

# Framing the Voting Rights Claims of Cognitively Impaired Individuals

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## I. INTRODUCTION

Oliver Sacks wrote a marvelous essay, entitled *The President's Speech*, about a ward of neurology patients watching a televised address by President Ronald Reagan.<sup>1</sup> The patients, aphasiacs who could no longer “understan[d] words as such,”<sup>2</sup> laughed uproariously:

[T]he grimaces, the histrionisms, the false gestures and, above all, the false tones and cadences of the voice . . . rang false for these wordless but immensely sensitive patients. It was to these (for them) most glaring, even grotesque, incongruities and improprieties that my aphasiac patients responded, undeceived and undeceivable by words.<sup>3</sup>

By contrast, a patient with agnosia, who could no longer follow tone or feeling at all and so could process *only* the words themselves, listened “stony-faced”:

Deprived of emotional reaction, was she then (like the rest of us) transported or taken in? By no means. “He is not cogent,” she said. “He does not speak good prose. His word-use is improper. Either he is brain-damaged, or he has something to conceal.”<sup>4</sup>

Sacks concluded by noting “the paradox of the President’s speech”: normal individuals were fooled by a mixture of “deceptive word-use combined with deceptive tone,” while “only the brain-damaged remained intact, undeceived.”<sup>5</sup>

Does this mean we should entrust political choice only to persons suffering from various neurological impairments? Of course not. But *The President's Speech* reminds us that much of our political discourse, for better or worse, bypasses the conscious mind altogether, and that a large number of citizens’ views and choices are driven by a range of irrelevant factors and fortuities—such as a candidate’s height, whether he uses a nickname, or the format of the ballot.<sup>6</sup>

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1. OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* 80 (Summit Books 1985) (1987).

2. *Id.*

3. *Id.* at 78-79.

4. *Id.* at 80.

5. *Id.*

6. See Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide*

And yet, there's something discomfiting about the idea that voters may be casting their ballots randomly or arbitrarily, without real comprehension of the issues or of the candidates' positions. The idea that voting reflects the citizenry's free and informed choices is central to the legitimacy of our political system. Traditionally, the franchise was restricted to those considered capable of responsible self-government. And while that category has expanded dramatically over time, so that neither property ownership, nor race, nor gender, nor affluence, nor literacy is any longer regarded as a legitimate basis for awarding or withholding the right to cast a ballot,<sup>7</sup> the system still excludes two large classes of citizens who are considered to lack either the cognitive skills or the wisdom to cast ballots—namely, children and certain incompetent individuals.<sup>8</sup>

The aim of this article is to describe the interplay between the existing constitutional and legal frameworks that govern the right to vote and the distinctive problems faced by individuals with cognitive impairments, particularly citizens suffering from age-related dementia. The number of such citizens is large now and is likely to grow as the baby boomers move into old age and life expectancies rise.<sup>9</sup> The problem that these voters face is distinctive because, unlike the groups whose claims largely shaped the current legal framework, these voters' inability to participate is not primarily a function of state policies of affirmative disenfranchisement. Rather, their exclusion is the product of a combination of state omissions, private actions, and policies that, at least until now, have been largely outside the scope of federal regulation. Precisely because private actions play a particularly significant role in cognitively impaired individuals' exercise of the franchise, their participation implicates a set of constitutional concerns with the integrity of the electoral process that have largely been rejected when it comes to other groups.

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*Your Future*, 18 J.L. & POL. 643, 651, 653 (2002) (describing one study that found a massive advantage for candidates using a nickname); Maureen Dowd, *Where They Stand*, N.Y. TIMES, June 21, 1992, § 9, at 1 (reporting that the taller candidate won “in 18 of the last 22 [U.S.] Presidential elections”).

7. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003) [hereinafter Karlan, *Ballots and Bullets*] (discussing historical restrictions on voting).

8. For a recent survey of state laws regarding disenfranchisement of persons adjudicated incompetent, see Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109 (2003).

In addition, nearly every state disqualifies convicted individuals who are currently incarcerated, and many states extend this disenfranchisement to individuals on probation or parole. A handful of states continue the traditional practice of lifetime disenfranchisement for individuals convicted of a crime. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). As explained elsewhere, this practice, whatever its historical justification, can today be understood only as punishment. See also Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).

9. See Jason H. Karlawish et al., *Addressing the Ethical, Legal and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345 (2004).

## II. THE LOCI OF POLITICAL EXCLUSION

There are at least three distinct points at which individuals are winnowed out of the electoral process: eligibility to vote, ability to register, and ability to actually cast a ballot and have it counted. At the first point, exclusion is almost entirely a function of positive law. But at the latter two points, disenfranchisement may be the consequence of state action, state inaction, private action, or a combination of factors. The current legal tools available to respond to exclusion depend critically on the source of that exclusion.

With respect to eligibility, in *Minor v. Happersett*, the Supreme Court expressed itself “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one.”<sup>10</sup> Instead, eligibility to vote is defined in the first instance by state law, although the contours of that state law are subject to a series of overriding federal constraints. Every state limits the basic right to vote to adult citizens who reside within the jurisdiction.<sup>11</sup> The Federal Constitution, through various amendments, forbids exclusion on the basis of certain factors. Some of those factors—such as race, sex, or payment of a poll tax—are expressly proscribed.<sup>12</sup> Of particular salience to this Symposium, the Twenty-Sixth Amendment prohibits denial or abridgement of “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote.”<sup>13</sup> While the amendment was enacted for the purpose of extending the right to vote to younger citizens,<sup>14</sup> it also clearly prohibits setting any upper age on eligibility. Other factors, such as durational residency requirements or restrictions to property owners, are not expressly forbidden, but have been struck down as violations of the Equal Protection Clause.<sup>15</sup> Moreover, because the right to vote constitutes a liberty or property interest, government decisions that deprive an

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10. 88 U.S. 162, 178 (1875). *Cf.* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”).

11. Two circumscribed exceptions are jurisdictions that allow legal resident aliens to vote in some local elections (for example, resident aliens with children in the school system may participate in school board elections) and jurisdictions that allow property owners to vote in some local elections. *See* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 55-56, 61-62 (3d ed. 2007) (describing noncitizen and nonresident voting).

12. *See* U.S. CONST. amends. XV (race), XIX (sex), XXIV (payment of a poll tax). To be slightly more precise, the Twenty-Fourth Amendment prohibits conditioning eligibility to vote in federal elections on payment of a poll tax; the Supreme Court has interpreted the Fourteenth Amendment’s Equal Protection Clause to extend this prohibition to all elections. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

13. U.S. CONST. amend. XXVI, § 1.

14. *See* Karlan, *Ballots and Bullets*, *supra* note 7, at 1358-59.

15. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (holding that durational residence requirements violate the Equal Protection Clause because the restriction does not further a compelling state interest); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 633 (1969) (holding that a property ownership requirement to vote was not narrowly tailored and therefore violated the Equal Protection Clause).

individual of that right also implicate the Due Process Clause.<sup>16</sup> Finally, beyond federal constitutional constraints, federal statutes, such as the Voting Rights Act, further circumscribe state limits on the franchise.<sup>17</sup>

However, some restrictions on the franchise are affirmatively sanctioned by federal law. For example, a provision of the National Voter Registration Act, which otherwise limits states' ability to remove a voter's name from the registration rolls, explicitly exempts state decisions to disenfranchise individuals "by reason of criminal conviction or mental incapacity."<sup>18</sup>

By contrast to many other advanced democracies, the United States does not automatically enfranchise all eligible citizens. Rather, the burden remains on individual citizens to register. Thus, the registration process may effectively winnow out voters who are legally eligible to participate but who fail to register properly. To be sure, the National Voter Registration Act of 1993 (the so-called Motor Voter Law or NVRA) requires states to make registration applications and certain forms of assistance available at various government agencies and to design procedures for registration by mail.<sup>19</sup> However, not every individual comes into contact with the relevant agencies and, with respect to registration by mail, no affirmative government assistance is required at all. Moreover, in recent years, a number of states have adopted restrictive voter identification requirements as part of the registration process.<sup>20</sup> These voter identification laws often require aspiring registrants to produce various forms of government-issued identification, such as current drivers' licenses, that many individuals—for example, elderly citizens whose physical condition precludes their driving—may lack.

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16. See Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 562-68 (2001) (describing one version of how procedural due process protects the right to vote).

17. See, e.g., 42 U.S.C. § 1973aa (1994) (providing that citizens cannot be denied the right to vote because of a "failure to comply with any test or device."). "[T]est or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

*Id.*

18. 42 U.S.C. § 1973gg-6(a)(3)(B) (2000). See *Richardson v. Ramirez*, 418 U.S. 24 (1973) (interpreting the reduction-of-representation clause in section 2 of the Fourteenth Amendment to permit disenfranchisement of felons).

19. 42 U.S.C. § 1973gg to 1973gg-10 (2000).

20. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 658-63 (2007) (discussing the recent rise of voter identification requirements and the number of citizens who lack the requisite documentation); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 712-13 (2006) (discussing the recent rise of voter identification requirements and the number of citizens who lack the requisite documentation). Tokaji has also posted a number of valuable discussions of voter identification requirements and litigation on his blog, which includes a chart listing current litigation. Election Law @ Mortitz, Major Pending Election Law Litigation, <http://moritzlaw.osu.edu/electionlaw/litigation/index.php> (last visited June 22, 2007) (on file with the *McGeorge Law Review*).

With respect to actually casting a ballot and having that ballot counted, the electoral process operates under an even more motley patchwork of rules. While some rules regarding election administration—such as the eligibility to cast an absentee ballot rather than appearing personally at the polls during specified hours on Election Day—are subject to uniform rules set at the state level, many other rules are not. In most states, the actual conduct of elections is devolved down to the county or municipal level. Those governments often select the machines that will be used and create the ballot formats that voters will face. Local governments select the polling places that will be used and train the temporary employees (often little more than volunteers) who will staff them.<sup>21</sup> Each of these choices is likely to affect some voters' ability to participate. Restrictive absentee voting rules, such as some states' requirement that voters have their applications or ballots notarized, will prevent some voters from requesting or casting ballots.<sup>22</sup> The pervasive use of inaccessible polling places may prevent many other voters from arriving at the polls.<sup>23</sup> The use of ballot designs that are confusing or hard to read, or voting technology that requires precise fine-motor coordination may lead voters to miscast or spoil their ballots.<sup>24</sup> Poll workers who are unaware of voters' right to assistance or accommodation<sup>25</sup> may interfere with voters' ability to cast their ballots. Finally, rules that limit the amount of time a voter can spend in the voting booth may prevent voters with cognitive or motor disabilities from completing the voting process.<sup>26</sup>

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21. For a discussion of local election administration, see Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393 (2002).

22. The Federal Voting Accessibility for the Elderly and Handicapped Act (VAEHA) provides that No notarization or medical certification shall be required of a handicapped voter with respect to an absentee ballot or an application for such ballot, except that medical certification may be required when the certification establishes eligibility, under State law—(1) to automatically receive an application or a ballot on a continuing basis; or (2) to apply for an absentee ballot after the deadline has passed.

42 U.S.C. § 1973ee-3(b) (2000). However, the statute clearly distinguishes between “elderly” voters and “handicapped” voters. See 42 U.S.C. § 1973ee-6. Moreover, by defining “handicapped” to include only “having a temporary or permanent physical disability,” *id.* § 1973ee-6(4), it is unclear at precisely what point a voter with cognitive impairments comes within the definition’s scope.

23. See GENERAL ACCOUNTING OFFICE, VOTERS WITH DISABILITIES: ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 29 (2001), <http://www.gao.gov/new.items/d02107.pdf> (on file with the *McGeorge Law Review*) (finding that in the 2000 election, eighty-four percent of polling places had features that could impede access for physically disabled voters).

24. The notorious combination of the butterfly ballot format and punch card voting in Palm Beach County, Florida, in the 2000 presidential election is a textbook example of these more pervasive issues.

25. See *infra* text accompanying notes 58-63.

26. See, e.g., ARIZ. REV. STAT. ANN. § 16-580(c) (2006) (“[A] voter shall not be allowed to occupy a voting booth for more than five minutes when other voters are waiting to occupy the booth.”); CONN. GEN. STAT. § 9-261(d) (West 2006) (giving each elector no more than two minutes to remain within the voting machine booth); IND. CODE ANN. § 3-1-23-28 (repealed 1986) (allowing voters who are casting ballots by machine no longer than one minute and voters using printed ballots no more than three minutes within the voting booth).

Independent of state action, private interference may also exclude citizens from effective participation in the political process. Historically, many minority citizens were subject to economic or physical intimidation.<sup>27</sup> Similarly, with respect to elderly voters, there have been episodes over the years in which voters living in institutions such as nursing homes have been victims of ballot tampering by caregivers who filled out residents' ballots contrary to their expressed wishes.<sup>28</sup>

At each of these stages, individuals with cognitive impairments may be excluded from the system. For a relatively limited category, the source of exclusion is formal disenfranchisement through state laws that render individuals with cognitive impairments legally ineligible to vote. In eleven states, individuals who are under guardianships are categorically prohibited from voting.<sup>29</sup> However, only a minority of individuals with cognitive impairments fall into this category.<sup>30</sup> In many states, unless the court that appointed the guardian also specifically determines that their impairments should disenfranchise them, even individuals who are under guardianship are permitted to vote.

Nevertheless, there may well be another category of cognitively impaired individuals whose inability to register is the product of intentional state disenfranchisement. There is a long and sorry tradition in the United States of line-level officials refusing to provide or accept registration applications from disfavored groups.<sup>31</sup> It is entirely possible that some registrars or other public officials may make similar judgments with respect to particular individuals with cognitive impairments. They may, for example, flout the NVRA's requirement that they provide such individuals with the same level of assistance in filling out registration forms that they provide with respect to their own agencies' forms. They may determine that individuals who seem confused about registration requirements should be discouraged from completing the process. It is impossible, however, to know the extent of any such state action, since it would be largely the product of individual officials' on-the-spot decision-making.

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27. For accounts of this intimidation and retaliation, see, for example, CHARLES V. HAMILTON, *THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS* 177-217 (1973); FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, 15-17, 23-26 (1990).

28. For discussions of cases and reports raising these issues, see, for example, Joan L. O'Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. HEALTH CARE L. & POL'Y 325 (2002) and Jessica A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 3 ELDER L.J. 453 (2005).

29. See Roy, *supra* note 8, at 115-16. For a survey of state laws restricting voting by persons under guardianship or various forms of institutionalization or treatment, see Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 456-72, tbl.2 (2000).

30. 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 (2007).

31. That tradition was particularly notorious in the South with respect to African American voters, and prompted Congress to authorize the appointment of federal registrars to enroll voters in particularly recalcitrant jurisdictions. See 42 U.S.C. § 1973d (2000).

A far greater source of effective exclusion, however, likely lies in government policies that are not purposefully directed at excluding cognitively impaired voters, but that nonetheless have that effect. Precisely because they are impaired, such voters are likely to need various affirmative accommodations in order to register or to cast their ballots effectively. They may be unable to read or write, and thus may require assistance to understand the ballot and indicate their choices. And if their cognitive impairments are accompanied by physical problems—as will often be true of elderly voters—they may require additional assistance in getting to the polls or in obtaining and returning absentee ballots. The absence of sufficient affirmative accommodations may preclude their full participation. Therefore, it is quite plausible to hypothesize that more individuals with cognitive impairments are unable to vote because of governmental failures to act than because of explicit disenfranchising policies.

Finally, and perhaps most significantly, individuals with cognitive impairments often depend on a range of private actors to perform various life activities. Sometimes, these actors are family members or private caregivers. Often these actors are institutions, such as nursing homes or assisted living facilities. These private actors may serve as gatekeepers to the outside world. Even if state law recognizes the eligibility of individuals with cognitive impairments, provides registration or voting assistance to individuals who request it, and makes polling places physically accessible, individual citizens must still contact registration officials, request absentee ballots, and show up at polling places. For many elderly individuals with cognitive impairments, these contacts can be made only with the assistance of their caregivers. If those caregivers decline to provide that assistance, the formal right to vote will remain abstract. Thus, the inability of cognitively impaired voters to participate fully in the electoral process is often the product of a combination of state and private action and inaction.

### III. CONSTITUTIONAL DOCTRINE

The Supreme Court has recognized that the right to vote is a (conditional) fundamental right—that is, “[o]nce the franchise is granted to the electorate,” the state cannot exclude qualified citizens from participating.<sup>32</sup> However, the constitutional right remains, at its core, a negative right protected only against state interference. While Congress arguably can use its enforcement powers under the various voting rights amendments to enact statutes that outlaw private conduct,<sup>33</sup> the amendments by their own force reach only government action.

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32. See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966)).

33. It has never been squarely established that Congress’s enforcement power under various voting-related amendments can be used to reach private conduct. Federal statutes directed at private conduct, for example, 42 U.S.C.A. § 1971(b) (West Supp. 2006), generally contain a jurisdictional element that forbids

Thus, to the extent that private acts or omissions are the real barrier to effective participation by cognitively impaired individuals, the Constitution offers little self-executing protection.

Even with respect to state-erected barriers, constitutional doctrine is somewhat complicated. On the one hand, a long line of cases has held that statutes restricting the franchise are presumptively unconstitutional, must be subjected to “exacting judicial scrutiny,”<sup>34</sup> and can be upheld only if “the exclusions are necessary to promote a compelling state interest.”<sup>35</sup> With respect to the permissible reasons for excluding voters, the Supreme Court has specifically rejected arguments for disenfranchisement that rest on how those voters might make their choices:

“Fencing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. “The exercise of rights so vital to the maintenance of democratic institutions,” . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.<sup>36</sup>

More generally, although the Supreme Court once suggested that fairly administered literacy tests might be constitutional because they “promote intelligent use of the ballot,”<sup>37</sup> that decision antedated the application of heightened scrutiny to restrictions on the franchise. The Court has both subsequently upheld federal statutes barring such prerequisites<sup>38</sup> and, applying heightened scrutiny, rejected a jurisdiction’s claim that it could limit participation in school board elections to a subgroup of the citizenry that was more likely to “understand the whys and wherefores of the detailed operations of the school system” in light of “the ever increasing complexity of the many interacting phases of the school system and structure.”<sup>39</sup> Thus, the mere fact that some citizens labor under cognitive impairments that preclude them from casting their ballots in optimally intelligent ways cannot by itself justify disenfranchisement. Regardless of our republican aspirations about citizens engaging in public

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private activity in connection with elections at which federal offices are being filled. Thus, they may rest both on Congress’s enforcement power and on its plenary power under U.S. CONST. art. I, § 4, to regulate all elections involving congressional candidates.

34. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969). *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 360 (1972); *Harper*, 383 U.S. at 666.

35. *Kramer*, 395 U.S. at 627.

36. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). *See also Dunn*, 405 U.S. at 354-60 (rejecting arguments in favor of durational residency requirements that rested on claims about the desirability of ensuring that citizens understood, and shared, community values before they were permitted to vote and noting that such requirements had often been used in the past to exclude people who were outsiders or who had different political views).

37. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959).

38. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

39. *Kramer*, 395 U.S. at 631.

decision-making, we have recognized since the time of the *Federalist Papers* that voters will often behave selfishly, prejudicially, and irrationally.<sup>40</sup> The fact that voters who are cognitively impaired may not process information in a sophisticated or entirely rational manner may separate them only in degree—if even that—from the remainder of the electorate.

At the same time, however, the Supreme Court has noted that states have the ability “to preserve the basic conception of a political community.”<sup>41</sup> Permitting individuals with cognitive impairments so severe that they are unaware of the very nature of the process in which they are participating to vote may undermine that conception in two ways, one conceptual and one practical. As a matter of democratic theory, courts might discern a difference between voters who intend to express some preference—however that preference is derived—and voters who have no conscious intention of expressing a preference designed to affect electoral outcomes. As a practical matter, including within the electorate individuals who do not understand the nature of voting creates a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals’ ballots—a species of vote fraud. Both preserving the political community and preventing vote fraud have been recognized as “compelling government goal[s],” at least in some circumstances.<sup>42</sup> Last Term, for example, in the context of discussing voter identification requirements, the Supreme Court reiterated that “[a] state indisputably has a compelling interest in preserving the integrity of its election process.”<sup>43</sup>

Thus, the constitutional analysis of restrictions on the voting rights of cognitively impaired individuals is likely to turn on the question whether state restrictions are narrowly tailored to exclude only those individuals who are so impaired that they lack the capacity to cast a vote that is meaningful to them.<sup>44</sup> Here, the Due Process Clause is likely to play a significant role.<sup>45</sup> Once voting is understood to be not only a liberty interest but a fundamental one, courts are likely to insist that any deprivation of the right to vote be accomplished only through procedures that satisfy the three-part procedural due process calculus of *Mathews v. Eldridge*.<sup>46</sup> Thus, rather than treating the category of cognitive

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40. See THE FEDERALIST NO. 10 (James Madison).

41. *Dunn*, 405 U.S. at 344.

42. See *id.* at 345.

43. *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

44. For an early discussion of this narrow tailoring point, see Notes, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979).

45. For more elaborations on the Due Process Clause, see *Doe v. Rowe*, 156 F. Supp. 2d 35, 47-49 (D. Me. 2001) and Shane, *supra* note 16, at 562-68.

46. 424 U.S. 319, 335 (1976) (explaining that determining the required process for depriving an individual of a liberty or property right depends on considering three factors: (1) the private interest at stake; (2) the risk of an erroneous deprivation under the existing procedures and the probable value of additional safeguards; and (3) the burden that additional safeguards would impose on the government).

impairment as a unitary concept authorizing the disenfranchisement of *all* individuals who are impaired to any degree, courts may well insist that states develop clear procedures for deciding which individuals can be prohibited from voting and for providing such individuals with the ability to challenge those determinations.

While existing constitutional doctrine offers at least a relatively clear-cut roadmap for challenging the affirmative disenfranchisement of cognitively impaired individuals, the doctrine is decidedly less favorable with respect to constitutional challenges to state omissions. A variety of state practices have the effect, if not the specific purpose, of precluding full participation in the political process by some identifiable groups of voters. Almost certainly, illiteracy will make it more difficult for a citizen to participate in the political process. The location of polling places and the restriction of access to absentee ballots combined with the conduct of elections on weekdays during a limited number of hours undoubtedly makes voting more difficult for less affluent voters. Registration requirements themselves are likely to have disproportionate impacts on less affluent and less educated voters, who will find it harder to navigate the system. And although the Supreme Court has stated that “[w]ealth . . . is not germane to one’s ability to participate intelligently in the electoral process,”<sup>47</sup> the Court has never held that the states are obligated to counteract the effects wealth has on an individual’s ability to participate. Thus, it is doubtful, at least as a constitutional matter, that a state’s failure to modify its election procedures to facilitate voting by persons with cognitive impairments would raise serious constitutional difficulties. If citizens with cognitive impairments are to receive affirmative assistance from the states, or if private actors are to face any obligation to help them to participate, those duties will have to be imposed by statute.

Finally, although the Twenty-Sixth Amendment expressly prohibits denial or abridgement of the right to vote “on account of age,”<sup>48</sup> that amendment is unlikely to play a major role in protecting the rights of older citizens. The structure of the Twenty-Sixth Amendment parallels that of the Fifteenth, which prohibits denial or abridgement of the right to vote “on account of race.”<sup>49</sup> That amendment has been interpreted to prohibit express racial classifications, as well as the use of facially neutral criteria that are adopted or maintained for the purpose of disenfranchising racial minorities,<sup>50</sup> but it has not been interpreted to

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47. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

48. U.S. CONST. amend. XXVI, § 1.

49. U.S. CONST. amend. XV, § 1.

50. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (concluding that changing city boundaries to eliminate minority voters is unconstitutional); *Lane v. Wilson*, 307 U.S. 268 (1939) (holding that an alternative to a “grandfather clause” is invalid under the Fifteenth Amendment because the alternative operated unfairly against the class that the amendment was meant to protect); *Guinn v. United States*, 238 U.S. 347 (1915) (holding that an Oklahoma grandfather clause was void because it violated the Fifteenth Amendment).

reach practices that have an adverse impact absent a discriminatory purpose. Thus, a state practice that expressly subjected older citizens to criteria that were not applied to younger citizens—for example, a voter competency exam required of all individuals over the age of seventy-five<sup>51</sup>—would arguably violate the Twenty-Sixth Amendment. So too, administrative practices that treated older voters differently would raise concerns under the Twenty-Sixth Amendment. But the use of practices that have an adverse, but not intended, effect on older voters would not, by itself, cause constitutional difficulties under the Twenty-Sixth Amendment.

#### IV. STATUTORY PROTECTIONS

Congress possesses essentially plenary power under the Elections Clause of Article I, Section 4 to regulate every aspect of the electoral process for federal elections. In *Cook v. Gralike*,<sup>52</sup> the Court stated that the clause “encompasses matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’”<sup>53</sup> The clause gives Congress the power to override state policies regarding these matters with respect to any election in which congressional offices, as well as state or local races, appear on the ballot.<sup>54</sup> As a practical matter, this power over mixed elections gives Congress leverage over the electoral process as a whole, since few jurisdictions can afford to run dual election systems.<sup>55</sup>

In the past forty years, Congress has used its Article I power to enact a series of laws protecting voting rights against various forms of state interference. Each of these laws contains some provisions that might bear on the voting rights of cognitively disabled individuals. At least so far, however, there has been little, if any, judicial elaboration of these individuals’ rights.

The Voting Rights Act of 1965 was designed largely to enfranchise and protect the voting rights of minority voters. Most of the Act’s substantive provisions are expressly race-conscious in that they forbid the use of voting practices, procedures, or prerequisites to voting that are adopted for racially

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51. Compare some states’ practice of imposing more restrictive procedures for renewing the drivers’ licenses of older residents. See Jennifer L. Klein, Note, *Elderly Drivers: The Need for Tailored License Renewal Procedures*, 3 ELDER L.J. 309, 320-28 (1995).

52. 531 U.S. 510 (2001).

53. *Id.* at 523-24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

54. See *In re Coy*, 127 U.S. 731 (1888); see also *Foster v. Love*, 522 U.S. 67, 69 (1997) (discussing Congress’s preemptive power).

55. Section 2 of the Twenty-Fourth Amendment also gives Congress broad enforcement powers with regard to the voting rights of older Americans. U.S. CONST. amend. XXIV, § 2. Cf. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 10-16 (2007) (explaining the broad scope of the Fifteenth Amendment’s identically worded enforcement clause).

discriminatory purposes or that have racially disparate impacts.<sup>56</sup> But Section 208 sweeps more broadly, providing, in pertinent part, that “[a]ny 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.”<sup>57</sup> Thus, to the extent that a voter’s cognitive impairment affects his or her ability to read or write, the voter can receive help in voting. But note that Section 208, like the constitutional protections discussed in the prior section, is phrased in essentially negative terms; it prohibits state interference with voters receiving help from people they choose—presumably people who are willing to assist them. It provides no additional guarantee of assistance and imposes no duty to assist.

Yet another series of statutes deal more explicitly with the voting rights of citizens with disabilities. Section 504 of the Rehabilitation Act of 1973 provides that “no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability,” be denied access to any program receiving federal financial assistance. Similarly, Title II of the Americans With Disabilities Act (ADA), passed in 1991, prohibits discrimination against disabled individuals in the provision of public “services, programs, or activities.”<sup>58</sup> And in a more affirmative vein, the Voting Accessibility for the Elderly and Handicapped Act of 1984 requires jurisdictions either to make polling places for federal elections accessible to voters with disabilities or to provide disabled individuals with alternative ways of voting, such as absentee ballots.<sup>59</sup> Finally, administrative regulations governing long-term care facilities that participate in the Federal Medicare program provide that residents have the “right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility” and require that facilities “protect and promote the rights of each resident, including . . . the right to exercise his or her rights as a . . . citizen . . . of the United States.”<sup>60</sup> Facilities are forbidden from “interference, coercion, discrimination, and reprisal” with respect to these rights.<sup>61</sup>

While courts in recent years have uniformly held voting to be an activity falling within Title II of the ADA<sup>62</sup>—the statutory provision with the most

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56. See, e.g., 42 U.S.C. §§ 1973, 1973c (2000).

57. 42 U.S.C. § 1973aa-6. However, Section 208 does impose one restriction: it precludes assistance by “the voter’s employer or agent of that employer or officer or agent of the voter’s union.” *Id.* This restriction is clearly designed to prevent undue influence on a voter’s choice.

More generally, other provisions of the Act first suspended—initially in only a specified set of jurisdictions and later temporarily, before becoming nationwide and permanent—the use of literacy or good character tests for voter eligibility. See 42 U.S.C. § 1973aa.

58. 42 U.S.C. § 12132 (2000).

59. 42 U.S.C. §§ 1973ee to 1973-ee6.

60. 42 C.F.R. § 483.10(a)(1) (2006).

61. *Id.* § 483.10(a)(2).

62. For an extensive discussion of the ADA and voting rights, see Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005).

plaintiff-friendly enforcement mechanism<sup>63</sup>—it is unclear that the Act has significantly reduced barriers to participation, particularly by cognitively impaired citizens. Studies have found states pervasively in violation of the ADA. In 2000, the General Accounting Office found that more than eighty percent of polling places had features that could impede access for physically disabled voters.<sup>64</sup> Although the Help America Vote Act of 2002<sup>65</sup> provides states with potential funding to make polling places accessible,<sup>66</sup> it provides no express private right of action,<sup>67</sup> and thus little leverage for enforcement.

While the ADA does at least hold out the potential for requiring states to make modifications and offer assistance to respond to physical barriers that bar cognitively impaired individuals from full participation, its results, at least so far, have been less salutary with respect to the more cognitively-related barriers. Of particular salience to voters with mental disabilities, ADA suits involving challenges to election procedures that fail to provide disabled voters with the opportunity to cast their votes secretly and independently have been met with only mixed success.<sup>68</sup> Indeed, beyond general criminal prohibitions on fraud or intimidation, disabled voters enjoy little, if any, additional protection of their ability to cast votes without outside interference.<sup>69</sup>

More significantly, in light of the interactive effect of state and private action, none of the federal statutes enacted so far have placed any clear obligations on private actors, as opposed to government entities. Thus, they do little to address situations in which caregivers either fail to provide cognitively impaired individuals with information about upcoming elections or affirmatively prevent them from participating—by, for example, refusing to help them request absentee ballot forms or refusing to take them to the polls. While jurisdictions are obligated to modify their programs to eliminate government-created barriers and to assist individuals who request accommodations, the Act has not yet been construed to place the more affirmative obligation on private individuals to actually seek out disabled individuals to see whether they want to participate. Unless and until the Act is construed to impose such duties, many cognitively impaired individuals will not benefit from its provisions.

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63. By contrast to the ADA, the Accessibility for the Elderly and Handicapped Act has occasioned little litigation, perhaps because its enforcement machinery both requires forty-five days notice before filing suit and fails to provide for attorney's fees. *See* 42 U.S.C. § 1973ee-4(a)-(c).

64. GENERAL ACCOUNTING OFFICE, *supra* note 23, at 29.

65. 42 U.S.C. §§ 15301-15545 (Supp. 2004).

66. *See id.* § 15301(b)(1)(G).

67. The subchapter of HAVA dealing with enforcement, 42 U.S.C. §§ 15511, 15512 (2006), refers only to enforcement by the Attorney General and through state-based administrative processes. In the one reported court of appeals case, however, the court held that some of HAVA's provisions could be enforced through lawsuits brought under 42 U.S.C. § 1983, at least with respect to injunctive relief. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572-73 (6th Cir. 2004).

68. *See Waterstone*, *supra* note 62, at 832-33.

69. *See Fay*, *supra* note 28, at 471.

A number of states have enacted various provisions explicitly dealing with voting by individuals in nursing homes and other institutional settings.<sup>70</sup> Few of these provisions, however, impose mandatory duties on caregivers, as opposed to simply setting out protocols for dealing with resident- or institution-generated requests.<sup>71</sup> Thus, these provisions leave unaddressed the same problems largely ignored by federal law—namely, the interaction of public and private barriers to full participation. In a recent paper, we discovered that long-term care facilities vary widely with respect to their understanding of the legal prerequisites to voting as well as their own activities with regard to enhancing or deterring residents' participation.<sup>72</sup> The current system provides long-term care facilities with little clear guidance as to obligations beyond noninterference in residents' independent participation in the political process.

#### V. CONCLUSION

The ability of individuals with cognitive impairments to participate fully and meaningfully in the political process raises issues that fall both inside and outside the already developed constitutional and statutory frameworks for dealing with voting rights. Fully vindicating their interests requires going beyond the conventional elimination of state-created barriers to effective participation to reach privately created or maintained obstacles as well. The participation of individuals with cognitive impairments raises questions of how to balance their interest in participation, both internally—in order to enable them to exercise independent choice and avoid undue influence or coercion—and externally against the broader public interest in maintaining the integrity of the electoral process as a whole.

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70. For an extensive discussion of provisions dealing with voting in nursing homes and other institutional settings, see Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, 26 BIFOCAL 1, 1 (2004).

71. *Id.* at 2.

72. See Jason H. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL'Y (forthcoming 2007).