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# A FIRST AMENDMENT ANALYSIS OF VOTING RIGHTS OF THE MENTALLY INCAPACITATED: WHY ARE YOU CALLING ME AN IDIOT, WHY CAN'T I VOTE?

Tiffany Yates\*

## INTRODUCTION

In August of 2012, Clinton Gode went before Judge Lee Jantzen to petition for the right to vote.<sup>1</sup> Clinton Gode has Down Syndrome, and when he was eighteen years old his parents became his legal guardians to manage his medical and financial affairs.<sup>2</sup> Gode lives in Arizona, so he was disqualified from voting when his parents were granted guardianship over him.<sup>3</sup> Arizona is a state that has no provision for allowing those who are declared mentally incompetent to vote, but Gode was afforded the right to vote by Judge Jantzen, who stated that, “by clear and convincing evidence.”<sup>4</sup> Gode illustrated “sufficient understanding to exercise the right to vote.”<sup>5</sup>

Donald Trump? Hillary Clinton? Who did you vote for? If you can answer this question by going to the polls and casting a vote, then you have a right denied to adults adjudged to be mentally incompetent in fourteen states.<sup>6</sup> There are roughly 1.5 million adult guardianships in the United States with an estimated total of \$273 billion in assets.<sup>7</sup> The question arises—can they vote to protect their interests? The answer is—it depends on where they live. For example, as described above, Clinton Gode had to fight for the right to vote by petitioning the

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<sup>1</sup> Deanna Pan, *Protecting the Voting Rights of People with Mental Disabilities*, MOTHER JONES (Nov. 5, 2012, 5:01 PM) <http://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Sally Hurme & Paul Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 935 (2007).

<sup>7</sup> Arian Campo-Flores & Ashby Jones, *Abuse Plagues System of Legal Guardians for Adults*, WALL ST. J. (Oct. 30, 2015), <http://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524>.

court, because Arizona does not allow those who are adjudged mentally incompetent to vote.<sup>8</sup> This contrasts with the experience of Roberta Blomster, a forty-one-year-old woman diagnosed with mild mental retardation, who lives in St. Paul, Minnesota, and is allowed to vote because she was given a hearing where she presented sufficient evidence in court that she should retain the ability to vote.<sup>9</sup>

There is a common misconception that voting is a form of speech that is protected by the First Amendment of the United States Constitution. It isn't. Voting is looked at through a very different lens. As the two legal scholars describe it, "[v]oting is a fundamental right protected by the federal and state constitutions, and it is a hallmark of our democracy. However, the states have authority to regulate their election processes, including defining who is eligible to vote."<sup>10</sup> Laws intended to prevent voter fraud in elections are reviewed for whether or not the law is "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"<sup>11</sup> Further, it is thought that preventing people who are adjudicated as incompetent from voting will limit voter fraud. This belief arises from the stereotype that those who are adjudicated as incompetent are considered to be vulnerable to exploitation and manipulation. This belief perpetuates the idea that their vote is compromised because someone seeking to exploit or manipulate how they vote, could effectively get two votes. Why is this a concern?

First, it is necessary to evaluate the process by which adjudication of incompetence is determined, the course of action taken when someone is adjudged to be mentally incompetent, and the approaches that states take to allowing those who are found to be mentally incompetent to vote. Then, it is necessary to review the general reasoning behind the revocation of the ability to vote for those declared mentally incompetent taken by states, and why rational basis is the wrong standard. This Note will argue that a First Amendment approach would better protect those who are being denied the right to vote on the grounds that

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<sup>8</sup> Pan, *supra* note 1.

<sup>9</sup> Kimberly Leonard, *Keeping the 'Mentally Incompetent' From Voting*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>.

<sup>10</sup> Hurme & Appelbaum, *supra* note 4, at 931.

<sup>11</sup> Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

they have been adjudged as mentally incompetent. This argument is grounded in the scrutiny that is afforded to those practices that are found to be considered “free speech,” and seeks to make the case for a departure from the rational basis standard utilized by the court in approach to some laws regarding voting regulation.

Part I will provide a general overview of how adult incompetency proceedings progress. Part II will delve into a discussion of the various forms of guardianship. Then Part III of this Note will describe the different restrictions to voting when someone has been adjudged incompetent. There are four approaches that states have taken, and this Note will categorize and analyze each one. Part V will explore different reasons that have been articulated for restricting voting for those who have guardians. Part VI will examine the Court’s approach to incompetency and voting. Part VII will explain why reform is necessary, and further, Part VII will argue that a First Amendment view of the voting issue would protect the rights of more people and limit disenfranchisement.

### **I. WHAT IT MEANS TO BE MENTALLY INCOMPETENT AND WHEN DOES INCOMPETENCE ADJUDICATION OCCUR**

This overview of guardianship is not state specific, and therefore it is not dispositive of any particular process, but North Carolina is the primarily cited model. This overview is a conceptual one.

Mental incompetence is the inability of a person to make or carry out important decisions regarding his or her affairs. An individual is defined as mentally incompetent if h/she is manifestly psychotic or otherwise of unsound mind, either consistently or sporadically, by reason of mental defect.<sup>12</sup>

This definition appears if you search for the term “mental incompetence.” If a person is adjudged to be mentally incompetent it can be because they have a mental illness,

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<sup>12</sup> *Mental Incompetence*, US LEGAL, <http://definitions.uslegal.com/m/mental-incompetence/> (last visited Oct. 6, 2016).

developmental disability, or traumatic brain injury that renders them incapable of making basic living decisions for themselves, such as where to live or how to spend money.<sup>13</sup>

People with developmental disabilities can also be placed under the care of a guardian.<sup>14</sup> For example, consider a person who is diagnosed with autism, which is a spectrum disorder.<sup>15</sup> Some individuals with autism are high functioning, such as individuals with Asperger's syndrome and are "highly intelligent," while others are not capable of speech or day-to-day tasks.<sup>16</sup> It is the same with mental competence because there is a spectrum. For example, "a patient with severe dementia may be judged incompetent but . . . a patient may be judged competent despite some forgetfulness and confusion."<sup>17</sup>

Who needs a guardian and what type of guardian is needed is determined on an individual basis, and the process varies widely from state to state.<sup>18</sup> For example, in Florida there exists an ability to appoint a "voluntary guardian," who manages the affairs of a person who is still competent (there is no incompetency proceeding), but is "incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment."<sup>19</sup> In contrast, North Carolina does not allow for the voluntary appointment of a guardian of the estate; the person would have to go through an incompetency proceeding and be found incompetent to have someone appointed as the guardian of the estate.<sup>20</sup> The only mechanism that allows for someone to manage another's estate without an incompetency proceeding in

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<sup>13</sup> See Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAT'L ACAD. OF ELDER LAW ATT'YS J. 125, 126 n.3 (2014).

<sup>14</sup> See *id.*

<sup>15</sup> *What is Autism? What is Autism Spectrum Disorder?* AUTISM SPEAKS, <https://www.autismspeaks.org/what-autism> (last visited Dec. 18, 2016).

<sup>16</sup> Jeannette Kennett, *Autism, Empathy, and Moral Agency*, 52 PHIL. Q. 340, 345-46 (2002).

<sup>17</sup> *Competency – Drawing the Line Between Competency and Incompetence – Clinical, Patient, and Decision*, MEDICINE ENCYCLOPEDIA, <http://medicine.jrank.org/pages/319/Competency-Drawing-line-between-competency-incompetence.html> (last visited Nov. 16, 2016).

<sup>18</sup> Feinstein & Webber, *supra* note 12, at 126.

<sup>19</sup> FLA. STAT. § 744.341(a) (2016).

<sup>20</sup> N.C. GEN. STAT. § 35A-1251 (2016).

North Carolina is a durable power of attorney.<sup>21</sup>

Another aspect that varies widely from state to state is how many and to what degree “fundamental rights,” or tenets of citizenship, are taken away.<sup>22</sup> The most prevalent fundamental federal right that is revoked is voting.<sup>23</sup> People who are adjudged to be incompetent lose the right to vote in many states.<sup>24</sup> There are states that have recognized that “incompetent” encompasses a wide spectrum of people and tried to mitigate their policies.<sup>25</sup> However, there are a large number of states which still consider it within their discretion to limit voting or take away the right completely.<sup>26</sup> A large number of people are losing the most important right granted by the United States Constitution—the right that guarantees that individuals can hold their political leaders accountable for the choices that they make in office—voting.

Both the Due Process and Equal Protection clauses of the Fourteenth Amendment protect voting:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>27</sup>

People who are adjudicated as mentally incompetent are still citizens of the United States, and their rights should be protected by the Fourteenth Amendment. However, because a declaration of incompetence impedes so many of their fundamental rights (the right to contract, to marry, to bring suit), it would seem that those who are adjudged mentally incompetent no longer fit into

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<sup>21</sup> *Id.* § 32A-8.

<sup>22</sup> Feinstein & Webber, *supra* note 12, at 126.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 132.

<sup>26</sup> *Id.* at 132-33.

<sup>27</sup> U.S. CONST. amend. XIV, § 1.

the category of “citizen.”<sup>28</sup> Even when those who are adjudged mentally incompetent have vast amounts of wealth, they no longer are afforded the right to decide how it is used.<sup>29</sup> So does the Fourteenth Amendment protect them? It should—“[l]egally and constitutionally, it must be presumed that all citizens are equal before the law . . . [t]he Bill of Rights does not speak of competents and incompetents.”<sup>30</sup> A person who is incompetent is still responsible for paying taxes; they are afforded deductions,<sup>31</sup> but must still pay taxes.<sup>32</sup> As people who contribute to society, they should be protected by traditional liberty safeguards. One of those safeguards is due process.

Under traditional due process principles, deprivation of a fundamental right requires notice and an opportunity to be heard. That right may be limited, by state law, for lack of mental capacity, as enumerated in Section 8(a) of the National Voter Registration Act of 1993: “In the administration of voter registration for elections for Federal office, each State shall . . . provide that the name of a registrant may not be removed from the official list of eligible voters except . . . as provided by State law, by reason of criminal conviction or mental incapacity. . . . [T]he federal government delegated the authority to restrict voting rights to the states subject to those criteria. However, the Equal Protection Clause of the Fourteenth Amendment prohibits categorical restrictions on fundamental rights, requiring instead that an individualized inquiry be performed. In the guardianship context, this means that states cannot disenfranchise individuals merely for being under guardianship; instead, they must inquire whether “those who cast a vote have the mental capacity to make their own decision by being able to understand the

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<sup>28</sup> Amy L. Bruggeman, *Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence*, 14 AKRON L. REV. 321, 329 (1980).

<sup>29</sup> *Id.* at 327.

<sup>30</sup> *Id.* (quoting Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 65, 72 (1975)).

<sup>31</sup> IRS, *Tax Benefits for Disabled Taxpayers*, <https://www.irs.gov/uac/tax-benefits-for-disabled-taxpayers>.

<sup>32</sup> *Id.*

nature and effect of the voting act itself.”<sup>33</sup>

Guardianship laws vary state by state, but typically “guardianship laws define ‘incapacity’ or ‘incompetency’ through a combination of two or more of the following components:” medical, functional, cognitive, or necessity.<sup>34</sup> “A ‘medical’ component [typically] requires that the respondent’s incapacity be caused by a diagnosed medical condition or identified mental or physical impairment, such as mental illness, developmental disability, or chronic intoxication.”<sup>35</sup> “A ‘functional’ component [typically] requires that the respondent’s incapacity limit [their] ability to manage [their] own affairs or property or to care for [their] essential personal needs such as medical care, food, clothing, shelter, and safety.”<sup>36</sup> “A ‘cognitive’ component requires that the respondent’s incapacity involve a mental or physical condition that limits his or her ability to make or communicate ‘rational decisions.’”<sup>37</sup> “A ‘necessity’ component requires that the respondent’s incapacity endanger the respondent’s person or property to such an extent that appointment of a guardian, as opposed to some other ‘less restrictive’ alternative, is necessary and in the respondent’s best interest.”<sup>38</sup> These are the generally recognized fields through which it is possible to question a person’s competency.

But what if voting were protected by the First Amendment of the United States Constitution? What if, instead of a compelling interest standard, voting rights had a strict scrutiny standard? When the Supreme Court classifies an activity as free speech entitled to First Amendment protection, the Court subjects any law restricting that activity to strict scrutiny.<sup>39</sup> This

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<sup>33</sup> Feinstein & Webber, *supra* note 12, at 129 (emphasis omitted).

<sup>34</sup> UNC SCHOOL OF GOVERNMENT, *North Carolina Guardianship Manual*, 73, 76, <http://defendermanuals.sog.unc.edu/guardianship/6-incapacity> (last visited Oct. 6, 2016).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Armand Derfner & J. Harold Hebert, *Why Doesn't the Law Give Full Free Speech Protections to Voters?*, HUFF. POST (Dec. 1, 2012), [http://www.huffingtonpost.com/armand-derfner/full-free-speech-protection\\_b\\_1929620.html](http://www.huffingtonpost.com/armand-derfner/full-free-speech-protection_b_1929620.html). See *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *United States v. Eichman*, 110 S. Ct. 2404 (1990). *But see*, *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).



results in the law being viewed skeptically.<sup>40</sup> That means that the law will be upheld only if the state can prove the law advances an actual “compelling interest” of the government by the least restrictive means possible.<sup>41</sup> The burden of proof in such a case falls to the state.<sup>42</sup>

The idea that casting a vote is engaging in a form of free speech seems natural because a vote, after all, is an individual’s mechanism for speaking to society about how they want society to be governed. However, the Supreme Court approaches voting laws in a deferential way in terms of mental illness or other forms of incompetence. Other laws that are not considered too discriminatory are also treated with deference, for example, the Indiana voter ID laws were upheld even though there were virtually no cases of voter ID fraud.<sup>43</sup> It is an interesting dichotomy that the votes themselves are not protected by the First Amendment, but the money contributed to campaigns is considered free speech and is protected.<sup>44</sup>

## II. VARIOUS FORMS OF GUARDIANSHIP

Guardianship is a court procedure where a legal relationship is created between a person or organization, with another vulnerable person.<sup>45</sup> The guardian is given the responsibility to care for and make decisions for another individual over the age of eighteen, the ward, who is not competent to handle their own affairs, or is unable to make important decisions.<sup>46</sup> There are several types of guardianship that can be ordered by the court. The four types are “Guardian of the Person,” “Guardian of the Estate,” “General Guardian,” and “Limited Guardianship.”

The first type of guardianship is “Guardian of the Person,” and it entails handling personal affairs, medical

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; see also *Citizens United v. FEC*, 555 U.S. 1028 (2008).

<sup>45</sup> PAMELA TEASTER ET. AL., *PUBLIC GUARDIANSHIP: IN THE BEST INTERESTS OF INCAPACITATED PEOPLE?* 21 (Praeger, 2010).

<sup>46</sup> *Id.*

decisions, decisions about where the person lives, participation in educational or vocational programs, and other decisions regarding the person who is determined to be incompetent.<sup>47</sup>

Another form that guardianship can take is “Guardian of the Estate,” which is where the appointed guardian handles the financial affairs, investment decisions, bill payments, as well as real and personal property.<sup>48</sup>

Another form that guardianship can take is “General Guardian,” where the guardian has the responsibilities of both of the aforementioned types of guardianship.<sup>49</sup> The type of guardian that is appointed is based on what the judge deems necessary.<sup>50</sup> For example, if an older person was struggling with memory loss and they were competently handling their personal affairs, but they were incapable of managing their financial affairs, the judge would likely rule that they needed a “Guardian of the Estate.” It is important to note that guardianships are only meant for cases in which they are immediately necessary, and they are not meant as a planning tool, so they cannot be done in advance.<sup>51</sup> It is also important to note that there are vast differences between guardianship cases for adults and guardianship cases for children, which make these two separate fields legally incomparable.

Limited guardianship is another common type of guardianship.<sup>52</sup> It is based on the idea that there are people who are only partially incapacitated (*i.e.* somewhat competent) and retain “sufficient capacity to exercise certain rights or make or participate in certain decisions.”<sup>53</sup> For example, persons with a developmental disability may lack the capacity to make medical decisions, but remain capable of making a decision about where they want to live. In such instances, they should be placed under a limited guardianship, where a guardian is appointed to help them make decisions that they lack the capacity to make (in this

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<sup>47</sup> UNC SCHOOL OF GOVERNMENT, *supra* note 32.

<sup>48</sup> N.C. GEN. STAT. § 35A-1253 (2016).

<sup>49</sup> THE LAW AND THE ELDERLY IN NORTH CAROLINA 215 (Michael J. McCann & John L. Saxon eds., 2d ed. 1996).

<sup>50</sup> N.C. GEN. STAT. § 35A-1212(a) (2016).

<sup>51</sup> TEASTER ET AL., *supra* note 45, at 21.

<sup>52</sup> THE LAW AND THE ELDERLY, *supra* note 49, at 215.

<sup>53</sup> TEASTER ET AL., *supra* note 45, at 22.

example, medical decisions), but allows the adjudged incompetent individuals to make decisions that they are capable of making on their own (in this example, where to live).

The role of guardian can be filled by family, friends, a corporation, or a public guardian. Family is the preferred solution because it is believed that the family will act in accord with what is in the best interests for the ward.<sup>54</sup> Public guardianships occur when a person has been declared incompetent and has an estate, but has no person that could be appointed as guardian.<sup>55</sup> A public guardian is an individual appointed by a clerk of superior court for a term of eight years as guardian.<sup>56</sup> One concern that should be taken into consideration during appointment is whether the proposed guardian is prepared to have “regular contact” with the ward and to act in the best interest of the ward so as to ensure a life as “comfortable, healthy, and safe as possible.”<sup>57</sup> This concern is the reason that a Guardian *ad litem* (“GAL”) will conduct an investigation into whether to appoint a guardian, and who should be appointed; then, the GAL will make a recommendation based on their investigation.<sup>58</sup>

### III. STATES APPROACHES TO ALLOWING THOSE FOUND MENTALLY INCOMPETENT TO VOTE<sup>59</sup>

Voting laws are left to the discretion of the states. The states have generally taken one of four approaches regarding the mentally incompetent and voting: (1) not allowing those adjudged mentally incompetent to vote at all; (2) after someone has been adjudicated to be mentally incompetent there is a

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<sup>54</sup> See N.C. GEN. STAT. § 35A-1214 (2016); THE LAW AND THE ELDERLY, *supra* note 49, at 216.

<sup>55</sup> N.C. GEN. STAT. § 35A-1214 (2016).

<sup>56</sup> *Id.*

<sup>57</sup> N.C. DEP'T OF HEALTH AND HUMAN SERV., GUARDIANSHIP OF INCOMPETENT ADULTS IN NORTH CAROLINA, DHHS-6226 (1997).

<sup>58</sup> See generally Bradley Geller, *Manuals for Guardians ad Litem and Appointed Counsel*, Michigan Center for Law and Aging, 1, 5–6 (2014) (explaining the role of guardians ad litem).

<sup>59</sup> See generally BAZELTON CTR. FOR MENTAL HEALTH LAW, *State Laws Affecting the Voting Rights of People with Mental Disabilities*, [http://www.bazelton.org/LinkClick.aspx?fileticket=-Hs7F\\_Ohfgg%3D&tabid=543](http://www.bazelton.org/LinkClick.aspx?fileticket=-Hs7F_Ohfgg%3D&tabid=543) (last visited Oct. 6, 2016) (referencing statutes used in this section).

presumption of *inability* to vote unless information otherwise is presented during adjudication; (3) after someone has been adjudicated to be mentally incompetent there is a presumption of the *capability* to vote unless information otherwise is presented during adjudication; and (4) allowing those judged mentally incompetent to vote. Each of these approaches has different implications depending on the state where the person was adjudicated incompetent, and they have very different benefits and drawbacks.

### A. The First Approach

The first approach that many states have elected to follow for those adjudicated incompetent is simply not allow people with that adjudication to vote. Period. No one found to need a guardian is permitted to vote. This occurs in eighteen states and the District of Columbia. These states are: Arizona,<sup>60</sup> District of Columbia,<sup>61</sup> Georgia,<sup>62</sup> Hawaii,<sup>63</sup> Mississippi,<sup>64</sup> Missouri,<sup>65</sup> Montana,<sup>66</sup> Nebraska,<sup>67</sup> Nevada,<sup>68</sup> New Jersey,<sup>69</sup> New York,<sup>70</sup> Ohio,<sup>71</sup> Rhode Island,<sup>72</sup> South Carolina,<sup>73</sup> Utah,<sup>74</sup> Virginia,<sup>75</sup> West Virginia,<sup>76</sup> and Wyoming.<sup>77</sup> Many of these statutes require that someone be deemed competent before they are allowed to participate in voting again.

South Carolina's statute states that "[a] person is disqualified from registering or voting if he is adjudicated

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<sup>60</sup> See *id.* at 1 (citing ARIZ. CONST. art. VII, § 2(c)).

<sup>61</sup> See *id.* at 4 (citing D.C. CODE §1-1001.02 (2016)).

<sup>62</sup> See *id.* (citing GA. CONST. art. II, § 1, ¶ 3(b)) (then citing GA. CODE ANN. § 21-2-216(b) (West 2016)).

<sup>63</sup> See *id.* (citing HAW. CONST. art. II, § 2).

<sup>64</sup> See *id.* at 8 (citing MISS. CONST. art. XII, § 241).

<sup>65</sup> See *id.* (citing MO. CONST. art. VIII, § 2).

<sup>66</sup> See *id.* at 9 (citing MONT. CONST. art. IV, § 2).

<sup>67</sup> See *id.* (citing NEB. CONST. art. VI, § 2).

<sup>68</sup> See *id.* (citing NEV. CONST. art. II, § 1).

<sup>69</sup> See *id.* at 10 (citing N.J. CONST. art. II, § 1, ¶ 6).

<sup>70</sup> See *id.* at 11 (citing N.Y. ELEC. LAW § 5-106(6) (McKinney 2016)).

<sup>71</sup> See *id.* at 12 (citing OHIO CONST. art. V, § 6).

<sup>72</sup> See *id.* at 14 (citing R.I. CONST. art. II, § 1).

<sup>73</sup> See *id.* (citing S.C. CONST. art. II, § 7).

<sup>74</sup> See *id.* at 15 (citing UTAH CONST. art. IV, § 6).

<sup>75</sup> See *id.* at 16 (citing VA. CONST. art. II, § 1).

<sup>76</sup> See *id.* at 17 (citing W. VA. CONST. art. IV, § 1).

<sup>77</sup> See *id.* at 19 (citing WYO. CONST. art. VI, § 6).

mentally incompetent by a court of competent jurisdiction.”<sup>78</sup> Nevada includes the requirement that to regain the ability to vote, a person’s competency must be restored—“[n]o person who has been adjudicated mentally incompetent, unless restored to legal capacity, shall be entitled to the privilege of elector . . . .”<sup>79</sup>

Other states use less precise language for the competency requirement. For example, Mississippi’s constitution reads “[e]very inhabitant of this state, except idiots and insane persons. . . .”<sup>80</sup> is a qualified elector. However, Mississippi does not stop there; the code goes on to explain that “[e]very citizen, except persons adjudicated *non compos mentis* . . .” shall be permitted to vote.<sup>81</sup> In these states, those deemed to need limited guardianships or full guardianships are not permitted to vote.

### *B. The Second and Third Approaches*

The second and third approaches to whether or not those adjudged mentally incompetent should vote only differ in the presumption regarding the ability to vote during adjudication. In some states, the court is required to make a specific determination of the voting capacity of a person under guardianship.<sup>82</sup> In other states, it is within the court’s discretion to decide whether to issue an order regarding capability to vote. For example, under South Dakota law:

The appointment of a guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders, and the protected person shall otherwise retain all rights which have not been granted to the guardian or conservator.<sup>83</sup>

In many states, such as North Carolina and Oklahoma, when a person is adjudged to be mentally incompetent and they retain

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<sup>78</sup> *See id.* at 14 (citing S.C. CODE ANN. § 7-5-120(B)(1) (West 2016)).

<sup>79</sup> *See id.* at 9 (citing NEV. CONST. art. II, § 1).

<sup>80</sup> *See id.* at 8 (citing MISS. CONST. art. XII, § 241).

<sup>81</sup> *See id.* (citing MISS. CODE ANN. § 23-15-11 (West 2016)).

<sup>82</sup> *See id.* at 12 (citing OKLA. STAT. ANN. tit. 30 § 3-113(B)(1) (West 2016)).

<sup>83</sup> *See id.* at 14 (citing S.D. CODIFIED LAWS § 29A-5-118 (2016)).

some of their rights, such as the right to vote, they are considered partially incapacitated or under some form of limited guardianship.<sup>84</sup> In other states, it is possible to be under a limited form of guardianship, but still not have the right to vote.<sup>85</sup>

For example, in Texas, the statute reads, “[t]o be eligible to register as a voter, a person must not have been determined totally mentally incapacitated or partially mentally incapacitated without the right to vote by a final judgment of a court exercising probate jurisdiction.”<sup>86</sup> There are twenty-one states that allow those who have been adjudged to be incompetent to vote based on information that is presented in court.<sup>87</sup> The key difference between these approaches is the following: there is an assumption of capacity to vote, there is an assumption of incapacity to vote, or it is left to the court to determine based on information presented during the adjudicative process. These states are: Alabama,<sup>88</sup> Alaska,<sup>89</sup> Arkansas,<sup>90</sup> California,<sup>91</sup> Connecticut,<sup>92</sup> Delaware,<sup>93</sup> Florida,<sup>94</sup> Iowa,<sup>95</sup> Kentucky,<sup>96</sup> Louisiana,<sup>97</sup> Maryland,<sup>98</sup> Massachusetts,<sup>99</sup> Michigan,<sup>100</sup> Minnesota,<sup>101</sup> New Mexico,<sup>102</sup> North Carolina,<sup>103</sup> North

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<sup>84</sup> See e.g., *id.* at 12 (citing OKLA. STAT. ANN. tit. 30 § 3-113(B)(1) (West 2016)).

<sup>85</sup> See generally *id.*

<sup>86</sup> See *id.* at 15 (citing TEX. ELEC. CODE ANN. tit. 2, § 13.001(a)(3) (West 2016)).

<sup>87</sup> See generally *id.*

<sup>88</sup> See *id.* at 1 (citing ALA. CODE § 38-9C-4(7) (2016)).

<sup>89</sup> See *id.* (citing ALASKA STAT. ANN. § 13.26.150(e)(6) (West 2016)).

<sup>90</sup> See *id.* at 2 (citing ARK. CODE ANN. § 28-65-106 (West 2016)).

<sup>91</sup> See *id.* (citing CAL. PROB. CODE § 1910(b) (West 2016)).

<sup>92</sup> See *id.* at 3 (citing CONN. GEN. STAT. ANN. § 45a-703 (West 2016)).

<sup>93</sup> See *id.* (citing DEL. CODE ANN. tit. 15, § 1701 (West 2016)).

<sup>94</sup> See *id.* at 4 (citing FLA. STAT. ANN. § 744.331(3)(g)(2) (West 2016)).

<sup>95</sup> See *id.* at 6 (citing IOWA CODE ANN. § 633.556(1) (West 2016)).

<sup>96</sup> See *id.* (citing KY. REV. STAT. ANN. § 387.580(3)(C) (LexisNexis 2016)).

<sup>97</sup> See *id.* (citing LA. STAT. ANN. § 18:102(A)(2) (2016)).

<sup>98</sup> See *id.* at 7 (citing MD. CODE ANN. ELEC. LAW § 3-102(b)(2) (LexisNexis 2016)).

<sup>99</sup> Mass. Sec. of State, *Persons Subject to Guardianship That Do Not Specifically Forbid Voting Are Eligible Voters*, PUB. RECORDER (Jan. 1991),

<http://www.margolis.com/hs-fs/hub/29051/file-13683957->

[pdf/docs/guardianship.pdf](http://www.margolis.com/hs-fs/hub/29051/file-13683957-pdf/docs/guardianship.pdf) (interpreting MASS CONST. amend. art. III).

<sup>100</sup> See BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 8 (citing MICH. CONST. art. II, § 2).

<sup>101</sup> See *id.* (citing MINN. STAT. ANN. § 524.5-313(v)(8) (West 2016)).

<sup>102</sup> See *id.* at 11 (citing N.M. STAT. ANN. § 45-5-301.1 (West 2016)).

<sup>103</sup> North Carolina does not have a statutory provision or a section in its constitution prohibiting voting for those under guardianship. See *id.* at 11.

Dakota,<sup>104</sup> Oklahoma,<sup>105</sup> Oregon,<sup>106</sup> South Dakota,<sup>107</sup> Tennessee,<sup>108</sup> Texas,<sup>109</sup> Washington,<sup>110</sup> and Wisconsin.<sup>111</sup> Determination of capacity in these proceedings varies based on the state where the proceedings are taking place. For example, in California a “[p]erson under conservatorship is disqualified from voting if court determines that he or she is not capable of completing voter registration affidavit; must review their capability of completing the affidavit during the yearly or biennial review of conservatorship.”<sup>112</sup>

When compared to the first approach, both the second and third approaches allow more freedom to exercise the right to vote; however, there is a lack of consistency and determinations are highly dependent on where incompetence proceedings take place. In addition to a lack of consistency between states, there is often a lack of consistency within a state as well. For example, in Alabama, the state constitution states that “[n]o person who is mentally incompetent shall be qualified to vote unless the disability has been removed”<sup>113</sup> and that “[p]ersons disqualified under the [Alabama] Constitution are not entitled to vote.”<sup>114</sup> In the Alabama Code, this section clarifies the role of the court in limiting rights:

The court shall exercise the authority conferred in this division so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive

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<sup>104</sup> *See id.* (citing N.D. CENT. CODE ANN. § 30.1-28-04(3) (West 2016)).

<sup>105</sup> *See id.* at 12 (citing OKLA. STAT. ANN. tit. 30, § 3-113(B)(1) (West 2016)).

<sup>106</sup> *See id.* (citing OR. CONST. art. II, § 3).

<sup>107</sup> *See id.* at 14 (citing S.D. CODIFIED LAWS § 29A-5-118 (2016)).

<sup>108</sup> *See id.* (citing TENN. CODE ANN. §34-3-104(8) (West 2016)).

<sup>109</sup> *See id.* at 15 (citing TEX. CONST. art. VI, § 1(a)(2)).

<sup>110</sup> *See id.* at 17 (citing WASH. REV. CODE ANN. § 11.88.010(5) (West 2016)).

<sup>111</sup> *See id.* at 18 (citing WIS. STAT. ANN. § 54.25(2)(c)(1)(g) (West 2016)).

<sup>112</sup> *See id.* at 2. (citing CAL. PROB. CODE § 1910 (2016)); *see also* CAL. ELEC. CODE §§ 2208-2209 (West 2016).

<sup>113</sup> Feinstein & Webber, *supra* note 13, at 134 n.75 (quoting ALA. CONST. art VII, § 177(b)).

<sup>114</sup> *See* BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 1. (citing ALA. CODE § 17-3-30 (2016)).

limitations or other conditions warranting the procedure.<sup>115</sup>

Facially, the state constitution and the section above do not seem inconsistent, but consider that only those who are determined to be mentally incompetent and in need of “limited guardianship” are still eligible for consideration to vote.<sup>116</sup> Those who are determined to be mentally incompetent and in need of full guardianship are not afforded that same consideration.

Further, these approaches to mentally incompetent voting laws result in required litigation. In Connecticut “[n]o mentally incompetent person shall be admitted as an elector,”<sup>117</sup> but if the guardian or the conservator believes their ward to have the capacity to vote, then “[t]he guardian or conservator of an individual may file a petition in probate court to determine such individual’s competency to vote in a primary, referendum or election.”<sup>118</sup> This is unnecessarily replicating work. There should be a presumption that the person who has been adjudged to be mentally incompetent has the ability to vote unless the ward is in a state so as to render it impossible for them to be able to make a decision regarding who to vote for (such as a vegetative state).

Some states do not have a statute or a portion of the constitution that requires a specific determination of incompetence to vote. Instead, these states have policies dictated by case law and opinions (specifically, attorney general opinions) that provide guidance regarding voting after a finding of incompetence. For example, in Massachusetts “[e]very citizen . . . excepting persons under guardianship . . . shall have a right to vote in such election,”<sup>119</sup> but the Secretary of State has issued an opinion in a “Voters’ Bill of Rights” that interprets this provision as requiring a specific finding of incompetence before disenfranchising the adjudged incompetent.<sup>120</sup>

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<sup>115</sup> *See id.* at 1 (citing ALA. CODE § 26-2A-105(a) (2016)).

<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 3 (citing CONN. GEN. STAT. § 9-12(a) (2016)).

<sup>118</sup> *See id.* at 3 (citing CONN. GEN. STAT. § 45a-703 (2016)).

<sup>119</sup> *See id.* at 8 (citing MASS. CONST. amend. art. III).

<sup>120</sup> SEC’Y OF THE COMMONWEALTH OF MASS., *2012 Information for Voters: Massachusetts Voters’ Bill of Rights*, [http://www.sec.state.ma.us/ele/ele12/ballot\\_questions\\_12/ma\\_voter\\_rights.htm](http://www.sec.state.ma.us/ele/ele12/ballot_questions_12/ma_voter_rights.htm) (last visited Oct. 6, 2016).



*C. The Fourth Approach*

The fourth approach that is taken by several states is having no restrictions on those who are adjudged mentally incompetent to vote. There are nine states that allow everyone to vote regardless of mental capacity. These states are: Colorado,<sup>121</sup> Idaho,<sup>122</sup> Illinois,<sup>123</sup> Indiana,<sup>124</sup> Kansas,<sup>125</sup> Maine,<sup>126</sup> New Hampshire,<sup>127</sup> Pennsylvania,<sup>128</sup> and Vermont.<sup>129</sup> These states have no constitutional disqualification provisions. Some of them have affirmative statutes that reiterate the right to vote, while others do not. Pennsylvania's constitution states that, "[s]ubject to state law, anyone who is over twenty-one, has been a citizen of the United States for at least one month, and has resided in the state and election district for the specified time may vote."<sup>130</sup>

Only one of these states has a limitation regarding capacity, but is not directed specifically at those who have been adjudged to be mentally incompetent. That state is Vermont, whose constitution states that "[t]o be entitled to the privilege of voting, persons must be of 'quiet and peaceable behavior.'"<sup>131</sup>

#### IV. STATE REASONING FOR DISENFRANCHISING AN ENTIRE GROUP OF PEOPLE

As described above, there is a lot of variety in the approaches that states take regarding if and when a person who has been adjudged as mentally incompetent can vote. One of the reasons that so many states take either the "no voting" approach or the judicially determined ability to vote approach is because of a fear of voting fraud.

There is a fear of "vote harvesting." Vote harvesting is a

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<sup>121</sup> See BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 3 (citing COLO. REV. STAT. § 1-2-103(5) (2016)).

<sup>122</sup> *Id.* (stating that there is no disqualification statute for this state).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Jennifer Mathis, *Voting Rights of Older Adults with Cognitive Impairments*, 42 CLEARING HOUSE REV. J. POVERTY L. & POL'Y, 292, 294 n.20 (2008) (stating that the secretary of state's office issued a memo contradicting Maine's constitution after a federal court found it was "unlawful" to bar individuals with guardians from voting).

<sup>127</sup> BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 10.

<sup>128</sup> See *id.* at 13 (citing PA. CONST. art. VII, § 1).

<sup>129</sup> See *id.* at 16 (citing VT. STAT. ANN. tit. 17, § 2121 (West 2016)).

<sup>130</sup> See *id.* at 13 (citing PA. CONST. art. VII, § 1).

<sup>131</sup> *Id.* (quoting VT. CONST. ch. II., § 42).

term coined to refer to voting in nursing homes and assisted living facilities, where it is believed that there are people who do not have the capacity to vote and caretakers at these facilities are taking advantage of this lack of capacity and voting in their stead.<sup>132</sup> Entering the terms “nursing home voting fraud” brings up several blogs and online newspapers alleging that various individuals have been “victims,” in the sense that someone has assumed their identity to cast a ballot, of voter fraud.<sup>133</sup> Also present are articles questioning the validity of the voter fraud search.<sup>134</sup> The director of the American Bar Association’s Commission on Law and Aging, Charles Sabatino, stated that “[t]here’s a lot of people out there who either don’t have adequate access to the ballot and should, or could be vulnerable to overreaching political types who want to take advantage of their votes to swing an election.”<sup>135</sup>

It is difficult to determine exactly how many cases of voting fraud occur; however, the U.S. Justice Department conducted an investigation for three years under President George W. Bush.<sup>136</sup> The Justice Department studied voter fraud in federal elections and “[o]ut of 197,056,035 votes cast in the two federal elections held during that period, the rate of voter

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<sup>132</sup> Kimberly Leonard, *Keeping the ‘Mentally Incompetent’ from Voting*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>.

<sup>133</sup> See e.g., Emily Nohr, *Vulnerable Adults Deserve Better Protection from Voter Fraud, Citizens Tell Nebraska Legislators*, OMAHA WORLD-HERALD (Oct. 14, 2016), [http://www.omaha.com/news/legislature/vulnerable-adults-deserve-better-protection-from-voter-fraud-citizens-tell/article\\_ed77e237-8169-529c-90a0-a37deaeedf29.html](http://www.omaha.com/news/legislature/vulnerable-adults-deserve-better-protection-from-voter-fraud-citizens-tell/article_ed77e237-8169-529c-90a0-a37deaeedf29.html) (discussing an alleged case of voter fraud lasting 20 years of a woman in a nursing home); *Voter Fraud Uncovered at Nursing Home?*, MACIVER INSTITUTE (May 30, 2012), <http://www.maciverinstitute.com/2012/05/vote-fraud-uncovered-at-nursing-home/> (recounting one grandson’s belief that his grandfather had been a victim of voter fraud; the author could not find an unbiased source that confirms this account).

<sup>134</sup> See Michael Waldman, *What’s Behind the Voter Fraud Witch Hunt?*, BRENNAN CTR. FOR JUST. (Mar. 30, 2016), <https://www.brennancenter.org/blog/whats-behind-voter-fraud-witch-hunt> (stating “conservative activists focused on one thing that hadn’t occurred: voter fraud, specifically voter impersonation at the polls.”).

<sup>135</sup> Pam Belluck, *States Face Decisions on Who is Mentally Fit to Vote*, N.Y. TIMES (Jun. 19, 2007), [http://www.nytimes.com/2007/06/19/us/19vote.html?\\_r=0](http://www.nytimes.com/2007/06/19/us/19vote.html?_r=0).

<sup>136</sup> Lorraine C. Minnite, *The Misleading Myth of Voter Fraud in American Elections*, SCHOLARS STRATEGY NETWORK, (Jan. 2014) <http://www.scholarsstrategynetwork.org/brief/misleading-myth-voter-fraud-american-elections>.

fraud was a miniscule 0.00000132 percent.”<sup>137</sup> To date there has been no showing in any state of any substantial amount of voting fraud regarding those people who have been adjudged as mentally incompetent.<sup>138</sup> This raises the question, if there is no data indicating that fraudulent voting is a problem, then why are there concerns regarding the exploitation of those declared incompetent?

There are concerns about fraudulent voting based on stereotypes of incompetency, which led to inherently biased laws regulating voting rights of those who are mentally incompetent.<sup>139</sup> The laws are “‘based on a faulty stereotype’ that ‘people with mental disabilities can’t make decisions, don’t have a preference in a political issue or among political candidates, or can’t express that preference in a way that is reliable.’”<sup>140</sup> There needs to be a shift in how voting laws are regulated by the courts, which would not allow the states to create laws based on stereotypes. This note seeks to suggest an alternative judicial approach to laws that do not allow those who have been adjudicated as mentally incompetent to vote.

## V. THE COURTS’ APPROACH

Footnote four in *United States v. Carolene Products*<sup>141</sup> establishes that there are different levels of judicial scrutiny that can be used when examining the constitutionality of a particular law.<sup>142</sup> The three levels of judicial scrutiny that will be discussed in this section are: strict scrutiny, intermediate scrutiny, and rational basis. The level of scrutiny that is applied depends on several factors, including who the law effects and which part of the constitution is allegedly being violated.<sup>143</sup> In determining which standard to apply in reviewing a law challenged on constitutional grounds, the Supreme Court considers whether

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Pan, *supra* note 1.

<sup>140</sup> *Id.*

<sup>141</sup> 304 U.S. 144 (1938).

<sup>142</sup> *Id.* at 152.

<sup>143</sup> *Id.*

the law disproportionately impacts members of certain classes.<sup>144</sup>

When reviewing claims based on the Equal Protection Clause of the Fourteenth Amendment, a court determines the level of scrutiny to apply based on whether the affected individual is a member of a suspect class.<sup>145</sup> In *Hirabayashi v. United States*<sup>146</sup> and *Korematsu v. United States*,<sup>147</sup> the Supreme Court established the judicial precedent for suspect classifications. National origin and race are classes that the Supreme Court recognizes as suspect.<sup>148</sup> Alienage was added to the list in the 1970s.<sup>149</sup> Gender and religion, it could be argued, are also deserving of strict scrutiny.<sup>150</sup> When a law targets one of these clearly defined “suspect classes” the court uses a “strict scrutiny” approach to determine whether the law is invalid. “[I]f strict scrutiny is applicable, the government action is unconstitutional unless: (1) it furthers an actual, compelling government interest and (2) the means chosen are necessary (narrowly tailored, the least restrictive alternative) for advancing that interest.”<sup>151</sup> In other words, when analyzing a law under strict scrutiny, the court presumes that the challenged policy is invalid unless the government can demonstrate a compelling interest to justify the policy.<sup>152</sup>

The Supreme Court has two other standards of review that it uses: intermediate scrutiny and rational basis. Intermediate scrutiny is a form of scrutiny between rational basis and strict scrutiny, and a court will likely uphold a discriminatory law under intermediate scrutiny if the law has

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<sup>144</sup> *Id.*

<sup>145</sup> See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 143, 147 (2008).

<sup>146</sup> 323 U.S. 81 (1943).

<sup>147</sup> 320 U.S. 214 (1944).

<sup>148</sup> *Id.* at 216; Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 144 (2011).

<sup>149</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

<sup>150</sup> See, e.g., Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny*, 6 SETON HALL CONST. L.J. 953 (1996); Steven G. Calabrisi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1005-06 (2013) (arguing that footnote four in *Carolene Products* requires strict scrutiny for laws burdening religious rights).

<sup>151</sup> Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 453 (1988), citing *Bernal v. Fainter*, 467 U.S. 216, 219 (1984), *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

<sup>152</sup> *Id.*

persuasive justification.<sup>153</sup> Rational basis means that there is a “reasonable basis in the law . . . [and that] the application of the law [is] in a just and reasonable manner.”<sup>154</sup> “Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis.”<sup>155</sup>

The Supreme Court has split, in recent years, in regards to what kind of scrutiny should apply to laws that restrict voting access for people who are not members of a “suspect class.” This is most clearly demonstrated in the 2008 case, *Crawford v Marion County Election Board*.<sup>156</sup> In this case, the Supreme Court considered a challenge to Indiana’s strict voter identification law that required all voters to present a driver’s license, passport, or a state-issued photo identification card at the polls.<sup>157</sup> Voters also had the option to cast a provisional ballot, but in order to have their votes validated they were required to present a valid photo ID at a designated government office.<sup>158</sup> Delivering the judgment of the Court, Justice Stevens, with whom Justices Roberts and Kennedy joined, thought that if the law places a substantial burden on a person’s ability to vote it may justify heightened scrutiny, but they say that it is not appropriate for a facial challenge to the law.<sup>159</sup> Concurring in the judgment, Justices Scalia, Thomas, and Alito, believed that Indiana’s law should be subjected only to rational basis consideration because the state’s interest in preventing voting fraud constituted a legitimate state interest.<sup>160</sup> Scalia further felt that the law was sufficiently neutral such that an imposition of some burden on a small amount of voters was constitutionally permissible.<sup>161</sup>

Justice Souter, with whom Justice Ginsburg joined, dissented based upon the fact that Indiana could not rely on “abstract interests,” even if legitimate, in burdening the right to

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<sup>153</sup> See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); see also *Nguyen v. INS*, 533 U.S. 53, 70-71 (2001).

<sup>154</sup> *Rational Basis*, BALLENTINE’S LAW DICTIONARY, (3d ed. 1969).

<sup>155</sup> *Rational-Basis Test*, BLACK’S LAW DICTIONARY, (10th ed. 2014).

<sup>156</sup> 553 U.S. 181 (2008).

<sup>157</sup> *Id.* at 185.

<sup>158</sup> *Id.* at 186.

<sup>159</sup> *Id.* at 199.

<sup>160</sup> 553 U.S. 181, 204 (Scalia, J., concurring).

<sup>161</sup> *Id.*

vote.<sup>162</sup> Justice Breyer similarly dissented, asserting that the Indiana Law failed the balancing test because of its disproportionate impact on eligible voters without acceptable identification (including the homeless, the elderly, and those who do not drive).<sup>163</sup> This case is illustrative of the lack of cohesion on the part of the Supreme Court in regards to voting laws that restrict groups that do not fall into the classification of “suspect class.”

Deference to state laws in many areas of governance is rational and effective, but in the arena of voting laws there are groups who are not being protected because they are not recognized as a suspect class by the Supreme Court. Does that mean that those adjudged as mentally incompetent deserve less protection and to be denied something seen as a fundamental right—the right to vote? No. The Supreme Court disagreed and determined that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>164</sup>

## VI. THE NECESSITY OF REFORM

Currently, many individuals who would like to vote are excluded because of overly broad classifications in statutes and the level of deference applied by courts on review. The population of the United States is aging,<sup>165</sup> which means that the amount of voter disenfranchisement as a result of age-related diseases (such as Alzheimer’s, dementia, Huntington’s, Parkinson’s, and amyotrophic lateral sclerosis).<sup>166</sup>

In *Doe v. Rowe*,<sup>167</sup> the court held that Maine’s denial of the

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<sup>162</sup> 553 U.S. 181, 209 (Souter, J., dissenting).

<sup>163</sup> 553 U.S. 181, 237 (Breyer, J., dissenting).

<sup>164</sup> *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

<sup>165</sup> Jennifer M. Ortman, Victoria A. Velkoff, & Howard Hogan, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU 2 (May, 2014)

<https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

<sup>166</sup> *Degenerative Disorders*, BRAINFACFS.ORG, <http://www.brainfacts.org/diseases-disorders/degenerative-disorders/> (last visited Nov. 10, 2016).

<sup>167</sup> 156 F. Supp. 2d 35 (D. Me. 2001).

right to vote in guardianship proceedings violated both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.<sup>168</sup> Maine's constitutional provision left the decision as to whether or not a ward could vote in the hands of the probate court judge (which meant that it was applied in a very inconsistent manner).<sup>169</sup> Further, while the person whose competency was in question was warned of the consequences of being found incompetent, the impact that a finding of incompetence would have on their ability to vote was never discussed, which raised significant due process issues.<sup>170</sup> Defendants tried to save the constitutional provision by proposing additional language to the provision, but the court found that proposing language was not the same as altering the constitution so that those who were found to be mentally incompetent were sufficiently protected by the constitution.<sup>171</sup> The court reasoned that the Due Process Clause was violated because persons being disenfranchised were "not given advance notice they might lose their right to vote because of the guardianship proceeding, leading to an inadequate opportunity to be heard."<sup>172</sup> The court further found that Maine was violating the Equal Protection Clause because the means that Maine had selected were too broad for ensuring that "those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself."<sup>173</sup> The court determined that Maine has a compelling state interest in making sure that individuals who vote are capable of understanding their action.<sup>174</sup>

The category of those "under guardianship for mental illness" was not held to be a permissible surrogate for "mental incapacity to vote."<sup>175</sup> Many people with traditional psychiatric

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<sup>168</sup> *Id.* at 49; see also *The Right to Vote: Interplay of Federal and State Law on Voting Rights*, DISABILITY JUST., <http://disabilityjustice.org/right-to-vote/> (last visited Aug. 30, 2016).

<sup>169</sup> 156 F. Supp. 2d at 43.

<sup>170</sup> *Id.* at 48-49.

<sup>171</sup> *Id.* at 49-51.

<sup>172</sup> *The Right to Vote*, *supra* note 168.

<sup>173</sup> 156 F. Supp. 2d at 51 (quoting Defs. Mot. for Summ. J. at 8).

<sup>174</sup> *The Right to Vote*, *supra* note 168; see also *Doe v. Rowe*, 156 F. Supp. 2d at 51.

<sup>175</sup> 156 F. Supp. 2d at 55-56.

disorders disenfranchised under this provision were capable of understanding the nature and effect of the act of voting; conversely, many people permitted to vote under this standard—those with developmental disabilities or senility—might not understand the nature and effect of voting.<sup>176</sup> The *Rowe* decision has important ramifications in terms of what is permissible statutory language. Language that is overly broad and disqualifying because of mere “mental illness” is sometimes substituted for determining actual incapacity. This case promulgates the idea that incapacity to vote and adjudged mental incompetence are not synonymous and that there are strong due process arguments if cases are not looked at on a case by case basis. Unfortunately, despite the fact that this decision made an important distinction between mental illness and actual incapacity, because this comes from a federal district court, it is not binding on any other court and may only be marginally persuasive.

Another consideration for reform for adult guardianship voting laws, and mentioned briefly above, is that the United States has an aging population.

The number of Americans with Alzheimer's disease and other dementias will grow each year as the size and proportion of the U.S. population age 65 and older continue to increase. By 2025, the number of people age 65 and older with Alzheimer's disease is estimated to reach 7.1 million – a 40 percent increase from the 5.1 million age 65 and older affected in 2015.<sup>177</sup>

“Many people with mild dementia are able to understand the issues in an election,” just as many people in the early stages of Alzheimer's are able to understand election issues.<sup>178</sup> There are many people with Alzheimer's and dementia who lack the

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<sup>176</sup> *The Right to Vote*, *supra* note 168.

<sup>177</sup> David Dutcher, *2015 Alzheimer's Disease Facts and Figures*, CAIRN PARK (Apr. 15, 2015), <http://cairnpark.com/2015-alzheimers-disease-facts-and-figures/>.

<sup>178</sup> Shankar Vedantam, *As Americans Age, Dementia Poses a Voting-Rights Quandry*, WALL. ST. J. (Sept. 15, 2004), <http://www.wsj.com/articles/SB109518930299917583>.



capacity to vote;<sup>179</sup> however, the fact that some people with a disease lack the capacity should not be determinative of the entire population. Disenfranchising such a large portion of the United States should require a higher degree of scrutiny than rational basis. It should require strict scrutiny.

## VI. HOW A FIRST AMENDMENT APPROACH COULD SOLVE THE PROBLEM

If you were to ask a person on the street if voting was a form of speech protected by the First Amendment, you would likely get an answer of “yes” to that question. It follows that, by picking a candidate and voting for them, you are letting your voice be heard in society. There are five constitutional amendments that are said to protect voting: Fifteenth Amendment,<sup>180</sup> Nineteenth Amendment,<sup>181</sup> Twenty-Third Amendment,<sup>182</sup> Twenty-Fourth Amendment,<sup>183</sup> and Twenty-Sixth Amendment.<sup>184</sup> Each of these amendments targets voting discrimination; however, the strongest argument for protecting voting is through the freedom of speech and the First Amendment.

In the United States, political speech is held to be sacred and is one of the most highly valued forms of speech. There is a line of cases that illustrate how much we value being able to “vote” for candidates in the form of campaign contributions. In *Buckley v. Valeo*<sup>185</sup> the majority of justices in a *per curiam* opinion held that the limits that were placed on election spending by candidates by the Federal Election Campaign Act of 1971 were unconstitutional, but the court upheld limits on campaign contributions.<sup>186</sup> Then in *First Nat'l Bank v. Bellotti*<sup>187</sup> the Supreme Court struck down a Massachusetts law that prevented

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<sup>179</sup> *Id.*

<sup>180</sup> U.S. CONST. amend. XV.

<sup>181</sup> U.S. CONST. amend. XIX.

<sup>182</sup> U.S. CONST. amend. XXIII.

<sup>183</sup> U.S. CONST. amend. XXIV.

<sup>184</sup> U.S. CONST. amend. XXVI.

<sup>185</sup> 424 U.S. 1 (1976) (*per curiam*).

<sup>186</sup> *Id.* at 1.

<sup>187</sup> 435 U.S. 765 (1978).

corporations from contributing to a referendum regarding tax policy because the Court found that corporations have a First Amendment right to contribute.<sup>188</sup> However, there were also cases that went against this line of reasoning.

In *McConnell v. Federal Election Commission*,<sup>189</sup> “limits on electioneering communications were upheld.”<sup>190</sup> “The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 . . . [which] held that political speech may be banned based on the speaker’s corporate identity.”<sup>191</sup> Both of these cases are mentioned and dismissed summarily by the Supreme Court in the landmark case preserving First Amendment protections for corporate contributions in the political arena—*Citizens United v. Federal Election Commission*. Further, in *Citizens United*, the Supreme Court notes that *Austin* has long been considered “a significant departure from ancient First Amendment principles.”<sup>192</sup> *Citizens United* is a case about a non-profit corporation, which took money from non-profit corporations and from corporations for profit, who wanted to disseminate a video about Hillary Clinton and show advertisements for the video leading up to the 2008 election.<sup>193</sup> These actions were considered in violation of a law that prohibited corporations from electioneering communications in close proximity to an election.<sup>194</sup> The Supreme Court approached the issue of whether or not this form of “speech” is protected by delineating the following:

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to

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<sup>188</sup> *Id.* at 765.

<sup>189</sup> 540 U.S. 93 (2003).

<sup>190</sup> *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007)).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, “must give the benefit of any doubt to protecting rather than stifling speech.”<sup>195</sup>

This illustrates the high premium that the Supreme Court has placed on activities that are considered free speech and their hesitation to draw questionable distinctions that poses the risk of “stifling speech” and granting the “benefit of any doubt” to protecting that speech.<sup>196</sup> The Supreme Court goes on to say that “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”<sup>197</sup> Hence, arguably, free speech affords the most protection by the Supreme Court.

By approaching state laws that limit voting rights for certain classes of people described above, free speech would not only afford the most protection to individuals found to be incompetent through “strict scrutiny,” but also it would be the best argument as “mentally incompetent” is not a suspect class. This is how the Supreme Court has protected a form of “speech,” especially political speech, outside of suspect classifications. In *Citizens United*, the Supreme Court struck down a law limiting political donation by corporations finding that campaign contributions are protected as speech under the First Amendment.<sup>198</sup> A restriction on the amount of money that can be spent on “political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and

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<sup>195</sup> *Id.* at 326-27 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 340 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

<sup>198</sup> *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*)).

the size of the audience reached.”<sup>199</sup> The Court also stated that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>200</sup> This illustrates how highly freedom in political speech is regarded by the Supreme Court.

A parallel argument for voting rights for those adjudged mentally incompetent can be made here. In *Citizens United*, the Court illustrated the deprivations that would occur if donations from corporations were to be limited.<sup>201</sup> Here, the deprivation challenges the ideological constructs of our society—if you must abide by the law, then you should be able to determine who represents you. Voting is the mechanism for effecting change. The deprivation here is not the dissemination of information, like in *Citizens United*, but rather, it is the deprivation of the individual to “speak” through voting. Voting is a communication by an individual with the government. The Court in *Citizens United* held that campaign donations are free speech because the Court objects to a candidate’s inability to communicate with the electorate.<sup>202</sup> The Court should protect voters from being disenfranchised with the same scrutiny that is applied to campaign financing. The scope is different in these cases; one is about nationwide dissemination of information and the other is an individual communicating with the government.

A public policy argument stemming from *Citizens United* can be made. Our society benefits from information about candidates being disseminated because of high campaign contributions. This notion is secondary to the concept that corporations “speech” should not be limited in the form of campaign contributions, but it is nonetheless an important point. In *Citizens United*, the Supreme Court protected free political speech on the grounds that free speech should be given every protection and that there is value in information being distributed about candidates even if it is from a skewed perspective because of the belief that our election system will be balanced by the

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<sup>199</sup> *Buckley*, 424 U.S. at 19 (footnote omitted).

<sup>200</sup> *Citizens United*, 558 U.S. at 339.

<sup>201</sup> *Id.* at 354-55.

<sup>202</sup> *See id.* at 355-56.

response from the other side.<sup>203</sup> The Supreme Court asserts that there is value in political discourse and free political speech because it is better that the American public be given as much information as possible and make a decision based on all the information that is brought to bear during an election cycle.

Similarly, there is a public policy argument that our society believes there is a benefit in all members participating in the electoral process, which is evidenced by the five amendments to the United States Constitution that extended the right to vote to people other than property-owning, educated white males. In *Citizens United*, the Supreme Court stated that “[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.”<sup>204</sup> Here, *Citizens United* made the case that every person or class has the right to utilize speech to further their interest and the interests of those similarly situated in this country through free speech. Of course, in *Citizens United*, the Court was reviewing actions already considered “speech” under the First Amendment; however, as described above a vote is in essence speech as it is a citizen’s communication with their government regarding who they think would be best suited to run the country. If this concept from *Citizens United* is applied to the concept of voting as an act of free speech, then laws that deprive those who have been declared mentally incompetent of the right to vote are a governmental deprivation that is clearly in violation of the First Amendment. The Court in *Citizens United* acknowledged that they had “upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.”<sup>205</sup> The speech restrictions that the Court has upheld arguably do not apply to classes of voters because by voting no one is impeding the ability of governmental entities to perform their functions.

There is one case where the Supreme Court has

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<sup>203</sup> *See id.* at 320.

<sup>204</sup> *Id.* at 340-41.

<sup>205</sup> *Id.* at 341.

considered the possibility of voting as free speech. The Supreme Court has held that legislators' votes do not fall under the First Amendment free speech protections, but rather the votes belong "to the people."<sup>206</sup> This case is *Nevada Ethics Commission v. Carrigan*, which is about elected officials voting when they have a conflict of interest and their voting history being public.<sup>207</sup> This case is distinct from using the First Amendment to protect the voting rights of those who are adjudged to be mentally incompetent because the affected class is different—legislators acting in their official capacity versus individuals acting on their own behalf.

The Supreme Court has repeatedly upheld that political speech is sacrosanct and that it is deserving of every protection and all benefit of the doubt. By redefining "free speech" to include voting, the Supreme Court could protect the citizenry from having a fundamental right stripped away in a blanket manner without regard for individual capability. There is an argument that to approach voting with a broader conception, such as free speech, would create an inefficient and backlogged system arising from the necessity of a broader ruling because free speech is afforded more protection. The Supreme Court also presented the concern that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."<sup>208</sup> However, as the Supreme Court stated in *Citizens United*, "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling."<sup>209</sup> This would indicate that the Supreme Court would agree, if voting is approached through the lens of speech, that to shy away from making a broader ruling that protects the "free speech" rights of those who have been declared incompetent would be negligent.

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<sup>206</sup> Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011).

<sup>207</sup> *Id.* at 120.

<sup>208</sup> Burdick v. Takushi, 504 U.S. 428, 433 (1992).

<sup>209</sup> *Citizens United*, 558 U.S. at 329.

### CONCLUSION

Laws that prohibited certain races from voting, poll taxes that kept the poor from voting, literacy tests that kept the poor from voting, laws that prohibited women from voting, and laws that required that you own land to vote—all of these were struck down by the Supreme Court as unconstitutional. State voting laws that restrict voting rights of people who have been adjudicated as mentally incompetent, are another means of discrimination in regards to voting.

Identification requirements are one example of this discrimination, but a much more potent example is that as this country's population ages and our understanding of mental illness is greater than ever before more and more people will be disenfranchised as they are adjudged mentally incompetent. The Supreme Court has ardently protected political speech and going so far as to say that it can "find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion."<sup>210</sup> A First Amendment, political speech centered approach would more accurately reflect societal views of voting as free speech, while affording better protection to those who are adjudged mentally incompetent. By acknowledging that voting is an exercise of political speech the courts would better protect an act that is the cornerstone of society in any democracy: the act of casting a ballot.

To make it hard, to make it difficult almost impossible for people to cast a vote is not in keeping with the democratic process. Someone once said, "Man is not made for the law; law is made for man." Customs, traditions, laws should be flexible, within good reason, if that is what it takes to make our democracy work. We should be creative, and we should accommodate the needs of every community to open up the democratic process. We should make it easy and accessible for

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<sup>210</sup> *Id.* at 341.

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every citizen to participate.<sup>211</sup>

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<sup>211</sup> Andrew Cohen, *Rep. John Lewis: 'Make Some Noise' on New Voting Restrictions*, THE ATLANTIC (Aug. 26, 2012), <http://www.theatlantic.com/politics/archive/2012/08/rep-john-lewis-make-some-noise-on-new-voting-restrictions/261549/>.