The Right to Vote of the Mentally Disabled in Oklahoma: A Case Study in Overinclusive Language and Fundamental Rights

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THE RIGHT TO VOTE OF THE MENTALLY DISABLED IN OKLAHOMA: A CASE STUDY IN OVERINCLUSIVE LANGUAGE AND FUNDAMENTAL RIGHTS

Poor Tom, that eats the swimming frogs, the toads, the tadpole, the wall newt and the water newt, that in the fury of his heart, when the foul fiend rages, eats cow dung, fox sallets, swallows the old rat and the ditch dog, drinks the green mantle of the slimy pool; who is shipt from tything to tything, and stocked, punished and imprisoned.  

I. INTRODUCTION

Through a history marked by segregation, exploitation, and attempted extermination, to a current status as a governmentally protected class, the mentally retarded have consistently been the subject of societal misconception. The passage of time, coupled with a greater understanding of retardation and its effects, has served to temper this misconception and eliminate much of the extreme treatment common in

1. The statutory topic of this comment, Title 26, Section 4-101(3), [hereinafter Section 4-101(3)] will be purged from the Oklahoma Statutes effective November 1, 1989. See Act of May 8, 1989, ch. 174, 1989 Okla. Sess. Law Serv. 438 (West) (to be codified at OKLA. STAT. tit. 26, § 4-101). Though this revision virtually eliminates the voting rights restriction on the mentally retarded in Oklahoma, its thirteen-year existence in the Oklahoma statutes serves to highlight one example of the statutory provisions which unconstitutionally infringe upon the fundamental rights of a population. (For other rights recognized by the United States Supreme Court as fundamentally protected by the United States Constitution, see infra note 35.) The following analysis of former Section 4-101(3) under the equal protection clause of the fourteenth amendment serves to illustrate the United States Supreme Court's approach to overinclusive statutory language in the context of fundamental rights.


3. Historically the mentally retarded have been subject to various methods of extermination, ostracized and segregated from the community, and tolerated for their entertainment value. The retarded were also often considered demonically possessed, and were tortured in an effort to exorcize the demons. For a general discussion of the history of the mentally retarded, see B. GEARHEART & F. LITTON, THE TRAINABLE RETARDED 1-19 (1975) [hereinafter GEARHEART & LITTON]; see also S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 1 (1971); W. EHLERS, C. KRISHEF & J. PROTHERO, AN INTRODUCTION TO MENTAL RETARDATION: A PROGRAMMED TEXT 17-19 (1973) [hereinafter EHLERS, KRISHEF & PROTHERO].

earlier times.\(^5\) Still, however, a stigma of inferiority persists in the minds of a substantial percentage of the population.\(^6\) This stigma, as is often true with respect to any superior-inferior dichotomy, has developed into blind and overinclusive discrimination\(^7\) based not on evaluation of the individual, but rather on a stereotypical perception of the retarded as a class.

For a period in excess of ten years, title 26, section 4-101(3)\(^8\) of the Oklahoma Statutes (hereinafter Section 4-101(3)), by denying the right to vote to the mentally retarded in Oklahoma,\(^9\) stood as one form of this overinclusive discrimination.\(^10\) Though the statute reflected a more progressive terminology\(^11\) than that found in the original exclusions of the Oklahoma Constitution,\(^12\) it failed to reflect a concomitant appreciation of accomplishing this task was to cast these individuals out to sea on "ships of fools." S. HERR, S. ARONS & R. WALLACE, LEGAL RIGHTS AND MENTAL HEALTH CARE 143 (1983). The retarded were often tortured to exorcise the demons thought to possess them and were commonly kept as playthings or court jesters. GEARHEART & LITTON, supra note 3, at 1-2; EHLERS, KRISHEF & PROTHERO, supra note 3, at 17-19.

6. For a general discussion of public attitudes toward the mentally retarded, see M. BEGAB & S. RICHARDSON, THE MENTALLY RETARDED: A SOCIAL SCIENCE PERSPECTIVE 102-05 (1975) [hereinafter BEGAB & RICHARDSON]; for a general discussion of attitude-changing strategies, see id. at 159.

7. Many parallels can be drawn between the discriminations experienced by ethnic minorities, women, and the mentally retarded. See S. HERR, S. ARONS & R. WALLACE, supra note 5, at 143.

8. OKLA. STAT. tit. 26, § 4-101 (1981) stated:

Every person who is a qualified elector as defined by Section 1 of Article III of the Oklahoma Constitution shall be entitled to become a registered voter in the precinct of his residence, with the following exceptions:

3. "Mentally retarded persons" as defined by Section 3 of Title 43A of the Oklahoma Statutes shall be ineligible to register.

Id.

9. Section 4-101(3) technically did not deny the right to vote. Rather, it rendered the retarded ineligible to register to vote. In order to legally vote, a party must be registered. OKLA. STAT. tit. 26, § 4-102 (1981). However, because Section 4-101(3) denied the right to register, for purposes of this Comment, it is considered effective to have denied the right to vote.

10. A similar analysis might also be appropriate with respect to OKLA. STAT. tit. 26, § 4-101(2), regarding the adjudicated mentally incompetent. For text of Section 4-101(2), see infra note 21.

11. "Idiot," "lunatic," and all other analogous terms were deleted from Article III, Section 1 of the Oklahoma Constitution in 1964. All restrictions on the right of suffrage, except for the age and residency requirements contained in the Oklahoma Constitution, are provided in the Oklahoma statutes. The statutory exclusion previously referred to "mentally retarded persons." More recently enacted statutes refer to these individuals as "developmentally disabled." See infra note 28.

12. The Oklahoma Constitution, as adopted in 1907, included eligibility requirements for the electorate of this state. Among these were the requirements that the electorate be male citizens of both the United States and Oklahoma, twenty-one years of age and residents of the state for one year, the county for six months, and the precinct for thirty days. In addition, the Oklahoma Constitution excluded convicted felons, indigents, persons in public prisons, idiots and lunatics. OKLA. CONST. art. III, § 1 (1907, repealed 1964). In 1964, the terms "idiot" and "lunatic" were replaced...
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for progressive understanding of the retarded. Rather, by failing to recognize the complexity of retardation and the diversity of its effects, the statute perpetuated a prevailing misconception regarding the retarded and unconstitutionally abridged their fundamental right to vote.

Pointed advances in national policy, structured to protect the franchise generally,13 did little to prevent the 1979 enactment of Section 4-101(3). Though many states maintained cerebrally-focused restrictions on the franchise during this period, because Oklahoma was the only state to specifically exclude the retarded,14 little national attention focused on the restriction. Consequently, it became unequivocally clear that in spite of the paucity of case law on the subject,15 any meaningful reevaluation of the voting rights of the mentally retarded in Oklahoma would have to originate within the state.16

Ongoing revisions in other areas of the Oklahoma statutes indicated

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14. Forty-five states exclude individuals from voting based on criteria related to mental capacity. B. SALES, DISABLED PERSONS AND THE LAW 100-04 (1982). Many of the classifications currently in use throughout the United States suffer the same infirmities of ambiguity as the term "mentally retarded persons" did in Section 4-101(3). Classifications most often used include: Insane persons - 17 states; Idiots and Mentally Incompetent persons - 13 states each; Persons under guardianship - 9 states; Persons non compos mentis - 7 states; Incompetent institutional residents - 3 states; Persons of unsound mind - 3 states; Persons committed to an institution for the mentally ill or insane - 2 states; Mentally Diseased persons - 1 state; Mentally Retarded persons - 1 state. Id. at 100.

15. Though unchallenged in the area of voting rights for the mentally disabled, Oklahoma has been challenged in other areas restricting the franchise. See, e.g., Lane v. Wilson, 307 U.S. 268 (1939) (voter registration provisions held racially discriminatory in violation of fifteenth amendment); Guinn v. United States, 238 U.S. 347 (1915) (discriminatory effect of grandfather clause exemption to literacy test found unconstitutional).

16. This reevaluation has in fact originated within the state. With the enactment of the following revisions to Title 26, Section 4-101, the prior restriction on the voting rights of the mentally retarded in Oklahoma is a thing of the past. Section 4-101, effective November 1, 1989, reads:

Every person who is a qualified elector as defined by Section 1 or Article III of the Oklahoma Constitution shall be entitled to become a registered voter in the precinct of his residence, with the following exceptions:

1. Persons convicted of a felony shall be ineligible to register for a period of time

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that legislative correction was a possibility.\textsuperscript{17} Absent such initiative, however, the challenge was destined to fall to the judiciary. Such a challenge, in the context of the equal protection clause\textsuperscript{18} of the fourteenth amendment, certainly would have succeeded. Because exclusion of the mentally retarded from the voting process was not based on consideration of the relative capabilities of the retarded individuals, but rather on societal ignorance and misconception regarding the retarded as a class, Section 4-101(3) inevitably would have been found unconstitutionally inclusive.

\section{II. Statutory and Constitutional Standards}

\textbf{A. Statutory Standard}

The former Section 4-101 identified three categories of Oklahoma citizens as ineligible to vote. By rejecting the mentally retarded,\textsuperscript{19} convicted felons,\textsuperscript{20} and those adjudicated mentally incompetent\textsuperscript{21} as eligible voters, Section 4-101 supplemented the age and residency requirements enumerated in Article III, Section 1\textsuperscript{22} of the Oklahoma Constitution in

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  \item equal to the time prescribed in the judgment and sentence, when such convictions have become final.
  \item Any person who has been adjudged to be an incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes, shall be ineligible to register to vote. When such incapacitated person has been adjudged to be no longer incapacitated such person shall be eligible to become a registered voter. The provisions of this paragraph shall not prohibit any person adjudged to be a partially incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes from being eligible to register to vote unless the order adjudging the person to be partially incapacitated restricts such persons from being eligible to register to vote.
  \item The Group Homes Act, OKLA. STAT. tit. 63, § 1-818(2)(8) (Supp. 1988), provides a definition for "developmental disability" that reflects a more progressive understanding of retardation and its effects. In addition, the Oklahoma Guardianship Act adopts the Group Homes Act definition and provides a finding of partial incapacity and a specific evaluation regarding the capacity to vote. OKLA. STAT. tit. 30, § 1-111(12) (Supp. 1988).
  \item The fourteenth amendment provides in part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
  \item See supra notes 8-9 and accompanying text.
  \item "Persons convicted of a felony shall be ineligible to register for a period of time equal to the time prescribed in the judgment and sentence, when such convictions have become final." OKLA. STAT. tit. 26, § 4-101(1) (1981).
  \item "Persons who have been adjudged 'mentally incompetent' as defined by Section 3 of Title 43A of the Oklahoma Statutes shall be ineligible to register until they have been declared mentally competent by a court of competent jurisdiction." OKLA. STAT. tit. 26, § 4-101(2) (1981).
  \item The Oklahoma Constitution was streamlined in 1978 to provide that "[s]ubject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state." OKLA. CONST. art. III, § 1.
\end{itemize}
defining the eligible electorate in Oklahoma. Most of these state-imposed limitations on the franchise had been approved by the United States Supreme Court as constitutional.\(^\text{23}\) Classification of the mentally retarded has thus far escaped the scrutiny of the Court in the context of voting rights, however.

Though each of the excluded classes was similarly situated with respect to the franchise, not all enjoyed the same clarity of definition. In the context of the mentally retarded, any apparent clarity was merely superficial. The complexity of retardation and the diversity of its effects prevented definitional precision through the use of generalized terms.\(^\text{24}\) Section 4-101(3), in identifying the class subject to exclusion as “mentally retarded persons,” failed to recognize this complexity and consequently excluded a class of individuals with a broad range of functional capabilities.\(^\text{25}\)

Further compounding the definitional difficulty inherent in the context of retardation was the technical difficulty in statutory integration. Section 4-101(3) defined the term “mentally retarded persons” through a cross-reference to title 43A, section 3 of the Oklahoma Statutes. However, an amendment to the referenced statute deleted the term “mentally retarded person” and its successor “developmental disability” without restructuring the definitional reference included in Section 4-101(3).\(^\text{26}\) The effect of the resulting statutory incongruity confused Oklahoma election officials as well as the mentally retarded electorate. This confusion, when coupled with the lack of effective enforcement provisions, fostered

\(^{23}\) See Richardson v. Ramirez, 418 U.S. 34, 54 (1974) (exclusion of felons from the right of suffrage implicitly authorized by the fourteenth amendment and subject to minimal scrutiny); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (50-day voter residency requirements upheld as constitutional); Carrington v. Rash, 380 U.S. 89 (1965) (exclusion of military personnel from the right of suffrage held unconstitutional where traditional state residency requirements are met). The state's power to impose age-based restrictions on the right of suffrage is implicit in the twenty-sixth amendment to the United States Constitution. The twenty-sixth amendment identifies eighteen years of age as the threshold of constitutionality for age-based voting restrictions.

\(^{24}\) See S. Sarason, Educational Handicap, Public Policy, and Social History 11-12 (1979). See also Gearheart & Litton, supra note 3, at 21, 25; H. Grossman, Manual on Terminology and Classification in Mental Retardation 5-7 (1973). The American Association of Mental Deficiency [AAMR] defines mental retardation as “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.” Gearheart & Litton, supra note 3, at 22 (quoting H. Grossman, supra, at 5).

\(^{25}\) See infra notes 61-62 and accompanying text.

\(^{26}\) In 1986, Okla. Stat. tit. 43A, § 3 was revised, eliminating the referenced definition "mentally retarded person" and thereby creating a statutory incongruity between Title 26, Section 4-101(3) and Title 43A, Section 3. With the 1989 revision to Title 26, Section 4-101, which will become effective November 1, 1989, the rectification of this incongruity in the statutory scheme is no longer necessary.
an indifference to the statutory directive extended in Section 4-101(3) and resulted in an absolute failure in its application.

Correcting this definitional oversight would have required minimal effort by the Oklahoma Legislature. Several definitions for "mentally retarded person" and "developmentally disabled person" currently exist in scattered sections of the Oklahoma statutes. These definitions range from the traditionally accepted definition\(^{27}\) to the progressive.\(^{28}\) However, it was clear that a mere definitional recitation would be unlikely to overcome the constitutional infirmities inherent in any inclusive definition of the mentally retarded.\(^{29}\) In addition, the legislature would have been severely taxed to develop legitimate procedures for enforcement of the statutory restrictions.\(^{30}\)

Determining the constitutionality of a statute such as Section 4-

27. **OKLA. STAT. tit. 10, § 1408(A) (Supp. 1988)** provides that:

"Mentally retarded person" . . . means a person afflicted with mental defectiveness or developmental disability from birth or from an early age to such an extent that he is incapable of managing himself or his affairs, who for his own welfare or the welfare of others or of the community requires supervision, control, or care, and who is not mentally ill or of unsound mind to such an extent as to require his certification to an institution for the mentally ill.

Id.

Compare nearly identical language used in **OKLA. STAT. tit. 43A, § 3 (Supp. 1979)** at the time the exclusionary classifications of **OKLA. STAT. tit. 26, § 4-101 (Supp. 1979)** were enacted:

"Mentally retarded person" means a person afflicted with mental defectiveness from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who, for his own welfare or the welfare of others or of the community, requires supervision, control or care and who is not mentally ill or of unsound mind to such an extent as to require his certification to an institution for the mentally ill as provided by this act.

**OKLA. STAT. tit. 43A, § 3(g) (Supp. 1979), amended by OKLA. STAT. tit. 43A, § 3 (1981), renumbered as § 1-103 (Supp. 1986).**

28. "Developmental disability" is defined in **OKLA. STAT. tit. 63, § 1-818.2(8) (Supp. 1988)** as:

a. severely chronic disability of a person which: a. is attributable to a physical or mental impairment or a combination of physical and mental impairments; and b. is manifested before the person attains the age of twenty-two (22); and c. is likely to continue indefinitely; and d. results in substantial functional limitations in three or more of the following areas of major life activity: (1) self-care, (2) receptive and expressive language, (3) learning, (4) mobility, (5) self-direction, (6) capacity for independent living, (7) economic self-sufficiency; e. reflects the person's need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are lifelong or of extended duration and are individually planned and coordinated.

Id.


29. **See supra** note 24 and **infra** notes 74-98 and accompanying text.

30. **See infra** notes 56-58 and accompanying text.
101(3) requires an analysis of the restriction in terms of the equal protection clause of the fourteenth amendment to the United States Constitution. Three standards of judicial scrutiny have been enunciated by the United States Supreme Court with regard to the equal protection clause. Determining which level of scrutiny is appropriate in a given circumstance is in part predicated on the classification of the particular right in dispute.

B. Equal Protection Standards and the Right to Vote

The right to vote as provided in the United States Constitution is not absolute but rather is qualified by the power of the states to prescribe qualifications for their electorate. The Constitution has, however, served as a source of judicially-imposed limits on the manner and

31. The right to vote is derived from several provisions of the United States Constitution. The fourteenth amendment provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Article I provides in part: "The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . . ." U.S. CONST. art. I, § 2 (emphasis added). The fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. The nineteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. The twenty-fourth amendment provides in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1. The twenty-sixth amendment states: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1.

32. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("This 'equal right to vote' is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.") (citation omitted); Kramer v. Union Free School District No. 15, 395 U.S. 621, 625 (1969) ("States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot."); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("the right of suffrage 'is subject to the imposition of state standards which are not discriminatory and which do not contravene any restrictions that Congress . . . has imposed' ") (quoting Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959)); Carrington v. Rash, 380 U.S. 89, 91 (1965) ("There can be no doubt . . . [as to] the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, . . . qualifications for the exercise of the franchise."); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959) ("The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised absent of course the discrimination which the Constitution condemns.") (citations omitted); Yick Wo v. Hopkins, 118 U.S. 356, 370-71 (1886) (dictum); Ex parte Yarbrough, 110 U.S. 651, 664-65 (1884).

33. Kusper v. Pontikes, 414 U.S. 51, 57 (1973) ("administration of the electoral process is a matter that the Constitution largely entrusts to the States"); Dunn, 405 U.S. at 336 ("the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways"); Kramer, 395 U.S. at 625; Williams v. Rhodes, 393 U.S. 23, 28-29 (1968); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) ("States 'have broad powers to determine the conditions under which suffrage may be exercised.' ") (citation omitted); Harper, 383 U.S. at 665; Carrington, 380 U.S. at 93-
nature of any state-imposed qualifications. The courts have consistently identified the right to vote as a fundamental political right, because as a "citizen's link to his laws and government, [it] is protective of all fundamental rights and privileges." As a result of this characterization, the Supreme Court, with some exceptions, has established a rigorous standard of judicial scrutiny under the equal protection clause of the fourteenth amendment with respect to any state-imposed infringement on the right to vote.

A strict scrutiny analysis under the equal protection clause requires the court to evaluate two sets of criteria. First, the court must identify the objectives advanced by the state to justify the restrictions imposed by

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94; Lassiter, 360 U.S. at 50; Pope v. Williams, 193 U.S. 621, 632-33 (1904); Yarbrough, 110 U.S. at 664.

34. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)(dictum) ("[Strict scrutiny is also used] by the courts . . . when state laws impinge on personal rights protected by the Constitution."); Kusper, 414 U.S. at 55 (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)); Evans v. Connman, 389 U.S. 419, 422 (1970) ("before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); Kramer, 395 U.S. at 626; Harper, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); Reynolds v. Sims, 377 U.S. 533, 554, 561, 566 (1964); Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Lassiter, 360 U.S. at 51; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Yick Wo, 118 U.S. at 370-71; Yarbrough, 110 U.S. at 665.

35. Evans v. Connman, 398 U.S. 419, 422 (1970). See also Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[The right to vote is] a fundamental political right, because preservative of all rights."). The United States Supreme Court has also identified other rights as fundamentally protected by the United States Constitution. See, e.g., Roe v. Wade, 410 U.S. 113 (1973)(right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the first amendment); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

36. See, e.g., Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (exclusion of felons from the right of suffrage implicitly authorized by the fourteenth amendment, therefore subject to minimal scrutiny).


The strict scrutiny standard of judicial review has also been recognized by the Oklahoma Supreme Court. See, e.g., Fleming v. Baptist Gen. Convention, 742 P.2d 1087, 1097 (Okla. 1987) (dictum) ("Equal protection analysis requires strict scrutiny of a legislative classification only when the categorization impermissibly interferes with the exercise of a fundamental right, a right of a uniquely private nature such as the right to vote."); Clegg v. Oklahoma State Election Bd., 637 P.2d 103, 106 (Okla. 1981) (dictum); Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1044-45 (Okla. 1980); McClendon v. Slater, 554 P.2d 774, 777 (Okla. 1976), cert. denied, 429 U.S. 1096 (1977).

"Suspect classifications" also trigger strict scrutiny, but the Supreme Court has not gone so far as to hold the mentally retarded as a "suspect class." See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985).

38. Restriction on the right to vote of the mentally retarded under former Section 4-101(3) also invoked due process implications beyond the scope of this Comment.
the challenged statute. This identification is followed by an evaluation of the objectives in light of the fundamental rights being restricted. Through this analysis, the court determines the relative importance of the objective in relation to the fundamental right infringed. To survive this prong of a strict scrutiny analysis, the state objective must be determined by the court to be both legitimate and compelling.40

The second prong considered by the court in a strict scrutiny analysis is the "fit" created between the restriction and the restricted.41 In evaluating this prong, the court focuses on the particularity with which the statute is tailored to effectuate the legitimate and compelling objective.42 This effect-based analysis is characterized by the evaluation of the statute in terms of its overinclusive and underinclusive effects.43 As part of this analysis, the court considers whether alternative, less intrusive means are available for accomplishing the state-advanced objective while preserving the fundamental rights of those unnecessarily affected.

The state's burden of justification in defending a challenged statute

39. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("heavy burden of justification is on the State; . . . the statute will be closely scrutinized in light of its asserted purposes"); Cleburne, 473 U.S. at 440 (dictum) (when constitutionally protected personal rights are affected, strict scrutiny is employed to determine if statute is "suitably tailored to serve a compelling state interest"); Kramer, 395 U.S. at 626-27 (statute that grants the right to vote to some residents and not to others is subject to analysis of necessary and compelling state interest); United States v. Robel, 389 U.S. 258, 271 (1967) (Brennan, J., concurring) ("Each regulation must be examined in terms of its potential impact on fundamental rights, the importance of the end sought and the necessity for the means adopted.").

40. The Supreme Court has not articulated a clear test for determining whether a state interest is compelling, therefore the projected result of any such analysis can be considered no more than an educated estimation. See Simpson, A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause, 29 Stan. L. Rev. 663, 677 (1977).

41. Because a strict scrutiny analysis relies upon the satisfaction of a multi-component test, the Court often finds a violation through the mere failure to satisfy one component. See Kramer v. Union Free School District No. 15, 395 U.S. 621, 632 n.14 (1969).

42. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)(dictum) (Statutes that impinge on personal rights protected by the Constitution "are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); Kusper v. Pontikes, 414 U.S. 51, 59 (1973) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("Statutes affecting constitutional rights must be drawn with 'precision', and must be 'tailored' to serve their legitimate objectives.") (citations omitted).

43. See Kusper, 414 U.S. at 59 ("If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."). See also Dunn, 405 U.S. at 337; Kramer, 395 U.S. at 627 (In applying the strict scrutiny analysis "the Court must determine whether the exclusions are necessary to promote a compelling state interest." (emphasis added)); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

44. While the "fit" analysis comprises both an overinclusive and underinclusive component, overinclusivity has been the primary basis for statutory rejection by the Court on equal protection, strict scrutiny grounds. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-4 n.4 (1988).
is substantial under a strict scrutiny analysis. The burden is best summarized by the observations of some commentators that strict scrutiny is often “strict” in theory, but “fatal” in fact. The right to vote, as a fundamental right, is particularly appropriate for strict scrutiny review. As succinctly enunciated by the Supreme Court in *Wesberry v. Sanders*: The burden is best summarized by the observations of some commentators that strict scrutiny is often “strict” in theory, but “fatal” in fact. The right to vote, as a fundamental right, is particularly appropriate for strict scrutiny review. As succinctly enunciated by the Supreme Court in *Wesberry v. Sanders*:  

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

### III. Application of the Strict Scrutiny Standard  
#### A. Statutory Objectives  

In projecting the probable outcome of a judicial challenge to the restriction imposed by Section 4-101(3), it is first necessary to determine the probable motive underlying exclusion of the mentally retarded. Neither a purpose statement for the statute nor legislative history is available for establishing the true intent of the legislature. However, consideration of state-advanced objectives as propounded by courts and commentators outside Oklahoma isolate two possible objectives that the state might have advanced in support of the exclusions contained in former Section 4-101(3).  

1. Purity at the Ballot Box  

The most compelling interest a state could advance in support of the exclusion of the mentally retarded from registering and voting is preventing voter fraud. The fraud anticipated by the state might take two forms. Each relies on the assumption that the mentally retarded are significantly more susceptible to intentional interference by a third party with the individual’s freedom of choice than is the average elector. In the first instance, the alleged fraud results from the intentional manipulation of the retarded individual in an effort to influence his vote. Though not unlike the influence imposed on all voters, it may have been argued that higher  

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47. *Id.* at 17-18.  
48. In *Carrington v. Rash*, 380 U.S. 89, 93-94 (1965), the Court held that the danger of undue influence by a commander over his men was not a sufficient basis to permit disenfranchisement. *See also* *O’Brien v. Skinner*, 414 U.S. 524, 534 (1974) (Marshall, J., concurring) (rejecting the legitimacy
than normal vulnerability of the retarded to such undue influence justified the comprehensive exclusion of the retarded as a class. In the second instance, the manipulation focuses not on the individual voter, but on the absentee ballot system. Here, the manipulator would execute the absentee ballot for the retarded individual and in the process substitute his own will for that of the retarded voter. The belief that the low level of understanding inherent in the retarded enhances the possibility of voter fraud is ill-founded.

The state might have contended that preventing voter fraud is particularly important for two overriding reasons. First, it is the states in which the Constitution vested the power to implement and supervise the electoral system. Accompanying this significant delegation of power is a heightened interest in maintaining the integrity of that system. Second, the state has a particularly poignant interest in providing for the fair and equal representation of its electorate. Infringement through fraud would dilute the legitimate vote, resulting in elections that might not reflect the true will of the majority. In both cases, the state's interest in maintaining an electoral system free of fraudulent voting practices is certainly legitimate and would likely be found compelling.

A contrary position may be advanced through analysis of the procedures provided for enforcing the exclusions of Section 4-101. The statutes provide for effective means of identifying convicted felons and the adjudicated mentally incompetent for purposes of revoking their eligibility to register to vote. Procedures for notifying local county registrars and removing identified parties from the rolls are clearly prescribed. However, no similar means of identification and notification are provided in the context of the mentally retarded. Rather, enforcement was left to

of the state's interest in preventing state officials from influencing pre-trial detainees by denying them voting rights).

49. The viability of this assertion is necessarily dependent on the validity of the suggestion that the retarded are significantly more susceptible to the influence of third parties than a non-excluded individual. While it is recognized that certain individuals are more prone to ready acceptance of outside influence than are their non-categorized counterparts, this generalization cannot conclusively be applied to all within the exclusionary language of former Section 4-101(3).

50. See supra note 33 and accompanying text.


52. See, e.g., O'Brien, 414 U.S. at 534; Dunn, 405 U.S. at 345.


55. Id. § 4-120.4-.5.
the individual elector or the local county registrar. Neither alternative was particularly effective in preventing the retarded from voting.

In addition, a clear standard of punishment is provided for any willful vote cast with knowledge of ineligibility. This is particularly anomalous with respect to the mentally retarded. Without clear and specific lines demarking that class of the retarded to be excluded, the scienter requirement of the punishment provision is largely without effect. Apparently, any retarded individual accused of feloniously voting while ineligible might have relied on the failure in statutory definition to rebut the claim that the violation was perpetrated with knowledge of the ineligibility.

This ineffectiveness, when coupled with the complete lack of identification, notification, and enforcement provisions, renders suspect any state interest advanced to justify exclusion of the mentally retarded from

56. At the time of registration, each voter is required to sign an oath stating:

I, the undersigned, do solemnly swear or affirm that I am a citizen of the United States and a resident of the State of Oklahoma. I further swear that I am eighteen years of age or older, or that I will be eighteen years of age on or before the date of the next ensuing election.

I further swear that I have not been convicted of a felony, for which a period of time equal to the original judgment and sentence has not expired, or for which I have not been pardoned. I further swear that I am not now under adjudication as being mentally incompetent and that I am not mentally retarded.

Oklahoma State Voter Registration Oath, 1988 (emphasis added).

57. Most registrars do not have the authority to and are advised against challenging an individual regarding eligibility to register. Whether this failure to inquire is due to feelings of inadequacy to reach such a conclusion or fear of liability in raising the issue, the fact remains that electors are seldom challenged before registering. This is not only true with regard to the mentally retarded, but also regarding the restrictions on residency, mental incompetency, and conviction of a felony. Telephone interview with Barbara Rossetti, Assistant Secretary, Tulsa County Election Board (Feb. 15, 1989).

58. Several reasons have been advanced to explain the failure in enforcement and lack of judicial challenge to Section 4-101(3). First, it is argued that many of the individuals encompassed by the general exclusion are not identifiably retarded, whether visibly or through electoral records, and therefore were not prevented from exercising the right. Second, many of the retarded who are capable, but do not vote, share the same indifference to the electoral process as a significant percentage of the qualified electorate. See H. Bone & A. Ranney, Politics and Voters § (1971). Third, it is argued that those remaining individuals to which the exclusions are directed are in the numerically insignificant category of profoundly retarded to whom the right to vote is meaningless. See Gearheart & Litton, supra note 3, at 26 (approximately three percent of the retarded population fall within the severe and profound category). Fourth, it may be advanced that complacency in enforcement, where prosecution is rare even when a violation is identified, results in a similar posture in those responsible for initiating the enforcement of and demanding compliance with the statutory restrictions.

59. Okla. Stat. tit. 26, § 16-102 (1981) provides that "[a]ny person who votes more than once at any election or who, knowing that he is not eligible to vote at an election, willfully votes at said election shall be deemed guilty of a felony." Id. The felony established by Section 16-102 carries as punishment not more than two years in the state penitentiary or a fine of not more than Five Thousand Dollars, or both. Okla. Stat. tit. 26, § 16-101 (1981).
the right to vote. Taken further, it may be argued that the lack of effective enforcement provisions negates any claim by the state that the interest advanced is sufficiently compelling to survive strict scrutiny. Additional support for this position may be drawn from the fact that the statutes already provide stiff penalties for perpetrators of voter fraud. Therefore, further restriction to prevent fraud in the context of the mentally retarded is redundant.

Another argument that might be advanced in rejecting the state interest as sufficiently compelling to survive strict scrutiny is the invalidity of the premise upon which the voter fraud restriction is based. The voter fraud justification presupposes that the mentally retarded are significantly more vulnerable to undue influence than the average eligible voter. This presumption, in the context of the mentally retarded, is only partially supported by fact. The nature of retardation encompasses varying degrees of capabilities, from the most profound to the marginally normal. As a result, any attempt to comprehensively classify the retarded with respect to functional capabilities must survive the overinclusive and underinclusive prongs of a strict scrutiny analysis.


61. Of every thirty retarded individuals, twenty-five will lead socially and economically independent lives. Of the remaining five individuals, four will require some assistance all their lives but are capable of self-support. U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS 189 (1980) (statements of Marcia P. Burgdorf, Co-director, Developmental Disabilities Law Project, University of Maryland at Baltimore) [hereinafter CIVIL RIGHTS ISSUES]. See also GEARHEART & LITTON, supra note 3, at 26; City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 n.9 (1985) ("severe" and "profound" retardation found in only five percent of retarded individuals).

62. Mental retardation is often divided into four classifications based on relative intelligence and capabilities. Approximately eighty-five percent of all retarded individuals (estimated at approximately three percent of the total population) are classified as mildly retarded. With I.Q.'s in the range of 67-52, these individuals, with proper education and training, can lead socially and economically independent lives. H. GROSSMAN, supra note 24, at 18.

A second category of retarded individuals are often described as moderately retarded. Trainable and capable of leading relatively normal lives, this category is distinguished from the mildly retarded by their greater need for supervision and support. With I.Q.'s in the range of 51-36, moderately retarded individuals comprise approximately twelve percent of the retarded population. Id.

The remaining three percent of retarded individuals consists of two groups, the severely retarded (I.Q. of 35-20) and profoundly retarded (I.Q. below 20). These individuals are generally regarded as totally dependent, requiring hour by hour supervision. Id. See Cleburne, 473 U.S. at 442 n.9. See also GEARHEART & LITTON, supra note 3, at 26; EHLERS, KRISHEF & PROTHERO, supra note 3, at 56.
2. Preventing Intrusion of the Irrational Vote

Another potential "evil" prevented by the restrictions imposed by former Section 4-101(3) was the perceived adulteration of the electoral system by intrusion of the irrational vote. The state might have argued that the mentally retarded are incapable of exercising the reason necessary to cast a rational ballot; that irrationality in the electoral process undermines the equal representation characteristic of our electoral system by diluting the rational vote; and that preventing this dilution would result in better government. The state may have further contended that preservation of rationality in the electoral process and the pursuit of better government are each compelling state interests.

The counterarguments to this position are identical to those advanced in rejecting prevention of voter fraud as a compelling state interest. First, failure to provide an effective means of enforcement indicates legislative indifference rather than compelling state interest. Second, the premise that all mentally retarded persons are incapable of casting a rational ballot is factually inaccurate, therefore negating the argument in favor of comprehensive exclusion.

Moreover, studies indicate that the voting patterns of the mentally ill do not differ significantly from those of the general population. Either rationality is not a significant criterion in establishing the capacity to vote or mental illness (and by analogy retardation) does not significantly affect the casting of a rational ballot. In either case, little judicial guidance is available to project how a court might react to an argument advancing rational voting as a legitimate and compelling state interest. However, in the analogous context of intelligent and informed voting, the

63. In the context of this Comment, "rational voter" means any potential elector who is capable of a minimal understanding of the nature and purpose of the electoral process and is capable of participating in that process based on that understanding. Note the distinction between capacity to understand and actual understanding. The inability to vote rationally differs significantly from the ability to vote rationally but failing to do so.

64. See supra notes 53-60 and accompanying text.

65. See supra note 61; infra notes 79-98 and accompanying text.

66. Though the mentally ill and mentally retarded suffer from deficits which are very different in cause, parallels may be drawn between the two with respect to the perceived rationality.

67. Klein & Grossman, Voting Patterns of Mental Patients in a Community State Hospital, 3 Community Mental Health J. 149 (1967).

68. With respect to the quality of the voter's decisionmaking process, the only area addressed by the Supreme Court has been in the context of literacy tests. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). At that time the Court applied a minimal scrutiny standard, leaving open the question of whether such restrictions would meet the strict scrutiny standard imposed today. Id. at 51. See L. Tribe, supra note 44, at §§ 13-15.
United States Supreme Court has found a state's interest legitimate without determining whether it is also compelling.  

B. Do the Means Justify the Ends?  

Assuming arguendo that the interests in excluding the mentally retarded from the right of suffrage are both legitimate and compelling, a court must evaluate the effect of the statute on the fundamental rights involved. Section 4-101(3) comprehensively denies the right of suffrage to all persons classified as mentally retarded. The net effect is exclusion of a class containing many mentally retarded individuals who are fully capable of voting. Additionally, the classification does not prevent from voting many individuals who are either irrational or equally susceptible to third party influence. It is these overinclusive and underinclusive classifications that strict scrutiny forbids.

1. Overinclusive Classification

The general presumption apparently underlying the former exclusion of the mentally retarded from the right to vote is that the retarded lack the requisite capacity to exercise the right rationally or are inherently susceptible to abuse of the system through fraud. This assessment has been widely rejected in both the medical and mental health communities, as well as by an ever-increasing number of courts and legislatures. The Oklahoma Legislature, in the 1988 provisions of the

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70. See supra notes 8-9 and accompanying text.
71. See supra notes 61-63 and accompanying text; infra notes 79-98 and accompanying text.
72. See infra notes 99-100 and accompanying text.
73. See supra notes 42-44 and accompanying text.
75. See B. Sales, supra note 14, at 99. See generally supra notes 61-62 and accompanying text; infra notes 79-98 and accompanying text.
77. In the recently enacted Oklahoma Guardianship Act, Okla. Stat. tit. 30, §§ 1-101 to 5-101 (Supp. 1988), the Oklahoma Legislature recognizes that the lack of capacity for one purpose does not create a presumption of incapacity for all purposes. Section 3-113 of the Act expressly provides for a finding of partial incapacity upon evaluation of the individual in several specific areas. The capacity to vote is one specified area. Though the Act is limited in its application to guardianship hearings, it may be argued that in identifying the retarded as one of the class subject to such findings, the legislature recognizes the varying capabilities inherent in the retarded as a class. See id. §§ 1-111(12)(a)(2), 1-111(21).
Oklahoma Guardianship Act,\textsuperscript{78} exhibits a legislative awareness of the varying capabilities of the mentally retarded. Yet society harbors the ill-founded notion that the retarded as a class are devoid of reason and generally incapable of thoughtful consideration. Therefore, any analysis of individual rights with respect to the retarded requires at least a cursory understanding of the capacital distinctions within the class.

\textit{a. Mental Retardation: A Factual Perspective}

Much of the stigma surrounding the mentally retarded may be explained by the extreme and conspicuous nature of the disability in some individuals. Studies indicate that the predominant societal perception of the retarded is that of the most severe cases.\textsuperscript{79} Though mental health and education professionals recognize retardation as encompassing a broad range of functional capabilities, much of society is unaware of this distinction.\textsuperscript{80}

An effect-based analysis under the second prong of strict scrutiny, however, requires a conscientious understanding of the complexity of retardation and the diversity of its effects. A thorough investigation of characteristics inherent in the varying degrees of mental retardation is required and consideration of the statutory “fit” must reflect an understanding of those characteristics. For purposes of research and interdisciplinary communication, the heterogeneous population of the retarded have been divided into homogenous subgroups. This classification scheme includes the generally accepted categories of mild, moderate, severe, and profound retardation. Each subgroup is characterized by varying degrees of functional capabilities.

The most functionally limited subgroups consist of the severe and profoundly retarded. Characterized by limited language, speech, and motor capabilities, severe and profound retardation is often accompanied by physical handicaps.\textsuperscript{81} These individuals experience impaired judgment, are unable to make important life decisions, and require permanent hour by hour supervision and care.\textsuperscript{82} Combined, these subgroups comprise approximately three percent of the total retarded population.\textsuperscript{83}

\textsuperscript{79} Begab & Richardson, supra note 6, at 103.
\textsuperscript{80} Begab & Richardson, supra note 6, at 103. See also R. Ingalls, Mental Retardation: The Changing Outlook 2-6 (1978).
\textsuperscript{81} Ehlers, Krishef & Prothero, supra note 3, at 56.
\textsuperscript{82} Ehlers, Krishef & Prothero, supra note 3, at 56. See also Civil Rights Issues, supra note 61, at 189.
\textsuperscript{83} Gearheart & Litton, supra note 3, at 26-27. See also City of Cleburne v. Cleburne
The remaining ninety-seven percent of the retarded population is divided into two groups distinguished by varying degrees of capability. Comprising an estimated twelve percent of the total retarded population,\(^8^4\) the moderately retarded are characterized as trainable,\(^8^5\) capable of self-care, and able to perform useful tasks at home and simple jobs in sheltered workshops.\(^8^6\) Members of this subgroup require support and some supervision all their lives, but are capable, in some instances, of self-support.\(^8^7\)

By far the most predominant category of retardation, the mildly retarded, comprise approximately eighty-five percent of the retarded population.\(^8^8\) Characterized as educable, these individuals are slow to develop, but ordinarily achieve a state of social and economic independence.\(^8^9\) Generally capable of managing their affairs with minimal counseling and guidance, members of this group lead relatively normal lives.\(^9^0\)

The varying capabilities inherent in these subgroups fairly illustrate the inequity in comprehensively classifying the mentally retarded for purposes of exclusion from the right to vote. Where individuals have the capacity to manage their own affairs and live socially and economically independent lives, the state would be hard pressed to contend that they lack the capacity to vote. Therefore, it may be reasonably concluded that exclusion of the mentally retarded from the voting process is not based on consideration of the relative capabilities of the retarded individual, but rather on societal ignorance and misconception regarding the retarded as a class. For this reason a court might readily find that a statute restricting all mentally retarded from voting is unconstitutionally overinclusive.

\(^8^4\) Gearheart & Litton, supra note 3, at 26-27.
\(^8^5\) Ehlers, Krishef & Protthero, supra note 3, at 56.
\(^8^6\) Ehlers, Krishef & Protthero, supra note 3, at 56. See also Gearheart & Litton, supra note 3, at 120-31; Civil Rights Issues, supra note 61, at 189.
\(^8^7\) Ehlers, Krishef & Protthero, supra note 3, at 56; Civil Rights Issues, supra note 61, at 189.
\(^8^8\) Gearheart & Litton, supra note 3, at 26-27. See also City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 n.9 (1985); Civil Rights Issues, supra note 61, at 189.
\(^8^9\) Ehlers, Krishef & Protthero, supra note 3, at 56; Civil Rights Issues, supra note 61, at 189.
\(^9^0\) Civil Rights Issues, supra note 61, at 189.
b. Legislative Recognition

In 1988, the Oklahoma Legislature enacted the Oklahoma Guardianship Act.\footnote{\textit{OKLA. STAT. tit. 30, §§ 1-101 to 5-101} (Supp. 1988).} Though designed to regulate the guardianship system, several provisions reflect a more factually accurate legislative understanding of the mentally retarded.\footnote{Particularly relevant to evaluating the mentally retarded is the Oklahoma Guardianship Act. Section 3-108 provides for the evaluation of the subject of the hearing by health care professionals in an effort to aid the judge in determining the individual's capacity. \textit{OKLA. STAT. tit. 30, § 3-108} (Supp. 1988). Section 3-113 requires specific consideration and determination of the individual's capacity to vote. \textit{OKLA. STAT. tit. 30, § 3-113} (Supp. 1988).} Moreover, the provisions of the Act are particularly pertinent to the voting rights of the mentally retarded both now and in the future.

The significance of the Act in the context of the voting rights of the mentally disabled in Oklahoma is twofold. First, the Act relies on the near-clinical definition of mental retardation contained in Title 63, Section 1-818.2(8).\footnote{\textit{OKLA. STAT. tit. 63, § 1-818.2(8)} (Supp. 1988). See also supra note 28.} This is significant because it reflects a legislative awareness of mental retardation as a complex and diverse condition.\footnote{See supra notes 24 and 61-62 and accompanying text.} It is this diversity that prevents comprehensive exclusion of the retarded from the voting process in a manner acceptable under the equal protection clause. In addition, by recognizing the diverse capabilities of the retarded, the legislature indirectly undercuts the arguments advanced in support of the compelling state interest and clearly supports the contention that the provisions of former Section 4-101(3) were unconstitutionally overinclusive.

Second, the Act provides for a judicial finding of \textit{partial} incapacity.\footnote{\textit{OKLA. STAT. tit. 30, § 1-111(21)} (Supp. 1988) (emphasis added).} One criterion specifically enumerated for consideration in this context is the capacity of the individual to vote.\footnote{When read in conjunction with Sections 3-108 and 3-113, the distinctive capabilities of the varying degrees of mental retardation are statutorily subject to consideration in the context of guardianship. A similar analysis might also have been appropriate with respect to former \textit{OKLA. STAT. tit.}}

Due to the broad range of
functional capabilities inherent in the class, this provision is particularly appropriate for application to the mentally retarded. The flexibility provided in the Act also reflects a legislative cognizance of the potential conflict between the varying degrees of mental retardation and the right to vote. Additionally, it expresses a factually based conclusion that not all mentally retarded individuals are incapable of exercising the reason necessary to cast a rational ballot nor are they unacceptably susceptible to the influence of others.

Moreover, it may be argued from the perspective of scientific estimation that approximately eighty-five percent of Oklahoma’s mentally retarded population are functionally capable of exercising the right to vote. Based upon this empirical consideration of the capabilities of the retarded as a generic class and given an apparently similar consideration by the Oklahoma Legislature, it is clear that a court would hold the provisions of a statute such as Section 4-101(3) unconstitutionally overinclusive.

2. Underinclusive Classification

Though not as apparent, it may be reasonably asserted that the provisions of Section 4-101(3) were also underinclusive in the context of the state interests advanced. By limiting the exclusions to the mentally retarded, the statute failed to prevent the potentiality of fraud that may exist in any institutional setting. Nursing homes and long term hospital care facilities provide fertile ground for these same fraudulent practices. Additionally, the statute failed to limit the potentially irrational vote resulting from senility in the aged or the severely mentally ill. Though seldom a basis for judicial rejection of a statute affecting fundamental rights, the Supreme Court has articulated underinclusivity as a

26, § 4-101(2), regarding the adjudicated mentally incompetent. For statutory text of Section 4-101(2), see supra note 21.
97. See supra note 62.
98. See supra notes 61-62 and 88-90 and accompanying text. Census for the state of Oklahoma in 1988 reveals a total population of 3,025,487. THE WORLD ALMANAC AND BOOK OF FACTS (1988). Of this group, an estimated three percent suffer from some degree of retardation. See GEARHEART & LITTON, supra note 3, at 26. Therefore, approximately 90,765 Oklahoma citizens suffer some form of retardation. Of this group, approximately three percent, or 2,723 persons, are severely and profoundly retarded; twelve percent, or 10,892 persons, are moderately retarded; and eighty-five percent, or 77,150 persons, are mildly retarded.
99. The nature of the institutional setting may be conducive to fraudulent voting practices because the manipulation can be imposed, whether on the individual or on the absentee ballot, on a proportionately greater number of susceptible individuals than would be possible in the general population.
potential ground for invalidation.\textsuperscript{100}

C. Alternative Means of Achieving the Objective

    Again, assuming \textit{arguendo} that the state-advanced objective is both legitimate and compelling, the final step in a strict scrutiny analysis of former Section 4-101(3) requires consideration of alternative means of achieving the state objective.\textsuperscript{101} The goal in developing these alternatives is to accomplish the state objective in a manner least intrusive into the fundamental rights of affected individuals. Upon identifying the best of the alternative methods, the court weights the existing method of achieving the state objective and the “fit” created thereby against the alternative method and the “fit” that can most reasonably be anticipated to result from its implementation.\textsuperscript{102} The approach that least intrusively promotes the state objective determines the constitutional fate of the challenged statute.

    A least intrusive yet workable alternative for accomplishing the state objectives advanced in support of former Section 4-101(3)\textsuperscript{103} might have been extracted from existing provisions of the Oklahoma statutes.\textsuperscript{104} Though intended to address areas other than the right to vote of the mentally retarded, many of the resources necessary to achieve a constitutionally acceptable “fit” are available in these provisions. Moreover, implementation of the procedures necessary to achieve this “fit” would be substantially simplified through the use of modified versions of existing statutory provisions.

    Because of the inherently complex definition of the varying capabilities of the retarded,\textsuperscript{105} a “least intrusive means” approach requires evaluation of the retarded on an individual basis. To prevent fraud and irrationality in the voting process, the method devised must identify those retarded individuals who are most vulnerable to improper influence and who lack the reason necessary to vote rationally. Such an individual evaluation procedure would not vary significantly from that currently provided in scattered sections of the Oklahoma statutes.

\textsuperscript{100} See Note, \textit{Mental Disability and the Right to Vote}, 88 \textit{YALE L.J.} 1644, 1650 n.38 (1979). Although no voting restrictions have been invalidated for underinclusivity, restrictions on other rights have. See, e.g., \textit{Eisenstadt v. Baird}, 405 U.S. 438, 454 (1972).

\textsuperscript{101} See supra notes 44-45 and accompanying text.

\textsuperscript{102} See supra text accompanying note 44.

\textsuperscript{103} See supra text accompanying notes 48-69.

\textsuperscript{104} See e.g., \textit{OKLA. STAT. tit. 30, §§ 3-101, 3-108, 3-113 (Supp. 1988); OKLA. STAT. tit. 26, §§ 4-120.4-.5, 14-115 (1981).}

\textsuperscript{105} See supra note 62.
The first step in the implementation of the offered alternative is the elimination of the statutory restriction on the franchise contained in Section 4-101(3). Having eliminated the exclusions imposed by the statute, a mentally retarded individual would be free to register to vote just as any other elector. While registering, the individual would be informally scrutinized by the registrar for any signs that would indicate incapacity to vote. Upon identifying a party as potentially incapable, the registrar would file a challenge with the county election board. Any registration challenged by the registrar would then be certified to the court for review. The court would interview the retarded individual as necessary to determine whether the capacity to vote existed. In some instances the court might order an evaluation of the individual by an assortment of health care professionals to aid in the decision making process. Upon reaching a determination regarding the capacity of the individual to vote, the court would order the clerk to notify the county

106. Effective November 1, 1989, Section 4-101(3) was repealed. The text of the revised statute states:

Any person who has been adjudged to be an incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes, shall be ineligible to register to vote. When such incapacitated person has been adjudged to be no longer incapacitated such person shall be eligible to become a registered voter. The provisions of this paragraph shall not prohibit any person adjudged to be a partially incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes from being eligible to register to vote unless the order adjudging the person to be partially incapacitated restricts such persons from being eligible to register to vote.


107. This procedure would not differ significantly from the procedures currently in effect in Okla. Stat. tit. 30, § 3-101 (Supp. 1988). There the court receives petitions from any individual interested in the welfare of a person believed to be incapacitated or partially incapacitated. Id.

The rights of the individual would also be adequately protected as provided in Okla. Stat. tit. 30, § 3-106 (Supp. 1988). Section 3-106 provides for notice, presence at the hearing, power to compel the attendance of witnesses, presentation of evidence, appeal, representation by court-appointed counsel, and privacy of the proceedings. Id.

108. The procedure would necessarily require an evaluation by the court regarding the capacity of the individual. Okla. Stat. tit. 30, § 3-113 (Supp. 1988) provides that the judge, in the dispositional order, upon finding that the party is partially incapacitated, shall set forth the specific limitations to be imposed upon the party. One area specifically identified as requiring the judge's evaluation and determination is the capacity to vote. Id.

109. The evaluation procedure of Okla. Stat. tit. 30, § 3-113 is supplemented by Section 3-108 which provides for evaluation of the subject of the proceedings by a physician, psychologist, qualified social worker, or "other expert with knowledge of the particular incapacity or disability." Id. § 3-108B. Section 3-108 further requires an evaluation report be filed with the court by the examiner outlining the nature and extent of the incapacity, a description of the mental, emotional, and physical condition of the person, an opinion regarding the kind and extent of assistance required and an assessment of the services necessary to provide for the well-being of the person. Id. § 3-108C. Additionally the report must include an opinion regarding the probability that the incapacity will lessen or worsen. Id. § 3-108C(5).
election board of its findings.\textsuperscript{110} The election board secretary would either enroll the individual as a registered voter, sending notice to that effect, or notify the individual of the revocation of his challenged registration.\textsuperscript{111} In this way the state could rely on state officials to monitor and enforce the exclusion of those retarded individuals adjudicated as lacking the capacity to vote.

While such a proposal would require the education of registrars in identifying those not capable of voting, such education would not be prohibitively difficult. If consistently accurate or overwhelmingly frequent identification were envisioned, the task might be insurmountable. However, the relative incidence of identification would likely be infrequent\textsuperscript{112} and in terms of accuracy, a keypoint checklist and a guarded skepticism would likely suffice.

Another potential difficulty in the proposed approach is the education of judges in determining what the capacity to vote requires. Though a difficult task, the Oklahoma Legislature has apparently already developed the necessary procedures, as evidenced by the provisions of Title 30, Section 3-113.\textsuperscript{113} This section requires an evaluation similar to that proposed and a dispositional order that includes a specific finding as to the ward's capacity to vote.\textsuperscript{114} In addition the statute provides a judge the opportunity to consult with medical and psychological professionals in reaching a determination, diminishing the potential for an uninformed adjudication.\textsuperscript{115}

Existing statutes also serve to address the potential fraud resulting from abuse of the absentee ballot system.\textsuperscript{116} Registration of those individuals wishing to vote yet unable to travel to the registration office would be accomplished by the assignment of registration boards.\textsuperscript{117}

\textsuperscript{110} Existing statutes require a court clerk to notify the county election board of adjudications of mental incompetence and convictions for felony in order that those individuals so adjudicated may be removed from the roll of registered voters. See also supra notes 53-54 and accompanying text.

\textsuperscript{111} Currently the election board secretary does not send notice to the adjudicated mentally incompetent or to convicted felons regarding registration revocation. Telephone interview with Barbara Rossetti, Assistant Secretary, Tulsa County Election Board (Feb. 15, 1989).

\textsuperscript{112} See supra note 58.

\textsuperscript{113} Okla. Stat. tit. 30, § 3-113 (Supp. 1988).

\textsuperscript{114} See supra note 108.

\textsuperscript{115} See supra note 109.

\textsuperscript{116} See supra note 60.

\textsuperscript{117} No general statutory provisions exist for registration where the party is confined and unable to travel to designated registration points. However, informal registration procedures do currently exist specifically for those confined to institutions or residential care facilities. These include communication between the local county election board and the activities director of the facility regarding parties in the facilities who wish to become registered. The county election board then sends a
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These boards would consist of two qualified registrars, one for each party affiliation, and would be assigned the task of delivering and procuring the voluntary registration of the homebound individuals. The capacity of an elector would be subject to challenge in much the same manner as proposed above. Distribution and collection of absentee ballots in this circumstance would follow similar procedures provided in title 26, section 14-115\textsuperscript{118} with respect to parties confined to nursing homes or convalescent hospitals.

Because many of the suggested procedures are currently a part of the Oklahoma statutes, little legislative effort would be required to effectuate their application to the mentally retarded. In addition, the class of individuals formerly excluded by Section 4-101(3) would be narrowed substantially, resulting in exclusion based on the professional and informed evaluation of the retarded individual, rather than the categorical exclusion of an ill-defined class. This specially tailored statutory scheme is precisely the approach mandated by a strict scrutiny analysis under the equal protection clause of the fourteenth amendment.

IV. CONCLUSION

Though it may not be necessary to provide any form of restriction on the right to vote of the mentally disabled in Oklahoma, the foregoing alternatives suggest procedures specifically structured to deal with the diverse nature of retardation should the legislature find such restrictions necessary. These alternatives, coupled with the inevitable finding that a statute excluding all mentally retarded persons is overinclusive and the supplemental arguments advanced in derogation of the compelling state interest, make it abundantly clear that the statute would have failed a strict scrutiny analysis. Fortunately, however, the continued absence of judicial challenge has not delayed legislative reconsideration of the issue.

Yet the inequity formally cultivated by Section 4-101(3) serves to

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registrar to the facility to register the individuals. Telephone interview with Barbara Rosetti, Assistant Secretary, Tulsa County Election Board (Feb. 15, 1989).

\textsuperscript{118} Okla. Stat. tit. 26, § 14-115 (1981) serves to permit the free exercise of the franchise by those individuals confined to nursing homes and convalescent hospitals. However, the structure of the statute and the safeguards enacted therein are apparently tailored to prevent fraudulent voting practices in the distribution and collection of absentee ballots in the institutional context. See supra note \textsuperscript{99} and accompanying text. Section 14-115 requires that absentee ballots be delivered and collected by absentee voting boards. \textit{Id.} The boards consist of two members each, one from each party affiliation. \textit{Id.} Further safeguards include the requirement that the voter mark his ballot, place it in the envelope, and seal the inner and outer envelopes. \textit{Id.}
illustrate the danger associated with ambiguity in legislative action, especially where the ambiguity results from a lack of essential knowledge regarding the particular issue. Repeal of the constitutionally offensive provisions of this section of the Oklahoma statutes signifies a commitment to the evolution of Oklahoma in the area of mental health and moves one step closer to overcoming societal ignorance and misconception regarding the mentally retarded.

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