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Just How Youthful Should Voters Be? Part III: Why We Need a Conception of Electoral Competence, and Its Implications for Adults with Cognitive Impairments

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Just How Young Should Voters Be? Part III: Why We Need a Conception of Electoral Competence, and Its Implications for Adults with Cognitive Impairments

Posted By [Vivian Hamilton](#) On January 9, 2013 @ 10:16 am In [Civil Rights, Election Law, Uncategorized](#) | [6 Comments](#)

[¹] Professor Joey Fishkin raised several important questions in his comment to my [previous post](#) [²]. I'd initially planned to set out a pretty streamlined version of my argument for lowering the voting age, but I think his questions merit a bit of a detour/elaboration.

Do We Really Want to Reintroduce Notions of Electoral Competence? Fishkin suggests that introducing a conception of electoral competence is potentially fraught. And he's right—political elite have historically, and notoriously, invoked the supposed incompetence of various groups to justify their categorical disfranchisement. But competence as a basic criterion for voting has been a constant. Indeed, some notion of it is what justifies voting-age requirements. Only young people's want of the relevant competence (however that competence is defined/conceptualized) can render legitimate their electoral exclusion.

There can be little dispute that newborns lack the relevant competence, or that individuals typically acquire it at some point over the course of their development. Development and age predictably correlate. There is thus a temporal element to the attainment of electoral competence, making age arguably the most reasonable proxy for it.

Competence-based arguments did not drive the nation to lower the voting age from 21 to 18; Congress's lowering of the draft age did (see what is probably the most comprehensive history of the passage of the 26th Am., lowering the voting age: Wendell Cultice, [Youth's Battle for the Ballot](#) [³]). Is age 18 the most reliable indicator of electoral competence that we can identify today? To decide, I think we need to answer two questions: First, what is the most appropriate conception of electoral decision-making competence (discussed in my last post)? And second, is it possible to identify an age or age range by which that competence has reliably developed (next post)?

Does the Conception of Electoral Competence I Suggest Risk Disfranchising Segments of the Adult Population? Fishkin suggests that it could, but I don't think so. I don't propose that individual would-be voters would have to demonstrate that they meet this standard in order to qualify to vote. I concede the practicality of age as proxy for electoral competence. I advance a conception of competence to guide a reevaluation of our current age-proxy and, if appropriate, establish a better, more empirically-grounded and principled one. We would assess the age or age range by which *typical individuals* reliably develop electoral decision-making competence. Individuals who attain the age of presumptive competence (just as they do today) would automatically gain the franchise.

The standard for electoral competence I argue for requires certain thinking/reasoning capacities (these attend normal individual development, which may be improved by, but does not require, specific levels or types of learning). Some individuals may meet this standard prior to attaining the presumptive age of competence; some will reach the presumptive age of competence (and gain the franchise) without having attained the typical capacities. Such slippage is the nature of proxies.



Justifying a Lenient Standard to Assess the Competence of Age-Qualified Individuals with Cognitive Impairments: Fishkin also discusses the potential effect of a conception of electoral competence on cognitively-impaired adults. I think that a lenient standard to assess the electoral competence of otherwise-qualified voters whose cognitive competence is in question is appropriate. Nearly 40 states have constitutional or statutory provisions prohibiting people with cognitive impairments from voting. In the last couple of decades, many have begun adopting procedural protections to guard against the unwarranted deprivation of voting rights of cognitively impaired persons. Over 30 states now provide for individualized judicial determinations of whether adults under guardianship nonetheless retain the competence to vote. The [Competence Assessment Tool for Voting](#) ^[4] (CAT-V) is a questionnaire developed by psychiatrists to help assess whether individuals meet the basic, often-cited standard articulated in *Doe v. Rowe* ^[5] (D. Me. 2001), requiring simply that potential voters have the “mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.” Consistent with that standard, the CAT-V consists of seven basic questions about the nature of voting in general, and the meaning of casting a vote in the election at issue.

I’d argue that something like the *Doe* standard of the CAT-V remains an appropriate tool to assess the electoral competence of otherwise-qualified voters with cognitive impairments. Here’s why: Age-qualified individuals with mental impairments are members of the group that has presumptively attained the array of development-related capacities required for electoral competence. They should receive the benefit of that presumption. The burden is not on them to demonstrate their competence and entitlement to inclusion; the burden is on the state to overcome the presumption of inclusion and demonstrate that the absence of the relevant capacity is such as to justify individuals’ exclusion. It is this heavy burden, justified in part by the foundational nature of the individual right, that can explain the simultaneous existence of one conception to assess, as a general matter, the initial acquisition of the capacities required for competent voting; and a different standard to convincingly establish its absence, or loss.

My focus has been on the initial acquisition of competence, generally. The voting rights of those with cognitive impairments merits more thought, and attention. In that regard, [see](#) ^[6] the contributions of a U. Penn. Memory Center project on facilitating voting as people age (Pamela Karlan, whose article Fishkin mentions, is affiliated with the project).

photo: http://commons.wikimedia.org/wiki/File:Forside_Gammel_ung_profil.jpg

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URLs in this post:

[1] Image: <http://www.concurringopinions.com/archives/2013/01/just-how-youthful-should-voters-be-part-iii-why-we-need-a-conception-of-electoral-competence-and-its-implications-for-adults-with-cognitive-impairments.html/elderlyandyouth>

[2] previous post: <http://www.concurringopinions.com/archives/2013/01/just-how-youth...ing-competence.htm>

[3] Youth’s Battle for the Ballot: http://www.amazon.com/Youths-Battle-Ballot-Contributions-Political/dp/0313279624/ref=sr_1_1?s=books&ie=UTF8&qid=1357734394&sr=1-1&keywords=Cultice

[4] Competence Assessment Tool for Voting: http://ps.psychiatryonline.org/data/Journals/PSS/3878/pss_60_05_624_02.pdf

[5] *Doe v. Rowe*: http://www.leagle.com/xmlResult.aspx?xmlDoc=2001191156FSupp2d35_1186.xml&docbase=CSLWAR2-1986-2006

[6] see: <http://www.uphs.upenn.edu/adc/info-DVP-guidelines.shtml>