

TO: The Bill of Rights & Voting Committee of the Constitutional Modernization Commission

FROM: Wilson Huhn on behalf of the ACLU of Ohio

DATE: November 12, 2015

RE: Revision of Article V, Section 6, Voting Rights of Persons with Disabilities

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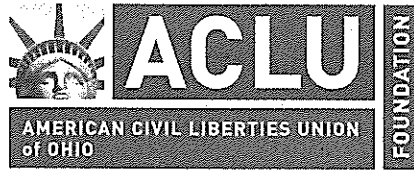
My name is Wilson Huhn. I have had the privilege of working with children and young adults as a teacher and coach my entire adult life. Some of my experiences may help to shed light on the proposed amendments to Article V, Section 6 of the Ohio Constitution.

Specifically, I taught Special Education as a Teacher's Aide at the Benhaven School for Autistic and Brain-Damaged Children (1969-1971); taught Constitutional Law at The University of Akron School of Law, and published extensively in that field (1984-2015); organized and coached a multitude of adaptive recreation programs in eastern Cuyahoga County for persons with special needs (1983-present); and served on the board of the ARC of Greater Cleveland (2003-2009) and the Ohio A.C.L.U. (2010-present). In addition, my wife, Dr. Nancy Wollam-Huhn, and I organized a number of local Ohio chapters of the National Tuberous Sclerosis Association (1980s).

Perhaps the most relevant experience I have had is that I have helped many persons with developmental delays to register to vote and to speak with the representatives of different political campaigns. I bring the perspective of a constitutional scholar, a special needs teacher and father, and a person concerned with helping fellow citizens with developmental delays to become more informed about political issues and candidates.

The Centrality of the Right to Vote.

The right to vote is a vitally important right. In the landmark Equal Protection case of *Yick Wo v. Hopkins* (1886), the Supreme Court stated that the right to vote "is regarded as a fundamental political right, because preservative of all rights." The right to vote is the hallmark of a citizen. It springs from the natural right of the individual to govern himself or herself: "Governments are instituted among men, deriving their just powers from the consent of the governed."



The Constitutionality of This Provision Under Substantive Due Process and Equal Protection.

The Supreme Court of the United States has made it clear that the right to vote is a fundamental right, and that this right may be denied only by laws that are narrowly drawn to serve a compelling governmental interest. The provision under consideration does not relate simply to the process of conducting an election, such as voter identification or determination of residency, but rather involves a complete disqualification from voting, similar to a poll tax or a property qualification. Accordingly, under both Due Process and Equal Protection the constitutionality of this provision will be evaluated under the strict scrutiny test. For this provision to be constitutional the State of Ohio must have a compelling interest in denying these groups of people the right to vote, and the law must be the least restrictive means of achieving that compelling interest.

The Constitutionality of This Provision Under Procedural Due Process.


The Constitution prohibits the government from depriving individuals of life, liberty, or property without due process of law. The right to vote is unquestionably a "liberty" interest; it is arguably the most important right, because "preservative of all rights." Accordingly, the government must give a person adequate notice and a fair hearing before depriving that person of the right to vote. Adequate notice would require the text of the law to be clear enough for citizens to obey it and public officials to enforce it. A fair hearing requires the government to give the individual the opportunity to be heard at a meaningful time and in a meaningful manner.

Consequence of Deleting the Provision.

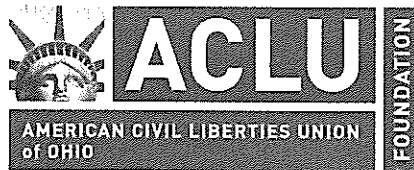
If Article V, Section 6 were deleted the legislature would still retain the power to establish procedures for denying the vote to persons who are incapable of exercising that right. While the right to vote is fundamental, it is not absolute ... just as the rights to freedom of speech, freedom of religion, and the right to privacy are not absolute. People have the right to be free of arbitrary restraints, but they may be institutionalized against their will if they pose a danger to others, or placed under guardianship if they cannot care for themselves. Like a constitutional provision, however, statutory provisions and official procedures denying certain citizens the right to vote would have to pass strict scrutiny and the requirements of procedural due process.

"Right" or "Privilege"?

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It will not make any practical difference whether the Constitution is amended to refer to the “right” to vote or a “privilege” to vote. The term “privilege” is an archaic term that meant the same as what we now call a “right.” Under Due Process and Equal Protection the strict scrutiny test will still apply, and under Procedural Due Process the person will be entitled to adequate notice and a fair opportunity to be heard. However, the connotation of the word “privilege,” at least to modern ears, is something contingent that the government may summarily terminate, such as the Food Stamp program or Social Security. For that reason it might be more appropriate for the revision to simply use the term “right” in referring to voting.

Cognitive Tests Bear Little Relevance to the Ability to Perform.

Traditionally, an “idiot” was a person with an IQ of 25 or below. (Henry Goddard, 1910). Today this same population is referred to as persons with a “profound” cognitive impairment. However, IQ scores are now considered to be of limited use in assessing a person’s level of disability. We are far more concerned with a person’s ability to live independently, which depends upon assessment of a broad scope of behaviors: daily living skills, communication skills, and social skills. Professional educators, psychologists, and social workers all agree that these qualities are more important for both rational decision-making and quality of life than raw measurements of IQ. It stands to reason that these adaptive skills are also more important for voting. Any legal disability on voting must reflect vastly more factors than the results of a cognitive examination.

Political Discussions with Persons with Special Needs.

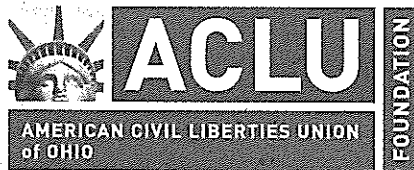
The participants in my political discussion programs have a wide range of intellectual and adaptive abilities. None, in my estimation, are in the “profound” category of intellectual impairment; as with the general population of persons with developmental delays, most of them are “mildly” or “moderately” affected, and a few are at the top of the “severe” category. Almost all of them are registered to vote and most of them are eager and proud to exercise the franchise.

It was fascinating to see how they conducted themselves in discussions with political representatives – particularly the questions they asked. They raised very concrete, practical concerns: “Where will I live after my parents are gone?” “How will I pay my bills if I can’t write a check?” “Where will I work?” “How will I get to work?”

Our oldest child exemplifies the concrete, practical approach to life that so many of his peers exhibit. His tested IQ is about 50 – moderate to severe impairment. Yet he lives independently, leads a very active social life, works part-

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time, and takes flying lessons. At the age of 18 he could not read, but today at the age of 35 he reads at about a third or fourth grade level. His reading, listening, and viewing habits have evolved over time; his favorite television personality used to be "Barney," but now it's "Dr. Phil." He is very concerned about children who are abused, and loves helping children with special needs. He volunteers in that capacity for several community programs.

Persons with developmental delay have a vivid understanding of the public policies that affect them. Like all of us they are influenced by the media, family, and friends. But the vast majority of them are fully capable of intelligently and independently exercising the precious right to vote. For this reason the Ohio Constitution and Ohio law must vigorously protect their right to vote.

Election Fraud.

On the other hand, thousands of Ohio citizens cannot knowingly and voluntarily vote because of profound intellectual impairment, serious and uncontrolled mental illness, or advanced dementia. It would be wrong to allow a person or organization to commit election fraud by casting votes in place of those persons. The Committee's path is not an easy one – steering between the invasion of personal choice that would occur if disabled but competent Ohio citizens are denied the right to vote, and preventing the invasion of personal rights and election fraud that could occur if the votes of incompetent Ohio citizens were converted by others.

Abraham Lincoln's Remarks on Equality.

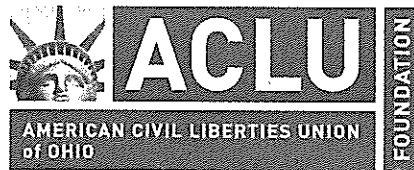
The Declaration of Independence states, "All men are created equal." Abraham Lincoln reflected on this principle in his speech of June 26, 1857:

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal – equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness. ... This they said, and this meant."

In crafting this provision of the Ohio Constitution it is necessary to keep that principle uppermost in mind – that all persons are endowed with the same inalienable right to choose who our leaders will be and what policies they will

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pursue. Some persons are utterly incapable of exercising that right; but that is no excuse for denying that right to others.

Recommendation.

I would recommend that Article V, Section 6 simply be abolished, and that no attempt be made to replace it. All persons have an inalienable right to vote; that right is not absolute, but any exceptions to that right must be closely circumscribed. As noted above, the Ohio Legislature would still have the power to adopt laws authorizing the courts to declare individuals incompetent to vote.

If the Committee chooses to replace the existing language of Article V, Section 6, with another provision, then I would recommend that the Committee closely track the language that was proposed in the 1970s: "The General Assembly shall have power to deny the [right to vote and] privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency." The United States Constitution would automatically place the burden of proof on the government to prove incompetency to vote, and the requirement of adjudication would prevent poll workers from arbitrarily preventing other persons with disabilities from voting. Laws prohibiting election fraud should be adequate to discourage and prevent the conversion of votes from persons who did not knowingly and voluntarily vote.

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