

A CLASS LEFT BEHIND:
AN ASSESSMENT OF STATE VOTER COMPETENCY LAWS AND
THE DISENFRANCHISEMENT OF PEOPLE WITH MENTAL
DISABILITIES

*Lily Verbeck**

One of our most profound accomplishments since the founding of the United States is the progressive broadening of the franchise to include African-Americans, women and others subject to pervasive discrimination. In this process, we have learned that few of the rights or interests of a particular group of Americans can be secure so long as that group lacks the right to vote for officials who will be accountable to them. We have also learned that, as more adult citizens become full participants in our polity, the democratic process is enriched for all. We are still in the process of learning this lesson with regard to persons with disabilities.¹

INTRODUCTION

Voting is a fundamental constitutional right that has long been considered a hallmark of democracy.² Throughout American history, the federal government expanded the right to vote to historically disenfranchised communities, such as women³ and African Americans.⁴ Society has come a long way in ensuring that all individuals have the

* George Mason University Antonin Scalia Law School, J.D. expected, 2022.

¹ Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 353 (2003) (quoting H.R. REP. NO. 107-329, pt.1, at 79 (2001) (additional views of Rep. Steny H. Hoyer)).

² See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.").

³ U.S. CONST. amend. XIX, § 1.

⁴ U.S. CONST. amend. XV, § 1.

right to vote, regardless of race, religion, sex, or education.⁵ Yet, individuals with mental disabilities⁶ have consistently been left behind.⁷

Take, for example, Greg Demer, a middle-aged man from California.⁸ He is a bright individual who is passionate about movies and military aircraft, but because of his autism, has trouble communicating with others.⁹ When Greg turned eighteen in 2005, Greg's mother, Linda, who was worried about her son managing his own financial and health care decisions, sought help from a judge.¹⁰ Following a conservatorship proceeding,¹¹ a California judge then granted Linda a conservatorship over Greg to make those financial and health decisions for him.¹² However, Greg's ability to make independent financial and health decisions were not the only matters on the table.¹³ During his conservatorship process, the judge also ruled Greg was unfit to vote.¹⁴ Declared "mentally incapacitated," Greg joined tens of thousands of Americans with disabilities who have lost their right to vote through a guardianship or conservatorship proceeding.¹⁵

Forty states and Washington, D.C. have voter competency laws.¹⁶ These laws generally require a certain level of competence to register

⁵ See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGEORGE L. REV. 931, 931 (2007).

⁶ This Comment uses the term "mentally disabled" as a generic reference to persons suffering, or legally declared to be suffering, from any mental health problem, whether because of deficiency or disease, that subjects them to special laws regulating their personal, social, or civil rights. See AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* xv n.1 (rev. ed. Samuel J. Brakel & Ronald S. Rock eds., 1971).

⁷ See Hurme & Appelbaum, *supra* note 5, at 963-64.

⁸ Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW (March 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ A conservatorship is a judicial tool that enables a court to legally remove a disabled adult's decision-making capabilities and transfer them to a surrogate decision-maker. See Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143, 166 (1995-96) (quoting W. VA. CODE §§ 44A-2-10(c), 44A-2-11(a), (b)); see also Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 190 (1994) ("[A conservatorship] is a court-imposed process by which a person is relieved of the right to make personal life decisions and another is appointed to make those decisions on that person's behalf.").

¹² Vasilogambros, *supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Kristin Sullivan, *State Voter Competence Laws*, CONN. OFF. OF LEGIS. RES. 1, 1 (Jan. 27, 2020), <https://www.cga.ct.gov/2020/rpt/pdf/2020-R-0018.pdf> (last visited Jan. 5, 2021).

to vote in an attempt to disenfranchise individuals who may be under guardianship¹⁷ or who have certain cognitive disabilities.¹⁸ Given most states with voter competency laws lack a clear legal definition of mental incapacitation, it is often left up to a judge to determine whether the individual before them is incapacitated.¹⁹ This procedure creates uncertainty because although some judges strip voting rights from every person who comes before them in a conservatorship or guardianship case,²⁰ other judges will preserve the right to vote if the individual can pass a basic assessment, such as naming the mayor or the President.²¹ Considering no universal standard exists for measuring the mental capacity required to vote, most states have taken upon themselves the task of implementing laws for measuring such capacity.²²

Kentucky,²³ Mississippi,²⁴ and Ohio²⁵ have voter competency laws in which “idiots” and “insane” persons do not have the right to vote. States are allowed to enact these general prohibition competency laws because they have the ultimate authority to regulate the election process.²⁶ The various voter competency laws enacted by states have raised significant moral and procedural questions. On the ethical side, it might be asked why there is even a state interest in ensuring that voters with various disabilities are competent to vote.²⁷ On the procedural side, how would an individual even qualify as competent to vote? What is the metric used to measure such competency?

This Comment argues that (1) courts should strike down general prohibition incompetency laws because they violate due process, are

¹⁷ Guardianship is the state court process by which an individual called the “ward” is determined to be so incapacitated that it is necessary to remove their rights to make some or all decisions, and delegate that authority to another known as the “guardian.” See *Snyder v. U.S.*, 134 F. Supp. 319, 322 (W.D. N.C. 1955); *Grayson v. Linton*, 125 P.2d 318, 320 (1942); *Owen v. Hines*, 41 S.E.2d 739, 742 (1947). Some jurisdictions recognize another type of guardianship known as a “limited guardianship” in which the guardian is only trusted with those duties that the ward is incapable of exercising. See *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 572 (Iowa 1995).

¹⁸ Sullivan, *supra* note 16, at 1.

¹⁹ Vasilogambros, *supra* note 8.

²⁰ *Id.*

²¹ *Id.*

²² See *id.*

²³ KY. CONST. § 145(3).

²⁴ MISS. CONST. art. 12, § 241.

²⁵ OHIO CONST. art. 5, § 6.

²⁶ Hurme & Applebaum, *supra* note 5, at 931.

²⁷ *Id.* at 964.

void for vagueness, and are overbroad, and (2) laws that allow judges to decide an individual's capacity to vote should implement a clear and convincing evidence standard, thereby linking disenfranchisement with specific criteria that determines incapacity to vote. First, this Comment will discuss background concepts and information pertinent to voter competency laws. Part I will detail the prevalence of autism and Alzheimer's disease in the United States and how the application of voter competency laws to these two groups is expected to become more pressing in the near future. Part II will provide an overview of voter competency laws in the United States, including their history and relevant caselaw. Part III will address the current landscape of voter competency laws, including its two forms: general prohibitions and judicial determinations. Part IV will provide an overview of current federal statutes that address voting rights and voting accessibility. Part V will discuss three legal doctrines applicable to voting rights: due process, vagueness, and overbreadth.

Second, this Comment will analyze states' voter competency laws under due process, vagueness, overbreadth, and the relevant caselaw. These analyses will assess both general prohibitions and judicial determination incompetency laws currently implemented by states. Lastly, this Comment concludes with two recommended changes to voter competency laws to better protect the right to vote of individuals with mental disabilities.

BACKGROUND

I. THE PREVALENCE OF AUTISM AND ALZHEIMER'S DISEASE IN THE UNITED STATES

"Mental disabilities" is a broad term encompassing many types of disability.²⁸ Such disabilities include cerebral palsy, autism, Down syndrome, Alzheimer's disease, dementia, and certain brain injuries.²⁹ Although state voter competency laws implicate individuals afflicted by all these mental disabilities,³⁰ the prevalence of two disabilities merit specific attention: autism and Alzheimer's disease.

²⁸ *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1644 n.2 (1979).

²⁹ See Vasilogambros, *supra* note 8; N.C. GEN. STAT. § 35A-1101(7) (1987).

³⁰ See Hillary May, *The Last Frontier of Disenfranchisement: A Fundamental Right for Individuals with Cognitive Disabilities*, 59 WM. & MARY L. REV. 693, 708 (2017).

A. *The Prevalence of Autism in the United States*

Autism is the fastest growing developmental disability.³¹ It affects one in forty-five adults over the age of eighteen in the United States.³² An autism diagnosis can mean many things; it is a variable cluster of cognitive, communicative, and sensory symptoms.³³ The different forms of autism are described as a spectrum, which refers to the varied symptoms, skills, and levels of functioning.³⁴ Although some adults with autism can perform their daily living activities, others require substantial assistance in performing the same activities.³⁵

As different statistics show, individuals with autism often face immense challenges in many facets of life ranging from health to financial security.³⁶ In terms of medical conditions, an estimated forty percent of people with autism are nonverbal; as many as one-third have epilepsy; and more than a quarter have been diagnosed with depression.³⁷ Additionally, the economic costs involved with treating and dealing with the long-term effects of autism are immense. In total, the cost of caring for Americans with autism is projected to reach \$461 billion by 2025.³⁸ On average, autism costs an estimated \$60,000 a year through childhood.³⁹ In particular, it costs around \$8,600 extra per year to educate a student with autism.⁴⁰ Continuing into adulthood, nearly thirty-five percent of young adults ages nineteen to twenty-three have not had a job or received postgraduate education after high school.⁴¹

³¹ *Facts and Statistics*, AUTISM SOCIETY, <https://www.autism-society.org/what-is/facts-and-statistics/> (last accessed November 15, 2021).

³² *CDC Estimates 2.2 percent of adults in U.S. have autism*, AUTISM SPEAKS (May 13, 2020), <https://www.autismspeaks.org/science-news/cdc-estimates-22-percent-adults-us-have-autism>.

³³ See Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM J.L. & MED 483, 490 (2010).

³⁴ *Id.*

³⁵ See *id.*

³⁶ See *Autism Statistics and Facts*, AUTISM SPEAKS (November 15, 2021), <https://www.autismspeaks.org/autism-statistics-asd>.

³⁷ *Id.*

³⁸ *Id.* The majority of autism's costs in the U.S. are for adult services (estimated to be between \$175-\$196 billion a year).

³⁹ *Id.* The bulk of the costs is split between special services and lost wages related to increased time demands on one or both parents.

⁴⁰ *Facts and Statistics*, *supra* note 31.

⁴¹ *Id.*

Autism's growing presence and its challenges have also found their way into the judicial forum.⁴² Judicial opinions serve an important determinative function in the controversy on the agency of individuals with autism.⁴³ For example, thousands of individuals diagnosed with autism, like Greg Demer, are placed by a judge under the care of a guardian to make certain decisions for them.⁴⁴ In states that have laws revoking an individual's voting rights based solely on guardianship status, that means the loss of voting rights for thousands of individuals with autism.⁴⁵

Autism advocacy groups have garnered some success in the voting rights realm. Tom Coleman,⁴⁶ the legal director of an advocacy group for people with disabilities, successfully lobbied for a law in California that says the right to vote should be taken away only if a court finds clear and convincing evidence the person cannot express a desire to vote.⁴⁷ Maryland, Nevada, and New Mexico have since followed California's lead and have adopted a version of this clear and convincing evidence standard.⁴⁸

B. *The Prevalence of Alzheimer's Disease in the United States*

More than 6 million Americans are living with Alzheimer's disease.⁴⁹ By the year 2030, individuals sixty-five and older are estimated to comprise nearly 72 million individuals in the United States.⁵⁰ That would account for over twenty percent of the United States' population by that time.⁵¹ Statistics also show that one in three seniors die with Alzheimer's or another dementia.⁵² That means Alzheimer's and

⁴² *Id.* at 500.

⁴³ *Id.*

⁴⁴ See Vasilogambros, *supra* note 8; see also Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAT'L ACAD. OF ELDER LAW ATTY'S J. 125, 126 n.3 (2014) (citing *Mo. Protec. & Advoc. Servs., Inc. v. Carnaham*, 499 F.3d 803, 805 (8th Cir. 2007)).

⁴⁵ See Vasilogambros, *supra* note 8.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Facts and Figures*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/facts-figures> (last accessed November 15, 2021).

⁵⁰ Wan He et al., 65 + *In The United States: 2005*, U.S. CENSUS BUREAU 1-12 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

⁵¹ *Id.*

⁵² *Facts and Figures*, *supra* footnote 49.

other similar dementia kills more than breast cancer and prostate cancer combined.⁵³ During the covid-19 pandemic, Alzheimer's and dementia related deaths have increased sixteen percent.⁵⁴ Notably as well, there is also a racial disparity in the makeup of Americans living with Alzheimer's.⁵⁵ Older Black Americans are about twice as likely to have Alzheimer's or other dementias as older White Americans.⁵⁶ Similarly, older Hispanic Americans are about one and a half times as likely to have Alzheimer's or other dementias as older White Americans.⁵⁷

The costs of healthcare and long-term care for individuals with Alzheimer's and other forms of dementia are substantial.⁵⁸ In 2021, these diseases will cost the United States \$355 billion.⁵⁹ By 2050, these diseases are estimated to cost the United States more than \$1.1 trillion.⁶⁰ These enormous costs are due in part because people living with Alzheimer's have twice as many hospital stays per year as other older individuals.⁶¹ These costs are also partly shared by people who care for those with Alzheimer's and dementia. In 2020, caregivers provided an estimated 15.3 billion hours of care valued at nearly \$257 billion.⁶² Additionally, more than 11 million Americans provide unpaid care for people with Alzheimer's or other dementias.⁶³

Importantly here, the demographic of Americans living with Alzheimer's represents a significant percentage of the voting electorate, an electorate that typically needs more assistance with voting than younger individuals.⁶⁴ Although the percentage of those with

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Facts and Figures, *supra* footnote 49.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See, e.g., Paul S. Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094, 2095, 2097, 2099 (2005); Symposium, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 MCGEORGE L. REV. 843, 844 (2007); Benjamin O. Hoerner, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's Potential*, 20 TEX. J. ON C.L. & C.R. 89, 106 (2015) ("This increase in the median age will likely correlate with an increase in the number and percentage of individuals with mental restrictions and disabilities, as 7%-8% of individuals aged 65 and older have severe mental disabilities.").

physical disabilities among this older demographic is declining, the rise in those afflicted with mental disabilities poses a growing concern.⁶⁵ Alzheimer's disease, the major cause of dementia, has the potential to significantly affect the ability of those afflicted to perform daily activities.⁶⁶ As a result, the number of elderly citizens who will be subject to conservatorship and guardianship proceedings is expected to rise.⁶⁷

Americans sixty-five and older vote in larger numbers than other age groups, meaning the application of voter competency laws to this class will become more pressing.⁶⁸ By the 2040 Presidential election, people sixty-five and older are estimated to cast forty-one percent of the votes.⁶⁹ Thus, over the next decade, steps must be taken to ensure that the right to vote by individuals with mental disabilities, such as Alzheimer's disease, are not unnecessarily compromised.⁷⁰

II. OVERVIEW OF VOTER COMPETENCY LAWS IN THE UNITED STATES

A. *History and Evolution of Voter Competency Laws*

The Supreme Court recognizes the right to vote as "a fundamental matter in a free and democratic society."⁷¹ The right to vote, however, is not guaranteed for every individual because states have the right to define their own qualifications for their voters.⁷² For example, forty-eight states and D.C. disenfranchise individuals convicted of

⁶⁵ Wan He, *supra* note 50, at 57.

⁶⁶ *Id.*

⁶⁷ Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L.J. 75, 75-76 (1997) ("[Conservatorship] threatens to remove from the elderly the ability to make basic life decisions and to live unfettered by the control of another."); see Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1824 (1992) ("If a person is deemed incompetent or incapacitated, she loses her right to control her own destiny.").

⁶⁸ Deborah Markowitz, *Voting and Cognitive Impairments: An Election Administrator's Perspective*, 38 McGEORGE L. REV. 871, 873 (2007).

⁶⁹ *Id.*

⁷⁰ *Id.* at 877.

⁷¹ See *Reynolds*, 377 U.S. at 561-62; see also *Kramer*, 395 U.S. at 626; *Harper*, 383 U.S. at 667; *Yick Wo*, 118 U.S. at 370.

⁷² See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959) (holding that "[s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised").

serious crimes over the course of their incarceration.⁷³ Moreover, state disenfranchisement of individuals with certain mental disabilities began to develop in the nineteenth century.⁷⁴ In 1793, Vermont's Constitution required voters to exhibit "quiet and peaceable behavior" to vote, and in 1819, Maine's Constitution began prohibiting "persons under guardianship" from voting.⁷⁵ Other states quickly began to follow suit, growing from just Vermont and Maine in 1820 to twenty-six states total by 1880.⁷⁶

Three rationales are provided for why states began to disenfranchise individuals with certain mental disabilities.⁷⁷ First, those in power were concerned about maintaining the integrity of elections and ensuring that voters were intellectually capable of voting.⁷⁸ The minds of individuals with mental disabilities were considered "too simple" to retain information, weigh details, and make calculated decisions to vote.⁷⁹ Second, in the nineteenth century, "idiocy" and "insanity" gained recognition as a social and political concern.⁸⁰ Although the disability community became more visible in society during this time, this visibility was clouded with contradictory feelings of concern and fear.⁸¹ Finally, the third rationale provided is that certain members of society did not believe that individuals with mental disabilities possessed the ability to consent to voting.⁸² Legislators reasoned that the parents or guardians of individuals with mental disabilities, by exercising their own right to vote, could sufficiently protect their ward's interests.⁸³

Today, however, the argument against providing all individuals with the right to vote regardless of cognitive ability predominantly

⁷³ Robin Miller, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th 31 (2006).

⁷⁴ Kay Schriner & Lisa Ochs, "*No Right Is More Precious*": *Voting Rights and People With Intellectual And Developmental Disabilities*, U. OF MINN. RES. AND TRAINING CTR. ON CMTY. LIVING, 1, 3 (2000), <http://ici.umn.edu/products/prb/111/111.pdf>.

⁷⁵ *Id.* at 1; May, *supra* note 30, at 702.

⁷⁶ May, *supra* note 30, at 702.

⁷⁷ Schriner & Ochs, *supra* note 74, at 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² Jennifer A. Bindel, Note, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 103 (2009).

⁸³ Schriner & Ochs, *supra* note 74, at 4.

rests on protection against voter fraud.⁸⁴ The main concern is that granting the right to vote to individuals with cognitive disabilities will result in the manipulation of that power by “unscrupulous people” or political organizations exploiting groups within this population.⁸⁵ This manipulation is believed to lead to inappropriate assistance during the voting process. For example, an individual could vote on behalf of someone with a mental disability without their input.⁸⁶ Scholars are also concerned that individuals with mental disabilities may be unduly persuaded.⁸⁷ This concern has some merit, for example, as allegations arose during the 2008 Presidential Election that campaign volunteers pressured individuals with mental disabilities to cast absentee ballots in favor of the volunteers’ preferred candidate.⁸⁸ Absentee ballots also raise voter fraud concerns.⁸⁹ Some fear that absentee ballots will be requested on behalf of individuals with mental disabilities and then be cast by completely different individuals.⁹⁰ In fact, there have been confirmed instances of fraudulent absentee ballots cast from nursing homes.⁹¹

Beginning in 1960, however, there has been a trend among certain states who had previously enacted such voter competency laws to repeal or scale back these laws.⁹² In 1974, the Louisiana legislature amended its constitution to “permit” rather than automatically “disqualify” “idiots or insane persons” and those “under guardianship” from voting.⁹³ Taking a greater leap in the 1990s, Idaho completely

⁸⁴ Kingshuk K. Roy, Note, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 119 (2003).

⁸⁵ Symposium, *supra* note 64, at 844.

⁸⁶ See Bindel, *supra* note 82, at 107.

⁸⁷ Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 345 (1993) (“[M]inors and the mentally disabled may be disenfranchised on account of their inability to comprehend the nature of elections, coupled with their susceptibility to intimidation and manipulation by elders.”).

⁸⁸ Jason Clayworth, *Woman, 87, Allegedly Pressured to Cast Ballot*, DES MOINES REG., Oct. 30, 2008, at 1A.

⁸⁹ See Bindel, *supra* note 82, at 108.

⁹⁰ Schriner & Ochs, *supra* note 74, at 4.

⁹¹ Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 461-65 (2005) (describing elderly voters as “[t]he strongest force in U.S. elections today” and “typically the most informed electors”). *But see* Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 McGEORGE L. REV. 1065, 1076 (2007) (noting that evidence of fraud in nursing home voting is “minimal and largely anecdotal”).

⁹² See Schriner & Ochs, *supra* note 74, at 3.

⁹³ *Id.*

abandoned its laws that disenfranchised individuals “under guardianship, idiotic, or insane.”⁹⁴ This trend toward revising and or abandoning voter competency laws sends a message that states are willing to make changes that promote greater inclusion, and sets the scene for the reform advocated for those with mental disabilities today.

B. *Federal Cases Addressing State Voter Competency Laws*

Two federal court decisions have addressed state voting restrictions based on mental competency.⁹⁵ First, in *Doe v. Rowe*, three women and an advocacy group challenged a disqualifying provision in Maine’s constitution that withheld voting rights from those “under guardianship for reasons of mental illness.”⁹⁶ Although it was uncontested that Maine had a compelling interest in ensuring that voters had the capacity to understand the nature and effect of voting, the disqualifying provision was subject to strict scrutiny.⁹⁷ The Maine federal district court struck the provision down as a violation of the Equal Protection Clause.⁹⁸ The court did so because the narrowly drafted provision reached only people with mental illness and not those with other forms of mental incapacity; thus the provision was not tailored to meet the State’s asserted interest.⁹⁹ The court also struck down the provision under the Fourteenth Amendment’s Due Process Clause.¹⁰⁰ It did so because Maine’s guardianship proceedings could result in the revocation of an individual’s voting rights without providing them notice that this right was in jeopardy.¹⁰¹

Six years later in *Missouri Protection & Advocacy Service, Inc. v. Carnahan*, the Eighth Circuit considered an Equal Protection Clause challenge to a voter competency provision in the Missouri Constitution.¹⁰² This provision provided that “no person who has a guardian of his or her estate or person by reason of mental incapacity . . . shall be

⁹⁴ *Id.*

⁹⁵ Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy*, 17 YALE J. HEALTH POL’Y, L. & ETHICS 209, 218 (2017).

⁹⁶ *Doe v. Rowe*, 156 F. Supp. 2d 35, 38-39 (D. Me. 2001).

⁹⁷ *Id.* at 51.

⁹⁸ *Id.* at 52.

⁹⁹ *Id.* at 55-56.

¹⁰⁰ *Id.* at 50-51.

¹⁰¹ *Id.*

¹⁰² *Mo. Prot. & Advocacy Servs. v. Carnahan*, 499 F.3d 803, 805 (8th Cir. 2007).

entitled to vote.”¹⁰³ Like the challenge in *Doe*, this Equal Protection challenge was also brought by three individuals under guardianship and an advocacy group.¹⁰⁴ However, this time, the court rejected a facial Equal Protection challenge.¹⁰⁵ Finding that the provision imposed a *case-specific* capacity standard that could potentially preserve a ward’s right to vote, rather than act as a categorical ban on all people under guardianship, the voting competency provision was upheld.¹⁰⁶ *Carnahan*, alongside *Doe*, therefore provides courts with the legal basis to overturn categorical voting bans while upholding revocations subject to an individualized process of finding the necessary incapacity to vote.¹⁰⁷

III. CURRENT LANDSCAPE OF STATE INCOMPETENCY LAWS

Competency laws vary across states.¹⁰⁸ In some states, voter competency laws are included in election statutes that specify voter qualification requirements.¹⁰⁹ In other states, they are included in statutes that specify the rights of people with cognitive disabilities or those who are under guardianship or conservatorship.¹¹⁰ Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont are the few states that do not have any sort of voting restrictions based on cognitive competency.¹¹¹ The remaining states, however, employ a variety of competency laws that can be classified into two categories: (1) general prohibitions, which function by categorically prohibiting voting rights to mentally incompetent individuals, and (2) judicial determinations, where a judge determines on a case-by-case basis whether an individual has the capacity to vote.¹¹² Both categories of competency laws will be discussed below.

¹⁰³ *Id.* (quoting MO. CONST. art. VIII, § 2).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 808-12.

¹⁰⁷ See Kopel, *supra* note 95, at 220.

¹⁰⁸ May, *supra* note 30, at 706-07.

¹⁰⁹ Sullivan, *supra* note 16, at 1.

¹¹⁰ *Id.*

¹¹¹ Vasilogambros, *supra* note 8.

¹¹² See Bindel, *supra* note 82, at 92-97.

A. *General Prohibitions: Categorical Prohibitions on Voting Rights as Applied to those with Mental Disabilities*

Simply put, general prohibitions in the voting rights context are laws that prohibit broad groups of people from voting.¹¹³ Prior historical examples of general prohibitions included bans on African Americans and women from voting.¹¹⁴ Today, general prohibitions based on cognitive disability still exist and commonly come in two forms. The first form excludes individuals placed under guardianship from voting.¹¹⁵ The second form prohibits individuals who are “mentally incompetent,”¹¹⁶ “idiot[s],”¹¹⁷ “insane,” or other similarly defined terms, from voting. Both forms of these provisions essentially function as per se rules disenfranchising individuals who fall into a certain defined group.¹¹⁸

The legal community has expressed much criticism about these general prohibitions. First, for prohibitions based on guardianship status, individuals in guardianship proceedings are often unaware that their right to vote is on the table and, thus, do not know to raise this issue.¹¹⁹ This unawareness, in turn, raises due process concerns as thousands of individuals, such as Greg Demer, are unknowingly stripped of their voting rights over the course of guardianship proceedings.¹²⁰ Second, many general prohibitions contain archaic language that does not reflect the modern discourse on disability.¹²¹ Terms included in some of these voting bans, such as “idiot” or “insane,” are derogatory and outdated.¹²² Those laws do not even define what these terms entail.¹²³ Additionally, prohibitions such as these may be especially difficult to enforce in the context of absentee ballots.¹²⁴ Evidence of their ineffectiveness is also shown by the fact

¹¹³ See *id.* at 93.

¹¹⁴ U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX.

¹¹⁵ Sullivan, *supra* note 16, at 1.

¹¹⁶ DEL. CONST. art. 5, § 2.

¹¹⁷ MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § 1.

¹¹⁸ See Sullivan, *supra* note 16, at 1-2.

¹¹⁹ See Bindel, *supra* note 82, at 96.

¹²⁰ See *Doe*, 156 F. Supp. 2d at 50-51.

¹²¹ See Hurme & Appelbaum, *supra* note 5, at 957-58.

¹²² Bindel, *supra* note 82, at 93-94.

¹²³ *Id.* at 93.

¹²⁴ *Id.* (“A voter who casts an absentee ballot need never appear in person before an election official or prove a lack of a clinical diagnosis of one of the aforementioned conditions.”).

these laws are typically not enforced.¹²⁵ Although some may wonder why attention should even be drawn to unenforced laws, their continuing presence continues to reinforce a negative stigma toward people with mental disabilities.¹²⁶

Carroll v. Cobb, a 1976 case arising out of the Superior Court of New Jersey, fully illustrates the issues surrounding such general prohibitions.¹²⁷ In this case, the five plaintiffs were adults living at a state school for the mentally impaired.¹²⁸ The five plaintiffs and the Director of Education at the school had traveled to the town clerk's office to register as voters.¹²⁹ When the town clerk told them she could not permit them to register to vote without a valid court order, a complaint was filed to allow the plaintiffs to register to vote.¹³⁰ After the trial court gave relief to the plaintiffs, the town clerk argued on appeal that as a registration official, she had the ultimate discretion to determine whether mentally impaired individuals fell within the New Jersey constitution's voter disqualifying clause.¹³¹ New Jersey's disqualifying clause provided that "idiots" and "insane persons" are disqualified from voting.¹³² Holding that a layperson is completely unequipped to determine whether a voter applicant is either an "idiot" or "insane person" and, thus, disenfranchised, the superior court found the town clerk's contention indefensible.¹³³ The court also noted that these imprecise terms are troublesome even to experts in psychiatry or psychology.¹³⁴ In *Carroll*, the plaintiffs were ultimately allowed to register to vote.¹³⁵

¹²⁵ See Bazelon Ctr. For Mental Health Law et al., *A Guide to the Voting Rights of People with Mental Disabilities*, 1, 13 n.48 (2016) (noting that "more specific statutory provisions . . . trump the 'idiots' and 'insane' language"), <http://www.bazelon.org/wp-content/uploads/2017/01/voting-rights-guide-2016.pdf>.

¹²⁶ Bindel, *supra* note 82, at 93.

¹²⁷ See *Carroll v. Cobb*, 354 A.2d 355, 359 (N.J. Super. Ct. App. Div. 1976).

¹²⁸ *Id.* at 356.

¹²⁹ *Id.*

¹³⁰ *Id.* at 357.

¹³¹ *Id.* at 358.

¹³² *Id.* at 359.

¹³³ *Carroll*, 354 A.2d at 359.

¹³⁴ *Id.*

¹³⁵ *Id.* at 363-64.

B. *Judicial Determination Approach: The Varying Standards Judges Apply for Determining Voting Capacity*

The second category of voter competency laws is known as the judicial determination approach. Under this approach, a court determines whether an individual with a cognitive disability has the capacity to vote.¹³⁶ Typically, these determinations will occur over the course of a guardianship or a conservatorship proceeding.¹³⁷ Just over half of the states with voter competency laws have implemented some form of this judicial approach.¹³⁸ Of these states that have adopted a judicial approach, six have laws adopting a specific standard for judges to make this determination.¹³⁹ California, Maine, Nevada, and New Mexico have all adopted standards based on the standard recommended by the American Bar Association (ABA).¹⁴⁰ Under the ABA's recommended standard, a judge should determine a person lacks the capacity to vote only by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a specific desire to participate in the voting process.¹⁴¹

A few other states' judicial determination voting competency laws are worth noting. In Delaware, the standard for disenfranchisement is "clear and convincing evidence of severe cognitive impairment, which precludes exercise of basic voting judgment."¹⁴² In Iowa, a court may find that a person is incompetent to vote only upon a determination that the individual "lacks sufficient mental capacity to comprehend and exercise the right to vote."¹⁴³ Washington, however, employs a more exacting standard in which a person loses their right to vote only if the person "lacks the capacity to understand the nature and effect of voting such that he or she cannot make an individual choice."¹⁴⁴ Thus, although many states have implemented the judicial approach, many differ in substance.

¹³⁶ Hurme & Applebaum, *supra* note 5, at 957.

¹³⁷ *See id.*

¹³⁸ Sullivan, *supra* note 16, at 1.

¹³⁹ *Id.* at 1-2.

¹⁴⁰ *Id.* at 2; AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING 2007 REPORT TO THE HOUSE OF DELEGATES, https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.pdf.

¹⁴¹ Sullivan, *supra* note 16, at 2.

¹⁴² DEL. CODE ANN. tit. 15, § 1701(a) (West 2019).

¹⁴³ IOWA CODE ANN. § 633.552(3) (West 2020).

¹⁴⁴ WASH. REV. CODE ANN. § 11.88.010(5) (West 2017).

A major issue with the judicial determination method is shown by Greg Demer's experience.¹⁴⁵ Neither Greg's desire, nor his capacity to vote, was taken into consideration by a judge before his voting rights were revoked.¹⁴⁶ Similarly, individuals in other states are also adjudicated incapacitated to vote based solely upon guardianship status.¹⁴⁷ The issue with this method is that guardianship status is usually based on an individual's capacity to make health or financial decisions.¹⁴⁸ The criteria to determine incapacity to manage personal or financial matters, however, do not always coincide with criteria for determining voting competency.¹⁴⁹

Thus, two important questions that need to be addressed under the judicial determination approach are, (1) what standard for measuring incapacity should courts use, and (2) whether courts should develop a separate determination for voting capacity.¹⁵⁰ For example, California's standard for finding incapacity to vote is clear and convincing evidence that the individual cannot communicate a desire to participate in the voting process.¹⁵¹ However, should someone even need to have a specific desire to participate in the voting process to have the capacity to vote? If so, how would a specific desire to participate in the voting process be assessed? Questions like these have spurred the development of tools for more specialized assessments of individuals' capacity to vote.¹⁵²

One tool that has emerged is the Competence Assessment Tool for Voting (CAT-V).¹⁵³ This assessment tool asks participants a set of questions about elections, such as how one would vote, how is the winner of an election decided, and a hypothetical question asking participants to decide between two candidates.¹⁵⁴ Then, by scoring the participants' answers to each of the three questions from zero to two points, CAT-V participants' total scores range from zero to six

¹⁴⁵ See Vasilogambros, *supra* note 8.

¹⁴⁶ *Id.*

¹⁴⁷ Hurme & Applebaum, *supra* note 5, at 957-58.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ E.g., CAL. ELEC. CODE § 2208(a).

¹⁵¹ *Id.* § 2208(a)

¹⁵² Kopel, *supra* note 95, at 233.

¹⁵³ See Applebaum et al., *supra* note 64, at 2095.

¹⁵⁴ *Id.*

points.¹⁵⁵ The questions aim to assess the participants (1) understanding of voting, (2) appreciation of voting, and (3) the ability to reason and make a choice.¹⁵⁶

In one study, CAT-V was employed on thirty-three people with Alzheimer's disease.¹⁵⁷ The participants' performance on the assessment were found to correlate strongly with their degree of dementia, with those with severe dementia scoring between zero and two points, and those with mild dementia scoring nearly perfect scores.¹⁵⁸ Interestingly, an express intention to vote in the next election, a standard like the one California currently employs, was not a good predictor of CAT-V scores.¹⁵⁹ Not all people who expressed a desire to vote in the study understood the nature and effect of voting under the CAT-V assessment.¹⁶⁰ While the CAT-V assessment is just a tool and has not formally been adopted for use by any state courts,¹⁶¹ it remains a useful guide for state legislatures to model their own capacity determining standards in the future.

In conclusion, this Section highlighted two kinds of voter competency laws employed by states: general prohibitions and the judicial determination approach. The next Section will provide a brief background on federal statutes that regulate voting rights and promote greater voting accessibility.

IV. CURRENT FEDERAL STATUTES ON VOTING RIGHTS AND VOTING ACCESSIBILITY

Congress, throughout history, has enacted several federal statutes to provide greater assistance during the voting process for those with disabilities. Although these statutes have focused mainly on assisting those with physical disabilities rather than mental disabilities, they all

¹⁵⁵ *Id.* (A completely correct response receives two points. An ambiguous or partially correct response receives one point. An incorrect or irrelevant response receives zero points.)

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2096.

¹⁵⁸ *Id.* at 2096-97.

¹⁵⁹ See Applebaum, *supra* note 64, at 2098. While the CAT-V assessment highlights the shortcoming in using one's desire to vote as a tool to determine voting capacity, this Comment argues that the rest of California voting capacity approach is a good model for other States.

¹⁶⁰ *Id.*

¹⁶¹ See Hurme & Applebaum, *supra* note 5, at 966-74.

convey the same message of showing how important it is to promote the electoral participation of people with disabilities.¹⁶²

A. *The Voting Rights Act and its Amended Form*

The Voting Rights Act of 1965 (VRA) outlawed discriminatory voting practices on account of race, and is widely considered one of the most important pieces of federal legislation in American history.¹⁶³ Although the main purpose of its enactment in 1965 was eradicating racial discrimination in the voting process, it is now being used to eradicate other forms of voter discrimination.¹⁶⁴ Moreover, the VRA was amended in 1982 to allow citizens with disabilities to bring a person of the voter's choice to help provide assistance at the polls.¹⁶⁵ The amendment gave voters with disabilities a federally protected right to vote for the first time.¹⁶⁶

The VRA was followed by the Voting Accessibility for the Elderly and Handicapped Act (VAEH) act two years later,¹⁶⁷ and the more broadly sweeping American with Disabilities Act (ADA) in 1990.¹⁶⁸ Both expanded on the goals set forth in the VRA.

B. *The Voting Accessibility for the Elderly and Handicapped Act*

Enacted in 1984, the Voting Accessibility for the Elderly and Handicapped Act (VAEH) was also a milestone in disability voting rights.¹⁶⁹ It was the first major standalone legislation to address the status of voters with disabilities.¹⁷⁰ It requires states to provide accessible polling places for individuals with a temporary or permanent

¹⁶² See Schriner & Ochs, *supra* note 74, at 5.

¹⁶³ Conner Johnston, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post- Shelby County*, 62 UCLA L. REV. 236, 238 (2015).

¹⁶⁴ 52 U.S.C.A. § 10508 (West 2020).

¹⁶⁵ *Id.* ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

¹⁶⁶ Michael Ellement, *Enfranchising Persons with Disabilities: Continuing Problems, an Old Statute, and a New Litigation Strategy*, 39 T. MARSHALL L. REV. 29, 33 (2013).

¹⁶⁷ David M. Cohen, *The Right to Vote and the Physically Disabled*, 85-AUG MICH. B.J. 34, 35 (2006).

¹⁶⁸ Americans with Disabilities Act of 2000, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213).

¹⁶⁹ Cohen, *supra* note 167, at 35.

¹⁷⁰ Ellement, *supra* note 166, at 30.

physical disabilities and to provide auxiliary aids.¹⁷¹ Additionally, under the VAEH, if the district's chief election officer determines that no place in the jurisdiction is accessible, they can provide disabled voters with another way to vote, such as an absentee ballot.¹⁷² However, the VAEH, although a major first step for addressing accessibility issues, does not set minimum standards for accessibility at voting polls.¹⁷³ It instead leaves such determinations to the sole discretion of state administrators, which results in continued variance across states.¹⁷⁴

C. *The Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) was enacted in 1990 and prohibits discrimination against citizens with disabilities in public areas, targeting employment, schooling, and transportation among others.¹⁷⁵ The ADA was designed to sweep more broadly than the VRA and the VAEH, and has helped reduce discrimination against people with disabilities.¹⁷⁶ Labeled as a civil rights law, the purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against citizens with disabilities.¹⁷⁷ Additionally, Congress's findings in the ADA note that unlike individuals who have experienced discrimination on the basis of race, color, or sex, individuals who have experienced discrimination on the basis of disability often had no legal recourse to redress such discrimination.¹⁷⁸ To ensure that people with disabilities can obtain legal recourse, the ADA includes the power to enforce the Fourteenth Amendment to address the major areas of discrimination faced by people with disabilities. Moreover, in the ADA's findings and purposes section, voting was listed as a "critical area" in which discrimination against people with disabilities persisted.¹⁷⁹ Thus, the ADA

¹⁷¹ 52 U.S.C.A. § 20104 (West 2020).

¹⁷² *Id.* § 20104(c).

¹⁷³ Ellement, *supra* note 166, at 34.

¹⁷⁴ *See* § 20104(c).

¹⁷⁵ 42 U.S.C. §§ 12101-12213.

¹⁷⁶ *See* Schriener & Ochs, *supra* note 74, at 4.

¹⁷⁷ 42 U.S.C.A. § 12101(b).

¹⁷⁸ *Id.* § 12101(a)(4).

¹⁷⁹ *Id.* § 12101(b)(4).

highlighted that work still needed to be done to better assist people with disabilities in exercising their right to vote.¹⁸⁰

D. *Help America Vote Act*

In 2002, George W. Bush signed the Help America Vote Act (HAVA) into law.¹⁸¹ This law aids the states in their administration of federal elections.¹⁸² Passed as a reaction to the increased voter distrust that resulted from the highly contested presidential election in 2000,¹⁸³ HAVA is the Bush administration's answer to this distrust. HAVA implemented a series of federal guidelines, incentives, and requirements, all to improve electoral access and integrity.¹⁸⁴

Although it was largely successful in increasing accessibility at voting polls,¹⁸⁵ some legal scholars have suggested that the HAVA fails to adequately address issues voters with mental disabilities face.¹⁸⁶ Post-HAVA, disagreement still remains as to whether enacting sweeping federal legislation addressing the rights of voters with mental disabilities is the best method for change available.¹⁸⁷

V. DUE PROCESS, VAGUENESS, AND OVERBREADTH IN THE CONTEXT OF VOTING RIGHTS

A. *Due Process and its Applicability to Individuals with Mental Disabilities*

The right to vote is protected by the Fourteenth Amendment's Due Process Clause.¹⁸⁸ For more than a century, the meaning of due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they

¹⁸⁰ See *id.* § 12101.

¹⁸¹ Brandon Fail, *HAVA's Unintended Consequences: A Lesson for Next Time*, 116 YALE L.J. 493, 493 (2006).

¹⁸² *Id.*

¹⁸³ See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1210 (2005).

¹⁸⁴ See Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified as 52 U.S.C.A. § 10101).

¹⁸⁵ Hoerner, *supra* note 64, at 131.

¹⁸⁶ See *id.* at 117-19.

¹⁸⁷ May, *supra* note 30, at 716-17.

¹⁸⁸ Amendola et al., *Due Process issues regarding right to vote*, 16D C.J.S. CONST. L. §2147 (2020).

must first be notified.”¹⁸⁹ Touches of due process consideration have made their way into election law jurisprudence.¹⁹⁰ *Doe*, in particular, notes how various courts have recognized that the fundamental nature of the right to vote gives rise to an interest entitled to due process protection.¹⁹¹ Additionally, the Sixth Circuit has declared that “the Due Process Clause protects against extraordinary voting restrictions that render the voting system ‘fundamentally unfair.’”¹⁹²

A symposium at the McGeorge School of Law directly addressed due process concerns regarding voting rights and people with cognitive disabilities.¹⁹³ The symposium culminated in the adoption of several recommendations.¹⁹⁴ One of the most important of these recommendations, later adopted by the ABA, was that exclusion based on mental capacity should have legal effect only if (1) the exclusion is based on a court of competent jurisdiction; (2) appropriate due process protections have been afforded; and (3) the court states on the record that the basis for the exclusion has been established by clear and convincing evidence.¹⁹⁵ This recommended standard has since been used as a model for California, Maryland, Nevada, and New Mexico’s voting capacity standards.¹⁹⁶

B. *Vagueness Doctrine and the Dangers of Uncertain Meanings*

For over 125 years, the Supreme Court has evaluated claims under the void-for-vagueness (vagueness) doctrine.¹⁹⁷ Although the vagueness doctrine is typically used in the context of the First Amendment, courts have since expanded it to almost all segments of the

¹⁸⁹ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

¹⁹⁰ See Joshua A. Douglas, *The Foundational Importance of Participation*, 66 OKLA. L. REV. 81, 98 (2013).

¹⁹¹ *Doe*, 156 F. Supp. 2d at 47-48 (citing *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F.Supp. 1354, 1357 (D. Ariz. 1990) (“Because voting is a fundamental right, the right to vote is a ‘liberty’ interest which may not be confiscated without due process.”); *United States v. Texas*, 252 F.Supp. 234, 250 (W.D. Tex. 1966) (discussing the other rights protected by due process and finding that the right to vote is entitled to the same protection because as a fundamental right it is “included within the concept of liberty”).

¹⁹² *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

¹⁹³ Symposium, *supra* note 64, at 843.

¹⁹⁴ See *id.* at 861-69.

¹⁹⁵ *Id.* at 863.

¹⁹⁶ Sullivan, *supra* note 16, at 2.

¹⁹⁷ *United States v. Reese*, 92 U.S. 214, 221 (1875).

law.¹⁹⁸ The design of the vagueness doctrine is to guarantee the citizenry "fair and nondiscriminatory application of the laws."¹⁹⁹ The relevant inquiry when considering a question of vagueness is whether the policy (1) is so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application," and (2) "authorizes or even encourages arbitrary and discriminatory enforcement."²⁰⁰

Applying the vagueness doctrine to strike down vague laws also motivates current legislators to more carefully draft laws. Carefully drafted laws in turn allow citizens to know what is prohibited by them so that they may act accordingly.²⁰¹ Vague laws however can often trap the innocent by not providing fair warning.²⁰² Uncertain meanings can lead citizens to steer far wider of the unlawful zone than if the prohibited areas' boundaries were clearly marked.²⁰³ Courts have found vagueness particularly concerning when the circumscribed behavior is constitutionally protected.²⁰⁴

C. *Overbreadth Doctrine and its Potential Applicability to Contexts Outside the First Amendment*

Under the overbreadth doctrine, "if a statute's language given its normal meaning is so broad that it may unnecessarily apply to conduct the state is not entitled to regulate, it is deemed overbroad."²⁰⁵ Additionally, "substantial overbreadth" arises where there is "realistic danger" that legislation significantly comprises fundamental rights.²⁰⁶ A

¹⁹⁸ See *United States v. American Tobacco Co.*, 221 U.S. 106, 178-79 (1911); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 61 (1911); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 108-09 (1909).

¹⁹⁹ *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992) ("[T]he vagueness doctrine, unlike the overbreadth doctrine, seeks to ensure fair and non-discriminatory application of the laws").

²⁰⁰ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); see also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Grayned v. Cty. of Rockford*, 408 U.S. 104, 108-09 (1972); *Coates v. Cincinnati*, 402 U.S. 611, 611 (1971).

²⁰¹ See *Morales*, 527 U.S. at 56.

²⁰² See *Grayned*, 408 U.S. at 108.

²⁰³ *Id.* at 109.

²⁰⁴ See *United States v. American Tobacco Co.*, 221 U.S. 106, 180 (1911).

²⁰⁵ John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 61 (2004); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984) ("A law is overbroad if it prohibits not only acts the legislature may forbid, but also constitutionally protected conduct.").

²⁰⁶ *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) (municipal ordinance prohibiting posting of signs on public property challenged by group

major benefit to using the overbreadth doctrine is that it permits a claim where the law threatens third parties not before the court who may still wish to engage in a protected activity.²⁰⁷ However, one obstacle to applying the overbreadth doctrine is that application is still typically contained within the First Amendment.²⁰⁸

There has been a great deal of recent debate about whether the Supreme Court has been willing, or has even applied, a form of the overbreadth doctrine to a context outside the First Amendment.²⁰⁹ The Supreme Court has directly stated it has not recognized an overbreadth doctrine outside the limited context of the First Amendment.²¹⁰ Its actions however seem to have contradicted this statement as the Supreme Court has also decided cases squarely on overbreadth grounds by holding statutes facially invalid that infringe on fundamental rights.²¹¹ For example, almost all abortion cases litigated post-*Roe v. Wade* involved facial attacks on overbroad statutes, and the Court has accepted overbreadth arguments on these cases.²¹² Thus, there is also a fair possibility that courts would accept overbreadth arguments in voting rights cases.

of supporters for election to city council held not unconstitutionally overbroad in violation of group's First Amendment rights of free expression).

²⁰⁷ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (holding Washington's moral nuisance statute not facially invalid in its entirety where statute reached material that incited normal as well as unhealthy interest in sex and statute contained severability clause permitting partial invalidation).

²⁰⁸ Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (1991).

²⁰⁹ *Id.*

²¹⁰ See *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) (outside First Amendment context, criminal statute cannot be attacked as overbroad).

²¹¹ See, e.g., *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 81-84 (1976) (upholding facial challenge to state statute regulating abortion); *Aptheker v. Sec'y of State*, 378 U.S. 500, 516 (1964) (finding overbreadth analysis proper where a statute encroaches on the right to travel, a "personal liberty protected by the Bill of Rights.").

²¹² See, e.g., *Ohio v. Akron Center for Reprod. Health*, 110 S. Ct. 2972, 2978 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2930-31 (1990); *Webster v. Reprod. Health Servs.*, 109 S. Ct. 3040, 3047-48 (1989); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 769 (1986). But see *H.L. v. Matheson*, 450 U.S. 398, 405-06 (1981) (holding that challenger lacked standing to raise facial challenge to parental notification statute and upholding statute as applied).

ANALYSIS

I. THE PROBLEMS POSED BY GENERAL PROHIBITION LAWS
UNDER DUE PROCESS, VAGUENESS, AND OVERBREADTH

General prohibitions function as per se rules that revoke an individual's voting right if the individual falls into a certain statutorily defined category.²¹³ Ohio's constitution contains such a general prohibition stating: "No 'idiot' or 'insane person' shall be entitled to the provisions of an elector."²¹⁴ This language creates a bright-line rule where an individual loses their right to vote if they are found to be an "idiot" or "insane person" as defined by statute.²¹⁵ Massachusetts also uses another form of a general prohibition that states: "Every citizen . . . except those under guardianship . . . shall have a right to vote in an election."²¹⁶ The bright-line rule created under this Massachusetts law is that an individual does not have the right to vote if they are under guardianship.²¹⁷

Applying the analysis from *Doe* shows that these kinds of general prohibitions based solely on guardianship status violate the Fourteenth Amendment's Due Process Clause.²¹⁸ The provision at issue in *Doe* was Maine's provision disenfranchising all people under guardianship on the basis of mental illness.²¹⁹ Maine's provision is almost identical to the one currently employed by Massachusetts as they both automatically disenfranchise based on guardianship status.²²⁰ In *Doe*, where the district court found that the provision violated the Fourteenth Amendment's Due Process Clause because an individual could be stripped of the right to vote without even providing notice that right was in jeopardy, similarly, Massachusetts's provision should be struck down for the same reasons.²²¹

Application of the vagueness doctrine to general prohibitions such as Ohio's also shows that a court would likely strike these types

²¹³ See Sullivan, *supra* note 16, at 2.

²¹⁴ OHIO CONST., art. V, § 6.

²¹⁵ See *id.*

²¹⁶ MASS. GEN. LAWS ch. 51, § 1.

²¹⁷ See *id.*

²¹⁸ See *Doe*, 156 F. Supp. 2d at 50-51.

²¹⁹ *Doe*, 156 F. Supp. 2d at 38.

²²⁰ See MASS. GEN. LAWS ch. 51, § 1; see also *Doe*, 156 F. Supp. 2d at 38.

²²¹ *Doe*, 156 F. Supp. 2d at 51-56.

of provisions down.²²² The relevant inquiry for vagueness is whether the provision is (1) so vague that people “of common intelligence must necessarily guess as to its meaning and differ as to its application,” and (2) “authorizes or even encourages arbitrary and discriminatory enforcement.”²²³ Applying the first prong of the vagueness test to Ohio’s general prohibition, “No ‘idiot’ or ‘insane person’ shall be entitled to the provisions of an elector,”²²⁴ one must ask whether the meaning of “idiot” or “insane person” is even clear, or whether people of common intelligence would differ as to its meaning.²²⁵ Extending the holding from *Carroll v. Cobb* that a layperson is completely unequipped to determine whether an individual is an “idiot” or “insane person,” the prohibition is indeed vague under the first prong.²²⁶ Given there is no clear meaning to a layperson who is an “idiot” or “insane person,” people must guess as to its meaning and differ as to its application.²²⁷

The second prong of the vagueness inquiry then asks whether the provision authorizes or encourages arbitrary and discriminatory enforcement.²²⁸ The answer here would also have to be yes. Extending the holding from *Carroll v. Cobb* once more, if a layperson is completely unequipped to determine whether an applicant is an “idiot,” it would logically follow that any decision made about who is or is not an “idiot” must be arbitrary.²²⁹ Considering general prohibitions like Ohio’s meet both prongs of the vagueness inquiry, a court could strike these prohibitions down under the vagueness doctrine.

Lastly, courts can use the overbreadth doctrine as a tool to strike down general prohibitions.²³⁰ A statute is overbroad when its language is so far-reaching that it applies to unprohibited conduct.²³¹ Take again Ohio’s provision that “no ‘idiot’ or ‘insane person’ shall be

²²² OHIO CONST., art. V, § 6.

²²³ See *Connally*, 269 U.S. at 391; *City of Chicago*, 527 U.S. at 56; see also *Kolender*, 461 U.S. at 357-58; *Grayned*, 408 U.S. at 108-09; *Coates*, 402 U.S. at 611.

²²⁴ OHIO CONST., art. V, § 6.

²²⁵ See *Connally*, 269 U.S. at 391; *City of Chicago*, 527 U.S. at 56; see also *Kolender*, 461 U.S. at 358; *Grayned*, 408 U.S. at 108-09; *Coates*, 402 U.S. at 614-16. .

²²⁶ See *Carroll*, 354 A.2d at 359.

²²⁷ See *id.*

²²⁸ *City of Chicago*, 527 U.S. at 56.

²²⁹ See *Carroll*, 354 A.2d at 359.

²³⁰ See *Schwartzmiller*, 752 F.2d at 1346.

²³¹ *Id.*

entitled to the provisions of an elector.”²³² Setting questions of vagueness aside, enforcement under the terminology “idiot” or “insane person” could lead to substantial overbreadth as people who should be allowed to vote could be deemed incapacitated.²³³ For example, assume poll workers in Ohio were both aware of and prepared to enforce this provision.²³⁴ A poll worker who has a broader definition of “idiot” could enforce this law against a wide range of people who display any sort of mental disability at the polls under their broad definition of “idiot.”²³⁵ As shown by this hypothetical example, a general prohibition such as Ohio’s could then lead to the disenfranchisement of individuals who do have the capacity to vote. Thus, a court could also strike down these general prohibitions as overbroad.²³⁶

In conclusion, courts can strike down general prohibitions for violating due process, and failing for vagueness or for overbreadth.

II. THE LEGAL PROTECTIONS AFFORDED BY JUDICIAL DETERMINATION LAWS UNDER DUE PROCESS, VAGUENESS, AND OVERBREADTH

This section will highlight the reasons why the judicial determination method offers the best approach to determining voter capacity. First, it is the best approach because it considers the totality of the individual’s circumstances before determining whether an individual has the capacity to vote. Second, it is the best approach because most provisions implementing the judicial determination approach are neither vague nor overbroad. Lastly, this section will tackle the issue of what standard a judge should employ when measuring an individual’s capacity to vote, and discuss one of the tools created to help with this assessment.

²³² OHIO CONST., art. V, § 6.

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See id.*; *see also Carroll*, 354 A.2d at 359 (“[A] lay person is completely unequipped to determine whether an applicant is either an ‘idiot’ or ‘insane person’ and thus disenfranchised.”)

²³⁶ *See Carroll*, 354 A.2d at 359.

A. *The Benefits of an Individualized Approach to Determining Voter Competency*

Whereas general prohibitions function as per se rules, the judicial determination approach operates using an individualized standard.²³⁷ The main benefit of the judicial determination approach compared to general prohibitions is that judicial determinations (1) offer a more individualized approach by operating case-by-case that (2) are easily implementable.²³⁸ To highlight the benefits of this approach, take California's judicial determination provision:

A person is presumed competent to vote regardless of his or her conservatorship status. A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process²³⁹

The California approach first establishes a baseline presumption of competence to vote regardless of conservatorship status.²⁴⁰ Then, only through a finding by a judge of clear and convincing evidence that the individual cannot communicate a desire to participate in the voting process would that individual's voting rights potentially be revoked.²⁴¹ In totality, this California provision provides a rather exacting standard for the potential revocation of voting rights, and reflects the notion that people should be allowed to vote except in the clearest cases of incapacity to do so.²⁴² It successfully incorporates the nuance and wide range of potential disability by its insertion of "with or without reasonable accommodations."²⁴³ It also conveys that not everyone with the desire to participate in the voting process may be

²³⁷ See Sullivan, *supra* note 16, at 1-2.

²³⁸ See *Carnahan*, 499 F.3d at 810 ("In Missouri, the judicial proceeding to determine whether a guardian should be appointed is individualized and protective of civil liberties. The finding necessary to appoint a guardian – that a person is unable to receive and evaluate information or communicate decisions – is indicative of a 'mental incapacity' to vote").

²³⁹ CAL. ELEC. CODE § 2208(a).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Hurme & Applebaum, *supra* note 5, at 963.

²⁴³ CAL. ELEC. CODE § 2208(a).

able to communicate that desire without reasonable assistance. Whereas some may be able to communicate a desire to vote only through technological assistance, that assistance would not disqualify them.

B. *Judicial Determinations as Analyzed Under the Vagueness and Overbreadth Doctrines*

Unlike general prohibitions, provisions implementing the judicial approach are not vague. Under vagueness, the relevant inquiry is whether the provision is (1) so vague that people "of common intelligence must necessarily guess as to its meaning and differ as to its application," and (2) "authorizes or even encourages arbitrary and discriminatory enforcement."²⁴⁴ Whereas with general prohibitions where laypeople were found to be unequipped to determine who is an "idiot,"²⁴⁵ the individualized process of the judicial approach offers a more clear and orderly process for a determination of incapacity.²⁴⁶ Only judges, with the evidence submitted before them, maintain full control of this decision.²⁴⁷ Under a provision like California's, judges also follow set criteria, and can only revoke one's right to vote under a finding of clear and convincing evidence.²⁴⁸ Arbitrary and discriminatory enforcement is therefore absent compared to general prohibitions.²⁴⁹ Unlike a layperson, the judge has all the relevant information about the individual before them to make a complete and informed decision about voting capacity.²⁵⁰

Turning next to overbreadth, some states' judicial determination approaches are overbroad and others are not. A statute is overbroad when its language is so far-reaching that it applies to unprohibited conduct.²⁵¹ An example of an overbroad state disqualifying provision is Arizona's disqualifying provision which states: "an individual is not qualified to register to vote if adjudicated as incapacitated."²⁵² Ari-

²⁴⁴ See *Connally*, 269 U.S. at 391; *City of Chicago*, 527 U.S. at 56; see also *Kolender*, 461 U.S. at 358; *Grayned*, 408 U.S. at 108-09; *Coates*, 402 U.S. at 611.

²⁴⁵ See *Carroll*, 354 A.2d at 359.

²⁴⁶ See *Hurme & Applebaum*, *supra* note 5, at 957.

²⁴⁷ See *id.*

²⁴⁸ CAL. ELEC. CODE § 2208(a).

²⁴⁹ See *id.*

²⁵⁰ See *Carroll*, 354 A.2d at 359.

²⁵¹ *Schwartzmiller*, 752 F.2d at 1346.

²⁵² ARIZ. REV. STAT. ANN. § 16-101(A)(6).

zona then defines “incapacitated” as “a person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic drug use, chronic intoxication, or other cause, except minority, to the extent he or she lacks sufficient understanding or capacity to make or communicate responsible decisions regarding herself.”²⁵³ Under Arizona law then, a person who is impaired by mental illness and is deemed to lack sufficient understanding to make a responsible decision for herself is adjudicated incapacitated.²⁵⁴ Because she is now adjudicated incapacitated, she is not qualified to vote in Arizona.²⁵⁵ The key inquiry here is what responsible decisions did the judge deem the woman unable to make for herself? In this hypothetical of a woman with mental illness, a judge may have found she lacked the understanding to make responsible health-care decisions for herself. However, the criteria necessary to find that an individual can make a responsible healthcare decision does not likely coincide with the criteria for finding capacity to vote.²⁵⁶ Someone with a mental illness who lacks a sufficient understanding to make responsible health decisions for themselves may be perfectly capable of exercising their right to vote. Therefore, a provision such as Arizona’s is overbroad because it is so far reaching that it can revoke an individual’s right to vote based on criteria irrelevant to determining voting competence.

However, not all judicial determination approaches are overbroad. For example, reexamine California’s judicial determination provision:

A person is presumed competent to vote regardless of his or her conservatorship status. A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process²⁵⁷

²⁵³ *Id.* § 14-5101(1).

²⁵⁴ *See id.*

²⁵⁵ *See id.* § 16-101(A)(6).

²⁵⁶ Hurme & Applebaum, *supra* note 5, at 958.

²⁵⁷ CAL. ELEC. CODE § 2208(a).

Here, California links a specific standard assessing capacity to vote to an individual's potential disenfranchisement. Where, in Arizona, an individual could hypothetically have their voting rights revoked because they lacked sufficient understanding to make a responsible health decision,²⁵⁸ in California, an individual can only have their voting rights revoked upon clear and convincing evidence they cannot communicate a desire to vote.²⁵⁹ The difference between the two approaches is, thus, what kind of capacity assessment the disenfranchisement is linked to. Because California's provision is not so far-reaching that it applies to unprohibited conduct, it is not overbroad.²⁶⁰

C. *The Challenge of Employing a Uniform Voting Capacity Standard*

If more states choose to implement a judicial approach to assess voter competency in the future, they will find themselves in the position of deciding what voting capacity standard to implement. First, the decision from *Doe* emphasizes the importance of informing the individual that their voting right is at stake,²⁶¹ and any sort of capacity standard needs to do such.²⁶² The California standard meets this mark by first stating that "[a] person is presumed competent to vote regardless of his or her conservatorship status."²⁶³

Once an individual is fully informed that their voting right is at stake, the next question is how to measure capacity.²⁶⁴ Although the California standard is more qualitative and boils down to the ability to *express* a desire to vote,²⁶⁵ the CAT-V assessment is more quantitative and incorporates understanding the nature and effect of voting and the ability to make a choice.²⁶⁶ The complexity of the CAT-V assessment is, thus, more likely to lead to more disenfranchised individuals compared to the California standard, but with the tradeoff CAT-V

²⁵⁸ ARIZ. REV. STAT. ANN. § 16-101(A)(6).

²⁵⁹ CAL. ELEC. CODE § 2208(a).

²⁶⁰ See *Schwartzmiller*, 752 F.2d at 1346.

²⁶¹ See *Rowe*, 156 F. Supp at 51-56.

²⁶² See *id.*; see also *Carnahan*, 499 F.3d at 810 n.8.

²⁶³ CAL. ELEC. CODE § 2208(a).

²⁶⁴ See *Hurme & Applebaum*, *supra* note 5, at 958.

²⁶⁵ See CAL. ELEC. CODE § 2208(a).

²⁶⁶ See *Applebaum et. al.*, *supra* note 64, at 2094-99.

might measure voting capacity more reliably.²⁶⁷ Although a new capacity standard is not proposed here, before a tool such as CAT-V is advocated for universal use, the discourse should first decide the ideal baseline measurement for defining capacity to vote. Expressing a desire to vote is not the same thing as actually understanding the nature and effect of voting. Should one even need to understand the nature or effect of voting to retain the right to vote? These are the kinds of questions that seem to have no settled answer yet, and, thus, should be left to the states to decide for now.

III. RECOMMENDED CHANGES TO CURRENT STATE VOTER COMPETENCY LAWS

Based on the analysis above, two changes to state voter competency laws should be made: one concerning general prohibitions, and the other concerning the judicial determination approach. First, general prohibitions should be repealed. As noted earlier, general prohibitions have garnered a swarm of legal issues, such as failing to inform those placed under a guardianship or conservatorship that their right to vote may be revoked,²⁶⁸ and implementation problems as laypeople have been deemed unequipped to make these decisions.²⁶⁹ The move toward individualized, judicial determinations of finding capacity to vote parallels similar trends with regard to assessment of an individual to manage finances, to consent to medical treatment, and to make other important decisions.²⁷⁰

Additionally, general prohibitions do not take into account the various forms that mental disabilities appear across the population.²⁷¹ Instead, general prohibitions oversimplify the complexities of mental disabilities by fixing people with a label such as “idiot” or “insane.”²⁷² These oversimplifications continue to reflect stigmas toward people with disabilities, and given their difficulty in enforcement, these laws often go unenforced.²⁷³ Even so, this Comment recommends repeal-

²⁶⁷ See *id.* at 2094.

²⁶⁸ *Carnahan*, 499 F.3d at 50-51.

²⁶⁹ *Carroll*, 354 A.2d at 359.

²⁷⁰ See Applebaum, *supra* note 64, at 2094.

²⁷¹ Hurme & Appelbaum, *supra* note 5, at 957.

²⁷² See, e.g., KY. CONST. § 145(3); MISS. CONST. art. XII, § 241; OHIO CONST. art. V, § 6.

²⁷³ Bazelon Ctr. For Mental Health Law et al., *supra* note 125, at 14.

ing such laws given both their implementation issues and the stigmas these laws continue to reinforce.

Second, this Comment recommends that states that use a judicial determination approach adopt a clear and convincing evidence standard. Such a standard should be linked to criteria proper for finding capacity or incapacity to vote. For example, Missouri's judicial determination approach only provides that "no person adjudicated incapacitated is entitled to vote."²⁷⁴ Similarly, South Carolina's approach only provides that "a person is disqualified from registering or voting if adjudicated mentally incompetent by a court of competent jurisdiction."²⁷⁵ The California standard differs from these two approaches by providing concrete assessment criteria linked to voting, that is, clear and convincing evidence that the person cannot communicate, with or without assistance, a desire to participate in the voting process.²⁷⁶ Whereas Missouri's and South Carolina's provisions do not provide concrete criteria with a specific link to capacity to vote, judges in those states must come up with their own ways to assess capacity.²⁷⁷ Although this approach may provide judges with greater flexibility for making these voter competency decisions, it could also lead to more arbitrariness and, thus, greater disenfranchisement.

In conclusion, the decisions in *Doe* and *Carnahan* both reflect the importance that an individual should be sufficiently informed their right to vote is at stake.²⁷⁸ Additionally, these cases reflect the importance that the individual making the decision has the proper tools to make this decision.²⁷⁹ Given the California clear and convincing evidence standard achieves both these goals with the most concreteness, this Comment ultimately concludes that this should be the model standard moving forward until a more universally agreed upon standard emerges.

CONCLUSION

After missing ten years of presidential, gubernatorial, and mayoral races, Greg Demer's voting rights were restored at twenty-eight

²⁷⁴ MO. REV. STAT. § 115.133(2).

²⁷⁵ S.C. CODE ANN. § 7-5-120(B)(1).

²⁷⁶ CAL. ELEC. CODE § 2208(a).

²⁷⁷ MO. REV. STAT. § 115.133(2); S.C. CODE ANN. § 7-5-120(B)(1).

²⁷⁸ See *Carnahan*, 499 F.3d at 810 n.8; see also *Doe*, 156 F. Supp at 50-51.

²⁷⁹ See *id.*

years old after advocacy groups successfully advanced the clear and convincing standard in California.²⁸⁰ “It was a way for my son to be proud of himself,” his mother Linda said, “and return some of his self-esteem.”²⁸¹ If there is one takeaway from Greg Demer’s story, it is that every individual with a mental disability has a unique circumstance and deserves to, at the very minimum, have a fair evaluation in front of a court of law before their right to vote is revoked.²⁸² Additionally, steps need to be taken by legislatures and judges alike to ensure that the right to vote for individuals with mental disabilities is properly protected. This need for action is pressing, especially because the rising prevalence of disabilities like Autism and Alzheimer’s disease will surely draw more attention in the near future.²⁸³ Revising voter competency laws to model California’s approach in which there must be clear and convincing evidence of incapacity to vote would help better ensure due process is met, remedy issues of vagueness and overbreadth, and better promote the electoral participation of people with mental disabilities.²⁸⁴ As more adult citizens become full participants in the polity, the democratic process is enriched for all.²⁸⁵ Although society is still learning this lesson with regard to persons with disabilities, my two recommendations are given together with the sincere hope of moving one step closer in this process for the mentally disabled community.

²⁸⁰ Vasilogambros, *supra* note 8.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See Symposium, *supra* note 64, at 843-44.

²⁸⁴ CAL. ELEC. CODE § 2208(a).

²⁸⁵ Waterstone, *supra* note 1, at 353.

