Creating the Disabled Citizen:
How Massachusetts Disenfranchised People Under Guardianship

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Abstract

Studies of the disability category in American public policy have focused on its use in economic, social, and civil rights policy. This study continues that tradition by reporting on the development of disability-based disenfranchisement in Massachusetts. We examine the establishment of the guardianship exclusion in Massachusetts suffrage law, originally adopted in 1821. We argue that it was first conceived largely as an economic exclusion intended to disenfranchise those who were not competent to manage their financial affairs, an exclusion that was conceptually consistent with the property-owning and taxpaying qualifications of earlier periods. In 1853, when the guardianship exclusion was again discussed in a constitutional convention, the same provision came to be understood as an exclusion based on the moral and intellectual incompetence of individuals who were called "idiots" and "insane" persons. An analysis of the events surrounding this transformation in justification of the disenfranchising provisions suggests a complex interrelationship between disability, dependency, and deviancy in the development of American political thought about the qualifications for participation in electoral politics. The implications of this history for contemporary disability policy, particularly the protection of voting rights for people with cognitive and emotional impairments, is also discussed.

I. Who are "the People"?

One of the central issues in democratic theory and practice is who exactly are "the People." The historical contest over suffrage rights gives testimony to the people's understanding of the importance of voting rights. In the United States, the question of "who votes" historically has been a contentious one because its answer is so basic to the functioning of a representative democracy. The selection of political decision-makers – perhaps the most significant element of this form of self-governance – is understood as the vital connection between individual, group, and national interests and the expression of these interests in the political system. Only through helping select the political decision-makers can the interests of individuals and groups be given voice.

The nation's history is storied with the demands of disenfranchised groups to be included in the American electorate. In most cases, the groups have succeeded. The property-less, immigrants, African-Americans, religious minorities, and women are among the groups that have fought for and won the right to suffrage. These conflicts occurred in the context of larger

economic and social forces and replicate in political terms the historic struggles to achieve equality in all its forms.

In the case of disabled people,[1] the issue of electoral participation has been framed primarily in terms of architectural access for persons with mobility impairments and secret voting for blind individuals.[2] Largely overlooked are the state laws that exclude from the electorate some individuals with cognitive or emotional impairments, usually when these individuals have been adjudicated incompetent or are under guardianship. Today, a large majority of states provide for the disenfranchisement of some individuals with cognitive and emotional impairments – making individuals with disabilities and criminals the two major exceptions to universal adult suffrage.

State constitution, statutes, and/or case law governing voter qualification in forty-four states disenfranchise some individuals with cognitive and emotional impairments.[3] The affected individuals are categorized using a variety of terms including the following: idiot, insane, lunatic, mentally incompetent, mentally incapacitated, unsound mind, not quiet and peaceable, and under guardianship and/or conservatorship. Fourteen states use the terms “idiots,” “insane,” and/or “lunatics” for identification purposes.[4] Thirty-two states identify individuals on the basis of mental incompetency and mental incapacity; and one state, “unsound mind.” Eleven states specifically disenfranchise individuals who have been placed under a guardianship and/or conservatorship. In the last five years, Alaska, Idaho, and North Dakota have repealed either their statutory or constitutional disenfranchising provisions but not the parallel provisions in their respective statutes or constitutions.

Among the six states, Colorado, Indiana, Kansas, Michigan, New Hampshire, and Pennsylvania, that do not specifically disenfranchise some individuals with cognitive or emotional impairments, Kansas and Michigan’s constitutions, contain permissive language enabling their legislatures to enact disenfranchising provisions. The permissive language is not found in Alaska, Idaho, and North Dakota’s respective constitutions. Specifically, Kansas’ legislature could disenfranchise based on mental illness and Michigan based on mental incompetence. Meanwhile, Colorado’s constitution directs the legislature to secure the purity of elections but does not speak to disenfranchising individuals with cognitive and emotional impairments as a means to secure election purity.

Among the states that disenfranchise some individuals with cognitive or emotional impairments, only California, Florida, Hawaii, Oregon, and Wisconsin have constitutional and/or statutory provisions that specifically

address or refer to voting capabilities. However, eleven states have provisions regarding voting rights in their guardianship and/or conservatorship statutes. These provisions address issues such as the following: ability of a guardian/conservator to restrict a ward from voting, notice requirements about the potential loss of voting rights upon the filing of a guardianship and/or conservatorship action, and voting-specific evaluations and/or court findings.

The laws that disenfranchise people with cognitive and mental impairments are a remarkable instance of the use of a disability category in the American political system. They are seldom discussed, but apparently enjoy broad support. Many policy makers and members of the public would probably argue that the laws are necessary to protect the political process against the unreasoned choices that such individuals presumably would make and the undue influence others might exert over these individuals. The ease with which such justifications might be made is evidence of the intransigence of the category in contemporary society. But what is the history of these disenfranchising provisions? When were they adopted, and why? Have they been justified on the same grounds over time?

Historically, the disability category in electoral law has not been subjected to the critical analysis that earlier disenfranchisements of minorities and women or the contemporary exclusion of felons have been subjected. States' efforts to prevent blacks from voting throughout the nation's history have been well-documented and thoroughly discussed. Similarly, the long struggle to secure the right to vote for women has been the subject of many scholars. Scholars have examined the contextual factors associated with the efforts to overcome racial and gender prejudice in electoral qualifications, documented the activities of advocates for expanding suffrage rights, described the registration and voting patterns of the affected groups, and so on. The collection of important works on these subjects has resulted in a rich knowledge base that is useful in illuminating our past and guiding the way into the future.

In contrast to more visible and concerted scholarly-focused efforts on the preceding groups, there has been little attention paid to the disability category in the context of voter qualification laws. In this article, we will attempt to shed some light on the history of the disability distinction. This article will focus on one state – Massachusetts – to permit a more thorough evaluation of the circumstances prevailing when the disenfranchising category was originally adopted and during later changes.

Massachusetts is the proper state to begin this endeavor for several reasons. First, Massachusetts was one of the original thirteen colonies and the home of

political actors whose influence extended beyond its borders. Second, Massachusetts was an innovator in developing the precursors of modern social policy affecting people whose impairments we now call mental illness and intellectual disability. Finally, Massachusetts' history exemplifies many of the social, economic, and political trends that were shaping the future of the entire nation. The combination of these factors renders Massachusetts a natural selection for the beginning of a systemic program of inquiry about the disability category in voter qualification law.

The problem of deciding who should vote is, as we shall see, inextricably tied to conceptions of disability, dependency, and deviancy. These connections are rooted in ideas about who has a stake in society; what interests a state is to protect; the nature of dependent relationships in colonial and early American times; the changing constructions of "disability" and their frequent pairing with notions of moral deficiency and deviancy; and the emergence of a specific "disability policy" and the disability professions.

II. Suffrage Law in Colonial and Early Post-Revolutionary America

During the colonial period, the common practice in the New World was to require property ownership as a basis for voting. The right to vote was essentially "a right to vote as a stockholder in a corporation,"[5] though in Massachusetts and other parts of New England, suffrage was limited to church members and others of good moral character. The colonies resembled businesses more than political subdivisions whose concerns were, at first, primarily commercial. However, as the colonies became more complex and the colonists themselves began to identify themselves as having more than strictly business interests in common, the property requirement became less tenable.[6] As the colonies evolved into political entities, suffrage qualifications defined characteristics that were thought to "determine capacity to take intelligent interest in community affairs."[7] These characteristics included: race, gender, age, religious affiliation, and residence.

Nevertheless, there is no clear distinction to be made in suffrage qualifications between the periods immediately before and after the Revolution. As Kirk Porter notes, "1776 is an appropriate date from which to trace the development of suffrage, not because that date is a landmark of especial importance, but rather simply because 1776 marks the beginning of the United States as an independent country with a history of its own."[8]

Property ownership was adopted and remained the preeminent criterion for suffrage during the colonial period and into the post-Revolutionary period for many reasons. First, the colonists predictably carried forward English practices based on the notion that property ownership was a prerequisite for selfhood.[9] Those holding property were believed to be the "repository of virtues not found in other classes"[10] – men who would have "a common interest in and a permanent attachment to society and the state."[11]

There was also a fear that votes would be bought through direct and indirect influence of the wealthy. Renters would be susceptible to the power of their landlords, and employers subject to the influence of their employers. This thought replicated ideas already common in England. In his Commentaries on Laws of England, Blackstone borrowed Montesquieu's dictim that the "true reason of requiring any qualification with regard to property in voters is to exclude such persons as are in so mean a situation as to be esteemed to have no will of their own."[12]

Finally, the property qualification was consistent with the emphasis on the protection of property *by* government, and the protection of property interests *from* government.[13] Consistent with the perspective that property interests were the basis for representation, the idea that government was supposed to be the shield between a property holder and the threat of confiscation or undue interference with property use underscored the emerging importance of private property interests.

As the colonial period ended and the new nation took shape, suffrage qualifications began to change, though the process was slow. After the Revolution, all thirteen states still had a property qualification, though only five still required real property.[14] The breakdown of the real estate requirement, according to Porter, typically occurred in two steps: "first, the substitution of personalty for real estate, and second, the substitution of taxpaying for property of any kind."[15] The Revolution occurred in the midst of this transition.

The major mark of the Revolutionary period was "the breaking down of religious and moral qualifications."[16] States abandoned these qualifications, but at the same time, began to exclude "foreigners, the free negro, and [women]."[17] The states also established suffrage laws that "began to assume the function of penalizing men for crime and keeping the polls free from corruption."[18]

During this same period, states began to develop disability-based exclusions. Before 1820, only two states (Maine and Vermont) had such exclusions, but more states adopted such measures in subsequent decades. Massachusetts did so in 1821 with its prohibition on voting by persons under guardianship, Virginia disqualified persons of unsound mind in 1830, and Delaware began to prohibit idiots and insane persons in 1831. Between 1840 and 1860, California, Iowa, Louisiana, Maryland, Minnesota, New Jersey, Ohio, Oregon, Rhode Island, and Wisconsin had joined in excluding citizens from voting because of disability. Then, by 1880 fifteen of the thirty-three states then in the Union, or forty-five percent of the states had disenfranchising provisions. By 1880, eleven more states (Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Nebraska, Nevada, South Carolina, Texas, and West Virginia) had adopted constitutional provisions prohibiting voting by some individuals with disabilities. These comprised sixty-eight percent of the states then in the Union. Most of the states adding exclusions between 1860 and 1880 were Southern states which wrote disenfranchising language into their new constitutions following the Civil War.

In this paper, we focus on the Massachusetts experience. In 1821, the suffrage provision of the original 1780 constitution was amended in two significant ways. First, the 1780 property qualification was dropped in favor of a taxpaying qualification; and second, “paupers and persons under guardianship” were excluded from the electorate. This exclusion was justified on a property basis. Paupers (persons who had no means of self-support and thus were dependent on public relief) and persons under guardianship (insane persons, drunkards, and others whose financial affairs were managed by a guardian for the primary purpose of avoiding dependency on public relief) were viewed as unworthy because of their *economic dependency*.

In 1853, when suffrage qualifications were again taken up in a constitutional convention, the discussion regarding this exclusion had been transformed dramatically. Now, delegates referred to the exclusion in terms of “idiocy” and “insanity,” emerging terms being used label people with emotional and cognitive impairments. The justification had been transformed into one of intellectual and moral incompetency due to *disability*, not dependency. True, people with those impairments were often dependent, but by 1853 the disability category had taken on a much more contemporary connotation. By 1853 (though the wording of the constitution did not change), “persons under guardianship” were clearly identified as “idiots” and “insane” persons in the legislators’ minds. *Disability had taken on a political meaning of its own, distinct from dependency, but still very much rooted in it*.

The Massachusetts experience illustrates the common nineteenth-century experience of moving away from basing suffrage exclusions on economic grounds to basing such exclusions on characteristics such as disability, gender, and race. Colonialists and early American policymakers were experimenting with various ways of determining who would select their representatives in democratic institutions. The debates exposed how the standards and biases of the time interacted to exclude first, those without real property, and later, via categories serving in some respects as proxies for the property-holding requirement, many of the same groups excluded under the property-holding requirement.

However, these new exclusions also disclose emerging ideas about the nature of voting (was it an obligation based on protecting the interests represented by the voter, or the right of an individual to participate in representative government?) and the character of immigrants, women, blacks, and, also, dependent people of whom some were disabled. As the democratic institutions of the new nation took shape, so did the standards for being a new democratic citizen. Only those who possessed the requisite moral and intellectual competence (first indicated by property ownership, later by taxpaying, and still later by race, gender, and disability categories) would be allowed to vote. Voting was being transformed from a means of protecting the rights of property-holders to a mechanism for representing the interests of individuals. As this notion took hold, the complementary effort to define and categorize individuals whose interests could be looked out for by others, or who were simply unable to protect their own self-interest because of incompetency, was well under way.

III. The Colonists Sow the Seeds of the Disability Exclusion

Massachusetts began its history as a collection of small settlements of English Puritans. Plymouth and Massachusetts Bay, the first two of these settlements, were established in 1620 and 1630, respectively, as the Puritans fled the English law, and sought the freedom to put into practice their understanding of God's will. The two collections of Puritans differed somewhat in their ideas about English religious traditions. The Plymouth Puritans had broken from the Anglican Church and thus had no government charter, while the Massachusetts Bay settlement had been granted a company charter by King Charles I in 1629. The conditions they encountered upon landing on the shores of New England had the effect of minimizing such differences. The commonality of economic hardship, the similarity of Biblical interpretation, and the belief that the community should be constructed to implement God's law

became more important than any strategic differences in relation to the English crown. By the time they had established their respective settlements, it was evident that “this body of people were to an exceptional degree bound together by the consciousness of their common faith.”[19]

One difference between the two settlements is, however, notable. The Massachusetts Bay colony, established by the Massachusetts Bay Company as a trading company, was governed by stockholders (freemen) who met four times a year to establish laws governing company and colonial affairs and elect company officials (governor and assistants).[20] The 1629 Charter had not specified the freemen’s meeting location; and shortly after the establishment of the colony, the colonists argued for the meetings to be held in New England, thus creating a “political commonwealth,” a development that turned out to be momentous in the history of the republic.[21] The failure to state a meeting place in the original company charter is thought by some to have been not merely an oversight, but a purposeful attempt to use the royal charter as a pretext for establishing the theocracy of the Puritan mind. John Winthrop, the first Governor to hold office under the newly-transferred charter, compared the Massachusetts Bay Colony to other colonies declaring that “[t]hose planters go and come chiefly for matter of profit; but we came to abide here, and to plant the gospel, and people the country, and herein God hath marvellously blessed us.”[22] In commenting on this and other evidence of the Puritans’ intentions, McKinley concludes that “[t]he absence of any stated meeting place for the company is now believed to have been the result of conscious endeavor” to eventually transfer power to the New World.[23]

The Plymouth Puritans, in contrast, established their version of theocracy with “no organic or legal connection with the English government.”[24] The Plymouth Puritans’ journey to the new world was funded by a London-based company formed for this purpose; but in 1626, the Londoners’ shares were bought out by the colonists, producing much the same result as had the Massachusetts Bay colonists’ charter transfer. In both cases, the events transferred power to the colonies, and also equated the company with the geographic entity of the colony itself and its new political rights of self-determination.[25]

A. The Puritan Theocracy

The most important characteristic of the colonies was their religious grounding. In this respect, the significance of the Puritans’ history as English people can be hardly underestimated. Their experiences under English rule had convinced them that the hierarchical, centralized, and universal nature of

the Anglican and Roman Catholic churches was inconsistent with the New Testament model of the church, in which the body of Christ is the church itself. Furthermore, they believed that Church membership should be restricted and admittance should be granted only to those who lived their lives in accordance with Christ's teachings.[26]

The outgrowth of this experience under English rule was a "theology [that] was profoundly political," and a body of religious thought that "was infused with such concepts of power, participation, and autonomy."[27] Thus, the Puritans were as much concerned with political affairs as with religious ones. Their concerns about how the church was to be governed were essentially political, for the church was a predominant force in English life during that period. The issues of privilege, hierarchy, and decision-making as they were related to church doctrine were also related to the community as a whole because of the virtual unity of the religious and the political body. Their objections to the Anglican and Roman Catholic churches centered on the way that power "issued from the central authority down to local congregations," that "authority was made up of ranked church officers (bishops, cardinals, etc.)," and that "everyone in a certain area was either admitted to the church or required to be a member of it."[28]

In the New World, the Puritans reformulated their theoretical criticism of the Anglican and Roman Catholic churches into an "alternative structure of small, autonomous churches in which the membership, not the church officers, had sovereign authority."[29] Membership gave one the right to voice opinion in the conduct of the church's affairs. Further, town and church were virtually the same entity. "From 1631 to 1634 all members of the Massachusetts company were members of the General Court…," or governing body.[30] And, beginning in 1631, all freeman were required to be church members.[31] Their political ideals revolved around their religious ideals; having political freedom meant essentially the right to put into practice these religious principles. Their new world would be a "city upon a hill" with "the eyes of all people" upon them.[32]

A central feature of Puritan life was "the covenant," described by Stephen Patterson as "a contractual arrangement of the members of the church or the members of the society whereby they defined their relationship with one another and with the community as a whole."[33] The men of the community "agreed to subordinate themselves to a civil government which would govern according to God's law."[34] This covenant was not so much a societal creation as it was the only logical way to impose God's natural law, an order instituted "after the Fall of Adam by divine degree in order to restrain what

otherwise would be the anarchic ravages of depravity."[35] The covenant was the inevitable outgrowth of combining the religious and the political order. In the words of John Winthrop, the first governor of Plymouth, the Puritans were required to "seek out a place of cohabitation and consortship, under a due form of government both civil and ecclestical."[36]

Not only did the covenant make the rule of God supreme over the religious and political community, it also subordinated individual interests to the common good. Public needs were more important than the needs and concerns of any single community member. As Governor Winthrop stated, "the care of the public must oversway all private respects…for it is a true rule that particular [individual] estates cannot subsist in the ruin of the public."[37] This subservience of private concerns was not so much a purposeful choice as it was an accepted component of the theological perspective. God's will, and its implementation in public affairs, was the predominant consideration. The private interests of individuals were insignificant by comparison and hardly merited attention.

Consistent with the limited heed paid to private interest were the limitations placed on individual freedom. People might do as they pleased only so long as their actions were congruent with the greater good. Personal opinions and concerns were tolerated if they were expressed in a way that furthered the religious goals of the community. Otherwise, members of the church were expected to suppress their opinions and concerns.

Further, the covenant allowed for inequality based on social and economic status. Governor Winthrop, who was antidemocratic in many of his views, stated, "God Almighty in His most holy and wise providence hath so disposed of the condition of mankind as in all times some must be rich, some poor; some high and eminent in power and dignity, other mean and in subjection."[38] An early pamphlet by Jonathan Edwards spoke of the "beauty of order in society" when "the different members of society have all their appointed office, place, and station, according to their several capacities and talents, and every one keeps his place, and continues in his proper business."[39] William Cooper compared the heavenly order to the political order, saying:

If we look around the Earth, we see it is not case into a Level; it has Mountains and Plains, Hills and Vallies. Even so in the political World, there are the Distinctions of Superiours and Inferious, Rules and Ruled, publick and private Orders of Men: Some sit on the Throne of Majesty, some at the Council Table, and some on the Bench of Justice; and some hold subordinate

Places of Power; while others serve their Generation only in a private Capacity.[40]

Positive law was the mechanism to realize God's purpose, and the purpose of the Puritan leadership was to discern His will in the particular laws by which the community was governed. The function of a legislator, then, was not to discern what was important among his constituents or to exercise independent judgement about how best to represent their interests; these practices would have been foreign. The purpose of governing was to make positive law consistent with God's greater purpose. Thus the lawmaker affirmed the natural law's presence and reflection in the positive law. This reflected the medieval tradition in which a legislature "interchangeably exercised legislative, judicial, and executive powers."[41] A legislator often acted as a judge, taking on such issues as the proper placement of boundaries between towns and the proprietary rights to rivers and streams.[42] Thus, a legislator in the General Court of Massachusetts had to be above the self-interested pursuits of individuals and, instead, represent the common good of all the people.

Puritan thought, then, afforded legitimacy to class distinctions, the use of government as a means to achieve God's ends, and the subservience of individual interests to the common good. These ideas are apparent in the ebb and flow of political thought as Massachusetts participated in the American Revolution and in the decades after, though in somewhat different forms and with fluctuating influence.

B. Suffrage in Colonial Massachusetts

The Puritan's ideas about the formation and governance of a church certainly influenced their practices in forming and governing their towns. Indeed, the town and church were almost indistinguishable in the Puritan mind.[43] However, while these innovations were radical for their time in expressing the democratic aspirations of these religious communities, we must also recognize that Puritan laws governing participation in both town and church consciously excluded many male adults.

Immediately after the establishment of the Plymouth colony, freemen (men with ownership in the company) were permitted to participate in elections, but other men (those not stockholders, called "particulars") were not.[44] After 1626, when the colonists bought out the interests of London shareholders, the stockholder distinction was dropped in favor of inhabitancy.[45] Suffrage rights were then controlled by the granting of inhabitancy.[46] But the conduct of

some inhabitants raised concerns about their moral fitness, and officials began to evaluate more carefully men's characters when deciding whether to admit them to the colony.[47] Additionally, qualifications for freemanship (including application to the general court, a term of probation, and the taking of a freeman's oath) were imposed to ensure that undesirables were not admitted.[48] Finally, religious qualifications were imposed in mid-century to exclude Quakers and their sympathizers.[49]

In the Massachusetts Bay Colony, the charter granted by Charles I provided for the selection of a governor, a deputy-governor, and eighteen assistants by the corporation's freemen.[50] The freemen, who were to meet in general court quarterly, were empowered to admit new freemen; and it was by virtue of this prerogative that the Puritans hoped to enforce political fidelity to their religious views.[51] After company operations were moved to New England in 1629 and the colonists began to realize that transfer of power from England to the New World presented new, unexplored options for self-governance, the question of the settlers' role in colonial governance began to fester and shape subsequent events. Even in the first few years, the Massachusetts Bay colony was facing pressure from settlers who were not members of the church. After all, the number of freemen in 1630 did not exceed fifteen, but more than 100 men requested to be admitted as freemen.[52] Given the virtually unlimited power of the General Court and its officers which had "full and absolute power and authority to correct, punish, pardon, govern, and rule,"[53] it was perhaps natural that those with no voice in the Court's decisions would develop a growing desire to achieve some influence there.

The impetus for democratic reforms was, in part, the oligarchic decisions of the freemen in 1630. At the General Court's first meeting, the freemen relinquished their right to choose the Governor and Deputy Governor, giving this right to the eighteen assistants they would still select.[54] Six months later, the freemen voted to allow decisions to be made by only five of the assistants, and sometimes fewer.[55] The influence of the new Governor, John Winthrop, perhaps explains these actions. Winthrop was, despite his representations of the Puritan church as a democratic institution, profoundly antidemocratic.[56]

Under the Charter of 1691, a new, non-commercial corporation was founded, and the religious qualification abolished.[57] At the same time, though, a universal property requirement was adopted which permitted only those owning freehold land or other property of a certain value to vote.[58] The centrality of this qualification in Puritan thought is indicated by the fact that it persisted until the Revolution. In colonial Massachusetts immediately before

the Revolutionary War, the property requirement stood at “real estate yielding an annual income of forty shillings”[59] or “other property worth forty pounds.”[60] The property requirement serves as evidence that the state of financial self-sufficiency was associated with the ability to manage one’s affairs and to participate in the community’s governance.

Adherence to strict moral codes was also important. The selectmen freely disciplined those whose behavior was disruptive and threatened to impose an aid obligation on the town. This discipline sometimes included being evicted from the corporation, as happened to four male freemen named Barnes, Newland, Howland, and Beare, who were:

convicted by law, and sentanced by the court to bee desfranchised of their freedome of this corporation; the said John Barnes, for his frequent and abominable drunkenes, and William Newland and Henery Howland for theire being abettors and entertainers of Quakers [who were considered to be morally inferior because of their religious views], contrary to the aforesaid order; likewise Richard Beare, of Marshfield, for being a grossly scandalouse pson, debaughed, haueing bine formerly convicted of filty, obseane practises, and for the same by the Court sentanced…he was likewise sentanced to bee disfranchised of his freedome of this corporation.[61]

Being expelled from the corporation meant that one was expelled from the governing body. The moral and political statuses of church members who had violated the behavioral codes of the community were diminished. Furthermore, town selectmen possessed much discretion in enforcing moral and political standards.

Because of the importance of self-sufficiency (as will become more apparent in the next section), the Puritans valued highly the ability to provide for oneself. While the political consequences of being thought of as incapable of managing one’s affairs are not well-documented, Robert Brown[62] relates a story about two candidates in a close race for public office in 1757. Each candidates’ supporters challenged the other’s candidate’s claim to victory, and allegations of corruption and bribery “flew thick and fast.”[63] Among the challenges was a challenge to one voter on the basis of competence. A town selectman defended the voter by saying that the voter “was not ‘compos mentis,’ as accused, but merely had a guardian because he drank too much.”[64] In the House of Representative’s subsequent deliberations to decide the race, Brown reports that all voters were presumed competent. This incident suggests that one competence standard did revolve around the ability to manage one’s business affairs, and also underscores the fact that

guardians were appointed for a variety of reasons, including drunkenness, insanity, and being a sprendthrift.

The political culture of colonial Massachusetts supported the various practices. Colonial ideas about individualism were quite different than contemporary notions. The church and its clergy were significant influences on society, the close-knit nature of families and communities constrained individuality, and convention dictated personal conduct. As Mary Ann Jimenez explains, "[I]ndividual decision making was not strongly valued in many areas of life. Insofar as deference and consensus characterized the political culture, the role of individual political choice was deemphasized."[65] It was important that towns and other geographic areas be represented, and more contemporary notions about representation based on individual and group interests were only beginning to gain credence. Further, the early practice of disenfranchising a man because of drunkenness, associating with Quakers, and immoral behavior[66] underscores the emphasis on moral and intellectual competence which is at the core of early suffrage law.

At the same time, it may be said that the Puritans' experience foreshadows the subsequent demands for the expansion of suffrage rights. As Joshua Miller claims, "The Puritan experiment itself taught the people that they legitimately possessed a share of power."[67] New, more participatory standards for governing were emerging.

C. Disability, Dependency, and Deviancy in Colonial Social and Political Organization

Consistent with their theocratic beliefs and their insular focus on the family was the Puritans' extreme fear of public dependence. Those who became dependent generally did so because of disability (emotional or intellectual), criminal conduct, or family circumstances such as the death of the head of the family. Puritan society had not yet developed distinct categories for labeling dependent people. The labels used to differentiate among and between disability, deviancy, and dependence we now so readily employ were largely unformed. At the same time, the need for such distinctions was beginning to be felt. The colonists realized that not all dependency was created equal; different forms of dependency appeared to call for different solutions.

The threat posed by dependency was felt strongly; as Robert Kelso, sympathetic to the Puritans' motives, argues that "[t]he margin of subsistence was so narrow that starvation stalked through the dreary months of more than one chill winter. There was urgent need, therefore, that the settlers guard their

hearth-fires against the indigent and the incompetent."[68] Pauperism (defined by Kelso as "willful poverty") had "hung like a millstone" around the necks of English taxpayers, and the Puritans vowed to enforce discipline by refusing poor relief to anyone other than those who "could no longer help themselves and had no kin who owed them support."[69] Further, English Poor Law officials began to transport criminals and paupers to the colonies as early as 1617, leading the colonists to enact laws designed to reduce the influx of vagrants into their towns.[70] The settlers viewed these circumstances as quite threatening and took steps to decrease the likelihood that dependency would place so great a burden on a town that the town's very existence would be threatened, though at least one scholar has suggested that this threat may have been exaggerated.[71]

1. Settlement laws and access to public aid

The colonists accomplished their purpose of controlling the provision of public aid in three main ways. First, colonial towns instituted laws of settlement that specified the conditions under which strangers could be admitted to town inhabitancy. Inhabitancy was legal residency, and legal residency was required before public aid was granted. The laws of settlement determined "jurisdictional responsibility for public expenditures made on account of persons in distress."[72] Second, the towns routinely "warned out" strangers, actively seeking to avoid accepting new arrivals into their midst, the hope being that strangers would choose to move on to the next town (where they might again be warned out). Third, the colonies also routinely required that newcomers request permission to reside in a particular town, which was often refused; and towns also required that property owners seek approval from the authorities before selling property to a stranger.[73] The historical record is clear that settlement laws were used to rid the colonies of many kinds of undesirable persons, including those considered mad. For example, John Winthorp's diary includes a note concerning "One Abigal Gifford, widow . . . [who was] found to be somewhat distracted and a very burdensome woman . . . ." who was returned to the ship on which she traveled to the colony.[74]

The development of settlement laws was the primary mechanism for controlling both the religious makeup of the town's residents and the town's responsibility for the dependent – though the concern about dependency seems to have been the more important.[75] Inhabitancy was granted only to those with suitable religious beliefs and who could be shown to belong to a family unit. Every member of the town (with the sole exception of free adult males) was required to belong to a family. Children, servants, and women had to be bound to a master, who in turn was responsible for their support.[76]

The belief that the family bore the responsibility for the care of its members was a central tenet of Puritan social and political organization. Thus, only church members who were members of families were eligible for public aid should they fall on hard times and require such assistance.

The reliance on the family to maintain discipline and independence was of paramount importance in the Puritan communities. Given the small size of the towns, the common ownership of public land, and the self-reliant philosophy, the centrality of family can be seen as entirely consistent with other practices of the earliest Massachusetts settlers.

2. The principle of local responsibility

The colonists employed the settlement law to govern the provision of public aid, thus associating legal inhabitancy with a right of access to public assistance. Chief among the principles of poor relief was that the responsibility for such aid was local. Locating the liability for aid in the town was natural for the colonists. The town was

where he has dwelt and had his home; where he has earned and spent his wages; where his children have gone to school; where the ties of his everyday life bind him: that is his home, and, should he come to distress, that is the group of neighbors who should, as against others more remote, rally about him to set him on his feet.[77]

The significance of the settlement law was its use to attempt to construct strict boundaries between individuals whose inhabitancy made them eligible for aid during times of need and ineligible individuals.

Aid might take many forms and be partial or complete. Some dependent persons were placed with families who agreed to care for them for a time, with the cost to be paid out of town funds.[78] When persons were not totally dependent, they might receive a gift of land for the building of a home, permission to conduct trade on the sidewalk[79] or the abatement of taxpaying obligations.[80] Often dependents were provided health services without charge.[81] In more severe cases, when one was completely without resources, the shape of aid was much less desirable. Dependents, no matter whether men, women, or children, might be auctioned off to the bidder willing to provide them room and board at the lowest cost to the town.[82] When dependents could work in exchange for the aid, they were expected to work. Another formal version of this arrangement was the indenturing of adults and even children.

Decisions about who would be provided help and the kind of assistance to be given were made first by town selectmen on an individual-by-individual basis, and later by overseers.[83] Town selectmen had found that dealing with the poor had become too demanding. By 1691 in Boston, for example, selectmen decided to appoint four officers whose sole responsibility was to oversee the care of dependent persons.[84] The public burden was increasing dramatically. Boston residents spent about 500 pounds on poor relief in 1700; but by 1715, the annual cost had risen to 2000 pounds; and in another twenty years, the cost doubled.[85] By the mid-1700's, Bostonians were facing poor relief costs of 10,000 pounds yearly; and the cost continued to grow, even when the population did not.[86]

Around 1700, public almshouses began to appear. This indoor relief (as opposed to the outdoor relief of placement in private homes, apprenticing dependent children, etc.) became favored as the problem of dependency deepened in the colonies. Almshouses were thought to be more effective in imposing discipline on the poor – a step believed necessary for restoring the productive capacity of dependents. Decisions about poor relief were complicated, though, by the realization that there were many causes of dependency and many different kinds of people who became dependent. Almshouses (and jails, the other major institution for dealing with deviancy) were crowded with widows, children, people whom we would now label as intellectually impaired or mentally ill, criminals, and others who drank too much. They "housed little children with the prostitute, the vagrant, the drunkard, the idiot, and the maniac."[87] Partly because of this unfortunate mixing of the deserving and nondeserving poor, crime and deviancy were spread. Though the almshouse ultimately failed to achieve its lofty objectives, it was a significant departure from earlier practices and signaled the beginning of a new era in policies directed at the dependent poor.

3. The disability construct in Colonial poor law

The colonists began the slow process of constructing an administrative framework used to make determinations about who was or was not worthy of poor relief. The Puritans' concern was hardly new. Beginning around 1500, economic changes had resulted in English society being rocked by increases in vagrancy as feudal relationships dissolved and a nascent market economy developed. The dislocation of economic relations caused social and political instability, and English officials experimented with ways of controlling the labor force. They searched for ways to balance the humanitarian needs of those who were unable to work against the need to force those who could work into the new market economy.

English officials had established the rough outlines for determining worthiness as early as 1388 when they specified the ability to work as the criterion for receipt of aid and invested local officials with the power to determine the work ability of dependent people.[88] In 1531, the English parliament had instructed local officials to find the “aged and impotent poor” and register them for begging within certain geographic boundaries; and in 1536, “lepers and bedridden creatures” were excluded from automatic expulsion from the territories established for begging.[89] Finally, in the Poor Law Amendment Act of 1834, the English demonstrated that “a formerly undifferentiated mass of paupers [could] be understood as comprising several distinct elements”[90] which included “children, the sick, the insane, ‘defectives,’ and the ‘aged and infirm.’”[91] In making these distinctions, the Poor Law established the “concept of need” as the “mirror image of the concept of work.”[92] It unified formerly undifferentiated conditions that were “more unified in the notion of vagrancy than in any concept of common cause.”[93] To put it another way, the English had found a way to identify those who were unable to work through no fault of their own. This distinction, though, was not nearly so benign as might be thought because of the social construction of these disability categories as deviant, dependent, and at least vaguely threatening. The deserving poor – those who were provided with public aid without being required to work for it – were privileged by virtue of not having to work, but at a considerable cost to their social and political status.

The Puritans of the New World, then, had some experience with the problem of controlling the dependent population and surely brought with them the conceptions about the differences and behavior that marked some individuals as unworthy of public aid. Though there is little concrete evidence to indicate just how the Puritans thought about insanity and idiocy, some scholars have concluded that their seventeenth century views probably coincided with the contemporaneous views of the English and Europeans and the Puritans views of subsequent centuries. David Rothman writes, “The colonists who migrated to the New World in the seventeenth and eighteenth centuries brought with them institutions and patterns of thought characteristic of their place of origin.”[94] Similarly, Jimenez assert that while “[e]vidence about conceptions of insanity in seventeenth-century New England is extremely limited . . . [it] suggests a strong continuity with the ideas elaborated in the early eighteenth century.[95]

If we are to make these extrapolations (and supplement them with the limited evidence available), it seems we may conclude fairly that the Puritans in the early and mid-1600’s viewed insanity with some dismissiveness. This is not to

say that insanity was seen as completely benign. Madness was explained by a combination of supernatural actors (e.g., the Devil), personal sin, and human biology;[96] with madness being more likely to visit itself upon those weakened by sinfulness as morality was implicated in the etiological descriptions of insanity. However, insanity apparently was not elevated to the place of a major social problem in the public's mind. Distraction and other forms of madness, such as melancholy and mania, were more likely to be considered oddities of the human condition that generally could be accommodated in the everyday life of the town.

Consistent with the Puritan commitment to instilling responsibility in the family, "harmless lunatics" were generally left to their own devices. Most of the mad were not confined during the colonial period. Those who were distracted (the least serious form of mental illness) or possessed (a more serious variety) were generally cared for by their families. Families provided for them as best they could, and they were generally accepted by friends and neighbors. Insane people were probably a common sight in the colonies and usually tolerated. When their mental conditions improved, they often returned to their former occupations and status.

The few individuals whose situations commanded the attention of public officials were those who were violent or those for whom families, friends, or neighbors could provide. When the insane threatened the social order, officials were forced to take action, typically by paying for their care in private homes or confining them to jails or almshouses. The treatment of the insane did not differ greatly from the treatment of other groups of disabled persons. There were few hospitals and the physically sick were cared for in their homes.

Elected officials had almost complete discretion when making decisions about insane individuals. Because responsibility for public aid was local, local towns were invested with the authority to determine who should be subjected to discipline and be admitted to public aid. A 1678 Massachusetts act ordered town selectmen with "unruly Distracted persons" to take care of all such persons that they do not Damnifie others" and to

take Care and Order the Management of their Estates in the Times of their Distemperature, so as may be for the good of themselves and Families depending on them; and the Charge be Paid out of the estates of all such persons where is may be had, otherwise at the public charge of the town such persons belong unto.[97]

The act also gave judges the right to liquidate the estates of distracted persons to cover the cost of their support and to order an insane person to take work to help pay for the town's assistance.[98]

The 1678 act was significant in establishing local responsibility for insane paupers. It indicates the colonial concern with order and dependence, while at the same time providing some protection for the property of the insane by requiring that their estates be managed by a guardian. This legal framework was furthered by a 1694 act, "An Act for the Relief of Idiots and Distracted persons," that provided:

When any person…by the Providence of God shall fall into distraction and become non compos mentis, and no relations appear that will undertake the care of providing for them, or that stand in so near a degree as that by law they may be compelled thereto, in every such case the Selectmen or Overseers of the Poor of the town or perculiar where such person was born, or is by law an inhabitant, be and hereby are empowered and enjoined to take care, and make necessary effectual provisions for the relief, support and safety of such impotent or distracted persons, at the charge of the town or place whereof he or she of right belongs if the party has no estate of his or her own, the incomes whereof may be sufficient to defray the same.[99]

In discussing the legal principles established by these colonial laws, Jimenez observes that authorities were rarely asked to control someone who had "damnified" another and had "little to do" with the determination of insanity in guardianship cases. A guardianship often simply involved the legal sanctioning of an arrangement already made by private individuals. Justices of the peace, however, were granted the authority to use insane persons' resources to provide for their families, and moreover, could order insane persons to perform "any proper work or service he or she may be capable to be employed in" to help pay for their care.[100] These laws served as a sort of backstop to prevent an undue financial burden on localities whose insane residents were violent or indigent.

By 1736, a law was enacted to specify the procedure to determine mental incompetence. Town selectmen would decide if an individual were insane. The criteria to be used were not dictated, though the ability to conduct one's business affairs was apparently critical, particularly for men. Physicians, who at that time had only a limited interest in insanity, were not involved in the determination process.[101] When the Probate Court appointed a guardian, protection of financial resources was the primary concern. Guardians were expected to manage the estate "frugally and without waste and destruction

and to provide for the insane and his family out of the income of the estate."[102] For the insane poor, then,

[t]heir status as paupers was far more important in determining their fate than was their madness. In general, the financial dependence of the insane was a greater concern than their insane behavior. The guardianship laws were designed primary to ensure that the insane did not become financially dependent; the great care taken to warn out distracted strangers suggests a related fear of long-term financial incapacity.[103]

With respect to idiocy, the colonists' opinions reflected their understanding of insanity and other forms of deviancy and dependency. Indeed, it would not be until the middle decades of the nineteenth century that idiocy took on a meaning distinct from insanity. The common understanding during the colonial period appears to have been that, to the extent that idiocy was thought of as a specific phenomenon at all, it was believed that idiocy was a *form* of insanity (and this formulation came into being only in the latter years of the colonial period). Because colonists' work was primarily agrarian in nature, intellectual impairments did not have the economic significance that intellectual impairments would later acquire when work became more individualized and routinized. And, of course, it was only much later that the development of the intelligence test and the influx of immigrants produced conditions in which idiocy would be politically important.

We see, then, that before the American Revolution, insanity was thought of as another condition of dependence. It was not terribly different than any other circumstance that thrust someone into a state of economic need. Insanity was not thought of as a medical condition, but a moral condition. While insanity could cause disturbing or threatening behavior, it was not subject to professional intervention, but rather was treated as a religious issue. Insanity was largely a private matter and became a public concern only when the mad person was violent or indigent.

Public officials established the public idea of insanity during this time primarily as one of dependence. In this respect, there was a fear of insanity; but to a large degree, this fear had more to do with the fiscal nature of insanity's threat than any other kind of threat. In a time of very limited government and equally limited public resources, madness posed the unpleasant prospect of public obligations – obligations that were unwanted and difficult to meet.

It seems apparent that the Puritan's primary motive was to ensure the survival of their colonies by controlling the degree of financial responsibility placed on

the public treasury. The moral rightness of their motives and quality of their charity have been variously described as understandable, perhaps justifiable, and admirably generous given their limited means. Regardless of their motives, their policies are important in illustrating both the process by which insanity came to be recognized as a public problem and the approaches taken to dealing with it. By framing the public nature of insanity primarily in terms of *dependency*, the Massachusetts colonists created the pairing of madness with a lack of personal and familiar economic wherewithal. The relevance of this construction will become more apparent as we examine subsequent developments in the history of suffrage law and disability policy.

D. The Seeds are Sown

In Puritan Massachusetts, the seeds of the disability exclusion had been sown. The Puritans' understanding of insanity and idiocy – which became public problems when they caused violence or dependency – set of the stage for the eventual adoption of a guardian exclusion in three important ways. First, the use of guardianship status to control and execute the public responsibility for idiocy and insanity established these categories as classes of individual difference that were problematic both politically and economically. The potential of incurring public cost for the care of the insane and idiots was a constant source of concern to the town selectmen in colonial society and helped form their understanding of disability's political aspects.

Second, the colonists began to craft ways of identifying those who were deserving of public aid and those were not. By beginning to construct subcategories of dependence, the Massachusetts Puritans had started to make a crucial distinction in social policy. Criminality (or more accurately, immoral behavior) was different from insanity (and idiocy) and called for different treatment. But the perceived commonalties between deviance, economic dependency, and disability had not yet been entirely separated; and this shared history of association affected the colonists' political decisions. Asylums and prisons contained persons who fit in both categories.

Third, the Puritans (as did many other early colonists) established the importance of financial wherewithal in determining who would take part in governance and who would not. Though their first qualifications centered on membership in the company, by 1691 the colonists had stepped in the direction of property-based qualifications by instituting a province-wide property requirement for men who were not church members. In doing so, they set forth the other important criterion for the eventual adoption of the guardianship exclusion in 1821. By equating insanity and idiocy with

dependence and deviancy (through their use of public guardianship for the violent and dependent insane and the development of disability categories to specify who were the deserving poor), the Puritans had built the foundation on which future lawmakers could exclude individuals under guardianship.

IV. The New State Creates the Disability Exclusion

With the colonial period drawing to a close, Massachusetts was searching for solutions to the problems caused by dependency and had decided on a property suffrage qualification as one element of its governmental system. The Revolution was fast approaching; and after it, the new state experienced a period of rapid change in the economic, social, and political conditions. Though the Puritan domination in state affairs was diminishing, conservative philosophy and traditions continued to influence public affairs.

In the years immediately preceding the American Revolution, Massachusetts was awash in uncertainty. When the Provincial Congress convened in October of 1774, circumstances in Massachusetts were “profoundly unsettled.”[104] It had neither written a constitution nor established a government, Boston was occupied by the British, and there was little hope that the political dispute would be resolved quickly. By 1780, the situation had changed rather dramatically. John Hancock had been elected Governor by the “nearly unanimous vote of his fellow citizens” and a new constitution promised stability and progress.[105]

As the new century arrived and wore on, change proceeded apace. First, economic conditions were taking on a different character. Boston traditionally had been the center of commercial activity, but gradually other towns gained economic importance by virtue of their whaling, farming, or manufacturing interests.[106] Second, political strife was tearing at traditional party structures and allowing for new parties that reflected emerging demands for democratic reforms. Agitation for more egalitarianism in economic and political affairs confronted the traditional conservative tradition of Massachusetts politics. Disputes over national banking policy, representation in the state legislative bodies, suffrage expansion, and slavery were prominent topics of political discussion. In each case, the central concern of dissenters was the expansion of opportunity, equality, and representation for the lower strata of society. Third, immigration produced profound reconfigurations in the state’s social and political make-up. The large number of immigrants arriving in the nineteenth century were not easily accepted or accommodated. Housing was inadequate; many employers exploited immigrant labor; and immigrants’

social and religious habits were criticized by Protestants. Immigration set the stage for serious debates over the moral and intellectual competence of certain groups with implications for suffrage law. Fourth, the state's role in addressing the issues of disability, dependency, and deviancy was transformed during this period. Historically, as we have seen, the state had taken at most a limited role, but it was now beginning to view the issues as social concerns calling for a concerted public response. Policy initiatives included experiments with asylums and schools for persons we would now label as disabled, prison and jails for criminals, and various programs to control and provide for the poor.

In the remainder of this section, we will describe these events and analyze their relationships to the adoption of the guardianship exclusion in Massachusetts voter qualification law. First, we will focus on the coalescence of disability, dependency, and deviance as public concerns; and, second, we address the political dynamics underpinning the 1780, 1820-1821, and 1853 constitutional conventions in which delegates made decisions about suffrage rights. Such a discussion is needed to explain the evolution of justifications for the guardianship exclusion, from the 1820-1821 justification based on the economic dependency of persons under guardianship to the 1853 justification based on the moral and intellectual incompetence of "idiots" and "insane" persons.

A. Disability, Dependency, and Deviance Coalesce as State Concerns

Between the colonial period and 1853, when the disenfranchisement of persons under guardianship began to take on its contemporary disability connotation, Massachusetts changed in many ways. In this relatively short period, not only did conceptions about the nature and etiology of various forms of dependency undergo a profound change, but so did the nature of public policy directed at dependent persons.

During this time, a variety of social ills were occupying the public's attention. Dependency was still viewed as a scourge on society; and the cost of providing for dependents was high, had been rising for decades, and was feared to have no ceiling. A number of circumstances had caused these miseries. The most important circumstances included the following: massive immigration, unavailability of work, wars or other military engagements, illegitimacy, and epidemics.[107] But while many citizens supported the provision of relief on the theory it was their duty to ameliorate conditions for the poor, there was also widespread resentment of the tax burden imposed to

do so. The fact that taxpayers received a separate bill for poor taxes only exacerbated the situation.[108]

The rising costs of providing for the dependent population created pressure on public officials, though private charities played perhaps a more prominent role in poor relief during the early and middle decades of the nineteenth century. In both the public and private sectors, there was recognition that the problem of dependency was best addressed in two ways. First, the poor should be provided for (albeit with a mixture of charity and control). Second, poverty should be prevented to the extent possible. Providing relief for dependent populations was a duty, but many also believed that the root causes of poverty could be ferreted out and destroyed via the promise of nascent scientific methods and professional expertise made possible by the application of science to the human condition.

Initiatives taken in both the public and private sectors for remedying the causes of poverty and the living conditions of the poor took on new characteristics. A core premise of these was that *categorization* of the poor was necessary step to devise effective policies for ridding society of the problems associated with poverty. People who *could* work should be treated differently from those who *could not* work. As we have seen, this central distinction – between the deserving poor who could not work through no fault of their own and the undeserving poor who did not work because they were immoral – was not an American invention but rather the continuation of the earlier English practices encoded in the English Poor Law.[109]

The nineteenth century saw this distinction emerge in public policy in the United States as it had in earlier English law. The former practice of using the almshouse as a one-size-fits-all approach for addressing dependency evolved in the direction of dividing the dependent population into discrete subgoups for different treatment. Criminals were sentenced to confinement in jails, and the unworthy poor were sent to poorhouses where they were forced to labor to reduce the financial burden on the public and to improve their character. Treatment of the deserving poor depended on the perceived cause of poverty. People believed to be insane or idiots were treated differently than widows, orphans, and the physically ill.

This trend was particularly evident in the case of insanity. The end of the eighteenth century brought significant change in the way insanity was viewed. The Puritan preachers who had been so influential in interpreting madness to their faithful began referring to it in ways that, while still containing moral judgement, did not implicate the Devil. Rather, the evolving perception

suggested that personal volition was involved. Surely, God's law was being transgressed, but it was increasingly portrayed as a function of the individual's religious groundings (or lack thereof) and moral choices. The "structure of causality," as Jimenez refers to it,[110] was pulled from its previous roots in the supernatural and re-established in the ability to reason. The effect of the Enlightenment had been to bring the power of individual judgement to the fore in explaining madness. Predictably, a byproduct of this reevaluation was the decline in influence of the ministry in construing the causation of madness and dictating its cure.

One factor in this new conception of insanity was the slow emergence of the health profession as an influence on social and political views about madness. Prominent theorists such as Pinel (a Frenchman), Tuke (an Englishmen), and Benjamin Rush (an American) were exploring ways of explaining insanity and their work was widely read among American intellectuals. Though they took quite different approaches, the collective efforts of these men prompted physicians in Massachusetts and elsewhere to reconsider the causes and treatment of insanity.[111] The illness metaphor of madness complemented the ethical understanding. The illness etiology, though, also had a distinctly individualized aura about it. In the American version of medical explanation (especially as espoused by Benjamin Rush), passion played a central role. Passions must be controlled, since an absence of moderation could lead to problems of all kinds, not the least of which was madness.[112] To be mad was to have failed, to have been unable to exercise control over the more destructive passions, and to have given into "avarice and ambition," as Benjamin Rush phrased it.[113]

By the 1830's, Samuel Woodward, the superintendent of Massachusetts' first public insane asylum, had gained considerable credibility and prominence with the state legislature and others concerned with the growing social problems believed to cause, and be caused by, madness. In Woodward's view, there were two primary reasons people went insane – intemperance and masturbation.[114] Woodward's opinion, based on observations of patients at the Worcester State Lunatic Hospital, was held with firm conviction, though it contrasted with the opinions of other superintendents of the time. The others, with whom Woodward disagreed only in degree of emphasis, held that the poverty-stricken conditions of the poor and other social ills were the leading causes of insanity.[115]

The collection of explanations began to coalesce around the notion of madness as a disease having both voluntary and involuntary dimensions. In this changing causal formulation, the insane both gained and lost. Now,

madness could be controlled; it was no longer a supernatural curse. Insanity could be conquered, especially if the insane person were actively engaged in the curative process. But this new emphasis on rationality and the self led to a reassessment of blame. The mad were, at least in part, responsible for their own illness.

This confluence of forces resulted in a profound change in both the conception of insanity and its place in the public sphere. In the latter decades of the eighteenth century, towns throughout Massachusetts were beginning to confine persons believed to be insane – in stark contrast to the earlier colonial practice of intervening only when an insane person was violent or indigent. Insane people often had been sent to almshouses (also called poorhouses) during the colonial period where they mixed uncomfortably with other dependent or deviant people, but some towns began to separate out insane paupers from the remainder of the pauper population. Significantly, in Salem, insane persons were confined to the almshouse were not all paupers, thus breaking the historical connection between confinement of the insane and their pauper status.[116] In 1796, Massachusetts lawmakers enacted a law permitting town officials to confine in houses of correction and jails the "furiously mad or those who were dangerous to the peace and safety of the good people,"[117] and there is evidence of adherence to this practice in many towns.[118] By the late 1820's, it appears that the majority of various town officials in the state had accepted the apparent necessity of confinement. A 1829 report to the state legislature documents the trend with a total of 289 "lunatic persons" confined by 112 towns in almshouses, private homes, or jails, with 38 of them in chains.[119] Conditions for most insane individuals were barely tolerable and many lived in deplorable conditions.

The change in treatment of the insane suggests that officials had adopted a different attitude toward them as well. Insanity was now not just a departure from God's teachings, but it was a disease brought on by multiple causal and malleable factors. Social conditions could be improved, and individual characters could be improved. Yet, insanity was a threat to the social order that justified involuntary confinement. But the evolving stance toward insanity was also characterized by altruistic motives. Because insanity was taking on the character of illness, many also believed (at least initially) that it could be *cured*. The establishment of the asylum was accompanied by optimism, and it would be decades before that optimism faded in the harsh light of falling "cure" rates.

The belief in curability was evident in the establishment of publicly-funded insane asylums. After considerable agitation on the part of a reform-minded

elite that included members of the clergy, prominent lay people such as Dorothea Dix, and increasingly influential physicians and lawmakers, the Massachusetts legislature appropriated funds to establish the first such asylum at Worcester. The asylym opened in 1833.[120] A central figure in the funding deliberations was Horace Mann, a member of the Massachusetts house, who argued for the hospital's establishment on both humanitarian and fiscal grounds.[121] To Mann's mind, the state should be providing treatment to those insane individuals who could not afford the private McLean Asylum that had opened in 1818. By 1854, another public hospital, located in Taunton, had also been opened, partly to relieve the overcrowding that already had begun to plague the Worchester public facility.

We should not assume, however, that the lawmakers' increasingly consistent stance toward asylums was indicative of any consensus within the medical community. Experts' opinions about the cause and treatment of insanity varied a great deal, and this diversity sometimes frustrated officials. This was especially true in the courts. Guardianship was still relied on to protect the property of insane persons and to save the public treasury from the cost of their support. But courts were reluctant to hear the testimony of physicians, and even guardians were not trusted to speak to the insanity question. Judges remained adamant that such a determination could be made only after they themselves had interviewed the individual.[122]

In the middle decades of the nineteenth century, a social construction of idiocy distinct from insanity was evolving. The distinction of idiocy from insanity or alternatively as a type of insanity prompted Massachusetts legislators to commission a report on idiocy. Samuel Gridley Howe's commissioned report was published in 1848.[123] Howe discussed at some length the difficulty of diagnosing idiocy, but adopted a definition of idiocy as

that condition of a human being in which, from some morbid cause in the bodily organization, the faculties and sentiments remain dormant or undeveloped, so that the person is incapable of self-guidance, and of approaching that degree of knowledge usual with others of his age.[124]

In this report, Howe reported on a survey of 63 towns that had identified 574 idiots. By Howe's estimation, this finding could be extrapolated to conclude that there were between 1200-1500 idiots in the state. These persons were portrayed in sympathetic terms overlayed with a warning about the potential social consequences of failing to address the problem of idiocy, with Howe identifying idiots as

one rank of that fearful host which is ever pressing upon society with its suffering, its miseries, and its crimes, and which society is ever trying to hold off at arm's length, – to keep in quarantine, to shut up in jails and almshouses, or, at least, to treat as a pariah caste; but all in vain.[125]

Moreover, Howe's definition of idiocy inherently contained a public policy proscription. Idiots should be provided education, just as were the other children of Massachusetts:

Massachusetts admits the right of all her citizens to a share in the blessings of education, and she provides it liberally for all her more favored children. If some be blind or deaf, she still continued to furnish them with special instruction at great cost; and will she longer neglect the poor idiot, – the most wretched of all who are born to her, – those who are usually abandoned by their fellows, – who can never, of themselves, step up upon the platform of humanity, – will she leave them to their dreadful fate, to a life of brutishness, without an effort in their behalf?[126]

Soon after the release of Howe's influential report, the Massachusetts legislature appropriated funds for the construction of the state's first idiot school.[127]

Massachusetts' policy toward the insane, idiots, and other persons with disabilities was complemented by major initiatives directed toward the undeserving poor – adults who were not disabled and so were not excused from the societal expectation that they would work. Traditional patterns of outdoor relief (the provision of aid to the poor in their homes or the purchase of custodial care in the homes of other community members) were replaced with a strong emphasis on indoor relief – confinement in almshouses – where a work ethic could be instilled through forced labor and harsh rules governing personal conduct. This strategy was adopted due to a growing concern that the nondisabled poor's moral deficiencies were not being addressed through outdoor relief, and that in fact, the lack of tight controls over their behavior was contributing to their idleness and profligacy.

Such beliefs were particularly prominent in regard to Irish and German immigrants, most of whom arrived in the eastern ports from Baltimore to Boston.[128] Some six million immigrants had landed on U.S. shores between 1800 and 1860, and many Protestants were alarmed by their dissipation and licentiousness. The clash of cultures created considerable backlash to existing poor law, and officials responded by strengthening the emphasis on institutional care or indoor relief.[129] In Massachusetts, the trend toward

indoor relief is readily apparent in the growth of almshouses from 83 in 1824 to 219 in 1860.[130]

When viewed in their entirety, the late eighteenth-century and nineteenth century developments in thought, attitude, and behavior take on the appearance of an increasingly consistent stance toward disability, dependency, and deviancy. Society was changing, and many Massachusetts citizens did not think the change was always for the better. The mutations in economic relations, rising concerns about the health and morality of the immigrant population, and novel concepts about insanity and idiocy formed the backdrop for alterations in policies toward those who were disabled, dependent, or deviant. Around the time Massachusetts adopted its first constitution in 1780, the state began settling into more-or-less permanent perspectives regarding the fundamental questions of how to respond to these problems. Among other things, the citizenry had adopted perspectives on dependency that were consistent with the political decisions it made. It viewed dependency as a deeply troubling phenomenon and struggled with public responses that would both establish and maintain standards for respectable behavior and be consistent with charitable attitudes toward the less fortunate. These events and circumstances allowed the people's representatives to establish the essential qualification for voting at its 1780 constitutional convention – property ownership. Further, the ideas that later would require a disability-based disenfranchisement were beginning to be articulated, partly through the public policies directed at the dependent population. These policies had a distinctive form that foreshadowed the eventual adoption of such a provision.

B. Voter Qualifications before the 1820-1821 Constitutional Convention

As it considered its constitution at the 1780 convention, the people of Massachusetts were confronting many of the essential issues of democratic governance. These issues included the critical question: "Who decides?,"[131] which was addressed in three parts: the apportionment of representatives to the chambers of government, the determination of qualifications for holding office, and the specification of qualifications for suffrage.[132] According to Carl Becker these were central issues and "the question was not merely home rule but who should rule at home."[133]

Convention delegates proposed two chambers for the state's government, a House of Representatives and a Senate. Representatives in the House were to be apportioned to towns in relation to the respective town's population. A town with 150 rateable polls would have one elected representative, a town

with 375 rateable polls would have two, with another representative allocated for each additional 225 rateable polls.[134] Senators would be chosen from Senate districts apportioned on the basis of "the relative tax burden of each district."[135] Officeholders had to meet various propertyholding and residency requirements. For example, Senators had to have resided in Massachusetts for five years and have a 300 pound freehold, or a rateable estate of 600 pounds.[136] Representatives had to own freehold of 100 pounds or rateable estate worth 200 pounds.[137] Candidates for the offices of governor and lieutenant government had to have a freehold of 1000 pounds in the state and to have been state residents for seven years[138]

In its first constitution, the state continued to rely on property ownership as the sign of a man's "deservedness" to vote. To vote, a male must be twenty-one years of age, reside in the town, and own a freehold of three pounds or a rateable estate of sixty pounds, which one scholar has estimated amounted to roughly a 12% increase over the pre-revolutionary requirement.[139]

These first decisions settled, at least for the time being, the most important questions of representation in Massachusetts. Property interests were protected by basing the apportionment of Senate seats on taxes and the property ownership requirement for suffrage and office holding. The interests of towns were represented by apportioning House seats to them. Individuals were assured of representation by the population-based apportionment of House seats. By dispersing representation across the governmental bodies in this way, the constitution attempted to decide also the question of political equality for individuals, as will become apparent as we examine subsequent developments. Voting was still seen primarily as an instrument of the common good by ensuring that the rights of property holders – those stewards of the public interest – were protected. In continuing to exercise some constraint on suffrage, early Massachusetts citizens indicated their belief that voting was not a *right* but a *privilege* (and to some degree, a responsibility), though there is also evidence that public opinion was in transition on this point.

The 1780 constitutional convention might be better understood by considering its political context. During that time period, it was generally known who voted and for whom they voted, since open voting was the norm in Massachusetts during the late eighteenth and early nineteenth centuries.[140] Prominent men actively monitored the polling place, watching the votes cast, and their presence provoked fears of economic reprisals for making the wrong choice. The use of "force" by Federalist party men in exerting such influence is captured in one observer's definition of "force":

I mean an intolerant and oppressive violence toward laborers, tenants, mechanics, debtors, and other dependents: every species of influence, on every description of persons, has been practiced, and with a shameless effrontery. Individuals have been threatened, with a deprivation of employment, and an instant exaction of debt to the last farthing as a Consequence of withholding a federal [a voting for the Federalist candidate] vote, or rather of not giving one.[141]

Political parties also intervened to ensure that their supporters would be allowed to vote. This sometimes meant that otherwise ineligible men cast votes when wealthier sponsors vouched for their property holdings.[142]

These events fueled criticism of election laws and practices. Observers repeated the traditional concerns about the influence of wealthy men in political affairs and often used these occurrences to support their advocacy for property requirements and their proper enforcement. In fact, it must be said that the property qualification for voting was not a controversial topic at the 1780 constitutional convention. It was so agreeable to most that “less than half a dozen towns” objected to the requirement that adult men be property owners before they be allowed to vote.[143]

Between 1780, though, and the next constitutional convention in 1820-1821, political winds had shifted and the core issue of representation in government institutions and electorate had to be reexamined. As examination of the second constitutional convention shows, the discussion of suffrage requirements was framed primarily in terms of the property holding requirements believed necessary to ensure that voters possessed the necessary moral and intellectual competence to participate in guarding the common good.

C. The Justification of the Guardianship Exclusion is Transformed: Comparing the 1820-1821 and 1853 Constitutional Conventions

During discussion of the number of Senators to be elected, Mr. Keyes of Concord proposed to add a pauper exclusion to the qualifications for electors of the Senate.[144] Almost immediately, Mr. Beach of Gloucester moved to add the phrase “and those under guardianship” to delegate Keyes’ language. Thus the two categories were linked and stayed so for the remainder of the deliberations.

In later consideration of electoral qualifications, delegates debated a resolution that would “amend the Constitution as to provide that paupers and

persons under guardianship, shall not be entitled to vote for any officer under the government."[145] It was this phrase that prompted a far-ranging discussion of the qualifications for electors and resulted in the adoption of both the pauper and guardianship exclusions. It is evident from the official report that it was property – not insanity or idiocy – that animated the discussion.

Mr. Quincy, a delegate, correctly noted that the proposal could not be characterized as advocating universal suffrage since women and minors were prohibited from voting, aphorizing that "[t]he real nature of the proposition is the exclusion of pecuniary qualification."[146] Arguing for the imposition of qualifications, Quincy claimed that disenfranchisement is a just principle, saying, "Society may make a part of its members obnoxious to laws, and yet deny them the right of suffrage, without any injustice."[147] He went on to argue that "[i]n its true character, this provision is in favor of the poor and against the pauper; -- that is to say, in favour of those, who have something, but very little; against those, who have nothing at all."[148] To Quincy, allowing the poor man to vote was consistent with democratic philosophy, but a pauper was a different matter. He stated:

The theory of our constitution is, that extreme poverty – that is, pauperism – is inconsistent with independence. It therefore assumes a qualification of a very low amount, which, according to its theory, is the lowest consistent with independence. Undoubtedly, it excludes some, of a different character of mind. But this number is very few; and from the small amount of property required, is, in individual cases, soon compensated.[149]

Mr. Quincy was not alone in believing that some line had to drawn based on economic qualifications. The boundary may have been in dispute, but other delegates also believed it to be necessary. It was not accepted by all the delegates; however, and some objected. Mr. Austin of Boston supported the right of the state to establish electoral qualifications but spoke against this pecuniary qualification for both practical and political reasons. Practically speaking, he said,

The provision could not be carried into effect; it was the cause of perjury and immorality – it did not prevent a fraudulent man from voting, who owed more than he was worth, but debarred an honest poor man who paid his debts – and it tended to throw suspicion of unfairness on the municipal authority.[150]

His other concern was more philosophical. What, he asked,

Will you do with your labouring men? [T]hey have no freehold – no property to the amount of two hundred dollars, but they support their families reputably with their daily earnings. What will you do with your sailors? Men who labor hard, and scatter with inconsiderateness the product of their toil, and who depend on the earnings of the next voyage. What will you do with your young men? who have spent all their money in acquiring an education? Must they buy their right to vote? Must they depend on their friends or parents to purchase it for them? Must they wait till they have turned their intelligence into stock? Shall all these classes of citizens be deprived of the rights of freemen for want of property? Regard for country…did not depend upon property, but upon institutions, laws, habits and associations.[151]

Some supported the property requirement on the grounds that it motivated men to improve their situation in life. Mr. Thorndike of Boston, for example, emphasized the effect of the pecuniary requirement on character development. He "had been long acquainted with the sea-faring men in a neighboring town," he said, and "had witnessed there the effect of the provision in the constitution upon young men under age.…They were generally anxious to amass the little property necessary to give them the right of voting, and this anxiety had a favorable effect on their habits and character."[152] But not every seaman should be permitted to cast his vote; a property requirement should be high enough to ensure their independence. If seamen were of the type who "scatter[ed] a great deal of money and do not save enough," they should not vote. Their votes would be "the votes of their owners, or of intriguing men who wish either to get into office themselves or to get their friends in."[153]

The connection made between property holding, independence, and morality did not set well with every delegate. Mr. Richardson protested that the "[w]ant of property in a free government, should be the last thing to prevent men from voting, unless the possession of property were shown to be necessarily connected with virtue."[154] Nonetheless, the delegates persisted in asking whether some property-related requirement was required to ensure that the electorate could be entrusted with the common good. Mr. Ward of Boston reasoned that:

[I]f to require no pecuniary qualification to make a voter was the most likely mode of securing the best good of the whole, it ought certainly to be adopted. [But o]n the contrary, if to confine the right of voting to persons who are directly interested in the protection of the rights of property, as well as of life and liberty, was the most probable mode of securing the enhancement of just,

equal, and useful laws, there could be no doubt that the people have a right, and that it is their duty so to limit the privilege of suffrage.[155]

Mr. Baldwin argued that the pertinent test ought to be whether a man had paid taxes, not whether he owned property, saying having paid taxes was more consistent with the Bill of Rights' assertion that "all men are born free and equal."[156] This argument held sway, and delegates adopted a taxpaying requirement as the centerpiece of the suffrage provision. The result of the discussion was the following proposed amendment:

Every male citizen, of twenty one years of age and upwards, (excepting paupers and persons under guardianship) who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months, next preceding any election of Governor, Lieutenant Governor, Senators or Representatives, and who shall have paid by himself or his parent, master or guardian, any state or county tax, which shall within two years next preceding such election, have been assessed upon him in any town or district of this Commonwealth; and, also, every citizen who shall be by law exempted from taxation, and who shall be in all other respects qualified as above mentioned, shall have a right to vote in such election of Governor, Lieutenant Governor, Senators and Representatives, and no other person shall be entitled to vote in such elections.[157]

Thus the 1820-1821 constitutional convention delegates adopted as the sine quo non of the voter qualification provision the idea that those casting ballots in elections be taxpayers. In doing so, they rejected the earlier idea that the ownership of real and personal property of a certain amount was required to indicate that one was of the requisite character to vote. But they were clearly struggling with nascent ideas about political representation, the potential for conflict between individual and common interests, and the very nature of early American institutions of governance.

These ideas surfaced in their consideration of appropriate qualifications for the electorate. As these excerpts from the convention record indicate, delegates considered the suffrage requirement in terms common to the day. The primary question underlying the discussion was that of independence: Did a man have the economic wherewithal necessary to exercise independence in political matters, or was he so dependent on other men for his livelihood or welfare that he might bend to their wishes? It was important to these delegates that the state's electorate be free from economic coercion, since only those who were independent could be endowed with the public trust inherent in electoral participation.

There were other concerns as well. Economic status was still associated with moral virtue, at least in some delegates' minds. Some delegates feared that pecuniary motives might hold undue sway in the political process; voters might cast ballots on the basis of their own selfish interests and not the greater good. Also figuring into the deliberations was the motivational effects of conditioning voting rights on economic status: Would not requiring some amount of property spur young men to acquire the necessary assets to gain the right to vote? The implications of the suffrage requirement for the political stability of the state were also weighed in the discussion, with some delegates expressing fear of the repercussions of preventing sailors and soldiers from being electors.

This mix of arguments pro and con is notable for one omission. Nowhere in the record does a delegate refer to those who are under guardianship in terms of "insanity" or "idiocy." Delegates simply did not consider the guardianship provision from the standpoint of these categorical labels. The entire discussion emanated from the theory of the protective value of economic ties to the community, both for the virtue of the individual and the polity as a whole. The philosophy underlying the debate was grounded in the common language of that era. The evolution of democratic thought had begun to move away from the strict application of a property-based qualification, and toward a more universal (though still exclusionary) suffrage. The guardianship exclusion was an outgrowth of this trend; as suffrage expanded, the convention delegates found themselves resisting truly universal adult suffrage. They could not quite bring themselves to abandon completely the idea that some controls should be placed on the granting of voting privileges.

At the 1853 constitutional convention, delegates again considered the qualifications of the Massachusetts electorate. The debates here (both with respect to the guardianship exclusion and another important controversy regarding the basis for Senate seats) begin to take on a very different hue then the debates at the 1820-1821 convention. In the 1853 convention, delegates used the terms "idiots" and "insane" freely. There apparently was a shared understanding of who these individuals were; and these impairment-based categories were often referred to in the same breath as women, children, and foreigners – suggesting that delegates now had a common vocabulary for carrying on the contests that were emerging over precisely who would be included in the electorate. As in other debates over slavery, immigration, women's rights, and so on, these categories were of increasing importance in national quarrels of all sorts.

The lengthy wrangling of the convention includes frequent mention of these various groups. Women, “foreigners,” children, and the “insane” and “idiots” are referred to often, and often at the same time, revealing the conceptions about intellectual and moral competence contained within the terms. In the debate of how Senate seats would be apportioned, delegates argued over the nature of political representation and who had a right to such representation. Mr. Hallett observed that other states excluded from representation “children under twenty-one years, idiots and insane, strangers and women, and in another class of States, slaves also.”[158] The justifications for these exclusions, he says, included the fact that these groups were naturally incapable of participation, and further, there were other legal restrictions on their civil rights:

Children are excluded, from the nature of things….This rule is too universal to be questioned….[but it is] a temporary exclusion only, removed by the necessary age, and imposing no burden or acquisition upon the party before he can become a citizen. Idiots and insane, and those excluded from society by infamous crimes, are manifestly not a part of the acting society, and can make no contract. Women, by the practices of the world and their own modest, dignified, self-resigning consent, are excluded, though represented by their husbands, parents and male relations. It is unnecessary to discuss this, because all our governments were formed without any innovation on this common consent of mankind in all governments. Slaves are excluded, for the same reason that minors and incompetent persons are, because, by the laws of the community in which they are found, they are incapable of making contracts. They are not citizens, and by no qualifications placed within their reach, by law, can become such. It follows, that in any organization of government, in a community where slavery exists, the slaves must of necessity be excluded from political power. They cannot enter into any political relation. They cannot contract. To say they are slaves, is to say that they are not thought of as beings having a political existence.[159]

Not only was the nature of these persons discussed. The Senate allocation dispute also contains numerous references to the representation of these groups’ interests in the political process. Delegates argued over whether and how to provide for their presumably legitimate claims on public attention. Some thought it was possible for members of one group (free white men) to represent other groups. Typical of the delegates’ statements were those made by Mr. Morton:

Can a man come here and not represent women? What is representation but a reflection of the opinions of the district which sends its representative here?

… I do not mean to be extravagant, but it would not be far from the truth to say that we represent the women and nobody else….And not only so, but the children also are represented here…. Are the women and children neglected in legislation? Are the insane and foreigners neglected in legislation? I apprehend not.[160]

Delegates also mused about the ancient political idea of guardianship, which envisions that a political elite would protect the interests of another, nonparticipating group. Mr. Wallace distinguished between the practice of representing another's interests as an elected official and serving as guardianship over those interests and saw representation as a higher-order relationship between an elected official and voter. He argued that for those who could not vote:

[t]he most that can be said of it is, that those persons who are elected, exercise a sort of guardianship over the women and children and foreigners in their districts. They are not their representatives. They assume a guardianship, and perhaps it is their duty to exercise a guardianship over the interests of those who have no voice in the election; but this is not representation.[161]

Mr. Wallace seemed to have had in mind that persons who are under "guardianship" of the political kind were dependent, and further, that dependence was a condition that disqualified one from the possibility of representation. He stated:

I find that mankind, in common with all created intelligences, are divided into two principal classes, the independent and the dependent. My idea of sovereignty, then, is that those rightfully possess it, who stand in the relation of independent in the community, and not that of dependent. I necessarily come to the conclusion, then, that the female portion of the community are in this condition of dependence, that they never can, and never might, rightfully, to be considered as possessing sovereign power.[162]

Delegates also debated the basis for the right to participate in selecting elected representatives. Mr. Bradford questioned who were "the people," and concluded that the phrase referred to:

that portion of the inhabitants of the country who are capable on instituting, maintaining, and altering government. It did not mean the child who was incapable for any act towards instituting, supporting, and maintaining government, but referred to the person, whose mental and physical faculties

were more matured, and who was, by that very qualify of mind, more competent to take a part in the discharge of government matters. It did not mean the female part of the community, who, by their physical organism, habits, and more gentle traits of character, are totally unsuited to take a part in all the departments of government, in war and in peace, and in carrying out the relations of commerce, and engaging in all the complicated and extensive business of life….It was intended to signify the adult male portion of the people, those who were competent to take part in the management of the affairs of the government.[163]

With respect to specific voter qualifications, the primary issue was whether or not to recommend that the taxpaying qualification (originally adopted in 1821 as a replacement for the property requirement) be repealed. The delegates adopted the committee recommendation that this be done.[164] Another less contentious committee recommendation was that "ability to read and write shall be an indispensable requisite for the exercise of the elective franchise."[165] They also considered the specific cases of "idiots," "insane persons," and persons convicted of crime. Indeed, the Committee on the Qualifications of Voters had proposed that the relevant constitutional article read "That no idiot or insane person, or person convicted of a felony, unless pardoned and restored to the right of suffrage, shall be entitled to vote in any election."[166]

Mr. Hathaway reacted to the committee's recommendation by proposing that the words "idiot or insane person" be replaced with the words "pauper, or person under guardianship" – in other words, that the existing 1780 constitutional language be retained – because the "only criterion that I know of, or that any one can know of, by which to settle this question of insanity or idiocy, is the judgment of a tribunal that is fit to pass upon that matter."[167] Hathaway expressed reluctance to rely on selectmen to determine whether an individual was an idiot or insane on election day, preferring instead that this judgement be made by a court in reference to guardianship status:

[T]he Committee had reported that 'insane persons' should not vote, and the reason why I wished to substitute for that 'persons under guardianship' was, because I would not deprive any person of the right to vote upon the judgment of the selectmen, and because they might believe a person to be idiotic or insane who was not so, and the only evidence that they should consider as sufficient to deprive any voter of his rights was a solemn adjudication, by a competent tribunal of law or probate, that the person was so, and that he was incompetent to vote.[168]

Others echoed Mr. Hathaway's concern about the difficulty of deciding who was incompetent to vote. Mr. Aldrich viewed the difficulty in determining competency as an insufficient reason for not excluding such individuals. Determining precisely which criminals had been restored to the right of suffrage was not an easy task, but "it will often be found equally difficult to ascertain who are insane persons, paupers, or idiots; and yet these several classes of persons are usually excluded, the difficulty of determination, not being regarded as a sufficient reason for making no disqualifying provision respecting them."[169]

Yet, though the dividing line between competence and incompetence be narrow and difficult to discern, Mr. Aldrich still viewed the distinction as worth making, saying:

But all this furnishes no reason why an idiot should be allowed the important and responsible right of suffrage. Nor should insane persons be permitted to exercise this right, [simply] because it is not always easy to ascertain whether a person be of a sane or insane mind. Well, Sir, there are those who deem it equally clear, that that man who has shown himself, in a sense, morally insane by the commission of flagrant crimes, ought also to be disenfranchised.[170]

The wedge gradually beingdrawn between pauper status and guardianship status is evident from the comments of Mr. Keyes, who, in commenting on the proposal to substitute "idiot or insane person" for "paupers and persons under guardianship," claimed there was no justification for disenfranchising paupers. He stated,

I do not know why we should not extend the right of voting to all paupers, because they have…more interest in the laws, and in the conduct of the administration of affairs, than any other class of persons, inasmuch as they are the children of the government, and affected in their food and their raiment by the laws which are passed, and therefore, all of people, they have the highest interest in voting.[171]

The change in the way lawmakers justified the guardianship exclusion is notable for many reasons. First and most important among these reasons is the new association of guardianship with insanity and idiocy in 1853. Nowhere in the 1820-1821 convention record do these words appear, but they are used frequently and with facility only three decades later. By mid-century, despite some uncertainty about just how to do so, legislators did not seem to doubt that people could be accurately identified as insane or idiotic. Further, they

used the labels adeptly and characterized the two groups as (at least) intellectually incompetent and (perhaps) morally incompetent as well. The reinterpretation of the guardianship exclusion – from one based on economic status to one based on cognitive and emotional impairment – was accomplished quickly and completely.

The terms used to identify who would be affected by the guardianship exclusion had been transformed. The transformation occurred within the context of greater political controversies about representation and participation. By 1853, the quarrel about essential voter qualifications was framed in terms of individual characteristics of gender, race, disability, immigrant status, and so on – not the previous battleground of property, though it can hardly be said that economic status no longer mattered. Indeed, it may be that these categorical distinctions simply replaced the earlier economic ones and served as proxies for similar, earlier-held prejudices.

In weighing groups' political representation as well as their individual characteristics, legislators seem to have been reflecting the growing concern of the era about the relative weight of property interests versus other interests that would be the focus of the political process. Discussing the topic in these terms also suggests that attitudes toward the nature of voting itself were in flux. Voting was not only the means for ensuring the stability and quality of the republic; but, it was, also, a method for individuals to secure the consideration of issues important to them. This perspective on the purpose of electoral participation consciously allowed for the notion that the public good consisted of more than property interests. Proponents of expanded suffrage knew that some voters would challenge the fundamental value placed on property rights and argued that these interests were just as legitimate.

D. Explaining the New Justification

In 1820-1821, conventional delegates employed the phrase "paupers and persons under guardianship" and, thereby, indicated the associations they drew between the economic dependency of those who were receiving public aid (paupers) and those with private resources who were potentially likely to become dependent on public aid (persons under guardianship). In disenfranchising these groups, legislators believed they were doing what was necessary to protect and further the democratic nature of their young state. The changing nature of the *rationale* for this exclusion, however, suggests that the legislators of 1853 had quite different notions of *why* such "persons under guardianship" should not be permitted to vote. How are we to explain the

dramatic change in legislators' rationales for the guardianship exclusion between 1820-1821 and 1853?

The shifting tapestry of social, economic, and political circumstances during that brief three-decade period contain several clues for the changing justification. One powerful causal thread is the broad collection of ideas about the nature of government and its relationship to individual citizens and to the citizenry as a whole. The nineteenth century was marked by significant changes in this regard. In the fifty years after the Revolution, politics was gradually becoming more democratic, a process marked by "the breakdown of the deferential style of politics, the emergence of egalitarian politics, the gradual opening of the political process to the average citizen, and most importantly, the gradual expansion of suffrage rights."[172] During the Jacksonian era beginning in 1828, political parties mobilized voters of all classes, and campaigns became significant social events.[173]

Political philosophy reflected these developments. The civic humanism tradition had elevated the common good over individual interests, but Liberalism gave center stage to the individual's rights to property, free political expression, and liberty from government interference.[174] Voting was still a civic duty, but Americans also came to view voting "more as a political right that enabled individuals to 'protect their interests.'"[175]

But, while the electorate was expanding dramatically, states also were excluding groups for various reasons. Not everyone benefited as voting evolved from a privilege to a right. Suffrage laws were employed to penalize criminals and to keep the polls free of corruption, so nineteen of thirty-four states disenfranchised criminals in 1860.[176] African Americans and aliens could vote in only six states.[177] Soldiers and sailors were disenfranchised in the majority of states; students in seven.[178] Paupers were excluded from the electorate in fifteen states.[179] As late as 1908, women had equal suffrage with men in only four states.[180] Despite the abandonment of an overt property requirement in most states, the disenfranchisement of these groups enforced standards of intellectual and moral competence.

Consistent with these changes in fundamental political notions were the notions about insanity and idiocy that were crystallizing during the nineteenth century, particularly its middle decades. Insanity itself was in conceptual transition, changing from a spiritual malady to a medical one. New scientific approaches and professional methods promised to cure insanity (a promise which went unrealized), but this optimistic outlook was tempered by the

concomitant belief that the insane were somehow at least partly to blame for their condition.

Similarly, popular and elite conceptions of idiocy were imbued with negative connotations. Idiocy was a threat to the social order, though the public bore some responsibility to correct the situation through education of idiots. Idiots were hardly expected to occupy places of status in the community, but reformers believed that the social harm caused by idiocy could be reduced dramatically through science and professional help. Nonetheless, idiocy was conceived as, at best, an unfortunate condition, and at worse, a sign of moral and intellectual decay.

With both idiocy and insanity, then, connotations were so negative that even the most progressive thinkers of the time perceived them as challenges to be managed for the survival and betterment of humanity. At the forefront of such reform movements was Horace Mann, an influential individual at the center of Massachusetts political decision making. As a state legislator, Mann chaired a committee appointed to look into the treatment of the insane[181] and was "mainly responsible" for the founding of Worcester State Lunatic Hospital[182] He was later appointed to the State Board of Education and, as secretary, issued a number of widely read reports.

Mann's ideas about idiocy and insanity are well worth noting, not only because of his own prominence in Massachusetts political affairs, but also because of his influence on the political and social elite in Massachusetts and other states as well. His ideas – and their implications for political participation – may be understood from his writings. In his essay entitled "Political Education," Mann emphasized the civic purposes to which public schooling could and should be put. A proponent of making schools a tool of democracy, he viewed education as a requirement of a self-governing republic. He feared a government that did not attend to the need to educate the citizenry, writing:

Nothing would be easier than to follow in the train of so many writers, and to demonstrate by logic, by history, and by the nature of the case, that a republic form of government, without intelligence in the people, must be, on a vast scale, what a mad-house, without superintendent or keepers, would be a small one, -- the despotism of a few succeeded by universal anarchy, and anarchy by despotism, with no change but from bad to worse.[183]

Mann had decided, though, that men with the requisite orientation and education might successfully engage in governing themselves. "If asked the

broad question, whether man is capable of self-government," Mann said he would "answer it conditionally" in that:

[i]f by man, in the inquiry, is meant the Feejee Islanders; or the convicts at Botany Bay; or the people of Mexico and some of the South American Republics (so called); or those as a class, in our own country, who can neither read nor write; or those who can read and write, and who possess talents and an education by force of which they get treasury, or post-office, or bank appointments, and then abscond with all the money they can steal; I answer unhesitatingly that man, or rather such men, are not fit for self-government. . . . But if, on the other hand, the inquiry be, whether mankind are not endowed with those germs of intelligence and those susceptibilities of goodness, by which, under a perfectly practicable system of cultivation and training they are able to avoid the evils of despotism and anarchy; and also, of those frequent changes in national policy which are but one remove from anarchy; and to hold steadfastly on their way in an endless career of improvement, -- then, in the full rapture of that joy and triumph which springs from a belief in the goodness of God and the progressive happiness of man, I answer, they are able. . . . [184]

Like many of his day, Mann seemed quite comfortable with the general notion that the right to participate in self-governance should be regulated. Truly universal suffrage was perhaps a possibility, but only if certain conditions were met. The ballot, he said, had "destructive potency" in the "hands of an ignorant and corrupt people."[185] Universal suffrage was dangerous "without mental illumination and moral principle."[186] Economic independence was also a virtue because it allowed for political independence. In its absence, Mann feared the dependent might "vote from malice, envy, or wantonness," which would involve "substantially the moral guilt of treason."[187] Those who exercised such undue influence over dependent men also bore burdens, theirs being both "baseness" and "subornation of treason."[188]

Mann's common claim throughout his writing on the subject was that a republican government absolutely required that the state commit itself to the moral and intellectual improvement of its citizenry. Otherwise it was doomed. "[W]ithout additional knowledge and morality," he wrote, "things much accelerate from worse to worse."[189] If there was universal suffrage, "there must be universal elevation of character, intellectual and moral, or there will be universal mismanagement and calamity."[190]

Mann's views provide us with some indication of how a prominent figure viewed insanity and idiocy and their political implications. Mann was well-

known at the time for his progressive stance on a wide range of issues, but perhaps differed from others in his more vociferous support for public education. His advocacy was founded not only in the idea that education was the basis for intellectual and economic advancement, but also because it was so important to the functioning of a republic. It inoculated democratic governance from much of what was feared about it. An educated citizenry staved off the more demagogic and destructive elements in society. It would provide a bulwark of stability and legitimacy in the face of challenges to its best impulses. In short, an effective system of public schooling would tip the balance between the beauty of republic government and the uglier forms of political organization.

Mann's ideas probably did not differ significantly from those of the rest of Massachusetts' elite in one important respect, however. Even when rhapsodizing over the possibility of the common man's ability to participate ably and effectively in self-government, one senses an ambivalence about that very ability. There is confusion and caution at the same time there is optimism and hope. Yes, there should be faith in the future of democratic governance . . . but surely there are limits?

Horace Mann, as many others whose writings are still available, such as delegates to state constitutional conventions, speaks with what was almost certainly a common thought: There may very well be limits on the ability to participate. And as the early citizens of Massachusetts weighed the relative merits of restricting participation on the basis of property holding, then paying taxes, and finally settling on the restrictions of the 1822-1821 constitution, they were making the difficult choices involved in specifying precisely where they believed those limits were. They decided first that there must be some limits on participation – a decision originating in their doubts, not their faith – ; and second, that one of those limits would be based on idiocy and insanity – another decision originating in doubt.

Coincidentally, the new concepts of idiocy and insanity came to the fore at about the same time as did particularities of gender and race. This is perhaps the most significant aspect of the Massachusetts story told here. As the nation's states were exercising their constitutional prerogative to establish voter qualifications, they were casting about for ways to realize the promise of the new political order expressed in the soaring language of the country's founders and leaders such as Andrew Jackson. They were successful in some respects, primarily in moving away from the deliberate preference for economic privilege, but much less so in others.

Until now, we have believed that the major failings in suffrage laws were the formal gender and racial distinctions adopted after the American Revolution. There can be no doubt that these prejudices were deep-seated and long-lived; their difficult legacy is still with us. It has taken the force of constitutional amendments and far-reaching legislation to address the enormity of these distinctions, and the battle is far from won.

Our purpose here is to suggest that the Massachusetts story exposes another prevalent form of discrimination in state electoral qualification laws, one based on intellectual and emotional impairment. Its presence today in the statutes and constitutions of forty-four states suggests that disability is a powerful idea in the imagination of the public and the public's representatives. It is, though, we argue, an *artificial* dividing line between those believed to be "competent" and those believed to be "incompetent."[191]

Perhaps the outcome of the Massachusetts story would have been different had the delegates to the 1853 convention not had the original "paupers and persons under guardianship" language from 1820-1821 with which to contend. It is an intriguing question. The 1853 delegates deliberated during a time of transition from an almost unquestioning acceptance of the necessity of a property holding requirement to more contemporary ideas about the right to vote and its role in ensuring political representation. Given that the original guardianship exclusion had been based on economic grounds, might the Massachusetts delegates of 1853 have avoided the discussion of "idiots" and "insane" people if the guardianship exclusion had not been there for them to transform?

If the experience of the other states is any guide, we would have to conclude that the Massachusetts constitution probably would have eventually included a disability-based exclusion of some variety. Given the proclivity of the states to adopt such exclusions during the mid-eighteenth century, there is good reason to think that Massachusetts would have made this distinction. The record makes it obvious that there was concern about the competency of people labeled as idiots and insane person. Intellectual and moral competency were fundamental criteria for participation, and idiots and insane people had neither competency. Like other nefarious distinctions of the time, the Massachusetts guardianship exclusion perpetuated a mythology that the health of the republic depended on keeping some people from taking part in governing.

End notes

[1] We will use the terms “disabled people” and “people with disabilities” (and their variants) interchangeably, though it is important to note that there is no consensus on what terms are most appropriate. Also, we will use terms such as “idiots” and “insane persons” when discussing historical events. These terms are no longer accepted in professional and academic circles.

[2] Kay Schriner, et al., "The Americans with Disabilities Act: Does it Secure the Fundamental Right to Vote?," *Pol'y Stud. J.* (forthcoming 2000 or 2001) (manuscript on file with authors).

[3] See Kay Schriner et al., "Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Mental Impairments," 21 *Berkeley J. Emp. & Lab. L.* 437 (2000) for specific constitutional, statutory, and/or case law citations.

[4] Some states have conflicting disenfranchising categories in their respective constitutional and statutory provisions; therefore, number counts across categories do not equal fifty.

[5] Kirk Harold Porter, *A History of Suffrage in the United States* 2 (1918).

[6] *Id.* at 3.

[7] *Id.*

[8] *Id.* at 2.

[9] Marcus Cunliffe, *Property, in Encyclopedia of American Political History: Studies of the Principal Movements and Ideas*, 1018-1030 at 1018 (Jack P. Green ed., 1984).

[10] Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860* at 3 (1960).

[11] *Id.* at 5.

[12] *Id.* at 11.

[13] Cuncliffe, *supra* note 8, at 1018.

[14] Porter, *supra* note 5, at 11.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 14.

[18] *Id.*

[19] Ralph Barton Perry, *Puritanism and Democracy* 73 (1944).

[20] Edmund Sears Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 43 (1988).

[21] Albert Brown McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 302 (1905).

[22] George H. Haynes, "Representation and Suffrage in Massachusetts," 1620-1691 at 11 (*John Hopkins Univ. Stud. in Hist. and Pol. Sci.* Twelfth Series, VIII-IX, Baltimore, The Johns Hopkins Press 1894).

[23] McKinley, *supra* note 21, at 302.

[24] *Id.* at 338.

[25] *Id.* at 339-340.

[26] Joshua Miller, *The Rise and Fall of Democracy in Early America, 1630-1789* at 25 (1991).

[27] *Id.* at 23.

[28] *Id.* at 24.

[29] *Id.* at 25.

[30] *Id.* at 27.

[31] McKinley, *supra* note 21, at 304.

[32] John Winthrop, "A Model of Christian Charity," in *The American Puritans*, 78-83 at 83 (Perry Miller, ed., 1956).

[33] Stephen E. Patterson, *Political Parties in Revolutionary Massachusetts* at 11 (1973).

[34] *Id.*

[35] Miller, supra note 26, at 84.

[36] *Id.* at 82.

[37] *Id.*

[38] *Id.* at 79.

[39] Patterson, *supra* note 33, at 12.

[40] Richard D. Brown, *Revolutionary Politics in Massachusetts: The Boston Committee of Correspondence and the Towns*, 1772-1774 at 9 (1970).

[41] Patterson, *supra* note 33, at 15.

[42] *Id.* at 16.

[43] Miller, *supra* note 26, at 27.

[44] McKinley, *supra* note 21, at 339.

[45] *Id.* at 340.

[46] *Id.* at 342.

[47] *Id.* at 344.

[48] *Id.* at 345.

[49] *Id.* at 346.

[50] *Id.* at 302.

[51] *Id.*

[52] *Id.* at 303.

[53] Haynes, *supra* note 22, at 8.

[54] *Id.* at 13.

[55] *Id.*

[56] *Id.*

[57] McKinley, *supra* note 21, at 353.

[58] *Id.* at 354.

[59] Porter, *supra* note 5, at 9.

[60] *Id.* at 10.

[61] Robert W. Kelso, *The History of Poor Relief in Massachusetts 1620-1920* at 32 (Patterson Smith 1969) (1922).

[62] Robert Brown, *Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780* (1955).

[63] *Id.* at 45.

[64] *Id.*

[65] Mary Ann Jimenez, *Changing Face of Madness: Early American Attitudes and Treatment of the Insane* at 61 (1987).

[66] Kelso, *supra* note 61, at 32.

[67] Miller, *supra* note 26, at 28.

[68] Kelso, *supra* note 61, at 37.

[69] *Id.* at 33.

[70] *Id.* at 42.

[71] See Gerald N. Grob, *The State and the Mentally Ill: A History of Worchester State Hospital in Massachusetts, 1830-1920* at 5 (1966).

[72] Kelso, *supra* note 61, at 33.

[73] *Id.* at 41.

[74] Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 25 (6th ed. 1999).

[75] Kelso, *supra* note 61, at 35.

[76] *Id.* at 30.

[77] *Id.* at 92.

[78] Trattner, *supra* note 74, at 18.

[79] Kelso, *supra* note 61, at 39.

[80] Trattner, *supra* note 74, at 18.

[81] *Id.* at 19.

[82] *Id.* at 18.

[83] Kelso, *supra* note 61, at 93.

[84] Trattner, *supra* note 74, at 30.

[85] *Id.*

[86] *Id.*

[87] Kelso, *supra* note 61, at 112.

[88] Deborah A. Stone, *The Disabled State* 36 (1984).

[89] *Id.*

[90] *Id.* at 39.

[91] *Id.* at 40.

[92] *Id.* at 55.

[93] *Id.*

[94] David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 4 (1971).

[95] Jimenez, *supra* note 65, at 143.

[96] *Id.* at 16.

[97] *Id.* at 50-51.

[98] *Id.* at 51.

[99] *Id.*

[100] *Id.*.

[101] *Id.* at 57.

[102] *Id.* at 58.

[103] *Id.* at 59.

[104] Brown, *supra* note 40, at 237.

[105] *Id.*

[106] Arthur B. Darling, *Political Changes in Massachusetts 1824-1848: A Study of Liberal Movements in Politics* 3-5 (1925).

[107] Trattner, *supra* note 74, at 31-32.

[108] Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 16 (1986).

[109] See Stone, *supra* note 88

[110] Jimenez, *supra* note 65, at 29.

[111] Grob, *supra* note 71, at 8-12.

[112] Jimenez, *supra* note 65, at 68.

[113] *Id.* at 73.

[114] *Id.* at 83.

[115] *Id.* at 85.

[116] *Id.* at 96.

[117] *Id.* at 92.

[118] *Id.* at 99-100.

[119] *Id.* at 102.

[120] Glob, *supra* note 71, at 28.

[121] *Id.*

[122] Jimenez, *supra* note 65, at 79-80.

[123] Samuel Gridley Howe, *Report Made to the Legislature of Massachusetts upon Idiocy* (Boston, Coolidge & Wiley 1848).

[124] *Id.* at 20.

[125] *Id.* at 56.

[126] *Id.* at 53.

[127] James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 13 (1994).

[128] Trattner, *supra* note 74, at 55.

[129] *Id.* at 55-57.

[130] *Id.* at 59.

[131] Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* 34 (1978).

[132] *Id.* at 35.

[133] Brown, *supra* note 62, at 61.

[134] Peters, *supra* note 131, at 35.

[135] *Id.*

[136] *Id.*

[137] Brown, *supra* note 62, at 393.

[138] Peters, *supra* note 131, at 35.

[139] Brown, *supra* note, at 394.

[140] Ronald P. Formisano, *The Transformation of Political Culture: Massachusetts Parties, 1790s – 1840s* at 136 (1983).

[141] *Id.*

[142] *Id.* at 137.

[143] Brown, *supra* note 62, at 396.

[144]*Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts* 115 (Boston, Office of Daily Advertiser 1821). The journal of the 1821constitutional convention is not a verbatim recording of delegates' remarks, but rather an observer's summary of them. The journal quotations included here are these official summaries.

[145] *Id.* at 122.

[146] *Id.* at 123.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* at 124.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 124-125.

[157] *Amendments of the Constitution of Massachusetts Proposed by the Convention of Delegates* 12-13 (Boston, Russell and Gardner, Printers 1821).

[158] 1 *Official Report of the Debates and Proceedings in the State Convention Assembled May 4, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* 221 (Boston, White and Porter 1853).

[159] *Id.* Emphasis added.

[160] *Id.* at 225-226.

[161] *Id.* at 208.

[162] *Id.* at 210.

[163] *Id.* at 212.

[164] None of the proposed constitutional changes proposed by the 1853 convention were adopted by the people.

[165] *2 Official Report of the Debates and Proceedings in the State Convention Assembled May 4, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* 251 (Boston, White and Porter 1853).

[166] *Id.* at 272-273.

[167] *Id.* at 275.

[168] *Id.*

[169] *Id.* at 277.

[170] *Id.* at 278.

[171] *Id.* at 275. Mr. Keyes' remark is precient. In 1974, the voters of Massachusetts agreed to repeal the constitutional provision that disenfranchised paupers, but retained the guardianship exclusion.

[172] Donald W. Rogers, "Introduction: The Right to Vote in American History," in *Voting and the Spirit of American Democracy*, 3-19 at 9 (Donald W. Rogers ed., 1992).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Porter, *supra* note 5, at 14.

[177] *Id.* at 148.

[178] *Id.*

[179] *Id.*

[180] Victoria Bissell Brown, "Jane Addams, Progressivism, and Woman Suffrage: An Introduction to 'Why Women Should Vote'", in *One Woman, One Vote*, 179-195 at 184 (Marjorie Spruill Wheeler ed. 1995). A petition submitted to the 1853 convention had called for the removal of the word “male” from all parts of the Massachusetts constitution, which, it was argued, would have had the effect of enfranchising women. *Id.* at 189. The committee on Qualification of Voters at the 1853 convention responded to this petition by ignoring it and refused to recommend any change that would have permitted women to vote. *Id.* at 189.

[181] Grob, *supra* note 71, at 26.

[182] Gerald N. Grob, *Howard Jarvis and the Medical World of Nineteenth Century America* 119 (1978).

[183] 4 Horace Mann, "Annual Reports of the Secretary of the Board of Education of Massachusetts for the years 845-1848," in *Life and Works of Horace Mann* 269 (Boston, Lee and Shepard 1891).

[184] *Id.* at 355-356. Emphasis in original.

[185] *Id.* at 359.

[186] *Id.*

[187] *Id.* at 364.

[188] *Id.*

[189] *Id.* at 365.

[190] *Id.* at 366.

[191] We will not address the constitutionality of this distinction here; however, see Kay Schriner, et al., "The Last Suffrage Movement: Voting Rights for People with Cognitive and Emotional Disabilities," 27 *Publius* 3 (1997). We also raise the issue of the necessity of making this distinction in state law. Six states (Colorado, Indiana, Kansas, Michigan, New Hampshire, and Pennsylvania) do not disenfranchise specific individuals with cognitive or emotional impairments and apparently suffer no ill effects. Further, if states require some measure of protection for the intelligence of the electorate, they might follow the suggestion of the American Bar Association to establish objective tests at the point of registration. Any potential voter who can provide the information required to register (with appropriate accommodations for those who need assistance) should be permitted to vote. Bruce D. Sales, et al., *Disabled Persons and the Law: State Legislative Issues III* (1982).