

IDIOTS AND INSANE PERSONS: ELECTORAL EXCLUSION
AND DEMOCRATIC VALUES WITHIN THE OHIO
CONSTITUTION

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I. INTRODUCTION

Article V, section 6 of the Ohio Constitution declares that “[n]o idiot, or insane person, shall be entitled to the privileges of an elector.”¹ It is the only official caveat to the otherwise general guarantee of voting rights for all citizens who have been residents within that state for at least thirty days with the exception of convicted felons—and that latter exception requires legislative action to be put into effect and can be eliminated as a source of exclusion in the same manner.² Therefore, unlike the status of a felon, the determination of a standard of “idiocy” and “insanity” is subject to executive determination and judicial interpretation. The fact that this language has been retained in its original form (despite a concerted constitutional revision process in 1975)³ is, in itself, a curiosity—though Ohio is not the only state that has employed that language for the purpose of constitutionally restricting the franchise.⁴ The fact that the Ohio government and

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¹ OHIO CONST. art. V, § 6.

² OHIO CONST. art. V, §§ 1, 4.

³ OHIO CONSTITUTIONAL REVISION COMM’N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION: PART 7 ELECTIONS AND SUFFRAGE 23–25 (1975).

⁴ The other states are Alabama (ALA. CONST. art. VIII, § 182 (repealed 1996)), Arizona (ARIZ. CONST. art. VII, § 2, cl. C (amended 2000)), Arkansas (ARK. CONST. art. III, § 5 (repealed 2009)), California (CAL. CONST. art. II, § 1 (repealed 1972)), Delaware (DEL. CONST. art. V, § 2 (amended 2001)), Iowa (IOWA CONST. art. II, § 5 (amended 2008)), Kentucky (KY. CONST. § 145, cl. 3), Maryland (MD. CONST. art. I, § 2 (moved to § 4 and amended 1978) (“lunatic”)), Minnesota (MINN. CONST. art. VII, § 1, cl. a), Mississippi (MISS. CONST. art. 12, § 241), Nevada (NEV. CONST. art. II, § 1 (amended 2004)), New Jersey (N.J. CONST. art. II, § 1, ¶ 6 (amended 2007)), New Mexico (N.M. CONST. art. 7, § 1 (amended 1967)), Texas (TEX. CONST. art. VI, § 1, cl. 2 (amended 1997)), and Wyoming (WYO. CONST. art. VI, § 6 (amended 1996)).

legislature did not take advantage of a formal proposal to remove such language may be significant. Even more significant are the principles that it reflects, particularly relating to attitudes concerning the role of voting as part of the wider tradition of democracy within that state.

Despite the legislative removal of the word “idiot” from the Ohio Revised Code in 2007,⁵ the word not only persists (along with “insane”) as a constitutional limit upon the electoral franchise but it also persists as a means of distinguishing political and cultural perceptions within Ohio society of the proper purpose and scope of democracy, the democratic process, and citizenship.⁶ The persistence of that language within the Ohio Constitution document (despite the official recommendation of the Ohio Constitutional Revision Commission in 1975 that it be at least modified)⁷ designates more than an anachronistic definition of mental disability. A recommended modification of article V, section 6 was not subsequently submitted to the amendment process, though the Ohio legislature eventually responded to part of the recommendation of the Constitutional Revision Commission in this area through a statute that requires an official adjudication of mental incompetence before a voter can be disqualified.⁸ However, neither the commission nor the state legislature ever challenged or even addressed in a critical manner the underlying rationale for excluding a category of voters upon the basis of some form of mental disability nor has there been evidence of wider Ohio public support for such an assessment.

That absence strongly suggests a consensus within Ohio that this sort of exclusion is, in principle, acceptable within the context of the state’s electoral system and, more broadly, its democratic values. More significantly, it indicates a particular interpretation of democratic theory and values (arguably based upon a relatively parochial and exclusive definition of the concept) that differs from competing perceptions. This aspect of the issue is not generally examined, even though it is foundational to understanding any liberal democratic constitutional system such as the United States and its federal subunits, including the State of Ohio.⁹ A factor that

⁵ S.B. 41, 127th Gen. Assemb., Reg. Sess., § 1 (Ohio 2007).

⁶ See discussion *infra* Parts III, IV and VI.

⁷ OHIO CONSTITUTIONAL REVISION COMM’N, *supra* note 3, at 23–25.

⁸ See OHIO REV. CODE ANN. § 5122.301 (West 2013).

⁹ See *generally* GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 3–35 (1987) (discussing perceptions and interpretations of democracy).

makes this subject especially significant is the multiple ideological interpretations of the concept of electoral participation.

Therefore, this section of the Ohio Constitution, though seldom invoked and seemingly obscure, may reveal broad insights into the fundamental political and social values of that state. Political communities are reflected in their respective constitutional instruments¹⁰ and Ohio is no exception. Article V, section 6 represents more than a particular electoral strategy. The extent to which the Ohio Constitution reveals fundamental attitudes about the role of the electoral franchise within its system of government is equally revelatory of the broader political culture of Ohio as it has evolved throughout its history.

II. FEDERAL DEFERENCE TOWARD VOTING RESTRICTIONS

In general terms, federal courts have been willing to extend broad latitude to state voting restrictions of persons who are identified as having some sort of mental incapacity. This deference can be contrasted with the “strict scrutiny” test, developed under the Fourteenth Amendment to the U.S. Constitution, which has been applied to voting restrictions that affect certain other categories of persons.¹¹ Voting restrictions upon the basis of race, gender, or other societal classification have not been permitted by the federal courts.¹² However, similar attempts to include people who have been identified as having a mental incapacity of some sort have been unsuccessful.¹³

The seminal precedent in this area has been the 1985 U.S. Supreme Court decision in *City of Cleburne v. Cleburne Living*

¹⁰ See RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 9–12 (1999) (“[L]iberalism, constitutionalism, and democracy are sociologically coordination theories when they work to establish and maintain social order.”).

¹¹ See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 147–51 (2008) (noting that the Supreme Court applies strict scrutiny to restrictions on the right to vote other than those based on residence, age, and citizenship).

¹² See, e.g., *Coal. for Educ. in Dist. One v. Bd. of Elections*, 370 F. Supp. 42, 54–56 (S.D.N.Y. 1974), *aff’d*, 495 F.2d 1090 (2d Cir. 1974) (race); *Kane v. Fortson*, 369 F. Supp. 1342, 1343 (N.D. Ga. 1973) (gender).

¹³ See, e.g., 42 U.S.C. § 1973gg-6(a)(3)(B) (2006) (stating providing that people’s names cannot be removed from voter registries except as pursuant to state law for reasons of criminal convictions or mental instability); *Developments in the Law, Voting Rights and the Mentally Incapacitated*, 121 HARV. L. REV. 1179, 1180–81 & 1180 n.2 (2008) (noting that Congress has left to the states to decide whether to allow mentally incapacitated persons to vote); see also *Prye v. Carnahan*, No. 04-4248-CV-C-ODS, 2006 WL 1888639, at *6–7 (W.D. Mo. July 7, 2006) (noting that a state may define standards by which voters may be excluded for mental disability).

*Center, Inc.*¹⁴ In that case (in which a special use permit was denied by a Texas city to the members of a group home because of the mental disability status of their domicile), the Court asserted that persons with mental disabilities do not constitute a suspect status or, even, a semi-suspect status, largely because this category includes people who are immutably different from other people in terms of demonstrable characteristics and capacities.¹⁵ Justice White's majority opinion reflected the essence of that exclusion of this category of citizen from state action that otherwise would be considered discriminatory in relation to other citizens.

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for

¹⁴ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

¹⁵ *See id.* at 435, 442.

such judicial oversight is present where the classification deals with mental retardation.¹⁶

But Justice Marshall's dissenting opinion challenged the Court's underlying assumption that restrictions based upon mental capacity are neither impermissible, discriminatory, nor justified as a substantial state interest.¹⁷ Public attitudes towards this category of citizen constituted, in his opinion, an irrational fear.¹⁸ Indeed, rationales for such restrictions continued to be based upon assertions that could be classified as both naïve and dangerous:

During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feebleminded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

....

Prejudice, once let loose, is not easily cabined. As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. Not until Congress enacted the Education of the Handicapped Act, were "the door[s] of public education" opened wide to handicapped children. But most important,

¹⁶ *Id.* at 441–43 (footnotes omitted).

¹⁷ *Id.* at 460–65, 472 (Marshall, J., dissenting).

¹⁸ *Id.* at 464.

lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.¹⁹

Despite that strong dissent, the majority opinion in this case prevailed and it is consistent with other federal decisions in terms of allowing enforced differential treatment of persons with mental disabilities.²⁰ By extension, it can be surmised that voting restrictions imposed upon such persons are uniformly permissible, provided that they conform to a demonstrable state interest.²¹ The interests that are compelling in support of this restriction generally have fallen under two categories: prevention of fraud and protection of the “purity” of the electoral process.²² Neither argument has been persuasively established in detail by the federal courts, even though they have tended to be accepted, nonetheless.²³

The prevention of fraud argument is similar to the permanent prohibition of convicted felons from voting, even after the relevant sentence has been served.²⁴ It is based upon an assertion that people who have committed serious crimes are more likely to engage in similar behavior in relation to the electoral process so that process needs to be protected from their potentially nefarious activities.²⁵ In relation to mentally challenged persons, this sort of reasoning also is implied, though seldom formally invoked. Presumably, this category of person is more likely to undermine the electoral process through potential, though largely unspecified, disruptive behavior.

The “purity of the vote” argument differs from the prevention of fraud rationale by focusing upon the alleged susceptibility of mentally challenged persons to vote in an independent manner, free from undue influence or irrational actions.²⁶ This rationale can be associated with concern about the choices of “rational voters” being “cancelled out” by irrelevant or indiscriminate choices of other

¹⁹ *Id.* at 461–64 (footnotes and citations omitted).

²⁰ *See, e.g., Heller v. Doe ex rel Doe*, 509 U.S. 312, 314–15, 321, 333–34 (1993) (finding a Kentucky civil commitment statute constitutional on rational basis grounds where the law distinguished between the burdens of proof required at civil commitment hearings based on whether the individual was mentally ill or mentally incapacitated).

²¹ *See Note, Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1651 (1979).

²² *See id.* at 1653.

²³ *See id.* at 1653–55.

²⁴ *See generally* Richard L. Lippke, *The Disenfranchisement of Felons*, 20 L. & PHIL. 553, 559–75 (2001) (explaining policies underlying the disenfranchisement of felons).

²⁵ *Id.* at 561–62.

²⁶ *See* Kay Schriener et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 PUBLIUS 75, 92 (1997).

voters, thus undermining the overall purpose of the process as a contest between well-reasoned alternatives.²⁷ This sort of argument has continued to prevail in terms of federal deference to state constitutional restrictions on voting rights that do not clearly transgress the strict scrutiny test of Fourteenth Amendment jurisprudence.²⁸ It also provides potential insights into the underlying principles and values that may have guided states, such as Ohio, to impose such restrictions.²⁹ More generally, it may reflect overall attitudes toward the democratic system of government that can be particularly revealing of the institutional and cultural framework within which such a constitutional tradition continues to evolve.

Federal courts have upheld state restrictions in this area, though with reservations. For example, in *Dunn v. Blumstein*,³⁰ a Tennessee statute that denied the right to vote to a person who had been resident within that state for less than one year (and had resided within a particular county for less than three months)³¹ was declared to be unconstitutional under the Fourteenth Amendment by a lower court (a decision that the U.S. Supreme Court upheld)³² for reasons that were compared to general restrictions relating to the electoral participation of allegedly uninformed voters.³³ Justice Marshall supported the general principle but indicated skepticism concerning the way that it might be applied:

It may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally uninformed about election matters. But as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They

²⁷ *But see id.* at 87–90 (suggesting that any type of intelligence-electorate rationale is misguided because it is possible for mentally incapacitated individuals to be as politically aware as other citizens).

²⁸ *See id.* at 92 (“Unlike the intelligent-electorate claim, the U.S. Supreme Court has found that states do have a compelling interest in ensuring that elections are free from undue influence and fraudulent behavior by those seeking to sway the outcomes of elections. Preventing individuals who could be easily influenced from voting, it might be argued, would further this state interest.”).

²⁹ *See* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 922–23 (2007).

³⁰ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

³¹ *Id.* at 331.

³² *Id.* at 332–33.

³³ *Id.* at 357–60.

exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens.³⁴

In general, though, the Court recognized that motivations for such provisions could be defended upon the basis of preventing electoral fraud (presumably because a mentally disabled person could be manipulated by another party to serve as an indirect proxy vote) and for limiting electoral participation to “knowledgeable voters.”³⁵ Simultaneously, though, the Court refused to equate this goal with another description of this objective as ensuring the participation of “intelligent” voters.³⁶ The Court’s opinion noted that this standard could not be defined or determined in an accurate manner and would be very susceptible to abuse.³⁷

Federal courts have overwhelmingly tended to address voting rights within the context of federalism and in relation to the limits of the authority of the U.S. Constitution.³⁸ Equal protection of voting rights may be constitutionally guaranteed at the federal level but the deeper meaning of that equality and the philosophical values upon which it is based have been affected by various conditions and circumstances, including the characteristics of particular judges.³⁹ Unless it is deemed to be consistent with the relatively narrow limits that have been determined to have been imposed by the Fourteenth and Fifteenth Amendments (especially in relation to race)⁴⁰ and expressly addressed by Congress under the enforcement provisions of those amendments (such as the Voting Rights Act of 1965),⁴¹ federal courts have tended to be deferential to state prerogatives in relation to these sorts of restrictions.⁴²

³⁴ *Id.* at 359–60.

³⁵ *Id.* at 345, 354 (internal quotation marks omitted).

³⁶ *Id.* at 356 (internal quotation marks omitted).

³⁷ *See id.*

³⁸ *E.g.*, *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 582, 583 (11th Cir. 1995) (certifying an issue regarding the validity of absentee ballots to the Alabama Supreme Court because federalism warranted state determination of the matter); *Roberts v. Wamser*, 883 F.2d 617, 621, 622–23 (8th Cir. 1989) (denying state and local political candidates standing under the Voting Rights Act to challenge election results because, *inter alia*, allowing such standing upsets the principles of federalism by improperly interposing federal power into state elections).

³⁹ *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3–5, 18–37 (2008) (examining how individual judicial characteristics, including ideology and race, affect voting rights determinations).

⁴⁰ *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 334 (1993).

⁴¹ *See* 42 U.S.C. §§ 1973 to 1973bb–1 (2006).

⁴² *See* Ryan Kelley, Note, *Toward an Unconstitutional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees*, 30 B.C. THIRD WORLD L.J. 359, 366 (2010).

Therefore, it is necessary to examine this issue from a state constitutional perspective, more closely.

III. OHIO BACKGROUND

As a large and relatively diverse state (though one that has a more strongly concentrated white population than the country as a whole),⁴³ Ohio shares characteristics with other large, diverse states such as California.⁴⁴ Those characteristics include a political culture and values that are much more heterogeneous than many smaller American states.⁴⁵ In some ways, Ohio is somewhat reflexive of the broader diversity of American society as a whole, especially in terms of the ideological principles that have influenced its political, legal, and constitutional development.⁴⁶

The political and constitutional development of the United States has been marked by the dual ideological influences of classical liberalism and modern civic republicanism.⁴⁷ Initially, American political culture was strongly associated with the classic liberalism of John Locke and its emphasis upon freedom, individualism, limited government, and the inalienable rights (ontologically rooted in an abstract expression of property) of every citizen.⁴⁸ The “fragment theory” of Louis Hartz was a particularly influential proponent of this consensus interpretation.⁴⁹ However, that hegemonic interpretation was challenged, during the latter part of the twentieth century, by political theorists from the “Cambridge School” who pressed strong arguments in favor of an interpretation

⁴³ DANIEL J. COFFEY ET AL., *BUCKEYE BATTLEGROUND: OHIO, CAMPAIGNS, AND ELECTIONS IN THE TWENTY-FIRST CENTURY* 31 tbl.2.1 (2011).

⁴⁴ *See id.* at 30; JAMES T. MCHUGH, *EX UNO PLURA: STATE CONSTITUTIONS AND THEIR POLITICAL CULTURES* 49–50 (2003).

⁴⁵ *See* MCHUGH, *supra* note 44, at 49–62 (describing California’s early political history).

⁴⁶ COFFEY ET AL., *supra* note 43, at 25, 30–32.

⁴⁷ *See* RICHARD C. SINOPOLI, *FROM MANY, ONE: READINGS IN AMERICAN POLITICAL AND SOCIAL THOUGHT* 3, 6–10, 12–15 (1997).

⁴⁸ *See generally* CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 26–29 (1958) (“Most Americans had absorbed Locke’s words as kind of political gospel, and the Declaration [of Independence], in its form, in its phraseology, follows closely certain sentences in Locke’s second treatise on government.”); J.G.A. POCOCK & RICHARD ASHCRAFT, *JOHN LOCKE: PAPERS READ AT A CLARK LIBRARY SEMINAR 10 DECEMBER 1977*, at 3–21 (1980) (describing what has become known as traditional Lockean ideals while questioning John Locke’s proper role in early American political thought).

⁴⁹ *See* STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 13–15 (1990). *See generally* LOUIS HARTZ, *THE FOUNDING OF NEW SOCIETIES: STUDIES IN THE HISTORY OF THE UNITED STATES, LATIN AMERICA, SOUTH AFRICA, CANADA, AND AUSTRALIA* 3–20 (1964) (presenting his theory that nations develop self-identities by adopting and rejecting aspects of European ideologies).

of an American political and constitutional history that was more strongly influenced by republican teachings and values.⁵⁰

Ohio's political history and development parallels, in many ways, that dualism. In the case of Ohio, that development can be understood in terms of the existence of distinct regions within the state that differ from each other in terms of demographics and economic foundations.⁵¹ In particular, five distinct regions of the state have been identified that provide, collectively, a microcosm of the country as a whole.⁵² The Northeast region of the state has been compared to the American Northeast in terms of population density and diversity,⁵³ the Northwest and Southwest regions are more reflective of the American Midwest as a whole,⁵⁴ the Central region reflects many of the professional and intellectual characteristics of the West,⁵⁵ and the Southeastern region reflects many characteristics of ethnicity and culture that are traditionally associated with the American South.⁵⁶

The presence and interaction of distinctly urban and rural areas of the state and the influence of industrial and agrarian economic sectors contributes to the diverse conditions that encourage these competing principles and values.⁵⁷ The result is a state that has not only been influenced by the politics of the Progressive Era, but also has a tradition of opposition to the expansion of governmental activity and authority.⁵⁸ It also is a state that has a fair amount of religious diversity but in which moral considerations have influenced state policies toward issues such as capital punishment.⁵⁹

⁵⁰ See generally DWORETZ, *supra* note 49, at 3–27 (explaining reinterpretations of early American political thought that deemphasize liberalism and focus on republicanism); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 46–65 (1998) (discussing how the American Revolution centered around the republican belief that individual interests should be sacrificed for the greater good of the whole). J.G.A. Pocock, a Cambridge School historian, is a proponent of this interpretation. See DWORETZ, *supra* note 49, at 22; *Cambridge School of Intellectual History*, INST. HIST. RES., http://www.history.ac.uk/makinghistory/themes/cambridge_school_of_intellectual_history.html (last visited May 20, 2013).

⁵¹ See COFFEY ET AL., *supra* note 43, at 25.

⁵² See *id.* at 32, 33 tbl.2.2.

⁵³ *Id.* at 34–35, 37. Northeast Ohio is historically, culturally, and economically similar to the mid-Atlantic region. *Id.* at 37.

⁵⁴ *Id.* at 35.

⁵⁵ *Id.*

⁵⁶ See *id.* at 42–43.

⁵⁷ See *id.* at 61–85 (discussing the impact of Ohio's diverse demography on voting outcomes).

⁵⁸ See ANDREW R. L. CAYTON, *OHIO: THE HISTORY OF A PEOPLE* 303–33 (2002).

⁵⁹ See COFFEY ET AL., *supra* note 43, at 34, 36 tbl.2.3; Robert H. Bremner, *The Civic*

Historical patterns of settlement, migration, and other demographic factors have contributed to the sort of cultural diversity within Ohio that parallels many other large, industrial states, especially (but not exclusively) from the American Midwest.⁶⁰ Ohio was created from the Northwest Territories and included land that originally had been set aside for colonization by Connecticut (that territory was known as the Western Reserve) and Virginia.⁶¹ The establishment of farming communities (including for crops such as tobacco) was followed, starting in the latter part of the nineteenth century, by industrialization.⁶² Slavery in Ohio had been prohibited since its territorial period (with the technical exception of the Western Reserve area while still under the administrative authority of Connecticut)⁶³ and the abolition movement was strong within that state, as was support for Reconstruction policies.⁶⁴ Simultaneously, the growth of pluralistic religious activity had a marked influence on the state, including many different Christian denominations in connection with the Second Great Awakening.⁶⁵ During the twentieth century, Ohio's industrial strength and infrastructure were challenged by economic shifts that affected its region and the country at large, including the Great Depression, the Cold War, and the general shrinking of the manufacturing sector of the economy that was responsible for the emergence of the "Rust Belt."⁶⁶

Like the United States as a whole and consistent with the

Revival in Ohio: Police, Penal and Parole Policies in Cleveland and Toledo, 14 AM. J. ECON. & SOC. 387, 397–98 (1955); see also VICTOR L. STREIB, *THE FAIRER DEATH: EXECUTING WOMEN IN OHIO* 26–27 (2006) (explaining that the modern Ohio death penalty excludes juveniles and that Ohio has never executed a female offender under the age of 18).

⁶⁰ See COFFEY ET AL., *supra* note 43, at 30, 31 tbl.2.1.

⁶¹ GEORGE W. KNEPPER, *OHIO AND ITS PEOPLE* 46–49 (3d ed. i2003).

⁶² See *id.* at 124–29.

⁶³ The Northwest Ordinance was enacted by Congress as governing mechanism for the Northwest Territory in 1787 and prohibited slavery. *Id.* at 57–59. However, the Western Reserve remained under control of the Connecticut Land Company until it was sold in 1796. *Id.* at 49.

⁶⁴ See generally *id.* 199–216, 245–52 (describing Ohio's antislavery sentiment, specific Ohioan abolitionists, and Ohio's Reconstruction-era politics).

⁶⁵ See generally Timothy L. Smith, *The Ohio Valley: Testing Ground for America's Experiment in Religious Pluralism*, 60 CHURCH HIST. 461 (1991) (explaining the effects of religious diversity on Ohio's development as a state).

⁶⁶ See generally KNEPPER, *supra* note 61, at 344–46, 354–63, 379–80, 436–39, 450 (discussing Ohio's economic changes from the early 1900s, through the Great Depression, and into the late twentieth century); SEAN SAFFORD, *WHY THE GARDEN CLUB COULDN'T SAVE YOUNGSTOWN: THE TRANSFORMATION OF THE RUST BELT* 3 (2009) (defining "Rust Belt" as a heavily industrialized area of the Northeast and Midwest United States with older factories, high unemployment, and declining population that are now either closed or only marginally profitable).

experience of other large American states, both liberal and republican values appear to have influenced Ohio. Control of political offices at the state level has fluctuated between the different major political parties.⁶⁷ State policy has supported, at times, government intervention in some areas (such as manufacturing incentives and social welfare)⁶⁸ and the preservation of “family values” in other areas.⁶⁹ While classic liberal values have influenced Ohio (such as the strong constitutional protection of individual gun rights),⁷⁰ the republican tradition also has been prominent, especially in terms of certain constitutional features. Indeed, article V, section 6 of the Ohio Constitution might be best explained from that ideological perspective. However, further background information and analysis is required to advance that analysis.

IV. OHIO CONSTITUTIONAL HISTORY

The first Ohio Constitution that was drafted and approved in 1802 did not include this particular restriction upon the electoral franchise.⁷¹ It did contain, however, other voting restrictions, including limiting eligibility to white, male, taxpaying voters⁷²—and the racial restriction existed despite the fact that slavery also was outlawed within that constitution⁷³ as had been required by the Northwest Ordinance of 1787⁷⁴—or otherwise eligible persons who had not been excluded by the legislature upon the bases of having been convicted of “bribery, perjury, or any other infamous crime.”⁷⁵ Within those limitations, that constitution was relatively expansive in terms of eligibility upon the basis of residency—allowing, for example, road laborers (a status that was considered to be the equivalent of a tax payer)⁷⁶ who had been residing in the state for at

⁶⁷ See, e.g., KNEPPER, *supra* note 61, app.1 at 483–84 (listing former Ohio governors and their various political party affiliations).

⁶⁸ See *id.* at 176–77, 438.

⁶⁹ See, e.g., *id.* at 335–37 (promoting temperance through prohibition legislation).

⁷⁰ OHIO CONST. art. I, § 4.

⁷¹ See OHIO CONST. art. V, § 6 (adopted 1851).

⁷² OHIO CONST. of 1802, art. IV, § 1.

⁷³ OHIO CONST. of 1802, art. VIII, § 2.

⁷⁴ KNEPPER, *supra* note 61, at 59, 93.

⁷⁵ OHIO CONST. of 1802, art. IV, § 4.

⁷⁶ Compare OHIO CONST. of 1802, art. IV, § 1 (providing voting rights to any white male resident over the age of twenty-one who has lived in the state for one year before the election and paid state or county tax), with OHIO CONST. of 1802, art. IV, § 5 (providing voting rights to any white male resident over the age of twenty-one who has lived in the state for one year and was “compelled to labor on the roads”).

least one year to claim a right to vote despite the lack of a fixed permanent address.⁷⁷

However, later iterations of that constitution did include a mental incapacity restriction.⁷⁸ Nonetheless, when it was added to the Ohio Constitution of 1851 and specific rationales were not addressed by that Constitutional Convention.⁷⁹ In relation to the qualification to be an elector, the main preoccupation of the delegates appears to have been with matters of jurisdiction of residency and age.⁸⁰ In one instance, a discussion ensued regarding whether or not a person should be permanently ineligible to vote upon the basis of having been convicted of dueling, but that limitation was associated with the general disqualification of all convicts—a limitation that appeared to be accepted without comment among the delegates.⁸¹ The terms “idiot” and “insane” were mentioned in passing only a few times and, particularly in the former case, only fleetingly in relation to probate, rather than constitutional, matters.⁸²

The Constitutional Convention of 1912 did not directly address the rationale for article V, section 6, treating it, without comment, as a “given.”⁸³ However, delegates to that convention did address the question of insanity as a general concern.⁸⁴ In particular, a correlation was claimed by some delegates between levels of insanity in other states and the consumption of intoxicating liquor.⁸⁵ The inference from these comparisons clearly indicated a categorization of “insane persons” as falling outside the normal constituency of “normal” citizens.⁸⁶ Indeed, persons committed to insane asylums were placed into the same category as persons who were incarcerated for committing crimes⁸⁷ with the implication that their status did not rise to the same level of civil protection as the citizenry in general. A delegate from Brown County, J. W. Kehoe, in extolling the virtues of his rural area of the state, nonetheless

⁷⁷ *Id.*

⁷⁸ OHIO CONST. art. V, § 6.

⁷⁹ See OHIO CONSTITUTIONAL CONVENTION, REPORT OF THE DEBATES AND PROCEEDINGS FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850–51 (1851) [hereinafter OHIO CONSTITUTIONAL CONVENTION OF 1850].

⁸⁰ *Id.* at 172–73, 218.

⁸¹ *Id.* at 260–63.

⁸² *Id.* at 32, 38, 60.

⁸³ See 1 OHIO CONSTITUTIONAL CONVENTION, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 13 (1912) [hereinafter OHIO CONSTITUTIONAL CONVENTION OF 1912].

⁸⁴ See *id.* at 425–27.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.* at 527, 533.

admitted that, while nobody from his county was incarcerated, an unspecified number of persons had been committed to the asylum.⁸⁸ The implication of that status was made clearer by his attempts to account for this otherwise inexplicable loss of status among these residents of his county:

Besides our agricultural pursuits, I think we have had a lot of men that are somewhat known, and I believe at this time we have no representatives in the penitentiary. We may have some in the lunatic asylum, but then you know there are others at large in the country and it is a question in my mind whether they ought not to be there. Some authority has said over-development makes defective brains. On that basis, all mankind are more or less insane; and that being true, it is not a fault of place, so we are not discredited, in that one or two of our citizens have found their way to the asylum.⁸⁹

One delegate from Cuyahoga County, Stephen S. Stilwell, alluded to this sentiment when he spoke in opposition to the general proliferation in government services that the Ohio Constitution appeared to tolerate:

[s]ome of you will ask what we ought to be relieved from. . . . [A]nd I assert beyond the possibility of contradiction that seventy-five per cent of the inmates of our state's prison, our many workhouses, the institutions for the reformation of the boys and girls [of] our schools for the deaf and blind and [for] the insane asylums, can be traced in a more or less direct way to some form of special privilege or to the criminal negligence of parent or official.⁹⁰

A previous exchange between delegates also appeared to place the "deaf," "dumb," and "blind" into the same category as the "insane."⁹¹ The same association was made by delegates to the 1850 convention.⁹² Again, these passages are fleeting but their tone suggests that the constitutional status of "idiots and insane persons" did not correspond, during this period or the previous ones, with the constitutional status of Ohio citizens in general. Nonetheless, the overall records relating to Ohio constitutional conventions in general appear to be largely silent concerning the

⁸⁸ *Id.* at 1, 35.

⁸⁹ *Id.* at 35.

⁹⁰ *Id.* at 1, 930, 931.

⁹¹ *See id.* at 609.

⁹² *See* OHIO CONSTITUTIONAL CONVENTION OF 1850, *supra* note 79, at 196, 243, 341, 542.

underlying motives and attitudes toward this particular constitutional clause and the restriction upon voting rights that it imposes. Judicial proceedings are a little more illuminating in that respect.

V. OHIO CASE LAW

There have been a few notable cases that have been brought before Ohio courts under that particular constitutional clause. The 1869 Supreme Court of Ohio case of *Sinks v. Reese*⁹³ offers an interesting insight into early attitudes toward this subject. A closely disputed election was the subject of a state constitutional challenge when it was discovered that several of the ballots had been cast by soldiers of the American Civil War who were residing in a “national asylum for disabled volunteer soldiers” located in Montgomery County, Ohio.⁹⁴ The challenge to the validity of those votes was based upon the contention that this asylum constituted federal jurisdiction so the soldiers who lived there did not qualify as residents of Ohio.⁹⁵

In addition to that parochial argument, though, it was noted that the eligibility of two of the voters was challenged upon the basis of mental incapacity.⁹⁶ Chief Justice Brinkerhoff’s opinion for a unanimous court was explicit in reversing two decisions that had been made by the trial court on this subject:

We are furthermore of the opinion that the court below erred in counting for the contestor the vote of one Wortz, whom the testimony clearly shows, we think, to be an idiot; and also in refusing to count the vote of an old gentleman of the name of Davidson, who is not shown by the evidence to be either a lunatic or an idiot, but simply a man whose mind is greatly enfeebled by age. This is not a legal disqualification; and the reverence which is due to “the hoary head” ought to have left his vote uncontested.⁹⁷

The court declined to explain its criteria in support of its determination that Wortz should be considered to be an “idiot,” especially as a constitutional standard. It also is notable that the court felt that special consideration should have been made for

⁹³ *Sinks v. Reese*, 19 Ohio St. 306 (1869).

⁹⁴ *Id.* at 313 (internal quotation marks omitted).

⁹⁵ *Id.* at 316–17.

⁹⁶ *Id.* at 320.

⁹⁷ *Id.*

Davidson because of his status as a senior citizen.⁹⁸ In that case, at least, the court alluded to the status of that voter as a representative of a distinguished category of citizen.⁹⁹ But as a matter of constitutional principle, the standards for disqualification upon the basis of mental capacity remained highly ambiguous.

A much more striking precedent in that respect is a controversy that came before the Ohio Court of Probate for Clark County in 1905.¹⁰⁰ The case of *In re South Charleston Election Contest* addressed a contested municipal ballot referendum concerning the sale of alcoholic beverages within the municipal corporation of South Charleston, Ohio.¹⁰¹ The final result was a one-vote victory in opposition to the proposal to permit such sales.¹⁰² The losing side contested this outcome upon the basis of the vote of Leroy Pitzer, whom these plaintiffs claimed to qualify as an “idiot.”¹⁰³ The court acknowledged the difficulty posed by a lack of a clear legal definition of idiocy or insanity,¹⁰⁴ citing the 1843 Ohio Supreme Court decision in *Clark v. State*,¹⁰⁵ in which the opinion of Judge Birchard, on behalf of a unanimous court, admitted that such a determination is not only based upon diverse criteria, but also subject to discrepancies even among professionals:

The jury must exercise their own judgment and good sense after all, and do justice accordingly, profiting by the aids derived, from the conflict, but in spite of the obstacles it creates. Insanity is a disease of the mind; and physicians, with all the science they possess, are as yet like the masses of mankind, without any certain knowledge of the nature of the thing disordered. They know, and all men know, that mind exists. By the results it produces in a healthy state, all men have equal evidence that it is; but what it is, how to fathom, span or define its nature, is what we lack direct facts and analogies to enable us to do. Philosophers and physicians are here upon a level with the common masses of our race, and if wiser upon the subject, it is because they have been more astute and attentive observers. Every one

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) 373 (Clark County Prob. Ct. 1905).

¹⁰¹ *Id.* at 374.

¹⁰² *Id.* at 374, 389.

¹⁰³ *Id.* at 386, 389.

¹⁰⁴ *Id.* at 386–87.

¹⁰⁵ *Clark v. State*, 12 Ohio 483 (1843).

who associates with his species, acquires, daily, correct knowledge of the natural operations of the human mind, and a capacity to form an opinion, if there should happen to be an aberration from the path of sanity, in any of his constant associates. The ability to form a just conclusion will depend much upon his native intelligence and accuracy of observation.¹⁰⁶

Likewise, this court found that it had to rely upon its own discretion in making a similar determination in relation to the mental capacity of Leroy Pitzer.¹⁰⁷ The opinion cited several precedents in which this general definition had been addressed—sometimes at length—by other Ohio courts, including, *Farrer v. State*,¹⁰⁸ *Loeffner v. State*,¹⁰⁹ *Maconnehey v. State*,¹¹⁰ *State v. Crow*,¹¹¹ and *Lessee of Lore's Heirs v. Truman*,¹¹² plus a standard legal dictionary.¹¹³ This review confirmed a lack of consistency, clarity, and definitiveness in these assessments, despite considerable efforts on the part of various jurists.¹¹⁴ Therefore, this court embarked upon its own exploration of the subject, noting the medical history of Leroy Pitzer (including a debilitating attack of sunstroke when he was seven years old)¹¹⁵ and the opinions of witnesses who knew him,¹¹⁶ ultimately drawing its own conclusion:

It can not be disputed that he is a person of diseased mind, of limited mental capacity, incapable of carrying on in an intelligent manner the ordinary affairs of life, having no distinct ideas upon the question of morality, right or wrong, and one who would probably not be responsible for any criminal act committed by him. His knowledge is so circumscribed and limited as not to include the most

¹⁰⁶ *Id.* at 489.

¹⁰⁷ *See In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 386–90.

¹⁰⁸ *Id.* at 387 (citing *Farrer v. State*, 2 Ohio St. 54, 68–69 (1853)).

¹⁰⁹ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 387–88 (citing *Loeffner v. State*, 10 Ohio St. 598, 603–04 (1857)).

¹¹⁰ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 388 (citing *Maconnehey v. State*, 5 Ohio St. 77, 78 (1855)).

¹¹¹ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 388 (citing *State v. Crow*, 1 Ohio Dec. Reprint 586, 587–88 (1853)).

¹¹² *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 388 (citing *Lessee of Lore's Heirs v. Truman*, 1 Ohio Dec. Reprint 510, 514–15 (1852), *rev'd sub nom.* *Lore's Lessee v. Truman*, 10 Ohio St. 45 (1859)).

¹¹³ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 387 (citing 1 BOUVIER'S LAW DICTIONARY 716 (1877)).

¹¹⁴ *See In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 386–88.

¹¹⁵ *Id.* at 389.

¹¹⁶ *Id.*

ordinary affairs, having no adequate knowledge of the value of money, or any definite conception of size or direction. The court would not hesitate a moment in adjudging him a proper person to be confined in an insane asylum were the matter brought before the court on an affidavit in lunacy; neither would there be any hesitation in appointing a guardian for him were a proper application made for the purpose, his mental condition being much more defective than in the majority of the cases where the court has been called upon to act in such matters.¹¹⁷

More important than the determination of whether or not Leroy Pitzer qualified as an “idiot” or “insane” was the matter of the disposition of his vote, which was invalidated, thus resulting in a tie vote in that referendum and the subsequent defeat of the proposed municipal ban of alcohol.¹¹⁸ Ultimately, the court did not consider the actual appropriateness of excluding such a voter from participating in an election, particularly under the terms of the so-called “local option” Beal Law that regulated such matters.¹¹⁹ It simply accepted that persons falling under that category should not participate in that process and that, if they do vote, their ballot is “illegal.”¹²⁰

One other case that has addressed this section of the Ohio Constitution approached it in a slightly different manner, though with a similar result. The 1950 Supreme Court of Ohio decision in *State ex rel. Melvin v. Sweeney*¹²¹ addressed a challenge to a directive of the Ohio Secretary of State, issued to local boards of election, that instructed them to provide assistance to illiterate voters in casting their ballots in the same manner as assistance already provided to physically disabled voters under the provisions of section 4785-132 of the Ohio General Code.¹²² The *per curiam* opinion on behalf of a unanimous court struck down this practice.¹²³ Although the court upheld the principle of individual voting rights as a necessary protection for each citizen,¹²⁴ it also ruled that the practice of assisting a voter in casting a ballot would unnecessarily

¹¹⁷ *Id.* at 388–89.

¹¹⁸ *Id.* at 389–90.

¹¹⁹ *See id.* at 390. *See generally Intoxicating Liquors—Local Option*, 52 OHIO L. BULL. 46, 46–47 (J.F. Laning & W.J. Tossell eds., 1907) (explaining the Beal Law regulations).

¹²⁰ *In re S. Charleston Election Contest*, 3 Ohio N.P. (n.s.) at 390–92.

¹²¹ *State ex rel. Melvin v. Sweeney*, 94 N.E.2d 785 (Ohio 1950) (*per curiam*).

¹²² *Id.* at 786–88.

¹²³ *Id.* at 791.

¹²⁴ *See id.* at 788–89.

undermine the secrecy of that ballot and, thus, compromise the overall electoral process.¹²⁵

This opinion was, however, dichotomous. While disqualifying illiterate voters as a practical matter, it nonetheless asserted a broader defense of the voting rights of all categories of citizen (including the mentally infirmed) than a more literal interpretation of article V, section 6 of the Ohio Constitution otherwise inferred. The court emphasized the equality of voting rights, even while acknowledging this express exception and the practical need for individual voters to be able to exercise this right in order to enjoy its benefits, consistent with previous rulings on the subject such as *State ex rel. Bateman v. Bode*¹²⁶ and *State ex rel. Weinberger v. Miller*.¹²⁷ Therefore, individual rights were linked to individual responsibilities:

Section 6, Article V of the Constitution, disqualifies idiots and insane persons from voting. All other citizens having proper qualifications may vote. The right of citizens to vote may not be denied or abridged, and, clearly, all qualified citizens have a right to vote even though they may suffer physical infirmities, illiteracy, feebleness of mind, ignorance or lack of information. But the ability to mark and cast a ballot rests upon the individual voter. If a statute should require each voter to mark and prepare his ballot in secret without declaring its content to other persons, doubtless such regulation would be valid and would not constitute a deprivation of the right to vote.¹²⁸

In this context, the court was not concerned with justifying an exception to the general guarantee of voting rights. Instead, it emphasized practical limitations that may arise in promoting and defending the voting rights of all Ohio citizens. The acknowledgement of those limitations appeared, therefore, to present an unfortunate reality rather than a validation for restricting the franchise:

“In construing all laws, whether it be the acts of the General Assembly or a provision of the Constitution of the state, the necessities of the situation must be taken into account. The very best that can be done is to give to all

¹²⁵ *See id.* at 790.

¹²⁶ *See State ex rel. Bateman v. Bode*, 45 N.E. 195, 196 (Ohio 1896).

¹²⁷ *See State ex rel. Weinberger v. Miller*, 99 N.E. 1078, 1081–82 (Ohio 1912).

¹²⁸ *Sweeney*, 94 N.E.2d at 789.

electors an equal opportunity. In every phase of our social and civic life the uneducated man is at a disadvantage. The opportunities are the same for him as for others, but the unfortunate fact remains and must forever remain that he is not in position to take advantage of these opportunities. It is undoubtedly the duty of the Legislature to guard and protect him in his rights in every possible way, consistent with the welfare of the state and the absolute necessity of securing by ballot an intelligent expression of the people's will; but human ingenuity has not yet discovered, and it is not likely that it ever will discover, any better or fairer means than the written or printed ballot, and, if that ballot presents to the uneducated voter the difficulties complained of, the state is powerless to give him further aid, until some Solomon shall devise a plan and method that will obviate all these difficulties, and provide not only equal opportunities to all electors, but also provide some method by which all electors may be able to take advantage of these equal opportunities."¹²⁹

The Ohio Supreme Court, while addressing article V, section 6 of the Ohio Constitution, neither defended nor challenged its specific legitimacy. It did, however, provide, in comparison with other precedents, alternative attitudes and approaches toward the general subject of the franchise and its constitutional limitation. The values promoted by different Ohio courts in this respect offer potential insights into the diverse political culture and values that underlie the Ohio Constitution, its initial drafting and development, and its ongoing evolution. Those values are not unique to Ohio but they are distinctive to its approach to fundamental constitutional concepts, such as voting.

VI. POLITICAL CULTURE AND VALUES

An expansive constitutional interpretation of the electoral franchise arguably reflects populist ideals. It also may be indicative of the influence of classic liberal thought, even though early liberal theorists typically focused upon civil rights (especially in relation to property) and the desirability of limited government. It also may reflect utilitarian interpretations of the relationship between voting and valid calculations of the "greater good" of society as a trade-off

¹²⁹ *Id.* (quoting *Weinberger*, 99 N.E. at 1084) (internal quotation marks omitted).

between subjective conceptions of pleasure and pain. That appeal to the greater good also can be associated with similar definitions that serve as a foundation for communitarian principles that can be traced back to the theories of Jean Jacques Rousseau.

That last claim raises an even broader connection between this sort of restriction of voter eligibility and certain classical republican ideals. However, Rousseau's general approach differs, substantially, between his arguments and more general understandings of modern republicanism and its ancient antecedents.¹³⁰ This contrast is especially true concerning the seminal republican relationship between the fundamental principles of "civic virtue" and "civic duty."¹³¹ One of the most important expressions of this connection has been noted in relation to the function of voting. The health of the republic traditionally has been tied to the support of all of its constituent parts, including its individual and collective citizens.¹³² In order to participate in this process in a meaningful way, the citizen has needed to be fully informed of the objectives, circumstances, and consequences of a vote, both in terms of its particular effect and its contributions to the long-term fortunes of the republic.¹³³ Therefore, the civic duty to vote could not be deemed to be satisfactorily performed unless the voting citizen possessed the civic virtue of being able to develop that knowledge and maintain the necessary capacity for critical understanding and rational choice.¹³⁴ From that perspective, the relationship between a "sound mind" and a "virtuous choice" might be surmised as a necessary precondition for not only performing that civic duty, but also avoiding the undermining of the duty of other voters by potentially cancelling their well-considered decisions in this process.

This perspective would be reflected at the federal level by the 1959 U.S. Supreme Court decision in *Lassiter v. Northampton County Board of Elections*,¹³⁵ relating to a challenge to North

¹³⁰ See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 92–94 (Ernest Rhys ed., G.D.H. Cole trans., 1913) (1762).

¹³¹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 376–79 (1992).

¹³² See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 484–85 (1989).

¹³³ See *id.* at 487–88 (providing an example of a city agreeing to depoliticize a school district by privatizing it for a period of ten years).

¹³⁴ See AMY GUTMANN, *DEMOCRATIC EDUCATION* 44–52 (1987); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 172–75 (1995).

¹³⁵ *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959).

Carolina's literacy test requirement for voters.¹³⁶ Justice William O. Douglas's opinion for a unanimous Court might be surprising because of his otherwise strongly libertarian reputation,¹³⁷ especially as it ultimately would conflict with the Voting Rights Act of 1965 and a congressional application of liberal values of voting as an inalienable, individual right.¹³⁸ Nonetheless, he expressed the opinion of his colleagues that reflected republican values of civic duty, civic virtue, and the common good as legitimate constraints upon the right to vote:

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage.¹³⁹

However, neither ancient nor modern applications of republican principles necessarily stress the importance of voting as a specific activity. Instead, the process of "rational deliberation" generally has been emphasized as key to the process of republican government.¹⁴⁰ Furthermore, the prelude to that process within the context of the institutions of government (especially, but not exclusively, in relation to the legislature) frequently is tied to a

¹³⁶ *Id.* at 45.

¹³⁷ Saul Brenner & Theodore Arrington, *William O. Douglas: Consistent Civil Libertarian or Parabolic Supporter?*, 45 J. POL. 490, 496 (1983).

¹³⁸ See generally Cox & Miles, *supra* note 39, at 3 (finding that Democrats tend to vote in favor of plaintiffs' Voting Rights Act claims more often than their counterparts).

¹³⁹ *Lassiter*, 360 U.S. at 51–52 (footnote omitted) (other citations omitted) (quoting *Stone v. Smith*, 34 N.E. 521, 521 (Mass. 1893)).

¹⁴⁰ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–49 (1988).

concept of proportional representation.¹⁴¹ This conception can be tied to a republican principle of virtual representation, which emphasizes the trustee relationship between government representatives and the constituency with which they are identified.¹⁴² It is theoretically possible, though not plausible, that a constituency of “idiots and insane persons” could be included among those constituent categories, especially in terms of defending the interests of persons with mental disabilities. As Cass Sunstein has noted, “efforts to ensure proportional representation become much more plausible if they are justified on republican grounds. The basic argument here would be that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups, particularly the disadvantaged, have access to the process.”¹⁴³ However, that scenario is exceptionally unlikely, even under an extreme interpretation of virtual representation, not only in terms of the lack of viability for such a category of “idiots and insane persons” but the negating effect of the demand for rational capacity as a necessary precondition for meaningful deliberation.¹⁴⁴

Therefore, this assessment returns to the characteristics of the virtuous voter that are necessary for meaningful fulfillment of that citizen’s civic duty to vote. These voters need to be informed and knowledgeable concerning those matters that affect the general welfare and common good. They should be active participants of the polity and not mere observers of its activities and procedures.¹⁴⁵ They also should have the capacity to exhibit the proper civic virtue that will enable them to fulfill their civic duties and bear the traits of a moral citizen. It is only if they cannot fulfill that function that they are excused from exercising that civic duty—which is not necessarily the same thing as excluding citizens from active participation in the general will.¹⁴⁶

However, republican government within the context of political

¹⁴¹ See *id.* at 1585–89.

¹⁴² See WOOD, *supra* note 50, at 174–80; Jean Yarbrough, *Representation and Republicanism: Two Views*, 9 PUBLIUS 77, 79–84 (1979).

¹⁴³ Sunstein, *supra* note 140, at 1588.

¹⁴⁴ It is interesting, nonetheless, in terms of a concern with “rational deliberation” within the political process that the limitations imposed by Article V of the Ohio Constitution apply only to voters and not to office holders.

¹⁴⁵ See KIM EZRA SHEINBAUM, *THE ELECTORAL CONNECTION: A REASSESSMENT OF THE ROLE OF VOTING IN CONTEMPORARY AMERICAN POLITICS* 98–103 (1984); Peter A. Beinart, *The Real American Voting Problem*, 22 POLITY 143, 145–49 (1989).

¹⁴⁶ See, e.g., WILLIAM N. NELSON, *ON JUSTIFYING DEMOCRACY* 94–130 (1980) (arguing that an educated and morally responsible citizenry is necessary for a good system of government).

deliberation also has been associated with exclusionary practices. It can stem from a belief that certain people simply “do not belong” to a community because of particular characteristics.¹⁴⁷ More specifically, it can reflect a fear that a political decision might be determined as the result of voters whose “insanity” leads them to support one’s political opponents or their cause. A concern that the “feeble-minded” might be manipulated by unscrupulous operatives into voting a particular way may inspire that concern, despite a lack of evidence in support of such fears—though the immediate political consequence of the previously addressed decision in *In re South Charleston Election Contest* offers an anecdotal demonstration of that concern.

Similar rationales have been offered in relation to the upholding of laws and state constitutional standards that have disenfranchised citizens who also are felons, even after their sentences have been served and their “debt to society” has been “paid.”¹⁴⁸ That restriction has been criticized for its inconsistency with liberal democratic principles of procedural justice and fairness.¹⁴⁹ It also has been explained (if not defended) in terms of republican principles of voting as a civic good rather than an individual right.¹⁵⁰ Judge Friendly’s opinion for the United States Court of Appeals Second Circuit in the 1967 case of *Green v. Board of Elections*¹⁵¹ (in which a former felon challenged his disenfranchisement under a New York statute) reflected that perspective when he opined that “man authorizes . . . society . . . to make laws . . . as the public good . . . shall require.”¹⁵² Although the two categories are substantively different, the justifications for disenfranchisement often have been defended by similar underlying premises that can be related to republican principles that treat voting as a civic duty requiring the demonstration of broad and

¹⁴⁷ See Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 650 (1982) (noting the classification of “the useful and the useless” in late eighteenth century Lockean ideology).

¹⁴⁸ See, e.g., Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J., 1197, 1221–26 (1997) (discussing philosophical and practical justifications of disenfranchisement).

¹⁴⁹ See *id.* at 1221–22; Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 491–92 (2004).

¹⁵⁰ See Alex C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1084 (“For republicans, casting a ballot is not merely instrumental, self-interested conduct, but is a vital act of civic participation . . .”).

¹⁵¹ *Green v. Bd. Of Elections*, 380 F.2d 445 (2d Cir. 1967).

¹⁵² *Id.* at 447–48, 451 (internal quotation marks omitted).

sustained traits relating to a general sense of civic virtue.¹⁵³

This approach is not contrasted with liberal ideals so much as it appears to contradict utilitarian notions of the relationship between public policy and the electoral process. The conventional understanding of this school of thought reduces all human calculations to the desire to avoid pain and pursue pleasure.¹⁵⁴ From that perspective, the delegated mission of government must, logically, be to maximize pleasure and minimize pain to promote the “greatest good” for society.¹⁵⁵ But, because pleasure and pain are necessarily subjective assessments, this determination at the societal level can be made only by polling those members of society, consistent with principles of procedural equality. While a sample of opinion can provide an indication of this subjective greater good, the only definitive indication can be provided through the process of voting—ideally with complete participation by all members of society.¹⁵⁶

Therefore, a utilitarian approach to the franchise would open the process to the greatest possible number of persons. Arguably, these voters do not, necessarily, need to be rational.¹⁵⁷ The hedonistic basis for this directive to government and its policies is not grounded upon those things that a person *ought* to find pleasurable but only upon their *actual* interpretation, regardless of reason.¹⁵⁸ In a perfect world, it would be possible to find a way to promote the pleasure of everyone and prevent all pain. In a less than perfect world, maximum pleasure and minimal pain is the practical utilitarian goal.¹⁵⁹

¹⁵³ See, e.g., Lippke, *supra* note 24, at 559–67 (“[Society] might reasonably disenfranchise those offenders whose crimes consist of relatively serious and direct attempts to undermine democratic political institutions and processes. [Society] might also reasonably disenfranchise those offenders whose sufficiently long and diverse histories of criminal convictions show that they are generally unwilling to comply with the laws enacted by democratic governments.”).

¹⁵⁴ See J.A. Mirrlees, *The Economic Uses of Utilitarianism*, in UTILITARIANISM AND BEYOND 63, 64 (Amartya Sen & Bernard Williams eds., 1982).

¹⁵⁵ See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 106–14 (J.H. Burns & H.L.A. Hart eds., 1988) (1821); Mirrlees, *supra* note 154, at 63; J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 12–28 (J.J.C. Smart & Bernard Williams eds., 1973).

¹⁵⁶ See Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q. 1, 11–12 (1977); Jonathan Riley, *Utilitarian Ethics and Democratic Government*, 100 ETHICS 335, 344–46 (1990).

¹⁵⁷ See Sunstein, *supra* note 140, at 1545–46.

¹⁵⁸ See William Curtis Swabey, *Non-Normative Utilitarianism*, 40 J. PHIL. 365, 366–67 (1943). See generally Earl Conee, *Utilitarianism and Rationality*, 42 ANALYSIS 55, 56–59 (1982) (arguing that utilitarianism is logically coherent).

¹⁵⁹ James T. McHugh, *Introduction* to JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT

An assumption that underlies the exclusion of “idiots and insane persons” from the franchise is that their irrational vote will cancel the vote of a rational person and, thus, eliminate the positive result of that rational voter’s participation. However, a utilitarian might counter that insane persons, like criminals, consistently represent a small minority of the population of a given society. Their harmful vote will not constitute, by itself, any sort of norm. However, if such a vote determines an otherwise evenly divided outcome, that result remains legitimate because it indicates that the preference of the insane person is shared by at least half of the participating electorate. Therefore, according to this approach, the need to discount the preferences of this small group (whose assessment of pain and pleasure is as subjectively valid as any other voters) is not justifiable.

A republican interpretation of the electoral process obviously does not share these assumptions. It emphasizes the importance of the act of participation as much, if not more, than the result.¹⁶⁰ A rational voter is necessary for that act to be fulfilled in a meaningful way. Admittedly, this motivation also can be tied to classic liberal notions of rationality as a necessary qualification for participation in the social contract.¹⁶¹ Protection of property is central to the social contract (both in terms of the preservation of inalienable rights and the primary delegated duty of the state) and it implies expectations concerning the capacity of persons who seek to become full participants in this contract and, consequently, full members of society.¹⁶²

This idea is reflected within the fundamental elements of a legal contract, which is foundational to the concept and functioning of the liberal marketplace.¹⁶³ In particular, the element of capacity as a necessary condition for a valid contract to exist is instructive in this

37 (James T. McHugh ed., 2009).

¹⁶⁰ Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1179–80 (2011).

¹⁶¹ See generally Peter McCormick, *Social Contract: Interpretation and Misinterpretation*, 9 CANADIAN J. POL. SCI. 63, 66–67 (1976) (“[D]uring the Enlightenment, reason ceases to set its own goals and merely prescribes optimal routes to the satisfaction of goals set for it.”).

¹⁶² See generally PETER LASLETT, JOHN LOCKE: TWO TREATISES OF GOVERNMENT 368–69 (2d ed. 1988) (“The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property.*”); JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 114–17 (1993) (discussing John Locke’s theory on property and natural law).

¹⁶³ See E. ALLAN FARNSWORTH, CONTRACTS 3–7 (4th ed. 2004) (discussing the necessary exchange of promises involved in contract formation).

respect.¹⁶⁴ The capacity of a party to a contract requires, among other criteria, the perceived mental ability to participate, fully, in the decision making process of this most basic of all liberal interactions.¹⁶⁵

Incapacity is based upon the *public policy* of protecting an incapacitated person from assuming contractual duties to which she was not capable of assenting. However, incapacity usually does not create tension between the contract policy of freedom of contract and the more general, policy, external to contract law, of protecting mentally incapacitated people. Rather, the policies pull in the same direction because the incapacitated party's lack of mental competence means that her apparent assent to the contract is illusory. The policy of freedom of contract is not served by holding a person incapable of assent to a false manifestation of it.¹⁶⁶

This explanation could be applied, readily, to policies related to voting restrictions. Indeed, the per curium opinion of the Ohio Supreme Court in the 1950 case of *State ex rel. Melvin v. Sweeney* echoed those sentiments when it concluded that:

In every phase of our social and civic life the uneducated man is at a disadvantage. The opportunities are the same for him as for others, but the unfortunate fact remains and must forever remain that he is not in position to take advantage of these opportunities. It is undoubtedly the duty of the Legislature to guard and protect him in his rights in every possible way¹⁶⁷

That specific rationale, though it ostensibly imposes restrictions upon individual rights, is not necessarily incompatible with liberal principles, especially concerning the proper role and limits of the state in protecting society and its individual members from demonstrable harm.

Civic republican explanations for this constitutional voting provision appear to be more compelling, though, especially in relation to the role of voting as being integral to the overall scheme of civic participation. In addition to a suspicion that an election will be "tainted" or "corrupted" by allowing the "wrong people" to participate in that process (perhaps helping to explain the

¹⁶⁴ See *id.* at 219–20.

¹⁶⁵ See *id.* at 228–29.

¹⁶⁶ BRIAN A. BLUM, *CONTRACTS: EXAMPLES & EXPLANATIONS* 454 (2007).

¹⁶⁷ *State ex. rel. Melvin v. Sweeney*, 94 N.E.2d 785, 789 (Ohio 1950) (quoting *State ex. rel. Weinberger v. Miller*, 99 N.E. 1078, 1084 (Ohio 1912)) (internal quotation marks omitted).

continued use of such seemingly dismissive terminology in relation to them), there are expressions of the relationship of this process to the common good and general welfare of the community that appear to motivate it as well. Ultimately, the performance of voting as a civic duty appears to provide a prominent rationale for this exclusion of this category of citizen, thus defining it less as an individual right and more as a matter of state interest, including in terms of guaranteeing the participation of persons whose intelligent choice will contribute to political decision making, rather than a guarantee of the protection of individual interests through the exercise of the ballot.¹⁶⁸

VII. CONCLUSION

Many mentally disabled persons can fulfill the expectations of republican citizenship. Frequently, though, a severe gap can exist between reality and popular perception—as indicated, particularly, by some of the deliberations of the Ohio constitutional conventions. Attitudes regarding the “appropriateness” of allowing citizens of this category to exercise their civil rights (including their voting rights) have continued to be largely prejudicial, despite strong evidence in favor of the full participation of these citizens within society.¹⁶⁹ This issue is not restricted to a particular state. Nonetheless, Ohio offers a good case study of this sort of constitutional limitation, especially in terms of the persistence of its derogatory language.

The right to vote is the central principle of a liberal democratic society. Any restriction upon this civil right, therefore, must be made and justified with great care if not with skepticism. Article V, section 6 of the Ohio Constitution not only provides such a restriction, but does it with language that might be considered, charitably, to be archaic, if not misapplied, and, even, insulting. It already has been reconsidered by a Constitutional Revision Commission and, arguably, it ought to be reconsidered, further. Otherwise, it may continue to reflect values that may be ostensibly justifiable in some respects but, also, may not reflect the best traditions of the political culture and philosophical principles that

¹⁶⁸ See generally Winkler, *supra* note 40, at 346–50 (discussing the state’s interest in having an educated electorate).

¹⁶⁹ See generally SUSAN STEFAN, AM. PSYCHOL. ASS’N, UNEQUAL RIGHTS 3–36 (2001) (discussing examples of discrimination against the mentally disabled throughout various aspects of society).

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will persist in shaping the Ohio constitutional tradition.