



We have the legal right of way.

Memorandum

To: Bill of Rights and Voting Committee,
Ohio Constitutional Modernization Commission

From: Michael Kirkman, Executive Director

Re: Article V, Section 6

Date: February 12, 2015

Thank you for this opportunity to provide additional information to the committee. This memorandum is provided to the committee in response to questions raised at the December meeting and proposals and concerns that have been raised since that time. It seems that all agree that the current language in the Ohio Constitution, which is antiquated and offensive to people with mental disabilities, should be removed. The discussion beyond that consensus has centered on whether new language should be proposed that would, to varying degrees, permit or require the General Assembly to create a process that would allow for the disqualification of individuals who are “incompetent” to vote, or other variations related to mental capacity. These proposals all suffer from similar limitations related to terminology and substance.

Questions of terminology – Ohio’s current (and limited) statutory scheme for disqualification of voters relies on a concept of “incompetent” to vote, presumably borrowing that language from the definition of an incompetent at section 2111.01(D).¹ Yet this language is not particularly specific to voting, and actually focuses on care for self or others. Current references to decisional ability refer to “capacity” or “incapacity” to engage in a particular function, as opposed to broad classifications.² This is more than simple semantics, as the better practice is to make an individualized determination of decisional capacity in the specific

¹ Cf. 5122.301 (person “retains all civil rights not specifically denied in the Revised Code or removed by an adjudication of incompetence following a judicial proceeding other than a proceeding under sections 5122.11 to 5122.15 of the Revised Code.”); 3503.21(A)(5) (removal from rolls based on “adjudication of incompetency of the registered elector for the purpose of voting as provided in section 5122.301 of the Revised Code”)

² For example, federal law allows (but does not compel) a state to remove a voter from the rolls because of an adjudication of “mental incapacity.” 42 U.S.C. § 1973gg-6(a)(3)(B)

Professor Nina Kohn in her 2008 article on voting and cognitive impairment emphasized that “. . . if democracies are to truly make voting accessible to persons with disabilities, they must seek not only to minimize physical barriers to voting but also to create cognitively accessible voting systems.”⁷ Removal of barriers for voters with intellectual, cognitive, or mental disabilities from the Ohio Constitution is strong step in this direction.

⁷ Kohn, Cognitive Impairment and the Right to Vote, 1 Canadian Journal of Elder Law 1, 51 (2008)