Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity

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ABSTRACT

An individual's status as a resident of a long-term care facility has the potential to significantly limit his or her ability to vote. While the high rates of dementia among residents of long-term care facilities may lead some to conclude that such limitations are for the best, this article argues that individuals' access to the ballot and to assistance with ballot completion should not be limited by their institutional status. Specifically, it argues that long-term care facilities should be neither required nor permitted to play a "gate-keeping" role in the electoral process by screening residents for mental capacity to vote before permitting or facilitating access to the ballot. Nor, it argues, should electoral officials single out long-term care residents for such capacity testing. Rather, the article concludes that both states and long-term care facilities should consider themselves to have an affirmative duty to facilitate long-term care residents' participation in the electoral process. If policymakers are sufficiently concerned that long-term care residents are voting when too compromised by dementia to understand the nature and consequences of doing so, a phenomenon of which there is little evidence, policymakers should create fair processes for disenfranchising voters that apply equally across residential settings.

I. INTRODUCTION

While residents of long-term care facilities constitute less than one percent of the American population,[1] they are increasingly attracting the attention of those concerned about the integrity of the election process. This is because such residents suffer from high rates of dementia, are perceived to be unusually susceptible to voter fraud, and face some of the most significant barriers to exercising their right to vote.

This article explores current and potential policies, practices, and issues related to voting by residents of long-term care (LTC) facilities, including nursing homes and assisted living facilities. It focuses on two key, interrelated concerns: (1) providing residents with meaningful access to the ballot, and (2)

1. There are approximately one and a half million nursing home residents in America. *See* NAT'L CTR. FOR HEALTH STATISTICS, NATIONAL NURSING HOME SURVEY, 2004 FACILITY TABLES, tbl.1 (2004), http://www.cdc.gov/nchs/data/nnhsd/nursinghomefacilities2006.pdf (on file with the *McGeorge Law Review*). Estimates of the number of persons residing in assisted living facilities vary widely, but it appears that nearly one million persons can reasonably be said to reside in assisted living facilities nationwide. *See* ROBERT MOLLICA & HEATHER JOHNSON-LAMARCHE, U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE RESIDENTIAL CARE & ASSISTED LIVING POLICY: 2004 1-2 (Janet O'Keeffe ed., 2005), http://aspe.hhs.gov/daltcp/reports/04alcom1.pdf (on file with the *McGeorge Law Review*) ("In 2004, states reported 36,451 licensed residential care facilities with 937,601 units/beds"). *See also* Nat'l Ctr. for Assisted Living, Assisted Living Resident Profile, www.ncal.org/about/resident.cfm (last visited Aug. 12, 2007) (on file with the *McGeorge Law Review*) (concluding that more than 900,000 people live in assisted living residences).

minimizing improper and abusive voting practices. After providing an overview of the nature and composition of LTC facilities, the article describes the barriers to voting encountered by LTC residents and the extent to which LTC residents are victimized by fraudulent voting practices. It then analyzes whether nursing homes and similar institutions should play a "gate-keeping" role in the electoral process by conditioning access to the ballot or assistance with ballot completion on a positive assessment of mental capacity.[2] After concluding that such gate-keeping is neither legally permissible nor politically desirable, the article explores alternative approaches to providing LTC residents with meaningful access to the ballot while guarding against fraudulent voting practices. In so doing, it explores the implications that the high concentration of persons with dementia in LTC facilities should have on policies and practices governing voting in such settings.

II. OVERVIEW OF THE INSTITUTIONALIZED LONG-TERM CARE POPULATION

A. Typology of Long-Term Care Institutions

Traditionally, institutional long-term care has been delivered by nursing homes. The term "nursing home" is generally used to refer to two related types of institutions: skilled nursing facilities (SNFs) and nursing facilities (NFs). SNFs are focused on rehabilitative care, and Medicare provides only limited coverage for SNFs, while NFs are generally focused on chronic care and are not covered by Medicare.[3] From a practical point of view, the two types of institutions are largely indistinguishable to consumers, in large part because the vast majority of nursing homes are dually certified as both SNFs and NFs.[4] In addition, regardless of whether they are SNFs or NFs, most nursing homes are subject to comprehensive federal regulations that govern both the quality and type of care they are to provide.[5]

Increasingly, however, long-term care services are being provided in facilities other than nursing homes. In particular, the past decade has seen the rapid proliferation of assisted living facilities. Such facilities typically provide

2. The phrase "access to the ballot" is sometimes used to refer to the ability of candidates for elected office to have their names placed on the ballot. In this article, however, the phrase is used to refer to voters' ability to access a ballot that they can use to register their votes.

3. The statutory definition of a Nursing Facility is found in 42 U.S.C. § 1396r(a) (2000). The statutory definition of a Skilled Nursing Facility is found in 42 U.S.C. § 1395i-3(a) (2000). *See also* 42 C.F.R. § 483.5 (2006) (noting the differentiation in payment for SNFs and NFs).

4. CHARLENE HARRINGTON, HELEN CARRILLO & COURTNEY LACAVA, NURSING FACILITIES, STAFFING, RESIDENTS AND FACILITY DEFICIENCIES, 1999 THROUGH 2005, at 16 (2006), http://www.nccnhr.org/uploads/OSCAR2006PartI.pdf (on file with the *McGeorge Law Review*) (reporting that 93.9 percent of American nursing homes were dually certified to participate in both the Medicare program and the Medicaid program in 2005).

5. *See* 42 C.F.R. § 483 (2006) (regulating all SNFs and NFs that are certified to receive either Medicare or Medicaid funds).

room, board, and some degree of medical care or medical monitoring. There is, however, no federal definition of "assisted living," and today the term is used to refer to a wide variety of facilities, ranging from those that provide little more than room and board to those that provide skilled nursing services twenty-four hours per day.[6]

B. Demographic Composition of Long-Term Care Institutions

The nursing home population is not representative of the greater American population. In large part this is because certain segments of the American population are better able than others to obtain the community-based assistance they need to avoid institutional placement.

Women are disproportionately likely to experience nursing home placement.[7] In part, this reflects the fact that they live longer than men.[8] However, life expectancy appears to be only one factor leading to the increased rate of institutionalization for women. Within each major age group over the age of sixty-five, woman are disproportionately over-represented in nursing homes as compared to their male peers.[9] For example, women age seventy-five through eighty-four are sixty-six percent more likely to reside in a nursing home than are men of their age, and that percentage rises to eighty percent for women age eighty-five and over.[10] The connection between race and institutionalization is somewhat more complex than that between gender and institutionalization. Whites far outnumber blacks in the nursing home population, and they also represent a larger portion of the nursing home population than they do of the overall population.[11] However, this appears to reflect whites' longer life expectancies.[12] Within any major age group, blacks are more likely to be

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6. *See* ERIC M. CARLSON, CRITICAL ISSUES IN ASSISTED LIVING: WHO'S IN, WHO'S OUT, AND WHO'S PROVIDING THE CARE 13-16 (2005) (discussing the many definitions of "assisted living"); ERIC M. CARLSON, LONG-TERM CARE ADVOCACY § 5.07(1) (2004) [hereinafter CARLSON, ADVOCACY] (also discussing the many definitions of "assisted living").

7. Jose Ness, Ali Ahmed & Wilbert S. Aronow, *Demographic and Payment Characteristics of Nursing Home Residents in the United States: A 23-Year Trend*, 59 J. GERONTOLOGY SERIES A: BIOLOGICAL SCI. & MED. SCI. 1213 (2004).

8. *See* Elizabeth Arias, *United States Life Tables, 2003*, 54 NAT'L VITAL STATS. REPORTS, NO. 14, Apr. 19, 2006, at 4 fig.1, http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf (revised Mar. 28, 2007) (on file with the *McGeorge Law Review*) (demonstrating and discussing the fact that American women have a longer life expectancy than American men).

9. *See* NAT'L CTR. FOR HEALTH STATS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., VITAL AND HEALTH STATS. SERIES 13, NO. 152, PUB. NO. (PHS) 2002-1723, NATIONAL NURSING HOME SURVEY: 1999 SUMMARY 18 tbl.13 (2002), http://www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf (on file with the *McGeorge Law Review*).

10. *See id.*

11. *See id.*

12. *See* Arias, *supra* note 8, at 3 tbl.A (indicating that white Americans have a longer life expectancy than black Americans).

institutionalized in a nursing home than are their white peers.[13] Finally, persons with lower income and persons with lower levels of education are more likely to become nursing home residents than are those with higher income or those with higher levels of education.[14]

Unfortunately, in large part because the term "assisted living" is used so imprecisely, it is difficult to obtain accurate and meaningful data on the demographics and needs of the assisted living population. Moreover, recent efforts to shift portions of the nursing home population into assisted living settings means the demographic composition of the assisted living population is in flux. It is clear, however, that women are disproportionately overrepresented in assisted living residences. Studies suggest that between seventy-four percent and seventy-nine percent of assisted living residents are female.[15] Assisted living residents are also disproportionately white.[16] This is particularly true of residents in assisted living facilities that provide for high levels of service, high levels of privacy, and a high level of resident control.[17] Relative to nursing home residents, assisted living residents are both more affluent and more likely to be college-educated.[18] These socio-economic differences likely reflect, at least in part, differences in how nursing home care and assisted living care are financed. Nearly two-thirds of nursing home residents' care is paid for by Medicaid.[19] By contrast, the vast majority of assisted living care in the United States is paid for with private funds.[20]

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13. *See* NAT'L CTR. FOR HEALTH STATISTICS, *supra* note 9. This is a relatively new trend. *See* Christine E. Bishop, *Where Are the Missing Elders? The Decline in Nursing Home Use, 1985 and 1995*, 18 HEALTH AFF. 146, 148 (1999) (discussing the prior racial composition of nursing homes).

14. *See* TIMOTHY A. WAIDMANN & SEEMA THOMAS, U.S. DEPT. OF HEALTH & HUMAN SERV., ESTIMATES OF THE RISK OF LONG-TERM CARE: ASSISTED LIVING AND NURSING HOME FACILITIES 6-7 (2003), http://aspe.hhs.gov/daltcp/reports/riskest.pdf (on file with the *McGeorge Law Review*).

15. *See* Elzbieta Sikorska-Simmons, *Linking Resident Satisfaction to Staff Perceptions of the Work Environment in Assisted Living: A Multilevel Analysis*, 46 GERONTOLOGIST 590, 593 (2006) (finding in a study of Maryland assisted living facilities that seventy-four percent of residents were women); Sheryl Zimmerman et al., *Assisted Living and Nursing Homes: Apples and Oranges?*, 43 GERONTOLOGIST 107, 114 (2003) (in a survey of assisted living type facilities in four states, finding that approximately seventy-six percent of residents were female); CATHERINE HAWES, CHARLES D. PHILLIPS & MIRIAM ROSE, U.S. DEPT. OF HEALTH & HUMAN SERV., HIGH SERVICE OR HIGH PRIVACY ASSISTED LIVING FACILITIES, THEIR RESIDENTS AND STAFF: RESULTS FROM A NATIONAL STUDY (2000), http://aspe.hhs.gov/daltcp/reports/hshp.htm (on file with the *McGeorge Law Review*) (finding that 78.6 percent of the residents of high service and/or high privacy assisted living facilities are women).

16. *See* Zimmerman et al., *supra* note 15, at 115 tbl.5 (in a survey of assisted living facilities in four states, finding that over ninety percent of residents were white); Sikorska-Simmons, *supra* note 15, at 593 (finding, in a study of Maryland assisted living facilities, that ninety-four percent of residents were white); HAWES, PHILLIPS & ROSE, *supra* note 15 (finding that 98.7 percent residents in high service and/or high privacy assisted living facilities were white).

17. *See* Zimmerman et al., *supra* note 15, at 114. *See also* HAWES, PHILLIPS & ROSE, *supra* note 15 (finding that in high service and/or high privacy assisted living facilities, 98.7 percent of residents were white).

18. *See* WAIDMANN & THOMAS, *supra* note 14, at 6-7.

19. HARRINGTON, CARRILLO & LACAVA, *supra* note 4, at 18.

20. Catherine Hawes et al., *A National Survey of Assisted Living Facilities*, 43 GERONTOLOGIST 875, 875 ("The [assisted living] industry is largely private pay and unaffordable for low- or moderate-income

C. Incidence of Dementia in Long-Term Care Institutions

As has been noted, "[s]urprisingly little is known about the prevalence of dementia among nursing home residents."[21] Estimates of the prevalence of dementia in the nursing home population range from approximately a quarter to more than two-thirds of the population,[22] and estimates appear to vary both by the type of method used to assess prevalence and by whether the estimate is based on admissions information or information about the entire nursing home population.[23]

Perhaps the best indication of the prevalence of dementia in the nursing home population is the Online Survey, Certification, and Reporting system (OSCAR), to which all federally certified nursing homes are required to report.[24] In 2005, facilities and states reported that 45.4 percent of nursing home residents had a diagnosis of dementia.[25] The percentage of residents with dementia diagnoses, however, varied widely from state to state and ranged "from 38.2 percent in Arkansas to 56.5 percent in Maine."[26]

While the OSCAR reports appear to be the most comprehensive source of information about the prevalence of dementia within the nursing home population, other estimates also deserve consideration. For example, a study of new admissions in nursing homes in Maryland used an expert panel to determine the percentage of such residents exhibiting dementia consistent with the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders III-R (DSM-III-R).[27] The study found that between 48.2 percent to 54.5 percent of new admissions could be properly classified as demented.[28] The study further found that among these newly admitted residents the incidence of dementia correlated with a greater inability to independently perform activities of daily living (ADLs) such as toileting, bathing, transferring, dressing, eating, and walking.[29] Indeed,

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persons aged ≥75 unless they use assets as well as income to pay.").

21. Jay Magaziner et al., *The Prevalence of Dementia in a Statewide Sample of New Nursing Home Admissions Aged 65 and Older*, 40 GERONTOLOGIST 663, 663 (2000).

22. *Id.* at 667 (reviewing past studies).

23. *Id.*

24. Given that nursing homes are generally reimbursed at higher rates for residents with higher care needs than for residents with lower care needs, it seems likely that, to the extent that OSCAR reports are biased, they are biased in favor of over-reporting the rates of dementia. *Cf.* Charlene Harrington, Janis O'Meara, Martin Kitchener, Lisa Payne Simon & John F. Schnelle, *Designing a Report Card for Nursing Facilities: What Information Is Needed and Why*, 43 GERONTOLOGIST 47, 54-55 (2003) ("[F]acilities have a financial incentive to report higher acuity levels (case-mix) to maximize their Medicare reimbursement under the Medicare prospective payment system and in those states that use case-mix reimbursement for Medicaid.").

25. HARRINGTON, CARRILLO & LACAVA, *supra* note 4, at 42.

26. *Id.*

27. The DSM-III has since been updated by the DSM-IV-TR. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

28. Magaziner et al., *supra* note 21, at 663.

29. *Id.*

the Maryland study determined that nearly three-quarters of those identified as demented had impairments in four or more areas.[30]

Information about the prevalence of dementia among assisted living residents is even more limited than information about the prevalence of dementia among nursing home residents. A 2003 survey of 1,251 administrators of "eligible" assisted living facilities reported that 34.1 percent of assisted living residents had severe to moderate dementia.[31] However, it is hard to put much faith in this estimate, given that the surveyors selected only a subset of those facilities identified as assisted living residences and then relied on the survey answers of facility administrators.[32] Moreover, a subsequent study suggests that the actual rate of dementia may be higher and that administrators may not be sufficiently aware of residents' mental states.[33]

There is an even greater dearth of information about what proportion of LTC residents with dementia lack the capacity to vote.[34] This lack of information reflects the fact that the existence of dementia does not itself indicate a lack of voting capacity.[35] While there appears to be a strong, inverse correlation between capacity to vote and severity of dementia,[36] the determination of whether a person

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30. *Id.* at 669 tbl.4.

31. Hawes et al., *supra* note 20, at 878.

32. While the authors identified nearly 3,000 potential assisted living facilities with which to conduct interviews, over half of these facilities were declared "ineligible" because they were a facility that either had fewer than eleven beds, did not serve a primarily elderly population, or did not "represent itself as an assisted living facility or offer at least a basic level of services, which included twenty-four hour a day staff oversight, housekeeping, at least two meals a day, and personal assistance, defined as help with at least two of the following: medications, bathing, or dressing." *Id.* at 876. Thus, it seems highly unlikely that the sample was representative of all those facilities which commonly call themselves assisted living facilities. Moreover, it seems unlikely that the administrators interviewed were in a position to accurately report the rate of dementia in their facilities. Nearly two-thirds of the facilities provided only "low" or "minimal" levels of services (i.e., did not have an RN on staff at least forty hours per week and provide nursing care). *Id.* at 877-88. Whether such facilities would have the information needed to assess dementia is questionable and whether they would take the measures needed to accurately describe the information even if they had it in order to respond to a telephone survey is even more questionable.

33. Homa Magsi & Timothy Malloy, *Underrecognition of Cognitive Impairment in Assisted Living Facilities*, 53 J. AM. GERIATRICS SOC. 295 (2005) (surveying residents in seven unscientifically selected assisted living facilities in Omaha, Nebraska).

34. One of the only studies to look at this issue, a 1998 survey of activity directors at nursing homes and assisted living facilities in three Florida counties, found that 38.2 percent of the directors thought that "'some' . . . of their residents suffer[ed] from mental problems that affect[ed] their ability to follow political campaigns" and that 42.1 percent believed that "a lot" of their residents suffered from such a problem. SUSAN A. MACMANUS, TARGETING SENIOR VOTERS: CAMPAIGN OUTREACH TO ELDERS AND OTHERS WITH SPECIAL NEEDS 41 (2000).

35. *Cf.* Jason H. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Constantine Lyketsos, Bryan James, David Knopman, Christopher Patusky, Rosalie A. Kane & Pamela S. Karlan, *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons With Dementia*, 292 JAMA 1345 (2004) [hereinafter Karlawish et al., *Addressing*]; Brian R. Ott, William C. Heindel & George D. Papandonatos, *A Survey of Cognitively Impaired Elderly Patients*, 60 NEUROLOGY 1546, 1548 (2003) ("[A] diagnosis of A[lzheimers] D[isease] does not necessarily imply incompetence to vote . . . .").

36. Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094, 2097 (2005).

suffers from dementia is distinct from the determination of whether a person lacks voting capacity.

The extent to which LTC residents afflicted with dementia vote is also unknown, although current research suggests that those with more severe levels of dementia are less likely to vote.[37] The fact that there is a high concentration of persons with dementia in LTC institutions does not necessarily mean that there is a high rate of voting by persons with dementia in those settings. Rather, there is reason to suspect that persons with dementia living in community-based settings are more likely to vote or be voted for than are their institutionalized peers. A study of community-dwelling persons with dementia found that persons with dementia were more likely to vote when their caregiver was a spouse than when their caregiver was an adult child.[38] The study's authors suggested that this difference might reflect the intimate and long-standing relationship between spouses, as well as care-giving spouses' relative availability to assist with voting.[39] Since most nursing home residents with dementia are less likely to have a spousal caregiver than their community-dwelling peers, these findings lead to the reasonable hypothesis that nursing home residents with dementia may be less likely to vote (or be voted for) than their community-dwelling peers.

III. VOTING PRACTICES, PATTERNS, AND CONCERNS IN LONG-TERM CARE FACILITIES

A. Voting Access

Residents of LTC facilities are often quite interested in voting and many do vote,[40] yet they experience significant barriers to voting. Some of these barriers are the natural result of residents' physical conditions, conditions that may be the basis for their placement. For example, the majority of nursing home residents are chair-bound, meaning that they are unable to walk without extensive or constant support from another person or persons.[41] Mental impairments may also create barriers to voting, even if those impairments do not undermine the resident's ability to make

37. *See* Ott, Heindel & Papandonatos, *supra* note 35 (in a survey of one hundred outpatients with dementia, finding that increased severity of dementia was associated with reduced voting participation); Jason H. Karlawish et al., *Do Persons with Dementia Vote?*, 58 NEUROLOGY 1100, 1102 (2002) [hereinafter Karlawish et al., *Do Persons with Dementia Vote*] (reporting that persons with more severe dementia are less likely to vote than persons with mild or moderate levels of dementia).

38. Karlawish et al., *Do Persons with Dementia Vote*, *supra* note 37, at 1101-02. *See also* Harald De Cauwer, *Are Cognitively Impaired Older Adults Able to Vote*, GERIATRICS, Mar. 1, 2005, at 13 (reporting the results of a Belgian study which found that demented persons residing in the community were more likely to vote if they resided with a spouse than if they lived alone or with a family member other than a spouse).

39. Karlawish et al., *Do Persons with Dementia Vote*, *supra* note 37, at 1102.

40. This phenomenon is not limited to the United States. *See* Paul Brettle, *Do Nursing Home Residents Use the Right to Vote?*, 91 NURSING TIMES, No. 51, Dec. 1995, at 40 (finding, in a study nursing home residents in England, that residents voted at a rate slightly under half of that of the general electorate).

41. HARRINGTON, CARRILLO & LACAVA, *supra* note 4, at 36-37 tbl.14.

informed voting choices. Residents may, for instance, have impaired short-term memory that makes it difficult to remember instructions for requesting a ballot or confusion that makes the process of requesting a ballot excessively difficult.

The barriers to voting faced by LTC residents, however, extend beyond those internal to the residents. For at least some LTC residents, especially those residing in nursing homes, the institutional settings in which they reside create additional barriers.

First and foremost, staff attitudes and beliefs about residents and about whether residents should vote play a critical role in limiting access to the franchise. Such attitudes and beliefs may translate into the active disenfranchisement of residents. For example, it appears that many nursing homes engage in some form of screening for voting capacity before permitting residents to vote or assisting residents with voting.[42] To screen residents, staff use a variety of techniques, ranging from asking election-related questions (such as quizzing residents on current political officer holders), to conducting a Folstein Mini-Mental State Exam (MMSE), to assessing the residents' abilities to vote based on earlier assessments of their mental statuses, to simply only asking those they think have capacity if they want to vote.[43] Such assessments, whether formal or informal, do not appear to reflect any understanding of the level of capacity at which one could be legally disenfranchised.[44] Indeed, some approaches may have no relation whatsoever to the legal capacity to vote.[45]

Second, residents of LTC facilities may have reduced access to mechanisms for communicating with persons outside their facilities compared to those living in community-based settings. For example, federal law requires that nursing home residents have access to a telephone and grants residents the right to confidential telephone communications,[46] but there is no requirement that telephones be provided in individual resident rooms.[47] Residents desiring a

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42. *See* Jason H. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Constantine Lyketsos, Pamela Karlan, Bryan D. James, Charles Sabatino, Thomas Lawrence, David Knopman & Rosalie Kane, *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL'Y (forthcoming 2007) [hereinafter Karlawish et al., *Identifying the Barriers*] (surveying LTC facilities in the Philadelphia area); *see also* Richard Bonnie et al., *How Does Voting Occur in Long-Term Care*, Interview Script and Responses (Spring 2005) (unpublished manuscript) (on file with the *McGeorge Law Review*).

43. *See* Karlawish et al., *Identifying the Barriers, supra* note 42 (surveying LTC facilities in the Philadelphia area regarding methods of screening residents to vote); *see also* Bonnie et al., *supra* note 42 (finding that eighteen percent of the LTC care facilities surveyed during a pilot study identified residents who wanted to vote in the preceding election by asking only those residents whom staff thought could vote). The Folstein Mini Mental State Exam is a simple, widely-used instrument for assessing cognitive impairment.

44. *Cf.* Karlawish et al., *Identifying the Barriers, supra* note 42 (finding that, in a survey of LTC facilities in the Philadelphia area, "[n]o staff member used a standardized method of assessing voting competence grounded in constitutional law").

45. For example, in a pilot survey of LTC facilities in Virginia, one facility responded that persons who "had" a power of attorney would not be allowed to vote. *See* Bonnie et al., *supra* note 42, at 15.

46. *See* 42 C.F.R. § 483.10(e)(1) (2006) ("The resident has the right to personal privacy . . . . Personal privacy includes . . . written and telephone communications . . . .").

47. *See id.* § 483.10(c)(8)(ii)(A) (explicitly stating that facilities may impose additional charges for

personal phone, if one is possible, must generally pay for it from their personal funds. For the nearly two-thirds of nursing home residents on Medicaid,[48] personal funds are limited to a monthly personal needs allowance which, under federal law, can be as little as thirty dollars per month.[49] Thus, for many residents, obtaining a private telephone call requires a specific request to staff for permission and access. Similarly, many nursing home residents must rely on staff to both mail and deliver postal items. Nursing home residents also tend to lack access to more modern means of communication, such as the Internet. Finally, both residents' physical conditions and nursing homes' internal rules generally limit residents' freedom to leave the facility. This means that residents are limited in their ability to associate with persons who are not affiliated with the facility. The result of these limitations on communication is that nursing home residents often cannot request an absentee ballot—or even discuss political opinions with persons outside the facility—without going through an institutional intermediary.

Third, institutional placement can limit access to outside information. Media is an important source of information for voters: it not only serves to educate them about candidates or propositions, but also to remind them of the time and place of elections. Compared to their community-dwelling peers, LTC residents are less likely to have control over whether they have access to media and are less likely to be able to select what media sources they can access. For example, for many nursing home residents, the only available television may be in a common area, and they may not be able to control what is shown on it. The problems created by a lack of access to media are compounded by a lack of direct information from candidates. Candidates for political office devote little attention to winning the support of nursing home residents.[50] By comparison, candidates spend disproportionately large amounts of time courting non-institutionalized seniors.[51]

Fourth, institutional placement corresponds to social changes that reduce nursing home residents' access to outside assistance and information. Placement in a nursing home is associated with a marked decline in contact with family and friends.[52] One study found that within the first few months of placement,

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telephone access even to persons whose payment is otherwise covered by Medicare or Medicaid). Notably, the problem posed by the lack of private telephone access has long been recognized. *See* JEANIE SCHMIT KAYSER-JONES, OLD, ALONE, AND NEGLECTED 114 (1981).

48. HARRINGTON, CARRILLO & LACAVA, *supra* note 4, at 18.

49. *See* 42 C.F.R. § 436.832(c)(1)(i) (2006).

50. MACMANUS, *supra* note 34, at 36-37, 68 (urging candidates to change their current outreach practices so as not to "ignore" the nursing home and assisted living populations); Joan L. O'Sullivan, *Voting and Nursing Home Residents*, 4 J. HEALTH CARE L. & POL'Y 325, 342 (2001) (finding, in a study of voting among nursing home residents in Maryland, that politicians rarely visited nursing homes).

51. MACMANUS, *supra* note 34, at 34-37.

52. Cynthia L. Port et al., *Resident Contact With Family and Friends Following Nursing Home Admission*, 41 GERONTOLOGIST 589 (2001) (examining both telephone and in-person contacts).

residents' contact with their families dropped by approximately fifty percent.[53] This decline appears to be especially large for blacks.[54] There is also reason to believe that contact is disproportionately reduced for poorer residents.[55]

Some of these barriers to voting can be overcome by bringing the polling place to LTC residents. For example, in some communities, mobile vans staffed by either election officials or volunteers conduct on-site voting at nursing homes.[56] Temporary voting booths may also be set up on site.[57] However, when nursing home residents vote, they typically utilize an absentee ballot,[58] which places them at increased risk of being the targets of voter fraud.[59]

In part because of concerns about possible fraud in the absentee balloting process, twenty-three states have absentee balloting procedures that specifically address absentee balloting by nursing home residents.[60] There is significant agreement in the approaches that states take toward providing ballots to nursing home residents. The typical provision provides for election officials to deliver and supervise absentee ballots where a threshold number of ballots are requested from a given facility.[61] By contrast, states vary significantly in their provisions for nursing home residents needing assistance with ballot completion.[62] A number of states provide for residents to be assisted by election officials but are silent as to whether other persons may also provide assistance.[63] Some states require election

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53. *Id.* at 595.

54. *Id.* at 593-94.

55. Individuals receiving Medicaid have less contact with family and friends than do residents whose nursing home stay is being paid for privately. *See id.* at 592-93.

56. MACMANUS, *supra* note 34, at 91.

57. *Id.* at 91-92.

58. Karlawish et al., *Identifying the Barriers*, *supra* note 42; Bonnie et al., *supra* note 42. This appears to be true in Britain as well as in the United States. *See* Brettle, *supra* note 40, at 40.

59. Indeed, the absentee ballot process–especially when it relies on mail-in ballots–is perhaps the single biggest source of voter fraud. *See* GOV'T ACCOUNTABILITY OFFICE, ELECTIONS: THE NATION'S EVOLVING ELECTION SYSTEM AS REFLECTED IN THE NOVEMBER 2004 GENERAL ELECTION, GAO-06-450, at 18 (June 2006), www.gao.gov/new.items/d06450.pdf (on file with the *McGeorge Law Review*) (noting a variety of problems that occur with absentee ballots and reporting that election officials consider mail-in absentee ballots to be especially susceptible to fraud); COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 35 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf (on file with the *McGeorge Law Review*) (describing mail-in absentee balloting as one of the major sources of election fraud); NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 44 (2004), http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf (describing mail-in absentee balloting as creating "the most likely opportunity for election fraud now encountered by law enforcement officials") (on file with the *McGeorge Law Review*). *Accord* Daniel P. Tokaji & Ruth Colker, *Absentee Voting By People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1025 (2007).

60. *See* Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, 26 BIFOCAL 1, 6-7 tbl.1 (2004). A review of the statutory landscape indicated that the Smith and Sabatino study remained largely current as of November 2006.

61. *See id.* at 4.

62. *See id.*

63. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-159q(g) (West 2002 & Supp. 2007) (stating that "[i]f any elector asks for assistance in voting his ballot, [the relevant election officials] shall render such assistance as they deem necessary and appropriate to enable such elector to vote his ballot."); OHIO REV. CODE ANN. §

officials to help residents who request assistance but explicitly allow residents to receive assistance from other persons just as non-institutionalized persons might.[64] One state allows for assistance by both election officials and third parties but places limitations on third-party assistance that apply specifically to the LTC population.[65] Yet other states have LTC-specific voting provisions but nevertheless lack LTC-specific provisions regarding assistance with ballot completion.[66]

In addition to varying from state to state, assistance practices and standards tend to vary widely from facility to facility.[67] In part, this appears to reflect different attitudes about voting held by staff in different facilities.[68] It also appears to reflect differences in staff's knowledge of election procedures. For example, a study of nursing home practices in Florida determined that one reason why some facilities requested assistance for residents from election officials while others did not was that many of those that did not were unaware that they could request such assistance.[69]

B. Voting Fraud

While the potential exists for fraud in nursing home voting, evidence of its occurrence is minimal and largely anecdotal. To date, there has been no systemic study of voting fraud in LTC settings, and there is no meaningful available

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3509.08 (LexisNexis 2005 & Supp. 2007) (providing for residents to receive assistance from election officials but silent as to whether other persons may also provide assistance); R.I. GEN. LAWS § 17-20-14(a) (2003 & Supp. 2006) (requiring election officials to "provide assistance, if requested" but silent as to whether other persons may also provide assistance); S.D. CODIFIED LAWS § 12-19-9.1 (1995 & Supp. 2003) (providing for the auditor's representative and accompanying representatives of political parties to assist residents with ballot completion, but silent as to whether other persons may also so assist). Notably, of these, only Connecticut's statute seems to easily lend itself to the interpretation that assistance from other parties is prohibited.

64. *See, e.g.*, MINN. STAT. ANN. §§ 203B.11, 204C.15 (West 1992 & Supp. 2007) (providing for election officials to assist with ballot completion and allowing for any other person to assist as well, provided that they are not "the voter's employer, an agent of the voter's employer, an officer or agent of the voter's union, or a candidate for election"); TENN. CODE ANN. §§ 2-6-105, 2-6-601(a), 2-7-116(a)(1) (2003) (providing for voting deputies to assist residents, but explicitly stating that residents voting early are entitled to receive the same assistance as residents voting at the polls and that residents voting at the polls are entitled to receive assistance from anyone they choose).

65. *See* LA. REV. STAT. ANN. § 18:1333(g) (2004 & Supp. 2007) (providing for an election official to assist residents with ballot completion but allowing residents to "receive assistance from any person of [their] selection, except a candidate in the election and except the owner, operator, or administrator of the nursing home or an employee of any of them. However, no person except a spouse, blood relative, or the registrar may assist more than one voter in voting.").

66. *See, e.g.*, COLO. REV. STAT. ANN. § 1-8-112 (West 2004) (silent on assistance); IND. CODE ANN. § 3-11-10-25 (West 2006 & Supp. 2006) (silent on assistance); MASS. GEN. LAWS ANN. ch. 54, § 91B (West Supp. 2007) (silent on assistance); OKLA. STAT. ANN. tit. 26, § 14-115 (West 1997 & Supp. 2007) (silent on assistance).

67. *See* Karlawish et al., *Identifying the Barriers*, *supra* note 42, at 12-14.

68. *See id.* at 14 (concluding that "differences in voter participation are mainly associated with attitudes and practices of staff rather than with facility characteristics or formal policies.").

69. MACMANUS, *supra* note 34, at 108.

estimate as to its frequency, type, or severity. This is not surprising, as there is little statistical evidence of the frequency of voting fraud in general.

Several high-profile court cases have been brought alleging that nursing home residents' ballots were improperly completed. In the 1980s, two cases uncovered bold schemes to commit fraud in LTC facilities. In *United States v. Odom*, the Fourth Circuit upheld the convictions of three defendants on charges of mail fraud arising out of a fraudulent absentee balloting scheme.[70] The defendants, associates of candidates running for office, colluded with the manager of a North Carolina nursing home to obtain and complete absentee ballots in the names of the home's residents.[71] In *United States. v. Olinger*, the Seventh Circuit upheld the criminal conviction of an election judge involved in a scheme to disenfranchise the residents of Monroe Pavillion, a residential facility for the elderly and mentally handicapped.[72] Specifically, the defendant in *Olinger* instructed fellow election judges that "the residents of Monroe Pavillion were 'crazy'" and that they should ignore residents' voting preferences and instead punch each resident's ballot to record a vote for each of the Democratic candidates on the ballot.[73] As part of the scheme, another election official paid residents for these fraudulently obtained votes.[74]

More recently, in 1998, an unincorporated group named Citizens for Democratic Elections unsuccessfully brought suit against the Maryland Boards of Supervisors of Elections alleging that the State's mechanisms for providing ballots to nursing home residents violated the Voting Rights Act because the procedures did not provide adequate protections to ensure that ballots were delivered to and completed by residents.[75] Although the group never proved that any resident's ballot had ever been improperly marked,[76] Citizens for Democratic Elections submitted several affidavits as part of their filing. One alleged that its signer, an investigator hired by a candidate for state-wide office, was aware that "senior citizens who resided in nursing homes, assisted living facilities, senior citizen housing projects, and similar facilities, and who wished to vote by absentee ballots were being abused by unscrupulous facility managers." The signer specifically alleged that "[t]hese managers would intercept the absentee ballots when they were mailed to the resident at the facility, and would vote them without the knowledge of the resident, alter the ballots after the votes had been

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

71. *Id.* at 106-07.

72. *See* United States v. Olinger, 759 F.2d 1293 (7th Cir. 1985).

73. *Id.* at 1297.

74. *Id.*

75. In addition to other forms of relief, Plaintiffs requested a temporary restraining order stopping the delivery of absentee ballots to nursing home residents until better procedures were implemented. *See* Brief of Plaintiffs, Citizens for Democratic Elections v. Bd. of Supervisors, No. 98-CV-3416 (D. Md. 1998) (on file with the *McGeorge Law Review*).

76. *See* O'Sullivan, *supra* note 50, at 327 (describing the case and noting that the plaintiffs never proved that any resident's ballot had been improperly marked).

made but before they were returned, or induce the resident to vote for particular candidates."[77] The allegation that managers were inducing residents to vote for a particular candidate appeared to stem from an incident in which nursing home staff threatened residents with eviction if they did not vote for a particular candidate.[78] Another former nursing home staff member swore in an affidavit that he believed that fraud was occurring at the nursing home where he had worked. He based his conclusion on his belief that "[n]one of the . . . residents in [his] care could identify their own voter registration cards when [he] showed them their documents" and he "later discovered that all . . . residents were registered to vote with the same party affiliation and that they had voted in recent elections."[79]

While *Odom*, *Olinger*, the allegations in *Citizens*, and other instances[80] of fraudulent voting in LTC facilities are certainly troubling, they appear to represent relatively isolated events as opposed to systemic or multi-facility schemes. Furthermore, many, if not most, reports of voter fraud in nursing homes can not be substantiated, and there is reason to believe that at least some such reports may stem from events where no legally improper behavior has occurred. Many reports of fraudulent voting practices are made by parties with an interest in changing the outcome of a race,[81] and who thus may have an undue incentive to challenge votes by voters perceived to be feeble or otherwise susceptible to a successful challenge.[82]

Moreover, while commentators have focused on concerns about fraudulent behavior with regard to residents with dementia, it does not appear that the fraud that has occurred has in fact targeted demented residents. Rather, the limited

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77. Affidavit of Drake A. Ferguson at ¶ 6, Citizens for Democratic Elections v. Bd. of Supervisors, No. 98-CV-3416 (D. Md. 1998) (on file with the *McGeorge Law Review*).

78. *Id.* In support of concerns about inducement, the signer explained that, "[i]n December, 1994, we received a complaint regarding Stella Maris Nursing Home, where it was alleged that residents were being coerced to vote for particular candidates by facility staff members. These residents were told that they would be 'thrown out' if they did note [sic] vote for certain candidates. Volunteer investigators were sent to the facility, but were denied access by staff members." *Id.* at ¶ 10.

79. Affidavit of Mark Tigert ¶¶ 3-4, Citizens for Democratic Elections v. Bd. of Supervisors, No. 98-CV-3416 (D. Md. 1998) (on file with the *McGeorge Law Review*).

80. *See, e.g.*, Glover v. S. Carolina Democratic Party, No. C/A 4-04-CV-2171-25, 2004 WL 3262756 (D.S.C. 2004), *aff'd by* Reaves v. S. Carolina Democratic Party, 122 Fed. App'x 83 (4th Cir. 2005) (allowing an unsuccessful candidate for the South Carolina state senate to successfully challenge the results of a Democratic primary race by alleging voting irregularities including voting fraud with regard to the absentee ballots of nursing home residents); State v. Jackson, 811 N.E.2d 68 (Ohio 2004) (considering an evidentiary issue in a criminal case of an Ohio election board employee who allegedly marked nursing home residents' ballots contrary to residents' wishes).

81. For example, a Detroit City Council candidate initiated a lawsuit against the Detroit City Council clerk alleging that election officials assisted legally incapacitated persons to vote at a Detroit nursing home. *See* David Josar & Lisa M. Collins, *State Targets Detroit Ballots*, DETROIT NEWS, Nov. 1, 2005, at A1. Similarly, an unsuccessful candidate for the South Carolina state senate, Tim Norwood, successfully challenged the results of a Democratic primary race by alleging voting irregularities including voting fraud with regard to the absentee ballots of nursing home residents. *See Glover*, 2004 WL 3262756 at *1.

82. *Cf.* Kolb v. Casella, 270 A.D.2d 964, 965 (N.Y. App. Div. 2005) (upholding a lower court's decision to count the disputed ballots of three nursing home residents).

reports that exist suggest that when fraud occurs, it targets nursing home residents in general and not simply those residents suffering from diminished mental capacity.

IV. CAPACITY ASSESSMENT IN LONG-TERM CARE FACILITIES

Standardized capacity testing of LTC residents has been proposed as a technique that would address concerns that LTC staff engage in over-zealous or uninformed disenfranchisement of residents, as well as concerns that residents lacking capacity to vote may do so.

In a 2004 article published in the *Journal of the American Medical Association* (*JAMA*), Jason Karlawish, Richard Bonnie, Pamela Karlan, and others suggested that a high-stakes assessment system be considered for LTC residents. The *JAMA* article noted that staff in LTC facilities tend to "serve as gatekeepers, deciding whether to inform individuals of their right to vote and whether and how to assist them in registering or voting."[83] The article called such screening by LTC staff "inevitabl[e]," cursorily dismissing the idea that "only voting officials can make judgments regarding incompetence to vote."[84] The article then advocated the development of LTC-specific guidelines and policies to facilitate this type of screening. Specifically, the authors called for uniform policies in LTC facilities and recommended the use of a simple capacity-assessing instrument.[85] Notably, while the article discussed concerns about voting by persons with dementia in general,[86] it only called for uniform policies in LTC settings.

Since the publication of the *JAMA* article, Karlawish and his colleagues have come to present a more circumscribed view on capacity testing. For example, writing again in 2006, they advised against the "systematic screening of competence to vote based exclusively on a diagnosis of dementia or on residence in a long-term care facility."[87] They recommended, however, "encouraging

83. Karlawish et al., *Addressing*, *supra* note 35, at 1346.

84. *Id.* at 1348.

85. *Id.* at 1349.

86. *Id.* at 1347 ("Nondiscriminatory procedures for applying a test of voter capacity at the voter registration facility and at the time of voting are needed. For example, if a question is raised about a particular person's capacity to vote at the polling place, a poll worker might ask the questions described above. Persons who are unable to answer such questions correctly might then undergo a more detailed assessment.").

87. Jason Karlawish, Paul S. Appelbaum, Richard Bonnie, Pamela Karlan & Stephen McConnell, *Policy Statement on Voting by Persons with Dementia Residing in Long-Term Care Facilities*, 2 ALZHEIMER'S & DEMENTIA 243, 244 (2006) [hereinafter Karlawish et al., *Policy Statement*]. *See also* 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, 973 (2007) (arguing that not permitting staff to screen residents for voting capacity would be "wasteful and costly" and would undermine staff's faith in the electoral process, and recommending informal capacity assessment of residents to identify residents who should have their voting capacity more formally determined).

assessments for residents whose voting competence is reasonably in doubt."[88] Karlawish, Bonnie, and Paul S. Appelbaum have also since collaborated to develop an instrument, known as the "CAT-V" and discussed in Part IV(A) of this article, designed to determine whether or not a person has the capacity to vote. The team's initial conclusion is that "it appears that the CAT-V may have some utility for screening voting capacity in the long-term care setting as an element of a comprehensive set of guidelines designed to promote voter education and facilitate voting by residents."[89]

The notion of imposing some form of capacity-testing primarily or exclusively on LTC residents before permitting them to vote has received some support from others, with at least one commentator going so far as to suggest that all nursing home residents should have their capacity tested before being allowed to vote.[90] A thorough analysis of the constitutional and policy implications of preventing or restricting access to the ballot based on capacity testing (referred to at points hereafter as "high-stakes capacity testing") suggests, however, that such an approach is neither legally permissible nor consistent with good public policy.

A. Due Process Concerns

Permitting or requiring LTC facilities to serve as gatekeepers raises serious due process concerns. Constitutional due process rights can be expected to attach if LTC facilities make what are effectively adjudicatory decisions as to residents' capacities for voting. In general, constitutional due process rights attach when the government acts to deprive an individual of a liberty interest. Denying citizens the right to vote is the denial of a liberty interest.[91] Thus, persons faced with such denials by government actors are entitled to due process protection.[92]

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88. Karlawish et al., *Policy Statement*, *supra* note 87, at 244.

89. Univ. Penn. Healthcare System, Development of the Competency Assessment Tool—Voting (CAT-V), www.uphs.upenn.edu/adc/old_site/news/voting_development.htm (last visited Aug. 12, 2007) (on file with the *McGeorge Law Review*).

90. *See* Jessica A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 483 (2005) ("States should implement a capacity test to ensure nursing home residents are capable of voting."). *Cf.* Fredrick T. Sherman, *Get Out the Demented Vote*, 59 GERIATRICS 11 (Oct. 2004) (calling for physicians to take affirmative steps to determine whether their patients lack capacity to vote, and calling for "special precautions" to be taken with regard to LTC residents and for the development of voting capacity standards for LTC residents).

91. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curium) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental."); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669-70 (1966) (treating the right to vote as a fundamental right); Reynolds v. Sims, 377 U.S. 533, 562 (1964) (endorsing the idea that the right to vote is a "fundamental political right").

92. *See* Bell v. Marinko, 235 F. Supp. 2d 772, 777 (N.D. Ohio 2002) (stating that "[a]n elector cannot be disenfranchised without notice and an opportunity to be heard" without violating elector's due process rights); Doe v. Rowe, 156 F. Supp. 2d 35, 47-48 (D. Me. 2001) (stating that "the fundamental nature of the right to vote gives rise to a liberty interest entitled to due process protection" in finding that a state law that barred persons under guardianship from voting violated constitutional due process protections); Raetzel v. Parks/Bellemont

When a LTC facility engages in high-stakes screening of residents, it should be considered to be a "state actor" and thus subject to constitutional due process requirements. Where the facility involved in screening is government-owned, as six percent of nursing homes are,[93] the screening process would undeniably constitute state action because the facility's government-owned status makes it a state actor whenever it acts.[94] Even facilities that are not government-owned, however, should be found to be subject to due process limitations when they engage in such high-stakes screening. It is well established that a private actor may be deemed a state actor for the purpose of the Fourteenth Amendment if the private actor carries on a function traditionally reserved to the government. As the Supreme Court explicitly recognized in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), while few functions performed by the government can be said to be traditionally reserved to the government, "our cases make it clear that the conduct of the elections themselves is an exclusively public function."[95] Since qualifying and disqualifying voters is at the heart of the conduct of elections, LTC facilities acting to qualify or disqualify voters would be engaging in a state function; therefore, due process rights would attach.[96]

Absentee Elections Bd., 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (stating that "[w]hile the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection," and therefore holding unconstitutional a statutory scheme that did not provide for notice and hearing to voters whose absentee ballots were disqualified); United States v. Texas, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 (1966) ("[T]he right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.").

93. HARRINGTON, CARRILLO & LACAVA, *supra* note 4, at 20-21 (reporting that six percent of nursing homes are government-owned, but showing that the rate of government ownership varies widely from state to state).

94. *See* Tinder v. Lewis County Nursing Home Dist., 207 F. Supp. 2d 951, 954-55 (E.D. Mo. 2001) (finding, in a case in which the estate of a deceased nursing home patient sued for violation of decedent's substantive due process and negligence, that a county-owned home was a state actor); Rhude v. Belknap County, No. Civ. 99-397-JD, 2000 WL 1745119 (D.N.H. Oct. 31, 2000) (treating a county-owned nursing home as a state actor in the context of a suit brought under § 1983 alleging a violation of procedural due process); Tremblay v. Delaware County, No. Civ. A. 04-2740, 2005 WL 1126960 (E.D. Pa. May 11, 2005) (acknowledging that a county-owned nursing home was a state actor and thus was acting under the color of state law, thereby triggering due process rights, when it terminated the employment of a doctor); Connor v. Halifax Hosp. Med. Ctr., 135 F. Supp. 2d 1198, 1222 (M.D. Fla. 2001) (in a wrongful death action, finding that a publicly-owned nursing home was a state actor and thus subject to a § 1983 claim alleging a deprivation of Fourteenth Amendment rights).

95. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978).

96. *Cf.* Terry v. Adams, 345 U.S. 461 (1953) (finding that a private organization violated the Fifteenth Amendment by holding its own primary election, the winner of which effectively became the only candidate in the Democratic primary); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the Texas Democratic Party had violated the Fifteenth Amendment by holding an all-white primary election).

Having determined that due process rights should attach to facility-level voter screening, the question is what process is due to LTC residents in such situations. In general, the touchstone of due process is the provision of notice and the opportunity for a fair hearing prior to the deprivation of a constitutionally recognized interest.[97] As the Supreme Court has explained, "[w]e tolerate some exceptions to the general rule requiring pre-deprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"[98] For the purpose of determining the contours of the notice and hearing requirement, and when less process might be permissible, the leading precedent is *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under *Mathews*, the process due depends on:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[99]

A determination of whether high-stakes facility-level screening of LTC residents would satisfy due process protections thus requires an analysis of the underlying interests in light of the *Mathews* factors.[100]

The first factor in the *Mathews* test weighs heavily in favor of a very robust form of process. The right to vote is a fundamental right.[101] Indeed, as the

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97. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' . . . We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'") (citations omitted). *See also* 16B AM. JUR. 2D *Constitutional Law* § 905 (2007) ("The fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. Exceptions to the principle that a person must be afforded notice and an opportunity for a hearing before he or she is deprived of his or her rights can be justified only in extraordinary circumstances. Thus, for purposes of due process, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest.") (citations omitted).

98. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (citation omitted).

99. *Id.* at 334-35.

100. While the *Mathews* factors were originally simply a framework for addressing due process claims, they quickly came to be treated as a "test" to be applied to all due process challenges. *See* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, *Oh Lord, Please Don't Let Me Be Misunderstood: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 21-23 (2005) (explaining how, "[b]y 1981, the transformation of the Mathews formulation from a framework for discussion into a decisionmaking [sic] algorithm was complete.").

101. *See supra* note 91.

Supreme Court has repeatedly recognized, it is a foundational right upon which all other rights are premised.[102]

The second factor, the risk of erroneous deprivation of such interest through the procedure used, also weighs heavily against allowing LTC facilities and their staff to screen residents for capacity. Even if the CAT-V is used as the screening tool, there is a significant likelihood that some persons tested using the instrument would be erroneously determined to lack capacity to vote. Not only is the instrument based on a single legal theory of capacity derived from a single federal district court case[103]—one with which other courts might disagree[104]—but whether or not it accurately measures capacity so defined seems ripe for debate.[105] Consider the first question on the CAT-V: "Imagine that two candidates are running for Governor of [resident's state], and that today is Election Day in [resident's state]. . . . What will the people of [resident's state] do today to pick the next Governor?"[106] An interviewee receives no credit for explaining how a voter might decide which candidate to vote for. Rather, if the interviewee so responds, the interviewer is to say, "[w]ell that's how you might decide who you think should be governor. But how would you actually indicate your choice?"[107] An interviewee's response to this question will be used to score his or her capacity. The interviewee receives a score of "2" for a "completely correct response," such as: "They will go to the polls and vote" or "Each person will cast his/her vote for one or the other."[108] By comparison, a person who responds, "That's why we have Election Day," is deemed to have given an "ambiguous or partially incorrect" response and receives only a "1."[109] Finally, an "incorrect or irrelevant response" receives a score of "0."[110] Yet whether an answer can be said to be "incorrect" or "irrelevant" is inherently subjective. As an example of such a response, the creators give the following: "There's nothing you can do; the TV guy decides."[111] While most Americans would likely find such a response

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102. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (declaring the right to vote to be a "fundamental political right" because it is "preservative of all rights") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); Wesberry v. Sanders, 376 U.S. 1, 17 (1976) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

103. Appelbaum, Bonnie & Karlawish, *supra* note 36 (describing the CAT-V instrument, which attempts to operationalize the standard for capacity discussed in the Maine District Court case of *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001)).

104. *Cf.* Hurme & Appelbaum, *supra* note 87, at 934-45 (indicating that states have different definitions of competence).

105. This article's discussion of the CAT-V reflects the version of the CAT-V published in 2005 in the American Journal of the Psychiatry. *See* Appelbaum, Bonnie & Karlawish, *supra* note 36, at 2099 app. 1. It is the author's understanding that the instrument is in the process of being refined.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

incorrect, a sizeable number of non-demented citizens might agree with it—at least with regards to certain media figures.[112] Furthermore, such an instrument would be of no value in determining whether persons unable to express themselves verbally or in writing but able to communicate through other means, or persons who have had a stroke or similar condition and are therefore unable to form sentences, nevertheless retain capacity to vote.

Moreover, even if a fully accurate instrument could be created,[113] erroneous deprivations of the right to vote could be expected to result from its use. The responses of a resident believed to be lucid may be perceived to be so even when the resident is not, and, more importantly, the responses of a resident believed to be demented may be considered as such even when the resident is not.[114] As has been documented in a variety of settings, medical professionals' diagnoses and assessments can be significantly affected by their expectations.[115] Staff members' expectations may, for example, lead them to unconsciously question residents in a manner that encourages residents to respond in a way that confirms those expectations.[116] Moreover, the relationship between a resident and a staff member can be a strategic one, with the resident conveying or withholding information to reach strategic ends. A resident seeking more assistance with activities of daily

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112. A common critique of the electoral process, after all, is that the media has undue influence over it. Moreover, there are regularly complaints that certain members of the media individually exert excessive influence over the electoral process (e.g., John Prescott Ellis, a cousin to President George W. Bush and then Fox News commentator, who called the 2000 presidential election for Bush, a move which some say fundamentally affected the result of the 2000 presidential election; Rupert Murdoch, chairman and chief executive officer of Fox News, who some commentators believe plays a significant role in the successes of certain political candidates and parties).

113. Notably, to be fully accurate, an instrument would need to account for the effects that the timing of testing may have on the quality of the responses given. For example, a test administered when a resident is experiencing an acute health care event (e.g., a urinary tract infection) may have a very different outcome than one given at another time. Similarly, a test given in the morning may have different results than one given in the afternoon.

114. For this reason, the fact that the creators of the CAT-V were able to produce reliable results when they administered the instrument may not necessarily indicate that facility staff members would be able to do so.

115. *See* Brian H. Bornstein & A. Christine Emler, *Rationality in Medical Decision Making: A Review of the Literature on Doctors' Decision-Making Biases*, 7 J. EVALUATION IN CLINICAL PRAC. 99 (2001) (discussing studies showing that doctors are subject to a "confirmation bias" such that they pay greater attention to evidence that confirms their expectations than to evidence that would be inconsistent with their expectations); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 192-93 (1998) (discussing the literature on confirmation bias in the context of medical diagnosis as part of a comprehensive discussion of the literature on confirmation bias).

116. *See generally* John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 AM. PSYCH. 867 (1980) (describing how self-fulfilling prophesies can arise in social interaction through a simple process by which the perceiver's expectations about a target lead the perceiver to act toward the target in way that encourages the target to respond in an expectancy-consistent manner). *Accord* John M. Darley & Kathryn O. Oleson, *Introduction to Research on Interpersonal Expectations* 47-59, *in* INTERPERSONAL EXPECTATIONS (Peter David Blanck ed., 1993); Nickerson, *supra* note 115, at 181-82.

living, for example, may either consciously or unconsciously project greater needs, helplessness, or confusion in order to obtain greater staff assistance.

The second *Mathews* factor also looks at the expected value of alternative procedures. This aspect of the second factor also weighs against allowing LTC facilities and their staff to screen residents for voting capacity. A more formal adjudicatory determination, specifically one made by an independent adjudicator after adequate notice and opportunity for hearing, would be far less likely to result in an erroneous deprivation of the right to vote. First, such a procedure would reduce the likelihood that assessments would be compromised either by staff expectations of residents or by residents' strategic approaches to communication with staff. Second, it would allow residents to present evidence of capacity. Residents may have legitimate fears about challenging a staff member's questions or assessment. For example, nursing home residents depend on staff members for their most basic needs—from toileting, to ambulating, to eating—and may legitimately fear retaliation if they object to a staff member's actions.[117] By comparison, a resident would not have a similar need to please a neutral, third-party adjudicator and thus would be in a better position to put forth a vigorous defense. Third, by allowing for the presentation of multiple types of evidence, a hearing would be more likely to result in an accurate assessment of voting capacity than would a single assessment. By comparison, a one-shot assessment may catch the resident at a time when his or her capacity is temporarily compromised by an acute health event, a medication, or simply the time of day.

Finally, the government's interest would seem to weigh in favor of a more robust form of procedure. While allowing facility staff to engage in capacity testing would reduce the administrative burden required to determine who lacks capacity to vote, the government has an even greater interest in ensuring free and fair elections and that citizens are not improperly disenfranchised.[118]

Thus, reviewing the interests involved in light of *Mathews* and its progeny leads to the conclusion that even if LTC facility staff determined that a resident lacks capacity to vote, the facility may not constitutionally deny that person the right to vote or create significant barriers to exercising that right. As made clear in the three decades since *Mathews*, the touchstones of due process are notice and fair hearing. To deny such a fundamental right as voting without basic notice and hearing simply does not comport with basic due process protections. At the very least, voters are entitled to adequate notice and a fair hearing before being denied

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117. *Cf.* CARLSON, ADVOCACY, *supra* note 6, at § 1.05(1) ("Due to the extent of residents' weakness, and the control exercised by the facility and its staff, residents, family members, and friends often fear that a complaint made to the facility will lead to retaliation against the resident.").

118. *See* Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) ("'A State indisputably has a compelling interest in preserving the integrity of its election process.'") (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

access to the ballot.[119] In order for the hearing to be fair, it must afford the resident the right to be heard by a neutral third-party adjudicator before being deprived of the right to vote.[120]

It is important to note that a policy conditioning assistance with obtaining or completing a ballot on an assessment of voting capacity would raise similar due process concerns, even if the policy stopped short of conditioning the right to complete a ballot on an assessment of voting capacity. At least for many nursing home residents, the two approaches are likely to be functionally equivalent as both would prevent the residents from realizing the right to vote. As previously discussed, many residents have physical disabilities that prevent them from successfully independently requesting or marking a ballot. Facility policies and practices may also make it impractical, if not infeasible, for residents to request or return an absentee ballot without assistance from staff.

To be sure, if only assistance from staff were conditioned on capacity assessment, some residents might be able to obtain assistance from other parties. Yet obtaining such third-party assistance might itself require the assistance of the facility since facility staff generally control access to outside communication by setting visitor and telephone access policies, and by delivering and sending all mail that comes in and out of the facility.

By comparison, a facility may be able to assess residents' voting capacities for the purpose of recommending an assessment be conducted by a neutral third party without running afoul of constitutional due process protections.[121] However, this would only be true to the extent that the third-party process would afford adequate notice and hearing and that no deprivation of voting rights occurred prior to the third party's determination.

B. Equal Protection Concerns

In addition to raising due process concerns, LTC facilities serving as gatekeepers to ballot access also raises serious Fourteenth Amendment equal protection concerns. Of course, in order for equal protection to be implicated, state action is required. There is no question that a state law requiring LTC facilities of any type to screen residents for capacity would constitute state action. As discussed earlier in the context of due process, such screening could

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119. Thus, were residency in a LTC facility a factor that, alone or combined with suspicion of incapacity, triggered high-stakes screening, prospective residents should be given notice of that risk prior to being admitted to a LTC facility.

120. While ideally this adjudicator would be a member of the judiciary, an administrative procedure reserving the right to appeal to the courts might be sufficient. *See* Bell v. Marinko, 235 F. Supp. 2d 772 (N.D. Ohio 2002) (holding that the due process rights of voters whose registrations were challenged on residency grounds were not violated by an administrative hearing procedure that provided for, among other things, notice, legal representation, and cross-examination of persons challenging the registrations).

121. *Cf.* Hurme & Appelbaum, *supra* note 87, at 973 (suggesting such a use for facility-level capacity assessments).

also constitute "state action" if voluntarily undertaken by LTC facilities because the qualification and disqualification of voters is a function traditionally reserved to the government.

The degree of scrutiny that the Supreme Court uses when evaluating whether a restriction on the franchise of voting is an impermissible violation of constitutionally guaranteed equal protection depends on the nature of the restriction. Specifically, as the Supreme Court held in *Burdick v. Takushi*, 504 U.S. 428 (1992), standard of review when considering a state election law "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[122] The *Burdick* Court explained that if a state election law imposes a "severe" restriction on such rights, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"[123] However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[124]

Consistent with *Burdick*, the Supreme Court has found that some provisions that impact a voter's access to the ballot are subject only to rational basis review.[125] Nevertheless, some voting restrictions are so severe as to warrant strict

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122. 504 U.S. 428, 434 (1992).

123. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

124. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). The *Burdick* approach continues to be relied on by the Supreme Court. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citing *Burdick* for the proposition that "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.") (citations omitted); Buckley v. Am. Constitutional L. Found., Inc., 525 U.S. 182, 206 (1999) (Thomas, J. concurring) ("[W]e have developed . . . a framework for assessing the constitutionality, under the First and Fourteenth Amendments, of state election laws. When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review . . . .").

125. Perhaps most notably, in *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), the Supreme Court considered the Fourteenth Amendment claims of prisoners awaiting trial in Illinois' Cook County jail. The prisoners, all eligible Cook County electors, sought absentee ballots due to their physical inability to appear at the polls on Election Day. At the time, Illinois' absentee ballot statute made no provision for persons physically present in their county of residence to receive absentee ballots unless the religious observance precluded their attendance at the polls or they provided proof of physical incapacitation. In determining whether the Illinois statute violated the Equal Protection Clause of the Fourteenth Amendment, the Court applied rational basis review. The decision to employ rational basis review was based on two key findings: (1) that the distinctions drawn by the statute were not based on wealth or race, two suspect classifications that would compel a higher standard of review; and (2) that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *Id.* at 807. *But see* O'Brien v. Skinner, 414 U.S. 524, 529 (1974) (invalidating a New York state statute with close parallels to that at issue in *McDonald* and distinguishing *McDonald* on the grounds that the *McDonald* case involved a "failure of proof" in that the *McDonald* petitioners had failed to prove that they were "absolutely prohibited from voting by the State . . . since there was the possibility that the State might furnish some other alternative means of voting"); Goosby v. Osser, 409 U.S. 512 (1973) (finding that *McDonald* should not be read as precluding a successful suit by Pennsylvania prisoners who challenged a state absentee ballot

scrutiny.[126] Strict scrutiny is particularly appropriate where the provision at issue governs voter qualifications.[127]

A requirement that LTC facilities restrict access to ballots—either by preventing such access or by creating significant barriers to access based on their assessment of residents' capacities for voting—is a severe restriction on the franchise. If access to the ballot were conditioned on capacity testing, a person who failed the test would be completely disenfranchised. There is, of course, no more severe restriction on the right to vote than the outright denial of that right. Conditioning voting on capacity testing, however, would also amount to a severe restriction on the right to vote for people who would pass the test. Capacity testing is potentially both socially and psychologically costly for would-be voters.[128] The voter must subject him or herself to the intrusive and potentially

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statute that allegedly created an absolute prohibition on voting by persons confined to penal institutions).

126. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (holding that the Court was required to apply strict scrutiny where a residency requirement denied some citizens the right to vote); Republican Party of Ark. v. Faulkner County, 49 F.3d 1289, 1297 (8th Cir. 1995) (applying strict scrutiny to a political party's equal protection challenge of a law that required parties seeking to place candidates on the general election ballot to conduct and pay for a primary election); Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) (applying strict scrutiny in an equal protection challenge to a Virginia law that required voters to supply their social security number in order to register to vote); Manhattan State Citizens' Group, Inc. v. Bass, 524 F. Supp. 1270, 1274-75 (S.D.N.Y. 1981) (applying strict scrutiny in an equal protection challenge to a New York state law that prohibited persons adjudicated incompetent or involuntarily committed to a mental institution from voting). *See also* Weinschenk v. State, 203 S.W.3d 201, 212-19 (Mo. 2006) (finding that a state statute requiring voters to present "a Missouri driver's license, a Missouri non-driver's license, or a United States passport on election day in order to vote" violated the Equal Protection Clause of Missouri's constitution).

127. *See Greidinger*, 988 F.2d at 1349 (finding that a Virginia law that required voters to supply their social security number in order to register to vote was unconstitutional in that it did not satisfy strict scrutiny, and noting that "[i]n the context of voter qualifications, traditional equal protection strict scrutiny analysis has been applied."). *See also Dunn*, 405 U.S. at 336 (applying strict scrutiny to a residency requirement); Hill v. Stone, 421 U.S. 289, 297 (1975) (in holding unconstitutional a city law limiting voting on city bond issues to persons who had "rendered" property for taxation, stating that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest"); *Manhattan State Citizens' Group*, 524 F. Supp. at 1274-75 (using strict scrutiny analysis to find that a state law violated equal protection requirements insofar as it disenfranchised all persons involuntarily committed to a mental institution); Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 373-74 (2003) (arguing that the Supreme Court is "reticent to strike down state statutes or practices that it feels only impact the 'administration' of elections" but is relatively more willing to strike down state laws that have a substantial impact on the right to vote). *Cf. Weinschenk*, 203 S.W.3d at 212, 219 (finding that a state statute requiring voters to present "a Missouri driver's license, a Missouri non-driver's license, or a United States passport on election day in order to vote" violated the Equal Protection Clause of Missouri's constitution); Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (holding that regardless of whether or not strict scrutiny was the proper standard, a challenge to a photographic identification requirement for voting was likely to succeed because the burden of the requirement imposed was sufficiently severe and the law was not sufficiently tailored to the state's purported interest). *But see* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007) (holding that an Indiana statute requiring persons voting at the polls to show photographic identification did not impermissibly burden the right to vote).

128. Such costs must be taken into account when considering whether a restriction on the right to vote is severe. *Cf. Greidinger*, 988 F.2d at 1352-55 (examining in depth the costs of disclosing one's social security number under a Virginia law that required voters to supply their social security number in order to register to

demeaning process of having his or her mental capacity challenged and, at least under the CAT-V, must reveal how he or she would make a voting choice. The later intrusion would significantly undermine one of the fundamental rights afforded to other voters: the right to privacy as to one's political views and beliefs.

Since conditioning the right to vote on capacity testing is a severe restriction on Fourteenth Amendment rights, strict scrutiny applies. In determining whether strict scrutiny is satisfied, the first question is whether the state has a compelling interest in preventing persons who lack the capacity to understand the nature of the vote and the electoral process from voting. It seems likely that the courts would find this to be a compelling interest. After all, the Supreme Court recently declared in *Purcell v. Gonzales*, 127 S. Ct. 5 (2006), that "[a] State indisputably has a compelling interest in preserving the integrity of its election process."[129] However, in *Purcell*, the Court equated the integrity of the system with a lack of fraud.[130] There is a legitimate question as to whether allowing persons who lack the capacity to vote to participate in the process would, like fraud, undermine the integrity of the electoral process. Under our current system, a person is permitted to cast a vote for any candidate for any reason—regardless of whether that reason be wise, informed, or even rational. Moreover, "[i]t is well established that when a restriction 'severely' limits fundamental voting rights, courts must assess the state's interests in doing so with great care."[131]

Even assuming *arguendo* that the first part of the strict scrutiny test is satisfied because the state has a compelling interest in preventing voting by persons lacking the capacity to understand the nature of the vote and the electoral process, there is reason to question whether a high-stakes gate-keeping requirement would be sufficiently tailored to meet that interest. One reason to believe it would not be sufficiently tailored is that selectively restricting the voting rights of institutionalized LTC residents is grossly under-inclusive since it targets only a small subset of persons with dementia. While a state may be able to bar "less knowledgeable or intelligent citizens from the franchise,"[132] under certain circumstances, selectively pursuing this aim may result in an equal protection violation. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Supreme Court considered the constitutionality of Tennessee's waiting period imposed on new residents' right to vote. Tennessee had attempted to justify the waiting period as furthering the state's interest in an intelligent, knowledgeable

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vote and finding the law unconstitutional because it imposed a severe burden on the right to vote).

129. 127 S. Ct. 5, 7 (2006).

130. *Id.* ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.").

131. Jones v. Bates, 127 F.3d 839, 857 (9th Cir. 1997) (finding a violation of constitutional due process where voters approved a ballot proposition without adequate notification that approval of the proposition would impose lifetime term limits on elected officials, thereby limiting voters' fundamental right to vote).

132. *See generally* Dunn v. Blumstein, 405 U.S. 330, 356-57 (1972).

electorate. The Supreme Court soundly rejected this argument. The Court noted that "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse."[133] Declining to determine whether a State could ever bar "less knowledgeable or intelligent citizens from the franchise," the Court instead concluded that Tennessee could not selectively pursue this interest with respect only to new arrivals.[134] Although *Dunn* does not speak to whether strict scrutiny would apply in the case at hand, as the *Dunn* case implicated not only the right to vote but also the right to travel between states, the Court's reasoning suggests that selectively targeting nursing home residents for capacity testing might run afoul of equal protection requirements by being too under-inclusive.

Defining the compelling interest as preventing voter fraud instead of preventing persons with insufficient capacity from voting does not avoid the equal protection problem. This is because a policy of restricting the rights of LTC facility residents by imposing gate-keeping requirements also cannot be reasonably said to be narrowly tailored to meet this interest. In general, a law is narrowly tailored to prevent voting fraud if it creates "the least restrictive means necessary for preventing fraud."[135] As discussed earlier, there is little evidence of voting fraud occurring in LTC facilities, the evidence that exists is largely anecdotal, and the evidence which exists suggests, at most, isolated—as opposed to systemic—instances of fraud. More importantly, the fraud that does occur does not appear to target LTC residents based on their individual mental capacities, but rather on their group status as LTC residents. Furthermore, as is discussed in more depth subsequently, empowering LTC facility staff as gatekeepers is likely to increase fraud, not reduce it. Such a policy creates entirely new opportunities and justifications for unaccountable parties to improperly deny ballot access.[136]

Just as the due process problems posed by facility gate-keeping cannot be averted by "simply" requiring that assistance with obtaining and completing the ballot—and not the right to complete the ballot—be conditioned on capacity assessment, the equal protection concerns raised by such gate-keeping also cannot be averted in this manner. The Fourteenth Amendment not only protects voters' right to access the ballot, but also their right to obtain the assistance needed to complete the ballot.[137] Allowing only certain groups of voters to receive

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133. *Id.* at 356.

134. *See id.* at 356-60.

135. *See id.* at 353.

136. It is important to recognize that fraud can occur not only by casting improper ballots but also by preventing proper ballots from being cast.

137. *See* James v. Humphreys County Bd. of Election Comm'rs, 384 F. Supp. 114, 132 (D. Miss. 1974) ("[N]o compelling reason exists for the election officials in Humphreys County to adhere to practices which distinguish between voter assistance offered to illiterates and that allowed to the blind and disabled. Since Mississippi's election laws expressly permit optional assistance for the blind and disabled voters, the Fourteenth Amendment mandates that like optional assistance be extended to illiterate voters."); O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977) (using rational basis review to determine whether a statutory scheme that placed greater restrictions on assistance to illiterate voters than on assistance to blind or disabled voters denied illiterate voters equal protection of law).

assistance raises serious constitutional concerns. At least for some individuals, denying assistance with ballot completion may severely burden the right to vote. The burden resulting from lack of assistance may be severe because of the person's physical status. For example, denying assistance to a bed-bound resident unable to hold a writing utensil is likely to render the resident entirely unable to vote. However, a denial of assistance may also impose a severe burden on the right to vote simply because of the person's residential status. For example, a voter confined to a LTC facility may be unable to obtain a ballot or to return a ballot without having a third party deliver or send mail for him or her.

The equal protection concerns raised by requiring capacity testing can also not be averted by "only" using them to determine which residents should have their voting capacity formally adjudicated.[138] While the process might be superior, it would still have the clear result of singling out the LTC population for a severe burden on the right to vote. Under such a scheme, LTC residents' institutional status would still result in both the burden of having their capacity tested and potentially the burden of outright disenfranchisement.

Finally, to fully understand the potential viability of an equal protection challenge to gate-keeping by LTC facilities, it is important to recognize that the Supreme Court has historically been receptive to voting rights claims that focus on the degrading effects of the denial of voting rights. In a sweeping analysis of Supreme Court voting rights jurisprudence in a 1997 *University of Pennsylvania Law Review* article, James Gardner recognized that the Court tends to speak of the value of the vote "almost exclusively in terms of its liberty-protective properties"—that is, its ability to allow citizens to protect their interests by influencing government decision-making.[139] However, Gardner found that the Court has been relatively hostile to claims actually based on theories of protective democracy.[140] By contrast, Gardner found that the Court has historically been receptive to voting rights claims based on "communitarian grounds"—that is, on the grounds that voting is a socially validating process and that exclusion from the franchise is "a mark of inferiority, a consignment to a degrading form of second-class citizenship."[141] This jurisprudential tendency suggests that the Court might be quite sympathetic to an equal protection claim brought by LTC residents arguing that barriers to exercising the franchise were being exclusively or disproportionately imposed on them and that this further stigmatized and marginalized them within their larger community.

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138. *Cf.* Hurme & Appelbaum, *supra* note 87, at 973.

139. *See* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 899 (1997).

140. *Id.* at 899, 906-41.

141. *Id.* at 901-02, 906-41 (arguing that "the plaintiffs most likely to meet with success as Supreme Court litigants are those who base their claims on communitarian theories [of democracy]—those who complain, that is, of being stigmatized by some demeaning form of exclusion from the community's political life.").

C. Statutory Concerns

Constitutional concerns aside, requiring or permitting LTC facilities and their staff to serve as gatekeepers to the ballot runs contrary to the aims of a wide variety of federal statutes, including the Americans with Disabilities Act, the Help America Vote Act, the Voting Rights Act, and the Nursing Home Reform Act of 1987.

A gate-keeping provision would most directly conflict with the Nursing Home Reform Act of 1987. Under the Nursing Home Reform Act and its implementing regulations, a nursing home resident residing in a facility that is certified to receive either Medicaid or Medicare funding has "the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States" and "the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights."[142] Under the law, nursing home residents also have the right to "reside and receive services in the facility with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered . . . ."[143] By screening nursing home residents for capacity, staff would directly undermine residents' right to be free from interference in exercising their right to vote. A limitation on assistance with ballot completion might also implicate residents' rights to have their needs and preferences accommodated.

Whether facility screening would implicate the Voting Rights Act of 1964 (VRA) requires a somewhat more complicated analysis as it could implicate two separate types of prohibitions found in the VRA: (1) prohibitions against discrimination on the basis of race, and (2) prohibitions against certain potentially discriminatory procedures and practices.

Section 1973 of the VRA prohibits voting standards, practices, and procedures that discriminate on the basis of, among other things, race or color.[144] In 1982, Congress amended the VRA to allow a plaintiff to establish a violation of the VRA without proving a discriminatory purpose. Today, a plaintiff may show a violation of the VRA simply by showing that, based on the "totality of [the] circumstances," a challenged voting practice discriminates on the basis of race.[145] The VRA has been used successfully to challenge at-large elections and multi-member districts that have the effect of diluting minority votes.[146] Arguably, creating barriers to voting specific to nursing home residents could be seen as a violation of the VRA

142. 42 C.F.R. §§ 483.10(a)(1)-(2) (2006).

143. 42 U.S.C. § 1396r(c)(1)(A)(v)(I) (2000) (applying to nursing facilities); 42 U.S.C. § 1395i-39(c)(1)(A)(v)(I) (2000) (applying to skilled nursing facilities); 42 C.F.R. § 483.15(e)(1) (2006). The language in both statutes and in their common regulation is essentially identical.

144. 42 U.S.C.A. § 1973(a) (West 2003).

145. *See* 42 U.S.C.A. § 1973(b) (West 2003). *See also* Thornburg v. Gingles, 478 U.S. 30, 38 (1986); Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003).

146. *See Thornburg*, 478 U.S. at 77-80 (upholding district court's finding of a Section 2 violation where a multi-member districting plan had been found to dilute minority voting rights).

on similar grounds. Since within any major age group blacks are more likely than whites to reside in nursing homes, creating nursing home resident-specific voting barriers can be expected to disproportionately increase the cost of voting for black voters of a given age relative to white voters of the same age. Nevertheless, similar arguments have been made challenging felon disenfranchisement laws with only limited success,[147] and the argument for violation here is not as strong as it is in the felon disenfranchisement cases: the total impact is smaller because the number of individuals affected is smaller, the barrier does not necessarily amount to a total denial of the franchise, and—perhaps most importantly—relative to the overall population, the nursing home population is disproportionately white. Thus, courts that reject the argument in the context of felon disenfranchisement can be expected to reject it here too, and even those courts that have been receptive to the felon disenfranchisement argument may not be willing to extend the reach of the VRA to cover this new possibility.[148] Accordingly, it seems unlikely that high-stakes screening of LTC residents for voting capacity would be found to run afoul of the VRA on the grounds that it discriminates on the basis of race.

By contrast, creating nursing home-specific barriers would likely violate Section 1971 of the VRA, which states that:

> [n]o person acting under color of law shall . . . in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote . . . .[149]

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147. *See* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (en banc) (affirming the district court's dismissal of a VRA challenge to a New York felon disenfranchisement statute); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (holding that Florida's felon disenfranchisement law did not violate either the VRA or Fourteenth Amendment equal protection guarantees); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (finding that Tennessee's felon disenfranchisement law, which disproportionately disenfranchised minorities, did not violate either Section 2 of the VRA or the Equal Protection Clause of the Fourteenth Amendment). *But see Farrakhan*, 338 F.3d at 1016 (stating that "[a]lthough states may deprive felons of the right to vote without violating the Fourteenth Amendment, when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress" and remanding for further proceedings) (citations omitted).

148. In upholding one such challenge, the Ninth Circuit conceded that "a bare statistical showing of disproportionate *impact* on a racial minority" is insufficient to establish a Section 2 violation but found that a Section 2 violation may be found if "the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances." *Farrakhan*, 338 F.3d at 1019 (emphasis in original). Specifically, in *Farrakhan*, the Ninth Circuit remanded for new proceedings because the district court failed to consider "evidence of discrimination within the criminal justice system"—evidence that the Ninth Circuit held "can be relevant to a Section 2 analysis." *Id.* at 1012. Translated into the nursing home context, a successful challenge to nursing home-specific barriers to voting might well require a showing that policies providing for the financing of long-term care in the United States discriminate against minorities.

149. 42 U.S.C.A. § 1971(a)(2)(A) (West 2003).

Selectively testing the capacity of LTC residents would be applying different standards, practices, and procedures to this population. Similarly, to the extent that capacity-testing instruments could be construed to be "literacy tests," they would also be unlawful because the VRA specifically prohibits selective employment of literacy tests.[150]

In addition to potentially limiting states' abilities to selectively target LTC residents, the VRA limits states' abilities to deny affirmative assistance with ballot completion to such residents. Under the VRA, "[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, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[151] Accordingly, a state might not able to condition LTC residents' ability to obtain assistance with ballot completion on residents agreeing to subject themselves to informal capacity assessments without violating the VRA.

Allowing or requiring LTC facilities to engage in high-stakes gate-keeping might also be found to violate Title II of the Americans with Disabilities Act (ADA). Title II declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[152] Its implementing regulations further prohibit public entities from using eligibility criteria that tend to screen out disabled individuals from such services, programs, or activities unless the criteria are "necessary."[153] For reasons previously discussed, using residence in a LTC institution as a criterion for (or even as a factor contributing to) the imposition of high-stakes capacity testing is not necessary to protect the integrity of the electoral process. Accordingly, conditioning the ability of LTC residents to vote on capacity testing might well be determined to be unlawful discrimination on the basis of disability. The case law in this area is still in its infancy, however, and plaintiffs arguing that the ADA regulates states' freedom to condition the right to vote on the basis of mental incompetence have met with only limited success.[154] To the extent that an ADA claim might succeed, so too might a claim

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150. *See id.* § 1971(a)(2)(C)(i) (prohibiting any person "acting under color of law" from "employ[ing] any literacy test as a qualification for voting in any election unless . . . such test is administered to each individual and is conducted wholly in writing . . . .").

151. *Id.* § 1973aa-6.

152. 42 U.S.C. § 12132 (2000). A person is a "qualified individual with a disability" if he or she is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). An individual with a disability, in turn, includes one with a physical or mental impairment that substantially limits one or more major life activities as well as one who is regarded as having such an impairment. *See id.* § 12101(2).

153. 28 C.F.R. § 35.130(b)(8) (2006).

154. *See* Doe v. Rowe, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (finding that a state law disenfranchising persons subject to guardianship violated Title II of the ADA). *But see* Prye v. Carnahan, No. 04-4248-CV-C-ODS, 2006 WL 1888639, *5-7, *19 (W.D. Mo. July 7, 2006) (finding that the ADA was not violated by a state

that such gate-keeping violates Section 504 of the Rehabilitation Act of 1973,[155] which prohibits federally-funded programs and activities from discriminating on the basis of disability.[156]

While it is thus an open question whether the ADA could be successfully used to prevent LTC facilities from serving as gatekeepers, it is clear that attempts to impose high-stakes gate-keeping would run contrary to the aims of the ADA. The ADA is premised on the notion that Congress should work to counteract society's tendency to "isolate and segregate individuals with disabilities" including in the areas of "institutionalization, health services, [and] voting . . . ."[157] The ADA and subsequent case law interpreting its provisions reflect an increasingly widespread understanding that persons with disabilities are entitled to reside in the most integrated setting reasonably possible. Restricting fundamental rights based in part on a disabled person's institutional placement thus runs contrary to the ADA's basic tenets.

Such gate-keeping also runs contrary to the more recent Help America Vote Act (HAVA), although HAVA does not appear to directly prohibit LTC facilities from serving as gatekeepers. HAVA, passed in a climate of significant concern about access to the ballot following the 2000 presidential election fiasco,[158] requires states to take affirmative action to make polling places accessible to voters with disabilities.[159] While HAVA does not address absentee balloting or other forms of

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law prohibiting persons under a full order of protection from voting so long as "[t]he evidence in a particular case persuades a probate court that a person is mentally incapacitated as to some matters but not incapacitated with respect to his or her ability to vote, the court is to enter an order tailored to reflect this finding.").

155. 29 U.S.C.A. § 794 (West 1999 & Supp. 2007).

156. *See* Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1229 n.3 (9th Cir. 2002) ("The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and 'cases interpreting either are applicable and interchangeable.'") (quoting Allison v. Dep't of Corrections, 94 F.3d 494, 497 (8th Cir. 1996)); Sutton v. Lader, 185 F.3d 1203, 1207-08 n.5 (11th Cir. 1999) ("The standard for determining liability under the Rehabilitation Act is the same as that under the ADA."); McDonald v. Pennsylvania Dep't of Pub. Welfare, 62 F.3d 92, 94-95 (3d Cir. 1995) (finding the same standards apply to both ADA and Rehabilitation Act claims); *Prye*, 2006 WL 1888639, at *5 (In a case challenging a state law disenfranchising all person under a full order of guardianship, stating that "Plaintiffs raise claims under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. These statutes are similar in all pertinent respects and caselaw interpreting one may be used to interpret the other.").

157. *See* 42 U.S.C. § 12101(a)(1)-(3) (2000). Under the ADA, public entities must not exclude the disabled, by reason of their disability, from services or benefits. *See id.* § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). Accordingly, as the Supreme Court held in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), a state may not require persons with mental health needs to have those needs met in an institutional setting where a less restrictive setting can reasonably be made available.

158. *See* Arlene Kanter & Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852 (2006). For a more complete history of HAVA, *see* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005).

159. Under HAVA, states receiving HAVA funds must provide voting systems at polling places that are "accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." *See* 42 U.S.C. § 15481(a)(3)(A) (2000).

voting that might occur outside of polling places,[160] it reflects an understanding that a person's disabilities should not limit his or her right to vote on the same terms as other voters.

In sum, either requiring or permitting nursing homes to serve as gatekeepers would be inconsistent with the Nursing Home Reform Act and may potentially violate the ADA. Conditioning assistance with ballot completion on capacity assessment may also violate the VRA. In addition, the spirit of each of these statutory schemes, as well as that of HAVA, would be undermined by such high-stakes gatekeeping.[161]

D. Policy Concerns

As the preceding sections make clear, requiring or allowing LTC facilities and their staff to serve as gatekeepers raises serious legal concerns. Even aside from these legal issues, however, requiring or permitting LTC facilities and their staff to serve as gatekeepers to the ballot is simply bad policy. Treating residents of LTC institutions differently from other persons for purposes of access to voting not only unfairly targets a marginalized, segregated, and already stigmatized population with common interests, but also invites significantly more fraud than it would discourage.

1. Gross Under-Inclusiveness

While LTC facilities concentrate persons with dementia, the vast majority of persons with dementia reside in community-based settings. Instituting capacity testing for residents of LTC institutions and not for similarly situated persons in community-based settings is thus under-inclusive.

The mere fact that targeting LTC residents would be an under-inclusive approach to policymaking is not in and of itself a basis for concern. Governments need some discretion in regulating social problems. As is well recognized in the context of entitlement statutes, to require perfect precision would be to create a potentially insurmountable hurdle to well-meaning policies that significantly address important social problems. However, under-inclusiveness in entitlement programs is different than under-inclusiveness in programs or policies that limit preexisting liberty interests and fundamental rights. Laws and practices that impose significant burdens on the liberty interests and fundamental rights of marginalized, disempowered populations but not on similarly situated mainstreamed populations raise serious ethical and political concerns. Rather

160. *See* § 15481(a)(3).

161. The VRA, HAVA, and the ADA are not, of course, the only federal statutes whose sentiments to which a policy restricting the voting rights of LTC residents would run contrary. For example, a stated purpose of the Federal Voting Accessibility for the Elderly and Handicapped Act is "improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections." *Id.* § 1973ee.

than reflecting legitimate, piecemeal approaches to policymaking or program design, such laws may represent a form of majority tyranny: policymakers imposing burdens on marginalized populations that they could not or would not impose on politically empowered populations.

Residents of LTC facilities are a classic example of a disempowered and marginalized population. Not only are residents of LTC facilities physically segregated from the mainstream population and physically feeble, but their residence in a LTC facility carries with it significant stigma.[162] That stigma, and the extent to which institutionalization undermines residents' sense of dignity, can only be expected to increase if residents are singled out for capacity testing.[163] Moreover, as previously discussed, the nursing home sub-population of the LTC resident population is disproportionately comprised of other marginalized populations.

Even beyond the moral implications of targeting this type of marginalized population, the under-inclusiveness of the approach has implications for the democratic system. When a certain group's views are diluted, there is a potential for a less representative and less legitimate government to result. The right to vote is a citizen's primary manner of exerting political power. For LTC residents weakened by age and frailty, it may be the only opportunity to exert such power. Moreover, since LTC residents tend to share important common interests (e.g., interests in high quality long-term care and in high levels of funding for the Medicaid program), barriers to exerting such power are not only an affront to their individual rights as citizens, but also impede their ability to defend or promote their collective interests.

2. Invitation for Fraud

Allowing or encouraging LTC facilities to use capacity testing to limit residents' ballot access invites fraud. A review of existing reports of fraudulent voting practices in the nation's LTC facilities suggests that most fraud occurs with the involvement of at least some facility staff. Voting fraud could therefore be expected to increase if staff members were granted formal authority to engage

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162. Placement in a LTC facility, especially a nursing home, is often seen by residents and potential residents as a sign of decline and frailty. For some, it is also an indicator of failure, whether that be the failure to stay physically or mentally healthy, the failure to financially provide for alternative forms of care, the failure in interpersonal relations and securing community-based support from family or friends, or some combination of the three.

163. *Cf.* Waterstone, *supra* note 127, 365-66 (arguing that treating the disabled citizens differently from other citizens in terms of voting procedures and access is problematic not only from an "instrumentalist" point of view, but also from an "equal dignity" perspective as such distinctions perpetrate negative stereotypes of this minority group). There is reason to believe that this type of argument might resound with the court system. *See* Gardner, *supra* note 139, at 901-02 (arguing that "the plaintiffs most likely to meet with success as Supreme Court litigants are those who base their claims on communitarian theories [of democracy]—those who complain, that is, of being stigmatized by some demeaning form of exclusion from the community's political life.").

in high-stakes capacity testing. Such authority would provide a convenient mechanism for a staff member with improper motivations to justify the denial of the ballot to a person whom the staff member believes will vote in a manner of which or for a candidate of whom the staff member disapproves. Arming staff members with more robust capacity testing instruments would add credibility to staff determinations, regardless of the correctness of those determinations. Moreover, without an open hearing, there would be virtually no way for an improperly disenfranchised resident to challenge the legitimacy of a staff member's determination even if the resident were willing to do so.

Even staff members without an intent to commit fraud might be tempted to improperly disenfranchise residents. A staff member assessing whether a person has the capacity to vote might be influenced by the resident's response to the question of how he or she would vote. Suppose, for example, a facility social worker administers the CAT-V to a bigoted resident and, in so doing, poses the following question:

> Let me ask you to imagine the following about the two candidates who are running. Candidate A thinks the state should be doing more to provide health insurance to people who don't have it and should be spending more money on schools. He is willing to raise taxes to get the money to do these things. Candidate B says the government should not provide health insurance but should make it easier for employers to offer it. He believes that the schools have enough money already but need tighter controls to make sure they use it properly. He is against raising taxes. Based on what I just told you, which candidate do you think you are more likely to vote for: A or B?[164]

Suppose the resident responds: "Whichever one is white. I don't vote for [racial epithet]." This response would evidence the ability to make a choice, which is what the question is designed to assess.[165] Yet it would be easy for the social worker who was offended or otherwise disturbed by the response to categorize it as "incorrect" or "unresponsive" because it was not based on facts that were part of the fact pattern.

E. Election Officials and Capacity Testing

Having concluded that LTC facilities and their staff should not condition residents' access to the ballot on any form of capacity assessment, the natural question is whether some other person or entity should do so. It has been suggested that election officials are the most suitable choice.[166] Underlying this

164. Appelbaum, Bonnie & Karlawish, *supra* note 36, at 2099 app. 1.

165. *See id.*

166. *See* Karlawish et al., *Identifying the Barriers*, *supra* note 42, at 11.

argument appears to be the assumption that someone must or will capacity-test residents in order to ensure the integrity of the electoral process and that the primary questions are who should do it and how.

To be sure, the government is constitutionally entitled to deny the right to vote to persons lacking capacity to vote. Under current law, such disenfranchisement would most naturally occur through the guardianship system. While guardianship procedures vary significantly from state to state, in most states, any person with an interest in an allegedly incapacitated person (AIP), including a residential care facility, can petition the appropriate court system to have the AIP declared incompetent. As part of this adjudication, the court may declare the AIP to be legally incompetent to vote and thus make it unlawful for the AIP to vote. Realistically, however, the guardianship system is not an effective way to restrict the voting rolls to those with capacity to vote. It is a time- and resource-intensive process,[167] and no one person is likely to have sufficient incentive to initiate a guardianship proceeding simply to prevent an allegedly incapacitated person from voting.

The failure of the guardianship system to serve as a mechanism to disenfranchise persons lacking capacity to vote does not mean, however, that election officials should screen voters for voting capacity. As previously discussed, to deny a citizen the right to vote without first providing adequate notice and pre-deprivation hearing rights not only runs afoul of constitutional due process protections, but is likely to result in more erroneous deprivations of that right than would a system providing for notice and pre-deprivation hearing. To the extent that screening by election officials would target LTC residents, it would raise the same—if not stronger—equal protection concerns as screening conducted by LTC facilities. Moreover, high-stakes screening by election officials threatens the integrity of the electoral process by creating opportunities for election officials to disenfranchise persons—in this case, an already marginalized group of persons with common interests and potentially common voting patterns—with little accountability. The fact that many election officials are partisan makes this especially problematic.

If voting by incapacitated persons is truly a concern, systems that provide adequate notice and pre-deprivation hearing rights to all persons who allegedly lack voting capacity—not just those in institutional settings—could be adopted. For example, Australia provides a simple, administrative procedure with pre-deprivation notice and hearing rights by which an allegedly incapacitated person may be removed from the country's voting rolls. Under the Australian Electoral Act of 1907, either another voter or an election official may object to the "enrollment" on the election rolls of any voter on the basis of mental incapacity.

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167. *Cf.* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 740-41 (2002) (noting that reforms designed to protect allegedly incapacitated persons from unnecessary rights deprivations have made the guardianship system increasingly costly and time-consuming).

The Electoral Commission is entitled to remove the person's name from the roll only after the allegedly incapacitated voter is served with written notice and is given the opportunity to object to such removal.[168] The challenged voter may object either in writing, in person, or through an agent.[169]

V. RECOMMENDED APPROACH

A. *Public Responsibilities*

LTC facilities cannot, and should not, be required to assume full responsibility for ensuring that residents are able to vote and are not targets of election fraud. Rather, all states should adopt legislation providing for election officials to conduct absentee balloting in LTC facilities. Not only would such an approach protect against fraudulent voting practices, but it would expand access to the ballot. Indeed, a study of the voting behavior of nursing home residents in two Maryland counties suggests that such legislation would likely lead to more residents who wish to vote being able to do so.[170]

In designing policies for conducting absentee balloting in LTC facilities, states should first examine existing state laws that may pose undue barriers to voting by LTC residents. For example, unnecessarily restrictive residency requirements, election laws that prohibit a LTC facility staff member from assisting with the completion of multiple absentee ballots, and voter identification requirements may impose disproportionate burdens on LTC residents. Accordingly, if a state chooses to impose such barriers on the general population, it might nevertheless be appropriate to make an exception for LTC residents.[171]

Having examined their own laws, states should then look to their sister states that currently have statutes and regulations that provide for election officials' involvement in absentee balloting. States with such policies differ in the types of institutions to which their absentee voting policies apply.[172] Ideally, statutes providing for the administration of absentee balloting should cover all residential institutions in which significant portions of residents are likely to have physical limitations that make voting at the polls unrealistic. This would not only include nursing homes, but also residential facilities that tend to fall under the label of

168. *See* Electoral Act 1907, §§ 48, 51A (Austl.).

169. *See id.* § 48(2)(e).

170. In the Maryland study, nursing home residents in a county in which the Board of Elections instigated and conducted voting in nursing homes were found to vote at a greater rate than residents in a county in which the Board of Elections did not involve itself in conducting balloting in nursing homes. *See* O'Sullivan, *supra* note 50, at 343.

171. For example, LTC residents are less likely than the general population to have a valid form of photo identification. In states with voter identification requirements, it might therefore be appropriate to allow a facility's identification of a resident in lieu of photo identification.

172. *See* Smith & Sabatino, *supra* note 60, at 6-7.

assisted living. A broad definition would help ensure that similarly situated individuals are provided with similar supports and protections.

Another important consideration when designing absentee balloting protocols is the trigger for election official involvement. Currently, triggers vary significantly from state to state.[173] Depending on the state, election official involvement may be triggered by a certain number of voters residing in an institution;[174] by a certain number of absentee ballots being requested by residents of an institution;[175] by a request of a voter residing in the facility;[176] or, by a request of the institution.[177] While each approach is not without its advantages, ideally states would provide for election official involvement to assist any time a properly registered voter resides in a qualifying institution. Given limited resources, however, states might reasonably limit election official involvement to those institutions in which a certain threshold number of registered voters (e.g., five registered voters) reside. Regardless of the threshold number, it is important that the threshold be based on registration figures as opposed to requests for absentee ballots or individual voter or facility requests for involvement. After all, one of the reasons for election official involvement is to enable registered voters to vote regardless of whether such voters are in a position to independently request an absentee ballot and regardless of whether LTC facility staff believe such voters should vote.

Yet another consideration is the identity of the election officials who assist with ballot completion. Many states with provisions for election officials to conduct absentee balloting in LTC facilities have attempted to guard against partisan behavior by creating procedural safeguards. For example, in Illinois and Minnesota, such balloting is to be conducted by two election judges, each from

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173. *See id*.

174. *See* CONN. GEN. STAT. ANN. §§ 9-159q, 9-159r(a) (West 2002 & Supp. 2007) (stating that where twenty or more electors reside in a facility, absentee balloting shall be conducted under the supervision of the registrar of voters).

175. *See* COLO. REV. STAT. ANN. § 1-8-112 (West 2004) (stating that election assistance by an appointed bipartisan committee is to be provided where "more than five absentee ballots are to be sent to the same group residential facility within a county"); IOWA CODE ANN. § 53.22.1.b (West 1999) (stating that two election officers shall deliver the absentee ballot to any resident who has requested one and assist with ballot completion if a request is made); N.Y. ELEC. LAW § 8-407 (McKinney 2007) (stating that bipartisan boards shall conduct voting in long-term care facilities from which at least twenty-five applications for absentee ballots from eligible voters have been received or, at the option of the County, where any application for an absentee ballot has been received); S.D. CODIFIED LAWS § 12-19-9.1 (1995 & Supp. 2003) (stating that representatives of the auditor's office will deliver ballots to and assist with ballot completion at any nursing facility, assisted living facility, or hospital from which "there might reasonably be expected to be five or more absentee ballot applications"); WIS. STAT. ANN. § 6.875 (West 2004 & Supp. 2006) (stating that special voting deputies shall provide ballots and assist with ballot completion where one or more qualified voters residing in a facility requests an absentee ballot).

176. *See* OKLA. STAT. ANN. tit. 26, § 14-115 (West 1997 & Supp. 2007) (stating that, at the request of a voter, the absentee voting board will deliver the absentee ballot and return it following completion).

177. *See* FLA. STAT. ANN. § 101.655 (West 2002 & Supp. 2007) (stating that supervisor of elections is required to provide election supervision where a facility administrator has requested it; the supervisor is also permitted to provide supervision where no request has been made).

different political parties.[178] Consistent with these approaches, election officials who conduct absentee balloting should do so in bipartisan teams regardless of whether they are paid employees or unpaid volunteers. Bipartisan teams not only help protect the integrity of the election process,[179] but also protect residents' votes by giving an impression of integrity, thus discouraging partisan challenges that could effectively disenfranchise LTC voters.

Having discussed where, when, and what kind of election officials should be made available, we come to the more pressing and complicated question of what role such officials should play. A superior approach to having facility staff assist with ballot completion is one that has been adopted by many states: providing bipartisan election officials to assist LTC residents who are unable to independently complete ballots. Providing bipartisan election officials to assist with ballot completion not only helps residents complete their ballots, but also protects their right to have their votes counted, much like providing bipartisan election officials to supervise balloting protects that right.

Election officials providing assistance should not limit their assistance simply because they suspect that a resident is confused or suffering from dementia.[180] Rather, so long as the resident is able to request assistance and clearly indicate a voting decision, assistance should be provided. Of course, at times, the determination of what constitutes a clear indication of a voting decision may require election officials to make a subjective, case-specific judgment. Accordingly, it would be prudent for states to develop guidelines for election officials in order to help them make consistent determinations as to whether a resident's communication constitutes a sufficiently clear voting decision. Despite the potential for subjective determinations, however, election officials should not be permitted to infer a voting decision from a resident's ambiguous statement. Although disallowing such inferences may have the effect of disenfranchising certain residents who are inarticulate or who lack critical language skills due to disability, such a limitation is necessary to ensure that it is the resident, and not the official, who is making the voting decision.[181]

Regardless of the precise practices and standards adopted by states, it is critical that the practices provide for transparency and accountability.

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178. 10 ILL. COMP. STAT. ANN. § 5/19-12.2 (West 2006); MINN. STAT. ANN. § 203B.11 (West 2006).

179. Even with bipartisan teams, fraud may occur. For example, pursuant to an Ohio law permitting election board members to assist physically infirm voters, an Ohio county election board sent two employees (Democrat Linda Weaver and Republican John Jackson) to a Cleveland nursing home to assist residents with ballot completion. Weaver suspected that Jackson was marking ballots contrary to residents' intentions. Weaver reported her suspicions and Jackson was eventually criminally indicted on five counts of ballot tampering and one count of election misconduct. *See* State v. Jackson, 811 N.E.2d 68 (Ohio 2004). However, as *State v. Jackson* shows, such bipartisan teams increase the chance that if fraud does occur, it will be uncovered.

180. Should a state adopt a court procedure for disenfranchising persons on the basis of incapacity, election officials who suspect that a resident lacks capacity would presumably be able to report their suspicions to the proper authority and a proceeding could be initiated.

181. Of course, where feasible and of value to the resident, assistive technologies should be made available to help residents with limited language skills to adequately communicate their voting choices.

Transparent and accountable practices not only help safeguard the integrity of elections by discouraging election officials from improperly influencing or stealing residents' votes, but also discourage politically-motivated third-party attempts to disenfranchise LTC residents. Good procedures also help protect against inept forms of assistance that might cause residents' ballots to be excluded.[182]

Traditionally, when election officials' assistance has been provided to LTC residents, it has been provided in the context of absentee balloting. While having all states provide LTC residents with election officials' assistance with absentee balloting would be a significant improvement over the status quo, a superior approach might be for election officials to conduct regular, on-site balloting. Such an approach, sometimes called "mobile voting," would allow residents to cast the equivalent of ballots voted at traditional polling places. In addition to better facilitating voting by paper ballot, mobile voting could have the advantage of allowing for the use of election technologies that could make it easier for LTC residents to vote independently.[183]

B. Long-Term Care Facility Responsibilities

Having concluded that LTC institutions may not and should not prevent residents from obtaining access to the ballot or to assistance with ballot completion—even in situations in which facility staff reasonably believe residents lack capacity to vote—the question is whether there is another role for LTC facilities to play in the electoral process. The final section of this article addresses this question. It concludes that LTC facilities should be considered to be under an affirmative obligation to assist all residents in obtaining access to the ballot. In making this argument, this article recognizes the significant barriers that institutionalization places on access to the ballot.

1. Duty to Provide Access to the Ballot

If the right to vote is to be meaningful, LTC voters must be properly registered to vote. Registration is often a challenge for residents of LTC institutions who, by moving to a LTC facility, may have moved out of the district where they are registered to vote. LTC facilities can easily help residents overcome this simple but critically important hurdle to voting by providing information about registration or change of address information to new residents

182. *See, e.g.*, Womack v. Foster, 8 S.W.3d 854, 861 (Ark. 2000) (discussing how a campaign worker for a candidate for County Municipal Judge solicited absentee ballots from nursing home residents but failed to attach the medical affidavits to those ballots that were necessary for the underlying votes to be counted).

183. For a discussion of such technologies, see generally Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, 38 MCGEORGE L. REV. 1113 (2007).

upon admission.[184] Specifically, facilities should provide information about and, to the extent feasible, materials for registering to vote to all new residents upon admission. Admission is an ideal time to provide registration information and materials both because it facilitates timely registration and because residents are likely to have relatives or friends assisting them with the admission process. Therefore, they are likely to have someone available to assist them with registration and potentially to discuss whether or not they should register.

For residents to have meaningful access to the ballot, however, it is not enough for them to simply be registered to vote. Residents voting at regular polling places need to know the location, date, and time for their polling place. They may also require help arranging transportation or physical assistance in order to safely vote at the polls. Residents voting by absentee ballot may also need significant assistance in order to vote. For example, they may need assistance in order to determine the timing of elections and procedures for requesting a ballot, and to obtain access to a phone or to the mail in order to request and return that ballot.

While these needs may seem minimal, they are not given the large barriers that institutional living places on communication and information dissemination. To counter this effect, facilities should provide timely and accessible information about the timing and nature of upcoming elections to all residents. This would be consistent with the Nursing Home Reform Act of 1987 and its implementing regulations that explicitly recognize that nursing homes have affirmative duties to help residents enjoy and exercise their civil rights.[185]

2. Duty to Assist With Ballot Completion

As discussed previously, states should provide election officials to help LTC residents with ballot completion. Where state officials are not readily available, however, facility staff should be available to assist residents who specifically request assistance with ballot completion. As long as a resident is able to request assistance with ballot completion and clearly indicate his or her voting choices, facility staff should not decline to provide the requested assistance.[186] To decline

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184. Some facilities already provide such information upon admission. *See* Karlawish et al., *Identifying the Barriers*, *supra* note 42, at 11 (in a survey of Philadelphia nursing homes and assisted living facilities, finding that fifty-five percent of responding facilities had a written policy for voter registration, and that most of these policies established a procedure for residents changing their address upon admission to the facility).

185. *See* 42 U.S.C. § 1396r(c)(1)(A) (2000) ("A nursing facility must protect and promote the rights of each resident . . . ."); *id.* § 1395i-3(c)(1)(A) ("A skilled nursing facility must protect and promote the rights of each resident . . . ."); 42 C.F.R. § 483.10(a)(1)-(2) (2006) ("A facility must protect and promote the rights of each resident, including . . . the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States . . . [and] the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights.").

186. In determining whether a resident has made a clear voting decision, staff members would face the same issues as election officials and should follow similar procedures. *See supra* Part V.A.

assistance in such situations would be to effectively condition residents' ability to vote on their physical condition.

It is important that when staff members provide assistance they do so in a transparent manner. Accordingly, to the extent possible, staff members providing assistance should do so in two-person teams composed of staff members who do not provide direct personal care to residents. Potentially appropriate staff members would include the facility social worker or activities director. Such practices help to safeguard the integrity of elections by, for example, helping ensure that a witness is present should staff "assisting" residents try to vote for them or unduly influence them. Accountability and transparency also help deter and overcome third-party attempts to disenfranchise LTC residents. Moreover, two-person teams increase the likelihood that assistance is properly rendered and that no procedural mistakes are made that might disqualify residents' ballots.

Consistent with the aim of fostering transparent and accountable assistance practices, unless a resident has explicitly requested assistance with ballot completion from a third party, facilities should deny that third party the opportunity to assist any resident with ballot completion unless: (1) the third party is designated, under applicable laws, as the proper purveyor of such assistance; or (2) the facility is confident that the third party is nonpartisan, and a staff member joins the third party as the third party provides assistance, unless the resident requests the staff member leave; or (3) the third party consists of multiple parties representing all major opposing interests or candidates on the ballot. Unless the third party is a close family member or close associate of the resident, the facility should not consider the assistance of that party to have been explicitly requested by the resident if that request is only made subsequent to an offer by the third party to provide assistance. Finally, to further transparency and accountability, facilities should promptly report suspicious offers of assistance to election officials.

3. Duty of Nonpartisanship

Political candidates use a variety of techniques—ranging from visits, to brochures, to videos delivered to a facility—to court the vote of LTC residents.[187] Yet many facilities have no official policy governing how they respond to such techniques. Indeed, a 1998 survey of a sample of nursing homes in Florida found that most nursing homes did not even have official policies regarding political candidates' visits.[188]

A lack of official policies on political campaigning is problematic because it may lead to LTC facilities giving more favorable treatment to some candidates

187. A survey of candidates for Florida state offices conducted in 1998 found that three percent of the candidates had used such videos and another seven percent had considered doing so. *See* MACMANUS, *supra* note 34, at 69.

188. *Id*. at 39.

than to others. Preferential treatment for certain candidates or parties, in turn, is problematic because it can unduly influence the voting decisions of residents. Especially in light of the closed nature of many LTC facilities, such preferential treatment may have the effect of selectively exposing residents to only one-sided campaign information or rhetoric. Moreover, preferential treatment may indicate to residents that the facility or its staff favor a particular candidate, party, or position and, especially considering the power imbalances between residents and staff, residents may feel compelled or prodded to adhere to those preferences.

Adopting voluntary policies that promote nonpartisan practices, by contrast, will help reduce the problem of actual or perceived preferential treatment. Accordingly, LTC facilities should adopt policies promoting nonpartisan practices.

Even more critical than the existence of policies is the content of such policies. The previously mentioned 1998 survey of Florida nursing homes found that among the minority of nursing homes that had official policies relating to political campaigning, most barred political candidates from campaigning in the facility.[189] Such a prohibition severely limits residents' associational rights, their ability to gain important electoral information, and their opportunity to influence political figures. It is, therefore, inconsistent with the resident rights provisions of the Nursing Home Reform Act of 1987 and its implementing regulations.[190]

Rather than barring candidate visits, facilities should permit—and potentially even invite—candidates for elected office to meet with residents. Facilities concerned about the disruptive effect of such visits or resident privacy could limit the location of such visits to a facility-selected common area provided that residents would be afforded private communications with candidates when residents so requested. To ensure that preferential treatment for certain candidates is neither given nor assumed, when a candidate for elected office visits a facility's residents, the facility should, to the extent feasible, contact opposing candidates to inform them that they are also welcome to visit.

Such voluntary policies will help guide staff actions to promote residents' access to candidates in a nonpartisan manner. In addition, such policies will provide staff members with a principled way to explain their actions to politicians and other interested parties. For example, a politician who campaigned in a facility with a policy such as that described above would know that if a staff member subsequently invited opposing candidates to campaign in the facility, that staff member was complying with facility policy and did not necessarily favor the opposing candidate.

189. *Id.*

190. *See* 42 C.F.R. §§ 483.10(a)(1)-(2); 483.15(e)(1) (2006).

VI. CONCLUSION

Voting as a resident of a LTC facility is not an easy task given residents' physical and psychological conditions and the many barriers to voting that stem directly from living in a LTC facility. Too often, whether LTC residents are able to overcome these barriers and successfully exercise their constitutional right to vote depends on the attitudes of facility staff toward resident voting.

LTC facilities may not and should not restrict or otherwise restrain residents' access to the ballot. Rather, consistent with the aims and obligations of the Nursing Home Reform Act of 1987, LTC facilities should be considered to be under an affirmative obligation to assist all residents with obtaining access to voting. While there are valid concerns that such facilitation may allow persons to vote who lack capacity to do so, permitting or requiring facilities to screen residents for voting capacity is not only legally untenable but creates more problems than it solves. Similarly, LTC facilities should provide affirmative assistance with ballot completion to residents who can request such assistance and clearly indicate their voting decisions.

States too should take responsibility for ensuring that LTC residents with the capacity to vote are able to do so by providing bipartisan election officials to conduct absentee balloting in LTC facilities in which significant portions of residents have physical disabilities that make voting at the polls unrealistic. While states are entitled to disenfranchise persons lacking capacity to vote, and LTC facilities undoubtedly concentrate such persons, states may not and should not attempt to disenfranchise LTC residents by having election officials screen residents for capacity to vote. If states believe that voting by persons without capacity to vote is a significant problem, states should invest the resources necessary to create specialized court procedures to address that problem. Such procedures, if adopted, should include adequate notice and hearing rights and should apply equally to all persons regardless of their residential status.

In considering how to address concerns about voting in LTC facilities, policymakers should be careful not to conflate concerns about voting by persons with dementia with concerns about voting fraud. The tension between access to the ballot and the integrity of elections is a common one.[191] However, in the context of concerns about persons with dementia voting, certain measures designed to reduce access would undermine election integrity, while certain measures expanding access can be expected to increase integrity.

Finally, when designing laws and policies governing voting in LTC institutions, it is critical to remember that how we as a nation treat the voting rights of institutionalized persons matters. The right to vote is not only of tremendous political value, but is also of tremendous symbolic and moral value. Disenfranchising a class of citizens, or selectively creating barriers to the

191. For example, this tension is currently being played out in the debate over voter identification laws.

franchise that apply exclusively to a select class of citizens, sends a powerful signal about the respect and significance such persons are to be accorded by their fellow citizens.

VII. APPENDIX A: MODEL GUIDELINES FOR LONG-TERM CARE FACILITIES

These guidelines are designed to be voluntary in nature, although states might have an interest in actively encouraging compliance with such guidelines and potentially making aspects of them mandatory.

Model Guidelines for Long-Term Care Facilities

I. Respecting Voting Rights
   - A. Facilities should recognize that residents' institutional status does not impact their right to vote or to otherwise participate in the political process.
   - B. Facilities should presume that all residents have the capacity to vote unless they have been adjudicated incompetent with regards to voting.
   - C. Nursing homes should recognize that facilitating access to voting is consistent with their mandate under the Nursing Home Reform Act of 1987 and its implementing regulations.

II. Facilitating Access to Electoral Information
   - A. Facilities should provide information about, and (to the extent feasible) materials for, registering to vote to all new residents upon admission.
   - B. Facilities should provide timely and accessible information about the timing and nature of upcoming elections to all residents.
   - C. Facilities should allow all candidates for elected office to visit their facility. Facilities may, where they deem appropriate, limit the location of such visits to a facility-selected common area, provided that residents are afforded private communications with candidates when residents so request.
   - D. Where a facility's residents have received a visit from a candidate for elected office, facilities should, to the extent feasible, contact opposing candidates for the position to inform them that they are also welcome to visit.

III. Facilitating Access to Voting
   - A. Facility staff should ask all residents if they wish to vote and actively assist any resident who wishes to vote with obtaining an absentee ballot, or utilizing mobile voting where it is an option, unless the resident has been adjudicated incompetent with respect to voting.
   - B. Unless other mechanisms for doing so are readily available, facilities should ensure that all absentee ballots requested by residents are delivered to residents in a prompt manner and, once completed, returned in a prompt manner.

IV. Providing Assistance with Ballot Completion
   - A. Where other assistance is not readily available, facility staff should be available to assist residents who specifically request assistance with ballot completion and

should provide such assistance so long as the resident is able to clearly communicate his or her voting choice or choices.

B. If facility staff assisting with ballot completion reasonably conclude that a resident requesting assistance is unable to make a determination as to how to vote without the assistance of a staff member, facility staff should decline to provide the requested assistance.

C. To the extent feasible, when facility staff provide assistance with ballot completion, they should do so in two-person teams composed of staff members who do not provide direct personal care.

V. Guarding Against Suspect Forms of Assistance

A. Unless a resident has explicitly requested assistance with ballot completion from a third party, facilities may and should deny that third party the opportunity to assist any resident with ballot completion unless: (1) the third party is designated, under applicable laws, as the proper purveyor of such assistance; (2) the facility is confident that the third party is nonpartisan, and a staff member joins the third party as the third party provides assistance, unless the resident requests that the staff member leave; or (3) the third party consists of multiple parties representing all major opposing interests or candidates on the ballot.

B. Unless the third party providing assistance with voting to a resident is a close family member or close associate of the resident, the facility should not consider the assistance of that party to have been explicitly requested by the resident if that request is only made subsequent to an offer by the third party to provide assistance.

C. Facilities should promptly report all suspicious offers of assistance to election officials.

VIII. APPENDIX B: FRAMEWORK FOR MODEL STATE LEGISLATION

This framework is designed as a template for model state legislation in states that intend to rely on absentee balloting to reach voters who are unable to vote at regular polling places. Since the administration of elections is a state-specific task and election procedures and needs vary significantly from state to state, the framework would have to be adjusted for each state to reflect differences in state procedures and traditions.

Notably, the basic approach embodied by this framework is also applicable to states that decide to use mobile voting to reach such LTC residents. Additional modifications, however, would be required.

Framework for Model State Legislation

I. Definitions

A. The *Electoral Unit* is the governmental entity with direct responsibility for administering absentee ballots in a given jurisdiction.

B. A *Long-Term Care Facility* is any institution licensed to provide room and board, as well as personal care and/or medical supervision to persons in need of assistance with activities of daily living (ADLs) or multiple instrumental activities of daily living (IADLs).

C. A *Qualified Long-Term Care Facility* is a Long-Term Care Facility in which five or more Registered Voters reside.

D. An *Election Agent* is an individual appointed by the Electoral Unit to administer absentee balloting in a Qualified Long-Term Care Facility.

E. A *Resident* is a person whose permanent or current residence is a Long-Term Care Facility.

F. A *Registered Voter* is a person lawfully registered to vote in the jurisdiction in which he or she resides.

II. Provision of Absentee Ballots to Residents of Long-Term Care Facilities

A. If the Electoral Unit determines that five or more Registered Voters reside in a Long-Term Care Facility, the Long-Term Care Facility shall be deemed a Qualified Long-Term Care Facility.

B. The Electoral Unit may, in its discretion, consider all Long-Term Care Facilities within its jurisdiction to be Qualified Long-Term Care Facilities regardless of the number of registered voters residing in those facilities.

C. The Electoral Unit shall appoint two or more Election Agents to conduct absentee balloting in each Qualified Long-Term Care Facility in its jurisdiction.

D. Each Election Agent shall work as part of a team composed of two or more Election Agents, each of whom is a *bona fide* member of a different political party. Each team of Election Agents shall include at least two members of major political parties.

E. A team of Election Agents shall personally and jointly visit each Qualified Long-Term Care Facility for the purpose of conducting absentee balloting no more than

seven days before or after the date of an election. During these visits, the team of Election Agents shall deliver an absentee ballot directly and personally to each Registered Voter who is a Resident of the facility and who has requested an absentee ballot. Unless the Resident requests otherwise, the team of Election Agents shall remain present while the Resident completes the ballot. Unless the Resident requests otherwise, the team of Election Agents shall also have full and sole responsibility for returning the Resident's ballot once completed, or, if the Resident declines to vote, once the ballot has been rejected.

F. The team of Election Agents shall effect such safeguards as may be practicable and necessary to provide secrecy for the votes cast by Residents.

III. Provision of Assistance with Ballot Completion to Residents of Long-Term Care Facilities

A. A Resident shall be entitled to assistance with ballot completion if he or she is unable to mark his or her ballot but is able to communicate how he or she wishes the ballot to be marked and requests assistance with marking the ballot.

B. One or more Election Agents shall provide assistance with marking a ballot if requested to do so by a Resident who meets the requirements of Section III.A.

IV. Registration of Voters Residing in Long-Term Care Facilities

A. All Long-Term Care Facilities shall provide a Resident with information about how to register to vote and how to obtain an absentee ballot within fourteen (14) days of the Resident's admission to the Long-Term Care Facility.

B. When a team of Election Agents is at a Long-Term Care Facility for the purpose of conducting absentee balloting, they shall personally visit each Registered Voter who is a Resident but who has not requested an absentee ballot. The team of Election Agents shall inform such Residents that they are entitled to vote by absentee ballot and provide information in plain language to such Residents indicating how they can request an absentee ballot.