

How straight does the line have to be to vote? A US Comparison on Voting Rights in the Mentally Disabled Community

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Abstract

Conducting universal, free, and fair elections do not make the right to vote open and just for everyone to participate in the political process. Even though on paper, it leads people to think the polls are open to all, but in practice, universal suffrage only includes a wide margin of citizens who can vote since barriers remain for citizens who are in disenfranchised groups. People with mental disabilities have been excluded from the political process and continue to be a disenfranchised group in society because of the misconception about their capacity to understand the political process. In the US, there can be at least 50 different rules and regulations about who and how US citizens vote in local, states, and federal elections and many states restrict people with mental disabilities when it comes to the right to vote. Therefore, the time has come to redraw the franchise lines for individuals with mental disabilities, and it starts with allowing them to have a voice in equal access to universal, free, fair, and secret ballot elections. Thus, we must look at the US Federal standards, the US States regulations, and an international convention to come up with methods to break down the boundaries for “universal” voting rights to include one more disenfranchised group.

Introduction

Either counting a ballot is done by a machine or by a person or in both methods; the identity of the voter is, on its face unknown. All that matters is that the ballot has the blue “X” in the box or that the hole-punch has been cut out enough for the voter’s choice to be clear. If the “X” is not perfect or the ballot punch is not cut out completely, does this, mean the intent of the voter is unclear. If the machine or a person on the voting committee can understand the choice indicated then the vote should be counted.¹ There is no way of telling who marked the “X” or punched out on the ballot without looking out up the reference number to find if the ballot belongs to a person who has the capacity to make a decision. Capacity is a complex and task-specific term that has evolved when it comes understanding who an elector can be in an election. With the expansion of the understanding of capacity, voting rights for minority and gender group’s barriers have been broken down in the US. Even people with disabilities have gained the right to vote, however, individuals with mental disabilities have not been enfranchised into the concept of “universal suffrage.”

Capacity is a dense and task-specific term that has evolved when it comes to an understanding of who an eligible voter is in an election. With the expansion of the understanding of capacity in the US through constitutional amendments, voting rights barriers for racial and gender groups have been broken down in the US. Even people with disabilities, which include physical and vision impairment, have gained the right to vote. Once “elections [became] structured in a way that allows people with disabilities to vote in the same way as their fellow citizens, to the greatest extent possible”² the barriers remained, for the most part, keeping

¹ Dissenting opinion in *Bush v. Gore* 531 US 98 (2000) their needs to be systems in place that can clearly tell the intent of voter on the ballots.

² Marcia H Rioux, Marks Lee Bassar Ann, and Melinda Jones. *Critical Perspectives on Human Rights and Disability Law*. (Leiden: Martinus Nijhoff Publishers, 2011.) 371.

individuals with mental disabilities disenfranchised. , however, individuals with mental disabilities have not been enfranchised into the concept of “universal suffrage.”

Individuals with mental disabilities should not have their political participation rights should be taken away because society does not consider individuals with mental disabilities to have the capacity to understand the political process. If there is a desire to vote, then people with mental disabilities should be able to vote and express their political will. That should be the only test; a desire to vote is enough to prove that an individual with mental disabilities has the capacity to vote. The right to vote is an essential political right because it leads individuals to have other rights, including socio-economic and civil rights. Political “[participation] is one device at our disposal for rendering public power more accountable,”³ and by having this fundamental right, individuals have the power to hold the government accountability which is part of a functioning democratic system.

Despite the right to vote not being explicitly written in the US Constitution, “That the only fair characterization the of Court’s recognition of the right to vote as a fundamental equal protection right under the 14th Amendment and of an entire jurisprudence built upon that recognition”⁴ and Justice Black reaffirmed this. Justice Black’s opinion in *Wesberry v. Sanders* established that the right to vote is a fundamental right by writing

³ Theodora T. Ziamou, *Rulemaking, participation, and the limits of public law in the USA and Europe*. (Aldershot, Hants, England: Ashgate/Dartmouth, 2001) 249.

⁴ Richard Pildes, “The Constitutionalization of Democracy I,” *Harvard Law Review*, Vol 118:28/2004. Pildes footnote “82. Even the right to vote itself is not a conventional, substantive, entitlement; no individual has an affirmative right to vote in any particular election. Instead, the right to vote has been understood to be a comparative right; once the vote has been understood to be a comparative right, once the vote is extended to some individuals, any classifications that the government makes (other than age, residency, and ex-felon status) become subject to strict scrutiny except in the context of more specialized elections. For a discussion of the doctrinal structure implementing the right to vote, see Samuel Issachoff, Pamela S. Karlan & Richard H. Pildes, and *The Law of Democracy: Legal structure of the Political Process* 16-140 (rev. 2d ed. 2002).”

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges... this right.”⁵

Therefore, it should not matter the level of capacity of who is allowed to vote because if a person has the desire and can indicate their political opinion on the ballot with or without help, then the political notions should be counted and valued by society.

Electoral laws and restrictions vary based on the country, and most countries do not use terms with clear explanations of which individuals within the mentally disabled community cannot vote based their disability and lack of capacity⁶. Dinesh Bhugra conducted a study, where Bhugra compared voting restrictions among the 193 UN Member States to determine which countries allowed individuals with mental disabilities the right to participate in the political process.⁷ There were seven categories that Bhugra concluded in his study⁸ express the current categories that are used in the US states and US territories electoral systems. There are five distinct categories among the 50 states and US territories comprise of; 11 states having no restriction,⁹ 25 states plus Washington DC have the courts find the capacity level of individuals, ten states plus Puerto Rico have guardianship and conservatorship rules, three states having non-

⁵ *Wesberry v. Sanders* 376 U.S. 1 available at <https://www.law.cornell.edu/supremecourt/text/376/1?qt-none=0#qt-none>

⁶ Dinesh Bhugra, “Mental Illness and the Right to Vote: A Review of Legislation across the World,” (28 Int'l Rev. Psychiatry 395 2016).

⁷ Dinesh Bhugra, “Mental Illness and the Right to Vote: A Review of Legislation across the World,” (28 Int'l Rev. Psychiatry 395 2016).

⁸ Dinesh Bhugra 7 categories are; no restrictions on voting by persons with mental health problems, persons with mental health problems barred from voting, cannot vote if Detention under the law, cannot if Declaration by Court, no information/insufficient information, Not applicable (non-democratic countries, and Unclear.

⁹ Charles Kopel, “Suffrage for people with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy.” (Yale Journal of Health Policy, Law & Ethics, no. IV 2017) Kopel referencing VOTE. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities, Bazelon Ctr. for Mental Health Law et al., 13 (2016), <http://www.bazelon.org/portals/0/voting/voting%20rights%20guide%202016.pdf> [https://perma.cc/3MPQ-SGPG] n. 8 The eleven states with no restrictions are Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont.

comp mentis regulations that lack definitions.¹⁰ Finally, Montana has its method of barring people with mental disabilities from voting.¹¹ The various US system represents the worlds take on how to tackle the right to vote within the mentally disabled community.

While the US has at least 15% disabled Americans,¹² this includes both people with physical and mental disabilities, which is a significant portion of the US population. The US acknowledges individuals with disabilities, but the systems in place among the states keep barring people with mental disabilities from enjoying fundamental rights. A leading disabilities advocate Arlene Kanter, sees international disability advocates are pushing back against the current laws and restrictions that are excluding people with disabilities by advocating for the adoption of the UN of the Convention on the Rights of Persons with Disabilities (UN CRPD, CRPD or the Convention).¹³ Even though Kanter views the CRPD as a step forwards, gaps are still present and looking at “countries even today, people with certain mental disabilities are not even counted within the larger group of people with disabilities.”¹⁴ The lack of recognition around the world leads there to be a lack of understanding of who is a part of the mentally disabled community and what are the levels of capacity that make fundamental right deprived.

¹⁰ Id. n.11 the three states are Mississippi, Nebraska, and Rhode Island. The Rhode Island Constitution and the Mississippi statute both require a specific adjudication of non-compos mentis status, but neither one defines the term. R.I. Const. art. 2, § 1; Miss. Code Ann. § 23-15-11 (2016). Nebraska law defines non compos mentis as "mentally incompetent." Neb. Rev. Stat. § 32-312 (2016). While the Hawaii Constitution also prohibits individuals who are non-compos mentis from voting, Haw. Const. art. 2, § 2, the relevant statute requires a specific finding that the person is "incapacitated to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting," Haw. Rev. Stat. § 11-23(a) (2016).

¹¹ Charles Kopel. "Suffrage for people with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy." (Yale Journal of Health Policy, Law & Ethics, no. IV 2017) n. 12 Mont. Code Ann. § 13-1-111(3) (2015).

¹² Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015.) 27.

¹³ *UN Convention on the Rights of Persons with Disabilities*. (2008) Referred to as the (UN CRPD, CRPD, Convention)

¹⁴ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015.) 27

Political participation used to be only for the privileged and to society members who held a level of capacity affording them a political voice. Over time in the US, the barriers to the poll booths have been removed and franchised out to other groups in society, but the fight remains for individuals with mental disabilities who are still being justified by society as being not capable of making a decision. In actuality, people are being deprived a voice in government, and if the US wants to hold that there is now “universal suffrage” in the states, then the US needs to expand the right to vote to everyone equally before it can continue saying they every voice counts.

The barriers that remain in place today will continue to block rights until the walls in the political sphere are knocked down, people with mental disabilities will not be a franchised group. The current levels of capacity are understood regarding if a person is under some form of guardianship. The results lead franchised members of society to continue to disenfranchise based on guardianship restrictions, which includes many individuals with mental disabilities. Individuals with mental disabilities who have a guardian and those without that are barred are being deprived of rights that are guaranteed not to be infringed upon by the government or anyone else. Once there is a common understanding and recognition then society can work on changing the restrictions to extend the right to include full inclusion to people with mental disabilities. The line has to be drawn whether scholars, advocates, politicians can agree or not, individuals with mental disabilities are asking for the desire for expansion.

Political participation is a fundamental right that needs to start as being open to everyone who is 18 years old in the United States.¹⁵ When people start being excluded from the right to

¹⁵ *United States Constitution* (1789), 26th Amendment Ratified July 1, 1971

vote, they lose their voice and opinions, which could lead individuals to be critical about the function of the government since feeling disconnection and underrepresented start to fester. However, being deprived of a fundamental right that gives you a voice in a society that is either never offered or available, then there is a violation, and it needs to be remedied. Therefore, the time has come to make it known to the mentally disabled community in the US, have had a political right that has been deprived for way too long.

This thesis will look at four factors that contribute to understanding the current legal limits, definitions, and justifications of how people with mental disabilities are disenfranchised. Once members of society, government, and individuals with mental disabilities come to an understanding to open up the political process to all individuals, then universal suffrage can come one more step closer to full inclusion. First, we will look at the US history of disenfranchisement to gain an understanding of why there is disenfranchisement. To answer this why question we have to start by looking at how groups go from being disenfranchised to being a franchise. Also by looking at the concept of guardianship and finally the current justifications to limits enfranchisement to gain an understanding of why disenfranchisement continues.

The second factor will be to look at the question of how by looking from an international perspective with the UN CRPD¹⁶ and looking at US federal and state law and regulations to see how and if an international convention is enough to influence change and enfranchisement. The third factor will look at the question of when, by comparing three US States, California, Maine, and Rhode Island. California has rules concerning guardianship, Maine has become part of the non-restrictive states, and Rhode Island has an undefined non-compos mentis rule. Therefore a

¹⁶ *UN Convention on the Rights of Persons with Disabilities* (2008)

comparative analysis of three systems can further the discussion to determine when enfranchisement can become a reality based on the current government and political climate.

These three factors combined moves us into the final factor which deals with the questions of if, and whether the road ahead is in the positive direction for the US to enfranchise people with mental disabilities, making it possible for the fundamental right to vote to be afforded to this group finally. There are steps to unfold the why, how, when, if, whether, questions when dealing with the expansion of “universal” voting right to people with mental disabilities. By unpacking disenfranchisement of people with mental disabilities within the US and international laws, we can look at the road ahead for changing the laws in the US States that currently restrict people with mental disabilities from voting and participating in the political process. Because everyone has the fundamental right to take part in his or her government and it is a matter of finding the way to open the doors for universal suffrage completely.

Chapter 1 United States History of Disenfranchisement

Being a disenfranchised group in the US has the connotation that the disenfranchised groups are “designed to protect them from society and to protect society from ‘them.’”¹⁷ This chapter will answer the question of why groups are disenfranchised from enjoying the fundamental right to vote, by exploring the history of gradual enfranchisement, the concept of guardianship, and the justification for limiting the franchise to individuals with mental disabilities.

First, what is it about individuals with mental disabilities that from being disenfranchised? Are the definitions and connotations of the meaning of mental disabilities that throws society off? The meaning of mental disability is a complex one, but for this thesis, it will consider mental disability to be an open and ever-changing list based on the short list below. The context of being a person with mental disabilities will include, but not be limited to individuals with; mental/psychological disorders, brain injuries, intellectual/learning disabilities, and being on the Autism/Asperger spectrum. These are the more commonly known mental disabilities that society sees as reasons to keep individuals with mental disabilities as outsiders in communities.

1.1 Gradual Enfranchisement

Being in a minority group in the US has meant having to fight for civil right and civil liberties. Women and African Americans are two groups that make up this traditional case of how minority groups gain recognition, and it shows that this fight continues today from individuals with mental disabilities. Protests, rallies, and court decisions played a part of the enfranchised process. Disenfranchised groups used the judicial process to prove that rights apply

¹⁷ Arlene S. Kanter. *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 12

to everyone. Especially the right to vote because barriers kept being created to keep groups from participating in politics. African American and women were disenfranchised from the right to vote. African Americans gained the right to vote with the ratification of the 15th Amendment, and it was not until the suffragist movement in the 1920's that women were granted the right to vote.¹⁸ However, many barriers were created by the states to keep African Americans from voting.¹⁹ Also, it was not until the Civil Rights Movement that all barriers were knocked down allowing African Americans the right to vote in free and fair elections.

The right to vote today is not entirely franchised out to everyone, as it leaves out people with mental disabilities. Even though in the US looked to have universal suffrage after the Civil Rights Movement, this was not the case, after all, because access to the polls was not accessible to people with disabilities. People with disabilities were seen as the outsiders in society, and because of this burden, people with mental disabilities were deprived of their rights.²⁰ “[Compared] to people without disabilities, people with disabilities experienced significantly lower social and civic participation rates and felt that the primary obstacles were social exclusions and the lack of economic resources.”²¹ After the success of the other disenfranchised groups being enfranchised into society, a push in the late 1970's, the disability community came forward demanding recognition of equality for fundamental rights.

¹⁸ *United States Constitution* (1789) 19th Amendment ratified effective August 18, 1920

¹⁹ Barriers included poll taxes and literacy tests. Poll taxes unconstitutional and literacy tests were not unconstitutional but expressed inequalities. See *Lassiter v. Northampton City Bd. of Elections*, 360 U.S. 45, 50-51 (1959), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) In Stone, Geoffrey F., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. *Constitutional Law*. (3rd ed. New York: Aspen Law & Business, 1996), and *Katzenbach v. Morgan* 384 US 641 (1966)

²⁰ Stanley Herr, “From Wrongs to Rights: International Human Rights and Legal Protections” in Stanley S Herr, Harold Hongju Koh, and Larry O. Gostin. *The Human Rights of Persons with Intellectual Disabilities: Different But Equal*. (Oxford University Press, 2003.)

²¹ Arie Rimmerman, *Social Inclusion of People with Disabilities: National and International Perspectives*. (Cambridge: Cambridge University Press, 2013.) See in preface p. xiv.

A disability expert, Michael Waterstone claims that the fundamental human right principle expresses that “individuals are inherently equal” and by adding the factor of being an individual who is disabled, the lines start to blur, and it becomes complex.²² This misunderstanding of terms is because there is a lack of a precise definition of what disability means. It adds a layers complexities because disabilities encompass physical, mental, servers, short-term, long-term, and even minor. Each level severity and each kind of disability makes the disabled community non-homogenous. However, at the same time homogenous for every individual who falls into the category of being mentally disabled because this group faces disenfranchisement from society. It should not matter whether an individual has a disability or not because every person should have the right have to assert his or her positions in the community.²³ One primary way to assert one’s opinion in the community is to have the fundamental right to vote.

There are three disenfranchised groups left in the US when it comes to who is not allowed to vote; they include children, prisoners/convicted felons, and people with mental disabilities. There are differences between the three groups for why they are disenfranchised. Children will one day grow up to be 18 years old gaining the right, while prisoners/convicted felons and people with mental disabilities have been targeted in Federal Code 42 U.S. Code §1973gg-6 (a)(3)(B) which allows states to disenfranchise voting rights “by reason of criminal conviction or mental incapacity.”²⁴ However, felons lose the right to because they committed a

²² Michael Waterstone,. “Political Participation for People with Disabilities. Part 4 Promoting Inclusion and Participation.” in Rioux, Marcia H., Basser Marks Lee Ann, and Melinda Jones. *Critical Perspectives on Human Rights and Disability Law*. (Leiden: Martinus Nijhoff Publishers, 2011) 373.

²³ Michael Waterstone,. “Political Participation for People with Disabilities. Part 4 Promoting Inclusion and Participation.” in Rioux, Marcia H., Basser Marks Lee Ann, and Melinda Jones. *Critical Perspectives on Human Rights and Disability Law*. (Leiden: Martinus Nijhoff Publishers, 2011) 378.

²⁴ National Voter Registration Act of 1993, 42 U.S. Code § 1973gg–6 (a)(3)(B) (2000)- Requirements with respect to administration of voter registration available at <https://www.law.cornell.edu/uscode/text/42/1973gg-6>

crime and some even get the right while in jail or when they are released depending on what state law in which they were convicted and sentenced.²⁵ While people with mental disabilities are disenfranchised due to being labeled incomplete by a judge or by society without their personal capacity being a factor to determine if an individual does holds a desire or an understanding to participate in the political process.

1.1.1 Individuals Under Guardianship

People in the mentally disabled community experience exclusion through different avenues of law, whether it is through legislation, regulations, or even limits established by the courts. One of the exclusion methods used in most societies is guardianship. According to the Stanley Herr, “In the United States, guardianship is an overused legal institution in danger of collapse. It is a blunt device for managing the property or personal affairs of an allegedly incompetent person.”²⁶ On the account that individuals who are under guardianship or conservatorship are not all placed under guardianship for the same reason.

Considering that individuals can be placed under guardianship for a range of different reason this makes guardianship non- homogenous, but society and governments treat guardianship as a homogenous group. Even though there are distinct levels of guardianship, full, limited, temporary, selective, health care proxy decision-makers, representative payee for income maintenance, supported training for self-advocacy, the list open and each type has particular rules and requirements set forth by a court.²⁷ The common link between the types of

²⁵ Maine and Vermont allow people in jail/prison the right to vote and many other states allow the right to be give back once the sentence and parole has been completely served.

²⁶ Stanley Herr, “Self-Determination, Autonomy, and Alternatives for Guardianship” in Stanley S Herr, Harold Hongju Koh, and Larry O. Gostin. *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 430

²⁷ Linda Barclay, “Cognitive Impairment and the Right to Vote: A Strategic Approach.” (Journal of Applied Philosophy 30, no. 2: Academic Search Complete, EBSCOhost. 2013) pp.146-159. And Stanley Herr, “Self-Determination, Autonomy, and Alternatives for Guardianship” in Stanley S Herr, Harold Hongju Koh, and Larry O.

guardianships is that the lines of capacity become blurry, by reasons of the court systems not having a definition for the meaning of capacity.

Agreeing with Herr “[guardianship] intrudes on fundamental liberties and privacy rights, employs vague criteria, fails to tailor the scope of the guardian’s authority, denies procedural safeguards, and lacks adequate monitoring and review.”²⁸ Since the result is, rights that have nothing to do with the guardianship conditions are deprived from individuals. The right to vote is one of the fundamental rights that gets deprived from many individuals under guardianship. Being under guardianship does not mean all decisions have to or should be made by the appointed guardian.

1.2 Justifications for Limiting the Franchise

The justifications for limiting the franchise of the right to vote to individuals with mental disabilities rely on the continued stereotypes, stigmas, and level of capacity that is being held on by both society and laws. Society created the laws to protect themselves against outsiders in the community including individuals with mental disabilities. Created laws and policy regulations to keep them from participating in the community achieved it. Laws that are restrictive, use out of date terminology without clear definitions for context or scope for the judicial system to work with causes issues when deciding where the line of capacity lies for individuals with mental disabilities.

“The courts have consistently identified the right to vote as a fundamental political right, because as a ‘citizen's link to his laws and government, [it] is protective of all fundamental rights

Gostin. *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) pp.429-452.

²⁸ Stanley Herr, “Self-Determination, Autonomy, and Alternatives for Guardianship” in Stanley S Herr, Harold Hongju Koh, and Larry O. Gostin. *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 430

and privileges.”²⁹ While The Supreme Court might have a strict standard when it comes to enfranchise the right to vote to every adult in the US however, the Court also made it known that some individuals are allowed to be tested or treated differently and this includes individuals in the mentally disabled community.³⁰

According to John Ely, there are constitutional implications for restrictions on what the government can do to stop people from being disenfranchised.³¹ Ely states that

“Carolene Products [focused, in part,] on whether the opportunity to participate [in] the [process] has been unduly constricted. [The farmers of the constitution created a representative democracy in which] the people in their self-interest would choose representatives whose interest intertwined with [theirs]. The Constitution has [proceeded] from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority will not systematically treat others less than it treats [itself]. Malfunctions occurs when [the] ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out. [Unblocking] stoppages in the democratic process is what judicial review ought to preeminently to be about, and denial of the vote seems the quintessential stoppage. [We] cannot trust the ins to decide who stays out, and it is therefore incumbent to the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason [it] had better be a very convincing one.”³²

This implication by Ely shows that the burden needs to be on the government to express why the compelling interest to keep disenfranchised groups from being denied the right to vote.

The court system does not categorize individuals with disabilities within the suspect classification. Heightened scrutiny from the suspect classification is only used in race and gender

²⁹ Steven K. Metcalf, “The Right to Vote of the Mentally Disabled in Oklahoma: A Case Study in Over-inclusive Language and Fundamental Rights,” (25 Tulsa L. J. 171 2013) 178, See Metcalf footnote 35
<http://digitalcommons.law.utulsa.edu/tlr/vol25/iss1/6>

³⁰ Steven K. Metcalf, “The Right to Vote of the Mentally Disabled in Oklahoma: A Case Study in Over-inclusive Language and Fundamental Rights,” (25 Tulsa L. J. 171 2013) 178, See Metcalf footnote 38
<http://digitalcommons.law.utulsa.edu/tlr/vol25/iss1/6>

³¹ J. Ely, *Democracy and Distrust*, 101-103 (1980). In Stone, Geoffrey F., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. *Constitutional Law*. (3rd ed. New York: Aspen Law & Business, 1996.) 851

³² J. Ely, *Democracy and Distrust*, 101-103 (1980). In Stone, Geoffrey F., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. *Constitutional Law*. (3rd ed. New York: Aspen Law & Business, 1996.) 851 and *United States v. Carolene Products Co.* 304 U.S. 144 (1938)

cases. While disability cases are determined based on the rational basis test, making it harder for people with disabilities to seek a discrimination claim per the Supreme Court decision *City of Cleburne v. Cleburne Living Center*.³³ However, according to the Justices in *Reynolds v Sims* case, “any alleged violation of the right of citizens to vote must be carefully and meticulously scrutinized.”³⁴ This Supreme Court case came more than 20 years before the *City of Cleburne* case show that a fundamental right must be held to a high standard. If a case were ever brought to the Supreme Court involving voting rights for people with disabilities the Court could use the rational basis test, or the Court go with the *Reynolds* judgment and making the level of scrutiny higher. The outcome in either way opens or closes the gates for cases that involve unequal treatment and rights violations from individuals with mental disabilities.

In this chapter, gradual enfranchisement, the concept of guardianship, and the justifications for limiting the franchise was broaden to explain why individuals with mental disabilities are excluded from the political process. History serves as an insight into why the US system has not been forthcoming to include anyone who was deemed unfit in the eyes of society. When society and governments created legal barricades like guardianship, they were not challenged, most people were forced to give up all their right despite their being little to no connection between the reason for guardianship and the rights taken away. The states with restrictions show they have fears and are holding onto the past stereotypes that is preserving the compelling state interest of electoral fraud as a justification for limiting and disenfranchise individuals from the mentally disabled community.

³³ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)

³⁴ *Reynolds v Sims*, 377 US 533, 562 (1964)

Chapter 2 United States Constitution and Int'l Human Rights Standards

The next question to answer is how. Looking into how the right to vote has incorporated in US laws and international human rights laws. First, we will discuss the international standard, UN CRPD³⁵ by discussing what is required by ratified countries. Are pushbacks and delays by countries to adhere to expanding voting to people with disabilities per Articles 29 in conjunction with Article 12 of the Convention?³⁶ Second, with the emergence of the CRPD, the question remains open if the US will become ratified party to the Convention. And by looking into how the US has become a signatory party, but not a ratified partner. Together we can gain an understanding of how of barriers to equal access to the polls for individuals with mental disabilities remain in place.

2.1 International Standards-UN CRPD

The CRPD took two decades of advocating and debating in its all-inclusive setting to include voices from individuals within the disabled community, disabilities advocates, and people without disabilities as well. The result created the first international standards exclusively protecting and benefiting people with disabilities.³⁷ Since entering into force in 2008, this Convention has been widely accepted by the international community. As of May of 2016, 164 countries have ratified the Convention, and a total of 89 countries have adopted the Convention and the additional Optional Protocols which shows countries are progressing and extending human rights where there were absent protections and accessibility present.³⁸

³⁵ *UN Convention on the Rights of Persons with Disabilities* (2008)

³⁶ *UN Convention on the Rights of Persons with Disabilities* (2008) Article 12 Guardianship and Article 29 Political Participation

³⁷ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 21

³⁸ 160 signatories to the Convention, 92 signatories to the Optional Protocol, 164 ratifications and accessions to the Convention, 89 ratifications and accessions to the Optional Protocol. "Note: Signatories include countries or regional integration organizations that have signed the Convention and its Optional Protocol, some of which may now also have ratified. The European Union, a regional integration organization, is a State party to the Convention.

The CRPD has turned out to be widely accepted by countries and has been able to make positive changes for people with disabilities. The Convention creates a voice to people with disabilities since “it was not until the adoption of the CRPD that people with disabilities were recognized worldwide as a group worthy of legal protections under international human rights law.”³⁹ The goal of the CRPD is to get rid of any existing blanket restrictions that impede the rights of people with disabilities, and so the CRPD flips the blanket restrictions on the countries to prevent them from violating their agreement.

2.1.1 What does the CRPD require exactly?

The CRPD allows countries from around the world to sign, ratify, and adopt the human rights standards laid out in the Convention and implement these safeguards into their systems. These measures in the CRPD are a minimum baseline for countries to adhere to and overall to create an internal structure to protect and produce equal opportunities for everyone regardless of their disability status. The burden of implementation is, on the country once the domestic government ratifies the Convention.⁴⁰ The CRPD requires obligations on the countries to comply with such as making reports to the Committee on the Rights of Persons with Disabilities on the implementation process and the functioning of the Convention to make sure it is correctly applied and enforced.⁴¹

Articles 12 and 29 of the Convention deal right and possible restrictions on the right to vote for people with any disability. Article 29 holds the right to vote for people with of the CRPD gives the right to political participation by enfranchising all individuals with any form of

The Cook Islands and the State of Palestine, non-member States of the United Nations, are State parties to the Convention.” http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.pdf

³⁹ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 6

⁴⁰ Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*. (Cambridge: Intersentia, 2015.)

⁴¹ *UN Convention on the Rights of Persons with Disabilities* (2008) Article 4 & 5.

disability to have the guarantees of political participation that countries cannot obstruct people with disabilities from expressing. Articles 29 states

That States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia...⁴²

Article 29 is worded in a way that may be interpenetrated in both broad and narrow ways, but it states that people with a disability can vote and stand in an election, which is a big step towards universal suffrage. However, a broad reading of this Article could bring up questions if it includes all people with mental disabilities since there is room for exceptions such as guardianship restrictions. For example, if Article 29 is read in conjunction with Article 12 which deals with guardianship.

Article 12 of the CRPD is about guardianship.⁴³ According to Arlene Kanter, Article 12 was created to be very multifaceted and dense. It has been considered one of the more intensely debated and thought-out articles of the Convention.⁴⁴ There are five parts to Article 12 of the Conventions, but there are not points on the surface that would harm the right to vote. The five

⁴² *UN Convention on the Rights of Persons with Disabilities* (2008), Article 29. The rest of Article 29: “(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free ...expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.”

⁴³ *UN Convention on the Rights of Persons with Disabilities* (2008) Article 12. Article 12 of the CRPD deals with guardianship rules and limitations over the people who are under guardianship.

⁴⁴ Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015.)

points are all about taking what the people with disabilities want and are protected under the law. However, being under guardianship does not automatically mean the individuals has a disability, there are some reasons why people are under the care of a guardian making it a very diverse group and not a homogenous group. Every person needs different rules and regulations, creating an individualized the system of guardianship. Since that is a factor holding some US states from allowing people with mental disabilities from voting it is relevant to know from the CRPD standards how it could handle this type of claim.

In 2010, a claim came forward to the European Court of Human Rights (ECtHR, the Court.) The Court heard *Kiss v. Hungary*, where a Hungarian man was denied from registering from voting because he was under guardianship.⁴⁵ Mr. Kiss was under guardianship for having poor spending habits and having a bit of temper.⁴⁶ The Court's' judgment ended in favor of Mr. Kiss, and he was given back his right to vote.⁴⁷ The reasoning from the ECtHR was that Hungary's guardianship restrictions were affecting a majority of individuals and that Mr. Kiss guardianship did not make him incapable of voting. The Court also pointed out that people with disabilities are a vulnerable group that has a history of always being excluded and disability cases should evaluate using strict scrutiny standards.⁴⁸ *Kiss v. Hungary* shows how European guardianship rules after the ratification of the CRPD still could use more legislative action to prevent individuals under guardianship who have capacity to enjoy their rights. Even though the CRPD provides countries with disabilities rights and guarantees it does not give precise

⁴⁵ *Alajos Kiss v. Hungary*, App. No. 38832/06, ECtHR. (2010)

⁴⁶ *Alajos Kiss v. Hungary*, App. No. 38832/06, ECtHR. (2010)

⁴⁷ *Alajos Kiss v. Hungary*, App. No. 38832/06, ECtHR. (2010)

⁴⁸ *Alajos Kiss v. Hungary*, App. No. 38832/06, ECtHR. (2010)

definitions of what is a person with a mental or physical disability, which leaves room for old habits and interruptions to mix with the new standards.

2.1.2 United States Objections to Ratifying the UN CRPD

The US has this reputation or not being forthcoming when it comes to international treaties that bind and gives authority to international laws over US laws.⁴⁹ Arlene Kanter expresses “[although] today there is a greater balance between State sovereignty and the role of international law, countries retain the right to decide when and how to be bound by international law.”⁵⁰ In most of the cases why the US does not ratify and implement international treaties are because of money and federalism factors. In this case, failure of ratification of the CRPD comes down to the US having the Americans with Disabilities Act (ADA)⁵¹ and adding this international convention is seen as unnecessary and could potentially bring changes to the US domestic laws.

Many US government actors claim the ADA is the “Golden Standard,” and that other countries should look at the ADA and other US laws as the standard to meet.⁵² US governmental actors believe that international measures, such as the CRPD, are not necessary due to the US having the ADA.⁵³ The US in the 1990’s one of three countries to come up with safeguards for persons with disabilities making the US stand out for coming out in supporting rights for persons

⁴⁹ Michael L. Perlin, *International Human Rights and Mental Disability Law: When the Silenced are Heard*. (New York: Oxford University Press, 2012) 24 “The United States in particular [has] become a reluctant participant in the UN-initiated endeavors.”

⁵⁰ Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 1

⁵¹ *Americans with Disability Act* (1990) Updated 2008.

⁵² Convention on the Rights of Persons with Disabilities. U.S. Senate Committee on Foreign Relations, Hearing Thursday, November 21, 2013. <https://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities>

⁵³ Convention on the Rights of Persons with Disabilities. U.S. Senate Committee on Foreign Relations, Hearing Thursday, November 21, 2013. <https://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities>

with disabilities.⁵⁴ It was a good start, but the ADA has its limits and mostly focuses on accessibility and equal opportunities in the employment sector. Also, the ADA does not have any regulations regarding voting rights for people with any form of disability, so the patchwork legislation began to fill in the gaps.⁵⁵

2.2 Right to Vote in the United States

When it comes to the right to vote in the US it is generally been up to the state to decide and enforce their elections code. In the following sub-sections, we will look into the limited federal legislation and the extensive power that is left up to the states to manage.

2.2.1 United State Constitution

In the US Constitution, there is no explicitly written right to votes or universal suffrage.

There is an “Election Clause” in Article 1 Section 4 Clause 1, which states that

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislation thereof; but Congress may at any time make or alter such Regulations, except as to Place of choosing Senators.”⁵⁶

Reading this clause of the Constitution on its face seems to mean that both Congress and State legislatures can regulate the “Time, Place, and Manner.” Which leaves open the question can the federal government interfere with the election rules and regulations within the States? Was this an extra check the Framers added to make sure the States were upholding free and fair elections?

If Congress has the power to change the States restrictions to open the elections to people with mental disabilities then why has there been a lack of congressional action to amend the voting restrictions to people with mental disabilities? According to the US Supreme Court in the

⁵⁴ Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 37

⁵⁵ Michael Waterstone “Political Participation for People with Disabilities. Part 4 Promoting Inclusion and Participation.” in Marcia H Rioux, Marks Lee Ann Bassier, and Melinda Jones. *A Critical Perspectives on Human Rights and Disability Law*. (Leiden: Martinus Nijhoff Publishers, 2011)

⁵⁶ *United States Constitution* (1789) Article 1 Section 4 Clause 1.

Thornton decision, “the Framers understood the Election Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”⁵⁷ Meaning if Congress wants to interfere in the procedural regulations in the States, Congress may do so as long as it is done neutrally and does not go beyond the range of the constitutional powers laid out for Congress.

2.2.2 States Reserved Powers

Each of the States controls and regulates the electoral systems concerning both state and federal elections. In the 10th Amendment of the US Constitution, “[the] powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”⁵⁸ Moreover, as we saw earlier in Article 1 Section 4 Clause 1, reinforces the state’s power to regulate elections at the national level because there is nothing else in the Constitution regarding the right to vote.

The US Supreme Court has upheld the 10th Amendment to protect the States from being controlled federally by congressional legislation in the form of federal statutes and international treaties.⁵⁹ In a recent US Supreme Court 10th Amendment case *Bond v. the United States*, Chief Justice Roberts stated in his opinion reading “the very structure of our Constitution and the Framers’ decision to divide power between the National Government and the States as a means

⁵⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) & at 833-34 reference from Congress.GOV. Annotation of Article 1 of the US Constitution at 131 <https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017-9-2.pdf> Accessed 1/26/2018.

⁵⁸ *United States Constitution* (1789) 10th Amendment ratified effective December 15, 1791.

⁵⁹ US Supreme Court 10th Amendment case *Bond v. United States* 572 US _ (2014) was about the international Chemical Weapons Convention and the Court found Congress cannot impose federal laws on to the States.

of preserving liberty.”⁶⁰ Pointing out that there are limits of what the US Federal Government can do within its jurisdiction to impose regulations on the States.

State governments have their competences guaranteed to them in the Constitution. Some states create laws and legislation that happens to be parallel to the federal government standards, but when it comes to voting regulations there a limited federal standards to follow. There is the Voting Right Act of 1965 and the Federal code mentioned earlier in Chapter 1.⁶¹ Besides the laws that were reinforced and created to make sure voting was accessible to every citizen, “[most] of the voting qualifications are determined at the state level”⁶² and without additional inputs or checks from the federal government. However, after the Presidential Election of 2000, the Supreme Court got involved in *Bush v. Gore*,⁶³ and after a controversial decision, the dissenting Justices suggested that states need to have a uniform system to make voting transparent and fair in the eyes of the public. Here again, the power of elections have been up to the States to regulate of who, how, and when, members of society may vote.⁶⁴

2.2.3 Equality Concerns

People with disabilities always were afterthoughts in society because they were seen as outcasts and burdens to the community. As discussed in chapter 1 activism, determination, and the demand for change during the Civil Rights Movement was the way racial minorities used to break down barriers that were blocking their civil rights and civil liberties. After a long, but successful battle for the minorities, people with disabilities realized it was time for them to speak

⁶⁰ *Bond v United States* 572 US_ (2014). Chief Justice Roberts opinion reading on June 2, 2014.

⁶¹ Voting Rights Act of 1965 & National Voter Registration Act of 1993, 42 U.S. Code § 1973gg-6 (a)(3)(B) (2000)- Requirements with respect to administration of voter registration available at <https://www.law.cornell.edu/uscode/text/42/1973gg-6>

⁶² Charles Kopel, “Suffrage for people with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy.” (Yale Journal of Health Policy, Law & Ethics, no. IV 2017) 211

⁶³ *Bush v. Gore* 531 US 98 (2000)

⁶⁴ During presidential elections are a big deal for when states hold their primary elections.

up about the inequalities. The struggle for equality was aggressive, and changes came rather quickly for people with disabilities. The US government came up with the ADA it was one of the first of its kind, to protect rights of people with disabilities.⁶⁵ The ADA is full of equal opportunities, public services, and obligations of state and federal government to make the US more accessible to people with disabilities. However, the ADA does not guarantee the right to vote for people with disabilities.

In 2002, Congress passed the Help Americans Vote Act (HAVA) expanding more regulations on the States' voting procedures.⁶⁶ HAVA guaranteed accessibility for people with disabilities, by requiring at each polling station to have the proper voting equipment available.⁶⁷ The progression actions have opened doors for people with disabilities, but when it comes to people with mental disabilities more still needs to be done since they are not able to participate in the political process. The progression actions have opened doors for people with disabilities, but when it comes to people with mental disabilities more still needs to be done since some of the states are still following the Federal US Code that allows restriction of voting rights to individuals who are "mental incapacity."⁶⁸

In this chapter the current laws and regulations opened the discussion up to how the right to vote and political participation has come about from an international and US perspective. With the US perspective there lacks an actually right to vote, but the implications that the vote is a fundamental right has been guaranteed thought state reserved powers, federal legislation and from the US Supreme Court. International law recognizes the right to vote, but there are gaps

⁶⁵ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015)

⁶⁶ *Help Americans Vote Act* (2001)

⁶⁷ *Help Americans Vote Act* (2001) Provision 1.2 Accessibility.

⁶⁸ National Voter Registration Act of 1993, 42 U.S. Code § 1973gg-6 (a)(3)(B) (2000)- Requirements with respect to administration of voter registration available at <https://www.law.cornell.edu/uscode/text/42/1973gg-6>

when guardianship is come into plays. Patchwork legislation has made what the varies electoral systems the US states have in are today.

Chapter 3 State Laws

In this chapter California, Maine, and Rhode Island voting regulations will be compared to see where the states are working to expand, clarify, or continue to block voting rights for individuals with mental disabilities. California has guardianship/conservatorship rules that in 2015 have expanded to a capacity assessment, allowing a chance for the right to vote to be afforded to more individuals under guardianship.⁶⁹ Back in 2001, Maine became a non-restrictive state on voting rights following to the *Doe v. Rowe* judgment.⁷⁰ Lastly, in Rhode Island, there is a non-compos mentis provision without a precise definition of how Rhode Island is supposed to interpret its restriction.⁷¹ These three states represent the large majority of electoral requirement systems and problems that are arising across the US to either open or keep the polling stations doors closed to individuals with mental disabilities.

The lack of a line to define mental disabilities and the levels if capacity contributes to the fight to getting commonality among the US voting systems. Lacking a universal definition of what defines the key terms that relate to mental disabilities will keep society and the legislature from accepting and enfranchising the mentally disabled community into society. Hence breaking down the current definitions and views, of what is meant to be an individual with mental

⁶⁹ California Code, Elections Code - ELEC § 2208. “Mentally incompetent persons; disqualification from voting; order; exceptions” “A person is presumed competent to vote regardless of his or her conservatorship status. A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process” available at <http://codes.findlaw.com/ca/elections-code/elec-sect-2208.html>

⁷⁰ *Doe v. Rowe* No. 00-CV-206-B-S (United States District Court, D. Maine. August 09, 2001)

⁷¹ Rhode Island Constitution Article 2, § 1 “Every citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote for all offices to be elected and on all questions submitted to the electors, except that no person who has been lawfully adjudicated to be non compos mentis shall be permitted to vote. No person who is incarcerated in a correctional facility upon a felony conviction shall be permitted to vote until such person is discharged from the facility. Upon discharge, such person's right to vote shall be restored. The general assembly may provide by law for shorter state and local residence requirements to vote for electors for president and vice president of the United States.”

disabilities is necessary because the inconsistencies among the different meanings are blocking the right to vote for a different level of capacity.

Paul Appelbaum recognizes the out-of-date terms to refer to people with mental disabilities as a problem because the terms hold on to the stigmas and prejudices.⁷² Appelbaum also expresses that “[t]o fail to have any standard that requires a person to have a grasp of what the process is all about would degrade the voting process,”⁷³ which means there should not be a test for capacity as a test would be against the electoral system. However, some advocates see the capacity tests as unequal to people without mental disabilities. Therefore, some line has to be drawn to allow people with mental disabilities to vote, while at the same time prevent all potential forms of voter fraud from interfering with the political process.

3.1 California

California represents a number of US states when it comes to having guardianship/conservatorship regulations that allow the disenfranchisement to those who are under guardianship. It is estimated that “more than 30,000 Californians — and an unknown number of others in the U.S. [Have] lost their voting rights under state guardianship laws.”⁷⁴ Recent changes in California’s Election Code has changed the guardianship/conservatorship rules, by allowing those who desire the right have to ask for it. Promoted an individuals system for a judge to determine if the individuals have the capacity. In a way, it is another hurdle and test for individuals with mental disabilities have to jump over to be afforded their fundamental rights.

⁷² Paul S Appelbaum, “Law & Psychiatry: ‘I Vote. I Count.’ Mental Disability and the Right to Vote.” (Psychiatric Services 51, no. 7 June 2000) 849

⁷³ Quote from Paul S Appelbaum, in Pam Belluck, “States Face Decisions on Who Is Mentally Fit to Vote,” (New York Times, June 19, 2007) Accessed 2/16/2018, <https://www.nytimes.com/2007/06/19/us/19vote.html>.

⁷⁴ Pam Fessler, “Disabled And Fighting For The Right To Vote.” NPR. September 04, 2016. <https://www.npr.org/2016/09/04/492430780/disabled-and-fighting-for-the-right-to-vote>. Accessed 11/5/2017

Commentator Charles Kopel argued that people with mental disabilities should not have to be subjected to capacity tests.⁷⁵ This could create an unequal line of competent, especially if the individualized system becomes a comparison among individuals. The US justice system is capable of creating a standard, but this is something that cannot be categorized easily as accommodating the diversity of those in the mental disability community are unique in their way. The courts should not resort to tests and comparisons to make a judgment call for capacity. Because if the individual is coming to court in the first place, they are showing the desire to wanting to be a part of the society and express their political opinions.

If individuals under guardianship have to take a test, then it is only fair that everyone should have to take a test. However, there has always been a “test” potential voters who do not have a guardian. The first question is asked, do you want to vote? Simply yes, no, question to answer. The second question, are you over 18? Again, a simple yes, no response is required. The third question usually asks if you are a convicted felon? A simple yes no, question again. Question 1 prompts individuals to fill out the voter registration forms where they are asked questions 2 and 3. However, the tests during a court hearing to decide if an individual will be giving their right back is determined by different questions. For example, do you know whom the current President is; promoting a name to be given to the court. Another question, can you name your representative in the State Assembly? Again asking individuals to remember names. Expecting anyone to name his or her representatives is stretch in the US. If you walk down the street and ask ten people, who represent them in their State assembly some people will not be able to give you a name but are voters. This test of capacity is modern day literacy test,⁷⁶ which

⁷⁵ Charles Kopel “Suffrage for people with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy.” (Yale Journal of Health Policy, Law & Ethics, no. IV 2017)

⁷⁶ *Katzenbach v. Morgan* 384 US 641 (1966)

shows how unequal and unfair tests are when deciding who is allowed to vote but can be seen constitutional as a state reserve power, but also as a violation of the Supremacy Clause.⁷⁷ There should only be one question asked by the judge, and that is, do you desire to vote and participate in the political process?

Once individuals express to the judge their desire, then there are resources available to help explain how to be a voter in California. California has something unique, in their elections codes, there is a “Voters Bill of Rights”⁷⁸ which help new voters understand their rights as a voter in California. Per point, 1(B) of the California Election Code §2300 the Citizens; Enumerated Rights; Report of Violation; Regulations; Public Notice (Voters Bill of Rights), states

[a] valid registered voter means a United States citizen who is a resident in this state, who is at least 18 years of age and not in prison or on parole for conviction of a felony, and who is registered to vote at his or her current residence address.⁷⁹

There is nothing in California’s Voters Bill of Rights that prohibits any individual with mental disabilities from casting a ballot.

However, if a person were to read the Article 2 §4 of California Constitution, it states, “[the] Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the

⁷⁷ Supremacy Clause of the United States Constitution (Article VI, Clause 2)

⁷⁸ California Election Code §2300 the Citizens; Enumerated Rights; Report of Violation; Regulations; Public Notice, (Voters Bill of Rights) point 1(B). Available at [https://1.next.westlaw.com/Document/N10D31AF0B87E11E7878CEBADA8D4909F/View/FullText.html?originati onContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/N10D31AF0B87E11E7878CEBADA8D4909F/View/FullText.html?originati onContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

⁷⁹ California Election Code §2300 the Citizens; Enumerated Rights; Report of Violation; Regulations; Public Notice, (Voters Bill of Rights) point 1(B). Available at [https://1.next.westlaw.com/Document/N10D31AF0B87E11E7878CEBADA8D4909F/View/FullText.html?originati onContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/N10D31AF0B87E11E7878CEBADA8D4909F/View/FullText.html?originati onContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

conviction of a felony.”⁸⁰ Now, the California Constitution expresses that individual with mental disabilities cannot vote. This part of the Constitution has not been updated since 1976, and the Voters Bill of Rights was added to California law in 2003. This shows that the laws are contradicting each other making it confusing on what the current restrictions are for individuals with mental disabilities, regardless of having a guardian or not.

The Voters Bill of Rights guarantees and protects the right to vote for each eligible California voter. It even includes services that are available to help voters such as having any form of assistance, ask questions, and voters can even watch how the electoral system works before casting a ballot. The whole system can be taught to any person who needs to know how the system works. These guaranteed resources are significant for first-time voters and even for people who want to know more about the process in general. Since the questions on the ballots can be, confusing individuals are allowed to bring in the sample ballot, mailed out to every registered voter.

The sample ballot contains information regarding, the voters voting place along with the time, showing a sample ballot with the questions that will be featured on that election actually ballot. It also includes information about the candidates and ballot questions to help voters make a decision. Since ballot questions can be confusing the sample ballot explains what a yes vote means and what a no vote means, because yes sometimes means no and vice versa. What I am

⁸⁰ “California Constitution ARTICLE II VOTING, INITIATIVE AND REFERENDUM, AND RECALL [SECTION 1 - SEC. 20].” California Legislative Information Accessed 3/16/2018. https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=II.

getting at with the sample ballot is that if a person has no clue about the electoral process, there are resources to provide any assistance.⁸¹

Before 2015, there are conservatorship/guardianship rules that once blocked anyone under the care of a guardian from being allowed to vote in California's elections. Three years ago, the standard changed opening the doors for individuals with mental disabilities to have a chance to prove to a judge that they hold the capacity to vote.⁸²

“A person is presumed competent to vote regardless of his or her conservatorship status. A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during any of the proceedings set forth below, the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.”⁸³

Placing California in a spot between two of the five categories of voting systems in the US because now a judge can focus on a level of capacity during the guardianship hearing.

California's new system could either be creating a chance for people under guardianship to retain a political voice or the new system, could start to draw an unequal capacity line in the sand.

California Election Code has been reshaped, and there is some pushback from the mentally disabled community concerning the capacity tests, but more individuals with disabilities can pursue this option to become enfranchise. More work has to be done for making the process of receiving rights easier in California, and maybe one day California can join Maine and the other non-restrictive states and enfranchise the mentally disabled community.

⁸¹ Due to a busy life or because High Schools explain the importance of voting, but never showing students how to actually vote. Schools tell students that voting is importance but every school district has a civic education requirement or elective available for its students. In California, civic education is a requirement to be able to graduate with a CA HS Diploma.

⁸² California Elections Code - ELEC § 2208. Mentally incompetent persons; disqualification from voting; order; exceptions

⁸³ California Elections Code - ELEC § 2208. Mentally incompetent persons; disqualification from voting; order; exceptions

3.2 Maine

Maine's model seems simple and straightforward now that it has become a non-restrictive state. The current laws ensure every citizen the right to vote if they are registered. Maine was not always an open state when it came to voting right. Maine has gone from a state with guardianship restrictions on voting to a state like California before the 2015 changes, to a state that allows every citizen who is registered to vote in the state of Maine to vote. This includes both disenfranchised groups of people who are jail or convicted of a felon and people with mental disabilities. Despite the attempts to remove the restrictions via two ballot questions before 2001, Maine's constitutional rule to disenfranchise people with mental disabilities remained. After a legal battle arose in 2001, the enfranchisement of people with mental disabilities became a reality based on the state's violations of the 14th Amendments Due Process Clause.

Maine's Constitution before 2001 disenfranchised individuals with mental disabilities who were under guardianship. In the game-changing the case of *Doe v. Rowe* where the court received, a question regarding Maines' voting restrictions placed on individuals who are mentally disabled and under guardianship.⁸⁴ In this case, three women were under guardianship because of their mental disabilities including bipolar disorder, "intermittent explosive disorder, antisocial personality, and mild organic brain syndrome (secondary to encephalitis)."⁸⁵ Each of the women was placed under full guardianship due to their mental disabilities, and because of Maines laws, the women were restricted from voting. These women wanted their fundamental

⁸⁴ *Doe v. Rowe* No. 00-CV-206-B-S (United States District Court, D. Maine. August 09, 2001) Available at https://eaccess.s3.amazonaws.com/media/attachments/resources_mainresource/346/Doe%20v%20Rowe.pdf

⁸⁵ *Doe v. Rowe* No. 00-CV-206-B-S (United States District Court, D. Maine. August 09, 2001) Available at https://eaccess.s3.amazonaws.com/media/attachments/resources_mainresource/346/Doe%20v%20Rowe.pdf

rights back, claiming their mental disabilities do not impact their capacity to participate in the political process.

In Court, the State of Maine had to prove that the restrictions were constitutional and fair comparing Maine Constitution, the US Constitution, the US federal regulations about voting rights and restrictions. The United States District Court in Maine found violations of the 14th Amendment and in turn were depriving rights of people with mentally disabled individuals.⁸⁶ First, the court found a violation of the 14th Amendment's Due Process Clause, due to the lack of an explicit notification process to those under guardianship regarding their loss of rights. Second, the court found a violation of the 14th Amendment because Maine could not prove or stretch their limited and undefined concept of what it means to be an individual with mental disabilities in the state of Maine.

The aftermath of the *Doe v. Rowe* influenced other states to legal pushback for not having updated standards and depriving people of any form disabilities of accessing their fundamental rights. In 2004 *Tennessee v Lane*⁸⁷ the Supreme Court said that Tennessee could have made and provided suitable accommodations instead of violating the fundamental rights of people who were disabled and could not access their polling place.

The 14th Amendment is essential for the courts to use in cases with guardianship blocks because 35 states are the potentials using guardianship combined with the capacity to continue to disenfranchise people with mental disabilities. The 14th Amendments states,

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

⁸⁶ “Developments in the law: The Law of Mental Illness. Part 7 Voting Rights and the Mentally Incapacitated” (Harvard Law Review. VOL 121 NO 4 Feb 2008)

⁸⁷ *Tennessee v. Lane* 541 US 509 (2004)

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸⁸

It is clear that they cannot exclude people from their civil right and liberties without due process of law, which is why many US states have the guardianship restriction because the court is involved and so the Due Process Clause is fulfilled. However, Maine lost their restriction when the government lacked proper notification process and a precise definition of what Maine considers to be an individual with a mental disability.

Despite Maine having to repeal the voting restrictions, the state has set in place additional safeguards to protect the right of mentally disabled community through legislation and policies. For example, the additions of state codes in the Department of Human Services Chapter 5 Regulations Governing Behavioral Support, Modification, and Management for People with Intellectual Disabilities or Autism in Maine. In this chapter §5.06, prevents restrictions on fundamental rights which include “inhumane treatment, or restricting the right to vote, or hold a religious belief”⁸⁹ from being taken away from individuals who have intellectual disabilities or Autism. Another example is 34-BM. R.S. A § 5606 Rights and Basic Protections of a Person with an Intellectual Disability or Autism which states at point 5 “[a] person with an intellectual disability or Autism may not be denied the right to vote.”⁹⁰ These legislative steps show how Maine’s legislature is taking constructive actions towards inclusion for people in the mentally disabled community.

Maine was left in limbo after the Doe v. Rowe decision, and instead of jumping to create more restrictions Maine moved towards inclusion. Therefore, if more states are facing simple

⁸⁸ 14th Amendment

⁸⁹ Sec. 5.06 Prohibited Practices ME ADC 14-197 CH 5 § 06 or 14-197 CMR Ch. 5, § 5.06

⁹⁰ 34-B M.R.S.A. § 5605 Rights and basic protections of a person with an intellectual disability or autism

cases and they see the parallel of what Maine has been able to enfranchise the community in society then maybe other states will follow. Even if the state governments do not want to make a severe jump, then states can follow in the direction of California. However, whatever path states want to do to start to enfranchise individuals from the mentally disabled communities making will start to the full enfranchise, the mentally disabled community has to watch out for states that have timeworn regulations like the ones Rhode Island continues to hold on the books.

3.3 Rhode Island

[Non-Compos Mentis is their unique system that RI defines.]

Rhode Island, one of the three states to have non-compos mentis rules to bar individuals that fall into the category of non-compos mentis. However, the Rhode Island Constitution states the rule without defining what precisely the state recognizes as non-compos mentis. This term is outdated and does not have a specific definition on its face, so the lack of clarification create discrepancies of what the courts can declare an individual to be non-compos mentis. Rhode Island's lack of definition leads there to be a question of is there an unequal line for the meaning of capacity for people in the disability.

In the Rhode Island's Constitution, Article 2 Section 1 states, "that no person who has been lawfully adjudicated to be non-compos mentis shall be permitted to vote."⁹¹ There is no definition of non-compos mentis anywhere, but it states that it has to be adjudicated leaving it up to the courts to pick a definition of non-compos mentis. When it comes to the voter registration form the box that must be initiated with an X that voters pledge that they be "not presently judged 'mentally incompetent' to vote by a court of law." The Rhode Island ACLU uses a similar definition; the ACLU define non-compos mentis rule to mean an individual has been

⁹¹ Rhode Island Constitution Article 2, § 1

“legally declared mentally incapable by a court.”⁹² Mellinkoff’s Dictionary of American Legal Usage defines non-compos mentis as “not having the mastery one’s mind: not of sound mind. A generalized expression, sometimes still used today.”⁹³ Black’s Law Dictionary defines non-compos mentis as “insane” and “incompetent.”⁹⁴ Looking definitions of non-compos mentis show that non-compos mentis is too abstract.

The only part of the non-compos mentis rule in Rhode Island is that consistency is the part left up to the judges to declare a non-compos mentis restriction is rendering an individual's right to vote. Leaving it up the court and judges to evaluate the definitions based on an individualizes system. People with mental disabilities should not be compared to each other because not every mental disability is the same or equal. The judges in California would have to look towards the states with the capacity test; then again how accurate is the capacity.

At the same time, the definition of non-compos mentis is up in the air, the fights for the right continues because of the gaps in understanding leave room for questions and alternative scenarios. One example was back in 2006 there were two institutionalized men found not guilty of murder by reason of insanity, but have been in a hospital for 20 years per their sentence.⁹⁵ However, they were found guilty by reasons of insanity does that also mean they are not allowed to vote? These two men were found to be not guilty by reason of insanity, and additionally not declared non-compos mentis by the court, and so in 2006, they wanted to know what they were

⁹² “VOTING RIGHTS: A Guide for Rhode Island Voters in 2016’ Pamphlet.” (American Civil Liberties Union of Rhode Island. 2016) Accessed 3/02/2018 <http://riaclu.org/know-your-rights/pamphlets/voting-rights-a-guide-for-rhode-island-voters-in-2016/>

⁹³ David Mellinkoff, *Mellinkoff’s Dictionary of American Legal Usage*. (St. Paul, MN: West, 1995) 426

⁹⁴ Henry Campbell Black, and Bryan A. Garner. *Blacks Law Dictionary*. (St. Paul, MN: Thomson-West, 2004 8th ed) 1078

⁹⁵ Pam Belluck, “States Face Decisions on Who Is Mentally Fit to Vote,” (New York Times, June 19, 2007) Accessed 2/16/2018, <https://www.nytimes.com/2007/06/19/us/19vote.html>.

being restricted from voting. Their lawyers argued, “‘non-compos mentis’ is different from ‘not guilty by reason of insanity.’”⁹⁶

While in California it is clear per the new California Election Code that people are pleading not guilty by reason of insanity by be excluded from voting by a judge. Point 4 of the Election Code States,

A person has pleaded not guilty by reason of insanity, has been found to be not guilty pursuant to Section 1026 of the Penal Code, and is deemed to be gravely disabled at the time of judgment as defined in paragraph (2) of subdivision (h) of Section 5008 of the Welfare and Institutions Code.⁹⁷

Rhode Island Election codes were written broadly and needed to be updated because the Courts are using the limited case-law in Rhode Island and the undefined term of non-compos mentis. Of course, Rhode Island can look at adopting and updating according to other states. However, there needs to be a push from the mentally disabled community in Rhode Island and even pressure from non-restrictive states can help Rhode Island transition away from a Latin phrase to a 2018 meaning of being an individual who is not allowed to vote. Moreover, it would also help if Rhode Island added definitions of what their understanding of mentally disabilities contextually.

Rhode Island and the two other states with non-compos mentis rules are far behind regarding updating and expanding the rights compared to states like Maine and California with more defined evolved the system, and more open electoral system. Electoral systems that have disenfranchised groups need to be updated because people in the mentally disabled community are not able to participate in the political process, which does connect to other rights violations.

⁹⁶ Pam Belluck, “States Face Decisions on Who Is Mentally Fit to Vote,” (New York Times, June 19, 2007) Accessed 2/16/2018, <https://www.nytimes.com/2007/06/19/us/19vote.html>.

⁹⁷ California Elections Code - ELEC § 2208. Mentally incompetent persons; disqualification from voting; order; exceptions

Rhode Island, Maine, and California have some terms regarding mental disabilities with definitions and some without, but the definition holds the key to understanding how has the right and who is disenfranchised. “In defining which people with mental disabilities lose their right to vote, most states use terminology that is vague, inconsistent, or outdated, and most do not directly address the capacity to vote.”⁹⁸ While many states have updates, there is terminology that is still undefined terms leaving gaps and uncertainties.⁹⁹ State definitions are broad, and this could be due to not wanting to exclude any groups from within the mentally disabled community.

This is where the Supreme Court could come in, end restrictions and enfranchise the mentally disabled community across the US. Since that the right to vote is acknowledged as a right under every US State constitution and the Supreme Court view the right to vote as a fundamental right there could be interested in taking a case under the right circumstances. For example, an individual with a mental disability relocating from an open, nonrestrictive state where they have been active in the political process but also under guardianship, to a restrictive, closed state due to guardianship restriction, stripping them of their fundamental rights. This causes conflicts between the state laws. Could they continue to vote if they went to court and tried to gain their right through a capacity argument? Would this be a fair process of other individuals in

⁹⁸ Developments in the law: The Law of Mental Illness. Part 7 Voting Rights and the Mentally Incapacitated.” Harvard Law Review. VOL 121 NO 4 (Feb 2008) 1180

⁹⁹ New Jersey who updated 2007 Nevada in 2004 and in Delaware in 2001. Developments in the law: The Law of Mental Illness. Part 7 Voting Rights and the Mentally Incapacitated.” Harvard Law Review. VOL 121 NO 4 (Feb 2008) 1184. Footnotes 21-23; S. Con. Res. 134, 212th Leg., 2d Reg. Sess., at 3 (N.J. 2007) (enacted), available at http://www.njleg.state.nj.us/2Oo6/Bills/SCR/i34_Ii.pdf (amending N.J. CONST, art. II, § 1(6)). The ballot measure passed with almost sixty percent of the vote. See N.J. Office of the Att’y Gen., Ballot Questions Tally for November 2007 Election, at 4 (Dec. 3, 2007), [http://www.nj.gov/oag/elections/2oo7results/o7general-election/o7-official-general-election-tallies\(pub-ques\)-i2.3.o7.pdf](http://www.nj.gov/oag/elections/2oo7results/o7general-election/o7-official-general-election-tallies(pub-ques)-i2.3.o7.pdf) Act of May 8, 2001, ch. 99, 73 Del. Laws 591 (amending DEL. CONST, art. V, § 2). 23 Assemb. J. Res. 3, 2003 Leg., 72nd Sess. (Nev. 2003), 2003 Nev. Stat. 3726 (amending NEV. CONST, art. II, § 1); Nev. Sec’y of State, 2004 Official General Election Results: State Question 7 (Nov. 2, 2004), [http://sos.state.nv.us/elections/results/2oo4General/ElectionSummary](http://sos.state.nv.us/elections/results/2oo4General/ElectionSummary.asp).asp (54.3% of voters approved the amendment)

the state? Because if they were the case, individuals could move to an open state for a few years gain their rights, come back to the closed, and prove they have the capacity to take part in the political process. This is just a hypothetical, and the right applicants would have to be found. It would not be the first time that a case was created to get changes at a federal level to make states comply. The court cases during the Civil Rights era were a vital part of social changes and inclusion to African American and other minority groups.

California, Maine, and Rhode Island represent a significant portion of what is happening with the current US election laws and future changes coming to the election codes. The three states show a form of a guardianship obstacle and definition issues adding to the confusion for enfranchising the people from the mentally disabled community. In this chapter, the question of when was answered by seeing what has made these states change course towards enfranchisement or remain the same disenfranchised state. There has been a voluntary process of change by California, a force but accepted change from Maine, and a stubborn Rhode Island that needs pressure to make changes and move towards inclusion and enfranchisement at some level.

Chapter 4 “The Road Ahead”

“[T]he fact that a person with a disability may need assistance, even a great deal of assistance, does not provide a legal justification for the...denial of the person’s rights under [the] law.”¹⁰⁰

The last question is a matter of if the US can change the rules to extend the right to vote to every individual with mental disabilities. What is the road ahead for state laws, federal laws, and even for international laws, when it comes to allowing individuals who are capable of voting to be allowed at the polls? Since the CRPD entered into force, some countries have not complied entirely, and there are cases pending challenging the inclusion of individuals with mental disabilities.¹⁰¹ While the US keeps deferring the implementation of the CRPD, some states have stated their inclusion efforts by changing the electoral systems and election code.

Currently, it has to start at the start at the state level the states need to continue to update the language in their constitutions and their statutory laws. The Federal Government needs to work for state governments, or the courts need to get involve on if the US want to either continue or discontinue to use the out-of-date Federal Code that allows there to be a level of discrimination against felons and people with mental disabilities. As for the international laws, the CRPD is a good start, but the UN CRPD Committee needs to be more aggressive by not letting the ratified countries restrict the rights guaranteed in the CRPD. Since the CRPD does not set definitions of what it means to be mentally or physically disabled the countries are left with coming up with ways to get around complying.

¹⁰⁰ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015)

¹⁰¹ Current case in Bulgaria man has been disenfranchised per his guardianship conditions. Article 3 Protocol 1 Available at <http://validity.ngo/bulgaria-validity-intervenes-at-european-court-of-human-rights-on-voting-rights-of-people-with-disabilities/>

Even though the CRPD ratification in the US system would hold accountability for the US to do more patchwork legislation to comply with the CRPD, the reality of ratification might be too far-fetched at this point. In the congressional hearing on CRPD, substantial concerns became known with main issues involving proposed the reservations, understandings, and declarations (RUDs)¹⁰² about federalism, the US influences abroad, and keeping the domestic law in the US safe from being changed. Many questions came up about from the US Senators and Secretary of State John Kerry and other witness testifying explained in the CRPD hearing that RUDs are essential to help clarify the US opinions on the CRPD. Professor Curtis Bradley¹⁰³ included that the RUDs need to be worded correctly and individually to make sure the US laws and regulations remain within the US constitutional scopes, but Secretary Kerry also makes it clear the RUDs need to stay within reasonable means.¹⁰⁴

Nevertheless, there are articles within the Convention that the US could help further protect and give American with mental disabilities more civil rights and civil liberties, but could also cross the lines of the US federalism system. Articles 12 and 29 would be a problem in the US because the states regulate these two articles under the reserved powers they hold. And the federal government cannot agree on complying with the standards on behalf of the states. RUDs

¹⁰² RUDs are the reservations, understandings, and declarations countries can make during ratifying a treaty. The US during Congressional deliberation came up with the following RUDs: Reservations (3): Federalism, Non-Regulation of Private Conduct, and Torture, Cruel, Inhumane or Degrading Treatment. Understandings(8): First Amendment, Economic, Social and Cultural Rights, Equal Employment Opportunity, U.S. Military Departments, Definitions(of disabilities), Article 34 Committee, Health Programs and Procedures, and Best Interest of the Child. Declarations (2): Non Self-Executing and U.S. Law Complies. <https://www.congress.gov/112/crpt/erpt6/CRPT-112erpt6.pdf>

¹⁰³ Professor Curtis Bradley: William Van Alstyne Professor Of Law, Duke University School of Law School Durham, NC from the Congressional Hearing

¹⁰⁴ Convention on the Rights of Persons with Disabilities. U.S. Senate Committee on Foreign Relations, Hearing Thursday, November 21, 2013. <https://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities>

will have to be placed on these two article meaning that maybe the CRPD is the best interest for changing the state's regulation on voting rights for people with mental disabilities.

If the US adopted international standards, could this improve and extend more fundamental rights regarding voting rights for persons with mental disabilities? We need to understand and possibly dig deeper into the costs and benefits of ratifying the CRPD. Because the US government is going to make a RUD for every article or even every other article in the Conventions, then it might be a waste of time. It is essential to look at the US standards of human rights regarding the US Constitution and the powers the individual States hold. Once the US standards are laid out on the table, we can see if international standards can help fill any gaps in the US System.

The US has more of a civil rights and equal opportunities approach while the international standards are focused on protecting human rights and human dignity. Both have similar qualities, but there are differences between civil and human rights. The differences bring questions to the US system of handling equal protection under the law and society since the US fails to adopt many of the international conventions on human rights in its entirety. The US government actors are split on this issue of having international laws, one because some see the US standards as being the “golden standard” when it comes to protecting rights and liberties, while other government actors see adding international standards will interfere with the US federalism system. However, international standards emerging are perceived to be more open and more inclusive for people with disabilities and other vulnerable groups.

In a current case in Bulgaria man has been disenfranchised per his guardianship conditions.¹⁰⁵ Bulgaria is a ratified part of the CRPD but is not unique in creating ways to continue to disenfranchise.

“Frequently, states justify disenfranchisement by challenging the “mental” or “cognitive” capacities of persons with disabilities, rather than recognizing their right to receive support to exercise their political rights. Such approaches are fundamentally discriminatory and undermine the democratic participation of persons with disabilities.”¹⁰⁶

This example shows that countries are not complying with the CRPD, which is causing the courts to come in dealing with the disputes. Barbara Méhes, a lawyer from the Validity organization, states that

“International human rights law requires states to protect the rights of people with mental disabilities on an equal basis with others. One essential way of protecting those rights is through ensuring the accessibility of elections and supporting people with disabilities to vote. The European Court now has the opportunity to remind [the] Member States to fulfill their obligations in this regard.”¹⁰⁷

She expresses the importance of international laws and regulations being a binding force, which is something the US sees as a problem based on the US not liking to be bound by international laws. Even if the US ends up ratifying the CRPD, there will be many RUDs to exempt the US to be the hieratical law between the two. Even though the point of CRPD is to help create and fill in the gaps to protect and provide fundamental rights to people with any form of disability the US has issues. So how should these gaps be filled in to allow change and enfranchisement?

¹⁰⁵ “Bulgaria: Validity Intervenes at European Court of Human Rights on Voting Rights of People with Disabilities.” Validity.. <http://validity.ngo/bulgaria-validity-intervenes-at-european-court-of-human-rights-on-voting-rights-of-people-with-disabilities/>. Accessed 3/28/2018

¹⁰⁶ “Bulgaria: Validity Intervenes at European Court of Human Rights on Voting Rights of People with Disabilities.” Validity.. <http://validity.ngo/bulgaria-validity-intervenes-at-european-court-of-human-rights-on-voting-rights-of-people-with-disabilities/>. Accessed 3/28/2018

¹⁰⁷ Barbara Méhes commenting on the pending Bulgarian case. Available at <http://validity.ngo/bulgaria-validity-intervenes-at-european-court-of-human-rights-on-voting-rights-of-people-with-disabilities/>

4.1 Amending State Laws

What should the approach be to amend the laws? Arie Rimmerman¹⁰⁸ and the CRPD Training Guide¹⁰⁹ expand on fundamental concepts for what society should view disability today. Four conventional methods and approaches are helping society and people with disabilities to understand what each side needs to acknowledge their role to gain recognition. The methods available include the medical model, social model, charity approach, and the human rights approach.

Medical model focuses on the medical components to establish limits that are placed on those who have disabilities.¹¹⁰ The social model responds to the shortcomings of the medical model because society was blocking people with disabilities from enjoying their fundamental rights, like housing and equal employment opportunities. The charity approach places a stigma on individuals with disabilities because society sees them as “welfare payments rather than empowered individuals with the right to participate in [the] political and cultural life and their development.”¹¹¹ Human rights approach is to fully and successfully get individuals with disabilities participating in their communities and societies.¹¹² These models are examples of the models being used by countries around the world. Moreover, since the CRPD has been widely adopted in over 160 countries, the social model has been pushed on countries to make the necessary social changes to comply with the process of inclusion for people with disabilities.

¹⁰⁸ Arie Rimmerman, *Social Inclusion of People with Disabilities: National and International Perspectives*. (Cambridge: Cambridge University Press, 2013)

¹⁰⁹ *The Convention on the Rights of Persons with Disabilities Training Guide*. Professional Training Series No. 19, UN, New York, Geneva. (2014)

¹¹⁰ Arie Rimmerman, *Social Inclusion of People with Disabilities: National and International Perspectives*. (Cambridge: Cambridge University Press, 2013)

¹¹¹ *The Convention on the Rights of Persons with Disabilities Training Guide*. Professional Training Series No. 19, UN, New York, Geneva. (2014)

¹¹² *The Convention on the Rights of Persons with Disabilities Training Guide*. Professional Training Series No. 19, UN, New York, Geneva. (2014)

There should be a mix of approaches to ensure the enfranchisement of the mentally disabled community. We need the medical terms, we need the social acknowledgment, we need charities and non-profits for legal support, and we need humans right to show that fundamental rights are being deprived and are causing other rights to interfere. We cannot choose one single approach a mix of all will allow states to amend and protect the civil, political, social, cultural, rights and liberties, the mentally disabled community has faced for way too long.

Conclusion

This discussion of the current disenfranchisement of the mentally disabled community within the context of the US has shown that the restrictions that are blocking enfranchisement come from guardianship, the use of outdated terms, and society and government officials doing everything possible to exclude them. The road ahead from an international perspective with the addition of the UN CRPD seems to be positive making the world more accessible for people with disabilities, despite the lack of compliance that is expressing itself through the annual report to reports the CRPD Committee. As for the US, the path for enfranchisement seems still far way but changes are happening gradually as seen in the Maine and Californian examples. However, it is longstanding and imprecise restrictions in states, like Rhode Island, which preserves disenfranchisement, regardless of the progressive changes that have taken place to enfranchise in other states. Of course, “[nothing] will change overnight... however, that change comes more rapidly with the law behind it,”¹¹³ which is why laws and restrictions need to be re-drawn in a way to enfranchise more individuals with mental disabilities and prevent voting fraud from transpiring.

Currently, there are 11 US states without restriction allowing people with mental disabilities the right to vote. Leaving the rest of the 39 US states have closed and with restrictions in place to keep individuals with mental disabilities from enfranchisement. The reason for this disenfranchisement lies in the fear, stereotypes, and lack of acceptance and understanding by society. As we have acknowledged in this thesis, the disenfranchisement of individuals with mental disabilities started off from a base of stigmas, which produced laws and regulations restricting people with mental disabilities from their fundamental rights. Laws and

¹¹³ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*. (Milton Park, Abingdon, Oxon: Routledge, 2015) 50

regulations could have worked to destroy the fears in society, but instead, it added to the protections for society, while in return people with mental disabilities lost their rights as a sacrifice. This is why it is only fair that the current laws and restrictions on voting rights should be crossed out and new laws, definitions, and regulations created for individuals with mental disabilities to enjoy all fundamental rights.

Voting opens the mentally disabled community to, much more than marking a ballot; it creates a voice that once given cannot be taken away, which might mean that convicted felons should also not be blocked from the right to vote, but that is a different story for a different time. Ultimately, advocates want every adult individual, no matter what, to be enfranchised. In the words of Michael Levitz, “Count US In! Count Everyone In!”¹¹⁴ I agree with Levitz; however, the practicality of this happening will take time, money, and support from society as well as additional pressure from within the mentally disabled community.

Society and government officials are worried about potential voting fraud, however, voting fraud happens all the time, and it does not always come from people under guardianship or those with any form of disability. The use of guardianship has turned lives of many individuals with and without disabilities into “civil death”¹¹⁵ for those who have been placed under the watch and care of a guardian. Individuals lose more than they want and it causes them to be deprived of their civil and political rights because someone else has been given the

¹¹⁴ Mitchell Levitz, “Voices of Self Advocates” in Stanley S.Herr, Harold Hongju Koh, and Larry O. Gostin. *The Human Rights of Persons with Intellectual Disabilities: Different But Equal*. (Oxford University Press, 2003.) 464

¹¹⁵ Arlene S. Kanter, “The Development of Disability Rights Under International Law: From Charity to Human Rights.” (Milton Park, Abingdon, Oxon: Routledge, 2015.) 242. From Kanter’s footnote number 33 in reference to Matthew Brunwasser, “In Eastern Europe, Lives Languish in Mental Facilities,” (N.Y. Times, Jan. 5, 2009); Barbara Weiner & Robert Wettstein, *Legal Issues in Mental Healthcare* (285 (1993).) See also Oliver Lewis, *End Civil Death: A Call to Action on the Right to Legal Capacity in Europe* (November 5, 2013), available at <http://mdac.info/en/news/end-civil-death-call-action-right-legal-capacity-europe> and Michael Perlin, “Striking the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law,” (117 Penn St. L. Rev. 1159, 2013) 242

responsibility to take their personhood. Guardianship laws are not proportional, causing exclusion of rights when the rights should have remained with the individual under guardianship.

In the US, some states with voting restrictions are confused due to the archaic, undefined language and the mixed understandings between US states of what it means to have the capacity as an individual with mental disabilities. “It is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”¹¹⁶ Therefore, the 11 states that have no restrictions for people with mental disabilities have potentially opened the gate, and thus restrictive states could potentially be found violating the right to vote under the 14th Amendment. However, US states are protected and guaranteed under both the 10th Amendment and the Election Clause in the US Constitution, giving states power and control over the election process. As established through US case-law, the right to vote in the US has been interpreted as a fundamental right, and as Justice Black stated if there is disenfranchisement, then states better have a convincing and compelling interest that is strong enough to disfranchise individuals.¹¹⁷

Conflicts with guardianship regulations and outdated terminology cause the judicial system to have mixed viewpoints and mixed approaches as to how to deal with enfranchising the mentally disabled community. If the Court goes with the rational basis, then this would possibly hinder enfranchisement if the burden were insufficient. Alternatively, this could open the door of enfranchisement because courts would be able to classify disabilities as a protective classification and are subject to strict scrutiny under the law. However, getting a case to the court also contributes to the problem since the US justice system is hard to navigate for any individual.

¹¹⁶ *Harper v. VA State Board of Elections* 383 U.S. 663 (1966). In Stone, Geoffrey F., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. *Constitutional Law*. (3rd ed. New York: Aspen Law & Business, 1996). 848.

¹¹⁷ Justice Black in *Wesberry v. Sanders* 376 U.S. 1

Arlene Kanter even claims that “many people with disabilities are also deprived of their right to access the justice system, the political process, not to mention making decisions about everyday aspects of their own lives.”¹¹⁸ The issues lead us back to the way the government system operates and functions and it is because society has set up barriers to combat enfranchisement.

Fundamental rights can be taken away under restrictive circumstances, but for starters, fundamental rights need to be available to all. Once rights are guaranteed for every individual and if rights are taken away, then there should be better and effective processes in place to gain the rights back.

Courts always have the last word, and their judgment could express violations of human rights, or they can continue to find an individual with a mental disability falling below the line of capacity.

If everyone is truly equal before the law, then no one can be blocked from obtaining the fundamental right to vote in a democratic society. The whole point of having and maintaining a functioning democratic society is for the people to express their view on the government process through the form of political participation. Political participation entails having free and fair elections, for all the voices in the community to be heard by the representatives that we the people choose to embody our opinions at all levels of government.

There has to be a line drawn somewhere, even though the terms mental disability and capacity are complex and task-specific. The line might be fuzzy at times but for the sake of the

¹¹⁸ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Milton Park, Abingdon, Oxon: Routledge, 2015.) 242. From Kanter’s footnote number 33 in reference to Matthew Brunwasser, “In Eastern Europe, Lives Languish in Mental Facilities,” (N.Y. Times, Jan. 5, 2009); Barbara Weiner & Robert Wettstein, *Legal Issues in Mental Healthcare* (285 (1993).) See also Oliver Lewis, *End Civil Death: A Call to Action on the Right to Legal Capacity in Europe* (November 5, 2013), available at <http://mdac.info/en/news/end-civil-death-call-action-right-legal-capacity-europe> and Michael Perlin, “Striking the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law,” (117 Penn St. L. Rev. 1159, 2013) 242

enfranchisement to people in the mentally disabled community the line has to be drawn to disqualify any individual who cannot communicate via themselves or through other people. This way only individuals with severe mental disabilities would continue to be disenfranchised.¹¹⁹ The system would have to become individualized, courts and medical professionals would have to get involved, but this new line would lower the current restrictions by allowing more individuals within the mentally disabled community to vote and have a voice in the US.

¹¹⁹ Those who have the mental status of children, people in comas, and people who are declared to be Brain dead, all have to be medically proven in this instance.

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