

**SLEEPING WATCHDOGS OF PERSONAL
LIBERTY: STATE LAWS
DISENFRANCHISING THE ELDERLY¹**

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A number of states currently revoke a person's right to vote upon a judicial determination of incompetence. In some states, voting rights are automatically revoked when an individual enters guardianship, for which an incompetence determination is a prerequisite. As the elderly are placed into guardianship in disproportionately high numbers, such laws often directly, and negatively, affect them. In his Note, Kingshuk Roy examines the approach to disenfranchisement taken by a number of state courts, and the historical purposes behind such laws. The Note points out the diminishing relevance of the rationale behind disenfranchisement laws. Although such laws claim to be an attempt to protect the elderly, especially in the voting forum, they often prevent eligible and interested voters from participating in the electoral process. In addition to examining the history of such guardianship laws, Mr. Roy suggests that courts be given a specific framework for determining the competency of elderly persons wishing to vote. The elderly should be informed that a judicial determination of the need for guardianship can lead to a restriction of voting rights, allowing them to prepare accordingly. Doing so will ensure that the elderly under guardianship are well informed, and that their voices are heard in the democratic process.

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1. Senator Edward R. Roybal, California, referred to many state and local guardianship systems as “sleeping watchdogs of personal liberty” during proceedings on the proposed National Guardianship Act of 1991. 137 CONG. REC. E425-03 (1991).

I. Introduction

During the 2000 presidential election controversy in Florida, many people felt that the elderly citizens who were confused by the “butterfly ballots” should not have been voting in the first place.² This view rests largely on the notion that there must be some requisite standard of competence before a citizen should be allowed to vote.³ Many states have codified this view by way of disenfranchisement laws.

A common misconception about elderly citizens is that they invariably lose the capacity to make well-informed decisions.⁴ As a result, the elderly are often regarded as second-class citizens.⁵ Although much legislation and litigation has been aimed at combating this notion, many government officials themselves appear to subscribe to it.⁶ Namely, probate judges with the authority and discretion to determine the competency of elder citizens often deprive these individuals of their voting privileges because these citizens are deemed incompetent at making reasonable decisions and thus may harm society by voting.⁷ Despite the prevalence and long history of state disenfranchisement laws, the rationale behind this abrogation of rights is not as apparent as it seems.

2. See Joel Engelhardt & Scott McCabe, *Election 2000: Over-votes Cost Gore the Election in FL*, PALM BEACH POST, http://www.gopbi.com/partners/pbpost/news/election2000_overvote_gore.html. See generally Fladell v. Palm Beach County Canvassing Bd., 772 So. 2d 1240 (Fla. 2000); Sue Anne Pressley & George Lardner, Jr., *In a Confused Palm Beach County, Complaints Came Early and Often*, WASH. POST, Nov. 11, 2000, at A1; Glen R. Simpson et al., *Ballot Botch: With All the Glitches, The Wonder Is Why the System Survives*, WALL ST. J., Nov. 9, 2000, at A1.

3. 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, 439 (2000).

4. Elias S. Cohen, *The Elderly Mystique: Constraints on the Autonomy of the Elderly with Disabilities*, GERONTOLOGIST 24 (Supp. 1998).

5. Douglas L. Kruse et al., *A Study of the Political Behavior of People with Disabilities, What Determines Voter Turnout Executive Summary Empowerment Through Civic Participation: Final Report to the Disability Research Consortium Bureau of Economic Research, Rutgers University and New Jersey Developmental Disabilities Council* (1999), at <http://www.independentliving.org/LibArt/disvoters.html> [hereinafter *Voter Turnout Report*].

6. The Americans with Disabilities Act and The Voting Accessibility for the Elderly and Handicapped Act are examples of such legislation. “The federal government’s role in promoting a new paradigm for disability policy has been significant in many respects; however, its effects on electoral practices has been limited.” Schriener et al., *supra* note 3, at 445.

7. Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001).

This Note examines the history and objectives of state disenfranchisement laws with respect to their effect on the elderly and the purpose these laws serve today. To fully understand disenfranchisement laws, it is important to open with a discussion of the guardianship process because many states deny the right to vote to those citizens placed under guardianship.⁸ Understanding the steps in guardianship proceedings and the competency requirements will demonstrate the effect disenfranchisement laws have on the elderly. Next, an overview of state disenfranchisement laws and relevant procedural due process issues will establish the backdrop for analyzing how courts have handled elderly disenfranchisement cases past and present.

II. Background

Currently, there are approximately 34.5 million elderly citizens in the United States.⁹ This group is expected not only to increase rapidly, but to become more diverse.¹⁰ One common thread through this population is their desire to vote.¹¹ Generally, senior citizens participate in the democratic process in greater numbers than those in other age groups.¹² Any barriers to the voting process thus present a significant concern to these citizens.

State statutes and constitutional provisions that permit the disenfranchisement for persons under guardianship are one type of voting barrier.¹³ The growing number of impaired, dependent, and needy elderly persons in this country clearly indicates that a corresponding increase will occur in the number of “surrogate manage-

8. Schriener et al., *supra* note 3, at 445.

9. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2000, at <http://www.aoa.dhhs.gov/aoa/stats/profile/profile2002.html> (last modified June 21, 2001). One in every eight Americans is elderly, or 12.7% of the population. *Id.*

10. *Id.* Minorities are expected to comprise 25.4% of the elderly population in 2030, up from 16.1% in 1999.

11. See Jane Maslow Cohen, *Competitive & Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2244 (1995).

12. *Id.*

13. Although voting has been found to be a fundamental right, and states cannot abridge that right in violation of the Fourteenth Amendment, states nonetheless remain free to restrict voting rights based on other factors. Schriener et al., *supra* note 3, at 438.

ment arrangements” for this population.¹⁴ The most common arrangement takes the form of guardianship, the process whereby a substitute decision maker is provided for a mentally disabled person.¹⁵ The purpose behind guardianship is to protect persons who are not capable of making decisions on their own behalf¹⁶ and are consequently more vulnerable to abuse.¹⁷ There is a legal relationship between the guardian, the person whom the court appoints as the surrogate decision maker, and the ward, the person whom the court has declared to be incompetent to make particular decisions.¹⁸ In most states, the probate division of the state courts governs this relationship.¹⁹

A. Guardianship Law—Protecting the Elderly

The proposed National Guardianship Rights Act of 1991, designed to help protect the rights of elderly citizens once they enter into guardianship, exemplifies the legal significance of the guardianship relationship.²⁰ Guardianship law reveals an inherent tension between individual autonomy, the right of the citizen to be independent, and the principles of *parens patriae*, the state’s duty to protect individuals from harming themselves.²¹ Most commonly, the problem arises in the context of managing the ward’s finances, making medical decisions, and addressing abusive guardians.²² However, this tension be-

14. George H. Zimny & George T. Grossberg, *Guardianship of the Elderly*, in *GUARDIANSHIP OF THE ELDERLY: PSYCHIATRIC AND JUDICIAL ASPECTS* 4 (George H. Zimny & George T. Grossberg eds., 1998) [hereinafter *GUARDIANSHIP OF THE ELDERLY*].

15. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW: IN A NUTSHELL* § 9.1 (2d ed. 1998). Some states refer to the decision making in regard to the disabled’s property more specifically as conservatorship. *Id.* However, for the purposes of this Note, the term “guardianship” will be used in its broader context, referring to decision making for both person and property.

16. *Id.*

17. FROLIK & KAPLAN, *supra* note 15, at 226.

18. Marshall B. Kapp, *Legal Basis of Guardianship*, in *GUARDIANSHIP OF THE ELDERLY*, *supra* note 14, at 16.

19. Field C. Benton, *The Courts*, in *GUARDIANSHIP OF THE ELDERLY*, *supra* note 14, at 74.

20. Roybal, *supra* note 1.

21. Kapp, *supra* note 18. The “*parens patriae*” aspect is also referred to as “beneficence and nonmaleficence,” where the state finds it in an individual’s best interest to use the state’s sovereign power to protect a person from him or herself. *Id.* at 17–18, 93.

22. Roybal, *supra* note 1; see also Isabella H. Grant & Mary J. Quinn, *Guardianship and Abuse of Dependent Adults*, in *GUARDIANSHIP OF THE ELDERLY*, *supra* note 14, at 112–13.

comes more difficult to resolve when the subject is the right to vote, and the purported malfeasance is an uninformed vote. The wrongful or misguided act is not as apparent when an individual is voting for a particular candidate as when the individual is negligent in his or her financial transactions. The detrimental effect from the alleged harm is more difficult to identify, and there is a fundamental right at stake.²³

There are approximately 1,250,000 adults under some form of guardianship in this country.²⁴ Depression, bipolar disorder, delirium, dementia, Alzheimer's disease, schizophrenia, and delusional disorder are all conditions common among the elderly that impair competency.²⁵ Due to the prevalence of these conditions, the proper administration and implementation of the guardianship process becomes more significant.²⁶ Specifically, it becomes difficult for judges to determine when a potential ward is competent within state guardianship law and is therefore able to retain the right to vote.

B. Determining Competency²⁷—The Judicial Approach

The guardianship process becomes murky when courts must determine the competency of a potential ward. An individual must be deemed incompetent before a state assigns a guardian.²⁸ Traditionally, this determination was based on diagnostic labels such as depression and dementia.²⁹ Now, many states have incorporated more objective standards designed to focus on the individual's functional ability rather than on a clinical condition.³⁰

State statutes for guardianship competency commonly contain two components: a categorical condition and a functional determina-

23. *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding voting to be a fundamental right).

24. THE CTR. FOR SOC. GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEM AND FEASIBILITY OF IMPLEMENTING EXPERT SYSTEMS 77 (1992).

25. Donald P. Hay et al., *Psychiatric Disorders Affecting Competency*, in GUARDIANSHIP OF THE ELDERLY, *supra* note 14, at 42–53; *see also* *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (specifically referring to Alzheimer's disease and depression as conditions which can lead to disenfranchisement).

26. *See* Hay et al., *supra* note 25.

27. For purposes of this Note, the terms “competency,” “capacity,” and “decision making” are used generally to refer to one's ability to make informed decisions on his or her own behalf.

28. Kapp, *supra* note 18, at 20.

29. *Id.*

30. *See id.*

tion.³¹ First, the individual must fall within a specific category, such as old age or mental illness, before a guardian can be appointed.³² Then, the individual must be found to be impaired functionally as a result of one of the above categories.³³ Despite this more comprehensive definition of competency, state statutes still define the term quite broadly and thus leave much discretion to judges in making such determinations.³⁴

Judges with the authority to determine competency typically ask whether individuals can make informed decisions about themselves or their property.³⁵ A judge subscribing to a more functional approach may look to see if the individual has the ability to make a reasoned choice and recognize different alternatives.³⁶ Due to the complexity of the matter, it is unlikely that a set of requisite functional abilities will ever be identified and agreed upon to make the competency determination more standardized and less discretionary.³⁷ Again, in the context of voting rights, the applicability of a functional approach is more difficult because there is no potential for the individual to make a wrong decision.

Although not perfect by any means, the functional approach to determining competency is a vast improvement from the judicial methods of the past. Historically, judges would simply ask themselves whether an individual could be categorized as an "idiot" or an "insane person."³⁸ In this context, a functional approach seems to be far better than the alternatives. It also comports better with the principles of procedural due process by providing more safeguards before the deprivation of any rights.

31. *Id.*

32. *Id.*

33. *Id.*

34. Fran M. Baker, *Assessing Competency in the Elderly*, in GUARDIANSHIP OF THE ELDERLY, *supra* note 14, at 27, 28; *see also* Bush v. Gore, 531 U.S. 98 (2000) (striking down a law that granted state officials excessive and standardless discretion for re-counting votes).

35. Baker, *supra* note 34.

36. *Id.* at 29. "[T]he ability (1) to receive, comprehend, and understand information about his or her specific situation, (2) to deliberate on accessible alternatives and to appreciate that he or she has a choice, and (3) to make a reasoned choice, that is, to select an option and provide reasons for the choice." *Id.*

37. Timo Erkinjuntti et al., *The Effect of Diagnostic Criteria on the Prevalence of Dementia*, 337 NEW ENG. J. MED. 1667 (1997).

38. This point is explained in greater detail under the analysis portion of the Note.

Another major concern in determining competence is the qualifications of the judge presiding over the guardianship proceedings. It is unlikely that even trained and experienced judges will be able to determine competency with any degree of consistency or certainty. A comprehensive study on the elderly published in the *New England Journal of Medicine* found large discrepancies among professionals in diagnosing dementia.³⁹ A group of neuropsychologists examined the effects of six commonly used classification schemes for identifying dementia and found that the proportion of subjects diagnosed with dementia varied anywhere from 3.1% to 29.1%.⁴⁰ The study states that such a dramatic discrepancy among professionals “arouses concern” about the validity of such tests and acknowledges the legal implications of this discrepancy.⁴¹ “It makes a substantial difference whether 3 percent or 29 percent of the population over 65 years of age has dementia.”⁴² This is particularly true for those facing the prospect of disenfranchisement at the hands of a probate judge. Setting aside the vast difference in expertise among judges and neuropsychologists in determining mental illness, what degree of inconsistency and uncertainty is acceptable among judges authorized to deny participation in the democratic process?

C. State Laws—Disenfranchising Persons Under Guardianship

The Supreme Court has established that “for reasons too self-evident to warrant amplification . . . voting is of the most fundamental significance under our constitutional structure.”⁴³ Nonetheless, the right is not absolute. The Court has also found that “[s]tates have the power to impose voter qualifications and to regulate access to the franchise.”⁴⁴

Many states impose voter qualifications and regulate access by way of mental competency tests.⁴⁵ Eleven states specifically disen-

39. Erkinjuntti et al., *supra* note 37.

40. *See id.* at 1667–68.

41. *See id.* at 1667–73.

42. *Id.* at 1673.

43. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *see also Reynolds v. Sims*, 377 U.S. 533 (1964) (holding voting to be a fundamental right).

44. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

45. *See Schriener et al.*, *supra* note 3.

franchise persons placed under guardianship.⁴⁶ Altogether, forty-four states have either statutes or constitutional provisions that permit disenfranchisement of the mentally incompetent.⁴⁷ These laws disproportionately affect elderly voters under guardianship because a finding of mental incompetence is a prerequisite for guardianship; thus, citizens under guardianship are prime targets for the disenfranchisement laws as a result of this finding.⁴⁸

In California, for example, individuals are disqualified from voting if they cannot complete an affidavit of voter registration.⁴⁹ Although there is some variation from state to state, most of these statutes are similar in content because they are all based on the Uniform Probate Code.⁵⁰ Disenfranchisement for gender, race, and wealth has disappeared.⁵¹ However, the harm posed by mentally disabled voters is somehow considered unique, justifying their exclusion from political participation.⁵²

46. Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 484 (2001). The following is a list of state statutes specific to guardianship and/or conservatorship: ALASKA STAT. § 13.26150(e)(6) (Michie 1996); ARK. CODE ANN. § 28-65-302(a)(5) (Michie 1987); CAL. PROB. CODE § 1910 (West 2000); FLA. STAT. ANN. § 744.331(3)(d)(2) (West 1997); GA. CODE ANN. § 29-5-7(f) (1999); KY. REV. STAT. ANN. § 387.590(10)(11) (Michie 1984); N.D. CENT. CODE § 30.1-28-04(3) (1996); OKLA. STAT. ANN. tit. 30, § 3-113(B)(1) (West 1991); TENN. CODE ANN. § 34-13-104(8) (1991); WIS. STAT. ANN. § 880.33(3) (West 1991).

47. Schriener & Ochs, *supra* note 46, at 485. The disenfranchisement laws for persons under guardianship address issues such as the ability of a guardian or conservator to restrict a ward from voting, notice requirements about the potential loss of voting rights, and voting-specific evaluations. See Schriener et al., *supra* note 3, tbl.2, for a comprehensive list of state guardianship statutes.

48. See Schriener & Ochs, *supra* note 46, at 483.

49. CAL. PROB. CODE § 1910 (West 2000). "If the court determines the conservatee is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code, the court shall by order disqualify the conservatee from voting pursuant to Section 2208 or 2209 of the Elections Code." *Id.*

50. Kapp, *supra* note 18, at 18. The UPC, drafted in 1975 by the National Conference of Commissioners on Uniform State Laws, was an attempt to provide uniform probate administration by courts among the various states. UNIF. PROBATE CODE § 1-102(b)(5) (amended 1993). Guardianship was included in the UPC for historical reasons. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143, 183 (1995-96). Article 5 of the revised UPC 1998 contains the applicable portions for guardianship proceedings, §§ 5-303 to -308. Kapp, *supra* note 18, at 18.

51. Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, (Mar. 2, 2002) (unpublished manuscript, on file with author) [hereinafter *Competence Line*].

52. *Id.*

Although recent legislative history is often unclear, presumably the main purpose for the exclusionary laws is to prevent those deemed to be mentally incompetent or incapacitated from determining their own interests and from affecting the interests of others.⁵³ Doing so safeguards the democratic process against corruption and undue influence.⁵⁴ However, when many of these laws were enacted, their purpose was “apparent on its face.”⁵⁵ The mentally impaired, or “lunatics” as they were labeled, “have no consent to give. A fool has no consent; the lunatic has none, and the child has none”⁵⁶ Legislators viewed mentally impaired voters akin to children playing with “sharp-edged tools.”⁵⁷ Although society’s perceptions and treatment of the mentally disabled and the elderly have changed substantially since this time, the rationale of protecting vulnerable individuals from harming themselves, as well as protecting the rest of society, remains the best explanation for the existence of disenfranchisement laws for persons under guardianship today.

The problem, however, lies in the analogy of the harm involved. First, an individual placing a vote for a particular candidate is not going to produce a direct and proximate harm.⁵⁸ For example, if a less qualified candidate wins an election, the senior citizen suffering from Alzheimer’s who voted for this candidate cannot be the lone culprit. In order to win the election, this candidate must have won a majority of the “intelligent” electorate’s votes as well. The harm here was the result of the majority of the electorate, and the voter in question cannot then be said to have voted irrationally.

Furthermore, there are many uninformed voters who will vote for candidates and issues without exercising what most people would consider amounts to reasonable judgment.⁵⁹ For instance, a candidate

53. *Id.*

54. Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867, 871 (1993). The value in safeguarding the democratic process extends beyond the casting of uninformed votes. *Id.* Corruption and undue influence refers to the potential for candidates to prey on those under guardianship by coercing or manipulating their voting preferences.

55. Competence Line, *supra* note 51, at 4 (quoting the Louisiana state legislature in 1845).

56. *Id.* (quoting the Nebraska state legislature in 1871).

57. *Id.* at 5 (quoting the Louisiana state legislature in 1898).

58. See generally *id.* (describing the problems of using competence as a voting requirement).

59. *Id.* at 6. Competent voting is difficult to understand because a distinction needs to be made between a voter selecting a candidate “based on some inchoate

may win because he or she is more attractive or had more campaign signs posted.⁶⁰ Although not the basis for a reasonable determination, these factors can often affect the outcome of elections.⁶¹ The uninformed electors relying on such factors, who are not incompetent by any standard, are not considered to present the same harm to society or themselves that the elector with Alzheimer's presents.⁶² These laws are therefore either grossly underinclusive or simply discriminatory. The misplaced notion of harm profoundly affects an individual's civic duty and raises concerns about how legislatures view the elderly once they enter guardianship.

One driving force behind these guardianship statutes is the attitude of the policymakers, as well as their constituents, toward individuals with mental illnesses.⁶³ Maryland's statute presents the codification of the second-class citizen mentality towards those under guardianship.⁶⁴ The law, even in the title, lumps convicted criminals and persons under guardianship together for purposes of voting privileges.⁶⁵ To classify the rights of law-abiding, elderly citizens who require the aid of a guardian in the same category with those convicted of an "infamous or other serious crime"⁶⁶ demonstrates that so-

impression of the candidate's qualities and abilities" and one "searching . . . into candidates' standings on issues of personal importance to the voter . . ." *Id.*

60. *See generally id.* (explaining that competent voting is hard to discern because the voting system does not depend on competency).

61. Although the fact that many elderly voters in Florida were confused by the "butterfly ballot" in the 2000 presidential election has been well documented, it is worth noting that their basis for voting for then Vice-President Al Gore was not considered unsound. *See Engelhardt & McCabe, supra note 2.* The voters were criticized for their inability to understand ballots, and not their inability to make a well-reasoned decision. *Id.*

62. *See generally* Competence Line, *supra note 51* (discussing different laws disenfranchising voters based on mental incompetency).

63. Schriener et al., *supra note 3*, at 446.

64. MD. CONST. art. I, § 4, titled "Right to vote of persons convicted of certain crimes and persons under guardianship," provides that "[t]he General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability."

65. *Id.*

66. *Id.* Perjury is an example of an "infamous crime" resulting in the loss of voting rights. *Hourie v. State*, 452 A.2d 440, 451 (Md. 1982). Elderly citizens placed under guardianship are most commonly disenfranchised as a result of the natural consequences of aging. Schriener et al., *supra note 3*, at 449. Presumably, the rationales for disenfranchising these two groups are different, and yet they are grouped in the same category. The Supreme Court has held that the disenfranchisement of convicted felons who had completed their sentences and paroles did not deny equal protection under the Constitution. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). The analysis would have been substantially different if the case was

ciety's perception of a citizen changes significantly when placed under guardianship. Any reform or debate on these laws would require lawmakers and the general public to confront these negative perceptions.⁶⁷

Voter fraud also may be a legitimate state interest for disenfranchisement statutes. The elderly, particularly those under guardianship, are highly susceptible to fraud and abuse.⁶⁸ Candidates and campaign staffers could prey on unsuspecting elders in an effort to win an election. In North Carolina, defendants were convicted of mail fraud for a deceptive absentee voting scheme involving nursing home residents.⁶⁹ The defendants cast absentee votes in the name of nursing home residents who were "persons of advanced years, feeble both physically and mentally."⁷⁰ This case illustrates that elderly citizens are targets for fraud in the voting process and that they require protection distinct from that of other age groups. Although clearly a drastic measure, some states choose to avoid this form of voter fraud by simply disenfranchising many of the elderly.⁷¹ States, however, should consider a less severe solution that does not operate at the expense of elderly voters.

Whatever the root of state disenfranchisement laws may be, the issue nonetheless boils down to 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. When brought to Congress' attention, state disenfranchisement laws

about the disenfranchisement of elderly citizens under guardianship. The Court interpreted the Fourteenth Amendment to expressly allow for:

the denial of citizens' right to vote. The denial of such right for "participation in rebellion, or other crime," and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise that this Court has held invalid under the Equal Protection Clause.

Id. at 25. There is no similar interpretation for disenfranchising the elderly.

67. Schriener et al., *supra* note 3, at 446. The article later states "that many lawmakers would be unable to put aside the misconceptions about cognitive and emotional impairments that persist in American society to focus instead on the lawful ways to ensure an intelligent electorate." *Id.* at 453.

68. See Grant & Quinn, *supra* note 22, at 106-07.

69. United States v. Odom, 736 F.2d 104, 106 (4th Cir. 1984).

70. *Id.* The nursing residents, primarily due to their age, were vulnerable targets to voter abuse. *Id.* For example, only a few of the residents could write their names. *Id.* at 107. As a result, much of the absentee voting process required the aid of another. *Id.*

71. *Id.*

were characterized as “sleeping watchdogs of personal liberty.”⁷² Proposed legislation, titled the National Guardianship Act of 1991, purported to end the “widespread abrogation of rights of our Nation’s most vulnerable elderly which our guardianship system today sadly permits.”⁷³ The Act would have required, among other things, adequate notice for individuals involved in guardianship proceedings, representation by trained attorneys, examination by an independent professional team before assigning guardianship, and the right to prompt appeal of the decision.⁷⁴ Although this legislation was not passed, it is worth noting that it did not take issue with the propriety of state disenfranchisement laws; rather, the focus was on procedural due process safeguards in the administration of guardianship proceedings.⁷⁵

D. Procedural Due Process—Safeguarding the Rights of the Elderly

Procedural due process “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”⁷⁶ Many states have enacted a variety of due process protection reforms in addressing the unnecessary or improper loss of decisional rights.⁷⁷ Guardianship reformers would like states to provide proposed wards with mandatory rights to notice and counsel, as well as other specific rights throughout the hearing, to ensure minimum procedural due process safeguards.⁷⁸

72. Roybal, *supra* note 1. “The current system is nothing less than a national disgrace. Unfortunately, many State and local guardianship systems have become sleeping watchdogs of personal liberty to the point where even a convicted felon is guaranteed more rights in many areas than innocent *elderly* and disabled Americans who are the subjects of guardianship proceedings.” *Id.* (emphasis added).

73. *Id.* When referring to the “Nation’s most vulnerable,” the legislation meant both the elderly and disabled Americans under guardianship. *Id.*

74. *Id.*

75. *Id.*

76. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

77. Kapp, *supra* note 18, at 20.

78. *Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 1989 A.B.A. 9–10 [hereinafter *American Bar Association*]. An Associated Press study found that only thirty-six percent of the potential wards in guardianship proceedings were represented by counsel. *Id.* at 10.

Almost all states have some statutory notice requirement for guardianship proceedings.⁷⁹ Although the individual must be able to understand the notice, it will not be considered otherwise defective merely because the statute was not followed correctly.⁸⁰ In other words, guardianship proceedings may be valid despite deficient notice. The American Bar Association (ABA) recommends that notice be served personally to the respondent by a court officer specifically trained to interact with elderly persons in “the mode of communication that the respondent is most likely to understand.”⁸¹ The ABA also would require, as a minimum safeguard, written notice of “the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled.”⁸² Certainly, abrogating the right to vote would be considered a “possible adverse consequence” for which an individual should be notified. The ABA thus has recognized the precarious position in which elderly citizens find themselves when facing the guardianship option.

Ensuring due process through a mandatory right to counsel is well supported; two-thirds of the states’ statutes require the right to counsel for guardianship proceedings.⁸³ Given a proceeding where a citizen may lose the right to vote, among other rights, providing counsel is the only way to ensure his or her rights are represented. Many elderly citizens cannot afford an attorney, and others will find it difficult to contact one.⁸⁴ The mandatory right to counsel feature is crucial because it makes certain that the rights of all respondents are being represented.

It is the probate judge’s role to administer the guardianship process, specifically the determination of competency.⁸⁵ These judges have a great deal of discretion in determining how they will imple-

79. *Id.* Forty-eight states require direct contact with the proposed ward; some even require the nearest relative or an individual entrusted with the person’s care or custody be notified also. *Id.*

80. *Id.*

81. *Id.* at 9. Plain language, large type, the time and place of the hearing are examples of what should be included in the written notice served to the individual. *Id.* at 9–10.

82. *Id.* at 10.

83. *Id.*

84. *See id.* at 11.

85. As noted above, the states have different names for their “guardianship courts” and different responsibilities and qualifications for their probate judges. Benton, *supra* note 19, at 74–75. For this Note, the guardianship courts will be referred to generally as the probate courts.

ment statutory provisions in their courts.⁸⁶ For this reason, it is important to provide training specifically tailored to the administration of guardianship proceedings.⁸⁷ The ABA proposes training on: (1) the rights and procedures applicable in guardianship proceedings; (2) the aging process and the myths and stereotypes concerning older and disabled persons; (3) the skills required to communicate effectively with elder and disabled persons; (4) the applicable medical and mental health terminology and possible effects of medications; and (5) services available in the community to elder and disabled persons.⁸⁸ Again, these requirements not only safeguard due process rights for respondents, but also acknowledge that senior citizens are particularly vulnerable in guardianship proceedings. Mandating training for judges in these matters reduces the likelihood that disenfranchisement will occur due to misconceptions or a lack of understanding concerning the elderly.

It is also important that respondents be able to exercise rights on their own behalf throughout the proceeding, and not simply at the start. Requiring the respondent's presence at the hearings and providing the right to appeal, for example, gives the respondent a more active role in the proceedings and could reduce the risk of erroneous deprivation of rights.⁸⁹

Florida's disenfranchisement statute for persons under guardianship presents a comprehensive incorporation of these due process safeguards.⁹⁰ First, notice of a guardianship hearing must be "served on and read" to the potential ward.⁹¹ Copies of the notice petition must also be given to the respondent's attorney and all next of kin.⁹² The provisions for a hearing on the appointment of a guardian have been interpreted as mandatory and "require an actual hearing to determine competency."⁹³ The court is required to appoint an attorney

86. George H. Zimny, *Empirical Research on Guardianship*, in GUARDIANSHIP OF THE ELDERLY, *supra* note 14, at 135, 140.

87. The ABA study would also require that the attorneys involved in these proceedings undergo similar training to help them represent their clients in a more well-informed manner. *American Bar Association*, *supra* note 78, at 13.

88. *Id.*

89. *Id.* at 10. The ABA would require (i) the respondent's presence; (ii) the right to compel witnesses, present evidence, and cross-examine witnesses; (iii) a clear and convincing standard of proof; and (iv) the right to appeal. *Id.*

90. FLA. STAT. ANN. § 744.331 (West 1997).

91. *Id.* § 744.331(1).

92. *Id.*

93. *In re Frederick*, 508 So. 2d 44, 45 (Fla. Dist. Ct. App. 1987).

for the respondent,⁹⁴ and counsel cannot thereafter waive the statutory rights.⁹⁵

The Florida statute continues in great detail to set forth how incapacity will be determined. The probate judge must appoint an “examining committee consisting of three members,” of which one member must be a psychiatrist or other physician and the

remaining members must be either a psychologist, gerontologist . . . a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.⁹⁶

The fact that a gerontologist and someone with advanced training in gerontology are expressly listed demonstrates the importance of the elderly’s understanding of the legal implications of the guardianship process.

Next, it is this committee’s task to determine if the allegedly incapacitated person can exercise specific rights.⁹⁷ The committee’s written report to the court must include an evaluation of the respondent’s ability to retain, without limitation, “the rights to marry; vote; contract; manage or dispose of property; have a driver’s license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.”⁹⁸ The right to vote, however, is different from the other rights listed in one distinct way—the respondent cannot make an unreasonable decision. For example, incapacitated persons may need to be protected against someone who wants to marry them only for their money; they may not be able to react quickly enough to the various factors on the road while driving, which could lead to injuries to themselves and others; or they may not be able to appreciate the life or death implications of a medical procedure. The potential for unreasonable and harmful decisions is apparent in those circumstances. The harm in voting is not so clear, and, at the very least, is distinguishable from the others. The committee must somehow take this into account in its determination.

Florida courts are then required to find the “exact nature and scope of the person’s incapacities” and “exact areas in which the per-

94. FLA. STAT. ANN. § 744.331(2)(a).

95. *In re Frederick*, 508 So. 2d at 45.

96. FLA. STAT. ANN. § 744.331(3)(a) (West 1997).

97. *Id.* § 744.331(3)(b).

98. *Id.* § 744.331(3)(d)(2) (West Supp. 2002).

son lacks capacity to make informed decisions.”⁹⁹ Thus, the decision ultimately rests in the hands of the court.¹⁰⁰ What the statute does not state for the court, and what the examining committee cannot provide, is what constitutes an uninformed decision in the voting booth. The court must decide, with little guidance from statutes and legislative history, whether a respondent would make an irrational decision when faced with a ballot. State disenfranchisement statutes for persons under guardianship therefore leave courts with a difficult and important task.

III. Judicial Disenfranchisement

A. Overview

With the complexity and sensitivity of the issue in mind, courts have approached challenges to state disenfranchisement laws with great care. The issue recently reemerged in Maine where a constitutional provision requiring the disenfranchisement of persons under guardianship was contested.¹⁰¹ The Maine Constitution provides that “[e]very citizen of the United States of the age of 18 years and upwards, *excepting persons under guardianship for reasons of mental illness*, having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives, in the city, town or plantation where his or her residence has been established.”¹⁰² Disenfranchisement laws in other states are substantially similar in content and purpose to that of Maine’s constitutional provision.¹⁰³

Interpreting and applying these laws, however, has proved to be a thorny task for courts. Determining competency is evidently a difficult issue, but the problem does not end there. What happens when an individual already deemed incompetent places a vote? Is the entire election then tainted, or is the vote so negligible that it should be ignored? Does, or should, it matter that the challenged voter’s infir-

99. *Id.* § 744.331(6)(a)(1), (2).

100. The Florida statute is similar to other state disenfranchisement statutes in that the court, usually the probate judge, must ultimately decide the fate of the respondent’s voting rights. *See id.* § 744.331(b). The Florida statute satisfies all the procedural due process safeguards to which a potential ward is entitled, but it ultimately depends on the individual judge.

101. ME. CONST. art. II, § 1 (states disenfranchisement for “persons under guardianship for reasons of mental illness”).

102. *Id.* (emphasis added).

103. *See generally* Schriener et al., *supra* note 3, at 456–71.

mities are a result of old age rather than some other form of mental impairment? These questions illustrate some of the problems that arise in adjudicating disenfranchisement laws.

B. The Presumption of Competence

Determining competency will always be a difficult issue for courts primarily because judges simply do not have adequate training to make such determinations. The Supreme Court has acknowledged the difficulty by holding that a rational basis existed for imposing the “beyond a reasonable doubt” burden of proof for involuntary commitment proceedings of those alleged to be mentally ill because a high risk of erroneous deprivation is involved.¹⁰⁴ Although courts have generally approached the issue of competency in a rather unsophisticated manner, they have nonetheless appreciated the significance of this high risk of erroneous deprivation.¹⁰⁵

In *Carroll v. Cobb*, the residents of a New Jersey school for the mentally ill sought to compel the municipal clerk and board of elections to accept their voter registration forms and permit them to vote in an upcoming election.¹⁰⁶ Defendants sought to enforce a New Jersey constitutional provision stating that “[n]o idiot or insane person shall enjoy the right of suffrage.”¹⁰⁷ Most disenfranchisement provisions were similarly worded and judges commonly applied the crude terms “idiot” and “insane person” to determine competency.¹⁰⁸ The Superior Court of New Jersey rejected the clerk’s assertion that she was vested with the discretion to determine voter competency.¹⁰⁹ In fact, the court stated

[I]t should be abundantly evident that a lay person is completely unequipped to determine whether an applicant is either an ‘idiot’

104. *Heller v. Doe*, 509 U.S. 312, 322 (1993). In justifying a higher burden of proof for the mentally ill, as opposed to the mentally retarded, in involuntary commitment proceedings, the Court stated that the “diagnosis of mental illness is difficult.” *Id.* Kentucky’s different burdens of proof exist to “equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question” *Id.*; see also *Addington v. Texas*, 441 U.S. 418, 430 (1979).

105. See *Addington*, 441 U.S. 418.

106. *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976); see also Joel E. Smith, Annotation, *Voting Rights of Persons Mentally Incapacitated*, 80 A.L.R.3d 1116 (1977) (covering an extensive list of cases regarding the right of the disabled to vote).

107. *Carroll*, 354 A.2d at 357 n.5.

108. See generally Smith, *supra* note 106.

109. *Carroll*, 354 A.2d at 358.

or an 'insane person,' as those terms are used in the Constitution and the statute, and thus disenfranchised. Indeed, we suspect that those imprecise terms may be troublesome to experts in the fields of psychiatry or psychology.¹¹⁰

As set forth above, the *New England Journal of Medicine* study illustrating the discrepancy among psychologists confirms the court's suspicions.¹¹¹ Understanding the complexities involved in determining an individual's competence, the court held as follows:

We do not intend to write a handbook on the subject for guidance of county boards of elections. But we should say at least this much, that a mentally retarded person need not be an "idiot," and a mentally ill person need not be "insane." We leave for another day the determination of where to draw the line of demarcation, beyond which disenfranchisement results.¹¹²

The court also rejected the defendant's contention that a determination of eligibility of an individual for services at a mental institution gave rise to a presumption of idiocy or incompetency.¹¹³ This presumption would essentially function to disqualify the individual in question from voting pursuant to laws denying the right to vote to idiots or insane persons.¹¹⁴ The court held that there was no presumption of incompetency due merely to the admission to a hospital for the mentally ill.¹¹⁵ A mentally ill person in a state hospital or school is entitled "to exercise all civil and religious rights provided for under the Constitutions and the laws of the State of New Jersey and the United States, unless he has been adjudicated incompetent."¹¹⁶

Recently, a New Jersey appellate court followed the *Carroll* principle that there is no presumption of incompetence for treatment at a mental institution, and admitted the ballots of challenged voters because there was no individualized determination of their incompetence.¹¹⁷ The presumption was in favor of competence and, consequently, retaining the right to vote. The judicial movement away from the archaic perceptions of those with mental impairments and the harm they present is becoming evident. Knowing full well that erroneous findings can be costly for the individual, courts have be-

110. *Id.*

111. Erkinjuntti et al., *supra* note 37.

112. *Carroll*, 354 A.2d at 360.

113. *Id.* at 359.

114. *See id.*

115. *Id.* at 359-60.

116. *Id.* at 359.

117. I/M/O Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 750 A.2d 790, 793 (N.J. Super. Ct. App. Div. 2000).

come more inclined to set higher burdens of proof and remove presumptions that favor disenfranchisement.

Establishing that there is no presumption of incompetence is useful to courts when presented with contested votes in an election. An Ohio court, however, went even further and formulated competency standards in *Baker v. Keller*, something the court in *Carroll* expressly refused to do.¹¹⁸ In *Baker*, there was a motion for a new trial because a juror had, on a number of occasions, suffered from a manic-depressive reaction.¹¹⁹ Recognizing the rule that all jurors must have the qualification of electors, the court drew attention to the Ohio Constitution, which provided that “[n]o idiot, or insane person, shall be entitled to the privileges of an elector.”¹²⁰ In an attempt to devise a workable competency test for judges, the court precisely defined the terms “idiot” and “insane.”¹²¹ The word “idiot” referred to a person who has been “without understanding from his birth, and whom the law, therefore, presumes never likely to attain any.”¹²² The words “insane person” were construed by the court to refer to a person who has “suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life.”¹²³ The ability of courts to apply these definitions consistently and effectively in general is questionable, but it is true more so in the context of voter competency. Judges themselves must be able to recognize when an individual’s vote is devoid of the adequate judgment required to be “competent.” As is the case with most judicial tests, the *Baker* definitional approach becomes much more imprecise and difficult to apply in practice.

C. To Count or Not to Count?

As with any law, state disenfranchisement laws are in place to prevent a specific harm or to serve a state interest.¹²⁴ So what correc-

118. *Carroll*, 354 A.2d at 360.

119. *Baker v. Keller*, 237 N.E.2d 629 (Ohio 1968); see also Smith, *supra* note 106.

120. *Baker*, 237 N.E.2d at 633.

121. *Id.* at 638.

122. *Id.* This was the definition as understood in 1851 when the present constitution was adopted and the judge was unable to find anything indicating any real change in this definition. *Id.*

123. *Id.*

124. See generally *Worden v. Mercer County Bd. of Elections*, 294 A.2d 233, 237–41 (N.J. 1972) (discussing numerous cases addressing the state’s interest in disenfranchising residents versus the right to vote).

tive action should take place when an incompetent person disqualified from voting illegally places a ballot?

Looking back to a time closer to the enactment of many of these disenfranchisement laws, we see the courts' harsh answers to the above questions. An Ohio probate court faced an action to contest the result of a 1905 election in the case of *In re South Charleston Law Election Contest*.¹²⁵ The court held invalid the vote of an elector found to be within the state constitutional provision which provided that "no idiot or insane person shall be entitled to the privileges of an elector."¹²⁶ The court, applying a competency test to determine whether the elector was an "idiot" or "insane," concluded that the voter came within the class of persons prohibited by the state constitution from voting under those terms and, accordingly, refused to count the ballot in question.¹²⁷

Almost a century later, courts seem to be headed in the opposite direction. The recent New Jersey appellate decision described above held that there is no presumption of incompetence, and absent individualized determinations of competence by the court, challenged ballots *will* be counted.¹²⁸

D. Disenfranchising the "Hoary Head"

Although ultimately the incompetent elector's vote was discarded in *In re South Charleston Law Election Contest*, the court did interpret the state's constitution to treat senior citizens differently from other incompetent voters, stating that "a person whose mind is greatly enfeebled by age is neither a lunatic nor an idiot, within the meaning of the Constitution."¹²⁹ Therefore, although courts have taken the ballot of an incompetent voter quite seriously, they have not necessarily considered elderly voters to be incompetent within the meaning of disenfranchisement laws. The legislatures intended to disenfranchise "lunatics,"¹³⁰ but there is no indication that the laws were meant to concern senior citizens. It seems neither courts nor legislatures in-

125. *In re S. Charleston Election Contest*, 1905 WL 774, at *9 (Ohio Prob. Apr. 26, 1905).

126. *Id.*; see Smith, *supra* note 106.

127. *In re S. Charleston Law Election Contest*, 1905 WL at *11.

128. *I/M/O Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 750 A.2d 790, 793 (N.J. Super. Ct. App. Div. 2000).

129. *In re S. Charleston Law Election Contest*, 1905 WL at *10.

130. *Competence Line*, *supra* note 51.

tended to disenfranchise elder citizens under guardianship as they do today.

For the most part, the terms “idiot” and “insane” in disenfranchisement statutes have been applied evenhandedly to voters.¹³¹ However, as demonstrated above, some courts have made a distinction when the voter in question is elderly. In 1869, the Supreme Court of Ohio found a number of lower court rulings in a challenged election case erroneous for counting the vote of one man “whom the testimony clearly shows, we think, to be an idiot.”¹³² Interestingly enough, the court did allow the vote of an elderly gentleman whose mind was “greatly enfeebled by age,” but not deemed an idiot.¹³³ The court acknowledged a distinction for senior citizens, finding that the “reverence which is due to ‘the hoary head’ ought to have left his vote uncontested.”¹³⁴ The court did not explain why those “greatly enfeebled by age” should be treated differently from other incompetent citizens.¹³⁵ Instead, the court simply held that old age is not grounds for legal disqualification.¹³⁶ It is thus evident, as far back as the middle of the nineteenth century, that courts have been aware of the compromising position elder electors are in as a result of disenfranchisement laws and are more reluctant to deprive the “hoary head” of the right to vote. However, legislatures seem to be in no hurry to modify these laws accordingly.

E. Disenfranchising the Elderly Today: *Doe v. Rowe*¹³⁷

The District Court of Maine recently struck down a state constitutional provision that prohibited voting by persons under guardianship for mental illness because it failed to provide adequate procedural due process in violation of the Fourteenth Amendment.¹³⁸ Specifically, the court found the Maine provision unconstitutional be-

131. *Id.* at 2.

132. *Sinks v. Reese*, 19 Ohio St. 306, 320 (1869) (this case was overruled on other grounds in *Evans v. Cornman*, 398 U.S. 419 (1970)); *see also* Smith, *supra* note 106.

133. *Sinks*, 19 Ohio St. at 320.

134. *Id.*

135. *Id.*

136. *Id.*

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

138. *Id.* at 49. The provision was invalidated on Americans with Disabilities Act and Equal Protection Clause grounds as well; the pertinent portions thereof are omitted. *Id.*

cause it did not provide for adequate notice or an opportunity to be heard on the issue of voting during guardianship proceedings and therefore violated the Due Process Clause, as applied and on its face.¹³⁹ This typifies the effect of these laws on the elderly.

1. FACTS

Pursuant to the 1965 amendment¹⁴⁰ to the Maine Constitution, and the relevant implementing statute, persons who are “under guardianship for reasons of mental illness” are prohibited from registering to vote or voting in any election.¹⁴¹ There were two elderly plaintiffs under guardianship involved in this case, one of whom was Jill Doe, a seventy-five-year-old Maine resident diagnosed with bipolar disorder.¹⁴² Despite her wishes to be subject to limited guardianship¹⁴³ that would only assure that she took her medication, she was placed under the more restrictive full guardianship.¹⁴⁴ The issue of her capacity to vote before being placed under guardianship was not raised.¹⁴⁵ Since that time, she had produced a sworn affidavit and expert testimony from her attending psychiatrist that “strongly suggested” that she understood the nature and effect of voting, and genuinely desired to participate in the process.¹⁴⁶

The second plaintiff, sixty-eight-year-old June Doe, was under full guardianship after being diagnosed with intermittent explosive disorder.¹⁴⁷ Since being placed under guardianship, June Doe had earned a high school diploma and had been able to “distinguish the

139. *Id.* at 48.

140. *Id.* at 44.

141. ME. CONST. art. II, § 1. A mentally ill person under guardianship, who votes knowing that he or she is subject to the prohibition, can be subject to criminal prosecution. See ME. REV. STAT. ANN. tit. 21, § 674(3)(B) (Supp. 2001).

142. *Rowe*, 156 F. Supp. 2d at 39. The third plaintiff, Jane Doe, was thirty-three years old and under guardianship due to bipolar disorder. *Id.* at 39–40. Though not a senior citizen, her illness is common among the elderly and one of the primary conditions leading to guardianship arrangements. See *id.* at 42.

143. FROLIK & KAPLAN, *supra* note 15, § 9.3. Limited guardianship recognizes that guardianship, although ultimately helpful, also represents a loss of liberty and autonomy. Limited guardianship attempts to minimize that loss of autonomy while still providing substitute decision making for those areas of life that the incapacitated person can no longer handle. Limited guardianship is “more palatable” because it is less intrusive than full guardianship. The ward is not subject to the “demeaning finding of total incompetency.” *Id.*

144. *Rowe*, 156 F. Supp. 2d at 40.

145. *Id.*

146. *Id.*

147. *Id.*

various issues on the ballot and expressed a specific desire not to cast a vote as to some issues because ‘she did not want to vote on issues she did not know.’”¹⁴⁸ Her treating psychiatrist concluded that she had the mental capacity to understand the nature and effect of voting.¹⁴⁹

Maine’s Probate Code defines “incapacitated person” as someone “who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.”¹⁵⁰ It is the duty of the probate judge to rule on the individual’s competency and, ultimately, his or her right to vote.¹⁵¹ Maine’s Probate Code also directs judges to “make appointive and other orders only to the extent necessitated by the incapacitated person’s actual mental and adaptive limitations or other conditions.”¹⁵² The District Court of Maine has interpreted this to mean that probate judges have the “authority to reserve the right to vote to a ward who is capable of understanding the act of voting,” even in cases of full guardianship.¹⁵³ The deprivation of the right to vote in Maine’s guardianship proceedings is consequently the result of a subjective process.

The process for guardianship in Maine is as follows. First, the person nominated to serve as guardian, if one is nominated, must file a guardianship plan detailing how the ward’s basic needs would be met.¹⁵⁴ Then, the probate court appoints a visitor or a guardian ad litem to meet with the allegedly incapacitated person to explain the

148. *Id.* at 41.

149. *Id.* Dr. Wilson found that June Doe could make an individual decision with regard to candidates and questions on the ballot. Dr. Wilson generally believed that a person under guardianship for a severe mental illness “is more likely to be monitored and receive treatment which will help restore him or her to capacity in areas such as voting” as opposed to similarly situated mentally ill persons not under guardianship. *Id.* at 41 n.7.

150. ME. REV. STAT. ANN. tit. 18, § 5-101(1) (West 1998).

151. *Doe v. Ketterer*, 2001 WL 40912, at *1 (D. Me. 2001).

152. ME. REV. STAT. ANN. tit. 18, §§ 5-304(a), 5-408.

153. *Ketterer*, 2001 WL 40912, at *1. The court specifically addressed the question “does a Probate Judge have the authority in the case of a full guardianship to reserve the right to vote to a ward who is capable of understanding the nature and effect of the act of voting?” *Id.* Answering affirmatively the court held that “it is clear that a Probate Judge has the authority to reserve the right to vote to a ward who is capable of understanding the act of voting.” *Id.*

154. ME. REV. STAT. ANN. tit. 18, § 5-303(a).

potential consequences of guardianship.¹⁵⁵ In addition, the visitor or guardian ad litem must serve this person with a written notice of the guardianship hearing.¹⁵⁶ The visitor or guardian ad litem must then determine if this person wishes to attend the guardianship hearing or contest any aspect of the guardianship.¹⁵⁷ In the event the allegedly incapacitated person does wish to contest, the probate court may appoint an attorney to represent the individual.¹⁵⁸

Next, the party filing the petition for guardianship must prove, by a preponderance of the evidence, that the potential ward is “incapacitated” and that guardianship “is a necessary or desirable means of providing continuing care and supervision of the person.”¹⁵⁹ The Maine provision did not require that the individuals subject to guardianship proceedings be specifically notified that their voting rights could be taken away if they were placed under guardianship.¹⁶⁰ The district court found that there was no procedure requiring probate judges to consider the capacity to vote during the course of these proceedings.¹⁶¹

Also conspicuously absent from this law was a definition of “mental illness.”¹⁶² The court noted that it is up to the discretion of each probate judge to put a person under guardianship for “mental illness.”¹⁶³ Realizing the constitutional infirmities of this law, the State made two distinct changes in its defense.¹⁶⁴ First, the State opted for a broad definition of “mental illness” in an effort to avoid arbitrarily

155. *Id.* tit. 18, § 5-303(b). Guardian ad litem refers to a person appointed by the court to investigate the circumstances surrounding the request for guardianship and to make a recommendation to the court. Zimny & Grossberg, *supra* note 14, at 10.

156. ME. REV. STAT. ANN. tit. 18, § 5-309(b).

157. *Id.* tit. 18, § 5-303(c).

158. *Id.* tit. 18, § 5-303(b).

159. *Id.*; *see also* Guardianship of Hughes, 715 A.2d 919, 922 (Me. 1998) (concluding that a preponderance of the evidence standard in guardianship proceedings satisfied the due process requirement).

160. Doe v. Rowe, 156 F. Supp. 2d 35, 48 (D. Me. 2001).

161. *Id.* at 43. The Court goes on to speculate that the right to vote is dependent more on the individual probate judge hearing the case than on the ward's actual capacity to understand the nature and effect of voting. *Id.*

162. *Id.*

163. *Id.* at 44. There is little guidance for probate judges to determine whether a person is mentally ill, and their discretion to make such determinations is broad. *Id.* The defendants changed their position and advocated for a broad definition of “mental illness” that disenfranchises anyone under full guardianship by reason of not only a psychiatric mental illness, but also mental retardation or other unsoundness of mind. *Id.*

164. *Id.* at 59.

disenfranchising a defined group of citizens.¹⁶⁵ The other change was a shift—from the position that the Maine prohibition applies only to those persons under full guardianship who do not have their right to vote specifically reserved¹⁶⁶—to the position that the ward retains the right to vote unless and until expressly suspended, based upon a finding that the ward lacks the mental capacity to understand the nature and effect of the act of voting.¹⁶⁷ Although useful, these changes came too late for the State.

2. DISCUSSION

The constitutional provision in question sought to disenfranchise only those “under guardianship for reasons of mental illness.”¹⁶⁸ The court’s first task was to determine if this provision was unconstitutional for failure to provide adequate procedural due process.¹⁶⁹ The plaintiffs alleged that the State, in implementing Article II, Section I of the Maine Constitution: (1) did not provide potential wards under guardianship proceedings notice or an opportunity to be heard on the issue of voting; and also (2) applied an inappropriate burden of proof in these proceedings resulting in the potential loss of voting rights.¹⁷⁰

For its analysis, the court applied the *Mathews v. Eldridge* “balancing test,” which requires consideration of the following three factors: (1) the plaintiffs’ interest in voting; (2) the “risk of erroneous deprivation of the right to vote” under the State procedures; and (3) the State’s interest, including any extra administrative or financial burdens from the additional procedures.¹⁷¹ Within this conceptual framework, the court sought to focus on “striking a balance that will

165. *Id.*

166. *Id.* at 58. The Attorney General took the position that Maine’s prohibition on voting by persons under guardianship due to mental illness does not apply if the incapacitated person is subject to full guardianship but the court order appointing the guardian explicitly reserves the individual’s right to vote. *Id.* at 43.

167. *Id.* at 45 n.14. The court labels these attempts to address the due process infirmities as “belated epiphanies,” presumably in a condescending manner because these changes could have helped June and Jill Doe vote in the 2000 election on a referendum on the Maine constitutional provision at issue here, but the State failed to do so. *Id.*

168. *Id.* at 38.

169. *Id.* at 47. The constitutional provision was also analyzed for claims under the Equal Protection Clause and the Americans with Disabilities Act for discriminating against individuals with mental disabilities. *Id.* at 51–58. For this Note, however, the focus will be on the due process analysis.

170. *Id.* at 47.

171. *Id.* at 48.

minimize the risk of the State erroneously disenfranchising persons who have the capacity to vote.”¹⁷²

a. Erroneous Deprivation Under Mathews The plaintiffs’ interest in voting, the first *Mathews* factor, was not specifically analyzed in the opinion.¹⁷³ Presumably, the parties here felt the interest was evident, and neither party contested this point. Next, the court found that the Maine provision did not provide adequate due process as applied because it failed to give the plaintiffs notice that they may lose the right to vote as a result of the state guardianship proceedings.¹⁷⁴ This lack of notice left the persons under guardianship unaware that they could be denied the right to vote regardless of their capacity to understand the nature and effect of voting and, therefore, led to an inadequate opportunity to be heard.¹⁷⁵ This, in the court’s view, amounted to a high risk of erroneous deprivation of the right to vote and, consequently, satisfied the second factor of the *Mathews* balancing test.¹⁷⁶

Not all state disenfranchisement statutes, however, have this infirmity. The Minnesota statute, for example, expressly preserves the right to vote unless restricted by a court order.¹⁷⁷ Thus, the ward retains the right to vote unless specifically notified otherwise. The Maine law, in contrast, simply deprived the ward of this right after a determination of incompetence.¹⁷⁸ This is further illustrated by the fact that some persons under guardianship for mental illness continued to vote despite their statutory disenfranchisement.¹⁷⁹

The court believed that providing specific notice of the potential loss of voting privileges “would give proposed wards an opportunity to contest this aspect of guardianship.”¹⁸⁰ The effectiveness of this notice requirement is a different matter. For example, it was stipulated in this case that both elder plaintiffs understood the nature and effect

172. *Id.*

173. *Id.* at 35.

174. *Id.* at 48.

175. *Id.*

176. *Id.*

177. MINN. STAT. § 525.54(4) (1999). In subdivision 4, the statutes provide that the “appointment of a conservator shall not deprive the conservatee of the right to vote, unless the right is restricted by court order.” *Id.* Conservatorship is guardianship of the estate and concerns decision making about the incapacitated person’s property. FROLIK & KAPLAN, *supra* note 15, § 9.3.

178. ME. CONST. art. II, § 1.

179. *Rowe*, 156 F. Supp. 2d at 48.

180. *Id.* at 48–49.

of voting,¹⁸¹ but it is unlikely that probate judges throughout the state would have been able to determine this uniformly.¹⁸²

Even if implemented, the notice requirement is likely to do little more than simply inform individuals that they are losing a fundamental right. The effectiveness of these requirements is also questionable because some states do not consider notice to be defective merely because the statute was not followed correctly.¹⁸³ It is therefore unreasonable to expect states to firmly enforce their notice requirements. Thus, the actual increase in protection for elderly voters is most likely marginal.

b. State Interests Under Mathews In its analysis of the third *Mathews* factor, the court found that it would not be “overly burdensome” for the State to provide specific notice of the potential loss of voting rights along with an opportunity to be heard on the matter.¹⁸⁴ In fact, the court found it to be “fairly simple to incorporate a specific notice regarding the right to vote.”¹⁸⁵ The court conceded that there may be an increased administrative burden as a result of proposed wards contesting their disenfranchisement, but went on to find that, in the long run, there would be fewer people returning to the probate courts for changes of their guardianship orders and the administrative burden would therefore decrease.¹⁸⁶

The *Mathews* test calls for the government to identify a state interest for the regulation.¹⁸⁷ In other words, the third *Mathews* factor required this court to ask, “[w]hat state interest is there in disenfranchising citizens under guardianship?”¹⁸⁸ Instead of asking why the state of Maine needs to deprive two elderly wards of their rights, the court opted to analyze the administrative and financial burdens for the state in its implementation.¹⁸⁹ It seems this point is glossed over

181. *Id.* at 39–40.

182. See generally Erkinjuntti et al., *supra* note 37 (explaining that the criteria for determining can differ greatly thereby making uniform determinations difficult).

183. See *American Bar Association*, *supra* note 78, at 10.

184. *Rowe*, 156 F. Supp. 2d at 49.

185. *Id.*

186. *Id.* The court continues to state that the administrative burdens on municipal registrars who currently have the “difficult task of determining when a guardianship order makes a person ineligible” can be lessened by this specific notice, thus decreasing the overall administrative burden on the state. *Id.*

187. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

188. See *Rowe*, 156 F. Supp. 2d at 48–49.

189. See *id.*

because, in the equal protection portion of the opinion, the court stated that “the parties agree that Maine has a compelling state interest in ensuring that ‘those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.’”¹⁹⁰ This compelling state interest, however, may not be so clear to the many elderly citizens contemplating guardianship. By conceding this point,¹⁹¹ the plaintiffs enabled the court to avoid any meaningful discussion on the purpose of disenfranchisement laws.¹⁹² The court gave these laws a presumption of legitimacy and did not truly question the purpose which they serve. The focus was on form over substance.¹⁹³

By marginally tightening the notice requirements for disenfranchisement, the court nonetheless left a great deal of discretion in the hands of probate judges in deciding who understands the nature and effect of voting and who does not. This was precisely the issue in *Bush v. Gore*.¹⁹⁴ The Supreme Court held that more stringent notice requirements do not reduce this discretion and do not provide any more guidance to judges in making this determination; thus, they do little to protect the disenfranchisement of senior citizens under guardianship.¹⁹⁵

190. *Id.* at 51. The court’s equal protection analysis centers around how Maine disenfranchises “a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity.” *Id.* at 52.

The court states that there is “little to no correlation between the State’s interest and the disenfranchisement of Jill Doe and June Doe.” *Id.* Again, the court is enabled to assume that ensuring voters understand the nature and effect of their votes is a compelling state interest instead of asking what harm this particular population, persons under guardianship, poses to the state if they are allowed to vote.

191. *Id.* at 51. This is assuming that the defendant’s motion for summary judgment does, in fact, indicate the plaintiffs recognized this as a compelling interest. ‘Defs.’ Mo. for Summ. J., *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (No. 41).

192. *Rowe*, 156 F. Supp. 2d at 35.

193. Maine has voted on this law and affirmed its legitimacy twice. *Id.* at 38 n.3.

194. 531 U.S. 98 (2000).

195. *See generally id.*

IV. Recommendation

A. Understanding State Interests

In addition to requiring a state interest in the *Mathews v. Eldridge* test, the Supreme Court has also held that restrictions on franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack.¹⁹⁶ It is thus important to understand the states' interests for disenfranchisement laws. A reasonable connection between the disenfranchisement laws and the objective should be apparent. Do these laws rest on grounds that elderly persons under guardianship are hurting the democratic process by placing uninformed votes? If so, these laws are overwhelmingly underinclusive because many other uninformed citizens are not being screened out from participation. If there are legitimate and nondiscriminatory purposes for these statutes' existence today, it is not apparent, at least not to June or Jill Doe of Maine. Assuming the laws are rooted in the notion that elderly persons under guardianship are "unworthy" and lack the "moral grounding" to vote, acknowledging this would initiate a meaningful debate.¹⁹⁷ Also, it would inform some of the most distinguished citizens of this country as to *why* society has suddenly deemed them unqualified to vote.

Doe v. Rowe established that states must grant citizens under guardianship full procedural due process protections before denying their right to vote.¹⁹⁸ The implication for state legislatures is simple: disenfranchisement statutes can withstand a procedural due process challenge by tightening notice requirements. However, the District Court of Maine does not do enough to dismiss the second-class citizen role elderly voters assume when they enter guardianship. Progress for elderly voters in this area continues to move slowly.

Disenfranchisement laws have existed a remarkably long time without serious challenge to their substance and purpose. State interests behind these laws are no longer as "apparent" as they were during their enactment in the mid-nineteenth century. More substantive challenges to these laws will force courts to confront more difficult questions. State governments will have to justify clearly why elderly

196. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

197. *Competence Line*, *supra* note 51. At the time many of disenfranchisement laws were enacted, those deemed mentally incompetent, or idiots and insane persons, were considered unworthy and to lack the moral grounding to vote. *Id.*

198. *Rowe*, 156 F. Supp. 2d at 35.

voters are treated in the same manner as criminals with regard to voting rights. Are states willing to reaffirm past legislatures in their characterization of elderly persons under guardianship as “fools,” and thus not worthy of the right to vote?

B. Judicial Guidelines for Determining Competency

It is sufficiently difficult for elderly individuals to establish their competency in matters concerning finances and day-to-day living; to also convince a probate judge that they understand the nature and effect of voting is excessive. The mere fact that an individual would be willing to go through the voting process is proof in itself that he or she understands the nature and effect of voting. In order to vote, that individual must know where to register, where to vote, when to vote, and then place the vote. Citizens must be able to understand the nature and effect of their actions to complete this process. For a judge to require proposed wards to prove anymore than this desire in order to retain the right to vote places an excessively demanding standard on those under guardianship—predominantly the elderly.¹⁹⁹

Although there may be some amending of state statutes to address due process infirmities, substantive changes are unlikely because there does not seem to be support by constituencies or lawmakers. Thus, elderly citizens may be put on notice of what is at stake when they enter guardianship proceedings, but there is still much discretion in the hands of probate judges to disenfranchise. Coupled with prejudices toward them, it is unlikely that the extra due process safeguards will help many elderly citizens under guardianship retain their right to vote.

Although it is inherently impossible to determine the reasonableness of a particular vote, if disenfranchisement laws must exist, there should be specific guidelines for judges to follow in making such determinations. They should indicate how much deference to give the examining committee because judges are simply ill-equipped to make these determinations on their own. Also, the determinations should always be subject-specific. For example, when determining

199. In *Harper v. Virginia State Board of Elections*, the Supreme Court held that “the right to vote is too precious, too fundamental to be so burdened or conditioned” in the context of poll taxes. 383 U.S. 663, 670 (1966). Likewise, proving competence to a probate judge in order to exercise the right to vote unnecessarily burdens and conditions the right.

whether individuals can handle their finances, courts should examine recent bills, accounts, and transactions. This determination, whatever it may be, would have no bearing on whether these individuals should retain the right to vote or make medical decisions. Courts would thus have to be thorough and exact in their competency examinations, and better able to avoid the erroneous abrogation of rights. This would guarantee each respondent a fair, individualized evaluation before a determination of voter competence.

C. Facilitating the Right to Vote Through Guardianship

Viewing guardianship as a tool for improving political participation rather than an impediment opens up many possibilities. For example, emphasizing the guardian's role in the process can curb voter fraud. If citizens must vote via absentee ballots, the guardian should be the only one able to assist the ward in the process. Or, if guardian abuse is a concern, courts could provide for a *de facto* guardian to execute votes for individuals. This would not be a great administrative burden, especially for those states who truly want to maintain the integrity of the democratic process and prevent voter fraud.

Additionally, in recognition of the "reverence which is due to the hoary head," we should *help*, not hinder, elderly voters in exercising their fundamental rights. Guardianship would therefore facilitate voting for elder citizens rather than act as a barrier. It would also allow senior citizens to retain their sense of civic duty, instead of feeling like second-class citizens.

V. Conclusion

Although state disenfranchisement laws have enjoyed a long history, their place in today's world is questionable. Their impact on the elderly is particularly harsh. After a lifetime of law-abiding citizenship, the elderly are being stripped of their fundamental right to vote for reasons beyond their control.

The judicial trend seems to be to award citizens a presumption of competence and to not err on the side of disenfranchisement. Many states are also securing individual rights by mandating stricter procedural due process requirements. Nonetheless, it is time for courts to take a more substantive look at state disenfranchisement laws. Their

purpose in society should be clearly presented, if for no other reason than to be sincere to those we disenfranchise.