

## Capacity testing the youth: a proposal for broader enfranchisement

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In this article, I claim that at least some young people have the requisite capacity for political participation, and that the exclusion of these young people is in breach of the reasonable expectation that all capable citizens are included in democratic processes. I suggest implementing a capacity test for those under the current age of majority. I outline a system of capacity testing for the youth, distinguish this proposal from prior attempts to justify capacity testing and argue that a suitably constrained capacity testing regime is not simply defensible, but superior to the current system, which arbitrarily excludes some capable members of society from participation. Finally, I explain why only this limited capacity testing regime is acceptable.

**Keywords:** citizenship; politics; exclusion; youth; voting

### 1. Introduction

It is widely accepted that those who lack the capacity for political participation can justifiably be excluded from that participation. Often a stronger claim is made, that only incapacity is a legitimate reason for exclusion. Ian Shapiro suggests this in *Democratic Justice*, where he claims that self-government should be maximally inclusive, with this inclusion being limited by necessity only. The limitation by necessity means that ‘participation in governance by those whose interests are significantly affected should be limited by incapacity only’ (Shapiro 1999). This position is reinforced by Cunningham (2006), who notes that it is the lack of capacity in a minor which warrants tying voting to age, and Olsson (2008) notes that ‘only [a lack of] competence can be accepted as a legitimate reason [for exclusion]’. This article analyses the exclusion of those under the age of 18 from voting on the grounds of incapacity, and I argue that as practiced, such exclusion cannot be defended.

In this article, I address four issues. Firstly, I claim that at least some young people have the requisite capacity for political participation through voting, and that the blanket exclusion of young people by means of a minimum age requirement for voting is in breach of the reasonable expectation that all capable citizens are included in democratic processes. Secondly, I argue that even a lower voting age will not resolve the issue, as any age-based criterion is arbitrary, and will fail either by excluding capable people from political processes or by including incapable people. Thirdly, I suggest implementing a capacity test for those under the current age of majority, based on the capacity testing regimes recently developed for cognitively

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disabled people in the USA. I outline a system of capacity testing for the youth, distinguish this proposal from prior attempts to justify capacity testing, and argue that a suitably constrained capacity testing regime is not simply defensible, but superior to the current system, which arbitrarily excludes some capable members of society from participation. Finally, I briefly discuss the benefits arising from the system I have defended here and explain why only this limited capacity testing regime is acceptable.

Throughout this article, I take voting to be the fundamental element of political participation which signifies political inclusion. There are a range of measures both proposed and implemented for increasing the political participation of the youth through means other than voting. These include participation in governmentally organised advisory roles, in youth parliaments and in roundtable discussions, as well as less formal activities such as political fundraising, volunteer work, protest movements and youth groups. There is increasing evidence that despite widespread participation in non-traditional political activities such as these, young people do not translate this activity into voting (See Forbrig 2005, Sloam 2007, Brooks 2009, Grover 2011). Turnout amongst those 18–24 is consistently lower than that for all other eligible age groups, and those under 18 are seldom entitled to vote at all (Blais *et al.* 2001). The reason for my focus in this article on voting is that it remains the core component of political participation. All the aforementioned activities are available to the citizenry as a whole, but only voting is denied to the young. While I do not wish to understate the advances young people have made towards meaningful political inclusion, particularly in the UK and in Europe, until this asymmetry is overcome no amount of inclusion in other forms of political participation can result in young people being treated with the respect and consideration they deserve as equal citizens within society.

## 2. Capacity requirements

Before I claim that some youth have the capacity to participate in democratic processes, I must clarify what the capacity requirements for such political participation actually are. The most widespread requirement for political participation through voting is not a capacity requirement as such, but a simple age threshold for participation. Standard defences of the age threshold assume that the voting age line has been drawn in roughly the right place. This relies both on the accuracy of the age limit in determining the general degree of capacity and on practical difficulties being inherent in any attempt to make a more nuanced determination of capacity. A system that automatically excludes those under a given age by virtue of their presumed abilities is more defensible the more widely its presumptions hold. Prudential restrictions based on the possibility of incapacity are not, however, the type of consideration that can be used to override the presumptive right to vote, a right of great importance in the modern liberal democratic state. Only the actual demonstration of incapacity is capable of doing this.

Those who defend setting the voting age at 18 must claim that setting the age at this level generates the right answer in a significant majority of instances. That is to say, that very few people under the age of 18 are capable of political participation, and that very few people over the age of 18 are incapable of political participation. I disagree with such a claim. The presumption of incapacity is neither universally

applicable to youth nor exclusively applicable to youth. It generates both false positives (excluding people who should be included) and false negatives (including people who should be excluded). In the following, I focus on instances of false positives and argue that we have reason to believe that many who are under 18 have the capacity for political participation, and as such, are falsely being excluded by the current system. To motivate this project, it is not necessary to show decisively that this is so. There is still reasoned disagreement as to the extent of participatory capacity both in the population at large, and amongst those under the age of 18. The goal of the opening section is to provide some reason to think that participatory capacity is present for some of those under 18. Having done this, the remaining sections provide a conditional suggestion as to the appropriate response, if we accept the claim that the current system wrongly excludes some capable persons from political participation.

It is clear that we want a system which excludes those who are incapable of participation from voting, without similarly excluding people who are capable. Excluding those under 18 is widely held to achieve this end. Carl Cohen claims that rational capacity matures slowly, and whilst it is present in the 'many, stupid, foolish citizens' who must have their vote protected, it is absent in children. As such the age criterion for voting simply seeks to stop the incapable, defined by age, from participating in a process (voting) they cannot deal satisfactorily with (Cohen 1975).

Cohen's worry that the pace of human maturation precludes the possibility of youth having political capacity has been widely questioned. Stevens (1982) examined this question, claiming that children of nine had the language to discuss politics, and that by 11 the vocabulary and framework necessary for participation, to 'make their choices at general elections' was present. Despite the age of the study, Archard (2001) recently claimed that one can still 'do no better' than cite this study in defence of the capacity of children. The capacity of children to make meaningful decisions is also increasingly being recognised in international agreements. The UN convention on the Rights of the Child, particularly Article 12, claims that children (defined in Article 1 as all those under the age of 18) have the right to express their opinions and have them listened to on matters that concern them, of which their political governance is surely one. Similarly, many sociologists have begun to question the characterisation of children as incapable of political participation. Hutchby and Moran-Ellis (1998) argued that a 'competence paradigm' is emerging which recognises the capacity of children to engage meaningfully in decision-making in a range of areas. Franklin (2002) similarly dismissed arguments for the exclusion of children on the grounds of incapacity, claiming at length that it cannot be justified. It is clear that the exclusion of those under 18 from political participation on the grounds of incapacity is controversial.

These arguments in favour of recognising the capacity of youth are further supported by evidence from the law, most famously the decision in *Gillick v West Norfolk and Wisbech Area Health Authority and another*, in which the House of Lords in the UK held that those under the age of majority should nevertheless be presumed capable of making some decisions on their own medical treatment, if they are capable of understanding the nature and consequences of that treatment. In particular, in *Gillick*, a doctor had a discretion to 'give contraceptive advice or treatment to a girl under 16 without her parents' knowledge or consent provided the girl had reached an age where she had a sufficient understanding and intelligence to enable her to

understand fully what was proposed, that being a question of fact in each case' [Gillick v West Norfolk and Wisbech Area Health Authority (1985) 3 All ER 402 (HL)]. The reasoning in this case has been widely accepted in common law jurisdictions, such as Australia, New Zealand and Canada. For example, in the 1992 Australian case *Department of Health and Community Services (NT) v JWB (Marion's case)* the majority held that '[a] minor is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed' (175 CLR 218). These approaches provide a model of competency for participation in decision-making which takes into account the particular abilities of the individual, rather than strictly categorising individuals solely on the basis of age.

These advances in the medical sphere bear strongly on the debate around youth voting. A key component of the rejection of a voting age as a reasonable proxy for capacity is the issue of differential development. Different people mature at different rates, and the pace of their maturation is reliant on disparate factors such as their social background, educational opportunity and capacity and (particularly with regard to political capacity) their interest. Consequently, there is no one age at which it can safely be claimed that any child has become an adult. Children as young as eight have been shown to display sufficient rationality to understand the consequences of different possible decisions, weigh the costs and benefits thereof, and to apply this understanding to their personal situations, in studies asking them to make medical decisions of their own accord, without the assistance of adults (Ladd 2002). This is evidence not of simple memorisation, as one potential criticism of the Stevens study could run, but of considered decision-making (for further discussions, see McCabe 1996, Kuther 2003, Sheldon 2004).

It is worth noting that the argument for youth political participation made since the late 1990s is not the first such argument. Further evidence against the presumption of youth incapacity is found by Report of the Royal Commission on the Electoral System (1986), in New Zealand. Despite not having the benefit of the modern research detailed above, the Commission found sufficient evidence to reject incapacity as justification of a minimum voting age of 18, although with somewhat different interpretations of the development of political capacity. It pronounced the argument that those under the age of 18 were incapable of making reasoned political decisions untenable, particularly regarding 16 and 17 year olds. Citing studies from the 1970s in both the USA and the UK (Dawson *et al.* 1977, Stacey 1978), the report recognises that the largest increases in capacity for political reasoning occur between the ages of 11 and 13, rather than at 18, and that 'in terms of purely political competence, 15 or 16 might be a better general qualifying age than 18' (Report of the Royal Commission on the Electoral System 1986). The Report claims that rather than being based on capacity, the primary reasons for the continued exclusion of youth, particularly 16 and 17 year olds, are no longer worries about their capacity, but, in New Zealand at least, a result of the entrenched nature of the age requirement in the Electoral Act, and of the general public perception that people of these ages are incapable of participating in the political process (Report of the Royal Commission on the Electoral System 1986).

If most people hold mistaken beliefs regarding the actual capacity of the youth for political participation, then democracy itself is not going to help in increasing inclusion. This idea that the 18-year limit is unwarranted is not only recognised in

New Zealand. Connell (1975) noted the same about Australian youth, stating that 'by the age of 15 or 16 a majority had formed political outlooks which, despite some incoherencies and contradictions, had an inner unity and could be characterized as wholes' (*In Schrag. . .*). This type of conclusion, drawn from analysis of the actual abilities of children within democratic societies has since the 1960s been replacing the traditional view that youth are incapable of political participation. Nor is it difficult to find practical political movements favourable to the concept of children's rights. In parts of Western Europe and the UK, there are strong campaigns being mounted to include youth in at least some democratic procedures, such as local elections, as a way to get the public used to the idea that youth are capable of participating. For example, the 'Learning to Listen' initiative in the UK seeks to make local, regional and national governments meaningfully include young people. The second action plan claims that successful children and young people's participation means that 'their opinions and knowledge will be sought as a matter of course when developing and reviewing policies and services that will have an impact on them *and* their communities... There will be recognition that without the engagement of the younger generation now, communities will not be economically, socially or democratically sustainable' (Office of the Deputy Prime Minister 2005). Since 2007, Austria has let 16 year olds vote in national elections, while regions in France and Germany allow 16 year olds to vote in local elections (Grover 2011). In the UK, the 'Votes at 16' campaign has attempted, so far without success, to have similar policies implemented (<http://www.votesat16.org>). These practical attempts to enfranchise and otherwise include young people in political activity serve to highlight a further objection sometimes put forward against the political inclusion of young people.

This further objection is that even young adults who are allowed to vote do not do so unless, as is the case in Australia, they are coerced into doing so by the threat of sanctions.<sup>1</sup> Such a claim relies heavily on data for young-enfranchised adults (18–24) which suggest that they vote in smaller numbers than do older citizens (For recent data, see Blais *et al.* 2006). Therefore, for example, Pirie and Worcester (1998) classified the millennial generation of young persons in the UK as 'apolitical'. They claimed that even among older persons of this generation who are allowed to vote (those 18–24 years of age), voting is uncommon, and seen as irrelevant to their needs (Pirie and Worcester 1998). This argument has, however, been challenged. Brooks (2009) claimed that the failure of young citizens to vote is not due to apathy, but rather represents a move away from participation in traditional political processes in favour of new approaches. Such apathy as is displayed does not reflect a lack of interest in politics, but a lack of trust in the old system. James Sloam similarly suggests that Pirie and Worcester misconceive the actions of young people in this context. Rather than being apolitical, he argues that youth are focusing their political activities on non-traditional forms of participation such as social and environmental activism (Sloam 2007).

In addition to academic criticism of the apathy claim, there is increasing recognition from European and British governments that young people are not apathetic, but rather are disillusioned with traditional means of political participation. In response to this, some important steps have been made, including in 2007 the lowering of the voting age in Austria to 16 (see Grover 2011). Many European nations encourage parallel participation in politics through organisations such as youth parliaments, and there are legislative attempts to encourage governments to

listen to the concerns of youth (Forbrig 2005). Prominent amongst these is the 'Learning to Listen' initiative in the UK, which is attempting to ensure that children and young people are involved in social policy decision-making.

In some ways, however, the increasing recognition of the capacity of young people in this regard only serves to make their ongoing exclusion from mainstream political processes such as voting harder to defend. Children and young people are taken to be capable of participating in all the aforementioned ways, and yet are still being denied the basic right to vote, a right which should be held by all citizens, as set out in Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights. If children and young people have the capacity to vote, then their blanket exclusion seems an unreasonable restriction on their rights under these agreements, whether the exclusion applies to all under 18, all under 16, or at any other level. One potential solution is an inclusive form of capacity testing. In the remainder of this article, I outline a means for determining, in an equitable manner, whether young people are in fact capable of voting, and I argue that when they are so capable, we have a duty to enfranchise them. I take this further step to be necessary as, despite the various and sometimes successful attempts to include youth in politics without enfranchising them; entitlement to vote remains an important further step towards the respectful treatment of young people as citizens. We can see from the above that there is at least good reason to worry that competence to vote is present, unrecognised, in many of those currently excluded from participation on the basis of age.

### 3. Capacity testing

While the obvious solution to the problems detailed above is to lower the voting age this will not fully resolve the problem, for no age threshold is going to accurately distinguish between the capable and incapable. Rather than discuss the difficulties surrounding a lowered voting age, the remainder of this paper addresses a means for resolving the difficulty that *any* age limit creates, the problem of imperfectly distinguishing between the capable and the incapable. To overcome this concern, I suggest introducing a capacity test to facilitate the inclusion of those capable young persons who are below even a lowered voting age. Such a test would be available on a voluntary basis to all below the formal voting age who desire to vote. The test I outline below draws of necessity from the US experience, as the more restrictive controls over voting rights for cognitively disabled people in the USA have resulted in more discussion of capacity testing there than has occurred in much of Europe. For present purposes, this means only that those who must prove participatory capacity in the USA are assumed throughout much of Europe to have capacity. Justifying the exclusion of any group is correspondingly more difficult as the threshold for inclusion is lowered. In Europe as in the USA, demonstration of capacity for political decision-making that is recognised as sufficient for inclusion provides a strong reason for such inclusion.

The test as envisaged judge's basic political competence, of the type presumed on the part of all above the voting age, and failure upon sitting the test does not preclude inclusion upon passing the age threshold. Finally, the test is sortal. It does not distinguish between the barely capable and the outstandingly capable, granting participatory rights to all who pass it. There are two major considerations regarding

the institution of a capacity test. The nature and content of the test must be examined and a plausible method for implementing the test must be generated such that gaining access to it is not an onerous task for those affected. The optional nature of this test means that those who are excluded by the blunt instrument of the voting age may opt to be assessed for capacity to participate, and where successful, their inclusion as participating members of the democratic community is to be fast-tracked. I will only briefly discuss the content, as the objections put forward against competence testing do not generally rely on the nature of the testing but on the idea of testing itself; they are independent of the form of the test. There are four main objections, related to the difficulty and expense of testing, the risk of corruption in testing, the absence of an objective standard of competence, and the worry that capacity testing introduces instability into democracy (Archard 2001). These objections are discussed in the next section, following the description of the nature of the test envisaged.

The content of a capacity test for young people could easily be developed, especially now that courts, particularly in the USA, have begun to display an interest in the content of the capacity requirement more generally. In *Doe v Rowe*, a case brought against the State of Maine by three women with bipolar disorder who claimed to have the requisite capacity to vote, and that they were being wrongly denied the vote, a test for capacity was determined. It is only if people 'lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice' (*Doe v Rowe* 2001) 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 (Appelbaum *et al.* 2005, Raad *et al.* 2009). 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. The conclusion drawn from these studies is that the capacity to vote can be measured simply and reliably. The test for the *Doe* capacity standard 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 (*Doe v Rowe* 2001). 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 earlier are strictly required for the *Doe* voting capacity standard (the full question list can be found in Appelbaum *et al.* 2005).

I suggest that there is a single capacity standard used in determining whether a person can legitimately be excluded from voting, irrespective of the reason for capacity being called into question. 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.

My proposal for capacity testing may then be summarised as follows. Everyone above a certain age (the details of which I have not discussed here, but which should, in any instance, be set lower than the current norm of 18), is automatically entitled to participate. No one above the age limit may be disqualified from voting on the grounds of having failed to pass the capacity test I am putting forward. For those who are excluded by the age limit set, an optional capacity test is to be made available, passing which allows them to participate, despite being below the age limit for automatic inclusion. The content of this test should test capacity to the same standard as is currently taken to prove capacity for the cognitively disabled, for I claim that participatory capacity is a single standard, applicable to all, rather than one which allows for differing thresholds according to irrelevant characteristics such as age. The questions outlined above constitute the entirety of this standard, the Doe voting capacity standard (Doe v Rowe 2001). I envisage the testing regime being made available through the school system of states which adopt a suggestion of this kind, and concerns regarding this are touched upon briefly in a later section of the paper (although their full exposition is left aside as the idea, rather than its implementation is my primary concern here). With this basic framework in place, I turn now to a defence of this type of minimal, optional and inclusive capacity testing from the objections that are commonly levelled against capacity testing regimes.

#### **4. Defending capacity testing**

Capacity testing has a lengthy and largely negative history. In the past, capacity testing has been associated with anti-democratic intent, such as the elitism of the Platonic republic. Accordingly, suggestions that capacity testing may be a legitimate method of controlling enfranchisement are greeted warily. In this section, I address the four prominent objections to capacity testing identified by David Archard, providing in response to each objection reason to accept that a capacity test as I envisage is not vulnerable to it. Archard identifies four main strands 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 age, no such agreement exists over either competence or the grading of responses (of particular concern here is the possibility of cultural bias); Finally, that while age provides stable expectations, capacity testing introduces the possibility that one will never be involved in democracy (Archard 2001).

From the discussion earlier in this article, the response to Archard's fourth objection is already clear. 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 will remain in place and will continue 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, then 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 three remaining objections will be addressed in order.

The first objection to capacity testing is that it is necessarily expensive and cumbersome. This objection 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, much work will be entailed in ensuring that only the currently proven capable are allowed to participate. My proposal minimises such concerns as it does not call for all citizens to be tested, rather only those under the age of majority who opt to participate. Similarly, 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, namely the school system. 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.

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' (Archard 2001). Again, this line of objection is undermined by the relatively benign capacity testing I envisage. The majority of citizens are still presumed capable. Those who pass a capacity test prove their capacity and join the ranks of the capable. 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 a capacity test that satisfies the current US Federal standard is sufficient to prove capacity. The test quoted from earlier is a simple three part test, very minimal in nature.

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 US position that capacity testing is unconstitutional, as prior attempts to implement it have consistently been biased against African Americans (See Ewald 2002, Karlan 2002, Goldman 2004). 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 include cognitively disabled persons is also sufficient to warrant the inclusion of those under the current voting age limit. We have examples of such tests for cognitively disabled persons (detailed in the previous section of this paper). 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 already tacitly accept 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.

The capacity testing discussed here is supplementary. It simply provides another means of entry into the franchise. 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 says, 'the many, stupid, foolish citizens must have their right to vote protected' (Cohen 1975). Furthermore, enfranchisement is not a rare good. It is more widespread in modern democracies than it has ever been, and the present proposal will spread it further again. As such, it lacks the exclusivity to make privileged access to it particularly enticing. This supplementary nature also provides a point of distinction between the capacity testing system I envisage, and the historical attempts to institute capacity testing in jurisdictions like the USA. Capacity testing generally is taken to be unconstitutional in the US system, but this is a result of previous attempts to use capacity testing as the sole or dominant determinant of political inclusion. As this system specifically excludes any mechanism through which a citizen can be disenfranchised as a result of the testing, it is distinct from the intended target of existing US 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 (*Guinn v United States* 1915, Keyssar 2000). It can, however, arise just as easily in other contexts. For example, a similar concern could be raised that capacity testing through state run

schools in the UK or Europe would privilege the children of long-term residents, or be used to subtly undermine the political power of immigrant groups by expanding the numbers of enfranchised.

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 the children at these schools 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 youth to pass this test as a means of inflating the number of democratic participants with a particular viewpoint. In response, I cannot deny this possibility, but two things reduce the concern this should cause. First, it must be remembered that if a person demonstrates the capacity required to participate, the means by which they acquired that ability are irrelevant. There is no wrong done by excluding the incapable, but to exclude anyone capable, 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. Secondly, given that the standard being tested for is minimal, and that the proposed test has no bearing on the inclusion of anyone beyond the age of voting majority, the number of persons for whom this possibility is significant will be minimal. 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.

Finally, I address 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. This objection is also overstated with respect to a minimal capacity test. As was discussed above when I set 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 judgement 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.

### **5. Limiting the testing regime**

With the main objections to capacity testing thus refuted, we turn to additional benefits of this system. While I did not discuss the benefits of lowering the voting age in detail, focusing instead on the role of capacity testing in protecting the participatory rights of those who will inevitably be excluded by any age limit, there is some synergy between the two suggestions. Lowering the voting age would not only provide a more accurate means of inclusion of relevantly capable actors into the political community, it would also ensure that all those excluded by reason of presumed incapacity as a result of age are required by the state to attend some form of educational facility, whether schools, technical training or apprenticeships. This drastically reduces the pressure exerted on the institutional infrastructure of the state by an optional capacity test for the excluded. If a particular young person chooses, against the will of society, to avoid school, it is not the responsibility of the state to ensure them the opportunity to participate provided by an optional test. There are specific groups in most modern societies who have, for whatever reason, traditionally low attendance rates in schooling. The presence of these groups might generate problems for a capacity test, in that a group is disadvantaged by the institution of this system. But the failure does not lie in the capacity test; rather, it lies in the state failing to institute basic educational facilities for the population. This issue if addressed would render the capacity testing equitable.

It is not necessary that all people who are capable of political participation are forced to participate, to do such a thing would be a gross violation of the personal liberty each individual has to act as they wish when such acts do not harm others. Rather, what must be done is simply to provide those with the capacity to participate with the opportunity to do so [A minority of OECD countries, Australia included, have compulsory voting. Compulsory voting raises a separate set of issues, an introduction to which can be found in Evans (2006)]. In the light of this, the content of the test is (in an effort to seek consistency) only attempting to identify in the youth evidence of those properties which are assumed present in all adults. The content of these properties is minimal at best. We do, after all, allow everyone else the right to vote, simply by virtue of having survived in a modern democratic society for 18 years, and without regard to their particular rational and intellectual capacities above a very basic threshold. The implementation of such a scheme would not remove all of the difficulties with the current enfranchisement scheme. We would be left without the problem of false positives, thereby substantially improving the functioning of our democratic society, but the problem of false negatives would remain. The problem of false negatives in this context occurs when those who ought not to be allowed to participate (by reason of incapacity) are given participatory rights.

The practical argument for the exclusion of all those under 18 from the franchise relies on untenable premises. In addition to the weakness of the suggestion that there are sufficient costs as to render alterations to the current scheme politically infeasible, and the untenable nature of the suggestion that change is sufficiently disruptive of the social order as to be avoided at the cost of some people's ability to participate in government, one wishing to argue against children's participation must

resolve the problem of rights. In order for an approximation to the political ideal such as an age limit on voting to be acceptable, one must circumvent the problem of rights, particularly the perceived right to equal treatment held by all persons. For, if the contention I make above is accepted and those under 18 are seen not necessarily to lack the rationality required for democratic participation, then an age based exclusion, being an approximation to the ideal and focusing on an arbitrary limit rather than on the actual capacity of individuals, will result in equals (i.e. people who display similar abilities to participate in the democratic process) being treated unequally. A 15-year-old and a 23-year-old with identical levels of political acumen will be unequally enfranchised. To make a practical argument for exclusion hold, one must be able to demonstrate that this is unproblematic at the rights level, or that the problems with it can be solved.

## 6. Conclusion

I claim that there are people, specifically in this context, some young people (those under 18), who ought to be allowed to participate in the democratic process, and are not. A full exploration of whether these young people are the only category of persons of whom this can be said is an argument for another time, but interesting possibilities arise from this conclusion for both the cognitively impaired and the elderly in resisting disenfranchisement. At the beginning of this article, I argued that an age-based exemption is, in certain cases, not excluding people on the basis of incapacity, but rather, is doing so arbitrarily, relying not on any characteristic of the person relevant to their ability to participate in a democratic society, but only to their age, which as we have seen, is not always an effective measure of one's ability for democratic participation. Thomas Christiano effectively describes the difficulties arising from such exclusion, claiming that as disenfranchisement publicly violates the equal status of a person, and the equal advancement of their interests. By stripping a minority, youth in this instance, of its democratic rights, the majority is acting 'as if its interests were of superior worth to those of the minority' (Christiano 2004).

As it is for any other minority in society, so it is for the young. If anything, the position of the young in society is considerably worse than that of other minorities, for rather than being stripped of democratic rights, the young simply have never had them. Useful analogies to the present position of the child appear to arise out of the literature on feminism, and on group rights. There is a lack of recognition of the child as valuable in the political processes of the modern western democratic state, and this lack of recognition serves in the case of the child, as it did (and indeed continues to do in certain respects) for women, to exclude and marginalise children away from full participation in the community. The reasoning behind the exclusion of children also mirrors the type of fallacious argument which had been used to attempt justifications of the exclusion of women; 'their lack of competence, in particular to be rational, and their dependency' (Lister 2007). It has been my contention here that there are people under 18 for whom the attempt to apply this exclusion is just as absurd as it would seem to attempt in the modern context to exclude women from the franchise for these reasons.

I suggested that not only is the implementation of a strict minimum age limit for voting rights untenable theoretically, as it improperly denies certain fundamental rights to persons who have been proven to deserve them, but that it need not be

particularly onerous a task for a democratic state to rectify this situation. The basic infrastructure, I suggested, is in place for the institution of an opt-in system of participation for those under the currently mandated minimum age, which need not be considered as a requirement for participatory rights more generally. The opt-in system can act concurrently with the presumption of capacity at a predetermined age.

Finally, I addressed four concerns that traditionally undermine attempts to develop capacity testing regimes within modern liberal democratic states. I argued that the particular features of the capacity testing regime I envisage are such that it is immune to these four criticisms, and does not represent a threat to democracy in the way that historical implementations of capacity requirements for political participation have. Further, the benefits of my proposed capacity testing regime for both citizens and the legitimate authority of the state, provide good reason to implement it.

### Note

1. Australia has a system of compulsory voting and fines those who do not have their names checked off against the electoral rolls.

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