

The Last Frontier of Disenfranchisement: A Fundamental Right for Individuals with Cognitive Disabilities

Hillary May

Repository Citation

Hillary May, *The Last Frontier of Disenfranchisement: A Fundamental Right for Individuals with Cognitive Disabilities*, 59 Wm. & Mary L. Rev. 693 (2017), <http://scholarship.law.wm.edu/wmlr/vol59/iss2/6>

NOTES

THE LAST FRONTIER OF DISENFRANCHISEMENT: A FUNDAMENTAL RIGHT FOR INDIVIDUALS WITH COGNITIVE DISABILITIES

TABLE OF CONTENTS

INTRODUCTION	695
I. DEVELOPMENT OF VOTING RIGHTS FOR INDIVIDUALS WITH COGNITIVE DISABILITIES	698
A. <i>Historical Foundations of Election Administration</i>	699
B. <i>Legal Evolution of Individuals with Cognitive Disabilities</i>	700
1. <i>Historical Prelude</i>	701
2. <i>Change in Election Laws</i>	702
3. <i>A Legal and Societal Shift</i>	702
C. <i>Federal Legislation Missing an Opportunity for Change</i>	703
1. <i>Early Legislation</i>	704
2. <i>Modern Legislation</i>	705
II. THE CURRENT STATE OF THE RIGHT TO VOTE FOR INDIVIDUALS WITH COGNITIVE DISABILITIES	706
A. <i>Current State Policy</i>	707
1. <i>State Specific Determination</i>	708
2. <i>Laws Within Each State</i>	709
B. <i>Doe v. Rowe</i>	710
C. <i>American Bar Association Recommendation</i>	712
1. <i>Content of the Recommendation</i>	712
2. <i>Praise and Criticism</i>	713
III. UNINTENTIONAL ISSUES OF THE PAST	715
A. <i>Unique Legislation for Cognitive Disabilities</i>	715

<i>B. Screening Tests</i>	717
IV. SLOW AND STEADY: AN INCREMENTAL AND PRACTICAL SOLUTION	719
<i>A. An Overview</i>	719
<i>B. A Step Toward Uniformity</i>	722
<i>C. Avoiding Federalism Problems</i>	725
<i>D. As Applied to Modern Concerns: Voter Fraud</i>	726
CONCLUSION	729

INTRODUCTION

In July 2008, National Public Radio producer David Rector moved from Washington, D.C., to San Diego to live with his fiancée, Rosalind Alexander-Kasparik.¹ One of the first things Rector did was register to vote.² After eight months in his new home, Rector suddenly suffered a tear in his aorta that resulted in severe brain trauma.³ As a result, he was left unable to use his arms and legs and could no longer speak.⁴

In 2011, Alexander-Kasparik and Rector entered into a conservatorship,⁵ a legal process wherein a citizen whom a court has determined to be civilly incompetent transfers decision-making authority to a conservator or guardian who will act in his or her favor.⁶ Guardianship laws vary by jurisdiction, and the scope of the guardianship can range from complete coverage of almost all legal decisions to more limited guardianship, granting the guardian power over decisions such as handling of the conservatee's finances.⁷ In Rector's case, the appointment of Alexander-Kasparik as his conservator resulted in the loss of something he deeply cherished: his right to vote.⁸

Seven years after his aortic tear, Rector uses a wheelchair to get from place to place.⁹ He expresses himself using a variety of electronic equipment.¹⁰ Rector collaborates with his fiancée on a comic book series, enjoys *Star Wars*, and wanted to vote in California's

1. Elliot Spagat, *Disabled California Man Seeks to Have Voting Rights Restored*, ASSOCIATED PRESS (Aug. 23, 2016), <https://apnews.com/ac3dd521a67045b29a9c8c10e4a93582/Disabled-California-man-seeks-to-have-voting-rights-restored> [<https://perma.cc/82V2-SQBB>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Pam Fessler, *Disabled and Fighting for the Right to Vote*, NPR (Sept. 4, 2016, 6:00 AM), <http://www.npr.org/2016/09/04/492430780/disabled-and-fighting-for-the-right-to-vote> [<https://perma.cc/DAQ7-CST6>].

6. See JOHN PARRY & ERIC Y. DROGIN, *MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY* 139 (2008).

7. See *id.*

8. Fessler, *supra* note 5.

9. Spagat, *supra* note 1.

10. *Id.*

2016 elections on November 8.¹¹ The California legislature recently passed new legislation presenting Rector with the opportunity to make that dream a reality, subject to a judicial determination restoring Rector's voting rights.¹²

Senate Bill 589, amending various sections of California Elections Code and Probate Law, became effective on January 1, 2016.¹³ This law expands the number of California citizens with disabilities who can retain or regain their voting rights, beginning with the provision that "[a] person is presumed competent to vote regardless of his or her conservatorship status."¹⁴ A California citizen is now disqualified from voting only if "the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process."¹⁵ It is thanks to this change that, after initially having his request denied in August, Rector's voting rights were restored by the San Diego Superior Court in September, just in time to vote in the 2016 elections.¹⁶

Rector and the state of California are success stories in the long and arduous journey that is the fight for a fair determination of voting rights for citizens with disabilities, specifically those with cognitive disabilities. The fundamental right to vote is engrained in the American conscience, and historically has been expanded to include previously marginalized groups as this country's understanding of capability develops.¹⁷ But a large segment of the population has been systematically denied the opportunity to participate in a robust democracy. In spite of California's success, a wide variety of vague and outdated laws remain in the constitutions and

11. *Id.*

12. *Id.*

13. S.B. 589, 2015-2016 Leg. Reg. Sess., 2015 Cal. Stat. 5526; *see also* SPECIAL NEEDS NETWORK INC., #SNNVOTERED TOOLKIT, http://snnla.org/wp-content/uploads/2016/09/SNN_votetoolkit.pdf [<https://perma.cc/SE7W-EA9G>].

14. CAL. ELEC. CODE § 2208(a) (West 2017).

15. *Id.*

16. Elliot Spagat, *California Judge Restores Disabled Man's Right to Vote*, ASSOCIATED PRESS (Sept. 7, 2016, 8:12 PM), <http://bigstory.ap.org/article/556b2f3af4e8423b83b9d77724bd0a07/california-judge-restores-disabled-mans-right-vote> [<https://perma.cc/49GV-2DFE>].

17. *See infra* Part I.

election laws of other states, making it difficult for these citizens to participate in the political process.¹⁸

In the past several years, this issue has been a topic of discussion on both a state and national level.¹⁹ Some states, like California, have taken steps to update their laws and have provided the opportunity for a larger number of Americans with cognitive disabilities to vote.²⁰ On a national level, the Help America Vote Act,²¹ the American Bar Association,²² and the Americans with Disabilities Act²³ have intended to make voting more accessible. Although this movement has greatly enabled voters with physical disabilities to participate, skepticism remains about the propriety of granting an unconditional right to vote to those with cognitive disabilities.²⁴ Fears of unconstitutional testing and voter fraud cause lawmakers to hesitate for the sake of election integrity.²⁵

Further, cementing an unconditional right to vote for people with cognitive disabilities is, in some sense, an exercise in line drawing: the spectrum of cognitive disabilities is vast and far from stagnant. Granting this right to vote requires an individualized review to guarantee that those with the capacity and desire to vote can do so. In this sense, sweeping definitions and broad, overly ambitious legislative schemes may leave gaps that, while well-intentioned, do not actually progress the movement for the voting rights of people with cognitive disabilities.

18. *See, e.g.*, KY. CONST. § 145(3) (“[T]he following persons are excepted and shall not have the right to vote ... Idiots and insane persons.”); OHIO CONST. art. V, § 6 (“No idiot, or insane person, shall be entitled to the privileges of an elector.”).

19. *See infra* Part II.

20. *See infra* Part II.

21. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C. §§ 20901-21145 (2012 & Supp. III 2016)).

22. COMM’N ON LAW & AGING, AM. BAR ASS’N, RECOMMENDATION NO. 121 (Aug. 13, 2007) [hereinafter ABA Recommendation], https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.authcheckdam.pdf [<https://perma.cc/6MF2-34HB>].

23. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2012 & Supp. III 2016)); *see also* DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT AND OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF VOTERS WITH DISABILITIES (2014), https://www.ada.gov/ada_voting/ada_voting_ta.htm [<https://perma.cc/EC26-GCWP>].

24. *See infra* Part IV.D.

25. *See infra* Parts III.B, IV.D.

This Note proposes that the most practical and effective next step in effecting change for voting rights of Americans with cognitive disabilities is enacting national legislation that would incentivize states to implement education measures about voting rights for those with cognitive disabilities, with a particular focus on educating judges, guardians, and conservators. Part I discusses the historical evolution of the movement to grant the right to vote to people with cognitive disabilities, and how history, the developing view of disabilities in the American legal system, and the holes left by previous federal voting rights legislation all suggest that now is the time for real progress in this area. In Part II, this Note explores the current haphazard state of voting rights for those with cognitive disabilities, and the legal roadblocks that make it difficult to obtain uniform application of the law.

With this background in mind, Part III notes how previously offered solutions to the disenfranchisement of voters with cognitive disabilities run into problems with overbreadth, vagueness, and constitutional questions. Finally, Part IV outlines a potential solution through a federal education program. This Part highlights how the proposed solution may be used to provide a workable step toward solving current problems without running into common fears that are part and parcel to restoring the right to vote for people with cognitive disabilities, such as federalism concerns inherent in questions of state election administration.

I. DEVELOPMENT OF VOTING RIGHTS FOR INDIVIDUALS WITH COGNITIVE DISABILITIES

The right to vote is fundamental to American democracy, but it has been abused in the past to exclude disfavored groups, resulting in a patchwork of legal provisions that often specifically grant the right to vote to certain previously alienated demographics.²⁶ As understanding of democratic principles has expanded, United States election doctrines have been adjusted and strengthened. However, people with cognitive disabilities have been consistently left behind. This mistake is particularly egregious when viewed in the context

26. See U.S. CONST. amend. XV (race is not a bar to voting); *id.* amend. XIX (gender is not a bar to voting); *id.* amend. XXVI (right to vote at age eighteen).

of the American relationship to voting: the right to vote is a form of communication and participation, and the exclusion of people with cognitive disabilities prevents those citizens from exercising their democratic right to make their voices heard.

It is significant that many democratic countries in some way exclude citizens with cognitive disabilities from voting.²⁷ However, the convergence of voting history, the position of citizens with cognitive disabilities in the law, and previous voting rights legislation creates a modern-day environment that is ready to accept a solution to the disenfranchisement of these citizens.

A. Historical Foundations of Election Administration

The right to vote is an incredibly personal right, one that is unique and may not be given to another.²⁸ With regard to election administration, Article I, Section IV of the United States Constitution specifies that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”²⁹

This provision was intended to clarify that election responsibility was first under the purview of the states, and rested only secondarily with Congress. The potential federalism implications that this clause presented did not go unrecognized even in the drafting of the Constitution, as this section came to be highly contentious throughout the ratification process.³⁰ However, fears were assuaged by framing Congress’s power over election administration as a type of default power to be used only when necessary for the federal

27. See Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879, 884 (2007) (noting that in a study of sixty-two democracies, only four did not exclude the mentally incapacitated from voting).

28. See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 947 (2007).

29. U.S. CONST. art. I, § 4, cl. 1.

30. Anthony Peacock, *The Heritage Guide to the Constitution: Election Regulations*, HERITAGE FOUND., <http://www.heritage.org/constitution/#!/articles/1/essays/19/election-regulations> [<https://perma.cc/7UER-R3HX>].

government to intervene, and not before.³¹ In spite of this assurance, contentious voting affairs have raised federalism issues in the past,³² although the majority of changes to individual election administration are, by and large, handled at a state level through state constitutions and election laws.³³

However, there are certainly instances where federal, rather than state, authorities have undertaken revision of election laws, particularly with regard to civil rights. For example, the federal government has intervened through constitutional amendments to explicitly grant the right to vote to certain historically marginalized groups, including women³⁴ and racial minorities.³⁵ Congress has also passed legislation aimed at curbing abuse within the election process, allowing the federal government to have some say in state election administration.³⁶ However, the federalism concerns that the constitutional drafters entertained still color the process of election administration today.³⁷

B. Legal Evolution of Individuals with Cognitive Disabilities

Though the right to vote has been categorized as a fundamental right for purposes of constitutional doctrine,³⁸ many citizens with cognitive disabilities have been denied this right. Because the ability to vote was traditionally available only “to those [citizens]

31. *Id.*

32. *See, e.g.,* Roberts v. Wamser, 883 F.2d 617, 621 (8th Cir. 1989) (“[B]ecause state and local election contests are quintessential state and local matters, to extend standing to an unsuccessful candidate to challenge his electoral defeat under the Voting Rights Act would violate principles of federalism in a highly radical way.”).

33. Peacock, *supra* note 30.

34. U.S. CONST. amend. XIX.

35. *Id.* amend. XV, § 1.

36. *See infra* Part I.C.

37. *See* Peacock, *supra* note 30 (“Despite Alexander Hamilton’s assurance that Congress would regulate elections only in ‘extraordinary circumstances,’ congressional intervention has been significant.”).

38. Jennifer A. Bindel, Note, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 109 (2009) (“[I]n the 1960s, the Supreme Court reversed course and held that the right to vote in both federal and state elections was not only protected by the Federal Constitution, but also that the right was among a handful of those considered fundamental.”).

considered capable of responsible self-government,”³⁹ it is unsurprising that stereotypes and outdated thinking about people with cognitive disabilities infiltrated state law. As society began to institutionalize those with disabilities, states implemented rules excluding these citizens from the polls.⁴⁰

1. *Historical Prelude*

The American legal system’s treatment of citizens with cognitive disabilities includes a long history of using the law to exclude, in both theory and practice. A sharp fear of the different and the unknown caused early American society to eschew people with cognitive disabilities.⁴¹ Many of these citizens received care in institutional settings that isolated them from the rest of society.⁴²

However, early advocates for disability reform eventually began to push for compulsory education, something that had been withheld from children with disabilities until the nineteenth century.⁴³ Although this was certainly a step forward in ensuring better legal treatment, it presented its own challenges: most schools still segregated learners with disabilities from other students.⁴⁴ Segregated education likely represented a good faith effort to accommodate all students,⁴⁵ but this pattern of exclusion quickly infiltrated voting rights as well.⁴⁶ Alongside schools and asylums that separated individuals with disabilities from the rest of the citizenry, states

39. Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 918 (2007).

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

41. *Id.* at 1423-24.

42. William Christian, Note, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 411 (1994) (“[I]n the past, the traditional setting for treating individuals with mental retardation was a large, isolated institution that provided custodial care.”).

43. See Colker, *supra* note 40, at 1423-30.

44. See *id.* at 1426-27.

45. See *id.* at 1426 (“Justifications ... were: (1) that separate schools benefited ‘normal’ students by removing disruptive elements and (2) that segregated settings benefited children with disabilities because they would be surrounded by ‘mutual understanding, helpfulness and sympathy.’” (quoting ROBERT L. OSGOOD, *THE HISTORY OF INCLUSION IN THE UNITED STATES* 28 (2005))).

46. See *id.* at 1449.

began to develop regulations specifying that people with cognitive disabilities were unable to participate in the election process.⁴⁷

2. *Change in Election Laws*

States began to adjust their constitutions and election laws to accommodate this shift in thinking. Vermont and Maine began the pattern early: Vermont's 1793 Constitution required voters to have "quiet and peaceable behavior" in order to vote, and Maine's 1819 Constitution prohibited "persons under guardianship" from participating in elections.⁴⁸ In just sixty years, the number of states with regulations disenfranchising citizens with cognitive disabilities rose from two in 1820 to twenty-six of thirty-eight states in 1880.⁴⁹ Many constitutions and election laws reflected a distrust and misunderstanding of these individuals, describing those who were excluded from voting in terms such as "idiots," "insane," or "lunatics."⁵⁰ This movement toward disenfranchisement is unsurprising in the context of the larger shift in thinking at the time.⁵¹ As fear of the unknown was replaced with a need to separate and compartmentalize, citizens with cognitive disabilities became marginalized in many facets of society.

3. *A Legal and Societal Shift*

Fortunately, the legal treatment of those with cognitive disabilities in the United States continues to shift in a positive direction as society gains a better, more complete understanding of how exactly these citizens should fit into the law. Although some state laws still retain outdated language purporting to exclude these citizens,⁵²

47. *See id.*

48. *Id.*; *see also* Bindel, *supra* note 38, at 102 (noting that Maine was the first state to prohibit "voting by persons with diminished mental capacities").

49. Bindel, *supra* note 38, at 102.

50. *See Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1181 (2008) (quoting Paul S. Appelbaum, "I Vote. I Count": *Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVS. 849, 849 (2000)).

51. *See* Colker, *supra* note 40, at 1450 ("As with the special education and institutionalization movements, this development can be traced to evolving views of individuals with disabilities.").

52. *See infra* Part II.A.

the federal government has promulgated several regulations aimed at improving the position of citizens with disabilities in the law generally, including the Individuals with Disabilities Education Improvement Act of 2004,⁵³ the Rehabilitation Act of 1973,⁵⁴ and the Developmentally Disabled Assistance and Bill of Rights Act of 2000.⁵⁵

Perhaps the best reflection of the changing understanding of citizens with disabilities in the legal system is demonstrated in the Americans with Disabilities Act (ADA),⁵⁶ which became law in 1990 and was updated in 2008.⁵⁷ The ADA prohibits discrimination against citizens with disabilities in public areas, targeting employment, schooling, and transportation, among others.⁵⁸ Importantly, the ADA is categorized as a civil rights law, treating individuals with disabilities similarly to other marginalized groups, such as those discriminated against “on the basis of race, color, sex, national origin, age, and religion.”⁵⁹ Although citizens with cognitive disabilities are not given any sort of special constitutional classification resulting in higher scrutiny,⁶⁰ the general legal trend reflects a modern understanding of these citizens as equals in the eyes of the law. This makes the gap in voting rights all the more confusing.

C. Federal Legislation Missing an Opportunity for Change

Efforts to reform voting rights for citizens with cognitive disabilities have not been as successful as general antidiscrimination efforts geared toward citizens with disabilities more generally. This

53. Individuals with Disabilities Education and Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400-1482 (2012 & Supp. III 2016)).

54. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-797b (2012 & Supp. III 2016)).

55. Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (codified at 42 U.S.C. §§ 15001-15115 (2012 & Supp. III 2016)).

56. Americans with Disabilities Act of 2000, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2012 & Supp. III 2016)).

57. See *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> [<https://perma.cc/SYV5-4VX5>].

58. *Id.*

59. *Id.*

60. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-46 (1985) (holding that the mentally retarded do not qualify as a quasi-suspect class for purposes of Equal Protection Clause analysis).

does not appear to be for lack of trying, as Congress has used its power to “at any time ... make or alter such Regulations”⁶¹ more than once in order to effect changes in election administration in response to societal concerns. Several of these schemes have had at least some effect on the voting rights of people with cognitive disabilities.

1. *Early Legislation*

Perhaps the most famous and influential federal voting legislation is the Voting Rights Act of 1965, passed in an effort to “enforce the fifteenth amendment to the Constitution.”⁶² Because the Act’s purpose was to reduce the obstacles encountered by African Americans attempting to exercise their voting rights,⁶³ this legislation was instrumental in merging the civil rights movement with the right to vote.⁶⁴

The majority of the Voting Rights Act of 1965 focused on racially discriminatory voting practices, as was the legislation’s original intention.⁶⁵ However, a 1982 amendment to the Act slightly expanded its scope,⁶⁶ including section 208, which specifically referred to voting practices for citizens with disabilities.⁶⁷ This section was

61. U.S. CONST. art. I, § 4, cl. 1.

62. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

63. See *Voting Rights Act (1965)*, OUR DOCUMENTS, <https://ourdocuments.gov/doc.php?flash=true&doc=100> [<https://perma.cc/79GX-AKS8>].

64. Before expanding to impact the voting rights of adults with cognitive disabilities, the Act encountered significant federalism problems. See *id.* The Act was seen as a massive statutory shift in the relationship between the federal and state governments, and was subject to various court proceedings attempting to strike it down as unconstitutional. *Id.*; see, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (“After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively.”).

65. See OUR DOCUMENTS, *supra* note 63.

66. See Benjamin O. Hoerner, Note, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA’s Potential*, 20 TEX. J. ON C.L. & C.R. 89, 109 (2014).

67. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 5, § 208, 96 Stat. 131, 135 (codified as amended at 52 U.S.C. § 10508 (Supp. III 2016)) (“Any voter who requires assistance to vote by reason of ... disability ... may be given assistance by a person of the voter’s choice.”).

fairly narrow, as it provided only for the possibility of assistance if the voter needs help reading the ballot.⁶⁸ As a result, the Act did not make significant strides in decreasing the disenfranchisement of citizens with cognitive disabilities.

Congress later promulgated the Rehabilitation Act of 1973, a federal legislative scheme targeted to affect change in the civil rights of citizens with disabilities.⁶⁹ Like the Voting Rights Act of 1965, the Rehabilitation Act's primary purpose was to prohibit discrimination.⁷⁰ However, the Rehabilitation Act was more narrowly tailored to prohibit discrimination on the basis of disability, particularly in programs that have some relationship to the federal government.⁷¹ One provision that has been construed to potentially apply to enfranchisement rights is 29 U.S.C. § 794(a), which states that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any [federal] program."⁷² Still, the Act did not highlight voting rights with the specificity needed to effectively address the continuing disenfranchisement of citizens with cognitive disabilities.⁷³

2. Modern Legislation

Modern federal schemes appear to have been moderately more successful at specifically enhancing voting rights for people with disabilities. Yet most of these regulations, while providing a clearer path to the right to vote for citizens with physical disabilities, did not have the same success in expanding the scope of voting rights for those with cognitive disabilities. For example, Congress passed

68. See 52 U.S.C. § 10508 (Supp. III 2016); Karlan, *supra* note 39, at 928.

69. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-797b (2012 & Supp. III 2016)); see Michael Ellement, *Enfranchising Persons with Disabilities: Continuing Problems, an Old Statute, and a New Litigation Strategy*, 39 T. MARSHALL L. REV. 29, 45 (2013).

70. See DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (2009), <https://www.ada.gov/cguide.htm#anchor65610> [<https://perma.cc/4YT4-MFGU>].

71. See *id.*

72. 29 U.S.C. § 794(a) (2012); see also Karlan, *supra* note 39, at 928.

73. See Karlan, *supra* note 39, at 927 ("At least so far ... there has been little, if any, judicial elaboration of these individuals' rights.").

the Voting Accessibility for the Elderly and Handicapped Act in 1984 to specifically address election protection for elderly voters and voters with disabilities.⁷⁴ The Act focused on increasing voters' ability to access and use the polls on election day.⁷⁵ Although this greatly increased the ability of physically disabled citizens to participate in the actual act of casting a vote, its focus on accessible polling places did not reach the issue of decreasing the disenfranchisement of those with cognitive disabilities.⁷⁶

Similarly, Congress later enacted the Help America Vote Act (HAVA) of 2002.⁷⁷ Although it created the Election Assistance Commission to encourage election administration reform and improve turnout, including for voters with disabilities,⁷⁸ HAVA encountered comparable criticism due to its ineffectiveness in reaching voters with cognitive disabilities.⁷⁹

Thus, previous attempts to solve this problem at the federal level did not effectively reach the issue of disenfranchisement for those with cognitive disabilities. The fundamental nature of voting and the increased recognition of people with cognitive disabilities in the legal system suggest the time is right for legislation that takes a manageable step toward solving this problem.

II. THE CURRENT STATE OF THE RIGHT TO VOTE FOR INDIVIDUALS WITH COGNITIVE DISABILITIES

Because election administration is within the domain of state governments,⁸⁰ people with cognitive disabilities in different states

74. Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 52 U.S.C. §§ 20101-20107 (2012 & Supp. III 2016)); see *What Is the Voting Accessibility for the Elderly and Handicapped Act of 1984?*, LAWINFO: LEGAL RESOURCE LIBR., <http://resources.lawinfo.com/civil-rights/right-to-vote/what-is-the-voting-accessibility-for-the-elde.html> [<https://perma.cc/M5BX-F9BJ>].

75. See, e.g., 52 U.S.C. § 20104(a) ("Each State shall make available registration and voting aids for Federal elections for handicapped and elderly individuals.").

76. See *infra* Part III.A.

77. Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 32 U.S.C. and 52 U.S.C.).

78. See *Help America Vote Act of 2002 (HAVA): An Overview*, LEGAL INFO. INST., <https://www.law.cornell.edu/background/HAVA.html> [<https://perma.cc/YUE2-N433>].

79. See generally Hoerner, *supra* note 66 (noting HAVA's lack of influence on the voting rights of people with cognitive disabilities).

80. See *supra* Part I.A.

have varying levels of access to voting rights. Many scholars currently advocating for a change in the status of voting rights for these citizens consider the wide variety of laws and regulations governing the topic at the state level to be an obstacle.⁸¹ Although California successfully passed Senate Bill 589 to bring state election laws up to date with a more comprehensive judicial determination of voting capability,⁸² many states retain laws that fail to account for the variety of citizens with cognitive disabilities. Until more states follow California's lead,⁸³ the lack of uniformity will likely result in sporadic disenfranchisement, allowing some citizens with cognitive disabilities to exercise their right to vote while withholding it from others.⁸⁴

A. Current State Policy

State laws governing the enfranchisement of citizens with cognitive disabilities reflect a wide variety of views on capability.⁸⁵ Each state uses its constitution, election laws, and probate laws differently, creating a patchwork of standards granting or denying the right to vote between, and sometimes within, each state.⁸⁶ This reflects a distinct, state-by-state understanding of the potential disenfranchisement of the citizens with cognitive disabilities who live there. Although this approach is perfectly legal (subject to

81. See, e.g., Hurme & Appelbaum, *supra* note 28, at 974 (“[S]tate standards for voting competence are often circular, archaic, and vague.”).

82. See S.B. 589, 2015-2016 Leg., Reg. Sess., 2015 Cal. Stat. 5526.

83. See *supra* notes 12-15 and accompanying text.

84. See Ryan Kelley, Note, *Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees*, 30 B.C. THIRD WORLD L.J. 359, 366 (2010) (“[F]rom state to state and even within each state’s various sources of law, inconsistent and often archaic terminology leads to ambiguity and amplifies the potential for discrimination.”).

85. For a specific and thorough categorization of state voting rights laws, see generally BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES (2016), <http://www.bazelon.org/wp-content/uploads/2017/01/voting-rights-guide-2016.pdf> [<https://perma.cc/9T36-XAVG>]; and Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAELA J. 125 (2014).

86. See Feinstein & Webber, *supra* note 85, at 133 (noting that while some states rigorously apply voting restrictions for those with cognitive disabilities, other states entirely ignore similar provisions, and still other states have regulations or rulings that appear to conflict with restrictions in their own constitutions).

Equal Protection Clause challenges),⁸⁷ the lack of uniformity between the states creates an environment that is not conducive to implementing sweeping change on this issue. Modern laws demonstrate that, as state treatment of the right to vote for people with cognitive disabilities changes, some states are forging ahead while others are being left behind.⁸⁸

1. *State Specific Determination*

Many states require their citizens to reach a certain determination of competency before casting a vote, but the definition of this standard varies by state. Some states will revoke the right to vote from a person with a cognitive disability only upon a judicial determination that the individual does not retain the appropriate capacity,⁸⁹ similar to the newly amended laws in California.⁹⁰ Other states revoke the voting rights of those individuals “under guardianship,” or those individuals with guardians or conservators managing aspects of their day-to-day lives.⁹¹ Although guardianship and conservatorship laws may require a judicial determination of incompetency in order to bar an individual from voting,⁹² the findings in a guardianship proceeding will often focus on the individual’s competency to order his or her own affairs in ways that do not necessarily implicate the individual’s competency to vote.⁹³ Only eleven states have no legislation, either in the state constitution or

87. See generally Bindel, *supra* note 38, at 88 (discussing the Equal Protection Clause concerns in determining voting rights for people with cognitive disabilities).

88. See Kimberly Leonard, *Keeping the ‘Mentally Incompetent’ from Voting*, ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/> [https://perma.cc/DKF7-JTUX] (discussing the case of Roberta Blomster and noting that “[t]he decision about whether to vote ... is hers alone—a reality that might be different if she lived in another state”).

89. See BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 13.

90. See *supra* notes 13-15 and accompanying text.

91. See BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 12.

92. See *id.*

93. Cf. Kingshuk K. Roy, Note, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 114 (2003) (“Judges with the authority to determine competency typically ask whether individuals can make informed decisions about themselves or their property.”).

in state election laws, restricting citizens with disabilities from casting a vote.⁹⁴

Beyond implementation of competency standards, several states continue to use dated language that does not adequately capture the nuances of voting as a citizen with a cognitive disability. For example, seven states use terms like “idiot,”⁹⁵ “insane person,”⁹⁶ and “of unsound mind”⁹⁷ to curb the voting rights of people with cognitive disabilities. Although these laws are typically not enforced because of more modern language,⁹⁸ their presence reflects a continuing stigma toward people with cognitive disabilities, which can influence even modern laws.

2. Laws Within Each State

These laws also reflect a different problem: not only are the states using a variety of standards to restrict access to the polls for people with cognitive disabilities, the laws within the states themselves are varied. State voting laws regarding citizens with cognitive disabilities are typically found in three places: the state constitution, the state election laws, and the state probate code.⁹⁹ Further information can be found in other state statutes including those regarding mental health and developmental disabilities.¹⁰⁰ The amount of conflicting information between and among the states is overwhelming, and beyond the scope of this Note. In fact, it has caused some scholars and organizations to advocate for a federal competency definition promulgated by Congress.¹⁰¹ Because of federalism concerns, however, a federal competency standard raises issues that

94. These states are Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont. BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 13.

95. OHIO CONST. art. V, § 6.

96. ARIZ. REV. STAT. ANN. § 16-165(C) (2017).

97. MONT. CODE ANN. § 13-1-111(3) (2017).

98. See BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 13 n.48 (noting that “more specific statutory provisions ... trump the ‘idiots’ and ‘insane’ language”).

99. See generally Hurme & Appelbaum, *supra* note 28, at 934-57 (discussing state treatment of voting rights for people with cognitive disabilities).

100. See generally BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 28-52.

101. See, e.g., Hoerner, *supra* note 66, at 124-30; see also COMM’N ON LAW & AGING, *supra* note 22, at 4-5; *Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861, 861-63 (2007).

may impede this idea to the point that it would be difficult to effect voting rights reform.¹⁰² Regardless, some amount of consistency would be highly beneficial.

B. Doe v. Rowe

Examining the relatively small amount of litigation surrounding voting rights for people with cognitive disabilities can inform an understanding of the current state of the law surrounding this issue.

Perhaps the seminal case interpreting the constitutionality of the current handling of this issue is a 2001 Maine case, *Doe v. Rowe*.¹⁰³ At the time that the case was filed, Maine's Constitution stated that "persons who are 'under guardianship for reasons of mental illness' are prohibited from registering to vote or voting in any election."¹⁰⁴ The plaintiffs claimed that this section of the Maine Constitution violated their rights to due process and their rights under the Equal Protection Clause.¹⁰⁵ Three women under guardianship due to mental illness brought this case.¹⁰⁶ Each woman wanted to vote in the November 2000 election, but only one achieved a modification in her guardianship, which would ensure that she had the right to vote.¹⁰⁷

The decision reflected a disparity in the judicial application of Maine law. While the state granted its probate judges "the power to specifically reserve or deny the right to vote to any ward," the probate judges disagreed over the exact scope of that authority.¹⁰⁸ Further, the specific definition of "mental illness" appeared to be left to the discretion of the probate judge, resulting in an "arbitrarily

102. See *infra* Part IV.C.

103. 156 F. Supp. 2d 35 (D. Me. 2001); see also Kelley, *supra* note 84, at 385-89; *Developments in the Law—The Law of Mental Illness*, *supra* note 50, at 1185-87.

104. *Doe*, 156 F. Supp. 2d at 38 (quoting ME. CONST. art. II, § 1).

105. *Id.* at 46.

106. *Id.* at 39. Jane Doe and Jill Doe were both diagnosed with bipolar disorder, and June Doe was diagnosed with intermittent explosive disorder, antisocial personality, and mild organic brain syndrome. *Id.* at 39-40.

107. See *id.* at 40, 45.

108. *Id.* at 43.

defined group of citizens” that were subject to disenfranchisement.¹⁰⁹

The court analyzed the claims under the presumption “that the denial of the right to vote is a denial of a fundamental liberty,”¹¹⁰ and found that the voting restriction violated procedural due process by failing to provide notice of the potential for disenfranchisement.¹¹¹ Additionally, the court held that the voting restriction violated the Equal Protection Clause.¹¹² As applied, the court noted that, under the guise of the phrase “mental illness,” the state had excluded only people with traditional psychiatric disorders from voting.¹¹³ The court concluded that no reasonable narrowing could make the provision constitutionally sound on its face.¹¹⁴

The holding in *Doe v. Rowe* represents a victory for voters with cognitive disabilities, and serves as strong precedent moving forward in potential litigation of state voting regulations.¹¹⁵ *Doe* represents the beginning of a move away from the use of categorical bans and toward standards that advocate for an individualized determination of the capacity to vote.¹¹⁶ Notably, courts following the *Doe* precedent “must examine whether the ends—excluding persons who lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice—justify the means—excluding persons under guardianship by reason of mental illness.”¹¹⁷ Other cases reflect this move away from the use of the categorical ban. For example, in *In re Guardianship of Erickson*, the court relied on the reasoning in *Doe* to find that the voting restriction language in the Minnesota Constitution also violated the United States Constitution.¹¹⁸

109. *Id.* at 43-45.

110. *Id.* at 48.

111. *See id.* at 48-51.

112. *Id.* at 56.

113. *Id.* at 52.

114. *Id.* at 56. The court also found that the provision violated Title II of the ADA. *Id.* at 59.

115. *See Kelley, supra* note 84, at 392-93 (claiming “[s]tates cannot remain blind to the change embodied in ... recent cases,” including *Rowe*).

116. *See id.* at 393.

117. *See, e.g., Doe*, 156 F. Supp. 2d at 51.

118. No. 27-GC-PR-09-57, 2012 Minn. Dist. LEXIS 193, at *19-28 (Minn. Dist. Ct. Oct. 4, 2012); *see also Feinstein & Webber, supra* note 85, at 139-40.

Thus, the general trend seems to positively favor expanding participation in the voting process by moving away from categorical exclusions.¹¹⁹ This emphasis on individual review rather than a flat ban can inform the way that scholars think about determining voting rights for people with disabilities.

C. American Bar Association Recommendation

Although state laws remain in wide disarray, the American Bar Association (ABA) presented a competency standard in 2007 to be used in the individualized process of determining voting capacity.¹²⁰ The criteria combine to form a multifaceted test that can be adopted by the states to ensure that their own standards align with the ABA's requirements for a fair determination of competency in the process of retaining or restoring the right to vote.¹²¹

1. Content of the Recommendation

The ABA Recommendation arose from a 2007 symposium at the University of the Pacific McGeorge School of Law and focused on encouraging voting as people age.¹²² The Recommendation focuses on urging federal, state, and local governments to facilitate voting by promoting accessibility both before the individual reaches the poll and while the individual is filling out his or her ballot.¹²³ The Recommendation also emphasizes voting in the context of long-term care facilities, focusing on implementing mobile polling and training for those involved in resident care about the appropriate level of voting assistance.¹²⁴ Similarly, the Recommendation emphasizes

119. See Kelley, *supra* note 84, at 392-93 (claiming that states that have previously excluded persons with mental disabilities from voting must now "affirmatively work toward facilitating the right to vote" for those persons).

120. See COMM'N ON LAW & AGING, *supra* note 22, at 4-5.

121. See *id.* at 1.

122. Jennifer Mathis, *Voting Rights of Older Adults with Cognitive Impairments*, 42 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 292, 292 (2008). See generally Charles P. Sabatino & Edward D. Spurgeon, *Introduction*, 38 MCGEORGE L. REV. 843 (2007) (providing an introduction to the symposium pieces); *Recommendations of the Symposium*, *supra* note 101 (describing the principles and goals of the symposium).

123. COMM'N ON LAW & AGING, *supra* note 22, at 1.

124. *Id.* at 1-2.

how absentee voting may be employed to reach citizens with cognitive disabilities.¹²⁵

Finally, the Recommendation sets forth an individualized standard that may be adopted by state law.¹²⁶ The standard advocates that states ensure retention of the right to vote, except in the event that a court, while affording the individual appropriate due process protection, finds by clear and convincing evidence that the individual “cannot communicate, with or without accommodations, a specific desire to participate.”¹²⁷

2. Praise and Criticism

In some states, the right to vote is taken from people with cognitive disabilities unless affirmatively reestablished through a court proceeding.¹²⁸ On the other hand, other states require that the right to vote cannot be taken away from a citizen with a cognitive disability unless there is a court order to do so.¹²⁹ Some states even require a completely separate judicial proceeding, including a hearing related to guardianship or conservator status.¹³⁰ However, states do not often outline *how* the determination of voting competency shall be made,¹³¹ as described by the Recommendation.¹³² This clarity makes the ABA Recommendation a useful resource for states looking to update laws regarding voting with a cognitive disability.

Critics of the standard advocated by the ABA Recommendation claim it may not be stringent enough as it “does not mirror the lev-

125. *Id.* at 1.

126. *Id.*

127. *Id.*

128. *See, e.g.*, MONT. CODE ANN. § 13-1-111(3) (2017) (“A person adjudicated to be of unsound mind does not have the right to vote unless the person has been restored to capacity as provided by law.”); VA. CODE ANN. § 24.2-101 (2017) (“No person adjudicated incapacitated shall be a qualified voter unless his capacity has been reestablished as provided by law.”).

129. *See, e.g.*, ARK. CODE ANN. § 28-65-106(a) (2017) (“A ward ... retains all legal and civil rights except those which have been expressly limited by court order.”).

130. *See, e.g.*, KY. REV. STAT. ANN. § 387.590(10) (West 2017) (“A ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record.”).

131. *See generally* BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 28-52.

132. COMM’N ON LAW & AGING, *supra* note 22, at 1.

el of cognition necessary to understand the effect of the vote.”¹³³ However, considering the status of voting as a fundamental right, and the potential to verge into the territory of discriminatory screening tests,¹³⁴ a higher standard may encounter its own problems.

The ABA Recommendation encompasses information that would underlie what appears to be an overhaul of the current status of voting rights for those with cognitive disabilities across the nation. However, scholars question the impact of the ABA Recommendation on state laws governing this issue.¹³⁵ Although parts of the Recommendation’s standard are reflected in some state laws,¹³⁶ many do not appear to have changed their constitutions or election laws in response.¹³⁷ This raises an important concern with the ABA Recommendation: it is not backed by much force. The official Recommendation simply urges federal, state, local, and territorial governments to improve the administration of elections.¹³⁸ The ABA Recommendation is an excellent resource, but an ideal solution would have legislative power behind it to encourage, but not force, change in state laws.

Thus, although it appears that certain aspects of the ABA Recommendation and the trend toward individualized review are reflected in some state laws,¹³⁹ the overall lack of specificity in many states leaves room for inconsistency in application by judges. Further, the number of states that continue to use difficult and restrictive regulations limits participation in the voting process.¹⁴⁰ The

133. Hoerner, *supra* note 66, at 127. For further criticism of the standard, see Bindel, *supra* note 38, at 132-34.

134. *See infra* Part III.B.

135. *See* Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 *BERKELEY J. EMP. & LAB. L.* 437, 451 (2001) (“The ABA’s proposed solution is a sensible one, but it has been largely ignored by the states.”).

136. *See* MD. CODE ANN. ELEC. LAW § 3-102(b)(2) (LexisNexis 2017) (barring a person under guardianship for mental disability from registering to vote if a court finds by “clear and convincing evidence that the individual cannot communicate ... a desire to participate in the voting process”).

137. *See generally* BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 28-52.

138. *COMM’N ON LAW & AGING*, *supra* note 22, at 17.

139. *See generally* BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., *supra* note 85, at 28-52.

140. *See* Feinstein & Webber, *supra* note 85, at 144 (“[M]any states still use antiquated voting rights laws that are categorically discriminatory, do nothing to promote intelligent use

variety in the nature and scope of state laws calls for a workable solution to the long-standing problem of disenfranchisement for people with cognitive disabilities.

III. UNINTENTIONAL ISSUES OF THE PAST

Past solutions reflect how even well-intentioned attempts at increasing voter accessibility run into federalism and constitutional issues. These proposed solutions emphasize the unique challenges of ensuring access to voting rights for those with cognitive disabilities as opposed to other groups of Americans, even other citizens with disabilities. This Part discusses common concerns raised by past solutions, and how they may inform future reform.

A. Unique Legislation for Cognitive Disabilities

Congress has passed significant amounts of legislation with the goal of increasing voting access for people with disabilities.¹⁴¹ But citizens with physical disabilities face very different challenges than citizens with cognitive disabilities when it comes to voting. People with physical disabilities are not often disenfranchised in the sense that they are actually barred from participating, while people with cognitive disabilities are still subject to competency standards, judicial determinations, and the like.¹⁴² This is not to say that people with physical disabilities do not experience barriers to voting; these voters can often face significant impediments when they show up to cast their votes on election day, even as recently as the 2016 presidential election.¹⁴³ These differences simply show that voting rights reform for citizens with physical and cognitive disabilities

of the ballot, and may violate due process rights.”).

141. *See supra* Part I.C.

142. *See supra* Part II.A.

143. *See* Scott MacFarlane et al., *Dozens of DMV-Polling Places May Be Inaccessible to Voters with Disabilities on Election Day*, NEWS4 WASH. (May 18, 2016, 1:28 PM), <http://www.nbcwashington.com/investigations/Dozens-of-DMV-Polling-Places-May-Be-Inaccessible-to-Voters-With-Disabilities-on-Election-Day-379883541.html> [<https://perma.cc/4FFK-MXJ8>] (“The polling places could present a variety of hurdles blocking access to people in wheelchairs or with limited range of movement, including heavy doors, steep wheelchair ramps, inoperative doorbells and narrow entranceways.”).

must be handled in distinct ways in order to accommodate the unique challenges that each group faces.

It became increasingly apparent that there was a need for reform as voting rights for citizens with disabilities garnered national attention through largely unsuccessful challenges under Title II and Title III of the Americans with Disabilities Act of 1990 and the Voting Accessibility for the Elderly and Handicapped Act of 1984.¹⁴⁴ Congress passed HAVA in 2002¹⁴⁵ in response to accessibility problems during the 2000 presidential election.¹⁴⁶ The goal was to ensure the same voting opportunities were available to all voters “by providing that funds be allocated to states for ‘making polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities.’”¹⁴⁷

Although in many ways successful in increasing accessibility at polling places, HAVA has been subject to some criticism, including a lack of a private right of action.¹⁴⁸ It also faced several federalism challenges.¹⁴⁹ Although well intentioned, some suggest that HAVA demonstrates a failure to effectively address the rights of voters with cognitive disabilities.¹⁵⁰

HAVA demonstrates the need for a different approach if the issue of disenfranchisement of individuals with cognitive disabilities is to be addressed at the federal level.¹⁵¹ Though it is tempting to create a sweeping reform of voting rights, a narrow solution is key in order

144. See *The Right to Vote*, DISABILITY JUST., <http://disabilityjustice.org/right-to-vote/> [<https://perma.cc/J57G-YAME>] (noting decades of limited success in challenges under the ADA and Voting Accessibility for the Elderly and Handicapped Act of 1984).

145. Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C. §§ 20901-21145 (2012 & Supp. III 2016)).

146. See DISABILITY JUST., *supra* note 144.

147. Hoerner, *supra* note 66, at 97 (quoting 52 U.S.C. § 21021(b)(1) (Supp. III 2016)).

148. *Id.* at 131; DISABILITY JUST., *supra* note 144.

149. Hoerner, *supra* note 66, at 100 (“HAVA’s federal requirements have led to an increased number of federal statutory claims in federal courts and, ... the federally mandated portions of HAVA have created preemption problems in states that have implemented their own voter identification statutes.”).

150. See *id.* at 117-19; DISABILITY JUST., *supra* note 144 (claiming that HAVA will primarily affect persons with physical disabilities and “[e]motionally and cognitively disabled individuals [will continue to have] unique challenges in securing their right to vote”).

151. See *generally* Hoerner, *supra* note 66 (discussing why Congress should enact legislation that provides a federal definition of voter competency).

to effectively focus on voting rights specifically for people with cognitive disabilities.

This presents the question of what exactly needs to be targeted by federal legislation aimed at effecting change in this arena. HAVA's focus on accessibility makes sense for the obstacles faced by voters with physical disabilities, but the most pressing issues faced by those with cognitive disabilities will not be effectively addressed through an accessibility overhaul. The main impediment to voting as a person with a cognitive disability begins before those citizens even reach the polls, as many are directly disenfranchised by state laws, or haphazard and disparate application of those laws.¹⁵² Although polling-place accessibility may be something that needs to be addressed in the future through assistive technology,¹⁵³ any proposed federal legislation regarding voting rights for people with cognitive disabilities must focus first and foremost on the ability of these individuals to retain or restore their right to vote.

Each citizen deserves the right to vote unimpeded by physical or legal barriers; in fact, "[a]n estimated thirty to thirty-five percent of all voters in the next twenty-five years will need some form of accommodation" to vote.¹⁵⁴ Though HAVA and other federal election legislation have undoubtedly made progress for citizens with physical disabilities, the current problems inherent in the movement for voting rights for people with cognitive disabilities demand that any federal action takes a new, specific approach.

B. Screening Tests

One common concern in this arena is that aspects of court proceedings may verge on discriminatory screenings that distinguish these citizens from other voters.¹⁵⁵ The long and sordid history of the legal treatment of people with cognitive disabilities,¹⁵⁶ combined

152. See *supra* Parts II.A-B.

153. As recommended by the ABA. See COMM'N ON LAW & AGING, *supra* note 22, at 1.

154. Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1493 (2016).

155. See Sabatino & Spurgeon, *supra* note 122, at 853; see also Bindel, *supra* note 38, at 132-33 (noting that challenging voters' competencies might run afoul of civil rights legislation).

156. See *supra* Part I.B.

with America's history of disenfranchising certain groups, raises a concern that those with cognitive disabilities are particularly susceptible to unlawful screening in terms of gaining or losing the right to vote.

Voting tests have a complicated history in the United States. At one point, the Supreme Court noted that “[t]he ability to read and write ... has some relation to standards designed to promote intelligent use of the ballot.”¹⁵⁷ Although later changed by the Civil Rights Act of 1964¹⁵⁸ and the Voting Rights Act of 1965,¹⁵⁹ this history has left Americans wary of any sort of unfair screening of voters.

These concerns can arise in the initial judicial determination of competency to vote.¹⁶⁰ Scholars have expressed concerns about whether judges can, and should, make competency determinations, as even professional diagnoses of cognitive impairments often show a large amount of discrepancy,¹⁶¹ and judges are not operating from the same educational background as doctors or psychologists. Scholars have argued that this amount of judicial discretion results in inconsistency, with judges granting voting rights to some citizens with cognitive disabilities and not others.¹⁶²

The Spectrum Institute's 2014 complaint to the Civil Rights Division of the United States Justice Department demonstrates this concern, and eventually played a part in triggering the reform of California's voting laws.¹⁶³ The complaint alleged that California

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

158. 52 U.S.C. § 10101(a)(2) (Supp. II 2015) (“No person acting under color of law shall in determining whether any individual is qualified under State law ... to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals.”).

159. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 644 (2006) (“The [Voting Rights Act] eliminated the use of literacy tests and other ‘devices’ that Southern jurisdictions had long employed to prevent black residents from registering and voting.”).

160. The larger question of whether there should be a judicial determination of competency at all in order to grant, retain, or deny the right to vote for people with cognitive disabilities is beyond the scope of this Note.

161. See Roy, *supra* note 93, at 115.

162. See *id.*

163. See Letter from Thomas F. Coleman, Legal Dir., Spectrum Inst., to Hon. Loretta Lynch, Att’y Gen., U.S. Dep’t of Justice, at 1-2 (Aug. 23, 2016), <http://spectruminstitute.org/votingrights/doj-amended-complaint.pdf> [<https://perma.cc/56KP-9JF8>] (discussing how the Spectrum Institute's complaint impacted California's voting laws).

law imposed a test that violated federal mandates, including the Voting Rights Act, by allowing judges to test whether the adult in question is able to complete an affidavit of voter registration, sometimes without assistance.¹⁶⁴ The group was successful in removing this impediment when the California voting laws were amended.¹⁶⁵

Thus, fears that judicial determinations of competency can border on discriminatory screening tests may be fixed by restructuring state competency determinations. However, the federalism concerns implicit in election administration preclude the federal government from mandating this process on the state level.¹⁶⁶ Rather, any federal action taken with regard to voting rights would need to effect change in state voting administration without a heavy hand.

IV. SLOW AND STEADY: AN INCREMENTAL AND PRACTICAL SOLUTION

The past and present state of voting rights for people with cognitive disabilities reflects a tradition of disenfranchisement. But the unique challenges posed by election administration at a state level, and the need for an individualized process, reflect issues that are difficult to solve broadly. The complexity of the situation calls for a solution that is not all-encompassing, but rather one that implements manageable and meaningful steps to further expand voting rights for those with cognitive disabilities. Therefore, this Note proposes that a current and workable solution is national education legislation, as outlined below.

A. An Overview

Education has been proposed to help solve difficult voting issues in the past,¹⁶⁷ and could be the key to pushing the voting reform

164. Complaint for Violations of Civil Rights Protection at vi, Disability & Abuse Project of Spectrum Inst. v. L.A. Superior Court (Department of Justice July 10, 2014), <https://disabilityandabuse.org/doj/complaint.pdf> [<https://perma.cc/96F9-YT2Z>].

165. See Letter from Thomas F. Coleman, *supra* note 163, at 1-2.

166. See *supra* Part I.A.

167. See generally Susan A. MacManus, *Voter Education: The Key to Election Reform Success Lessons from Florida*, 36 U. MICH. J.L. REFORM 517 (2003) (discussing Florida's efforts

movement for people with cognitive disabilities in the right direction. The level of review necessary to determine and restore the voting rights of these citizens requires a plan that treats each person as an individual¹⁶⁸ and creates change at the lowest level: through the family members, guardians, and judges who not only have a say, but often the final word, on whether voting rights are restored. Advocates for voting rights emphasize the importance of training for poll workers and employees at long-term care facilities,¹⁶⁹ but by promulgating federal education legislation that incentivizes states to actually implement education and training for judges and guardians, a workable and practical step may be taken to further the voting rights movement for people with cognitive disabilities.

Education and training were emphasized as part of the 2007 ABA Recommendation to facilitate voting among those citizens with cognitive disabilities.¹⁷⁰ However, the Recommendation focused on educating those who would be assisting voters with cognitive disabilities once they arrived at the polls.¹⁷¹ Although this objective is surely important to furthering the voting rights of people with cognitive disabilities, this Note advocates for educating judges and guardians, rather than poll workers, to ensure the right to vote is available to citizens with cognitive disabilities through a fair and uniform application of current state laws at the moment of court determination of voting rights, before these individuals arrive at the polls.¹⁷²

The federal legislation this Note proposes would be aimed at the legal education of guardians, conservators, and judges in state

to reform election law through voter education after the 2000 presidential election).

168. See Feinstein & Webber, *supra* note 85, at 126 (“The authors propose that no state should revoke a person under guardianship’s right to vote without an individualized inquiry into whether the person truly lacks the capacity to understand and participate in the electoral process.”).

169. See COMM’N ON LAW & AGING, *supra* note 22, at 1-2 (recommending education and training of long-term care workers and poll workers to facilitate voter registration of the cognitively impaired).

170. See *id.* at 1-2, 15.

171. See *id.* at 15.

172. See, e.g., *id.* at 5 (discussing the resolved clause “call[ing] for training of residents, staff, and others involved in the care of residents regarding the voting rights of persons with disabilities”).

courts, emphasizing how exactly the determination of voting rights is made, rather than how voters with cognitive disabilities might access the polls on election day.¹⁷³ This is critical because the proposal is aimed at increasing awareness and promoting a uniform application of the laws of each state, a step that needs to occur before citizens with cognitive disabilities can access the polls at all.¹⁷⁴

This legislation would incentivize states to provide detailed judicial and guardianship training through state programs specifically designed to highlight the legal challenges in facilitating voting rights for people with cognitive disabilities. For judges, this education could be a distinct curriculum that is part of a judicial training program,¹⁷⁵ designed to ensure that judges are aware of the voting laws impacting people with cognitive disabilities in each state and how to apply these laws correctly and uniformly to each citizen.

Guardianship education under the legislation could similarly be enacted as an in-depth training program, either separately or as part of any applicable guardianship training. Further, guardianship education could be designed to not only educate on the proper legal process of ensuring that a ward may access the right to vote, but also to emphasize the importance of a continuing right to vote for the ward.¹⁷⁶ Ideally, this education would be in the form of required training programs to draw appropriate attention to both the nature of voting as a fundamental right, and to the difficulty of ensuring an appropriate determination under what are often varied and vague state regulations. The minutia of this legislation would be intentionally vague, as the specific nature of these education programs would need to be determined on a state-by-state basis. This would allow each state to tailor its program in order to fit most appropriately within the laws of that state and to best meet the needs of citizens with cognitive disabilities.

173. For more discussion on this point, see *supra* Part III.A.

174. See *supra* Part III.A.

175. For an example of a judicial education curriculum that provides an in-depth examination of a legal issue, and one that may serve as a model for states under the proposed legislation, see *Elder Abuse Curriculum*, CTR. FOR ELDER & COURTS, <http://www.eldersandcourts.org/Training/Elder-Abuse-Curriculum.aspx> [<https://perma.cc/QS8L-UP4P>].

176. See Roy, *supra* note 93, at 139 (“Viewing guardianship as a tool for improving political participation rather than an impediment opens up many possibilities.”).

Congress would promulgate this plan on a federal level, providing the necessary incentive for the states without forcing any substantive changes to state voting laws. Importantly, the legislation would concentrate on educational efforts alone. By focusing solely on legal education for judges and guardians or conservators, the benefits of the plan would not get lost in the vast scope of a regulation that attempts to reform voting laws from multiple angles.¹⁷⁷ The issues unique to securing voting rights for people with cognitive disabilities require incremental change, and this narrow focus would result in legislation that would produce a workable step toward reform that is easy and practical for states to implement.

B. A Step Toward Uniformity

In the past, voter education has been touted as a way to facilitate voting in particularly low-voting groups, but the education has often been aimed toward the potential voters themselves.¹⁷⁸ In this proposal, however, the education would not be intended for citizens with cognitive disabilities, but for the judges and guardians who, at certain points, have been the very obstacles that have stood in the way of securing voting rights for those with cognitive disabilities. These important players need to be able to make these decisions as effectively as possible, as even states with more liberal legislation on voter competency experience disparity in who regains or loses the right to vote because each judge may approach the issue differently.

For example, the fight to reform voting rights of people with cognitive disabilities in California continued even after the change in state laws.¹⁷⁹ Although David Rector and Rosalind Alexander-Kasparik were successful in restoring Rector's voting rights, the Spectrum Institute, a disability rights organization that has worked

177. However, in the future this education legislation could be expanded to incentivize education training for legislators who may have an impact in writing or reframing laws regarding cognitively disabled voting rights.

178. See generally CIRCLE Staff, Haley Pero & Laura Nelson, *Voting Laws, Education and Youth Civic Engagement: A Literature Review* (The Ctr. for Info. & Research on Civic Learning & Engagement, Working Paper No. 75, 2012), http://civicyouth.org/wp-content/uploads/2012/11/WP_75_CIRCLEStaff.pdf [<https://perma.cc/VD2G-XDWA>] (discussing voting trends among young persons and the effectiveness of programs aimed at increasing their voting participation).

179. See *supra* notes 12-15 and accompanying text.

on California's voting rights restoration project for the past few years, filed another suit with the Department of Justice.¹⁸⁰ As the new law took effect, the Spectrum Institute was concerned that, rather than seeing a slew of newly re-enfranchised voters at the polls, the voting rights of California citizens with cognitive disabilities would remain the same.¹⁸¹ The Spectrum Institute encouraged the Department of Justice to contact certain California governmental institutions and courts so that those entities could give notice to disenfranchised California conservatees as ideally, notice would serve as an impetus to petition a probate court for the restoration of voting rights.¹⁸²

Thus, even in California—a state with a fairly involved and individualized standard of review for voting rights restoration¹⁸³—some citizens with cognitive disabilities remain disenfranchised. Federal legislation aimed at educating judges on the proper implementation of their state's standards for competency determinations would not only result in a more uniform standard of application, but, importantly, would also focus attention on the issue of voting rights—something that may not be at the forefront of every judge's mind in an initial competency hearing.

The proposed federal legislation would not be specifically aimed at increasing the electoral participation of people with cognitive disabilities, but rather taking a small step to reform the process by which these citizens may be able to restore their voting rights. Education would encourage guardians to make sure that the right to vote does not get lost in either the frenzy of an initial probate hearing or the passing of years in a relationship between a conservator and conservatee.¹⁸⁴ Although perhaps not the most practical of the items considered by either a judge or a guardian in

180. Thomas F. Coleman, *Spectrum Institute to File a Class-Action Complaint with the DOJ to RESTORE the Voting Rights of Thousands with Disabilities in California*, BUS. WIRE (Aug. 22, 2016, 9:00 AM), <http://www.businesswire.com/news/home/20160822005209/en/Spectrum-Institute-File-Class-Action-Complaint-DOJ-to%C2%A0RESTORE> [https://perma.cc/DD9C-ZDHS].

181. See Letter from Thomas F. Coleman, *supra* note 163, at 1-2 (“It appears that local probate judges are taking a passive approach to the reinstatement of the fundamental right to vote to conservatees.”).

182. See *id.* at 2-3.

183. See *supra* notes 14-15, 163-65 and accompanying text.

184. See *supra* Parts IIA-B.

a conservatorship hearing,¹⁸⁵ the right to vote is a fundamental one that cannot be left behind by passive judges or guardians who were unaware of the specificities of this issue in the legal process.

Promulgating this legislation at the national level would serve to foster uniformity in each state: state judges and guardians would become well-trained in the proper application of the relevant laws or competency determination process, resulting in stronger and more accurate application of laws governing the right to vote for people with cognitive disabilities. This would presumably increase the number of citizens with cognitive disabilities nationwide who are receiving a fair and accurate determination of voting rights under the laws of the state in which they live.¹⁸⁶

Although the disparity in the laws would remain, the proposed legislation would ensure that there is at least one common thread running through the judicial determination of voting rights for people with cognitive disabilities: that those who hold the power to grant or deny that right are well-educated in the application and implications of the decision. Moreover, it would benefit both the person seeking to restore his or her rights and the integrity of the voting process to have a workable capacity test that is applied uniformly throughout the states, perhaps similar to the standard promulgated by the ABA Recommendation.¹⁸⁷ But in order to avoid hindering state autonomy, federal legislation can only incentivize the process.

185. See Hurme & Appelbaum, *supra* note 28, at 946 (noting that the need for guardianship centers around the persons' alleged inability to manage their own affairs or make decisions about their personal care); see also Michael DiMauro, *Legal and Financial Planning: Guardianship Proceedings*, ALZHEIMER'S FOUND. OF AM., <http://www.alzfdn.org/LegalandFinancialPlanning/guardianshipproceedings.html> [<https://perma.cc/3G9R-Q4ST>] (noting that while laws vary state by state, "[t]he court scrutinizes all of the actions of the guardian, including the management of the individual's personal financial affairs, and decisions regarding medical treatments and long-term care").

186. See Roy, *supra* note 93, at 122 ("Mandating training for judges in [guardianship proceedings for the elderly] reduces the likelihood that disenfranchisement will occur due to misconceptions or a lack of understanding concerning the elderly.").

187. See COMM'N ON LAW & AGING, *supra* note 22, at 1 (calling for "federal, state, local, and territorial governments to ensure that" government entities do not exclude persons from voting due to various factors related to their disabilities).

C. Avoiding Federalism Problems

Implementing direct change in state voting policies through national legislation is problematic because of the federalism concerns posed by the structure of election administration in the United States Constitution.¹⁸⁸ This creates a difficulty in achieving broad reform of the voting laws governing those with cognitive disabilities. However, the proposed legislation does not implicate the issues inherent in federal regulation of state election administration.¹⁸⁹

Federally promulgated voting rights legislation should not cross the line into actually regulating state elections or forcing the states to change their voting laws or constitutions. Strong-arm legislation likely could not successfully bypass the election authority granted to the states in the Constitution.¹⁹⁰

With this in mind, Congress could promulgate the proposed federal legislation pursuant to the spending power.¹⁹¹ This neatly avoids the federalism problems that have made national regulation of voting rights for citizens with cognitive disabilities tricky in the past. The proposed legislation would financially incentivize states to take steps toward reforming the administration of voting rights for those citizens with cognitive disabilities, rather than mandating that states change their election laws or constitutions to implement a particular competency standard.¹⁹² In this manner, legislation can still reach each of the states and spur progress in this arena without impeding state autonomy.

Though implementing the proposed legislation through the spending power would avoid federalism challenges, this course raises

188. *See supra* Part I.A.

189. *See supra* Part I.A.

190. *See* U.S. CONST. art. I, § 4, cl. 1.

191. *See generally* *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (holding that federal legislation withholding highway funds from states with a minimum drinking age below 21 is a valid exercise of the spending power).

192. However, in order to maintain the legislation's constitutionality under the congressional spending power, the legislation would need to not unfairly impact federal funding currently in place. Rather, any cuts should be small and noncoercive in order to give deference to the fact that election administration is primarily within the realm of the states. *See generally* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (holding that a provision of the Affordable Care Act that withdrew funds from states that did not expand Medicaid pursuant to the Act was unconstitutional under the spending power).

potential criticism: the legislation would promote change, but it would not have an immediate and direct result in terms of mass restoration of voting rights for people with cognitive disabilities.¹⁹³ For this reason, while scholars have proposed federal education legislation in the past as an attempt to decrease disenfranchisement for people with cognitive disabilities,¹⁹⁴ the idea has been dismissed as low priority, as it would have a “questionable impact.”¹⁹⁵

However, this point of criticism actually promotes the utility of the proposal. The federalism implications of voting rights legislation prevent the federal government from mandating any sort of substantive change to state laws.¹⁹⁶ Although not directly improving the substance of state law, this plan can improve application of the laws currently on the books by educating and training the judges and guardians who are instrumental in making these determinations.¹⁹⁷ This would lessen the confusion and uncertainty of retaining or restoring these rights, and would bring correct and effective application of state laws to the attention of judges and guardians.

In the past, federal legislation of voting rights has been sweeping, presumably in a well-intentioned attempt to address all possible issues.¹⁹⁸ But these previous schemes have not had a tangible impact on voting rights for people with cognitive disabilities.¹⁹⁹ This issue is unique, complex, and entirely individualized. The way to achieve a sense of fairness for these citizens is to operate through small, manageable steps that attack the problem while leaving room to keep the process individualized and regulated at the state level.

D. As Applied to Modern Concerns: Voter Fraud

The above proposal would operate as a practical, intermediary step on the road to larger voter reform for people with cognitive

193. Compare Hoerner, *supra* note 66, at 124-25 (explaining the potential scope of election reform that focuses on education), with Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CAN. J. ELDER L. 29, 32 (2008) (explaining the expected increases in elderly and cognitively impaired persons by 2030).

194. Hoerner, *supra* note 66, at 124-25.

195. *Id.* at 125.

196. See *supra* Part I.A.

197. See *supra* Part IV.A.

198. See *supra* Part I.C.

199. See *supra* Parts I.C, III.

disabilities. The proposed legislation has the potential to mitigate a notable fear in allowing these citizens to participate in the voting process: the potential for voter fraud.²⁰⁰

An issue commonly raised regarding disenfranchisement of voters with cognitive disabilities is the fear that giving these citizens the chance to vote will increase the likelihood of voter fraud.²⁰¹ Specifically, those who hesitate to grant the right to vote to people with cognitive disabilities are often concerned about manipulation of that power “by unscrupulous persons or political organizations taking advantage of groups within this population, especially those living in group settings, such as nursing homes.”²⁰²

This is a valid concern considering the unique position of adults with cognitive disabilities, some of whom may rely on others to assist with everyday decisions.²⁰³ Further, states are at liberty to entertain this concern, as the Supreme Court has found “preserving the integrity of the election process” to be a compelling state interest.²⁰⁴ However, scholars caution states against overreacting to the potential for voter fraud when considering the voting rights of the cognitively disabled, and to be diligent in “weighing the cost of permitting mentally vulnerable citizens to participate in the democratic process against the cost of depriving these citizens of their right to vote.”²⁰⁵

The proposed federal legislation can ease this fear. By implementing specific education materials for both judges and guardians or conservators, those that assist cognitively disabled voters will be fully informed as to the scope of their roles.²⁰⁶ Ensuring accurate information and training for guardians and conservators regarding their ward’s right to vote would alleviate much of the fear in restoring voting rights to adults with cognitive disabilities.²⁰⁷ For guardians in particular, this education could highlight the individ-

200. See Hurme & Appelbaum, *supra* note 28, at 932; Karlan, *supra* note 39, at 925.

201. See, e.g., Sabatino & Spurgeon, *supra* note 122, at 844.

202. *Id.*

203. See PARRY & DROGIN, *supra* note 6, at 139.

204. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); see also Karlan, *supra* note 39, at 925.

205. Roy, *supra* note 93, at 119.

206. See *supra* Part IV.A; see also COMM’N ON LAW & AGING, *supra* note 22.

207. See Roy, *supra* note 93, at 139 (“For example, emphasizing the guardian’s role in the process can curb voter fraud.”).

ual nature of voting to ensure that a well-meaning guardian does not overstep his or her bounds by inappropriately influencing the right to vote. Of course, this would not guarantee that every guardian will faithfully execute those duties. However, it would help increase the likelihood that each guardian or conservator acts as one who ensures that the conservatee retains or regains the right to vote, rather than one who improperly usurps that right.²⁰⁸

The proposed federal legislation aims to use courtrooms to create a stronger and more uniform process of granting or restoring the right to vote, rather than influencing polling place procedures.²⁰⁹ Educating guardians or conservators about the importance and the integrity of the right to vote for people with cognitive disabilities is a crucial step in decreasing the likelihood of voter fraud. The education information promulgated by the proposed legislation must emphasize that while guardians and conservators should highlight the role that voting plays in the availability of rights under guardianship, the guardian or conservator does not step into the judge's shoes in terms of making an unofficial competency determination.²¹⁰

To fully address concerns of voter fraud among voters with cognitive disabilities, it would be necessary to target the potential influence of polling place workers on election day, as identified in the ABA Recommendation.²¹¹ Though not included in the focus of this proposal, future education legislation may emphasize the training of these groups as well.

Through specific and targeted educational and training materials, the guardian or conservator role becomes less likely to invite voter fraud and more likely to facilitate not only the right of his or her conservatee to cast their vote, but to cast it free of undue influence. By including the varied challenges of voting registration and restoration as part of court-appointed guardian training, voter fraud

208. See, e.g., Hoerner, *supra* note 66, at 118 (“[R]eports also arose of persons with mental disabilities being ‘coaxed’ into voting.”).

209. See *supra* Part IV.A.

210. See Kohn, *supra* note 193, at 47 (“It should be noted that there is a significant difference between educating caregivers and election officials about voting rights of the cognitively impaired and inviting or encouraging such individuals to screen would-be voters for capacity.”).

211. See COMM’N ON LAW & AGING, *supra* note 22, at 15 (identifying the need for voter assistance training, long-term care training, and poll worker training); see also Kohn, *supra* note 193, at 47.

among people with cognitive disabilities may be curbed before it begins.

CONCLUSION

The issue of voting rights for citizens with cognitive disabilities seems simple: the right to vote is fundamental, and heavily protected by both federal and state constitutions, along with election legislation.²¹² However, complications arise when the very same legal principles that protect the right to vote also may prevent people with cognitive disabilities from engaging in the democratic process by entertaining concerns about federalism and voter fraud. Historic biases in the legal system, outdated laws that remain on the books, and ineffective legislation act as a bar to further disenfranchise an already marginalized group.

Fortunately, the tide appears to be turning. A modern attitude and understanding of people with cognitive disabilities sets the stage to act with an eye toward the complicated background and legal underpinnings of voting rights for these citizens. Taken collectively, this calls for a proposal that straddles the line between federal uniformity and state autonomy.

Federal voter education legislation would allow the movement to reform voting rights for people with cognitive disabilities to implement progress in a practical and manageable way. Judicial education would encourage uniformity and accuracy²¹³ while guardian or conservator education would reduce the risk of voter fraud. Importantly, this proposal would bypass common federalism issues.²¹⁴ Further, drawing attention to and promulgating accurate information about the issue of disenfranchisement of voters with cognitive disabilities could potentially motivate states to bring election laws up to date. Certainly, it would be an improvement over solutions offered in the past that do not address the individual concerns of citizens with cognitive disabilities.

Although federal education legislation is an incremental solution that would not solve the problem of disenfranchisement entirely, it

212. *See supra* Part I.

213. *See supra* Part IV.A.

214. *See supra* Part IV.C.

is the narrow nature of the plan that ensures a practical, manageable step towards success in restoring voting rights for people with cognitive disabilities without running into the constitutional problems of past proposals. As the country is currently poised to make progress toward securing a fundamental right that has been denied to many members of this group for years, it is time for a practical step forward in restoring voting rights for people with cognitive disabilities.

*Hillary May**

* J.D. Candidate 2018, William & Mary Law School; B.A. 2014, Clemson University. I would like to thank the men and women whose passion and tenacity served as the inspiration for this Note. I must thank the talented and hardworking staff of the *William & Mary Law Review* for their thoughtful contributions throughout the publication process. Finally, thank you to my friends and family who encourage me in every endeavor.