

**INCAPACITY BY STATUS VERSUS
FUNCTIONAL ABILITY: PRESERVING THE
RIGHT TO VOTE FOR ELDERLY
AMERICANS WITH DIMINISHED MENTAL
CAPACITY WHILE UPHOLDING THE
INTEGRITY OF ELECTIONS**

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American democracy was founded on the principle that the voice of the people should guide the country in all of its endeavors. However, a balance must be struck between democratic principles of voting and upholding the integrity of elections. Elders make up a large proportion of the voting-age population, but the elderly are more susceptible to cognitive deficiencies such as dementia, Alzheimer's disease, and other degenerative conditions. In response to this issue, the states have instituted a variety of different methods, many of which are ineffective and unjust, to determine whether an elderly individual has the mental capacity to vote. To combat the injustice, the United States should institute a national standard that enables all voters with the requisite mental capacity to exercise their right to vote. The national standard would employ a functional ability test to measure an elderly individual's mental capacity by focusing on the individual's specific knowledge and awareness. Moreover, state laws that make use of status determinations and automatically disenfranchise elders under guardianship must be eliminated. This national standard will allow the United States to include the maximum number of elders in the election process while, at the same time, maintaining the integrity of elections. Without such a solution, many elders who have the mental capacity to vote may become disenfranchised.

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I. Introduction

As a democratic nation, the United States relies on the votes of its citizens to determine leadership through the use of elections. The age group with the highest voter turnout is ages sixty-five to seventy-four.¹ Seventy-one percent of elderly individuals in this age range voted in the 2012 election.² Of the 132.9 million Americans who reported voting in the 2012 election, 17.2 million were ages sixty-five to seventy-four, and another 12.5 million Americans seventy-five years or older voted.³ Thus, Americans above the age of sixty-five compose approximately twenty-two percent of the total vote in presidential elections.

Sadly, this group of persons is particularly vulnerable. The elderly population remains more susceptible to cognitive deficiencies as a result of aging, often in the form of dementia and Alzheimer's disease.⁴ Dementia and Alzheimer's disease, degenerative conditions, affect the ability to process information, and the incidence of dementia and Alzheimer's disease increases with age.⁵ These disorders affect an estimated four million elderly Americans.⁶

Many have called into question the ability of elderly citizens with signs of dementia to vote in elections as a result of cognitive deficiencies. Most states have revoked voting rights for those affected by these cognitive disorders.⁷ Studies comparing those with dementia to those without have shown that while elderly persons with dementia understand the concept and consequences of voting, they are not competent when it comes to making a choice while voting or demonstrating consequential reasoning.⁸

For example, a man voting in the 2000 election in Florida was an Alzheimer's patient; due to his condition, he believed at the time of

1. Loraine A. West et al., *65+ in the United States: 2010*, U.S. CENSUS BUREAU, Table 5-8, 148 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf>.

2. *Id.*

3. *Id.* at Figure 5-18.

4. *Id.* at 40.

5. *Id.*

6. Michael Marshall, *Who Decides If People with Dementia Should Vote?*, UNIV. OF VA. SCH. OF LAW (2004), https://www.law.virginia.edu/html/news/2004_fall/eldervote.htm (last visited Nov. 17, 2016).

7. Luis Javier Irastorza et al., *Capacity to Vote in Persons with Dementia and the Elderly*, INT'L J. OF ALZHEIMER'S DISEASE, <http://www.hindawi.com/journals/ijad/2011/941041/> (last visited Nov. 17, 2016) [hereinafter Irastorza].

8. *Id.*

the election that President Roosevelt was in office, yet he still voted in the 2000 election when his wife filled out his ballot for him.⁹ Florida, a state with a large elderly population, was the deciding state in the electoral count that went to President Bush, and it was won by a mere 537 votes.¹⁰ It is a concerning phenomenon that in instances where an individual is not in the state of mind to make a choice, a family member makes a choice for them. This occurrence creates concern because it calls the integrity of the election into question. Votes represent the voice of the people, and ideally, these votes would be cast in a cognizant manner. Apprehension as to whether elderly individuals can responsibly cast votes stem from this valid concern.

Each state has different laws for determining whether elderly individuals with cognitive deficiencies should be allowed to cast votes.¹¹ Some states do not allow these citizens, who demonstrate signs of mental deficiencies, to vote at all, or take the right to vote away from those who still have the capacity to cast a vote.¹² Some states revoke the right to vote if the person is under guardianship of another.¹³ Many citizens who would otherwise be considered competent to vote are unable to, according to the law, merely because they reside in a nursing home.¹⁴ Some states only bar voting if there has been a court order ruling that the person is unfit to vote.¹⁵

The laws adopted by each state not only remain inconsistent with one another, but also remain either too broad or too narrow to adequately protect the right to vote for elderly persons with cognitive disorders. The laws throughout the rest of the Western world appear to be less polarizing, with many nations implementing a functional ability test to assess voting capacity. This strategy strikes a balance between preservation of election integrity and the personal integrity of elderly voters.

9. Shankar Vedantam, *Dementia and the Voter*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/articles/A18916-2004Sep13.html> (last visited Nov. 17, 2016).

10. *Id.*

11. Mary Schrauben, *Ensuring the Fundamental Right to Vote for Elderly Citizens in the United States*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 307, 310 (2007) [hereinafter Schrauben].

12. *Id.* at 324.

13. Sally Balch Hurme and Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 950 (2007) [hereinafter Balch Hurme].

14. Schrauben, *supra* note 11, at 319.

15. Balch Hurme, *supra* note 13, at 957.

Part II of this Note discusses the background of this issue by discussing the value the United States places on the right to vote, defining the capacity to vote, and examining how mental capacity is assessed. Part III of this Note analyzes the different laws states have adopted in dealing with elderly individuals with diminished capacity, the advantages and disadvantages to these different laws, how other nations around the world deal with this very issue of voting capacity, and the various recommendations by national and global institutions on how to improve the current system in place for disenfranchisement of elderly individuals with cognitive deficiencies. Part IV recommends an approach to determining capacity to vote based upon functional ability, not the status of the elderly individual, through the use of a test, and also poses alterations that can be made to the American Bar Association recommendation on assessing the capacity to vote for those with cognitive disorders. Part V concludes.

II. Background

Many factors go into the decision of whether or not to allow elderly individuals with diminished capacity to vote. First, the importance of the practice of voting in the United States impacts the view that many hold in deciding whether to disenfranchise voters. Those who highly regard the process of democracy and the importance of individual votes are more likely to opt in favor of preserving the vote of incapacitated individuals. Additionally, there is confusion among experts, particularly medical professionals, as to how to define the capacity to vote and assess this capacity. This confusion has resulted in a variety of policies within the United States and different methods of testing for capacity. Understanding these policies and assessments may help to clarify the issues facing the elderly population in regards to disenfranchisement and assist in the creation of a positive and comprehensive solution.

A. The Right to Vote

Voting is considered a fundamental right in the United States.¹⁶ It is a right thought to be the bedrock of American democracy and should be protected and ensured for all citizens. Prior discrimination limited access of certain groups to vote, and that discrimination led to

16. *Id.* at 931.

changes in the law, so as to prevent future prejudice and injustice from occurring. Until the 1920s, women in the United States were not allowed to vote.¹⁷ More, due to discrimination against the black community, state laws prevented black voters from casting a ballot.¹⁸ While the laws were not direct in their denial of black voters, the laws had the purpose and effect of inhibiting the black vote.¹⁹ Now, as a result of these embarrassments in American history, the United States Constitution guarantees the right to vote for individuals above age eighteen and forbids discrimination of voting based on gender and race.²⁰

Although the Constitution protects the right to vote, states, through their individual constitutions, are able to limit the right to vote for public policy reasons. All states, with the exception of Pennsylvania and Connecticut, have laws that exclude certain groups of people from voting.²¹ The commonly excluded groups include criminals and those that have been committed to mental institutions, or are not considered to be of sound mind.²²

The Supreme Court has ruled on the exclusions of voters in state constitutions and election regulations. Based on the Supreme Court ruling in *Harper v. Virginia State Board of Elections*, legislation can prohibit certain groups from voting.²³ However, to successfully and constitutionally prohibit a particular group from voting, the law must survive strict scrutiny.²⁴ This means that the law must have a compelling governmental interest in order for the disenfranchisement of the group's right to be justified.

Because voting is regarded as a fundamental right, many consider it equally important to preserve the integrity of the vote. Votes represent the voice of the people. Therefore, many argue that those that have mental incapacities should not be able to vote, because those votes are not made in the proper mindset with the consequential reasoning required in making an important decision, thus devaluing the

17. U.S. CONST. amend. XIX.

18. See generally *South Carolina v. Katzenbach*, 385 U.S. 374 (1967).

19. *Id.*

20. U.S. CONST. amends. XV, XIX, XXVI.

21. Balch Hurme, *supra* note 13, at 934.

22. *Id.* at 934-35.

23. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 679 (1966).

24. See generally *id.*

individual's vote.²⁵ As a result of the fear of loss of election integrity, most states limit the right to vote for people with mental incapacity; however, the definition of mental incapacitation differs in each state.²⁶

B. Defining the Capacity to Vote

Forty-four states do not allow citizens with cognitive deficiencies to cast votes.²⁷ However, in defining who can and cannot vote, the states not only vary in approach, but also create laws that are difficult to decipher.²⁸ Each state defines the capacity to vote differently; often-times, these definitions are poorly articulated by state constitutions and legislatures, circular in nature, and do not give a clear rule as to which qualities are necessary in order to preserve an individual's right to vote.²⁹

Similarly, definitions of incapacity to vote are muddled and become circular when the definition merely describes the right to vote by having the right to vote. The Iowa constitution maintains that individuals have diminished capacity to vote when they are "incapable of comprehend[ing] and exercise[ing] the right to vote."³⁰ These guidelines for diminished capacity include the phrases "right to vote" and "voting judgment" within them, thus eliminating the clarity that these definitions are meant to provide because they merely reiterate the term being defined in the definition itself. The definitions do nothing to remedy the trouble with how diminished capacity is understood and instead create confusion based on the circular wording.

Additionally, many states use language that is not specific to elderly individuals with cognitive impairments. However, the language that is used, while not specific to this population, is often used to revoke the voting rights of elderly individuals. Restricting the votes of "idiots," "insane" persons, and "lunatics" does not define capacity to

25. Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L. J. 481, 486 (2001) [hereinafter Schriener].

26. Balch Hurme, *supra* note 13, at 935-36.

27. Schriener, *supra* note 25, at 484.

28. Balch Hurme, *supra* note 13, at 961.

29. *Id.* For example, Delaware describes diminished capacity as the "severe cognitive impairment that precludes basic voting judgment." 15 Del. Code § 1701 (2012). By defining the lack of voting judgment using the exact term "voting judgment" does not help to explain what voting judgment is. No questions as to what constitutes voting judgment are answered by the constitutional definitions and laws.

30. IOWA CONST. § 633.556.

vote, but the language is used to disenfranchise elderly voters.³¹ Legislatures use this language in defining the scope of who is allowed to vote, and as a result, elderly individuals are unfairly captured in the scope of the law.

Although these states lack clarity in describing diminished capacity, there are states, such as Washington and Wisconsin, that provide more precise and transparent definitions. Washington laws describe diminished capacity to vote as a “lack [in] the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice.”³² Similarly, in the state of Wisconsin, the law looks to whether the elderly individual is able to understand the impact of their vote and how elections work by defining diminished capacity as when an individual is “incapable of understanding the objective of the electoral process.”³³ These definitions get to the root of the issue when elderly individuals are voting. Mental incapacity to vote pertains to whether individuals are able to understand what they are doing and how their vote matters in the scheme of the election.

Furthermore, scholars highlight a dichotomy between the “capacity to decide something and the capacity to do something.”³⁴ In other words, the lack of physical capacity does not mean there is a lack of cognitive capacity. For example, although a person might not have the capacity to vote by doing, through physical means, they might have the mental capacity to decide for whom they wish to vote in an informed manner.

These individuals may have maintained the capacity to make decisions. Decisional capacity has been defined by constitutions and legislatures differently, though there is a consensus that it involves an understanding of relevant information and implications of that information related to that individual’s life, the ability to compare options, and ultimately choose an option.³⁵ Decisional capabilities are those that must be assessed and tailored to in the formulation of voting laws.

31. Note, *VII. Voting Rights and the Mentally Incapacitated*, 121 HARV. L. REV. 1179, 1182 (2008).

32. WASH. REV. CODE ANN. § 11.88.010 (2008).

33. WIS. STAT. § 54.25 (West 2016); Balch Hurme, *supra* note 13, at 961.

34. Balch Hurme, *supra* note 13, at 962.

35. *Id.* at 963.

C. Assessing Mental Capacity

When assessing mental capacity, doctors and the court examine certain characteristics: understanding, appreciation of issues, and reasoning.³⁶ Laws in many states attempt to prevent elderly individuals from voting if they lack these capabilities; however, it is often difficult to judge whether or not elderly individuals have retained these qualities.³⁷ In many states, judges hear evidence of incapacity and make an assessment based on the facts brought forth on whether or not the individual should be disenfranchised.³⁸ The judge, in making this assessment, must “hear evidence from . . . expert[s] that prove[s] that the person is not able to understand what voting is and cannot form an opinion about the choices on the ballot.”³⁹ This judgment is incredibly discretionary, and there is no scientific justification for the determination by the judge.

In recent years, with the growth in medical knowledge and instruments, there are tests that may be able to assess whether individuals with diminished capacity still retain these qualities and the ability to make decisions while voting. The Competence Assessment Tool for Voting (CAT-V) determines whether individuals have an understanding of voting and an understanding of the impact that their voting has in addition to determining if they are able to make a decision when given a list of candidates.⁴⁰ The test is administered with the purpose of creating an individualized standard based on function for the capacity to vote.⁴¹ The CAT-V scores individuals after they are given open-ended questions regarding elections.⁴² They are scored based on the correctness of their answers and the clarity and demonstration of understanding.⁴³ Test administrators deduct points for ambiguity and irrelevance.⁴⁴ This standardized test is easily administered to individuals, which would allow for broad use of the test.⁴⁵

36. *Id.*

37. *Id.*

38. *Id.* at 955.

39. *Id.*

40. Irastorza, *supra* note 7.

41. See generally Paul S. Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094 (2005) [hereinafter Appelbaum].

42. Irastorza, *supra* note 7.

43. *Id.*

44. Balch Hurme, *supra* note 13, at 967.

45. See generally Pietro Tiraboschi et al., *Evaluating Voting Competence in Persons with Alzheimer Disease*, 2011, INT. J. ALZHEIMER'S DISEASE 1 (2011).

Studies have been conducted by scholars on the effectiveness and accuracy of the CAT-V in assessing the capacity of individuals with cognitive impairments to vote.⁴⁶ These studies are initiated by first defining the mental state of the elderly individual being tested.⁴⁷ The mental state is determined through the use of the Mini-Mental State Examination (MMSE), which states the severity of the individual's cognitive impairment.⁴⁸ For example, the MMSE will indicate whether an individual is suffering from mild, moderate, or severe Alzheimer's disease.⁴⁹ Once the individuals have been placed into groups by the severity of cognitive deficiency, these groups are subjected to the CAT-V to determine their level of understanding in regards to their voting duties and whether or not they are able to make a choice regarding candidates.⁵⁰ The results of these studies have shown that each of the different groups, as divided by the MMSE, has a different voting capacity.⁵¹ Research on the CAT-V depicts this standardized test as a reliable and helpful tool in the assessment of voting capacity.⁵²

III. Analysis

Due to the variety of methods used to assess mental capacity and whether incapacity should prohibit voting, the recommendation of a method requires an analysis of the different laws that states use in broaching this issue. Understanding how interest groups, legal experts, and other nations view the existing laws and which methods these groups endorse are critical to the analysis.

A. State Laws Addressing Mental Capacity to Vote

There is a split among states as to how incapacity to vote is defined and whether elderly individuals with mental incapacities are allowed to vote.⁵³ Only ten states do not restrict the rights of any voter

46. See Appelbaum, *supra* note 41, at 2094.

47. *Id.* at 2095.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Balch Hurme, *supra* note 13, at 960.

based on mental disability.⁵⁴ Forty states disenfranchise voters if they are mentally disabled.⁵⁵ Disenfranchisement occurs because, depending on the state, the voter either meets the broad definition of mentally disabled given by state statute or election regulations, the voter is under guardianship of another, or a court proceeding has taken place resulting in the voter disenfranchisement.⁵⁶ When disenfranchisement occurs because a voter falls into one of these categories, the voter loses his or her right based upon a status determination,⁵⁷ meaning that government officials label these individual voters and disenfranchise them based on their status as being mentally incapable or under guardianship.⁵⁸ Just thirteen of the forty states that allow disenfranchisement of voters require an individualized determination on whether the individual has the capacity to vote.⁵⁹

There are four main groups states fall into when determining whether an elderly individual with mental incapacity has the right to vote: incapacity by status, incapacity by functional ability, alternative methods to determine capacity, and those states that do not touch upon mental incapacity when it comes to voting at all.

1. INCAPACITY BY STATUS

States that determine elderly citizens cannot vote based on a status rely not on the mental abilities of the patient, but by a legal or medical action. The guardianship statutes have drawn a bright, easily applicable line for who can and cannot vote due to diminished capacity.

As previously discussed, each state differs in its definition of those able to vote. However, many use terms such as “idiot” and “insane.”⁶⁰ The use of these terms suggests that the states base voting determinations on whether or not a person is labeled and placed into a specific category. Additionally, most states use the term “mentally incompetent” when validating disenfranchisement of individuals.⁶¹ This

54. DEP'T OF LEGIS. SERV., BARRIERS TO VOTING: INDIVIDUALS UNDER GUARDIANSHIP FOR MENTAL DISABILITY, 1, 6 (2009) [hereinafter BARRIERS TO VOTING].

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See, e.g.* KY. CONST. § 145; *see also* MINN. CONST. art. VII, § 1; OHIO CONST. art. V, § 6.

61. *See generally* Balch Hurme, *supra* note 13.

terminology also implies the use of categorization to determine whether an individual has the mental capacity to vote. Of the many states that use this phrase, only five states have a test to determine whether a person is mentally incompetent.⁶² Therefore, with the exception of these five states (California, Delaware, Hawaii, New Jersey, and Wisconsin),⁶³ voters are judged by status as opposed to their functional ability.

Guardianship statutes are used by four states (as of 2007) to define who can and cannot vote due to mental incapacity: Maryland, Massachusetts, Minnesota, and Missouri.⁶⁴ While each state defines the term “under guardianship” in a slightly different manner, the term generally means that the individual is “incapable of taking care of [him or herself].”⁶⁵

Several states had initially used guardianship as a measure of voting capacity but have since stopped using guardianship as an automatic indicator to disenfranchise voters. For example, the Idaho state constitution had initially banned individuals under guardianship from voting.⁶⁶ However, this provision was amended in 1998.⁶⁷ Additionally, nineteen states reason that even if an individual is under guardianship, they are still able to “retain all legal and civil rights not specifically taken away.”⁶⁸

The Supreme Court of Maine found the use of guardianship as the sole and determinative marker for disenfranchisement to be unconstitutional.⁶⁹ In the case *Doe v. Rowe*, three women, prohibited from voting as a result of mental illness, consolidated cases and sued the state of Maine.⁷⁰ The lawsuit was based on the grounds that the state constitutional provision disenfranchised them due to their status as under guardianship.⁷¹ Two of the three women were elderly individuals, both disenfranchised for mental illnesses, with one of the women, June Doe, suffering from mild organic brain syndrome, a cognitive disorder akin to dementia.⁷²

62. BARRIERS TO VOTING, *supra* note 54, at 4.

63. *Id.* at 4-5.

64. Balch Hurme, *supra* note 13, at 943.

65. *Id.* at 944.

66. IDAHO CONST. art. VI, § 3.

67. See generally Balch Hurme, *supra* note 13.

68. *Id.* at 950.

69. *Id.* at 980.

70. *Doe v. Rowe*, 157 F. Supp. 2d 35, 39 (2001).

71. *Id.*

72. *Id.* at 40.

Defendants in this case argue against the Maine constitutional provision regarding voting that was written in 1965.⁷³ According to the constitution, a person is not able to vote when “under guardianship for reasons of mental illness,” and if a person under guardianship does cast a vote, they can be subject to criminal prosecution.⁷⁴ The court held that this method of disenfranchisement was illegal because it violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as well as Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.⁷⁵

The court acknowledges that strict scrutiny must be applied to these cases, meaning that the effects that the voting of the population would have on society must justify the exclusion of this group.⁷⁶ According to the court, in this case, the compelling interest does not weigh enough, and is therefore insufficient, to allow for the use of a status to disenfranchise a population.⁷⁷

However, not all states are prohibiting disenfranchisement based on the status of being under guardianship. In *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, three citizens of the state of Missouri filed a lawsuit claiming an equal protections violation due to the Missouri law that prevents them from voting.⁷⁸ According to Missouri law, all citizens are allowed to vote with the exception of any “person who has a guardian . . . by reason of mental incapacity, appointed by a court of competent jurisdiction.”⁷⁹

The result of *Carnahan* differs from the holding in Maine’s *Doe v. Rowe*. While in *Doe* it was found that the disenfranchisement of individuals occurred because they were under guardianship is in violation of the United States Constitution,⁸⁰ the United States Court of Appeals, Eight Circuit, for *Carnahan* made no such finding.⁸¹ Instead, the Mis-

73. *Id.* at 38.

74. *Id.*

75. *Id.* at 46; see US CONST. amend. XIV; see also 42 U.S.C. § 12131; Pub. L. No. 93-112, 87 Stat. 355 (1973).

76. *Doe*, 157 F. Supp. 2d at 51.

77. *Id.*

78. *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 805 (2007).

79. MO. CONST. art. VIII, § 2.

80. *Doe v. Rowe*, 157 F. Supp. 2d 35, 51 (2001) (holding that disenfranchisement due to a status of guardianship violated the Equal Protection Clause and the Due Process Clause of the United States Constitution).

81. *Missouri Protection and Advocacy Services, Inc.*, 499 F.3d at 812.

souri law was found to be constitutional, and the court exploited the need for a straightforward and concrete factor to help make decisions.⁸² Contrary to this, the court also justified the ruling that the law was constitutional by holding that the law is constitutional because it does not “categorically disenfranchise[] persons under full guardianship.”⁸³ Based on this ruling, Missouri has continued to use the constitutional provision disenfranchising voters who are under guardianship, which is, by many states, considered to be a categorical determination because it relies on the status of the individual to revoke the right to vote.

2. INCAPACITY BY FUNCTIONAL ABILITY

As states have been moving away from the status definition of mental capacity to vote, some are moving toward a standard in which functional ability determines the capacity to vote.⁸⁴ In these states, an elderly individual’s right to vote cannot be taken away as a result of diminished capacity unless a judge rules specifically on that individual’s ability to vote.⁸⁵ This was established as a legitimate means to deduct an individual’s voting rights in the New Jersey case *Carroll v. Cobb*.⁸⁶

To determine if mental capacity on the basis of functionality and not status, judges must assess elderly citizens on an individual and personal level. Often, the court makes these determinations during a guardianship proceeding. However, in New Jersey, the decision to withdraw the right to vote comes down to the judge’s determination of the individual and his or her capacity to vote, as opposed to the blanket retraction of the right to vote based on status.⁸⁷ In *Carroll v. Cobb*, thirty-three residents of a school for individuals with mental disabilities successfully filed a lawsuit against the election officials in New Jersey, arguing that they were disenfranchised as a result of categorization.⁸⁸ The court held that the “mere fact that plaintiffs are residents of a state school ‘cannot bar them from voting.’”⁸⁹ This decision was significant because it made decisions of disenfranchisement based

82. *Id.* at 806.

83. *Id.* at 809.

84. Balch Hurme, *supra* note 13, at 960.

85. *Id.*

86. See *Carroll v. Cobb*, 354 A.2d 355 (1976).

87. *Id.*

88. *Id.*

89. *Id.* at 362.

on categorization illegal. Instead, the state would have to rely on whether the individual was functionally capable of casting a vote.

Other states in addition to New Jersey give judges the right to decide if a person is mentally capable of voting in an election. Five states give judges "specific statutory direction" as to what should be considered in making this decision:⁹⁰ California, Delaware, Iowa, Washington, and Wisconsin. Each state "prescribe[s] a test to determine whether an individual is competent to vote."⁹¹ Thus, a judge must find evidence that illustrates the elderly individual's ability to make a choice when voting in an election and evidence that their judgment is sound enough to understand and make a choice as they cast a ballot.⁹²

Each of these states determines competency to vote in different manners. In California, the court makes this determination based on an individual's ability to "complete a voter registration affidavit."⁹³ Delaware, however, requires that a judge find evidence of "severe cognitive impairment" that would "preclude[] [the] exercise of basic voting judgment."⁹⁴ Hawaii, New Jersey, and Wisconsin all rely on a determination of whether an individual has the ability to understand the act of voting, with Hawaii depending on this determination being made by county clerks as opposed to judges.⁹⁵ These findings must be made on an individual level.⁹⁶ This means that a judge or other delegate must make a determination on whether the elderly person has the ability to vote; this determination is made separate from a status or categorization. Instead, the judge must focus on the mentality and functionality of the individual.

The key to the functional ability assessment is the emphasis on the individual. While status determinations look at an individual to make the initial categorization, the choice to disenfranchise by way of status determination overlooks other qualities that the individual possesses that may positively demonstrate capacity to vote regardless of the categorization. Thus, disenfranchisement based on status occurs at a group level, not an individual level, because once categorized, the individual's presence in the group automatically justifies and results

90. Balch Hurme, *supra* note 13, at 960.

91. BARRIERS TO VOTING, *supra* note 54, at 6.

92. Balch Hurme, *supra* note 13, at 960.

93. BARRIERS TO VOTING, *supra* note 54, at 6.

94. *Id.* at 6-7; *see also* 15 Del. Code Ann. § 1701.

95. BARRIERS TO VOTING, *supra* note 54, at 7.

96. *Id.*

in disenfranchisement, regardless of additional, and potentially mitigating factors. In a jurisdiction where a functional ability test is used, other qualities besides the status of the individual are assessed.

3. ALTERNATIVE METHODS OF DETERMINING INCAPACITY TO VOTE

Several states use means of determining whether an elderly individual should be disenfranchised that differ from the straightforward incapacity by status and incapacity by functional ability formulas. One such divergence is the use of the guardianship proceeding to determine whether or not a person has the capacity to vote.⁹⁷ This method combines the judgment of incapacity by status with the judgment of incapacity by functional ability. In these proceedings, when a judge is approving guardianship rights over an individual, the judge is also making a determination on whether that individual should retain the capacity to vote even though they are under guardianship.⁹⁸

Moreover, in Iowa and Washington, the voting rights of a mentally incapacitated individual are written into the guardianship statute.⁹⁹ In Washington, this inserts a functional determination within a status determination.¹⁰⁰ Iowa adopts an additional factor in determining the ability to vote for those individuals placed under guardianship.¹⁰¹ In Iowa, the guardian is able to help in determining if the individual should retain the right to vote.¹⁰² While making these determinations, an individual's vote cannot be transferred to his or her guardian.¹⁰³

4. NO DETERMINATION OF INCAPACITY

The majority of states use one of these methods to disenfranchise voters in an effort to preserve the integrity of the election. However, there are some states that do nothing to prevent elderly individuals from voting, even if they suffer from cognitive disorders that may make them mentally incapable of comprehending their actions as they

97. Balch Hurme, *supra* note 13, at 946.

98. *Id.*

99. BARRIERS TO VOTING, *supra* note 54, at 5.

100. *Id.*

101. *Id.*

102. *Id.*

103. Balch Hurme, *supra* note 13, at 947.

cast a ballot.¹⁰⁴ Ten states, including Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont, do not restrict voting for these individuals.¹⁰⁵

The practice of these states that do not restrict voters is at the opposite end of the spectrum from determining incapacity based on status. There is no question regarding the constitutionality of allowing these citizens to vote. However, what is at issue is whether or not the integrity of the vote is maintained. Fears of election integrity and voter fraud are directly related to this issue.

B. The International Community and Advocacy Organizations Addressing Mental Capacity to Vote

When determining the best methods for allowing elderly individuals with diminished capacity to maintain their voting rights, understanding various perspectives and innovative approaches used and theorized could play an important role on how the United States should proceed going forward. One such analysis should be the assessment of the various methods employed by other countries. Because the United States has no uniform law dictating how to handle mentally incapacitated adults in the voting booth, viewing the laws in other countries and the effects that these laws have on elections and their elderly citizens could be helpful in shaping American law on the subject. The United States is not the only nation attempting to balance the democratic ideal of voting with the barrier of diminished capacity. Insight as to how other countries approach this same dilemma could provide navigation tools for the United States.

Not only should the legislation of other nations be taken into consideration, but it is also important to assess the policy recommendations of groups in the United States. These groups, particularly the American Bar Association, which assesses the legality of public policy, and elder law groups, which advocate for the elderly population in the United States, have opined ideas on the best practices for including the maximum amount of elderly individuals possible while still maintaining the integrity of the vote. To take the opinions of these groups into consideration is to further acknowledge the importance of these groups and demonstrate the priority of the issues concerning the elderly population and their right to vote.

104. BARRIERS TO VOTING, *supra* note 54, at 4.

105. *Id.*

1. DIMINISHED CAPACITY AND VOTING IN OTHER DEMOCRATIC NATIONS

Around the world, ninety-four percent of countries have laws that exclude individuals with diminished mental capacity from the voting process.¹⁰⁶ Other countries limit the voting of those with diminished capacity because there is doubt as to whether those affected can make rational and informed decisions about for whom they will cast their ballot. Previous laws in all of these nations have been over-inclusive, preventing persons who have disabilities from voting even though they still possess the capacity to vote.¹⁰⁷ Nations are now moving away from the broad laws, instead focusing on the people who are not functionally capable of voting.¹⁰⁸

For example, Germany automatically excludes elderly individuals who have been put under the guardianship of another.¹⁰⁹ While guardians can help those who are physically incapable of casting a vote, they can be of no assistance to those who are mentally incapacitated to vote.¹¹⁰ This rule is meant to exclude those who are mentally incapacitated, but due to the nature of the law, more citizens, including those with the mental wherewithal to cast votes, will be excluded from the process.

The laws in Germany are a stark contrast to the laws in Australia, which do not exclude voters unless the elderly individual submits to an administrative hearing that revokes their right to vote.¹¹¹ The criterion for excusing votes in Australia is rigid. Because they use a compulsory voting system, the aim of the nation's voting process is meant to include the votes of as many citizens as possible.¹¹² Elderly individuals with diminished capacity are not excluded from voting; they are merely excused from the duty to vote.¹¹³ Individuals are only removed from the electoral process if a private individual brings the issue to attention; the government does not initiate the revocation of the right to vote.¹¹⁴ It would be reasonable to infer that as a result of the proce-

106. 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) [hereinafter Karlawish].

107. *Id.*

108. *Id.*

109. *Id.* at 896-97.

110. *Id.* at 897.

111. *Id.* at 892.

112. *Id.* at 888.

113. *Id.* at 891.

114. *Id.*

ture for disenfranchisement in Australia, more people with cognitive deficiencies are able to vote, even if they are unable to comprehend the importance of their vote or make a proper decision using consequential reasoning.

In Canada, voting is a right that cannot be denied. The Federal Court of Canada invalidated a previous law disenfranchising voters with diminished capacity.¹¹⁵ Although critics, particularly the Royal Commission on Electoral Reform and Party Financing, argued that allowing all citizens, including those with diminished capacity, to vote would sacrifice the integrity of elections, the government could not come to a consensus on "criterion for disqualification."¹¹⁶ Without any means of distinguishing those with mental incapacity from those with capacity, the provision preventing those with mental disease from voting was repealed. Since disenfranchisement of those with cognitive impairments has been abolished, the ability for elderly individuals to access the polls has been "substantially enhanced."¹¹⁷

Each of these nations uses a different approach to prevent elderly individuals with diminished capacity from casting votes in elections. There is no consensus among the states as to the best method to lessen this issue. Some states use narrower guidelines for determining disenfranchisement, like Germany, some use broader guidelines that grant more citizens the right to vote, like Australia, and some employ no guidelines, like Canada.¹¹⁸ In determining how best to balance the granting of voting rights to those with cognitive disorders and maintaining the integrity of the election, it is helpful to observe the success that other nations have experienced using these methods.

The nations discussed have federal laws dictating whether or not to disenfranchise the elderly with cognitive deficiencies. The United States, on the other hand, does not have such an overarching law, instead relying on each state to regulate on this issue. It is clear based on the experiences of the other nations that there is no irreparable harm done to the integrity of the election when "dispensing with the capacity exclusion."¹¹⁹

The European Union is similar to the United States in its approach to disenfranchising those with mental incapacity. Like the

115. *Id.* at 901.

116. *Id.* at 903.

117. *Id.* at 905.

118. *Id.* at 879.

119. *Id.* at 909.

United States, in which the states each have individual policies as to which members of the population are not qualified to vote, the European Union is made up of nations that differ in their approaches to this same problem.¹²⁰ According to a report distributed by the European Union Agency for Fundamental Rights (FRA), nations belonging to the European Union (EU) fall into three categories along the political participation spectrum.¹²¹ These categories are: exclusion from political participation, limited political participation, and full political participation.¹²²

Several European nations have automatic disqualifications written into state constitutions that prevent individuals with mental health problems and intellectual disabilities from voting.¹²³ Important to note is that these nations, such as Hungary, Germany, Greece, and Poland, base the determination of voting capacity on status as opposed to functional ability.¹²⁴ Nations such as Spain and France have limited political participation.¹²⁵ In these countries, individuals are not automatically disenfranchised due to status.¹²⁶ Instead, judges will make individual determinations on capacity to vote.¹²⁷ Partial political participation differs from full political participation, in nations such as Austria and the Netherlands, because these states have no exclusion policies for any individual, regardless of mental capacity.¹²⁸

The FRA advises that the nations of Europe revise legislation that completely bans the participation of individuals with diminished mental capacity.¹²⁹ This recommendation for the EU can easily be applied to the United States. America is made up of fifty states, just as the European Union is made up of 28 nations.¹³⁰ Each nation is separately run, just as the states each have separate constitutions and laws on voting. The United States should take into consideration the approach of the European Union in its effort to create a standard to

120. See generally EUR.UNION AGENCY FOR FUNDAMENTAL RTS., THE RIGHT TO POLITICAL PARTICIPATION OF PERSONS WITH MENTAL HEALTH PROBLEMS AND PERSONS WITH INTELLECTUAL DISABILITIES, (2010).

121. See *id.*

122. *Id.* at 15.

123. *Id.*

124. *Id.*

125. *Id.* at 16.

126. *Id.* at 17.

127. *Id.*

128. *Id.* at 19.

129. *Id.* at 22.

130. EU Member Countries, EUR. UNION, <http://europa.eu/about-eu/countries/member-countries/> (last visited Nov. 17, 2016).

which all member nations should adhere in regards to voting capacity.

2. ABA RECOMMENDATION OF HOW STATES SHOULD ADDRESS MENTAL CAPACITY

The American Bar Association (ABA) is the professional organization committed to improving the legal profession and community by advocating for justice. In an effort to preserve equality and justice for all individuals while voting, the ABA recommends the evolution of laws used by the states in determining the voting status of elderly citizens with cognitive impairments.¹³¹ Specifically, the ABA suggests moving away from status laws and toward laws based on functional ability.¹³² Based on this recommendation, disenfranchisement should not be automatic just because an elderly individual has been placed under guardianship.¹³³

According to the ABA suggestion, states and election commissions

“should explicitly preserve the right to vote unless certain criteria are met and there is a court order that specifically addresses the individual’s right to vote.”¹³⁴ Elderly citizens can only be disenfranchised when: “[1] the exclusion is based on a determination by a court of competent jurisdiction, [2] appropriate due process protections have been afforded, [3] the court finds that the individual cannot communicate, with or without accommodations, a specific desire to participate in the voting process, and [4] the findings are established by clear and convincing evidence.”¹³⁵

Based on the recommendations specified by the ABA, preventing individuals from voting based only on their status as citizens is an improper method of judgment. While the ABA does not necessarily advocate for judging incapacity by a determination of functional ability, the language seems to indicate that this would be a preferable method over a status judgment. Because the organization is advocating for disenfranchisement only when a judge makes a ruling that a mentally incapacitated person cannot legally vote, it suggests that a voting determination is based on whether that individual can function as a voter because a judge would be assessing their abilities.

131. See generally BARRIERS TO VOTING, *supra* note 54, at 10.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

3. INTEREST GROUPS ADDRESSING MENTAL CAPACITY

There are several groups in the United States that dedicate themselves to advocating for the elderly population. While all of these groups advocate for elderly citizens who are being excluded from the democratic process, the recommendations for whether to and how to disenfranchise elderly voters differ.

Disability Justice is an advocacy group dedicated to retaining civil rights for individuals with disabilities.¹³⁶ While the main focus of this group pertains to individuals with developmental disabilities,¹³⁷ Disability Justice also advocates on behalf of those with cognitive disabilities, including elderly individuals who have diminished cognitive capacity.¹³⁸ Disability Justice clearly states that the voting system in the United States needs to change so as to increase the population able to cast votes.¹³⁹ To do this, the group insinuates that the ABA recommendation would mark a positive change for the voting system.¹⁴⁰ However, the group also goes further than the ABA by advocating for the elimination of the antiquated language used in state statutes and legislation that make broad and generic restrictions on the right to vote.¹⁴¹ Additionally, the group recommends that states narrow the grounds under which they are able to disenfranchise voters to those individuals that do not understand the nature of voting.¹⁴²

The National Academy of Elder Law Attorneys, Inc. (NAELA) is an association of attorneys geared towards advocating on behalf of elderly individuals dealing with legal issues, though the group does not provide legal services to elderly individuals.¹⁴³ The focus is on educating attorneys to better navigate the law when helping their clients.¹⁴⁴ In an article for the NAELA Journal, attorneys Feinstein and Webber

136. *The Fight for Civil Rights for People with Disabilities*, DISABILITY JUST., <http://disabilityjustice.org> (last visited Nov. 17, 2016).

137. *Id.*

138. *The Right to Vote*, DISABILITY JUST., <http://disabilityjustice.org/right-to-vote/> (last visited Nov. 17, 2016).

139. *Id.*

140. *Id.*

141. Twin Cities PBS, *Changes to the Voting System*, YOUTUBE <https://www.youtube.com/watch?v=KsPd2YjXW-w> (last visited Nov. 17, 2016).

142. *Id.*

143. *About NAELA*, NAT'L ACAD. OF ELDER LAW ATT'YS, INC., https://www.naela.org/Public/About/Public/About_NAELA/About.aspx?hkey=3ae07a3c-c172-4565-a52b-091d49e31841 (last visited Nov. 17, 2016).

144. *Id.*

discuss the issue of voting when under guardianship.¹⁴⁵ According to their view, if the individual under guardianship is able to vote, an over-reaching law restricting those under guardianship from voting could prevent them from doing so.¹⁴⁶ Thus, they recommend that guardians should advocate for the individual if they believe that, while under guardianship, the capacity to vote still exists.¹⁴⁷

The Bazelon Center for Mental Health Law is an interest group focused on the welfare and rights of individuals with mental illness and disabilities.¹⁴⁸ The Center has created educational material for individuals with diminished capacity so as to explain the rights that these individuals are entitled to.¹⁴⁹ According to the Center, under federal law, even individuals under guardianship have the right to vote, judges are the only authoritative figures that are able to disenfranchise voters,¹⁵⁰ individuals with diminished capacity have the right to receive help in voting, and states that attempt to impose a requirement that would limit an individuals right to vote must apply to all voters.¹⁵¹

In particular, the Bazelon Center argues that equality for those with and without mental disabilities is vital;¹⁵² if a state requires that a mentally incapacitated individual demonstrates an understanding of the nature of voting, all citizens must be subject to a showing of capacity when registering to vote to demonstrate that they too understand the nature of voting.¹⁵³ While individuals deemed mentally incapacitated have to “demonstrate the rationale of their votes or their understanding of how the voting process works,” other citizens have to make no such showing.¹⁵⁴ Many citizens have not taken any time to

145. See generally Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAELA J. 125 (2014) [hereinafter Feinstein & Webber].

146. *Id.*

147. *Id.*

148. *Who We Are*, BAZELON CTR., <http://www.bazelon.org/Who-We-Are.aspx> (last visited Nov. 17, 2016).

149. *Voting*, BAZELON CTR., <http://www.bazelon.org/Where-We-Stand/Self-Determination/Voting.aspx> (last visited Nov. 17, 2016).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Vote. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities*, BAZELON CTR. FOR MENTAL HEALTH LAW & NAT'L DISABILITY RTS. NETWORK, 14 (2008), http://www.bazelon.org/LinkClick.aspx?fileticket=8GRTfqaH_Qc%3d&tabid=543 (last visited Nov. 17, 2016) [hereinafter *Vote. It's Your Right*].

154. *Id.*

research the candidates or understand the policies, and yet they have the right to vote automatically, without ever having to prove that their vote is made in a thoughtful and competent manner.

These three interest groups that advocate for the elderly and disabled all take different approaches in how to create easier and more accessible voting for elderly individuals with diminished capacity because they each focus on different issues. Disability Justice focuses on the language embedded in the state statutes and constitutions that limit voting while the NAELA focuses on issues with those under guardianship being disenfranchised.¹⁵⁵ The Bazelon Center focuses on both of these issues, while also bringing up the issues of help given to voters and the inequality that is inherent in the proposed solutions to disenfranchised voters.¹⁵⁶

As is clear from the various recommendations, the issue of disenfranchising voters for reason of mental incapacity has many different branches. However, it is also clear that elder law interest groups all advocate for allowing better access to the polls.

4. SIMILARITIES AND DIFFERENCES IN APPROACHES TO ADDRESSING MENTAL CAPACITY

Other nations, the ABA, and the various elder law interest groups all propose different resolutions for how to incorporate individuals with diminished capacity in the voting population. Several nations, such as Germany, prevent any voting on the part of this category of people.¹⁵⁷ This is a status determination that is similar to those made in states like Missouri.¹⁵⁸ Through the use of status determinations, voters are turned away merely for the label applied to them as a result of their diminished capacity or need for a legal guardian. This exclusion is exactly what the NAELA and Bazelon Center argue against.¹⁵⁹ Both of these institutions maintain that guardianship should not be the decisive factor in disenfranchisement, as it is often the case that elderly individuals have been placed under guardianship for le-

155. See *The Right to Vote*, DISABILITY JUST., <http://disabilityjustice.org/right-to-vote/> (last visited Aug. 20, 2016); Feinstein & Webber, *supra* note 145.

156. See *Vote. It's Your Right*, *supra* note 153, at 14.

157. Karlawish, *supra* note 106, at 896-97.

158. Balch Hurme, *supra* note 13, at 960.

159. See *generally Vote. It's Your Right*, *supra* note 153; Feinstein & Webber, *supra* note 145.

gal reasons, yet they have retained their mental capacity to the extent to which they could successfully cast a vote.¹⁶⁰

What the NAELA and Bazelon Center advocate for, the individual mental capacity assessment of elderly citizens when under guardianship, is a strategy that has been implemented in Australia.¹⁶¹ In Australia, and in several countries in the European Union, there is limited political participation.¹⁶² These nations disenfranchise voters only when they are found incapacitated on an individual level, not based on a status determination.¹⁶³ Thus, these nations are assessing the functional ability of voters, and judges are making individualized decisions based on the capacity of the individual.

Still, there are nations, such as Canada and the Netherlands, that forbid the disenfranchisement of voters, allowing all individuals, regardless of mental capacity to vote. While this is an incredibly inclusive solution, none of the interest groups suggest this approach. One reason this approach may be unpopular is the threat to democratic integrity that it presents. If individuals who do not understand the nature of voting are able to cast a ballot for a candidate, the election results are less trustworthy. Even Bazelon Center, which advocates for inclusion of those with mental incapacities, reasons that a determination of competence may be necessary to preserve integrity of the election by making the argument that *all* citizens be tested for competence prior to voting, not just those deemed mentally incapacitated.

IV. Recommendation

The methods employed by different states within the United States are varied and ineffectual. Many of the state laws cause dismissal of fundamental rights owed to elderly individuals. However, each of the states has a different policy in regards to whom and how prohibition of voting will occur. The United States federal government should adopt new regulations to eliminate the overly inclusive laws currently in place that exclude competent voters, and instead should

160. *Vote. It's Your Right*, *supra* note 153; Feinstein & Webber, *supra* note 145.

161. See Feinstein & Webber, *supra* note 145; *Vote. It's Your Right*, *supra* note 153.

162. *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., 22 (Oct. 2010), http://fra.europa.eu/sites/default/files/fra_uploads/1216-Report-vote-disability_EN.pdf (last visited Nov. 17, 2016); Karlawish, *supra* note 106, at 892.

163. See generally *The Right to Political Participation*, *supra* note 162.

create and implement a national standard of voting that enables all capable voters to exercise their right to vote.

The primary method the United States government should employ is a functional ability test for elderly individuals. This would require the elimination of status determinations. Thus, state constitutions must be revised, abolishing labels such as “idiot” and “insane,” labels that have made the exclusion of elderly individuals with diminished capacity easy targets of disenfranchisement.

Moreover, being under guardianship should not automatically result in disenfranchisement. In a status determination jurisdiction, the mere presence of a guardian, even if not for reasons compromising the cognitive ability to vote, restricts elderly individuals. This practice is unfair because these people have the mental wherewithal to cast a vote and know that they are being cheated out of their right solely for the reason that they have a guardian. Elderly individuals should feel confident in seeking the help that they need without worrying if this choice will strip them of rights in the future.

The key to assessment using a functional ability test centers on analysis of the individual and that man or woman’s specific knowledge and awareness. Some states require judges to make this decision with each person. When a person is regarded as incapable of voting, a judicial officer will assess them personally to determine if this is in fact the case.

One concern regarding this method is the slowing of the judicial process; the courts will become bogged down with these types of cases. A remedy to this issue is the use of the CAT-V test, which would determine if the individual understands voting, the impact of their vote, and can make a determination based on a list of candidates.¹⁶⁴ The test assesses capacity by determining the individual’s functional ability. This process could take place in a doctor’s office, or another chosen venue, outside of the courts, and will only be brought to the attention of the court when results demonstrate incapacity to vote. This strategy would reduce the number of cases coming through the court system and only disenfranchise the voters who are found to be incapacitated through the use of a qualitative test.

Australia is one of the nations that both limits voters who are mentally incapacitated and attempts to include as many voters as possible in the democratic process; voters are only disenfranchised upon

164. See generally Irastorza, *supra* note 7.

a surveillance of the voter's functional ability after a private citizen has alerted the government of a potential incapacity to vote.¹⁶⁵ The nation does not use the proposed CAT-V test, but merely has each individual for whom there is a competency concern brought before a judge to make an individual determination on voting capacity. This method clearly assesses the functional ability of each individual because the government does not attempt to disenfranchise on its own volition, and instead, acts to disqualify voters only when the individual fails to meet the functional expectation.

Adopting a policy similar to that of Australia could prevent the unreasonable and unjust disenfranchisement of many elderly individuals in the United States. Australia's policy regarding mental capacity to vote is surely a step in the right direction; however, issues remain that could jeopardize the integrity of the election. For example, because reports of incompetence originate from private citizens, elderly voters might still vote, even if they have lost capacity to do so, because this incapacity was not conveyed, and therefore, the functional ability of the voter was not assessed. Due to the risk of underreporting, when considering this exact policy, and whether or not the United States should adopt one that parallels, balancing the value of the integrity of the voters versus the integrity of the election becomes crucial.

The American Bar Association has recommended a potential solution. Recommending changes to the policies used in the United States from status determinations to a determination based more upon functional ability,¹⁶⁶ the ABA endorses a policy more akin to the other nations of the Western world. Only a court order is sufficient to disenfranchise a voter under the policy of the ABA.¹⁶⁷ Therefore, judges under this policy must assess each person individually.

While the recommended policy by the ABA is surely more inclusive, rational, and just than the current laws, a potential issue with the problem remains: when do citizens come before a judge to have their functional ability assessed? In Australia, private citizens bring the issue of competency to the attention of the court.¹⁶⁸ Under the ABA recommendation, it appears as though a status determination must be made on the part of the government, triggering the entire process. The question thus becomes whether or not a status determination is ac-

165. Karlawish, *supra* note 106, at 891.

166. BARRIERS TO VOTING, *supra* note 54, at 10.

167. *Id.*

168. Karlawish, *supra* note 106, at 891.

ceptable when not automatically terminating the rights of the citizens but using the determination to prompt functional assessment. It appears that this strategy would be reasonable and acceptable so long as the status is not used as the sole factor by the judge when assessing the functional ability of the voter.

Most of the laws used throughout the United States in determining if mental capacity warrants disenfranchisement remain trivial, excessive, and prejudicial. While other nations struggle with this issue as well, many have produced more inclusive laws that focus on the functional ability of the individual. These exemplary nations can pave the way to reform in the United States. Adopting similar laws that have been produced by these forward thinking states, focusing on the functional ability of the individual, would preserve the rights of elderly Americans while still maintaining the integrity of the democratic process.

V. Conclusion

The United States was founded upon the idea that the voice of the people should guide the country's direction. Voting is how this voice is heard, and the United States Constitution guarantees the right to vote to all citizens found to be eligible. The controversy is that some states are limiting the ability for elderly individuals with diminished mental capabilities to vote.

While this action taken by the states preserves the integrity of the election by only allowing individuals able to understand the weight and consequences of their vote to cast a ballot, some state laws create too narrow of a requirement, excluding some elderly individuals from voting who do have the mental wherewithal to cast a vote.

The most effective way to preserve the right to vote to the people that are still capable of voting is for states to adopt a functional ability test, so as to only limit voting for those who are truly unable to cast a vote. Determinations made to disenfranchise are unjust when they prohibit voting without assessing the elderly at an individual level.

