gonzalez*, "*Confidence in the integrity of our electoral processes* is essential to the functioning of our participatory democracy."[98] In other words, voters' confidence in the integrity of the electoral process is as concerning to the Court as the actual integrity of the electoral process.[99]

Scholars have theorized that the election process is group-driven, such that the involvement of mentally disabled voters negatively affects perception of electoral integrity. The "meaningfulness" of the right to vote is defined by appreciation of the electoral process and the desire to participate in it.[100] Exercise of the right to vote is incentivized and reinforced by a voter's potential contribution to the general good.[101] Achen and Bartels propose that practical execution of elections requires a collective process where voters are reminded of their partisan identities and are mobilized "to support their group at the polls."[102] When voters are not sufficiently mobilized, even if they want to participate and are incentivized to affect the outcome of an election, the result has been described as the "paradox

95. Jason H. Karlawish et al., Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia, 292 JAMA 1345, 1347 (2004).

96. The significance of an individual vote in the context of the entire system has been questioned by voters and scholars alike. *See, e.g.*, Giovanni Russonello, *Voters Fear Their Ballot Won't Count, Poll Shows*, N.Y. TIMES (Oct. 25, 2016), https://www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html. Economists Gelman, Silver, and Edlin point out the tiny chance that a single vote may be decisive in a presidential election: on average, an American voter has, at most, about 1 in 60 million chance that a randomly-selected voter would be decisive. Andrew Gelman, Nate Silver & Aaron Edlin, *What is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321 (2012).

97. Hurme & Appelbaum, *supra* note 7, at 964.

98. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (emphasis added).

99. See id.

100. *See, e.g.*, Hurme & Appelbaum, *supra* note 7, at 966 n.209.

101. Aaron Edlin, Andrew Gelman & Noah Kaplan, *Voting as a Rational Choice: Why and How People Vote to Improve the Well-Being of Others* (Nat'l Bureau of Econ. Research, Working Paper No. 13562, 2007), https://www.nber.org/papers/w13562.pdf.

102. Christopher H. Achen & Larry M. Bartels, Democracy for Realists: Why Elections Do Not Produce Responsive Government 311–16 (Tali Mendelberg ed., 2016).

of not voting."[103] There must be sufficient reason for a voter to "buy into" the electoral process.[104]

This buy-in by prospective voters, i.e., what overcomes 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. "Why is it worth spending time analyzing the choices on the ballot, a competent voter might ask, when the state is willing to allow even clearly incompetent people to participate in what one might conclude is not a terribly important process?"[105]

Thus, from the perspective of a state administration crafting an electoral process, mental competency restrictions preserve the integrity of the process in practical and symbolic ways. First, to the extent that voter fraud is an actual threat, mental competency restrictions may prevent undesirable effects on close elections, "especially at local levels, where the pool of voters is restricted."[106] Second, the *perception* of electoral integrity, regardless of the actual threat of fraud, is symbolically preserved by affirming the importance of the personal, non-assignable vote—something called into question where people with diminished capacity are vulnerable to undue influence. Electoral integrity is further reinforced when voters "buy in" to the electoral process itself—when they are mobilized to publicly engage in a system that promises to reflect their meaningful choices. Mental competency restrictions may symbolically protect the system by serving as a safeguard against votes cast by those who do not understand, appreciate, or desire to participate in the electoral system.[107]

V. THE DEVIL IS IN THE DEFINITIONS: WHAT IS A NARROWLY TAILORED MENTAL COMPETENCY RESTRICTION?

Given the practical and symbolic functions performed by mental competency restrictions, the proliferation of such restrictions makes more sense. However, states with mental competency restrictions—despite the arguably compelling interest in preserving electoral integrity—still must be narrowly tailored

103. *See* Thomas R. Palfrey & Howard Rosenthal, *Voter Participation and Strategic Uncertainty*, 79 AM. POL. SCI. REV. 62, 62 (1985).

104. Political science scholar Adam Winkler has advanced an "instrumental" theory of voting, proposing that the Supreme Court has treated "voting [as] a specialized activity that has value only to the extent that it enables citizens to advance or defend narrowly defined political objectives - in contrast to the broader, generalized political notions discussed above - where such narrow objectives can be formed and analyzed in an educated, knowledgeable manner." Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 342 (1993). This has been theorized as why the Supreme Court is more willing to "devalue voting" when a voter's ballot is not cast in such a way to pursue "narrow, informed policy options." Bindel, *supra* note 5, at 112 (citing Winkler, *supra* at 342).

105. Hurme & Appelbaum, *supra* note 7, at 964.

106. Id.

107. Scholars who propose standards for determining voting capacity tend to focus on the ability of a voter to understand the nature and effect of voting, as well as the ability of the voter to form and express a personal choice in the voting process. Hurme & Appelbaum, *supra* note 7, at 964–65; *see* Karlawish et al., *supra* note 95, at 1347. Even Schwartz, a proponent of abolishing all mental competency restrictions, concedes that "*[w]here an individual can participate in the electoral process by selecting a candidate or position*, the issue of competency should be irrelevant to the person's right to vote." Schwartz, *supra* note 68, at 872 (emphasis added). Thus, the ability to form and express a voting choice still presents a litmus test. *Id.*

to meet that interest.[108] Aspects of these restrictions including delineating eligible from ineligible voters, establishing a standard for capacity, and the logistics of administering such standards. This Part examines what constitutes a "narrowly tailored" mental competency restriction, then briefly describes proposed standards for mental competency restrictions, before asking what Congress's role might be in making a mental competency standard uniform.

A. Narrow Tailoring

The patchwork of state restrictions reflects widely different language, standards, and mechanisms. Challenges to these restrictions highlight problematic aspects. These include arbitrary distinctions, as identified in the Maine decision *Doe v. Rowe*.[109] In *Doe v. Rowe*, the Maine federal district court was asked to decide if Maine's constitutional amendment—disenfranchising those "under guardianship for reasons of mental illness"[110]—violated the Equal Protection Clause.[111] "Mental illness" was defined elsewhere as a very narrow cause of incapacity, but other incapacitated persons without guardians were not disenfranchised.[112] The court first held this distinction was arbitrary—those under guardianship and those not—because incapacitated persons not under guardianship were allowed to vote "regardless of whether or not they possess the ability to understand the nature and effect of voting."[113] Further, even though the state argued that "mental illness" should be read broadly to include "all mental capacities," the court held that the language of "'mental illness' [could not] serve as a proxy for mental incapacity with regards to voting."[114]

Accordingly, restrictions that arbitrarily distinguish between incapacitated people based on guardianship status may, following *Doe v. Rowe*, be susceptible to Equal Protection challenges as an over- and underinclusive classification.[115] Other restrictions susceptible to challenges may include those that do not specify who adjudicates competency, or restrictions that use archaic or imprecise words to disqualify voters.[116] Further, the importance of the right to vote mandates judicial

108. *See* Dunn v. Blumstein, 405 U.S. 330, 356–360 (1972).

109. Doe v. Rowe, 156 F. Supp. 2d 35, 52 (D. Me. 2001).

110. ME. CONST. art. II, § 1 (West, Westlaw through 2019).

111. *Doe*, 156 F. Supp. 2d at 37. The court was also asked to find that this violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 46. The court agreed because there were no protections in guardianship proceedings for mentally ill persons to be informed of the disenfranchisement consequences. *Id.* at 48–51.

112. *Id.* at 43–45, 47.

113. *Id.* at 52.

114. *Id.* at 55.

115. *See In re* the Guardianship of Erickson, No. 27-GC-PR-09-57, 2012 Minn. Dist. LEXIS 193, at *26–28 (4th Jud. Dist. 2012) (holding Minnesota's categorical disenfranchisement of persons under guardianship by reason of mental illness was simultaneously under- and over-inclusive).

116. *See* Bindel, *supra* note 5, at 93–94; *see also* Carroll v. Cobb, 354 A.2d 355, 359, 360 n.12 (N.J. Super. Ct. App. Div. 1976) (observing that a county clerk or election official at a poll is unable to make voting capacity determinations in the midst of the election process and recognizing the outmoded nature of archaic term of "insane person" or "idiot").

determination of mental incompetence under the Due Process clause.[117] This judicial determination likely should be an independent evaluation of "the voting capacity of each ward at the time of the hearing on a petition for guardianship, and on subsequent occasions as needed or requested."[118] States that explicitly preserve a ward's right to vote unless this right is expressly removed through a court's finding of no voting capacity are likely narrowly tailored to satisfy the rigors of the Equal Protection Clause and the procedural protections required for due process.[119]

B. Measuring Voting Capacity

An individualized judicial determination of voting capacity is most likely to be deemed narrowly tailored to achieve the interest of preserving electoral integrity.[120] Less clear, however, is the actual standard for voting capacity. Most states do not define a standard for capacity, and very few courts have been called upon to define it.[121]

Proposed standards largely align with the standard loosely articulated in *Doe v. Rowe* by the Maine District Court: measuring a voter's understanding of the "nature and effect of voting."[122] Legal capacity in the first instance extends to capacity to *do* something as well as capacity to *decide* something.[123] Competency or capacity standards, write Hurme and Appelbaum, incorporate

> a person['s] . . . ability to: *understand* the information relevant to the decision to be made, *appreciate* the implications of that information for his or her own situation, *reason* about the information in a manner that compares the options, and *choose* the desired option from the list of possibilities.[124]

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117. *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (setting out multifactor test for procedural challenges to deprivation of property or liberty, emphasizing notice and opportunity for an evidentiary hearing in cases where there is jeopardy of a serious loss); *see also* Doe v. Rowe, 156 F. Supp. 2d 35, 48–51 (D. Me. 2001); *In re* the Guardianship of Erickson, No. 27-GC-PR-09-57, 2012 Minn. Dist. LEXIS 193, at *28–34 (4th Jud. Dist. 2012) (concluding that the probate court, in making guardianship determinations, was "uniquely situated to analyze [] whether a ward [could] thoughtfully and responsibly vote"). *But see* Bindel, *supra* note 5, at 95–97 (noting that, while a probate court may be equipped to make voting capacity determinations, "other, more immediately pressing aspects of the person's capabilities" may be the court's chief focus).

118. *In re* the Guardianship of Erickson, No. 27-GC-PR-09-57, 2012 Minn. Dist. LEXIS 193, at *29 (4th Jud. Dist. 2012).

119. *See, e.g.*, DEL. CODE ANN. tit. 15, § 1701 (West 2019) (requiring that court must find a mentally incompetent person to have a severe cognitive impairment precluding exercise of basic voting judgment); ME. REV. STAT. ANN. tit. 18-A, § 5-105 (2019) (preserving all civil rights of "incapacitated persons" except those explicitly removed); N.M. STAT. ANN. §§ 45-5-301.1, 45-5-312 (West 2019) (preserving all rights of "incapacitated persons" except those expressly limited, and requiring "legal insanity" to be ascertained by certification by guardianship court); *see also* CONN. GEN. STAT. § 45a-703 (2013) (allowing guardian or conservator to petition to determine voting competency to restore right to vote); FLA. STAT. ANN. § 97.041 (West 2019) (requiring guardianship court to determine if incapacitated person retains the right to vote).

120. *See supra* Parts III–IV.

121. Hurme & Appelbaum, *supra* note 7, at 961.

122. Doe v. Rowe, 156 F. Supp. 2d 35, 56 (D. Me. 2001). As Hurme and Appelbaum observe, a 1907 Illinois challenge to a voter's competency was rejected "because the voter understood the nature of his act and had interacted in a rational fashion with persons at the polling site." Hurme & Appelbaum, *supra* note 7, at 961 (citing Welch v. Shumway, 83 N.E. 549, 558 (Ill. 1907)).

123. Hurme & Appelbaum, *supra* note 7, at 962–63.

124. *Id.* at 963.

Scholars like Karlawish also emphasize that for the purposes of gauging competency to vote, "*The critical issue is whether the person is able to express a choice*."[125]

The American Bar Association approved a Voting Recommendation in 2007 which proposed the following criteria for exclusion:

> a. "The exclusion is based on a determination by a court of competent jurisdiction;"
> b. "Appropriate due process protections have been afforded;"
> c. The court finds that "the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process;" and
> d. The findings are established by clear and convincing evidence.[126]

As scholar Brescia writes, this recommendation appears narrowly tailored because it is not a categorical disenfranchisement, and because it requires an individualized judicial determination.[127] The "clear and convincing" standard of proof provides even greater protection.[128]

This recommendation has been met with varied support.[129] In particular, the competency standard suggested appears predicated on a voter's expressed desire to participate in the voting process, not "the level of cognition necessary to understand the effect of the vote."[130] Further, the fact that so many eligible voters choose not to vote—expressively or not—makes rather arbitrary the distinction 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.[131]

Quantification of voting capacity presents an obstacle that Dr. Paul Appelbaum, professor of psychiatry, acknowledges is "an exercise in policy, not science . . . . Essentially, this is a determination regarding allocation of the risk of error."[132] Taking this into consideration, Appelbaum and colleagues developed the Competence Assessment Tool for Voting (CAT-V), testing the various decisional

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125. Karlawish et al., *supra* note 95, at 1347 (italics in original). This aspect of the standard proposed by Karlawish is mirrored in Washington's voting competency statute, which adds the requirement that the person be able to make an "individual choice." WASH. REV. CODE ANN. § 11.88.010(5) (West 2019).

126. *See Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861, 863 (2007), https://www.americanbar.org/content/dam/aba/administrative/law_aging/recommendations.pdf [hereinafter ABA Recommendation].

127. Brescia, *supra* note 42, at 964.

128. *Id. But see* Doe v. Rowe, 156 F. Supp. 2d 35, 51 n.20 (D. Me. 2001).

129. *See* Schiltz, *supra* note 5, at 113; Hurme & Appelbaum, *supra* note 7, at 966 n.209; Brescia, *supra* note 42, at 964. *Cf.* Hoerner, *supra* note 42, at 126–27 (observing this standard to be "a relatively low bar for voting right eligibility"); Bindel, *supra* note 5, at 129–34 (pointing out a number of drawbacks, particularly in administration).

130. Hoerner, *supra* note 42, at 127.

131. The economic theory of democracy, advanced by Anthony Downs, poses the "paradox of not voting" where eligible voters decide not to vote, paradoxically, because the costs outweigh the perceived benefits. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

132. Hurme & Appelbaum, *supra* note 7, at 962 (citing PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY & THE LAW 183–84 (4th ed. 2007)).

aspects of voting and attempting to quantify overall capacity to vote.[133] This exercise boils down to three questions that explore how well subjects understand the nature to vote, how well they understand the effect of voting, and their ability to choose among the candidates.[134] The test scores range between 0 and 6.[135]

The simplicity of the CAT-V questions and potential scores is a double-edged sword. The conclusion to be drawn from extreme scores on either side of the spectrum is clear, but where should the line be drawn with intermediate scores?[136] Hurme and Appelbaum acknowledge that this challenge may preclude use of a competency test like CAT-V as the definitive instrument for denial of the right to vote, but suggest that they might be used in long-term care facilities as a trigger for referral to a neutral decision-maker.[137]

C. A Way Forward: Can Congress Level the Playing Field?

The government interests achieved by competency-based disenfranchisement are undoubtedly rooted in society's perception of the electoral process, depending far less on actual rates of voter fraud, and more on ill-defined concepts of integrity. One might ask why competency-based restrictions should continue, if perception, not reality, is the defining factor. Nevertheless, the integrity of the electoral process is increasingly divided and deeply politicized, and unquestionably states are incentivized to shore up both actual and perceived electoral integrity. If competency-based restrictions persist—and I contend they will—a national approach should be seriously considered. It may eliminate the patchwork of constitutional and statutory standards for disenfranchisement, and may level the playing field for voters with mental disabilities.

As noted, a mental competency standard addressing concerns about the integrity of the electoral system is hard to formulate. How a state defines its governmental interest in maintaining competency-based restrictions forecasts what that state's mental competency standard will prioritize.[138] Accordingly, there is significant room for interpretation and policy advocacy in each state. However, Congress may be able to achieve uniformity by providing a mental competency standard inextricably tied to a governmental interest in maintaining electoral integrity.

Again, Congress's role in establishing voting qualifications is limited.[139] Thus, Congress's ability to, for example, outright ban mental competency qualifications is

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133. *Id.* at 966–70. The instrument itself was developed for a small study (n=33) on the capacity to vote of persons with Alzheimer's Disease. *See* Paul Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094 (2005).

134. Hurme & Appelbaum, *supra* note 7, at 967–68.

135. *Id.* at 969.

136. *See id.* at 970. This comparison raises a classification question about why not *all* voters would be subjected to a similar assessment; *see also* Schwartz, *supra* note 68, at 871 ("Using a standard of the average voter as the reference for assessing the acceptability of an exclusionary rule, one would have to determine what level of information and understanding is the bare minimum to qualify for becoming a qualified voter.").

137. Hurme & Appelbaum, *supra* note 7, at 973.

138. See generally id.

139. *See supra* notes 17–27 and accompanying text.

vulnerable to Elections Clause challenges for overreach.[140] However, Congress could frame a uniform mental competency standard as a *manner* in which a qualification is determined, something arguably within Congress's Elections Clause power. Federal legislation likely could prohibit guardianship as a default, categorical trigger for disenfranchisement, requiring instead an individualized judicial determination, or could establish a uniform mental competency standard to be applied. Legislation could also condition election administration funds on the adoption of a uniform mental competency standard.[141]

Legal scholar Hoerner suggests sweeping voting legislation to "create a federal definition of voter competency."[142] In particular, he suggests a standard that would "categorically disqualify all individuals who are under a judicially determined guardianship order."[143] However, the court adjudicating guardianship would be required to ensure that proper notice was given of the loss of the right to vote, and if the parties expressed the desire to preserve the right to vote for the ward, "to effectively retain the right, the individual would then have to pass [a] court-administered functional test that mirrors the level of cognitive rigor of voting, namely (1) understanding the process and (2) understanding the effect of the vote."[144] Hoerner suggests that this standard would affirmatively "grant all citizens in the United States the right to vote," and would avoid many of the concerns about voter fraud or undue influence because, while a guardian could still attempt to preserve the right for a ward who is not sufficiently competent, the individual functional test would be the final determination.[145] This standard would "presume[] the voting capacity of all individuals, crystallizing the right to vote as a fundamental right and would inextricably incorporate a mix of functional and categorical disenfranchisement tests."[146]

A federal definition for voter competency is a step in the right direction, as it would provide the necessary uniformity for a would-be voter considering guardianship in one state to be aware of legal consequences of moving to another state. The requirement of a judicial determination at every step in the disenfranchisement process is also promising; where fundamental (or quasi-fundamental) rights are concerned, it is beyond question that a judge is the most qualified decision-maker.[147] Use of a functional test is also heartening, given that a

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140. The ongoing battle about felon disenfranchisement provides an example of challenges to an outright ban on mental competency restrictions. *See, e.g.*, *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights to People with Criminal Histories*, BRENNAN CTR. FOR JUST. (Aug. 3, 2009), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Brennan%20Center%20analysis%20of%20DRA%20federal%20authority%208-10-09.pdf.

141. For a discussion on the federal government's authority to use the Spending Clause to influence states' behavior, see BRIAN T. YEH, CONG. RESEARCH SERV., R44797, THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS (2017).

142. Hoerner, *supra* note 42, at 124.

143. *Id.* at 127.

144. *Id.* at 128.

145. *Id.* at 128–29.

146. *Id.* at 127.

147. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

vital part of the voting process is a voter's capacity to understand the opportunity to choose, and to choose.

However, categorical *disqualification* followed by an avenue for reinstatement falls on the wrong side of presumption. Differences between judges' use of full and limited guardianships, for example, meant that Missouri purged more than 10,000 registered voters during the 2008–2016 election cycles because these voters had been legally determined as "mentally incompetent."[148] (This was more than twice as many purged for the same reason in Kentucky; Missouri judges established full guardianships far more than limited guardianships).[149] A better approach may treat the entry of a guardianship order as a checkpoint at which an interested party—likely the guardian—could then recommend the ward undergo a simple functional test like the CAT-V suggested by Hurme and Appelbaum.[150] If a ward attained an extreme score suggesting she did not understand or appreciate the nature of the electoral process, a judge would then determine by clear and convincing evidence whether she was qualified to vote.[151] A ward seeking to have her vote restored—or acquire it for the first time—would need only petition the court to undergo the same test, such that the criteria to maintain and regain the vote would be the same. This approach would keep in clear focus a presumption, afforded to otherwise qualified voters, that the right to vote should be retained.

Of course, no matter how well-crafted a federal uniform approach may be, the ultimate deciding factor would be its ability to withstand a U.S. constitutional challenge under the Elections Clause. For that reason, an approach that does not overstep the boundaries of the Elections Clause might follow in the footsteps of the Uniform Law Commission and rely solely on bipartisan state support to pass legislation. However, given the vast number of state constitutional provisions, such an approach poses practical obstacles because many state constitutions would need to be amended or repealed. Nevertheless, however achieved, a uniform approach would eliminate guesswork, provide predictability for those considering the guardianship process, and level the playing field for voters with mental disabilities.

VI. CONCLUSION

The patchwork of competency-based restrictions poses a significant obstacle to the uniformity of the right to vote. Given the government interest in preserving the integrity of the electoral process—both actual and *perceived*, given how important it is to conceptually "buy into" the political process—these restrictions are almost certain to persist. If they *must* persist, scholars have offered several suggestions for assessing voting competency that will survive Equal Protection and Due Process challenges. Perhaps the best way to preserve the vote

148. Peggy Lowe, *Missouri Stops More 'Mentally Incapacitated' People from Voting than Anywhere Else*, KCUR.ORG (Nov. 5, 2018, 3:41 AM), https://www.kcur.org/post/missouri-stops-more-mentally-incapacitated-people-voting-anywhere-else#stream/0.

149. Id.

150. Hurme & Appelbaum, *supra* note 7, at 966–70.

151. The "clear and convincing" standard of proof would provide further protection. *Cf.* Santosky v. Kramer, 455 U.S. 745 (1982) (requiring "clear and convincing" standard of proof for termination of parental rights).

for the most amount of people would be to altogether eliminate restrictions based on mental competency. However, if these restrictions must persist, they should be based on an individual judicial determination of lack of voting competency. As to a mental competency standard, various aspects of voting competency—understanding the nature and effect of voting, as well as forming a choice about candidates—may pose differing levels of challenge in testing, scoring, and interpreting those scores. Nevertheless, the power of Congress to regulate time, place, and manner of federal elections may empower voting legislation focused on ensuring that the qualification of mental competency is uniformly enforced nationwide.