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Guarantees Mentally Handicapped Voting Rights, Unless Adjudicated Incompetent to Vote

City Club of Portland (Portland, Or.)

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REPORT ON
 GUARANTEES MENTALLY HANDICAPPED VOTING RIGHTS, UNLESS ADJUDICATED
 INCOMPETENT TO VOTE

(STATE MEASURE NO. 2)

Purpose: "Measure proposes constitutional amendment to eliminate present language which prohibits voting by any 'idiot or mentally diseased person,' changing it to guarantee full voting rights to mentally handicapped persons, unless they have been declared in the manner provided by law to be incompetent to vote."

To the Board of Governors,
 The City Club of Portland:

I. INTRODUCTION

This Committee was assigned to study and report on Senate Joint Resolution 26, referred to the voters by the 1979 legislature as State Measure No. 2 on the November 4, 1980 general election ballot. This Measure would amend section 3, Article II of the Oregon constitution (see text below).

"Paragraph 1. Section 3, Article II of the Constitution of the State of Oregon is amended to read:

Sec. 3. [No idiot or mentally diseased person shall be entitled to the privileges of an elector; and] A person suffering from a mental handicap is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law. The privilege of an elector, upon conviction of any crime which is punishable by imprisonment in the penitentiary, shall be forfeited, unless otherwise provided by law."

([Bracketed] material is deleted. Underlined material is new language.)

Senate Joint Resolution 26 as originally introduced at the 1979 legislature eliminated the words "no idiot or mentally diseased person shall be entitled to the privileges of an elector," and allowed mentally handicapped persons the right to vote. The resolution as finally passed by the legislature includes a clause clarifying that mentally handicapped persons may be denied the right to vote if they are adjudicated incompetent to vote according to law.

II. HISTORY AND BACKGROUND

A. Constitutional Provisions

When the Oregon constitution was ratified in 1859, only white males were allowed the right to vote. At that time Oregon denied voting rights to idiots or insane persons; Negroes; Chinamen or Mulattoes; soldiers, seamen, or marines stationed in the state who were not already residents; women, and persons under twenty-one.

In 1944, Article II, section 3 of the Oregon Constitution was amended by a vote of the people, changing the words "insane persons" to "mentally diseased."

Under Article I, section 4 of the United States Constitution, the individual states reserved the right to determine who was entitled to the privileges of an elector. However, in the last 120 years, several amendments to the United States Constitution have changed the states' ability to control the voting franchise. Those amendments granting protection of voting rights are set forth below.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (Ratified 1868)

Amendment 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. (Ratified 1870)

Amendment 19

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. Congress shall have power to enforce this article by appropriate legislation. (Ratified 1920)

Amendment 24

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. (Ratified 1964)

Amendment 26

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. (Ratified 1971)

[Emphasis added]

B. The Right to Vote and Federal Statutes

The 1866 Civil Rights Act provides that:

"All Persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Several subsequent federal statutes address the right to vote. They contain guarantees that may limit the application of Article II, section 3 of Oregon's constitution.

Various provisions of the United States Code underscore the principle that to single out a class of persons such as the mentally handicapped and deny them important rights, such as the right to vote, is contrary to law. Though many sections of the Code specifically prohibit voting classifications based on race, other provisions prohibit differential treatment of any persons who present themselves to vote.

For example, the Civil Rights Acts provide in part:

(a) No citizen shall be denied, because of failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term, 'test or device' means any requirement that a person as a prerequisite to voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class. (42 USC 1973 aa)

These laws significantly limit Article II, section 3 of the Oregon Constitution. Mentally handicapped persons who have been denied the right to vote may argue that any test used to determine their eligibility to vote violates federal law.

Further, federal law requires that in making a determination of whether a person is qualified to vote, no person acting under color of law may use any procedures with one person that are not used with others. [42 USC 1971a (2)] For example, if mentally handicapped citizens were denied the right to vote, unless all persons registered to vote were tested or evaluated in the same manner then the process used to disenfranchise them would violate federal law.

C. Current Oregon Provisions

The Oregon constitution contains few restrictions on the right to vote. According to its provisions, the right to vote can be denied to persons eighteen years of age or older only if they are not United States

citizens or if they are idiots, mentally diseased, felons, or fail to meet residency requirements.

Oregon statutes also regulate voting. These statutes implement Oregon constitutional restrictions on voting such as residency, age and citizenship. They are silent about restricting voting rights because of mental handicaps mentioned in Article II, section 3. (See generally ORS Chapter 247.) However, there is a provision in the civil commitment statutes that specifically acknowledges the right of some mentally handicapped persons to vote. Both ORS 426.385 and ORS 427.031, covering persons committed to state hospitals and training centers, provide in part that patients have the right to ...

Exercise all civil rights in the same manner and with the same effect as one not admitted ..., including, but not limited to, the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote, unless he has been adjudicated incompetent and has not been restored to legal capacity. ORS 426.385 (1)(m), ORS 427.031 (1).

Oregon statutes also specify that admission to a state hospital for treatment does not constitute a finding of incompetency (ORS 426.295). These statutes are consistent with the current legal philosophy that recognizes the human and legal rights of mentally handicapped citizens. Therefore, persons suffering from mental illness retain several legal rights even though they have been admitted to a state hospital or training center. (See Appendix C)

D. Oregon Attorney General's Opinion

In 1973 the Secretary of State asked the Oregon Attorney General, "What persons may be denied the right to vote under Article II, Section 3 of the Oregon Constitution, providing: 'No idiot or mentally diseased person shall be entitled to the privileges of an elector?'" (35 OpAG 1220) The answer of the Attorney General is the only recorded opinion interpreting Article II, section 3 of the Oregon constitution as it applies to the mentally handicapped. The Attorney General concluded that it "is applicable only to those persons who are admitted to a state hospital for treatment of mental illness, and declared incompetent under the procedure provided for in ORS 426.295 (Oregon's civil commitment statute)." (35 OpAG 1220)

The Attorney General stated that, "A degree of mental disease sufficient to justify the appointment of a guardian might well be insufficient to justify admission to a hospital for treatment, let alone an adjudication of incompetence under ORS 426.295." (35 OpAG 1220) Similarly, the Attorney General concluded that a finding of incompetence to stand trial would not deprive one of the right to vote.

III. ARGUMENTS ADVANCED IN FAVOR OF THE MEASURE

The following arguments were advanced in favor of the Measure in testimony before your Committee:

1. Present language in the Oregon constitution conflicts with Oregon statutes governing the rights of the mentally handicapped.
2. Present language in the Oregon constitution conflicts with the United States Constitution and federal civil rights laws.

- Oregon Department of Energy. Reports on Disposal of Spent Fuel and Accident at Three Mile Island. 1979.
- "Senate Passes Nuclear Waste Storage Bill," Congressional Quarterly. p. 2163. August 2, 1980.
- "Soviets Go Atomaya Energiya," Time. p. 68. October 30, 1978.
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- Trabalka, John R., L. Dean Eyman and Stanley I. Auerbach, "Analysis of the 1957-1958 Soviet Nuclear Accident," Science. Vol. 209. p. 345. July 18, 1980.
- "Underground Rock Storage Proposed for Nuclear Waste," Congressional Quarterly. p. 395. February 16, 1980.
- Wade, Nicholas, "France's All-out Nuclear Program Takes Shape," Science. Vol. 209. p. 884. 1980.
- Woods, W. Kelly, "Dear Daughter: No, Pro-Nuclear People Aren't Crazy," Oregonian. p. B7. September 12, 1978.

Other

- Arguments supporting and arguments opposing Measure 7 as submitted for printing in the 1980 General Election Voters' Pamphlet.
- Kulongoski, Theodore R., Letter to J. Carl Freeman, unpublished. March 8, 1980.
- Varanini, Emilio E., III, "California's Approach to the Nuclear Waste Disposal Issue," unpublished paper. March 1980.

Legal Issues

- Annotation, State Regulation of Nuclear Power Plants, 82 ALR 3rd 751 (1980 Supp)
- Murphy & LaPierre, Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption, 76 Columbia L. Rev. 392 (1976)
- Seiberling, Radioactive Waste Disposal: The Emerging Issue of States' Rights, 13 Akron L. Rev. 2 (1979)
- Meek, Nuclear Power and State Radiation Protection Measures: The Impotence of Preemption, 10 Environmental Law 1 (1979).
- Note (Bauman & Platt), May A State Say "No" to Nuclear Power? Pacific Legal Foundation Gives a Disappointing Answer, 10 Environmental Law 190 (1979).
- Northern States Power Co. v. Minnesota, (1971 CA 8 Minn.), 447 F2d 1143 Aff'd 405 US 1035.
- United States v. City of New York, (1978, D.C., S.D., N.Y.) 463 F Supp 604.
- Pacific Legal Foundation v. State Energy Resources, (1979, D.C., S.D. Cal.) 472 F Supp 191.
- Pacific Gas & Electric Co. v. State Energy Resources, (1980, D.C., E.D. Cal.) 1980 Nuclear Reg. Reports, paragraph 20,150.

3. Present Oregon constitutional language, "...idiot or mentally diseased person," is derogatory, is no longer used in medical terminology, and is not defined in Oregon law.

4. Present law is not being enforced and passage of the Measure would ratify current practice which allows the mentally handicapped to vote.

5. Mentally handicapped persons expect the same rights as other persons, including the right to vote.

6. Mentally handicapped persons' right to vote would be provided the strongest protection by a constitutional amendment. Without a protective clause in the constitution, the legislature could change the law without a vote of the people.

IV. ARGUMENTS ADVANCED AGAINST THE MEASURE

Your Committee was unable to find any opposition to the Measure, organized or otherwise. During the interviews with witnesses and during committee discussions, four points were raised as possible objections:

1. There is no need to change the Oregon constitution. No mentally handicapped person's rights are presently being abridged and no mentally handicapped person now is denied the right to vote.

2. Measure 2 is more complicated than necessary to guarantee voting rights to the mentally handicapped. It would have been adequate and certainly less complex to amend the constitution by eliminating the offensive wording and remaining silent on granting or denying voting rights to the mentally handicapped.

3. The introduction of the phrase "unless the person has been adjudicated incompetent to vote as provided by law" could lead to future litigation because there is no statutory method to adjudicate a person incompetent to vote.

4. The possibility of arousing an uninformed, biased reaction could result in an unfortunate climate for the mentally handicapped, who as noted above face no present problem in exercising their right to vote.

V. DISCUSSION

Your Committee has been unable to verify that any mentally handicapped persons have been denied the right to vote in Oregon in recent years, as long as they meet other voter requirements. Your Committee contacted various county and state election officials who said they do not reject any voter registrations on the basis of the "idiots or mentally diseased" wording of section 3 of Article II.

A significant benefit of the proposed constitutional change would be to eliminate archaic and derogatory language. At one time "idiot" was a legitimate diagnostic category of mental retardation. The term no longer is used by the medical profession and it has taken on a derogatory connotation to the lay person. Further, the proposed constitutional language, "person suffering from a mental handicap," is broad enough to encompass all of those who might have been denied the right to vote under the old prohibition -- the mentally retarded and the mentally ill.

The mentally retarded make up approximately one percent of the nation's population, and eighty percent of the mentally retarded are considered mildly retarded with IQ's in the range of 50 to 70. The mildly retarded usually live on their own or in a sheltered environment.

Mental illness covers a broad range of disorders with three main categories: psychosis, neurosis, and organic brain syndrome. Neurosis is by far the most prevalent mental illness, and it was stated to your Committee that most people are neurotic to one degree or another. Under the present constitutional language, neurotics could be denied the right to vote. The proposed constitutional change would prevent this from occurring.

The mentally handicapped want to be viewed as people and good citizens, without insulting labels. Like other citizens, they feel a desire and a social responsibility to vote, and are for the most part self-supporting taxpayers. Despite the present constitutional prohibition, the mentally handicapped are voting. Many of those in institutions vote by absentee ballot, and staff members from the hospitals and training centers often drive the patients to the polls.

Our interviews disclosed that some mentally handicapped persons who vote are given training and education about the candidates and ballot measures. Classes are held in some public and private institutions with both sides of the ballot measures explained objectively. Special attention is given to those retarded persons with limited reading skills. Voting procedures for the mentally handicapped are handled effectively, and the result is gratifying for those who get the opportunity to vote.

VI. CONCLUSIONS

Your Committee concluded that the arguments in favor of Measure 2 were more persuasive than those possible objections raised against it.

It has been argued that it would have been better to eliminate the offensive language and leave the constitution silent on the voting rights of the mentally handicapped.

We were troubled by the introduction of the phrase "unless the person has been adjudicated incompetent to vote as provided by law," as no method currently is specified under Oregon law to adjudicate a person incompetent to vote. Instead, a court properly can only find a person generally incompetent. Consequently, even under the proposed constitutional change, a general finding of incompetency may or may not bar a mentally handicapped person from voting, just as it could under the current state law. The legislature will have to define "incompetent to vote" and there is no indication that such legislation is contemplated. In fact, the Committee was unable to locate a proponent of the measure who could explain the legislature's intent in adding this language. Even if legislation were passed to define "incompetent to vote" your Committee concluded that such a definition would be difficult to apply.

Most of the witnesses appearing before the Committee, however, as well as those contacted on the phone, were asked if they preferred the constitution to remain silent or carry a positive assurance of voting rights for mentally handicapped persons. In most instances they supported the positive language as now contained in Ballot Measure 2. Under the proposed amendment it would be necessary to go to the voters to make any subsequent changes in voting rights for the mentally handicapped, whereas if the constitution remained silent, the legislature could make changes without a vote of the people.

Your Committee believes that Measure 2 should pass, even though the definition of "incompetent to vote" may require future attention by the legislature. Few, if any, mentally handicapped persons are being denied the right to vote in current practice and passage of Measure 2 would make Oregon law correspond with federal law and constitutional guarantees. Because various Oregon revised statutes already grant voting rights to the mentally handicapped, albeit in contravention of the Oregon constitution, changing the constitution would harmonize all current law and practice.

VII. RECOMMENDATION

Your Committee recommends a YES vote on State Measure No. 2 at the November 4, 1980 general election.

Respectfully submitted,

Walter R. Grande
 Thomas K. Hooper
 Jay Jacobsmuhlen
 Lynette Mannion
 Lisa Uhlmann
 Gordon V. Walker
 Karen Walsdorf
 Robert L. Weil
 Jan K. Kitchel, Chairman

Approved for publication by the Board of Governors on September 8, 1980 and authorized for publication and distribution to the membership for discussion and action on October 3, 1980.

APPENDIX A - WITNESSES INTERVIEWED

Dr. Joseph Bloom, psychiatrist, University of Oregon Health Sciences Center
 J. D. Bray, M.D., Assistant Administrator, Programs for Mentally or Emotionally Disturbed, Mental Health Division, State of Oregon
 Dr. Dean Brooks, Superintendent, Oregon State Hospital, Salem
 Pat Corder, office assistant, Multnomah County Bureau of Elections
 Judy Cunio, president, People First
 Therese DesCamp, Multnomah Association for Retarded Citizens
 Candy Hammersly, Oregon Psychiatric Security Review Board
 Tim Jacobs, Case Management Supervisor, Developmental Disabilities Program,
 Multnomah County
 Gerald S. Lobosco, Director, Oregon Developmental Disabilities Advocacy Center
 Raymond Phelps, State Director, Elections and Public Records, Secretary of State's office, Salem
 Jack Rosevear, Director, Shangri La School, Salem
 John Sherwood, Mental Health Association, Lane County
 Al Soenneker, Executive Director, Association for Retarded Citizens of Oregon
 D. H. Treleven, M.D., Assistant Director, Human Resources, Administrator for
 Mental Health, Mental Health Division, State of Oregon
 John Weldon, former director, Multnomah County Bureau of Elections

APPENDIX B - BIBLIOGRAPHY

David Brown, law student, University of Oregon. Written testimony submitted to Senate Committee on the Judiciary, hearings on SJR 26, April, 1979.
 Minutes, Senate Committee on the Judiciary, (in re SJR 26), April 19 and April 30, 1979
 Oregon Revised Statutes, Chapter 247; 426.295; 426.385; 427.031
 Opinions of the Attorney General, 35 OpAG 1220
 United States Code, 42 USC 1971 a (2); 42 USC 1973 aa

APPENDIX C

PATIENTS' RIGHTS (as set forth in ORS 426.385)

All persons receiving treatment at the Oregon State Hospital shall have the right to:

1. Communicate freely in person, by sending and receiving sealed mail, and by reasonable access to telephone;
2. Wear his own clothing;
3. Keep his personal possessions, including toilet articles;
4. Religious freedom;
5. A private storage area with free access thereto;
6. Be furnished with a reasonable supply of writing materials and stamps;
7. A written treatment plan, kept current with his progress;
8. Be represented by counsel whenever his substantial rights may be affected;
9. Petition for a writ of habeas corpus;
10. Not to be required to perform routine labor tasks of the facility except those essential for his treatment;
11. Be given reasonable compensation for all work performed other than personal housekeeping duties;
12. Such other rights as may be specified by regulation;
13. Exercise all civil rights in the same manner and with the same effect as one not admitted to the facility, including but not limited to, the right to dispose of property, execute instruments, make purchases, enter contractual relationships and vote, unless he has been adjudicated incompetent and has not been restored to legal capacity;
14. Be free from potentially unusual or hazardous treatment procedures, including lobotomy and electroshock therapy, unless they have given their express and informed consent;*
15. Mechanical restraints shall not be applied to a person admitted to the hospital unless it is determined by the chief medical officer of the hospital or his designee to be required by the medical needs of the person.

*This right may be denied to such persons for good cause only by the Superintendent, or his designee, but only after consultation with and approval of an independent examining physician. Any denial shall be entered into the patient's treatment record and shall include the reason for the denial.