Making Exceptions to Universal Suffrage: Disability and the Right to Vote

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The history of Western representative democracies is marked by disputes over who constitutes the electorate. In the U.S., where states have the prerogative of establishing voter qualifications, categories such as race and gender have been used during various periods to disqualify millions of individuals from participating in elections. These restrictions have long been considered an infamous example of the failings of democratic theorists and practitioners to overcome the prejudices of their time.

Less well-known is the common practice of disenfranchising other large numbers of adults. Indeed, very few American citizens are aware that there are still two groups who are routinely targeted for disenfranchisement - criminals and individuals with disabilities. These laws, which arguably perpetuate racial and disability discrimination, are vestiges of earlier attempts to cordon off from democracy those who were believed to be morally and intellectually inferior. This entry describes these disability-based disenfranchisements, and briefly discusses the political, economic, and social factors associated with their adoption.

Disenfranchising People with Cognitive and Emotional Impairments

Today, forty-four states disenfranchise some individuals with cognitive and emotional impairments. States use a variety of categories to identify such individuals, including idiot, insane, lunatic, mental incompetent, mental incapacitated, being of unsound mind, not quiet and peaceable, and under guardianship and/or conservatorship. Fifteen states disenfranchise individuals who are idiots, insane, and/or lunatics. The most frequently used categories identify individuals on the basis of mental incompetency, mental incapacity, unsound mind, and/or not quiet and peaceable. Thirty-two states disenfranchise individuals using the preceding categories. Finally, eleven states disenfranchise individuals who have been placed under a guardianship and/or conservatorship.

The language used by some states reflects earlier eras. Many states use the terms "idiots" and "insane" person to indicate who is targeted by these provisions. Some states have revised earlier language. In Florida, the 1868 constitution prohibited people "under guardianship, non compos mentis or insane" from voting, but later amended the constitution to disenfranchise those who have "adjudicated…mentally incompetent." Idaho is also an example in this regard. Until 1982, its constitution prohibited "idiots" and "insane" persons form voting (as well as anyone under guardianship). The more recent language narrows the prohibition to individuals with legal guardians.

States typically address the possibility of disenfranchisement in their constitutions, electoral qualification statutes, statutes governing service provision for people who are mentally ill or mentally retarded, or laws specifying the guardianship process. Most of the states have constitutional provisions that disenfranchise some disabled people, and probably because of the age of these constitutions, identify the affected individuals as "idiots" and "insane" people. [Only six states (Colorado, Indiana, Kansas, Michigan, New Hampshire, and Pennsylvania) do not constitutionally prohibit voting by idiots and insane people, or people who are "mentally incompetent."]

It is interesting to note that it has not been unusual for states to target people with disabilities in the same breath as criminals and other socially undesirable persons. The Delaware constitution, for example, declares that "no idiot or insane person, pauper, or person convicted of a crime deemed by law felony…shall enjoy the right of an elector…." (Del. Const. Art. V, sec. 2).

It appears that states have considered and adopted these provisions over a period of many years; and that, at times, legislators have failed to coordinate some statutory provisions with other statutory provisions. For example, in Arkansas, the Constitution prohibits idiots and insane people from voting, but the guardianship statute requires express court approval to prohibit voting and indicates that a ward is not presumed incompetent and retains all legal and civil rights not expressly limited. In this case, the constitutional provision may persist, at least in part, because of the difficulty of amending the constitution.

However, it may also be the case that constitutional exclusions remain because the public prefers it. This public support is illustrated in the 1997 example of efforts in Maine to repeal the constitutional prohibition against voting by persons under guardianship because of mental illness. Despite the efforts of disability advocates, the repeal proposal was defeated by a 60-40% margin.

The prohibitions against voting by people with cognitive and emotional impairments give rise to serious constitutional questions (Schriner, Ochs, & Shields, 1997). Because it is a fundamental right, infringements on the right to vote must be necessary to protect a compelling state interest. This test requires that the state's interest outweigh the individual right at issue. In this case, states would probably argue that these exclusions are required to ensure the intelligence of the electorate and the purity of the vote. Some have argued that these laws are unnecessary to achieve these purposes, given the other means - making interference with another's voting illegal, for example - available to the states.

Further, statutory schemes that infringe on the right to vote must be narrowly tailored. In other words, the language of the statute must specify precisely who is to be affected by the law, and this specification must not be over - inclusive (i.e., affect people who should not be affected), and must not be under-inclusive (i.e., it should affect everyone who should be affected). Because some individuals who could legitimately be said to be incompetent are undoubtedly not affected; and because some individuals who are targeted should not be, the laws disenfranchising this group of individuals do not appear to be sufficiently narrowly-tailored to a compelling state interest to survive a strict scrutiny analysis.

The History of Disability-based Disenfranchisement

These laws developed after the American Revolution, when legislators were replacing property ownership and taxpaying requirements with distinctions based on individual characteristics such as race, gender, and mental capacity. By 1860, 14 of the 34 states then in the union precluded incompetent people from voting (Porter, 1918). In 1880, 19 of 37 states did so (Naar, 1880).

How did idiocy and insanity (and related terms) come to be associated with an inability to exercise responsible political citizenship?1 Although the outlines of this historical process are just now being discovered, some preliminary observations are in order. The social, economic, and political conditions of the periods during which idiots and insane people began to be disenfranchised offer possible explanation for these events.

The new nation was faced with rapid and significant change on many fronts during the post-Revolutionary period. Vast numbers of immigrants - many of whom were poor and illiterate - arrived, causing concern about social and political unrest, particularly in the rapidly-growing cities. Popular views cast

immigrants as intellectually and morally inferior and thus contributed powerful imagery that may have influenced legislators who were making political distinctions in electoral qualification laws.

Newly emerging concepts about idiocy and insanity may also be explanatory factors. In the first decades of the 1800s, it was believed that insanity and idiocy could be overcome, or at least ameliorated through treatment. Elected officials came to view insanity and idiocy as public problems requiring a public response and began funding institutions where these treatments could be provided. The asylums and special schools founded in the 1830s and 1840s, however, soon became more custodial in nature as large numbers of immigrants entered them and state legislators imposed budget constraints.

The rise of professions may also have contributed to the disenfranchisement of idiots and insane people during this period. Establishing their authority to diagnose, treat, and (perhaps) cure idiocy and insanity, psychiatrists and other specialists were increasingly likely to portray these conditions as social threats. Etiological explanations varied, but some experts claimed that moral failings or physiological deficiencies caused intellectual and emotional impairments - causal statements that would be consistent with disenfranchisement. If individuals could not be trusted to exercise reason and virtue, they could and should be excluded from the political process.

Public policy reflected these influences. Over time, the optimism of psychiatrists and other professionals faded. By the middle of the 19th century, there was less hope that idiocy and insanity were curable, and a growing perception that idiots and insane people were a threat to the social order. Many idiots and insane people were confined in special schools and institutions where they were isolated, neglected, and often abused.

These events occurred against the backdrop of debate and change affecting electoral qualification laws. While further research is necessary to clarify the ways in which disability was constructed during these debates, it certainly seems possible that the growing visibility of insanity and idiocy as social and political problems made it more likely that legislators would disenfranchise this group. Further, it appears that legislators might do so almost without thought. Given the stubbornness of myth and misconception about the abilities of people labeled as idiots or insane, it is entirely within the realm of possibility that legislators viewed the distinction as a necessary one.

The distinction is even today, widely accepted. The notion of disenfranchising adults who are incompetent is often discussed as though it were unavoidable.

The prominent political theorist Robert Dahl, for example, who is regarded as a supporter of broad political participation, equates incompetent individuals with children, and justifies excluding both groups because of their presumed intellectual and moral incapacity (Dahl, 1989). Recent debates in the U.S. Congress concerning possible amendments to federal law which would prohibit disability-based distinctions in state law governing voting rights met with derision by many elected officials.

In political terms, then, the disability category in laws governing political participation appears to be of considerable importance. Because disability is often thought of as deviancy, the exclusion of incompetent people is no surprise. By associating cognitive and emotional impairments with deviancy, these terms also are connected to fears of criminality. Through these juxtapositions each group takes on some of the attributes of the others. Policies toward one group are influenced by policies toward the other. Distinctions between the groups are made based on science and professional knowledge, but boundaries are fluid and permeable. In this way, the long association between deviancy and criminality has disadvantaged both groups.

The Effects of Disability-based Exclusions

Evaluating these exclusions would require information about their effects at both the individual and the societal levels. It is unclear how many individuals with cognitive and emotional impairments are unable to vote because of their disability. This is partly due to the difficulty of conducting research in this area; for example, there is no central database of guardianship or incompetency decisions in most states. One study notes that there are an estimated 500,000 individuals under guardianship at any one time, but emphasizes that this number indicates only the number who might be affected (Schriner, Ochs, & Shields, 1997; this analysis does not include the individuals who might be disenfranchised because they are adjudicated mentally incompetent). Neither is it known whether affected individuals are later reinstated as electors (in those states where reinstatement is permitted); what due process requirements (such as the right to a hearing and the right to present evidence) are routinely observed; nor what kinds of evidence are presented and considered by the courts in deciding whether to disenfranchise a potential ward. Further, we do not know the psychological impact on those individuals who are disenfranchised.

Prohibiting participation by these individuals can have negative effects at the societal level as well. By ignoring the constitutional guarantees to equal

treatment under the law, the fabric of the political society is weakened. By refusing to face the mythology of incapacity that surrounds the disability distinction in electoral qualifications, we lose the opportunity to take another step toward ensuring representation in democratic governance. In hindsight, we may one day decide that in limiting the citizenship rights of people with cognitive and emotional impairments, we have disabled democracy itself.

1 We use the terms "idiot" and "insane" because of their historical importance. These words are rarely used today, except as colloquialisms. It is important to note, however, that more modern terms such as "developmental disability" and "cognitive impairment" are also controversial. Language is constantly changing, and language is contested when the concept is contested.

References

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