

## Capacity Testing as a Means for Increasing Political Inclusion

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### **Abstract:**

Some competent political actors, primarily young people and the cognitively impaired, are excluded from political participation by modern liberal democratic states. This exclusion occurs because the means utilised by states to distinguish between competent citizens (who must be included) and incompetent ones (who may be excluded) are imperfect. They include age restrictions on enfranchisement and, commonly, legal restrictions on enfranchisement for those with cognitive disabilities. Capacity testing provides a means to improve on these existing mechanisms for exclusion. It is not, however, often suggested, nor seen as viable. Here, I argue that we should utilise capacity testing to more effectively include capable citizens in our democratic practice. I defend a particular scope and kind of capacity testing against common objections.

### **Keywords:**

voting, capacity, inclusion, enfranchisement, democracy

## **Introduction**

There is ongoing debate as to who ought to be included in the franchise, and on which grounds people can be excluded from the franchise. The answers to questions of this kind, it is increasingly clear, are as follows: Every citizen capable of democratic participation ought to be included in the franchise, and it is only on grounds of incapacity that anyone may legitimately be excluded.<sup>1</sup> This answer leaves us with further questions. Firstly, what is the capacity standard? That is, do we have a good system for informing us who is capable of democratic participation? Secondly, how can we apply this system such that all and only the incapable are excluded from political participation? This can, of course, be reformulated to ask how to apply a system such that it includes all and only the capable. In this article, I am concerned primarily with answering this second question.<sup>2</sup>

I argue that we have and should utilise a test for political capacity in order to increase the extent to which we enfranchise capable citizens within our democracies. To make this case, I must first provide a prima facie case for the necessity for capacity testing. I then outline the features of the type of capacity testing I envisage, and provide evidence of the existence and use of this test to demonstrate its suitability for the task at hand. Having done this, I defend both this test in particular, and the appropriateness of capacity testing more generally against a series of standard objections to capacity testing. The reasons why states and theorists are opposed to capacity testing are predominantly reasons that serve to deny the legitimacy, not of capacity testing per se, but of a particular kind of capacity testing. There are four dominant objections to capacity testing, these being that capacity testing is necessarily expensive and cumbersome; that it carries risks of corruption, exploitation and the abuse of power; that while there is objective agreement over personal features such as age, no such agreement exists over either competence or the grading of responses (of particular concern here is the possibility of cultural bias); and that while an exclusion such as that made on the

basis of age provides stable expectations, capacity testing introduces the possibility that one will never be involved in democracy.<sup>3</sup> I address each of these strands of criticism, arguing that my proposed regime is not susceptible to any of these objections.

Having done all this, I will have shown that there is nothing intrinsically wrong with capacity testing within liberal democratic states; that the introduction of capacity testing stands to rectify an injustice currently prevalent amongst democratic states, namely the wrongful exclusion of capable citizens from political participation; that we have available a capacity test which could be used to achieve this goal; and that this capacity test, properly implemented, is immune to the standard criticisms of capacity testing regimes.

### **The need for capacity testing**

Political participation can be formal or informal, with formal participation characterised firstly by enfranchisement and secondly by the use of the rights granted by that enfranchisement. This is predominantly exercised in the casting of votes in elections. Informal political participation is more wide ranging, and there is no systematic process of exclusion which prevents any citizen in a modern liberal democratic state from being informally involved in political action. Any discussion of capacity testing is tied to the formal aspects of political participation, for it is here that governments claim and exercise their power to deny some citizens the right to register as a voter, or to vote.

I take it that an injustice is done to any capable citizen, not otherwise disqualified (for example, as a component of a legitimate punishment for a criminal act), who is denied rights to formal political participation. The primary remaining reason for citizens to be denied these rights is age, with the overwhelming majority of democratic states holding eighteen as the minimum voting age. Age is not, however, the ultimate reason for this exclusion. Age serves as a proxy for political capacity, as becomes clear when the minimum voting age is justified.

Larry Cunningham claims that we tie voting to age specifically because of the lack of capacity in minors,<sup>4</sup> while Robert Dahl dismisses out of hand the idea that young children (his example is of an eight year old) could be “enlightened” enough to “participate equally with adults in deciding on laws to be enforced by the government of the state.”<sup>5</sup> Jason Brennan is even more forward, stating that “[a]ll modern democracies exclude children from voting and holding office, on the ground that children are incompetent.”<sup>6</sup> So, in most democratic states, those under the age of eighteen are presumed incapable of political participation.<sup>7</sup> Age is not the only signifier of incapacity, although it is the most widespread.<sup>8</sup> Most democratic states also claim the power to disenfranchise at least some people with cognitive disabilities from voting on grounds of incapacity. In Australia, for example, the Commonwealth Electoral Act provides that any person who “by reason of being of unsound mind, is incapable of understanding the nature and significance of voting” is unable either to be registered on electoral rolls, or to vote.<sup>9</sup> There are a range of broadly similar laws in various states of the United States of America.<sup>10</sup> Of the democracies studied by Massicote, Blais & Yoshinaka in *Establishing the Rules of the Game*, only four countries, Canada, Ireland, Italy and Sweden, did not impose any requirement for cognitive ability on potential voters.<sup>11</sup>

For there to be a prima facie case for capacity testing, I need only show that the above disqualifications, as implemented, sometimes act to disenfranchise capable citizens, and to suggest that capacity testing offers a way to correct this disenfranchisement. With regard to the exclusion of young people, the fact that the current standard sometimes excludes capable actors from participation is often accepted even by proponents of this standard. No one in fact argues that the minimum voting age of eighteen correctly distinguishes in all cases between the capable and the incapable. Rather, the age of eighteen (and minimum voting ages of all kinds) is defended as being a sufficiently accurate approximation to the ideal that

ease of implementation excuses the (comparatively rare) cases in which capable actors are unfairly excluded.<sup>12</sup> There is, however, a growing body of evidence that suggests that an age of eighteen is a poor proxy for a meaningful capacity test. A good start is Olive Stevens' 1982 examination of the issue, where she claimed that children of nine had the language to discuss politics, and that by eleven, the vocabulary and framework necessary for participation to "make their choices at general elections" was present.<sup>13</sup> In 2004, David Archard promoted the Stevens study as remaining the best defence available of the capacity of children.<sup>14</sup> Ian Hutchby and Jo Moran-Ellis have argued for a "competence paradigm" which recognises the capacity of children to engage meaningfully in a range of decision making contexts,<sup>15</sup> and Bob Franklin has claimed that the exclusion of children on the grounds of incapacity cannot be justified.<sup>16</sup> Young people mature and develop at different rates, which makes the continued use of a single age standard problematic.<sup>17</sup>

A stronger reason to utilise capacity testing is provided by exclusions on the grounds of cognitive disability. The claim that incapacity is the only legitimate grounds for disenfranchisement has been litigated in the USA, notably in the case of *Doe v. Rowe*, where the claimants were victorious. They argued that the State of Maine had acted unconstitutionally in disenfranchising them on grounds of cognitive incapacity, as the constitutional provision under which they were excluded did not sufficiently determine whether those excluded by it were in fact incapable of participation.<sup>18</sup> The court found that Article II(1) of the Maine Constitution violated both the 14<sup>th</sup> Amendment of the US Constitution and the Americans with Disabilities Act in prohibiting voting by "persons under guardianship for reasons of mental illness."<sup>19</sup> The test proposed in *Doe*, and experimented with by Appelbaum et al,<sup>20</sup> is designed to replace subjective standards, including judicial discretion and court orders, with an objective and widely acknowledged standard for capacity. I examine both the case and the capacity testing system in more detail below. For now, it

suffices to show that the general application of blanket disenfranchisement provisions in fact, as well as theory, serves to disenfranchise some capable citizens. Given this, we have motivation to re-examine the practice of capacity testing, as it provides an opportunity to right some of these injustices.

### **A capacity testing regime**

Before we are able to establish a capacity testing regime, we need a clear understanding of what political capacity entails, and whether it differs from other relevant kinds of capacity. I propose that someone is politically capable who understands the nature and effect of voting, and has the ability to make a choice. This is the formulation used in the Doe capacity standard.<sup>21</sup> It parallels both the need in medical decision-making situations for an individual to understand the situation and potential consequences of their choice,<sup>22</sup> and the test for criminal capacity in minors.<sup>23</sup> I have defended this categorisation in previous publications.<sup>24</sup> The Doe test I defend here provides a standard for capacity which is consistent with medical and criminal capacity standards, is objective, and is easy to administer.<sup>25</sup> I do not propose to replace our existing systems of enfranchisement with a capacity testing regime. Rather, I wish here simply to explore the possibility that there is a particular kind of capacity testing system that would be an acceptable component of a well-functioning democratic system. I make the positive account in this section, and examine the standard objections to capacity testing in section five. Throughout section five the features of my system are drawn upon to show that it (or, systems of this kind) is able to avoid the most harmful aspects of the objections. The distinguishing features of my proposed capacity testing regime are that it is inclusive, minimal (supplementary), voluntary and sortal. The regime is inclusive because it seeks to find the capable that are otherwise excluded, and include them. It is minimal, or supplementary, because capacity testing is not the primary means of inclusion. Most citizens

will be included by virtue of age. It is voluntary because no person will be forced to submit to capacity testing. Finally, it is sortal because no distinctions are drawn amongst those who pass, and no long term restrictions imposed on those who fail.

The motivation for a capacity testing regime is important. Previous attempts at testing for capacity have run into constitutional difficulty in the USA both for their discriminatory outcomes and due to the loose connection between the things being tested for (such as literacy) and actual political capacity.<sup>26</sup> Previous testing regimes in the US were clearly motivated by a desire for exclusion. They existed to prevent certain people from participating in the democratic institutions of the US. Any capacity testing regime motivated by a desire for exclusion of certain groups, on the grounds of characteristics of that group which are irrelevant to their capacity for democratic participation, would be invalid, just as the various restrictions in the US were recognised to be invalid. But capacity testing could be a means to increase the extent of political inclusion within a state. For example, if a state has a law in place which disenfranchises those suffering from severe cognitive impairment, that law may be well intentioned, but not sufficiently fine grained. Severe cognitive impairment is imperfectly correlated with inability to competently make political decisions. As such, some members of the group of severely cognitively impaired persons would have the requisite capacity for political participation. However, the law takes them not to have such. Absent a capacity testing regime, proxies such as the above mentioned law, or indeed the minimum age threshold for political participation, will always exclude some capable participants. With a capacity testing regime, we can avoid such a rough characterisation, and instead ensure that we only disenfranchise those who are incapable of participation. My capacity testing system is inclusive. It is intended to provide opportunities for those who are excluded by other aspects of our democratic structures, to prove that they should not be excluded.

The capacity testing regime envisaged here is also minimal. Under this system, the primary means of enfranchisement would remain the automatic age based enfranchisement common to modern liberal democratic states. Upon reaching the age threshold set for political participation within a given state, a citizen of that state becomes eligible to enrol to vote, and thereafter to vote in elections. However, in all modern liberal democratic states, there exist mechanisms for political exclusion. The age threshold itself is the most obvious and most widespread of these, but restrictions on the enfranchisement of the cognitively disabled are also commonplace, and serve equivalent functions. Recognising that both the age threshold and restrictions on the enfranchisement of the cognitively disabled are merely proxies for the exclusion of the politically incapable, my capacity testing regime seeks to supplement these restrictions with an opportunity for those affected. Where someone is excluded through the operation of these mechanisms, the capacity testing regime I envisage allows them to challenge their exclusion by asking to demonstrate their political capacity, and thereby, to prove that their exclusion was illegitimate. The results of this testing would bind the state, such that if a currently excluded citizen passed the capacity test, the state would have an obligation to enfranchise them.

The above discussion of the minimal nature of the envisaged capacity testing regime also provides insight into the voluntary nature of the system. When a citizen is excluded, either through youth or cognitive disability, they may choose to undergo the capacity testing to challenge their exclusion. They are not compelled to do so. So in any country where the standard minimum voting age is eighteen, a sixteen year old may simply decide to wait until the first election following their eighteenth birthday to vote, rather than challenging their exclusion at sixteen. Finally, the idea that this capacity testing regime is *sortal* is important. By *sortal* I mean just that the test itself only measures success and failure. It does not differentiate as to degrees of success. This requirement exists so that enfranchisement on the

basis of the test parallels the enfranchisement provided through requirements such as the age threshold. It does not discriminate between the exceptionally capable and the minimally capable citizen. Each is entitled to a single vote, and each vote counts for the same. This too accords with widely held conceptions of good democratic practice.

***What would such a system look like?***

In order to implement a system satisfying the inclusive, minimal, voluntary and sortal criteria described above, we need a clear idea of what is entailed by a capacity for political participation, and a readily distributable test that accurately examines potential participants for this capacity.

There are two primary ways of articulating the requirements for democratic citizenry. These are ideal and minimalist accounts. Ideal accounts of democratic competence or capacity look for the features that we desire democratic participants to have, and argue that it is on the basis of these features that we can choose to enfranchise citizens. Minimal accounts, by contrast, argue that we must look only for the threshold requirements, and that any attempt to distinguish between citizens who each satisfy a minimal threshold requirement of capacity is illegitimate. In the remainder of this article I will assume that minimal accounts are the appropriate ones to use. There are two primary reasons for this. Firstly, I take it that no capacity testing regime set up to test for an ideal democratic citizen would be able to avoid the four objections in section five. Secondly, ideal theories do not accord with certain (uncontroversial) features of democratic practice. Perhaps most importantly, democracies do not ask citizens to explain the grounds upon which they have formulated their beliefs. In practice, the procedures of the modern liberal democratic state are neutral between the following democratic actors (and all others): (1) A citizen who has carefully analysed the likely results of particular electoral outcomes, cross-referenced those results to their personal

situation, and determined the best possible results for them and those they care about, then voted accordingly; (2) A citizen who is devoutly religious, and has been told by the leader of their local congregation that it is the will of their deity that some particular political party be voted into office; (3) A citizen who feels unenthused by all available choices and determines to complete their ballot according to chance. While we may have good reason to prefer a system in which citizens act as does (1) above, we do not take it to be appropriate to exclude those who act as (2) or (3). This holds for all citizens included by current democratic practice. There are no grounds upon which we could begin to make this distinction between the citizens included by a test such as the one I am envisaging, and the citizens currently included. One standard must apply to all.<sup>27</sup>

What, then, is that standard, and do we have any likely candidate systems that will satisfy it? The standard I take to be the basis for political capacity is that each enfranchised voter must, in order to have capacity for political participation, understand the nature of voting, the effect of voting and have the ability to make choices between options. This basis for capacity accords with the disenfranchisement provisions common amongst those states which exclude some cognitively impaired individuals from voting, and the analogous tests for decision-making capacity in other fields, such as the ability to consent to medical treatment, and liability for prosecution for criminal behaviour.<sup>28</sup>

The Australian federal standard for disenfranchisement on grounds of cognitive impairment is that any person who, “by reason of being of unsound mind, is incapable of understanding the nature and significance of voting” is not entitled to register or to vote.<sup>29</sup> We see the “nature” requirement arise here again, and the significance mentioned plays the role of “effect” in my proposed system. Similar provisions hold in other jurisdictions. The state of Wisconsin provides that if the individual “is incapable of understanding the objective of the elective process” they can have their right to vote removed.<sup>30</sup> Similarly, “idiots” and the

“insane” are constitutionally excluded from voting in Arkansas, Iowa, Kentucky, Minnesota, Mississippi, Nevada, New Jersey, New Mexico and Ohio;<sup>31</sup> Alaska and Montana exclude those of unsound mind;<sup>32</sup> and Hawaii, Nebraska and Rhode Island deny the right to vote to persons who are non compos mentis.<sup>33</sup> In all of these cases, a lack of capacity to understand what voting is for, why and how it should be done, underscores the exclusion. My proposal simply reverses the obligation. If any excluded person can show that they do understand the nature and effect of voting, and that they are able to cast a vote, then their continued exclusion is unjust.

Challenges to these disenfranchisement provisions provide us with a clearer idea of the current status of disenfranchisement, as enforcement varies substantially. A good example comes from the state of Maine, where until overturned in 2001, there existed a constitutional provision which prohibited registering and voting by persons under guardianship for mental illness. In *Doe v Rowe*, three plaintiffs who had been disenfranchised under this law argued that they had the requisite capacity for political participation and that as such, their disenfranchisement was illegitimate, and should be overturned.<sup>34</sup> The court agreed, holding the provision to be unconstitutional under the Due Process and Equal Protection clauses of the 14<sup>th</sup> Amendment.<sup>35</sup> In the judgement, the court identified the core requirements for political capacity, namely, knowledge of the nature and purpose of voting, and the ability to make a choice. If an individual satisfied these requirements, the court argued that they had sufficient capacity to participate.

The standard developed in *Doe v Rowe* provides the basis of the test for participatory capacity. It is only if people “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice”<sup>36</sup> that they may legitimately be excluded. This standard has since been embodied in question format and used in psychiatric studies of Alzheimer’s patients and of people with serious mental illnesses more generally.<sup>37</sup> If one can

answer some simple questions regarding the purpose and nature of voting, then one has sufficient knowledge of the system to be able to participate. These studies conclude that the capacity to vote can be measured simply and reliably. The test features three simple questions, the first of which, designed to test the subjects understanding of the nature of voting, asks “What will the people of [fill in name: your state] do today to pick the next Governor?” Two points are given for a correct response, such as answering that people will go to the polls and vote; one point for a partially correct response such as pointing out the importance of election day; zero for displaying no understanding, through for example expressing the belief that it is decided by the television presenters covering the election.<sup>38</sup> A score of four or more points over three questions, each of which follows the marking framework described above (correct/partial/no understanding), is taken to indicate a sufficient capacity for participation in democratic processes. The other two questions in the test examine understanding of the effect of voting (how the winner will be decided), and the ability to make a choice (by describing two positions and asking the test subject to pick one). The test itself features additional questions using the same scoring system, but only the three mentioned above are strictly required for the Doe voting capacity standard.<sup>39</sup>

If it is accepted that the standard for capacity is uniform across the citizens of a state, such that a single capacity standard can be used in determining whether a person can legitimately be excluded from voting, irrespective of the reason for capacity being called into question, then the above outlined test should be applicable not only to the cognitively impaired, but to all currently excluded citizens. If the above test suffices to provide proof of capacity for a cognitively disabled person, the same test when passed provides proof of capacity for a young person. Similarly, once capacity is proven, there is no remaining justification for continued exclusion. A lack of capacity is the basis for both restrictions on enfranchisement

of the cognitively impaired, and for the blanket exclusion of children and young people from the franchise.

My proposal for capacity testing may then be summarised as follows. We should retain the current practice of automatic inclusion for everyone above a set age. While I have not discussed the details of this here, I believe this should be set significantly lower than the current norm of eighteen; perhaps fourteen, although sixteen is more politically feasible in the current climate.<sup>40</sup> No one above the age limit may be compelled to undertake the proposed capacity test without independent concern having been raised about their capacity for political participation. That is, the presumption of capacity will remain for those over the revised age limit, and the circumstances in which that presumption is questioned will be unchanged. For those excluded by the age limit, or who have in the past been excluded on grounds of incapacity, an optional capacity test is to be made available, with the content described above. Passing this test entitles them to participate, overriding the prior determination of incapacity, or the age-based presumption of incapacity. The questions outlined above constitute the entirety of this standard, the Doe voting capacity standard.<sup>41</sup> I envisage the testing regime being primarily of value to currently excluded children and young people, as they make up an overwhelming majority of the citizens excluded from participation under the status quo.

The institution of a capacity testing regime is not a popular idea. Many of the suggestions for such a system, such as the recent defence of epistocracy by Jason Brennan,<sup>42</sup> are motivated by exclusion rather than inclusion. Unlike other systems, my minimal, optional, inclusive regime can be defended from the objections that are commonly levelled against capacity testing regimes.

## **The objections to capacity testing**

In *Children: Rights and Childhood*, David Archard clearly articulates the problems commonly taken to exist for any proposed capacity testing regime. Archard argues that there are four common kinds of objection to capacity testing. Firstly, that capacity testing is necessarily expensive and cumbersome; secondly, that it carries risks of corruption, exploitation and the abuse of power; thirdly, that while there is objective agreement over personal features such as age, no such agreement exists over either competence or the grading of responses (of particular concern here is the possibility of cultural bias); fourthly, that while an exclusion such as that made on the basis of age provides stable expectations, capacity testing introduces the possibility that one will never be involved in democracy.<sup>43</sup> I will address each of these objections in turn, arguing that a capacity testing regime needs not to run afoul of any of them.

### ***Expensive and cumbersome***

The objection that capacity testing is necessarily expensive and cumbersome arises from the idea that there will be considerable expense involved in developing an accurate test of participatory capacity, and further, that as any individual may vary in capacity over the years, testing will have to be done on an ongoing basis. Accordingly, it is claimed, much work will be entailed in ensuring that only the currently proven capable are allowed to participate.

The first aspect of this objection is the idea that developing a capacity test will itself involve considerable expense. However, as I have outlined above, there are already effective tests being developed and experimented with, and at least one of these (the model arising from the Doe standard, and developed by Raad, Appelbaum, Bonnie, Karlawish et al.) appears to do everything a fair capacity test needs to do.<sup>44</sup> The additional expense of developing a test is therefore not an issue. The expense of implementing an ongoing capacity testing regime,

even after a suitable test has been developed, is perhaps more relevant. Testing all eligible citizens prior to each vote would be a considerable organisational challenge, and very resource intensive. However, my proposal minimises such concerns as it calls for testing only those who are currently excluded and who wish to challenge their exclusion.

The inclusive nature of the presumption of capacity means that provision for capacity testing can be confined within state institutions that already have in place substantial amounts of the infrastructure required to administer such testing, such as the school system. A substantial majority of those disenfranchised by the current system are children and young people. For these young citizens, the school system provides an environment in which attendance is compulsory and a testing regime (albeit focussed on educational attainment rather than political capacity) is mandatory. Adding an optional and comparatively simple test for political capacity to the existing regime would not be a great challenge. It is commonplace to have standardised testing across a state, and making available another, comparatively simple test in this environment would be neither expensive nor cumbersome. For those currently excluded citizens who are not young people, the procedures required may be marginally more complicated. However, there are precedents for overcoming such concerns, such as the use of mobile polling booths to actively enfranchise those who are unable to attend standard polling stations, or the increasing use of absentee/postal ballots. Very few citizens are disenfranchised for reasons of cognitive incapacity, and of these, they are predominantly located in facilities housing many others who are similarly situated. Even if all of them were to exercise their ability to undergo the proposed capacity test, the resources needed to undertake the testing for all involved would remain minimal.

A second aspect of this first criticism is that “[n]ot only would every individual have to sit it but each would have to re-sit it periodically. For it cannot be assumed that a competence, once acquired, is possessed forever.”<sup>45</sup> This line of objection is also undermined by the

features of the capacity testing I envisage. My system retains the presumption of capacity, and applies it to all those who have either initially been presumed capable (in virtue of age) or have demonstrated capacity through the testing regime. This presumption provides immunity from requirements to re-sit. The worry about the cumbersome nature of the testing can also be alleviated, if we are willing to accept that the simple three part test, very minimal in nature, described above is sufficient to prove capacity.

### ***Corruption, exploitation and the abuse of power***

The second objection relies on the possibility of corruption, exploitation and the abuse of power, by those charged with the provision or administration of the testing, or those who develop the tests. This concern is clearly reasonable when capacity testing is suggested as the sole means of inclusion in the franchise. Consider the position of any historically disadvantaged minority group within a democratic system. Social disadvantages including discrimination continue for such groups long after formal equality is achieved, and capacity tests are thereby likely to disadvantage members of these groups, as those in positions of power are disproportionately likely both not to be members of the minority, and to be disposed against their interests. Worries of this sort also motivate the strict constitutional scrutiny applied in the US to capacity testing. Prior attempts to implement it have consistently been biased against African Americans.<sup>46</sup> This objection, as with all those addressed at capacity testing generally, is significantly less concerning when addressing the type of capacity test I envisage here; optional, minimal, and without bearing on the ability of any person tested to be included in democratic activities in the long term. This objection also seems to misapprehend the difference between testing for the minimal capacity required for participation, and testing to determine who is a good democratic citizen, or an approximation

of the ideal democratic citizen. As the test envisaged here does the former, it has certain characteristics that minimise the risks of corruption, exploitation and the abuse of power.

A consistent application of a capacity standard for participation requires that a test that suffices to show capacity for participation amongst any group of the currently excluded, such as for example cognitively disabled persons, is also sufficient to show capacity for participation amongst other excluded groups such as the youth. We have examples of such tests for cognitively disabled persons. They test on a pass or fail basis for a set of capacities that ensures only the ability to understand the nature and importance of democratic participation, rather than to ideally, or even successfully, parse the information presented and act so as to maximise personal benefit. This simplistic nature has two effects for the argument here. The first is that given the extensive enfranchisement that characterises the modern democratic state, the inclusion of an incapable person through malicious interference in the system is not going to have a significant impact on the functioning of the democracy. The weight of individual votes (or opinions) is minimal, the value of the franchise lies in the recognition as a relevantly equal political actor, not in the exercise of the powers thereby granted. The second is that the capacity test is not an appealing process to corrupt, as those people who pass gain few opportunities to vote before they are automatically included, and the outcome of decisions is unlikely to be affected by such unwarranted inclusion. Furthermore, in maintaining under the proposed capacity testing regime the automatic enfranchisement of those over the threshold age, we are already tacitly accepting the inclusion of some incapable persons as voting agents. This is due to the second consequence of an age threshold, its indifference to the actual capacity of those who have passed it. This consideration reduces the concern we need to have for any corrupt influence that may occur. In conjunction with the prior considerations, which show that there is little incentive for

corruption in this process, we can see that these aspects of this objection provide no reason to avoid this type of capacity testing.

As the capacity testing discussed here is supplementary, nothing in this suggestion allows for the exclusion of any person above the age of majority who is incapable of passing the competence test. As Carl Cohen argues, “the many, stupid, foolish citizens must have their right to vote protected.”<sup>47</sup> Further, enfranchisement is not a rare good. It is more widespread in modern democracies than it has ever been, and this proposal if implemented will spread it further. Enfranchisement lacks the exclusivity to make privileged access to it enticing. This supplementary nature also provides a distinction between the capacity testing system I envisage, and the historical attempts to institute capacity testing in jurisdictions like the US. As interpreted by the US Supreme Court in *Harper v Virginia Board of Elections*, the equal protection clause of the 14<sup>th</sup> Amendment to the US constitution requires strict scrutiny of laws that grant the right to vote to some citizens but not to others. Capacity testing does this due to the exclusion of those who fail the test.<sup>48</sup> Demian Ordway claims that “the traditional presumption of constitutionality afforded government action for which there exists a ‘rational basis’ does not apply to restrictions on the exercise of the franchise...”.<sup>49</sup> Nicholas Brescia similarly notes that “any qualification or condition imposed on [mentally disabled] individuals’ right to vote must pass a strict scrutiny constitutional analysis and comport with federal law.”<sup>50</sup> The proposed system specifically excludes any mechanism through which a citizen can be disenfranchised as a result of the testing, and is thus distinct from the intended target of existing US court decisions.

A possible aspect of this objection that remains plausible even against a minimal capacity testing proposal is that there are particular groups within society who could benefit from a scheme like this by using it to their advantage. The fear echoes the early days of the present US system, when literacy tests were implemented in various states that disproportionately

targeted the African American minority and thereby protected the interests of the traditionally powerful citizens.<sup>51</sup> Any capacity testing, it is claimed, generates this opportunity for bias. As an example, consider the common practice of private schools specifically training children to pass university entrance examinations, giving these children a significant advantage over those attending many public schools. Where a capacity test is implemented, the worry is that groups within society, perhaps the rich, or perhaps the overtly religious, will train children and young people to pass this test as a means of inflating the number of democratic participants with a particular viewpoint. While this seems a legitimate possibility, I do not take it to be a problem for the proposal. Exclusion from the franchise is justified based solely on a lack of capacity for participation. If any person demonstrates the capacity required to participate, the means by which they acquired that ability are irrelevant. As such, there is a morally relevant asymmetry here. Excluding the incapable generates no rights breaches as the right to vote is in fact dependent on it being possible for the individual concerned to exercise it. However, excluding a capable citizen from voting out of concern for how they will participate, or how they came to be capable, is equivalent to the further introduction of a test of moral soundness, one that is designed to exclude competent political actors. Such an action breaches their rights. We should then err towards inclusion.<sup>52</sup> Additionally I do not take this objection to have a very wide scope. The proposed test has no bearing on the inclusion of anyone beyond the age of voting majority and the capacity being tested for is a minimal one, so the number of persons who could be advantaged in this way is small. If it is nevertheless concerning, schools or other institutions could be compelled to offer training classes to anyone wishing to take the test. An exclusive test, one which relies on a particular conception of moral soundness, is not only morally reprehensible, but runs afoul of all the same objections that we are in the process of discussing, and as its purpose is exclusion, it has

much more difficulty responding satisfactorily to them than does the type of test I am defending.

### ***Lack of objective agreement***

The objection that there is no objective agreement over the determination of capacity, how it may be done, and whether differing cultural perspectives need to be considered in making such a determination is also overstated with respect to a minimal capacity test. As discussed in setting out the framework of capacity testing, there is increasing agreement regarding the level of competence required for democratic participation, and this level is minimal. The same applies to concerns regarding the grading of responses. That leaves the charge of bias as the overwhelming concern arising from this objection.

Against the charge of bias, one must consider that to the extent that an understanding of the nature and requirements of democratic participation is culturally specific, requiring either a liberal democratic environment or teaching in the procedures used in such an environment, this bias is acceptable. It only differentiates on the basis of knowledge that is required for effective participation, and makes no judgment on the type of reasoning or decision-making procedures any individual will utilise when participating within a democratic framework. The capacity test as outlined in this article does not, for example, differentiate against those who vote as they are told to by their community or religious leaders, so long as they understand that it is a tallying of votes that produces the outcome, and accept the role of elected officials in the state. An extensive capacity test, that attempted to select only the “good” democratic citizens as being legitimate participants in democracy, would run afoul of this objection, as once one moves beyond a determination of basic capacity and begins to examine what makes participation better, certain cultural characteristics rapidly become privileged.

### *Permanent exclusion*

Archard's final objection relies on the possibility of permanent exclusion from the franchise. He argues that by contrast to age, which provides stable expectations of inclusion (everyone is enfranchised upon reaching the threshold age requirement), capacity testing introduces the possibility that one will never be involved in democracy. That is, for those people who are incapable of passing the capacity test, inclusion in the franchise will always be denied. Were this objection accurate, it would perhaps be the most damning of them all. While the others could be mitigated by manipulating the capacity testing system, this objection points out that the results of the system may themselves be unacceptable.

My proposed system does not create the possibility of permanent disenfranchisement. Rather, I suggest that some limited forms of capacity testing may be justifiable, and that these forms should be used as a supplement to existing systems of disenfranchisement such as the age threshold and the exclusion of certain classes of the cognitively impaired.

The capacity test envisaged here is an enabling mechanism, allowing those under the age of majority who desire to vote to prove that they are capable of doing so, and thereby to gain early inclusion in the franchise. The age standard under such a system remains in place and continues to function as it does presently, providing participatory rights to all those who pass it. While this raises the possibility of over-inclusiveness, I leave this issue for another time.

Where capacity testing is supplementary to a voting age, it simply provides the option of early entry into the voting ranks for those who can demonstrate capacity, without affecting the inclusion of the general population automatically upon coming of age. The reasons for this lie in the positive case I make above, namely that existing methods of exclusion from the franchise, both for the cognitively impaired and for the young, are too coarse grained to effectively differentiate between the actually incapable and those for whom participation is

simply more difficult. If it is the case that existing methods of disenfranchisement misidentify some capable persons as non-capable, and if it is the case that a capacity testing system can remedy this misidentification, then we have reason to consider implementing it.

So, while this objection presumes that the purpose of capacity testing is to exclude citizens from participation, the test here envisaged is inclusive, or enabling. It is intended to allow those currently excluded to prove that they are capable of participation, and thereby to gain inclusion in the franchise. The testing regime will neither replace the age threshold, following which citizens are presumed capable and automatically included, nor will it subject citizens to testing indiscriminately. It is designed to provide a way for the currently excluded to prove they are capable of inclusion, not to eliminate any included persons from consideration.

### **Benefits of capacity testing**

The judicious use of capacity testing, under the circumstances outlined above, therefore provides democratic states with a better approximation of the goal of including all capable citizens in formal democratic procedures such as voting than does the status quo. The practical argument for the current model of exclusion from the franchise relies on untenable premises. The blanket provisions which prevent those under eighteen and those deemed cognitively incapable from participating, do not sufficiently accurately identify the features of these people which would justify their exclusion. Further, we have, as demonstrated here, a system available that allows us to identify at a much finer grained level those who are in fact capable of participation, and thereafter to include them.

If implemented with the current age limit, this system would include an electorally significant number of people. If, however, it was implemented in conjunction with a lowering of the voting age, there would be a comparatively small impact on political outcomes. Even in that case, the proposal would have practical benefits. This system helps for example to overcome

the worry that our current system has a “legitimacy deficit” - there are citizens with a valid claim to political inclusion, who we currently exclude out of expediency. While having an age limit and automatic inclusion upon reaching the age is simple, having a capacity test, usable to include those excluded by the simple system, is better as a matter of institutional structure. It overcomes the legitimacy deficit, and while not as simple as the current system, does a better job of capturing the actual capacity of the citizens concerned.

This test is not proposed as a cure-all for our existing democratic systems. I do not, for example, propose any method by which we can ensure that those presumed capable of participation are in fact so capable. As such, we continue to run the risk of wrongly including people who will not (because they cannot) vote with the requisite intentions. The standard of minimal competence to which I have appealed throughout this article should, however, significantly reduce the number of people who are eligible for such exclusion. Further, nothing in what I have argued for could restrict the ability of competent actors to act incompetently, should they so desire. These risks continue to be associated with our democratic institutions. What the implementation of this test will do, is remove one currently existing and substantial source of injustice in modern liberal democratic states. It will help these states to enfranchise all capable citizens.

## **Conclusion**

All modern liberal democratic states share a commitment to political inclusiveness, as evidenced by the steady expansion of the franchise in these states, and the corresponding decrease in the number and scope of disqualifying factors taken to justify the political exclusion of citizens. This practical commitment to inclusiveness reflects a coalescing theoretical consensus regarding political participation, that the institutions of democratic

states should be broadly inclusive, with limits on inclusion arising only out of necessity, as is the case when a person is in fact incapable of political participation.<sup>53</sup>

This commitment and consensus have significantly increased entitlements to participation amongst citizens. However, members of some particular groups within democratic states remain excluded, and it is not clear that this exclusion is always consonant with the ideals of inclusiveness outlined above. For many young people, excluded through strict age limits on participation, and for many cognitively impaired people, excluded through blanket statutory or constitutional provisions, our democracies are failing to include them, despite their being capable of participation. I have argued here that capacity for political participation is in fact a minimal standard; a standard which is satisfied by at least some young people, and at least some of the cognitively impaired. I have also described an existing test for political capacity which suffices to identify those citizens who are capable but excluded, and argued that this test provides us with an opportunity to right the injustice currently prevalent amongst democratic states. While this test was designed and has been used to identify the capable amongst the cognitively impaired that have been excluded from participation, capacity for political participation is a consistent standard across all citizens. If the characteristics and abilities identified by the test suffice to show capacity for any citizen who takes it, they similarly suffice to show capacity for all other citizens who display the same characteristics or abilities when tested.

However, capacity testing has a tawdry past, and is commonly held to be intrinsically harmful. As such, in addition to identifying the problem above as one which capacity testing can solve, I had also to defend the very idea of capacity testing against those who see any implementation of a testing regime as bringing with it an array of harms. To this end, I identified the major weaknesses of the idea of capacity testing, and argued that the aforementioned test is immune to each of them. In virtue of its central features, being

minimal, inclusive, voluntary and sortal, I argued that this test offers a solution to the problem of harmful exclusion from political participation, while not being subject to the standard concerns regarding expense, the cumbersome nature of testing regimes, openness to corruption, exploitation or the abuse of power, the lack of objective agreement about capacity, or the risk of permanent exclusion.

We have good reasons not to replace our current, inclusive systems with a system dependent on capacity testing for the inclusion of any citizen as a participant in the formal procedures of democracy. However, as I have argued here, there are other spaces within our current democratic practice where capacity testing could be utilised. Primarily, capacity testing as a supplement to our existing system of widespread inclusion benefits the members of currently marginalised groups such as young people and the cognitively impaired, while not harming the interests of those included under the present system. Implementing this capacity testing regime would help to align our democratic practices more closely with what our theories of political inclusion tell us to seek.

### **Notes on Contributor**

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## Notes

1. See Shapiro, *Democratic Justice*.
2. I discuss why we would look to capacity testing to resolve issues of political inclusion in Munn, "Capacity Testing the Youth." Archard provides a systematic analysis in *Children, Rights and Childhood*.
3. Archard, *Children, Rights and Childhood*, 90-91.
4. Cunningham, "A Question of Capacity," 295.
5. Dahl, *Democracy and Its Critics*, 126.
6. Brennan, "The Right to a Competent Electorate," 701.
7. Other notable discussions include Schrag, "The Child's Status"; Cohen, "On the Child's Status"; Chan & Clayton, "Should the Voting Age be Lowered".
8. I have argued elsewhere that age based exclusions cannot be rehabilitated solely by changes to the voting age – wherever the age of inclusion is set, capacity testing would still be required to ensure all capable actors are included. See Munn, "Capacity Testing the Youth."
9. (Australia) Commonwealth Electoral Act 1918, s93(8)a.
10. These are detailed at length in Hurme & Appelbaum, "Defining and Assessing Capacity."
11. Massicote, Blais & Yoshinaka, *Establishing the Rules*, 26-27.
12. Cohen, "On the Child's Status," 460-461.

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13. Stevens, *Children Talking Politics*, 148.
  14. Archard, *Children, Rights and Childhood*, 103.
  15. Hutchby & Moran-Ellis, *Children and Competence*, 8.
  16. Franklin, *New Handbook Children's Rights*, 22-29.
  17. See McCabe, "Involving Children and Adolescents," 505-516; Kuther, "Medical Decision-Making"; Sheldon, "Medical Decision-Making for Children."
  18. Doe v Rowe.
  19. Ibid.
  20. Appelbaum, Bonnie & Karlawish, "The Capacity to Vote."
  21. See Doe v Rowe; Appelbaum, Bonnie & Karlawish, "The Capacity to Vote."
  22. Gillick v West Norfolk and Wisbech Area Health Authority; Kuther, "Medical Decision-Making," 344.
  23. McDiarmid, *Childhood and Crime*.
  24. Munn, "Reconciling Criminal & Participatory Responsibilities."
  25. Appelbaum, Bonnie & Karlawish, "The Capacity to Vote."
  26. Literacy tests often utilized Grandfather Clauses rather than specifically referring to race. Such clauses were deemed unconstitutional by the US Supreme Court in *Guinn v. United States*. Keyssar examines the spread of literacy testing in the US in *The Right to Vote*, 141-6.
  27. See Archard, *Children, Rights and Childhood*; Author/Title/2012
  28. See Section 3.
  29. (Australia) Commonwealth Electoral Act 1918, s93(8)a.
  30. Wis. Stat. Ann. 54.25(2)(c)1 (West Supp 2006).
  31. Hurme & Appelbaum, "Defining and Assessing Capacity," 935.
  32. Ibid.

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33. Ibid.
  34. Doe v. Rowe.
  35. Hurme & Appelbaum, "Defining and Assessing Capacity," 953-4.
  36. Doe v. Rowe.
  37. See Appelbaum, Bonnie & Karlawish, "The Capacity to Vote," 2094-2100; Raad, Karlawish & Appelbaum, "The Capacity to Vote," 624-628.
  38. Appelbaum, Bonnie & Karlawish, "The Capacity to Vote," 2099-2100.
  39. The full question list can be found in Appelbaum, Bonnie & Karlawish, "The Capacity to Vote," 2099-2100.
  40. Munn, "Capacity Testing the Youth."
  41. Doe v. Rowe.
  42. Brennan, "The Right to a Competent Electorate."
  43. Archard, *Children, Rights and Childhood*, 90-91.
  44. Appelbaum, Bonnie & Karlawish, "The Capacity to Vote"; Raad, Karlawish & Appelbaum, "The Capacity to Vote."
  45. Archard, *Children, Rights and Childhood*, 90.
  46. See Ewald, "Civil Death"; Karlan, "Ballots and Bullets"; Goldman, "The Modern Day Literacy Test."
  47. Cohen, "On the Child's Status," 461.
  48. Harper v Virginia Board of Elections.
  49. Ordway, "Disenfranchisement and the Constitution," 1176.
  50. Brescia, "Modernizing State Voting Laws," 944.
  51. Keyssar, *The Right to Vote*, 141-146; Guinn v. United States.

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52. An anonymous reviewer points out that there is potentially symbolic harm done to someone who is now in fact incapable of political participation by excluding them, as could be the case for an Alzheimer's patient. I agree fully, but would point out that the suggested system would not exclude such a person, as it is intended to retain universal inclusion for those over the age of majority. In an upcoming article I discuss truly universal enfranchisement: dispensing with capacity requirements for political participation altogether.

53. Shapiro, *Democratic Justice*.

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