Voting Under Guardianship: Individual Rights Require Individual Review

By Michele J. Feinstein, Esq., and David K. Webber, Esq.

I. Introduction

At the time of publication, with the midterm elections only weeks away, the stakes are high and the quest for votes intense. But one segment of the electorate, individuals under guardianship, often face substantial barriers to voting, or worse, they are denied the right to vote. As Elder and Special Needs Law practitioners, we strive to assist clients to lead lives of quality, with the fullest measure of autonomy. We advocate for clients at hearings to determine if antipsychotic medication should be administered or if the person under guardianship is living in the least restrictive setting. We are not typically asked whether a person under guardianship can exercise a fundamental right for which soldiers fight and citizens have rioted. When pivotal elections can be decided by the slimmest of margins and every vote is critical, is every capable citizen allowed to vote?

In late October 2012, our office received a telephone call from a client who has served as a professional guardian for many years. A person under the client's guardianship wanted to vote in the upcoming presidential election, and the guardian wanted to know if the individual could. We theorized that given the emphasis in the newly adopted Massachusetts Uniform Probate Code on limiting guardianships wherever possible, the answer likely was yes, the individual could vote. We said we would look into the matter and let the client know. Thus began the odyssey that became this examination of voting rights.[1]

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It is clear that the right to vote, while revered in a democracy, is not without limit. The National Voter Registration Act of 1993 authorized states to disenfranchise individuals for criminal conviction or "mental incapacity."[2] By 1993, many states already had constitutional provisions or laws on the books preventing voting by incapacitated persons.[3] And because there is no federal definition of "mental incapacity," each state has taken its own approach.[4] Some states automatically revoke the right to vote when a person is placed under guardianship and do not restore it until the guardianship is removed.[5] Some states mandate a judicial inquiry, either by placing the burden on the person under guardianship to establish voting capacity by varying levels of proof or by placing that burden on those seeking to disenfranchise the person under guardianship.[6] Other states have no restrictions at all.[7]

Given the importance of individuals in a democratic society exercising their right to vote, it seems inconceivable that a person who is able to vote but who is under guardianship would be categorically denied this basic civil right. Our laws should prevent individuals from being wrongly disenfranchised, while protecting the integrity of elections by excluding those incapable of understanding the nature of voting or participating meaningfully in the electoral process. The authors propose that no state should revoke a person under guardianship's right to vote without an individualized inquiry into whether the person truly lacks the capacity to understand and participate in the electoral process.

This article examines the federal and state constitutional issues implicated in denying or allowing persons under guardianship the right to vote, beginning with the authors' home state of Massachusetts. States are categorized and sorted from most restrictive to least restrictive. The statutes and cases show that this is by no means a settled issue and is constantly evolving. While this article was being written, Nevada changed its laws and now requires specific judicial findings to revoke the right to vote of a person under guardianship.[8] Advocates should periodically review the law in their jurisdictions, because this area of the law is in flux.

II. Massachusetts

Can an individual who has been adjudicated as being in need of guardianship in Massachusetts vote in Massachusetts? The Massachusetts Constitution and voter qualifi-

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research assistance.

2 Pub. L. No. 103-31 (1993), codified at 42 U.S.C. § 1973gg-6(a)(3)(B) (2013). *See e.g.* Mass. Gen. Laws chap. 51, § 1 (2013); Mass. Const. amend. art. III (1821) (no voting by felons during incarceration); Fla. Const. art. VI, § 4; Fla. Stat. § 97.041 (2013) (no voting by felons even after release from incarceration).

3 *See See Mo. Protec. & Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 805 (8th Cir. 2007) ("[a]s States expanded the right to vote in the nineteenth century, most adopted constitutional provisions disqualifying persons who were idiots, insane, of unsound mind, or under guardianship").

4 *See infra* pt. IV.

5 *See infra* pt. IV.A.

6 *See See infra* pts. IV.B–IV.D. Besides guardianship, persons may be adjudicated incompetent in other ways, such as involuntary committal.

7 *See infra* pt. IV.E.

8 Nev. Rev. Stat. § 293.540-5415 (2014).

cation statute expressly exclude persons under guardianship from voting.[9] Nevertheless, the Elections Division of the Secretary of the Commonwealth of Massachusetts takes the position that persons under guardianship have the right to vote, unless the guardianship decree specifically prohibits it.[10] In Massachusetts, an administrative agency has, in effect, mandated an individualized inquiry into voting capacity even though the state constitution and statutes do not.

The Massachusetts Constitution grants voting rights to every citizen over 18 years of age, except for "persons under guardianship," incarcerated felons, and persons disqualified because of corrupt election practices.[11] In 1822, these three exceptions were enacted in the voter qualification statute.[12] That statute also requires the Secretary of the Commonwealth to promulgate affidavits of voter registration.[13]

In 1975, Massachusetts' highest court considered the scope of the guardianship exclusion in *Boyd v. Board of Registrars of Voters of Belchertown*.[14] In *Boyd*, several individuals who were committed to a state-run residential facility for individuals with developmental disabilities, but who were not under guardianship, sued when the local registrar refused to allow them to register to vote.[15] At that time, the Massachusetts voter registration form required a sworn affirmative statement that voters were not under guardianship.[16] The Massachusetts Supreme Judicial Court narrowly construed the state constitution and voter registration statute, holding that the residents were not "under guardianship" and so were entitled to vote as "a basic right of citizenship."[17]

A decade later, the disenfranchised plaintiff in a second case, *Guardianship of Hurley*, was under full guardianship at election time, but a petition to limit his guardianship and allow him to vote was pending.[18] The local election commissioner refused Mr. Hurley's affidavit of voter registration, because Mr. Hurley could not swear that he was not under guardianship.[19] With his full guardianship still in place, Mr. Hurley successfully obtained a probate court order declaring that he was capable of making informed voting decisions and therefore was not "under guardianship" as the term was used in the constitution and voting statute.[20] The Massachusetts Supreme Judicial Court upheld the probate court's order and remanded the case for an award of Mr. Hurley's reasonable attorneys' fees, holding that because he was "sufficiently competent to warrant a limited guardian-

9 Mass. Const. amend. art. III; Mass. Gen. Laws chap. 51, §§ 1, 36 (2014).

10 Sec. of the Cmmw. of Mass., Elections Div., *See Persons Subject to Guardianships That Do Not Specifically Forbid Voting Are Eligible Voters*, 41 Pub. Rec. 5 (Jan. 1991) ("under guardianship" means "under guardianship with specific findings that prohibit voting").

11 Mass. Const. amend. art. III.

12 Mass. Gen. Laws chap. 51, § 1 (2014). *See Boyd v. Bd. of Registrars of Voters of Belchertown*, 368 Mass. 631, 634–635 (Mass. 1975) (describing origins of guardianship disqualification at the 1821 Massachusetts Constitutional Convention).

13 Mass. Gen. Laws chap. 51, § 36 (2014).

14 368 Mass. 631.

15 *See id.* at 632.

16 *See id.* at 637.

17 *See id.*

18 394 Mass. 554 (1985).

19 *Id.* at 556.

20 *Id.* at 557.

ship … any derogation of his right to vote under [const. amend.] art. 3 and G.L. c. 51, § 1 may have deprived him under color of law of secured rights."[21]

Relying on the *Boyd* and *Hurley* decisions, the Massachusetts Elections Division in 1991 issued an opinion with the self-explanatory title *Persons Subject to Guardianships That Do Not Specifically Forbid Voting Are Eligible Voters*.[22] In issuing the opinion, the Elections Division consulted with the state's departments of Mental Health and Mental Retardation and the Attorney General.[23] The Opinion directs local election officials not to deny registration based on guardianship, unless the guardianship decree contains "specific findings that prohibit voting."[24]

In 2008, the Massachusetts legislature overhauled the guardianship statute and adopted the Massachusetts Uniform Probate Code (MUPC), embodying a legislative intent to limit guardianships wherever possible.[25] The MUPC does not address voting rights specifically, but under the MUPC, as with the Uniform Probate Code generally, courts must limit the scope of guardianships to "encourage the development of maximum self-reliance and independence of the person under guardianship."[26] The MUPC goes on to say that, once appointed, guardians should "encourage the person under guardianship to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the person under guardianship when making decisions."[27] These aspects of the MUPC are consistent with the *Boyd* and *Hurley* decisions and with the opinion of the Elections Division.

With respect to guardianship, the current version of the Massachusetts Official Mail-In Voter Registration Form also reflects the position of the Elections Division. Unlike the 1985 registration form that Mr. Hurley encountered, the current form requires only that the voter swear "I am not a person under a guardianship which prohibits my registering to vote."[28] And the current guardianship order promulgated by the Massachusetts Probate

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21 *Id.* at 559–560.

22 Sec. of the Cmmw. of Mass., *supra* n. 10. The opinion states in part:

> The question that has arisen recently is whether general guardianships that do not specifically forbid voting preclude otherwise eligible citizens from voting. In view of the "substantial" doubts expressed by the Supreme Judicial Court in [*Boyd* and *Hurley*], federal court decisions, and the views of respected commentators that prohibiting voting by all persons subject to general guardianships would be unconstitutional, we advise you to interpret the words "under guardianship" for voting purposes to refer only to guardianships that contain specific findings that prohibit voting.
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> Therefore, persons subject to limited or general guardianships that do not include such specific findings prohibiting voting are eligible to vote, and need not undertake the significant burden of obtaining court modifications of their guardianships explicitly allowing them to vote. Thus, they may truthfully sign the voter registration affidavit containing the statement that they are "not … under guardianship" for this purpose. (Of course, in any event, local election officials have no discretion to reject properly signed registration affidavits on this basis at the time of registration.)

23 *Id.*

24 *Id.*

25 *An Act Relative to the Uniform Probate Code*, 2008 Mass. Acts (effective Jan. 15, 2009), guardianship and conservatorship provisions codified at Mass. Gen. Laws chap. 190B, § 5-101 through 5-507.

26 Mass. Gen. Laws chap. 190B, § 5-306(a) (2014).

27 Mass. Gen. Laws chap. 190B, § 5-309(a).

28 Sec. of the Cmmw. of Mass., *Massachusetts Official Mail-In Voter Registration Form*, http://www.sec.

and Family Court includes an enumerated list of limitations on guardianship, among them the right to vote.[29] While the Massachusetts constitution and voter qualification statute still expressly prohibit voting by persons under guardianship, agency rules and guardianship procedures provide some protection for persons "under guardianship" who want to vote. Where does this place Massachusetts in the federal voting scheme and in relation to other states?

III. Voting as a Fundamental Federal Right

Voting is a fundamental right protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment of the U.S. Constitution.[30] Under traditional due process principles, deprivation of a fundamental right requires notice and an opportunity to be heard.[31] That right may be limited, by state law, for lack of mental capacity, as enumerated in Section 8(a) of the National Voter Registration Act of 1993: "In the administration of voter registration for elections for Federal office, each State shall … provide that the name of a registrant may not be removed from the official list of eligible voters except … as provided by State law, by reason of criminal conviction or *mental incapacity*"[32] (emphasis added). Thus, the federal government delegated to the states authority to restrict voting based on those criteria.[33] However, the Equal Protection Clause of the Fourteenth Amendment prohibits categorical restrictions on fundamental rights, requiring instead that an individualized inquiry be performed.[34] In the guardianship context, this means that states cannot disenfranchise individuals merely for being under guardianship; instead, they must inquire whether "those who cast a vote have the mental capacity to make their

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state.ma.us/ele/elepdf/2013-Voter-reg-mail-in.pdf (accessed Mar. 24, 2014).

29 Mass. Tr. Ct., Prob. & Fam. Ct., *Exhibit A Limitations to Guardianship (Form MPC 720A)* (May 30, 2011), http://www.mass.gov/courts/docs/forms/probate-and-family/mpc720a-exhibit-a-limitations-guardianship-fill.pdf (accessed June 2, 2014).

30 U.S. Const. amend. XIV, § 1 ("No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (holding that a recount would violate equal protection and due process clauses, and noting that "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; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

31 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

32 42 U.S.C. § 1973gg-6(a)(3)(B) (2013); Pub. L. No. 103-31 (1993), codified at 42 U.S.C. § 1973gg-6(a)(3)(B) 2013). *See Mo. Protec. & Advoc. Servs.*, 499 F.3d at 812 (examining Missouri's voter registration statute).

33 The Supreme Court has not directly addressed the application of this provision by the states. However, in dicta, in the context of Title II of the Americans with Disabilities Act, the Court stated: "It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, '[a]s of 1979, most States categorically disqualified 'idiots' from voting, *without regard to individual capacity. …'* The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including … *voting.*" *Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (emphasis added and footnotes omitted), quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall J. concurring in judgement in part and dissenting in part).

34 *See infra* pt. III.2.

own decision by being able to understand the nature and effect of the voting act itself"[35] (punctuation omitted).

A. Procedural Due Process

Because the right to vote is fundamental and preserves other basic civil and political rights, state laws restricting the right to vote are subject to careful and meticulous constitutional scrutiny.[36] At least one federal court has held that infringements on the right to vote may violate the due process principles of "fundamental fairness."[37] Under the Due Process Clause, a state constitutional provision or statute restricting voting must be scrutinized by balancing: 1) the voters' interest in participating in the electoral process; 2) the risk that the provision will erroneously prevent capable persons from voting; and 3) the state's interest in protecting the electoral process.[38] If the interests of the affected voters outweigh the interest of the state, the provision could violate due process "as applied" or be "facially invalid."[39]

An "as applied" due process violation occurs when a state fails to provide adequate notice and hearing to an incapacitated or protected person before revoking his or her right to vote.[40] "One should not lose a fundamental right without at least having fair warning that the right might be lost."[41] Such a notice should provide "the same level of notice and opportunity for hearing that is provided for all other aspects of guardianship."[42] Lack of proper notice increases the risk that otherwise capable voters will be erroneously prevented from voting.[43] Providing specific notice in the course of a guardianship proceeding should not be overly burdensome to the state, because it can be included with any notices already provided to the respondent.[44]

A state constitutional provision or statute is "facially invalid" if there is no set of circumstances under which it could satisfy the due process balancing test.[45] This could result from a lack of uniformity in state procedures — for example, if some people receive notice and a hearing on voting rights, but others do not[46] — or where, for example, as in Massachusetts and Missouri, there is inconsistency among the state's constitutions, statutes, and probate court procedures.[47]

Some states have begun to address this due process problem. In the seminal case of *Doe v. Rowe*, the U.S. District Court for the District of Maine in 2001 struck down

35 *Doe v. Roe*, 156 F. Supp. 2d 35, 51 (D.ME 2001).

36 *See supra* n. 30 and accompanying text. *See also Mo. Protec. & Advoc. Servs.*, 499 F.3d at 807–808 (examining Missouri statute).

37 *Doe*, 156 F. Supp. 2d at 48, quoting *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24 (1981).

38 *Doe*, 156 F. Supp. 2d at 48.

39 *Id.* at 48–51.

40 *Id.* at 48, citing *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

41 *See In re Guardianship of Erickson,* 2012 Minn. Dist Lexis 193 (2012), discussed at *infra* n. 128 and accompanying text.

42 *Doe,* 156 F. Supp. 2d at 49.

43 *Id.* at 48–49.

44 *Id.* at 49.

45 *Id.* at 49, n. 17.

46 *Id.* at 50.

47 *See supra* pt. II and *infra* n. 101 (discussing Missouri).

Maine's constitutional ban on voting for people "under guardianship for mental illness." The district court held in part that "specific notice" was required that a proposed ward might be disenfranchised.[48] Virginia, which bans all voting by persons under guardianship, requires a statutory notice to each guardianship respondent that "shall include the following statement in conspicuous, bold print: **WARNING. AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. … THE APPOINTMENT MAY AFFECT … WHETHER YOU ARE ALLOWED TO VOTE**."[49]

The Virginia provision likely satisfies the "notice and hearing requirements" of due process.[50] It is certainly clear notice. But a blanket ban on voting for persons under guardianship undoubtedly disenfranchises some voters who do have capacity.[51] Persons placed under guardianship in a state such as Virginia could be disenfranchised even if their disability does not affect their ability to understand the electoral process and to make individual voting choices.[52] Such a discrepancy between the ends (excluding those incapable of voting) and the means (blanket disenfranchisement of persons under guardianship) may also violate the Equal Protection Clause of the Fourteenth Amendment.

B. Equal Protection Clause

Under the Equal Protection Clause, a state's restriction of voting requirements for lack of mental capacity must be closely correlated to the state's interest in protecting the electoral process.[53] The statute or constitutional provision must not exclude persons who do, in fact, have the capacity to vote.[54] Any restriction will be subject to strict scrutiny by the courts.[55] It must be narrowly tailored to disenfranchise only voters who are unable to understand the nature and effect of voting.[56] As with procedural due process, a provision may be invalid as applied or be facially invalid.[57]

A state constitutional provision or statute restricting voting rights because of mental incapacity will be deemed invalid "as applied" unless it is narrowly tailored to protect the electoral process.[58] It must restrict voting based on actual, relevant incapacity, not on an arbitrary or irrational classification.[59] A provision will be deemed "facially invalid" if "there are no circumstances under which the State's voting restriction could be considered

48 *Doe*, 156 F. Supp. 2d at 48, citing *Armstrong*, 380 U.S. at 550.
49 Va. Code § 64.2-2004 (2014).
50 *Doe*, 156 F. Supp. 2d at 48.
51 *See infra* pt. IV.A.
52 *See* Jennifer Mathis, *Voting Rights of Older Adults with Cognitive Impairments*, 42 Clearinghouse Rev. 292, 296–298 (2008).
53 *Doe*, 156 F. Supp. 2d at 51–52, citing *Dunn v. Blumstein*, 405 U.S. 330, 337, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) ("If a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.").
54 *Doe*, 156 F. Supp. 2d at 52.
55 *Id.* at 51, citing *Dunn*, 405 U.S. at 337.
56 *Doe*, 156 F. Supp. 2d at 51.
57 *Id.* at 51–52.
58 *Id.* at 51.
59 *Id.* at 52.

narrowly tailored to meet the State's compelling interest."[60]

In *Doe v. Rowe*, the U.S. District Court for the District of Maine ruled that Maine's constitutional restriction on voting by persons "under guardianship for mental illness" violated the Equal Protection Clause both facially and as applied.[61] Under Maine's Probate Code, as in the codes of other states that have adopted § 5-304 of the Uniform Probate Code, guardianship restrictions must be limited to those "necessitated by the incapacitated person's actual mental and adaptive limitations."[62] The provision arbitrarily denied the vote to mentally ill persons under guardianship while allowing other persons under guardianship to vote.[63] In addition, the provision conflicted with Maine's guardianship and voting statutes that attempted to expand the definition of "mental illness" to include all mental incapacities.[64] Neither guardianship nor mental illness could "serve as a proxy for mental incapacity with regards to voting" the court reasoned in striking down the provision.[65] Under this reasoning, other state constitutions and statutes that rely on terms other than "mental incapacity" could be challenged as violating the Equal Protection Clause.[66]

Many other states have statutes and constitutions that fail to provide equal protection with respect to voting, and not just for using vague or inaccurate terminology. A conflict between a state's constitution and its statutes could implicate the Equal Protection Clause. In Minnesota, for example, the constitution bars voting by "a person under guardianship, or a person who is insane or not mentally competent."[67] However, Minnesota's guardianship statute provides that "unless otherwise ordered by the court, the ward retains the right to vote."[68] In Massachusetts, as noted previously, an administrative agency has issued a directive in response to the Supreme Judicial Court's rulings, which purports to allow voting by persons under guardianship despite an express constitutional prohibition.[69] Other examples of states with conflicting provisions include Arizona, Oklahoma, Louisiana, and Texas, where persons under limited guardianship may be able to vote, while those under plenary guardianship cannot.[70] All these laws identify some incompetent voters, but due to artificial distinctions or inconsistent application by local officials and judges, they may be ineffective for their intended purpose.[71] The laws also may improperly exclude voters

60 *Id.*

61 *Id.* at 56.

62 *Doe*, 156 F. Supp. 2d at 42–43; 18-A Me. Rev. Stat. § 5-304(a) (Lexis 2013).

63 *Doe,* 156 F. Supp. 2d at 56 (finding that "the probability of a mentally ill person under guardianship having the right to vote reserved depend[ed] more on the individual probate judge hearing the case than on the ward's actual capacity to understand the nature and effect of voting").

64 *Id.* at 55.

65 *Id.,* citing *St. George v. Biddeford*, 76 Me. 593, 596 (1885) (a person "may be of unsound mind in one respect, and not in all respects").

66 *E.g.* Miss. Const. art. XII, § 241 ("idiots and insane persons"); Mont. Const. art. IV, § 2 ("unsound mind"); Neb. Const. art. VI, § 2 ("*non compos mentis*").

67 Minn. Const. art. VII, § 1.

68 Minn. Stat. § 524.5-313 (2013).

69 Sec. of the Cmmw. of Mass., *supra* n. 10; Mass. Const. amend. art. III.

70 *See infra* pt. IV.2.

71 *See e.g.* Doe, 156 F. Supp. 2d at 52 (one probate judge granted voting rights, while another refused); *Mo. Protec. & Advoc. Servs.*, 499 F.3d at 809 n. 5 and accompanying text (despite constitutional ban, certain local courts preserved voting rights in full guardianships).

who are actually capable of understanding and participating in the electoral process.[72]

IV. State Laws and Constitutions

Unfortunately, many states may be overstepping federal constitutional boundaries by restricting participation in the electoral process for reasons beyond actual mental incapacity. Some state constitutions contain categorical exclusions prohibiting individuals under guardianship from voting, yet statutes and court rulings in those same states often seem to overrule them. In some states, constitutional restrictions are strictly applied and, in other states, completely ignored. State-specific guides to capacity and guardianship requirements have been completed by many organizations.[73] The Uniform Probate Code has been adopted by 17 states and incorporates a number of provisions with respect to guardianships.[74] However, even the Uniform Probate Code, with its emphasis on individual autonomy, is silent as to voting rights.

Appendix A contains a table summarizing the voting laws of the 50 states with respect to guardianships and the right of incapacitated individuals to vote. In an attempt to categorize the varied requirements, the authors divided the states into five groups, sorted from most restrictive to least restrictive: Automatic Revocation, Limited Guardianship Only, Automatic Revocation with Reinstatement, Revocation after Individual Inquiry, and No Restrictions.

A. Automatic Revocation

Eleven states automatically revoke the right to vote upon adjudication of mental

72 *See e.g. Doe,* 156 F. Supp. 2d at 55, n. 31 (distinguishing physical versus mental bases for guardianship).

73 *See e.g. Mo. Protec. & Advoc. Servs.*, www.moadvocacy.org (accessed June 2, 2014); *Disability Rights Montana*, www.disabilityrightsmt.org (accessed June 2, 2014); *Disability Rights Ohio*, www.disabilityrightsohio.org (accessed June 2, 2014). The National Alliance on Mental Illness maintains an advocacy page at www.nami.org/Template.cfm?Section=Elections1 (accessed Mar. 24, 2014). The Judge David L. Bazelon Center for Mental Health Law maintains a comprehensive website at www.bazelon.org/Where-We-Stand/Self-Determination/Voting/Voting-Policy-Documents.aspx (accessed Mar. 24, 2014). Among Bazelon's many excellent resources are *Restoring the Voting Rights of People Under Guardianship* (Aug. 30, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=hNis6-BXRZs%3d&tabid=543 (accessed June 2, 2014), which contains motions and other court documents for advocates seeking voting rights for their clients, and *State Laws Affecting the Voting Rights of People with Mental Disabilities* (updated 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=-Hs7F_Ohfgg%3d&tabid=543 (accessed June 2, 2014). Another source is the National Mail Voter Registration Form, which contains state-by-state listings of voting requirements, including capacity requirements. U.S. Election Assistance Commn., *Register to Vote in Your State by Using This Postcard Form and Guide* (revised Mar. 1, 2006), http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_11-1-13_ENG.pdf (accessed June 2, 2014).

74 Those states are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. The Uniform Probate Code was promulgated by the National Conference of Commissioners on Uniform State Laws. Nat'l Conf. of Comm'rs on Unif. St. Laws, *Uniform Probate Code* (1969) (Last Amended or Revised in 2010) (last updated Apr. 23, 2014), http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (mentioning voting rights only with respect to business entities).

incapacity or guardianship, with no individualized inquiry: Alabama,[75] Mississippi,[76] Montana,[77] Nebraska,[78] New Mexico,[79] New York,[80] Rhode Island,[81] South Carolina,[82] Virginia,[83] West Virginia,[84] and Wyoming.[85] The laws of these states do not require any individualized inquiry into capacity to vote, beyond the issue of whether a guardianship is needed. There do not appear to be any reported cases on this issue in these states. Except for Virginia, none appear to satisfy the procedural due process requirement for notice to the proposed ward that they may lose their right to vote.[86] And because many people under guardianship actually have the mental capacity to vote, these states are likely disenfranchising many voters who are fully capable of understanding the electoral process and making informed decisions about voting.[87] Individuals not under guardianship do not have to evidence such understanding. Accordingly, the voting procedures of these states are likely invalid under equal protection analysis as well. Advocates in these states may consider them ripe for challenge.

B. Limited Guardianship Only

Four states automatically revoke the right to vote upon adjudication of *full* mental incapacity or guardianship; however, upon adjudication of *limited* guardianship or incapacity, an individualized inquiry into voting capacity may be performed. Of these states,

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75 Ala. Const. art. VIII, § 177(b) ("no person who is mentally incompetent shall be qualified to vote, unless the disability has been removed"); Ala. Code § 17-3-30 (2014). *But see* Ala. Code § 26-2A-105 (2014) (persons under limited guardianship retain all rights not specifically delegated).

76 Miss. Const. art. XII, § 241 ("idiots and insane persons"); Miss. Code § 23-15-11 (2012) (ineligible if *"non compos mentis"*).

77 Mont. Const. art. IV, § 2 ("unsound mind"); Mont. Code Ann. § 13-1-111 (Lexis 2013) (cannot vote until restored to capacity).

78 Neb. Const. art. VI, § 2 (*"non compos mentis"*); Neb. Rev. Stat. § 32-313 (2013) ("No person is qualified to vote or to register to vote who is non compos mentis or who has been convicted of treason … unless restored to civil rights").

79 N.M. Const. art. VII, § 1 (excluding "idiots, insane persons and persons convicted of a felonious or infamous crime unless restored to political rights"); N.M. Stat. Ann. § 1-4-26 (Lexis 2013) (revoking registration of persons who are "legally insane … as that term is used in the constitution of New Mexico").

80 N.Y. Elec. Law § 5-106 ("adjudicated an incompetent"), § 5-400 (voter registration cancelled upon adjudication of incompetency) (Consol. 2014). No constitutional restriction.

81 R.I. Const. art. II, § 1 (*"non compos mentis"*).

82 S.C. Const. art. II, § 7 ("The General Assembly shall establish disqualifications for voting by reason of mental incompetence or conviction of serious crime, and may provide for the removal of such disqualifications"); S.C. Code Ann. § 7-5-120 (Lexis 2013) ("A person is disqualified from being registered or voting if … mentally incompetent as adjudicated by a court of competent jurisdiction").

83 Va. Const. art. II, § 1 ("mentally incompetent"); Va. Code § 24.2-101 (2014) ("incapacitated"); Va. Code § 24.2-410 (2013) ("mentally incompetent" or "incapacitated"); Va. Code § 64.2-2004 (2014) (requiring notice to guardianship respondent that guardianship revokes voting rights).

84 W. Va. Const. art. IV, § 1 ("mentally incompetent"); W. Va. Code § 3-2-2(b) (Lexis 2014).

85 Wyo. Const. art. VI, § 6 ("mentally incompetent"); Wyo. Stat. Ann. § 22-1-102 (2014).

86 *See supra* nn. 45–47 and accompanying text.

87 *See* Mathis, *supra* n. 52, at 293.

Louisiana,[88] Oklahoma,[89] and Texas[90] bar voting by persons under full guardianship, but partially incapacitated persons retain the right to vote unless a court specifically revokes it.[91] The fourth state, Arizona, is more restrictive and places the burden of proving voting capacity on the partially incapacitated respondent by clear and convincing evidence.[92]

The default law in Arizona until 2012 was that individuals under guardianship were categorically barred from voting under Arizona's constitution and voter qualification statute.[93] While voting is still prohibited under plenary guardianships, the law with respect to limited guardianships changed with the passage of Arizona House Bill 2377, which became effective April 10, 2012. Bill 2377 amended Arizona's limited guardianship statute by adding the following language:

> In cases of limited guardianship only, a person is not deemed an incapacitated person for purposes of voting if the person files a petition, has a hearing and the judge determines by clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote.[94]

The new statute might never have been enacted except for the courage of one individual who actively sought the right to vote despite being under guardianship. This individual, Clint Gode, who has Down syndrome, assisted by the Arizona Center for Disability Law, successfully lobbied the Arizona legislature to pass the bill.[95]

But despite Arizona's limited success in this matter, its law is still far more restrictive than those in many states. A person placed under limited guardianship in Arizona will

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88 La. Const. art. I, § 10 ("interdicted and declared mentally incompetent"); La. Rev. Stat. Ann. § 18:102 (2013) ("No person shall be permitted to register or vote who is: … (2) Interdicted after being judicially declared to be mentally incompetent as a result of a full interdiction proceeding pursuant to Civil Code Article 389. A person subject to a limited interdiction pursuant to Civil Code Article 390 shall be permitted to register and vote unless the court in that proceeding specifically suspends the interdicted person's right to vote in the judgment of interdiction").

89 Okla. Stat. tit. 26, § 4-101 (2013) ("Any person who has been adjudged to be an incapacitated person … shall be ineligible to register to vote … . The provisions of this paragraph shall not prohibit any person adjudged to be a partially incapacitated person … from being eligible to register to vote unless the order adjudging the person to be partially incapacitated restricts such persons from being eligible to register to vote"). No constitutional restriction.

90 Tex. Const. art. VI, § 2 ("mentally incompetent"); Tex. Election Code Ann. § 11.002 (2014) (eligible if person "has not been determined by a final judgment of a court exercising probate jurisdiction to be: (A) totally mentally incapacitated; or (B) partially mentally incapacitated without the right to vote").

91 *See infra* pt. IV.D regarding revocation after individualized inquiry.

92 Ariz. Const. art. VII, § 2(C) ("incapacitated"); Ariz. H. 2377, 50 Legis., 2d Reg. Sess. (Apr. 10, 2012), codified at Ariz. Rev. Stat. § 14-5101 (Lexis 2014) (in limited guardianship, the judge may determine "by clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote").

93 *See* Henry G. Watkins, *The Right to Vote of Persons Under Guardianship—Limited or Otherwise*, 44 Ariz. Atty. 34 (2007) (detailing history and inconsistency of voting under guardianship in Arizona).

94 Ariz. Rev. Stat. §§ 14-5101, 14-5304.02 (2014).

95 Watkins, *supra* n. 93.

automatically have his or her right to vote revoked.[96] The individual may petition the court to have the right to vote reinstated, but must meet a high burden — "clear and convincing evidence" of capacity to vote.[97] Delaware's law is the reverse; there is a presumption of capacity to vote, which can be revoked only by "clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment."[98]

In the four states that allow voting only for individuals under limited guardianship, but not under full guardianship, special care must be taken in preparing the initial guardianship petition. If the advocate anticipates the protected person may wish to vote and has the capacity to do so, the petitioner should seek a limited guardianship to preserve the possibility that the incapacitated individual will retain his or her voting rights.

C. Automatic Revocation with Reinstatement

Four states — Arkansas,[99] Connecticut,[100] Missouri,[101] and Wisconsin[102] — automatically revoke the right to vote upon adjudication of mental incapacity or guardianship, but that right may be retained or restored by means of an individualized judicial inquiry. Automatic revocation is not ideal, because it places the burden on the respondent to show that he or she has the capacity to vote. However, it may still prove adequate under constitutional analysis, provided that the proposed ward receives proper notice and a hearing.[103]

As noted above, if a guardianship will automatically revoke voting rights, due pro-

96 Ariz. Const. art. VII, § 2(C); Ariz. Rev. Stat. §§ 14-5101, 14-5304.02 (2014).

97 Ariz. Rev. Stat. § 14-5304.02 (2014).

98 Del. Code tit. 15, § 1701 (2014).

99 Ark. Const. amend. 51, § 11(a)(6) ("It shall be the duty of the permanent registrar to cancel the registration of voters … adjudged mentally incompetent by a court of competent jurisdiction"); Ark. Code Ann. § 28-65-302(2) (Lexis2014) ("No guardian appointed on or after October 1, 2001, shall [authorize a person under guardianship to vote] without filing a petition and receiving express court approval").

100 Conn. Gen. Stat. § 9-12 ("No mentally incompetent person shall be admitted as an elector"), § 45a-703 ("The guardian or conservator of an individual may file a petition in probate court to determine such individual's competency to vote in a primary, referendum or election") (2014). No constitutional restriction.

101 Missouri's status is nebulous because the constitution and voter qualification statute have outright prohibitions, while the Eighth Circuit Court of Appeals has recognized that some courts have allowed persons under full guardianships to retain their voting rights. Mo. Const. art. VIII, § 2 (no voting where court appoints "guardian … by reason of mental incapacity"); Mo. Rev. Stat. § 115.133 (2014) ("adjudged incapacitated"). *See Missouri Voter Registration Application*, http://dss.mo.gov/fsd/voter_registration.pdf (accessed June 3, 2014) (requiring registrants to certify they "have not been adjudged incapacitated by any court of law"). *But see* Mo. Protec. & Advoc. Servs., 499 F.3d at 809 n. 5 and accompanying text, citing *Estate of Werner*, 133 S.W.3d 108, 109 2004 Mo. App. Lexis 138 (2004) (finding no violation of equal protection clause because "Missouri wards under full guardianships have … had their voting rights specifically preserved").

102 Wis. Const. art. III, § 2 (b) ("Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside"); Wis. Stat. § 6.03(a) (2014) ("Any person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote").

103 *Doe*, 156 F. Supp. 2d at 48, citing *Lassiter*, 452 U.S. at 24. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24 (1981).

cess demands sufficient notice to the protected person and an opportunity for that person to be heard.[104] In Arkansas and Connecticut, respondents must file a special petition in order to restore their voting rights.[105] In Missouri, there is no established process; Missouri probate courts allow voting on a case-by-case basis.[106] Wisconsin preserves the right to vote where the guardianship judgment contains a judicial finding that the respondent can understand the electoral process.[107]

D. Revocation After Individual Inquiry

Eighteen states do not automatically place voting restrictions upon an individual after adjudication of mental incapacity or guardianship, but voting rights may be revoked after an individualized inquiry: California,[108] Delaware,[109] Florida,[110] Georgia,[111]

104 *See supra* pt. II.

105 Conn. Gen. Stat. § 45a-703 (2014). In 2009, Arkansas voters amended the State constitution to change the ban on voting by "idiots and insane persons." Until then, Article III, § 5, of the Arkansas Constitution provided that "[n]o idiot or insane person shall be entitled to the privileges of an elector." Now, pursuant to Amendment 51 to the Arkansas Constitution, a voter's registration will be cancelled if he or she is "adjudged incompetent by a court of competent jurisdiction." Among other technical changes, Amendment 51 also removed the unconstitutional requirement of a poll tax. The amendment was overwhelmingly adopted in the 2008 general election by a vote of 714,128 for and 267,326 against. Although Arkansas' scheme is not perfect, it does provide at least the possibility of due process and equal protection.

106 See Mo. Protec. & Advoc. Servs., 499 F.3d at 809 n. 5 and accompanying text, citing Estate of Werner, 133 S.W.3d at 109.

107 Wis. Const. art. III, § 2(b); Wis. Stat. § 6.03(a) (2014).

108 Cal. Const. art. II, § 4 ("mentally incompetent"); Cal. Elec. Code §§ 2208–2211 (Deering Lexis 2013) (mentally incompetent means "not capable of completing an affidavit of voter registration"). While California requires a judge to make a determination on voting capacity after an individualized inquiry, as of the date this article was going to press a complaint seeking intervention was filed with the U.S. Department of Justice. Advocates with the Disability and Abuse Project of Spectrum Institute claim that California judges are routinely restricting the voting rights of adults under disability who are under limited conservatorship (California's term for guardianship). The complaint alleges, among other issues, that judges are using literary tests to determine whether or not an individual should be allowed to vote in violation of the Voting Rights Act of 1965. *See* Heasely, *Voters With Special Needs Allegedly Disenfranchised*, http://www.disabilityscoop.com/2014/07/11/voters-disenfranchised/19502/ (accessed Jul. 28, 2014).

109 Del. Const. art. V, § 2 ("mentally incompetent or incapacitated"); Del. Code tit. 15, § 1701 (2013) ("specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment").

110 Fla. Const. art. VI, § 4 ("mentally incompetent"); Fla. Stat. § 97.041 (2014) ("mentally incapacitated with respect to voting").

111 Ga. Const. art. II, § 1 ("mentally incompetent"); Ga. Code Ann. § 29-4-20 (2014) ("appointment of a guardian is not a determination regarding the right of the ward to vote").

Hawaii,[112] Iowa,[113] Kentucky,[114] Maine,[115] Maryland,[116] Massachusetts,[117] Minnesota,[118] New Jersey,[119] Nevada,[120] North Dakota,[121] Ohio,[122] South Dakota,[123] Tennessee,[124] and Washington.[125] This compromise between protecting the electoral process from unquali-

112 Haw. Const. art. II, § 2 (*"non compos mentis"*); Haw. Rev. Stat. Ann. § 11-23 (Lexis 2013) (appointment of guardian triggers investigation; revocation only if "the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting").

113 Iowa Const. art. II, § 5 ("mentally incompetent to vote"); Iowa Code § 48A.6 (2013) ("incompetent to vote"), § 48A.2 ("'Person who is incompetent to vote' means a person with an intellectual disability who has been found to lack the mental capacity to vote in a [guardianship] proceeding").

114 Ky. Const. § 145(3) ("Idiots and insane persons"); Ky. Rev. Stat. § 387.590 (10) (2013) ("A ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record").

115 Me. Const. art. II, § 1 ("under guardianship for mental illness"), ruled unconstitutional by *Doe*, 156 F. Supp. 2d at 59 ("The Court finds that Article II, Section I of the Maine Constitution, along with its implementing statute found in [Me. Rev. Stat. Ann. § 115(1) (2000), repealed, 2001 Me. Laws p. 516, violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Thus, the State's disenfranchisement of those persons under guardianship by reason of mental illness is unconstitutional").

116 No constitutional restriction; Md. Election Code § 3-102(b)(2) (2014) ("under guardianship for mental disability and a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process").

117 Mass. Const. amend. art. III ("under guardianship"); Sec. of the Cmmw. of Mass., supra n. 10 ("under guardianship" means "under guardianship with specific findings that prohibit voting").

118 Minn. Const. art. VII, § 1 ("a person under guardianship, or a person who is insane or not mentally competent"); Minn. Stat. § 524.5-313 (2014) ("unless otherwise ordered by the court, the ward retains the right to vote"). *See In re Guardianship of Erickson,* 2012 Minn. Dist. LEXIS 193 (2012). *See infra* nn. 126-143 and accompanying text.

119 N.J. Const. art. II, § 1 ("adjudicated to lack capacity to understand the act of voting"); N.J. Stat. Ann. § 19:4-1 (Lexis 2014).

120 Nev. Const. art. II, § 1 ("adjudicated mentally incompetent"); Nev. Rev. Stat. § 293.540-5415 (2014) (clear and convincing evidence of incapacity to vote).

121 N.D. Const. art. II, § 2 ("mentally incompetent"); N.D. Cent. Code § 30.1-28-04 (2013) ("Except upon specific findings of the court, no ward may be deprived of any of the following legal rights: to vote …").

122 Ohio Const. art. V, § 6 ("idiot or insane person"); Ohio Rev. Code § 3503.18 (2013) ("adjudicated incompetent for the purpose of voting").

123 S.D. Const. art. VII, § 2 ("disqualified by law for mental incompetence"); S.D. Codified Laws § 29A-5-118 (2014) ("appointment of a guardian does not signify incompetence unless so ordered").

124 Tenn. Code Ann. § 34-3-104(8) (Lexis 2014) (court may revoke right to vote upon appointment of conservator). No constitutional restriction.

125 Wash. Const. art. VI, § 3 ("mentally incompetent"); Wash. Rev. Code § 11.88.010(5) (2013) ("Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor"). *See* Wash. Rev. Code § 11.88.010, nn. (2005) (legislative findings "that the right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections

fied voters and preventing potentially qualified, disabled voters from participating in the electoral process likely strikes the appropriate constitutional balance. Due process could be satisfied by grafting clear notice procedures into the guardianship procedures already in place to notify a respondent of hearings. Equal protection is provided because only those persons actually incapable of voting are excluded from doing so.

Among these states, Minnesota continues to struggle with its conflicting constitution and guardianship statute. Under the Minnesota constitution, a "person under guardianship" cannot vote.[126] In contrast, the guardianship statute says a protected person's right to vote can only be specifically revoked by decree.[127] In the 2012 case of Brian Erickson, one probate court judge decided to resolve the controversy in her own way.[128] She determined that Minnesota's constitutional ban violated the U.S. Constitution and ruled that each case in her court would receive an independent determination of voter competency.

Brian Erickson suffered from schizophrenia and dysthymia with psychotic tendencies. On occasion, he exhibited agitation and poor sleep. He needed reminders to accomplish many of his daily activities. He did not understand his medical and psychiatric diagnoses, and he exhibited paranoia, especially with respect to food.[129] In 2009, the court appointed Alternate Decision Makers, Inc. (ADMI), a "professional fiduciary organization," as Erickson's guardian.[130] The guardianship decree noted that Erickson retained the right to vote.[131] In 2011, ADMI filed a petition on Erickson's behalf, seeking "a declaratory judgment determining that individuals placed under guardianship have the presumptive right to vote until and unless a court orders that right taken away" and "a specific determination that he retains the right to vote."[132]

The *Erickson* court observed that Minnesota's guardianship statute clearly provides that a ward retains the right to vote unless that right is specifically restricted by the court.[133] The court also noted that Minnesota's constitution expressly prohibits a "person under guardianship" from voting.[134] Erickson, trying to finesse the dichotomy between the statute and constitution, contended that there was no conflict because the state legislature had the "constitutional authority to define and regulate" who is subject to the term "guardianship."[135] The court rejected Erickson's argument: "[e]ven if the Constitution allows the Legislature to determine who may be placed under a guardianship, no amount

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should include clear notice and a meaningful opportunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest").

126 Minn. Const. art. VII, § 1 ("a person under guardianship, or a person who is insane or not mentally competent").

127 Minn. Stat. § 524.5-313 (2014) ("unless otherwise ordered by the court, the ward retains the right to vote").

128 *In re Guardianship of Erickson*, 2012 Minn. Dist. Lexis 193 (2012).

129 *Id.* at *3.

130 *Id.*

131 *Id.*

132 *Id.* at *2.

133 *Id.* at *5, citing Minn. Stat. § 524.5-313 (2014), § 524.5-120 (2014).

134 *Id.* at *6, citing Minn. const. art. VII.

135 *Id.* at *8.

of statutory finagling can preserve for those placed under a guardianship a right that the Constitution says they cannot have."[136] The court observed that the Minnesota constitution's blanket ban conflicted with the U.S. Constitution on the three separate grounds identified in *Doe v. Rowe*.[137]

Based on its own analysis and the U.S. District Court's decision in *Doe v. Rowe*, the court concluded that it had a duty in Erickson's and future cases "to independently evaluate the voting capacity of each ward at the time of the hearing on a petition for guardianship, and on subsequent occasions as needed or requested" by the ward or guardian.[138] The court also addressed the due process issue by instituting a standing order in future cases, requiring notice to proposed wards that they could lose their right to vote and requiring that voting rights be addressed at each guardianship hearing that could result in a loss of voting rights.[139]

As for Mr. Erickson, the court ruled that he had "sufficient capacity and understanding to make an informed and intelligent vote. Simply stated, he is the type of informed and dedicated voter that our country needs."[140] The court noted that Erickson expressed a desire to vote, articulated which candidates he supported and why, and understood the nature and effect of voting.[141] The court declared that "all wards automatically retain the right to vote absent a court order to the contrary."[142]

The *Erickson* decision effectively pitted guardian against ward by requiring the guardian to police *future* voting ability. The court stated:

> Those presently under guardianship and within the jurisdiction of this Court will retain the right to vote unless:
> a. Future order of this Court removes that right based on the determination that the person under guardianship no longer has the capability to vote; or
> b. The guardian believes in good faith that the person under guardianship no longer has the capacity to vote, in which case the guardian shall not permit the ward to vote. If there is disagreement about the guardian's conclusion, the guardian must promptly bring the matter to court for a hearing and resolution.[143]

Minnesota's voting laws came under fire in federal court as well as in state court, but the federal action was lodged by individuals seeking to *disenfranchise* people under guardianship.[144] In *Minnesota Voters Alliance et al. v. Ritchie et al.*, the U.S. District Court

136 *Id.*
137 *Id.* at **13–20 (Equal Protection Clause as applied, Equal Protection Clause facially invalid, and Due Process Clause), citing *Doe,* 156 F. Supp. 2d 35.
138 *Id.* at *21.
139 *Id.* at **23, 25.
140 *Id.* at *23.
141 *Id.* at **23–24.
142 *Id.* at *26.
143 *Id.* at *25.
144 *Minn. Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106 (D. Minn. 2012), *aff'd*, 720 F.3d 1029 (8th Cir.

for the District of Minnesota rejected a challenge to Minnesota's guardianship voting laws.[145] Eight of the nine plaintiffs were prospective candidates for public office.[146] The ninth plaintiff was Sharon Stene, legal guardian of James Stene.[147] The plaintiffs complained that the defendant election officials had allowed ineligible voters to register in the 2010 elections, diluting the votes of eligible voters.[148] They alleged that the "Minnesota Constitution imposes on election officials an 'affirmative obligation to confirm a person's entitlement to vote.'"[149] The court noted that Stene's guardianship decree reserved Stene's right to vote.[150] Also, Sharon Stene did not challenge James Stene's right to vote during the course of those previous proceedings.[151] James Stene voted in 2010 and retained this right at the time of decision.[152] But the plaintiffs contended in part that "the appointment of a full or unlimited guardian categorically denies an individual of the right to vote because he or she has been 'adjudged incapacitated,' absent a 'specific adjudicated finding showing the ward knows the nature and effect of his or her vote.'"[153]

Minnesota had adopted the Uniform Guardianship and Protective Proceedings Act in 2003.[154] The federal District Court observed that Minnesota's constitution expressly prohibits a "person under guardianship" from voting,[155] but that the term "person under guardianship" is not defined in the Minnesota Constitution.[156] Attempting to reconcile the two, the court ruled on summary judgment that "notwithstanding the state constitution's apparent categorical ban on the rights of persons 'under guardianship' to vote, a ward is presumed to retain the right to vote as set forth by Minnesota statute."[157] The court deferred a bit to the state, noting that Minnesota's voting restriction for individuals under guardianship was a valid exercise of legislative authority[158] and that the Minnesota Supreme Court "held that the regulation of questions of guardianship are left to the legislature."[159]

The federal court undertook a detailed analysis of Minnesota's guardianship law, which is based on the Uniform Probate Code. The statute requires judicial findings that a person is incapacitated and states that there is no less restrictive means to limit the scope

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2013).

145 *Id.*

146 *Id.* at 1109. The plaintiffs included candidates for the state legislature and a city mayor, among others.

147 *Id.*

148 *Id.* at 1111.

149 *Id.*

150 *Id.* at 1114, n. 11.

151 *Id.* at 1118.

152 *Id.* at 1114, 1118.

153 *Id.* at 1115–1116.

154 *Id.* at 1116; Minn. Stat. § 524.5through 524.5-433 (2014).

155 *Ritchie*, 890 F. Supp. 2d at 1115, citing Minn. Const. art. VII, § 2 (1857); art. VII, § 1 (1974).

156 *Id.*

157 *Id.* at 1117.

158 *Id.* at 1115.

159 *Id. See St. of Minn. ex rel. Pearson v. Prob. Ct. of Ramsey Co.* , 205 Minn. 545, 287 N.W. 297, 299 (Minn. 1939), *aff'd sub nom.* , 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744 (1940) ("The [Minnesota] constitution does not specifically state what class of persons are subject to guardianship but leaves the regulation of that question to the legislature").

of guardianship.[160] It contains a Bill of Rights for Wards and Protected Persons, which "identifies the rights retained by persons under guardianship and specifically states that a ward retains the right to vote unless that right is restricted by a court."[161] It requires the guardian each year to "send or deliver to the ward and to interested persons of record with the court … notice of the status of the ward's right to vote."[162] The court also noted that under the state voter registration law, the Minnesota Secretary of State receives notice "of relevant changes in guardianship status for those individuals whose right to vote has been revoked or reinstated."[163] The court concluded that "the constitutional prohibition against voting based on guardianship status applies only when there has been an individualized judicial finding of incapacity to vote."[164] Because there were no constitutional violations, the court dismissed the case for lack of standing.[165] On appeal, the U.S. Court of Appeals for the Eight Circuit affirmed the district court's ruling.[166]

E. No Restrictions

Thirteen states place no restrictions on a person's right to vote based on mental incapacity or guardianship and therefore make no individualized inquiries into voting capacity. In nine states, the constitutions and statutes are completely silent: Colorado,[167] Idaho,[168] Illinois, Indiana, Kansas, New Hampshire, North Carolina, Pennsylvania, and Vermont. Three additional states — Michigan,[169] Oregon,[170] and Utah[171] — have constitutions that allow or require voting restrictions on grounds of mental incapacity or guardianship but have no statutes enforcing the restrictions, and their voter registration forms do not mention capacity. Finally, Alaska has a constitution that bans wards from voting, but its guardianship statute requires guardians to allow their wards to vote.[172]

While admirable for not disenfranchising persons under guardianship, the complete failure to address lack of capacity in these 13 states may swing the pendulum too far in the opposite direction. Having no requirement for capacity opens up the possibility of abuse

160 *Ritchie*, 890 F. Supp. 2d at 1116, citing Minn. Stat. § 524.5-102, subdiv. 6, § 524.5-410(c) (2014).

161 *Id.*, n. 13, citing Minn. Stat. § 524.5-120(14) (2014).

162 *Id.,* citing Minn. Stat. § 524.5-316(a) (2014).

163 *Id.* at 1118, citing Minn. Stat. § 201.15 (2014).

164 *Id.* at 1117.

165 *Id.* at 1118.

166 *Ritchie*, 720 F.3d 1029.

167 Colo. Rev. Stat. § 27-10.5-119 (Lexis 2013) ("all service agencies shall assist [developmentally disabled] persons to register to vote, to obtain applications for mail-in ballots and to obtain mail-in ballots, to comply with other requirements which are prerequisite to voting, and to vote").

168 "There is no restriction of voting privileges for persons under guardianship, provided they meet the other qualifications to be eligible to vote. Section 3, Article VI of the Idaho Constitution was amended in 1998 to remove language that previously prohibited people under guardianship from voting." Idaho Votes, *Frequently Asked Questions Regarding Voter Registration*, http://www.idahovotes.gov/VoterReg/REG_FAQ.HTM (accessed Mar. 24, 2014).

169 Mich. Const. art. II, § 2 ("mental incompetence"); no enabling statute.

170 Or. Const. art. II, § 3 ("adjudicated incompetent to vote"); no enabling statute.

171 Utah Const. art. IV, § 6 ("mentally incompetent"); no enabling statute.

172 Alaska Const. art. II, § 2 ("unsound mind"); Alaska Stat. § 13.26.150(e)(6) (2013) (guardian may not prevent ward from registering or voting).

of the electoral process; it could result in manipulation of votes by those preying on the vulnerable or in opportunistic use of their votes.[173] Clearly, due process and equal protection are not implicated, because there are no restrictions on the fundamental right to vote, the other end of the spectrum requires protecting the electorial process itself.

Restrictions on voting based on an individualized inquiry into mental incapacity, if properly implemented, can protect the electoral process. The states currently without restrictions should consider enacting carefully crafted statutes such as Delaware's (requiring "specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment"),[174] Kentucky's ("ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record"),[175] Maryland's (requiring "clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process"),[176] Nevada's (requiring a judicial finding of "clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process and [including] the finding in a court order"),[177] or Washington's (determination "that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice").[178] Such statutes provide rational limits to protect the integrity of the electoral process without unduly burdening the incapacitated individual who has the ability and desire to participate in the process.

V. Conclusion

As elections are increasingly won by narrow margins, the power of each vote is becoming more important than ever. Voting rights for incapacitated persons is becoming a more serious issue as the population ages and more people are placed under guardianship. A recent multistate study estimated that approximately 1.5 million active guardianships exist in the United States, although the actual number may be anywhere between 1 million and 3 million.[179] According to the U.S. Census Bureau, as of 2012, approximately 4,994,000 Americans age 15 and older were living in non-institutional settings and needed assistance with basic activities of daily living such as bathing, eating, and dressing.[180]

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173 *See* Sally Hurme & Paul Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters, in Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment,* 38 McGeorge L. Rev. 931, 964 (2007).

174 Del. Code tit. 15, § 1701 (2014).

175 Ky. Rev. Stat. § 387.590 (2013).

176 Md. Election Code § 3-102(b)(2) (2014).

177 Nev. Rev. Stat. § 293.5415 (2014).

178 Wash. Rev. Code § 11.88.010(5) (2013).

179 Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform, in Future Trends in State Courts 2011* 106, 109 (Nat'l Ctr. for St. Cts. 2011).

180 Matthew W. Brault, *Americans with Disabilities: 2010* 18 (U.S. Census Bureau, Jul. 2012), http://www.census.gov/prod/2012pubs/p70-131.pdf (accessed Jul. 28, 2014).

Guardianship can become necessary because of physical or mental incapacity, or both.[181]

The need for guardianship does not necessarily correlate with the inability to make informed decisions about voting. For example, a person under guardianship for schizophrenia might still have the mental capacity to make voting decisions and to understand the nature and effect of the act of voting. While a guardian can make decisions about where a protected person should live or the medical care he or she should receive, the guardian cannot decide whether the person should be allowed vote, because that right is personal to the individual.[182]

States, as well as the federal government, have a legitimate interest in preserving the integrity of the ballot. It is clear that courts will uphold non-discriminatory voting restrictions, which protect that integrity while also protecting the rights of incapacitated individuals.[183] However, many states still use antiquated voting rights laws that are categorically discriminatory, do nothing to promote intelligent use of the ballot, and may violate due process rights. Judicial inquiry and findings, based upon an individual's actual capacity to understand the electoral process, protect both interests.

Voting rights under guardianship should be addressed well in advance of the next presidential election. Until there is a national standard, states will remain free to define access to this fundamental right for its most vulnerable citizens. Suffrage is an individual, fundamental right, which should be determined on a case-by-case basis. Every guardian should carefully scrutinize the law in their jurisdiction to determine the legal standard for capacity in voting (if any) and advocate for persons under guardianship to vote if they are capable of understanding the voting process and making informed decisions and they wish to do so. In most cases, if a protected person want to vote, the guardian should advocate for his or her right to do so.

181 See Nat'l Conf. of Comm'rs on Unif. St. Laws, *Unif. Guardianship & Protective Procs. Act* § 102(5) (stating grounds for guardianship); Hurme & Appelbaum, *supra* at 948.

182 *See e.g.* Wis. Stat. Ann. § 54.25(2)(c) (2014) (identifying the right to vote as one of seven personal rights that can be removed, including the right to consent to marriage, to execute a will, to serve on a jury, to apply for an operator's license, to consent to sterilization, and to consent to organ, tissue, or bone marrow donation).

183 *See Mo. Protec. & Advoc. Servs.*, 499 F.3d at 809 n. 5 and accompanying text citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

Appendix A

State	**Constitutional Provisions**	**Selected Statute(s)**	**Individualized Inquiry for Incapacity/ Guardianship**
Alabama	Ala. Const. art. VIII, § 177(b)	Ala. Code § 17-3-30	N (voting prohibited)
Alaska	Alaska Const. art. II, § 2	Alaska Stat. § 13.26.150(e)(6)	N (no enabling statute; no restriction)
Arizona	Ariz. Const. art. VII, § 2(C)	Ariz. Rev. Stat. § 14-5101; Ariz. H. 2377	Full: N (voting prohibited); Limited: Y (judicial inquiry required to restore)
Arkansas	Ark. Const. amend. 51, § 11(a)(6)	Ark. Code § 28-65-302(2)	Y (automatically revoked unless court allows)
California	Cal. Const. art. II, § 4	Cal. Elec. Code §§ 2208–2211	Y (judicial finding of incapacity to complete affidavit of voter registration required to revoke)
Colorado	None	None	N (no restriction)
Connecticut	None	Conn. Gen. Stat. §§ 9-12, 45a-703	Y (automatically revoked unless court allows)
Delaware	Del. Const. art. V, § 2	Del. Code tit. 15, § 1701	Y (judicial findings required to revoke)
Florida	Fla. Const. art. VI, § 4	Fla. Stat. §§ 97.041, 744.3215(2)	Y (judicial findings required to revoke)
Georgia	Ga. Const. art. II, § 1	Ga. Code § 29-4-20	Y (judicial findings required to revoke)
Hawaii	Haw. Const. art. II, § 2	Haw. Rev. Stat. § 11-23	Y (findings by election clerk required to revoke)
Idaho	None	None	N (no restriction)
Illinois	None	None	N (no restriction)
Indiana	None	None	N (no restriction)

State	Constitutional Provisions	Selected Statute(s)	Individualized Inquiry for Incapacity/ Guardianship
Iowa	Iowa Const. art. II, § 5	Iowa Code §§ 48A.2.3, 48A.6.2	Y (judicial findings required to revoke)
Kansas	None	None	N (no restriction)
Kentucky	Ky. Const. § 145(3)	Ky. Rev. Stat. § 387.590(10)	Y (judicial findings required to revoke)
Louisiana	La. Const. art. I, § 10	La. Rev. Stat. § 18:102	Full: N (voting prohibited); Limited: Y (judicial inquiry required to revoke)
Maine	Me. Const. art. II, § 1, struck down by Doe v. Rowe, 156 F. Supp. 2d 35, 59 (D. Me. 2001)	None	Y (judicial findings required to revoke)
Maryland	None	Md. Election Code § 3-102(b)(2)	Y (judicial findings required to revoke)
Massachusetts	Mass. Const. amend. art. III (interpreted by Sec. of the Cmmw. of Mass., Elections Div.)	Mass. Gen. Laws chap. 51, § 1	Y (judicial findings required to revoke)
Michigan	Mich. Const. art. II, § 2	None	N (no enabling statute; no restriction)
Minnesota	Minn. Const. art. VII, § 1	Minn. Stat. § 524.5-313(8)	Y (judicial findings required to revoke)
Mississippi	Miss. Const. art. XII, § 241	Miss. Code § 23-15-11	N (voting prohibited)
Missouri	Mo. Const. art VIII, § 2	Mo. Rev. Stat. § 115.133	Y (automatically revoked unless court allows)
Montana	Mont. Const. art. IV, § 2	Mont. Code Ann. § 13-1-111(3)	N (voting prohibited)

State	**Constitutional Provisions**	**Selected Statute(s)**	**Individualized Inquiry for Incapacity/ Guardianship**
Nebraska	Neb. Const. art VI, § 2	Neb. Rev. Stat. § 32-313	N (voting prohibited)
Nevada	Nev. Const. art II, § 1	Nev. Rev. Stat. § 293.540-5415	Y (judicial findings required to revoke)
New Hampshire	None	None	N (no restriction)
New Jersey	N.J. Const. art. II, § 1	N.J. Stat. § 19:4-1	Y (judicial findings required to revoke)
New Mexico	N.M. Const. art. VII, § 1	N.M. Stat. §§ 1-4-24, 1-4-26	N (voting prohibited)
New York	None	N.Y. Elec. Law §§ 5-106, 5-400	N (voting prohibited)
North Carolina	None	None	N (no restriction)
North Dakota	N.D. Const. art. II, § 2	N.D. Cent. Code § 30.1-28-04	Y (judicial findings required to revoke)
Ohio	Ohio Const. art. V, § 6	Ohio Rev. Code §§ 3503.18, 5122.301	Y (judicial findings required to revoke)
Oklahoma	None	Okla. Stat. tit. 26, § 4-101	Full: N (voting prohibited); Limited: Y (judicial inquiry required to revoke)
Oregon	Or. Const. art. II, § 3	None	N (no enabling statute, no restriction)
Pennsylvania	None	None	N (no restriction)
Rhode Island	R.I. Const. art. II, § 1	None	N (voting prohibited)
South Carolina	S.C. Const. art. II, § 7	S.C. Code § 7-5-120	N (voting prohibited)
South Dakota	S.D. Const. art. VII, § 2	S.D. Codified Laws § 29A-5-118	Y (judicial findings required to revoke)
Tennessee	None	Tenn. Code § 34-3-104(8)	Y (judicial findings required to revoke)

State	**Constitutional Provisions**	**Selected Statute(s)**	**Individualized Inquiry for Incapacity/ Guardianship**
Texas	Tex. Const. art. VI, § 2	Tex. Election Code § 11.002	Full: N (voting prohibited); Limited: Y (judicial inquiry required to revoke)
Utah	Utah Const. art. IV, § 6	none	N (no enabling statute, no restriction)
Vermont	None	None	N (no restriction)
Virginia	Va. Const. art II, § 1	Va. Code §§ 24.2-101, 24.2-410	N (voting prohibited)
Washington	Wash. Const. art. VI, § 3	Wash. Rev. Code §§ 29A.08.515, 11.88.010(5)	Y (judicial findings required to revoke)
West Virginia	W.V. Const. art. IV, § 1	W.V. Code § 3-2-2(b)	N (voting prohibited)
Wisconsin	Wis. Const. art. III, § 2(b)	Wis. Stat. 6.03(a)	Y (automatically revoked unless court allows)
Wyoming	Wyo. Const. art. VI, § 6	Wyo. Stat. § 22-1-102(a)(xxvi)	N (voting prohibited)