OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

Thursday, December 11, 2014
10:15 a.m.
Statehouse Room 116

Agenda

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of September 11, 2014
- Meeting of October 9, 2014

IV. Presentation

- Article V, Section 6 (Idiots and Insane Persons)
  Michael Kirkman, Executive Director
  Disability Rights Ohio

V. Reports and Recommendations

- Article I, Section 2 (Right to Alter, Reform, or Abolish Government)
- Article I, Section 3 (Right to Assemble)
- Article I, Section 4 (Bearing Arms; Standing Armies; Military Power)

VI. Committee Discussion

- Article V, Section 6 (Idiots and Insane Persons)
- Article V, Section 4 (Felony Disenfranchisement)
- Future topics for consideration

VII. Public Comment

VIII. Adjourn

Michael Kirkman, J.D.

Michael Kirkman is the Executive Director of Disability Rights Ohio (DRO), a not for profit corporation whose mission is to advocate for the human, civil, and legal rights of people with disabilities. Disability Rights is designated under federal law as the Ohio system to protect and advocate the rights of people with disabilities (P&A). Kirkman led the 2012 transition to the not for profit P&A from a state agency, Ohio Legal Rights Service, where he had been the Director for five years and Legal Director since 1987.

- Principal co-author of OHIO MENTAL HEALTH LAW (Banks-Baldwin 2d ed. 1990), writes and lectures frequently on legal and policy issues affecting people with disabilities.
- National consultant on legal and governance issues affecting P&As, has recently consulted with offices in Virginia, New York, and Indiana on questions related to creation of a not for profit P&A. Currently Vice-President of the board of the National Disability Rights Network.
- Active in both state and federal legislative matters, he is co-convener of the Ohio work group urging ratification by the U.S. Senate of the U. N. Convention on the Rights of People with Disabilities, in conjunction with the National Council on Disabilities and the U.S. International Council on Disabilities.
- Active on state bar association and Supreme Court of Ohio committees, with a particular interest on legal standards for surrogate decision makers.
- Experienced federal trial and appellate litigator, focused on the community integration mandate under the Americans with Disabilities Act and access to federal court for civil rights claims. Trial attorney on the *Glancy v. Morrow Co. Board of Elections* litigation, has represented clients in the U.S. Supreme Court, and participated in of cases in several U. S. Courts of Appeals and the Ohio Supreme Court.
- 1980 graduate of the University of Dayton School Of Law where he was on Law Review; Post graduate Reginald Heber Smith Community Lawyer Fellow through Howard University and the Legal Services Corporation
- Admitted to practice before the courts of Nebraska and Ohio, the United States District Courts in Ohio and Nebraska, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court.
- Life Fellow, Ohio State Bar Foundation

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People with Disabilities and Voting in Ohio

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I. INTRODUCTION – A BRIEF HISTORY OF DISABILITY RIGHTS

The issue of how society should regard people with disabilities, and particularly those with diminished mental capacity, is one that has seen a great deal of evolution since Ohio ratified its current constitution in 1851. At that time, the asylum movement of Dorthea Dix was in full swing. This created institutions where isolation and daily activity were used to provide humane treatment to people with mental disabilities.[1] Advancements in science, generally, and medicine and psychology, specifically, over the late 19th and early 20th century led to hope of more effective treatments for those seen as incapable of caring for themselves.[2] These hopes were, in large part, unrealized as the Eugenics movement and horrific (and ultimately unconstitutional) conditions in institutions caused massive physical and psychic injury to hundreds of thousands of people with intellectual, developmental, and psychiatric disabilities through the early and mid-20th century.[3] Jurisdictions, including Columbus, Ohio, passed "Ugly Laws" as part of their vagrancy codes, allowing authorities to remove "unsightly beggars" from the streets, which became shorthand that allowed detention and removal of the poor and people with disabilities.[4]

The mid-20th Century brought watershed changes to the perception and treatment of people with disabilities. In 1966, tenBroek published his seminal article on disability rights,[5] urging that the law should recognize the right of people

[1] See generally Whitaker, Mad in America: Bad Science, Bad Medicine, and the Enduring Mistreatment of the Mentally Ill (Perseus 2002); Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change (Oxford 1994)

[2] Whittaker, *Id.*

[3] Rothman, The Willowbrook Wars (Transaction 2005)

[4] Schwiek, The Ugly Laws: Disability in Public (NYU Press 2009)

[5] The Right To Live in the World: The Disabled in the Law of Torts, 54 California L. Rev. 841, 848 (1966)

with disabilities to "live in the world." Press coverage[6] led to aggressive federal litigation asking federal courts to address horrific conditions at the Willowbrook institution in New York and at similar institutions for individuals with developmental disabilities in Ohio around the country.[7] The United States and Ohio Supreme Courts spelled out specific due process rights, including a right to counsel and to treatment for people who are detained against their will in state institutions.[8]

Political and social gains also occurred. Following in the steps of the civil rights revolution, the independent living movement and groups such as ADAPT took the refrain "nothing about us without us," a slogan that is still used today by the growing movement of people with intellectual and developmental disabilities (I/DD) such as Self Advocates Becoming United, People First, and Autism Self Advocacy Network.

Recognizing the need for federal legislation to ensure the rights of people with disabilities, disability interest groups with otherwise disparate interests came together to achieve bi-partisan support for adoption of the Americans with Disabilities Act of 1990.[9] This sweeping civil rights litigation has had enormous influence in the discussion of how society perceives and treats people with disabilities.

The ADA embodies in the law the key elements of the independent living movement: nondiscrimination, integration and full inclusion of people with

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[6] Rivera, Geraldo (1972). *Willowbrook: The Last Great Disgrace*. WABC-TV. Film. A unique perspective of the Willowbrook school can be seen at "Unforgotten: Twenty-Five Years After Willowbrook," https://www.youtube.com/watch?v=FcjRIZFQcUY. A similar documentary from the Ohio perspective is "Lest We Forget: Silent Voices," http://partnersohio.com/about/lest-we-forget/sample-clips/.

[7] *New York ARC v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y.1973). Cases were filed in Ohio against Orient State School (*Barbara C. v. Moritz* No. C-2-77-887, Order and plan for relief October 19, 1981 (S.D. Ohio) and Apple Creek Developmental Center (*Sidles v. Delaney*No. C75-300A, Consent Judgment April 26, 1976, modified January 6, 1981(N.D. Ohio), resulting in rulings that provided comprehensive standards for the management of the institutions.

[8] *Youngberg v. Romeo* 457 U.S. 307 (1982)(substantive due process requires that state institution provide treatment to those legally detained); *Addington v. Texas*, 441 U.S. 418 (1979)(state must prove that person meets criteria for involuntary hospitalization by clear and convincing evidence); *In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851 (1974)(mandatory right to counsel for respondent subject to involuntary commitment)

[9] P.L 101-336 (1990), 42 U.S.C. § 12101 et seq. See generally, Bagenstos, Law and the Contraindications of the Disability Rights Movement (Yale 2009)

disabilities as members of society. People must be treated as individuals, not a stereotype or caricature.

The Americans with Disabilities Act Amendments of 2008[10] reinforced that the focus of attention was placed on whether the covered entity had discriminated, rather than focusing on the individual and determining if the individual seeking the protection of law had a disability that fit within a technical definition. These amendments reflect a person-centered focus of the disability rights movement, where individuals are not defined by a specific condition, disease or impairment, but instead are treated as whole, individual people with individual needs and circumstances.

Full participation in the political process is a central value of the disability movement. Broad protections, both constitutional and statutory, exist to ensure that people with disabilities have full access to the ballot. People with disabilities will insist that these considerations be central to a discussion of amending the Ohio Constitution.

II. CURRENT OHIO LEGAL ENVIRONMENT

The current State Constitution regulates the essential elements of voter qualification. Article V, Section 1, specifies that any U.S. citizen who is a resident of the state "has the qualifications of an elector and is entitled to vote at all elections."[11] Article V also has additional provisions that provide for mechanics of the ballot process and also the circumstances that allow disqualification of electors. Article V, section 6 speaks in antiquated terms of people with disabilities, and states "No idiot, or insane person, shall be entitled to the privileges of an elector."[12] This class of voters is the only one that is conclusively disqualified in the current provisions of the 1851 constitution; the General Assembly is, however, given

[10] P.L. 110-325 (2008)

[11] Ohio Constitution, Article V section 1. The section states in full:

> "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote."

[12] A separate provision of the 1851 Constitution, not addressed in this article, presents similar challenges. Article VII, section 1, provides institutions for the "insane, blind, and deaf and dumb shall always be fostered by the state…."

discretion to "exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony."[13]

State statutes speak to and further define on the qualifications of electors and those who can register to vote.[14] Yet the Revised Code does not provide a comprehensive or cohesive scheme to implement the constitutional provision. Instead, a single provision sets out a procedure for cancelling the registration for a discrete class of enrolled electors:

> At least once each month, each probate judge in this state shall file with the board of elections the names and residence addresses of all persons over eighteen years of age *who have been adjudicated incompetent for the purpose of voting, as provided in section 5122.301* of the Revised Code.[15]

Section 5122.301 provides for protection of rights of those who have been involuntarily hospitalized under the provisions of the state's mental health code. It provides:

> Any person admitted to a hospital or otherwise taken into custody, voluntarily or involuntarily, under this chapter retains all civil rights not specifically denied in the Revised Code *or removed by an adjudication of incompetence following a judicial proceeding other than a proceeding* under sections 5122.11 to 5122.15 of the Revised Code.

Only people governed by this statute, those who are voluntarily or involuntarily committed to treatment facility for mental illness, are be subject to removal from the rolls of electors. Significantly, nothing else in the Revised Code speaks to any other class of electors who have a disability, including those who are committed under a companion provision for people with intellectual or developmental disabilities.[16] More specifically, a person who is found to be an "incompetent" under section 2111.01 of the Revised Code but otherwise meets the

[13] Ohio Constitution, Article V section 4
[14] R.C. §§ 3503.01, 3503.07
[15] R.C. § 3503.18 (emphasis supplied)
[16] R.C. §§ 5123.86 et seq. The Bill of Rights for people with DD, at section 5123.62, does not include a similar limitation, and provides an affirmative guarantee of participation in the political process. R.C. § 5123.62(W)

qualifications of an elector under Article I, Section 1 or section 3503.01 is not prohibited from registering under section 3503.07.

Finally, Ohio Secretary of State Directive 84-20 implements the requirements of the federal Voting Rights Act Amendments Act of 1982, which specifies that voters with disabilities are entitled to ballot access and necessary assistance and the consent order between plaintiffs with I/DD and the Secretary of State, which will be discussed more fully below.

There are very few Ohio judicial opinions directly interpreting these constitutional or statutory provisions. Article I, section 6 is applied in *In re South Charleston Election Contest*, a 1905 case from the Probate Court of Clark County.[17] The case is a statutory challenge from a contested liquor option. Among other issues, a challenge was mounted under the constitutional provision to the qualifications of one Leroy Pitzer, a voter identified as having a disability related to a childhood injury. For reasons that would likely not stand current clinical scrutiny, the judge concluded that Mr. Pitzer's vote should not be counted. The court then tried to discern how the ballot was cast in order to attempt to break a tie. Even as he was disqualified, the court quotes Mr. Pitzer as insisting that he had voted "dry;" this demonstrated both purpose and cognitive understanding related to his vote.

Other cases approach the issue as a collateral matter, such as *Baker v. Keller*,[18] where a juror challenge in a workers compensation appeal required the court to determine if the juror was qualified as an elector. In that case, which involved a voter who had previously been hospitalized for mental illness, the court relied on the capacity and legal status of the elector at the time of the trial to overturn the challenge.

This dearth of case law provides little opportunity for rich or nuanced analysis of these provisions, as the trial court opinions may be given undue deference. The decisions are heavily dependent on and highly specific to the facts before the trial court. Any legal analysis is weaker for not having had the benefit of appellate court review.

[17] 3 Ohio N.P.(N.S.) 373 (P.Ct. Clark Co. 1905)
[18] 15 Ohio Misc. 215 (C.P. Marion Co. 1968)

III. Federal considerations

Any consideration of the Ohio constitution must of necessity take into account federal constitutional and statutory provisions, which are significant. As with the state courts, few federal courts have addressed issues related to voters with disabilities, and trial court opinions are given significant deference.

"[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[19] While the Supreme Court has ruled that disability is not treated as a suspect or quasi-suspect classification for equal protection purposes, at the same time it has pointed out that treatment of people with disabilities that is based on stereotype or is motivated by discriminatory animus cannot be considered rational.[20] Still, there is no question that people with disabilities are a discrete class that has not enjoyed great protection in the political process, and there remains an argument that heightened scrutiny should be applied in a given case.[21] In particular, the Supreme Court has recognized that discrimination against this class of people in the political process is well documented throughout our nation's history and justified Congress' passage of the ADA under Section V of the Fourteenth Amendment.[22]

Recent trends in equal protection analysis have invigorated the notion that "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"[23] Even

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[19] *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966)

[20] *Clebourne Living Center v. City of Clebourne*, 473 US 432, 446 (1985)("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. . . . Furthermore, some objectives-such as 'a bare ... desire to harm a politically unpopular group,' are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."[internal citations omitted) Some refer to this as giving teeth to rational basis review, or rational basis with a "bite." Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection, 86 Harv. L. Rev. 1, 13 (1972)

[21] *Id.*, 464, n.14 (Marshall, dissenting)

[22] *Tennessee v Lane*, 541 US 509, 524, n.5; *Clebourne*, 473 U.S.at 464, n.14 (Marshall, dissenting); *Missouri Protection & Advocacy v. Missouri Department of Mental Health*, 447 F.3d 1021 (8th Cir. 2006)(recognition of voting rights under constitution in analyzing standing)

[23] *Romer v. Evans*, 517 U. S. 620, 633 (1996) [quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32, 37–38 (1928)]

under rationality "'a bare . . . desire to harm a politically unpopular group cannot' justify disparate treatment of that group. . . ."[24]

Moreover, the fundamental nature of voting and political participation requires that federal courts will look critically at any provision that is based on stereotype, fear, or perceptions that are not supported in fact. A state's restriction on voting is subject to strict scrutiny because it restricts a fundamental right. "[I]f 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.'"[25] Additionally, a restriction must be narrowly tailored and a high level of procedural due process protection be provided. A voter cannot be disenfranchised without specific notice of that fact and an opportunity to be heard to challenge any finding.[26]

Federal statutes now provide a significant level of protection designed to prevent barriers to participation by people with disabilities in voting. The Voting Rights Act as amended in 1982, provides that "any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[27] Additional provisions ensure that people may receive assistance in registration,[28] that voting systems "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," and that every polling station have at least one electronic voting machine that is accessible to voters with disabilities.[29]

Finally, the Americans with Disabilities Act has considerable influence in protecting the rights of people with disabilities in the electoral process. Elections officials must make reasonable accommodations in election procedures to accommodate individuals with disabilities unless the requested modification

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[24] *Windsor v. United States*, 570 U.S. ___, 133 S.Ct. 2675, 2692 (2013)(internal citations omitted)
[25] *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) [quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969)]
[26] *Doe v. Rowe*,156 F.Supp2d 35 (D.Me. 2001)
[27] 42 USC 1973aa-6. This provision is subject to enforcement in Ohio under a consent decree in the case of *Glancy v. Morrow County Board of Elections*, No. C-2-82-991 (S.D. Ohio April 20, 1984) and Secretary of State Directive 84-20.
[28] National Voter Registration Act of 1993, 42 USC 1973gg-5
[29] Help America Vote Act, 42 USC 15481

"would fundamentally alter the nature of the service, program, or activity."[30] Federal district courts in Ohio have ruled that officials must provide a home visit if person is unable to appear in person at board of elections to cure defects in an absentee ballot[31] and that a ballot must be supplied by alternative means to person hospitalized in out of county facility.[32] A federal judge in Maine ruled that the ADA prevented Maine officials from enforcing a state constitutional provision that was used to disqualify people with mental illness from voting if they were under guardianship.[33]

These provisions make it difficult except in the narrowest of circumstances to exclude a voter because of an intellectual or cognitive disability. Individualized assessment and reasonable accommodations to ensure access to the electoral process are required by statute. Provisions that exclude people with disabilities will be subject to constitutional scrutiny, and only a compelling interest implemented in the narrowest manner possible will survive.

IV. CAPACITY TO VOTE

"We note that the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse." Justice Blackman[34]

Federal law makes it clear that some of the tools used by states over the years to disqualify voters with disabilities are no longer legal. Principal among these is a literacy test.

Still, a recurring question is whether the state may enact measures to ensure that only voters who have "capacity to vote" are qualified as electors. Groups as diverse as the American Bar Association and the Alzheimer's Association have weighed in on this discussion with both groups passing resolutions on the issue (these affirm a broad interest in inclusion and careful protections for any measure disqualifying voters).[35] A few researchers have attempted to articulate a test that

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[30] 28 C.F.R. § 35.130(b)(7)
[31] *Ray v. Franklin County Board of Elections*, No. 2:08–cv–1086, 2008 WL 4966759 (S.D. Ohio Nov.17, 2008)
[32] *Mooneyhan v. Husted*, No. 3:12–cv–379, 2012 WL 5834232 (S.D. Ohio, Decision on Temporary Restraining Order, Nov. 16, 2012)
[33] *Doe*, supra n. 24
[34] *Dunn v Blumstein*, 405 U.S. 330, 356 (1972)
[35] American Bar Association House of Delegates Report of the Standing Committee on Election Law approved August 13, 2007; Alzheimer's & Dementia 2 (2006) 243-245

could be used by a fact finder (presumably a judge) to discern if a person with a cognitive disability has requisite capacity to cast a ballot.[36] Justifications for this include the integrity of the ballot process, or protecting people with cognitive disabilities or elders with dementia from exploitation even as evidence of such practices is anecdotal and other mechanisms exist to address them.

One prominent researcher, Jason Karlawish, professor of medicine, medical ethics and health policy at the University of Pennsylvania, points out the inherent tension between increasing enfranchisement with the desire to protect the integrity of the vote.[37] For example, Canada does not remove people from the voting rolls because of the lack of capacity to vote – greatly decreasing the risk of improper disenfranchisement of people with disabilities. Canada balances presumptive enfranchisement with several other features to protect the integrity of the vote – including limiting a non-family member to assisting only one voter per election, and having a non-partisan and independent commission that runs voting among other protections to the integrity to vote that do not limit who is permitted to vote.

Capacity to make a particular decision is a factual determination, but there must be a legal, medical, or social framework that guides that determination. Historically legal capacity, or competence, has been viewed broadly and people with disabilities were automatically presumed to be incompetent to fully engage with society. As recently as 1975, people with mental disabilities in Ohio were denied basic human and civil rights as a function of state statute. Public attitudes reinforce this bias, as many individuals may assume that all people with mental illness or I/DD lack basic reasoning abilities or other cognitive skills. Capacity in this sense serves as a proxy for subordination of and discrimination against people with disabilities.

Mental capacity is not fixed in time, nor is it static with regard to different situations or contexts. Thus, a person with dementia may find themselves confused about their address but be absolutely clear regarding a desire to vote for or against an issue or candidate. Inability or unwillingness to communicate can sometimes be confused for a lack of decisional capacity.

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[36] *E.g* Appelbaum, Bonnie, Karlawish, The Capacity to Vote of Persons With Alzheimer's Disease, Am J. Psychiatry 162:11, November 2005

[37] Karlawish, Bonnie, Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations, 38 McGeorge L. Rev. 879 (2007)

Legal concepts regarding capacity have shifted and are continuing to evolve. Many states, including Ohio, now recognize a form of limited guardianship, with all rights not affected by the guardianship retained.[38]The Uniform Guardianship and Protective Proceedings Act suggests a functional definition of incapacity that is scaled to the protective services needs of the individual and can be time limited. Article 12 of the United Nations Convention on the Rights of Persons with Disabilities directs signatories to ensure a conclusive presumption of legal capacity for people with disabilities with accommodations and supports to maximize autonomy in the decision making process for the person.

There is very little clinical research in this area. Commonly, the researchers apply the Competency Assessment Tool for Voting derived by Karlawish, Bonnie, and Appelbaum,[39] based on the judicial opinion in *Doe v Rowe*. A recent study determined that people with brain injuries were equally competent in the realm of voting competence and political knowledge as the average college student.[40]

Even the leading researchers are aware that there is no consensus regarding what standard should be used. Appelbaum suggests that being able identify oneself, as proposed by the American Bar Association resolution, may be the best test.[41] This appealingly simple standard does not, however, fully accommodate the complex area of cognitive function.

[38] R.C. § 2111.02(B)(1)
[39] Supra, note 36
[40] Link, et al., Assessing Voting Competence and Political Knowledge: Comparing Individuals with Traumatic Brain Injuries and ‘‘Average’’ College Students, ELECTION LAW JOURNAL Volume 11, Number 1:52 (2012)
[41] Appelbaum, I Vote and I Count: Mental Disability and the Right to Vote, PSYCHIATRIC SERVICES Vol. 51 No. 7:849 (July 2000)

IV. CONCLUSION AND RECOMMENDATIONS

"The focus should be on maximizing access to voting and maximizing assistance for people who need it," Dr. Jason Karlawish[42]

People with disabilities and elders are unified in their desire to be seen as fully realized and integrated members of society. Voting is considered a measure of autonomy, full participation as citizens, and independence. Ohio's Constitution should affirm these values.

Any attempt to restrict voter participation based on disability will run afoul of well-established federal constitutional and statutory norms. Attempts to discern a test for "capacity" to vote are frustrated by the general understanding that voting is inherently personal, that people vote for many reasons, and not all of them are rational. As scholar Pam Karlan recognizes:

> [O]ur political discourse, for better or worse, bypasses the conscious mind altogether, and that a large number of citizen views and choices are driven by a range of irrelevant factors and fortuities-such as a candidate's height, whether he uses a nickname, or the format of the ballot.[43]

The Ohio Constitution should be changed as follows.

- Article V, section 6 should be removed. There is no question that this section is unconstitutional under the Fourteenth Amendment to the United States Constitution, and violates the Voting Rights Act and the Americans with Disabilities Act.
- Article V, section 6 should not be replaced. Article V, section 1 provides a standard for elector qualification that is consistent with the state of the law, social science, and normative ethics in treating all citizens equally regarding the privileges of an elector. The individual inquiry and accommodations that are mandated by federal law for voters with disabilities provide a mechanism to ensure maximum participation. Any attempt by others to commit voter fraud through exploitation of the person with a disability or elder may be addressed by election officials under current law.

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[42] Quoted in Leonard, Health: Keeping the 'Mentally Incompetent' From Voting, October 17, 2012, http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/

[43] Karlan, Framing the Voting Rights Claims of Cognitively Impaired Individuals, 38 McGeorge L. Rev. 917, 917 (2007)

- If language addressing this issue is necessary, the provision should be phrased as an affirmative statement of non-discrimination. E.g: “No person otherwise qualified to be an elector shall be denied any of the rights or privileges of an elector because of a disability.”
- Although there is a strong likelihood that any such provision would be subject to legal challenge under the principles described above, if further qualification is desired it could follow the pattern of Article V, section 4 and be permissive, i.e. not self-enabling. The General Assembly might be authorized to define any limitation narrowly based on a compelling state interest, and set forth the necessary procedures and rights protections incumbent to that procedure. E.g: “Except as provided in this section, no person otherwise qualified to be an elector shall be denied any of the rights or privileges of an elector because of a disability. The General Assembly may provide for a process to challenge the capacity of an elector to vote. The process shall require that a court of competent jurisdiction conduct a hearing with full due process protections, including right to counsel, for the elector.”

To: Commission Members of the Bill of Rights Committee

From: Karla Bell

Attached please find a memo which proposes an order for the consideration of the multiple issues raised regarding the "idiots and insane" language. I thought it might speed things up. (As for me, I think the present language should be repealed; new language should be added; the new language could conform to other language in the constitution, or not; I don't have a strong preference on the "right" and "privilege" issue; we should specify it is a judicial adjudication; upon reflection, I agree there is no necessity to specify the right to counsel and the burden of proof is an issue for the legislature).

The only issue I remain concerned about is the language describing what we are seeking to ban. If, as I understood, we only mean to bar those who do not understand the voting process, I think we should be very clear about that. I include a section (Question 8) about the definition of "mental capacity" in various statutes and constitutions that might lead to confusion.

I don't think I will have time to prepare the second memo, but my research has also convinced me that the existing provisions regarding a separate adjudication will not clarify the matter. The disqualification of voters, and the guarantee of rights without an adjudication only refer to those who are "hospitalized or otherwise in custody." I'm not sure of the range of "otherwise in custody" but those who are hospitalized have already been found to have a "mental illness" and be "subject to court order." Again, I don't think we mean to have those as a requirement.[1]

Shari did a wonderful job in her memo, providing a lot of detail, thoughtful reasoning and research. I have given some consideration to the order in which the Committee should address the propositions. A simple up/down vote could be taken on several of them, in order to move things expeditiously.

[1] Ohio Rev. Code 5122.301, specifically requiring an adjudication of incompetence before the removal of a civil right, including the right to vote, is directed to the civil rights *of patients*, limited in application to persons "*admitted to a hospital or otherwise taken into custody voluntarily or involuntarily."*

The code section pertaining to cancellation of voter registration, Section 3503.21 states that a voter's registration will be cancelled upon, upon an adjudication of incompetence provided in the section relating to patients or those in custody. The term "mentally ill," for the purposes of voluntary and involuntary hospitalization, is: "[A] substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."

Not all persons who are mentally ill can be hospitalized—only those persons who are a "mentally ill person subject to court order," which requires a further finding of risk to self or others. Ohio Rev. Code 5122.01

Proposed Outcome

1) **Should the present language of Article 6 be removed?**

    A. Pro: The terms are antiquated, offensive and not meaningfully employed in Ohio statutory law. Moreover, the prior commission received expert testimony that the provision is probably unconstitutional as violative of both the equal protection and due process clauses of the 14th Amendment.
    B. Con: None articulated so far, except a general preference not to disturb the constitution.

2) **Should there be new language?**

    A. Pro: Both Senator Skindell and Dean Steinglass believe the broad language of entitlement in Article V, Section 1 arguably precludes the legislature from acting on its own to limit the right or privilege to vote.
    B. Con: None articulated so far.

The basic phrasing of the proposed provision

3) **Should the language be phrased as a limit on legislative power or as a right of the voter?**

    Example 1: " The General Assembly shall have the power…"

    A. Pro: This aligns with the language of the prior section regarding felons, producing consistency in the document.

    Example 2: "Except as provided in , an elector's right to vote shall not be.."

    B. Pro: This arguably is a stronger expression of support for an individual's right to vote, and implicitly puts the burden of proof upon those seeking to deny that right.

4) **Should voting be referred to as a "right" or a "privilege"?**

    A. Argument for right: The Supreme Court has recognized voting as a fundamental right.
    B. Argument for privilege: Consistency in language in the Ohio constitution. As Shari pointed out, Article V, Section 4 regarding felonies refers to "the privilege of voting."

Possible Additions to the Constitutional Provision

5) Should the constitutional provision provide for a heightened burden of proof?

A. Pro: This would help ensure electors would retain the right to vote. A showing of "clear and convincing evidence" is required in other court hearings removing a person's rights.
B. Con: This is a policy matter which should be determined by the legislature.

6) Should the constitutional provision specify a right to counsel?

A. Pro: Enumeration of this right will insure it is provided in a hearing that may strip an elector of the right to vote.
B. Con: Because the right to vote is fundamental, due process will require this anyway, so there is no need to specify this. *Bell* v. *Marinko*, 235 F. Supp.2d 772, citing *Doe v. Rowe*. (I can't give a pin cite because the search engine I am using doesn't show page numbers; sorry.)

7) Should the constitutional provision require a judicial adjudication?

A. Pro: This would insure that no administrative agency or department could make a finding removing an elector's right to vote.
B. Con: The prior objection was wordiness, but Shari's excellent suggestion of simply adding the word "judicial "really handles this.

8) Should the statute specify what it means to be "mentally incompetent to vote" or clarify that only a mental disability related to voting would disqualify a voter?(See Shari's memo at Question 4. Page 2:

This is an issue that was not part of an extended discussion in the last session, but after doing some research, my answer to these questions is an emphatic, "Yes." I would ask the Committee to consider the Ohio and federal statutes discussed when drafting the constitutional provision.

The statutory definition of "incompetent" and "mentally incompetent" appears in Chapter 21 of the Ohio Revised Code pertaining to Guardians & Conservatorships :

> "[A] any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state."

See: Ohio Rev. Code Section 2111.01 (D), specifying that this definition will be used in Revised Code Chapters 2101 to 2131; Ohio Rev. Code Section 2135.01 stating that, as used in Sections 2135.01 to 2145, "incompetent" has the same meaning as in section 2111.01.

In addition to the problems potentially created by the by the state code, federal law specifically reserves to the states the right to disenfranchise electors, "by reason of…mental incapacity." 42 U.S.C. Section 1973gg-6 (a) (3) (B). Consistent with this, multiple state constitutions bar any person who is "not mentally competent" from voting. See, e.g., Minnesota, Article VII, Section 1; Michigan, Article 1, Section 2; Georgia Article II, Section 1; Louisiana, Article 1, Section 10 (A) . This is not my understanding of what the committee seeks to do.

Recommendation

Because we would be adopting a meaning of "mental capacity" different than that referenced in state and federal law, and use it in a way that is not the most popular in state constitutions, I think we need to make it clear**:** We need to plainly state what it means to be "mentally competent to vote."

The Committee could use the definition, or at least some part of the definition employed in *Doe v. Rowe*, 156 F. Supp. 35, 51 (the one circulated by Shari).The court in that case described "mental capacity to vote" as **"the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself**." Id. at 51 This could be pared down to" **mental capacity to understand the nature and effect of voting**" or modified slightly to, **"mental capacity [ability?] to understand the purpose and effect of voting."**

Another phrasing proposed by Shari, in under Question 4 at page 2 of her memo is also excellent, and shorter: **the elector "lacks the ability to understand the act of voting."** This might be modified to **"lacks the mental capacity to understand the act of voting,"** or **"lacks the mental ability to understand the act of voting."** Using "ability" would also employ a term not already defined in the Code.