Taking Votes Seriously: How Age Qualifications Are To Be Reexamined

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Table of Contents

I. Introduction

The deficiency of distinctions on the basis of age is that the line established is quite probably impossible to justify. A generalization is made on those above and below a certain line that legislators feel to be intuitively correct. For most instances of such distinctions, this is acceptable. The definition of adulthood is set in these circumstances and it is the milestone of a new time in a person's life. Voting, however, is different. It is different from cases like driving licenses because it is, politically, more fundamental. It is also considered by the law to be fundamental. But voting is also different from other activities that are considered fundamental (like interstate travel, speech, or privacy). The difference stems from the franchises' fundamental nature. It is fundamental not only because it is important and valuable, but also it is fundamental like having nine fielders is fundamental to the game of baseball.[1] I submit that it is fundamental in both ways.

The general history of the franchise in America is well known. It is marked by epochs of expansion and moments of contraction.[2] The Constitution was amended three times with regards to guaranteeing the franchise to certain classes of people. The Fifteenth Amendment was ratified in 1870 and prohibited its denial on the basis of race. The Nineteenth Amendment was ratified in 1920 and prohibited its denial on the basis of gender. The Twenty-Sixth Amendment was ratified in 1971 and prohibited the denial of the franchise on the basis of age to those eighteen or older. Note that none grant a right to vote, but only block the federal and state governments from denying that right. These amendments were responsive. Like setting new minimum boundaries

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1 I am indebted to Prof. LaRue for all of his comments which pushed this note from what was polemical to what, I hope, has a conceptual depth and clarity of which I can be proud. His definitional/instrumental dichotomy as well as the use of a game metaphor was instrumental in that change.

2 *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

in a baseball field,[3] the rules changed to fit perceived deficiencies. And, like instant replay, inspires controversy. Furthermore, it is enforcement that inspires greater controversy than even the rule (at least in the case of the Fifteenth Amendment).[4]

The bulk of this note is concerned with Equal Protection and the level of scrutiny applicable to this case. First, however, I address the definitional aspect of the franchise in Article I. If the issue is purely constitutional, then the issue must be addressed by parsing the Constitution alone. If, however, it is purely instrumental (i.e. laws to address issues requiring an interest and rationale), then the issue must be addressed on Equal Protection grounds. If, as I conclude, it is ambiguous, both sources must be analyzed. Second, I present the Equal Protection issues and define the framework to analyze the problem. Third, I apply the facts to the framework and come to a legal conclusion.

As this note appears to upset the established rule in place since the inception of our government—that is, an age qualification—it is appropriate that I address my ultimate alternative at the outset. The ideal solution would be to eliminate all age qualifications and require states and territories to establish independent qualifications that are bright-line and automatically applicable. Some examples would be graduation from a certain grade level, the potential liability for taxes, selective service registration, or age qualifications backed by appropriate evidence. As I will discuss next, the law may well accept an unjustified age qualification, but as a matter of civic awareness, as citizens we ought not to accept any qualification of the franchise without justification. If we can find anyone under eighteen who should vote, our sense of civic pride should be

3 *See* Baseball Almanac, *Rule Change Timeline*, http://www.baseball-almanac.com/rulechng.shtml.

4 *See* GARRINE P. LANEY, VOTING RIGHTS ACT: HISTORICAL BACKGROUND AND CURRENT ISSUES (2003) (hereinafter Voting Rights Act) (detailing the history and aspects of the Voting Rights Act and its amendments).

offended. If, as I find, the qualifications are antagonistic to the Fourteenth Amendment, the courts should invalidate these qualifications so as to force the hand of state legislatures.

II. By Definition

Qualifications can be seen in two ways: as definitional or instrumental. If they are instrumental, they are conceptually distinct from the qualified object. If they are definitional, they are necessary components of the qualified object. Apply this to the term "voter"[5] and the age qualification of eighteen. Qualifications-as-definitional denies "fourteen year old voter" as a logical statement, like "invertebrate mammal." There are invertebrates and there are mammals, but no invertebrate is a mammal because the definition of mammal is a vertebrate creature. Our fourteen year old may be voting, but could never be a "voter." Qualifications-as-instrumental accepts "fourteen year old voter" as a logical statement, like "millionaire welfare recipient." Millionaires generally are not welfare recipients, but they could be if the limit to welfare were changed. Welfare is only a system by which people (of no necessary identity) receive funds.

In this paper, I will refer to concepts as supporting the "instrumental view" of the franchise or the "definitional view" of the franchise. This will be used in contrast to certain regulations as being definitional or instrumental. When I refer to cases as supporting the instrumental view, I mean that the franchise is open to means-ends analysis, or that definitional components (like the age qualification) must be justified under the Fourteenth Amendment. When I refer to cases as supporting the definitional view, I mean that the franchise is a matter of defined powers under the Constitution that are immune from means-ends analysis because it is a rule of the game beyond the challenge of the courts.

5 This assumes an original definition of "qualified voter" to be a voter in the state who can vote in the elections of the state. That is, there are voters in France, but they are not voters in my definition which adopts a purely American perspective.

A. Definition Applied

The definition argument begins with Article I, Section 2 of the Constitution: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[6] Alabama, for example, sets forth in their constitution as follows:

> Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting.[7]

Thus, the argument is: (1) electors are qualified by their state, (2) the State sets the qualification at age eighteen, therefore (3) the elector must be eighteen to vote. That said, under Article I, Section 4, "The Times, Places and Manner of holding Elections . . . , shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[8] This has been interpreted as allowing Congress to alter voter qualifications in federal elections.[9]

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6 U.S. CONST. art. I, § 2, cl. 1.

7 ALA. CONST. art. VIII, §177. But see Tex. Const. art. VI, § 1 for the statement that "The following classes of persons shall not be allowed to vote in this State: (1) persons under 18 years of age." This could be a fatal flaw in the Texas system. While Alabama's constitution easily falls within the definitional conception of qualifications-as-elements, Texas' definition, in its constitution, is more easily identifiable as a qualification-as-appendage. Also, it may fall outside of the U.S. Constitution's reference to qualifications. If this were so, then the disallowance would be open to an Equal Protection claim and require justification (the outcome of which will be discussed in later sections). This point is mooted by Tex. Elec. Code Ann. § 11.002 (Vernon 2007) which defines "qualified voter" as those meeting the age minimum. However, it points out the precariousness of the legal position of one using the definitional approach, which is highly technical in nature. If Texas had simply disallowed certain groups from voting, one would have to argue that "allow" would mean qualified-as-elemental. That is, resolving the ambiguity of "allow" would have to parallel the resolution of the ambiguity of "qualified" so that to allow is to qualify is to be a voter. A court would probably accept that argument, but it is a problem that makes one stutter.

8 U.S. CONST. art. II, § 4, cl. 1.

9 *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (deciding that Congress had the power to affix the age qualification at eighteen for federal but not for state elections).

That said, the Fourteenth Amendment is clear: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] Thus, logically, states may set qualifications, but they may not run counter to equal protection.[11] This presents the first branch in the analysis of this topic. Are qualifications treated with greater, lesser, or the same scrutiny as other forms of state action? For example, is discrimination in the franchise treated the same way as segregation in public schools? To answer this, we must look into Equal Protection jurisprudence. First, however, we should identify the values that will control that question. Fundamentally, the definitional/instrumental views will parallel views on federalism and the power of the states. Therefore, the question is this: when states set down foundational rules (like rules of the game), must the Fourteenth Amendment analysis give greater deference than it would to non-foundational rules that arise from these (e.g., legislation or regulations)

III. Equal Protection

Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights. *-Yick Wo v. Hopkins*[12]

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10 U.S. CONST. amend. XIV, § 1.

11 *See* Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) ("[T]he States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action.")

12 *See* Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064 (1886) (finding the application of a facially neutral statute to deny Chinese-run laundries the ability to continue business). San Francisco had an ordinance that required laundries to be licensed by the board of supervisors if the laundry was other than brick or stone. *Id.* at1065. It was alleged that the sheriff had arrested 150 Chinese laundry owners but no non-Chinese owners. *Id.* at 1066. The Court considered the issue to be whether the "naked and arbitrary power to give or withhold consent" used predominantly against Chinese aliens violated the Fourteenth Amendment. *Id* at 1069. The inequality is described as follows: "[the ordinance] divides the owners or occupiers into two classes . . . merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." *Id.* at 1070. "The fourteenth amendment to the constitution is not confined to the protection of citizens." *Id.* "[W]e are constrained to conclude that [our institutions of government] do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 1071. And, looking at the actual application of the law, they find that it was applied unequally, in violation of the Fourteenth Amendment. *Id.* at 1073. "Though the law itself be fair on its face, an impartial in appearance, yet, if is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances," it "is still within the prohibition of the constitutions." *Id.*

Why that issue was raised at all in *Yick Wo* is curious. That case was about the denial of employment opportunities to Chinese aliens by application of a facially benign statute.[13] Furthermore, aliens are traditionally, though not always, denied the vote.[14] It is, however, a classic statement and should be noted. The key elements of Equal Protection jurisprudence that must be discussed for this topic are heightened review and fundamental rights.

A. Heightened Review

Heightened review begins at Footnote 4 of *United States v. Carolene Products Co.*[15] Although it was unnecessary to the case, Justice Stone established a "more searching judicial inquiry" for "prejudice against discrete and insular minorities" and what I will call fundamental rights.[16] Note that the prejudice to minorities Stone had in mind was that "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[17] What processes did he have in mind? An education for racial minorities?[18] Enforcing

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13 *See id.* at 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the constitution.")

14 *See* PAUL KLEPPNER, WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870-1980 8 (1982) [hereinafter KLEPPNER].

15 *See* United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938) (upholding an action prohibiting shipment of milk "compounded with any fat or oil other than milk fat so as to resemble milk or cream"). Carolene Products had been indicted in federal court for violating the "Filled Milk Act," which consisted of using fat or oil other than milk fat to create what resembled milk. Id. at 145–146. The issue in Carolene Products was whether such act, prohibiting the interstate shipment of such products was constitutional under the due process clause of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, or its powers to regulate interstate commerce. Id. The Court stated that "Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare." Id. at 147 (citing Reid v. Colorado, 187 U.S. 137 (1902)). It does not infringe on the Fifth Amendment because "[t]he power of the Legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, [is] not doubted." Id. at 148. Further, Congress found "that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public." Id. at 149. The Fourteenth Amendment is of no avail because it "does not compel their Legislatures to prohibit all like evils, or none." Id. at 151. Footnote 4, which is discussed later, arrives at a discussion of the presumption of facts of legislative findings in commercial legislation. Id. at 152. Thus, Justice Stone suggests that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its fact to be within a specific prohibition of the Constition." Id. at n. 4. Ultimately, however, there is sufficient legislative findings to support the Act and take the issue out of the hands of the judiciary. Id. at 153.

16 *Id.*

17 *Id.*

that education?[19] Housing?[20] Employment?[21] "Reverse" discrimination?[22] Medicare?[23] Inheritance?[24] Age of buying alcohol?[25] That thread ("political processes") of the footnote has been lost. Each of the above applied or entailed a heightened level of review depending upon the classification, but few, if any, have more than a passing connection to political processes. This is only to say that the case of the franchise was more in the focus of what Stone said than the more common circumstances in which it was invoked. Sufficed to say, the result is a three-tiered system of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny.[26]

Rational basis review will uphold a law that is discriminatory, but has a reasonable state interest that is rationally related to the means employed. This standard is used when the distinction is not used on suspect or quasi-suspect classifications. This has been the case in such classifications as age,[27] wealth,[28] and mental retardation.[29] Intermediate scrutiny will uphold a law that is discriminatory against a quasi-suspect classification (like sex[30] or legitimacy[31]) if the State

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18 *See* Brown v. Board of Education, 347 U.S. 483 (1955) (finding segregation of schools by race was a denial of equal protection).

19 *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, (concerning teacher population), Board of Education of Oklahoma City Public Schools v. Dowell, 448 U.S. 287 (concerning Busing).

20 *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (concerning zoning laws that had potential racial effects).

21 *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (concerning a requirement that 10% of federal funds go to "minority business enterprises" for local public works projects), Washington v. Davis, 426 U.S. 229 (1976) (concerning a employee entrance test in which Black test takers were failing disproportionately).

22 *See* Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (concerning an affirmative action program).

23 *See* Mathews v. Diaz, 426 U.S. 67 (1976) (concerning a five year residency requirement for Medicare coverage).

24 *See* Lalli v. Lalli, 439 U.S. 259 (1978) (concerning inheritance rights for an illegitimate child).

25 *See* Craig v. Boren, 429 U.S. 190 (1976) (concerning different minimum ages to purchase alcohol among the genders).

26 *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.3 (3d ed. 1999) [hereinafter ROTUNDA] (discussing equal protection generally).

27 *See* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (concerning mandatory retirement from the police force at age 50).

28 *See* ROTUNDA, at § 18.25 ("The Court will uphold legislative actions which burden poor persons as a class under the equal protection or due process guarantee if the actions have any rational relationship to a legitimate end of government.")

29 *See id.* at § 18.3(f) (concerning "mental status" designations before the Court).

30 *See* Craig v. Boren, 429 U.S. 190 (1976) (concerning different minimum ages to purchase alcohol among the genders).

has an important interest that is substantially related to the means.[32] Strict scrutiny will uphold a law that is discriminatory against a suspect classification (such as race,[33] nationality,[34] or alienage[35]) if there is a compelling state interest whose means are necessary to that end.[36] Fundamental rights, generally speaking, warrant strict scrutiny.[37]

Why? "Any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."[38] The rationale behind these classifications is explained in *San Antonio ISD v. Rodriguez*.[39] In *Rodriguez*, the Court had to consider two questions: (1) whether the poor are a suspect class and (2) whether education is a fundamental right.[40] Justice Powell believed that the lower court was too quick to answer both questions in the affirmative, and so delved into the rationale behind those classifications.[41] There are three "indicia of suspectness" given: (1) the class is "saddled with . . . disabilities," (2) it has been "subjected to such a history of purposeful unequal treatment, or" (3)

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31 Lalli v. Lalli, 439 U.S. 259 (1978) (concerning inheritance rights for an illegitimate child).

32 *See* ROTUNDA, at §18.3 (discussing equal protection generally).

33 *See* ROTUNDA, at §§18.8(d)–18.10 (discussing the modern view of racial distinctions).

34 *See id.* (discussing, in parallel with racial distinctions, distinctions of national origin).

35 *See id.* at §18.11 (concerning the "General Status of Aliens").

36 *See* ROTUNDA, at §18.3 (discussing equal protection generally); Kramer v. Union Free School District No. 15, 395 U.S. 621, 630, 89 S.Ct. 1886, 1891, 23 L.Ed.2d 583 (1969) ("We turn . . . to [the] question whether the [means] is necessary to promote a compelling state interest.")

37 *See* ROTUNDA, at §18.3 (discussing equal protection generally); Clark v. Jeter, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights, are given the most exacting scrutiny.") (referencing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672, 86 S.Ct. 1079, 1084-85, 16 L.Ed.2d 169 (1966)).

38 Regents of University of California v. Bakke, 438 U.S. 265, 361–362, 98 S.Ct. 2733, 2784 (1978).

39 *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (finding that disparate impact on poor families in local funding was not unconstitutional state action). In *Rodriguez*, pupils from poorer schools in San Antonio were funded significantly less than pupils in affluent schools because a large portion of the funding were taxes based upon a local property assessment. *Id.* at 4, 9–17. The issues were whether "the poor" were a suspect classification and whether education was a fundamental right. *Id.* at 17–18. The Court found that the poor were in a suspect class or even that they were discriminated against in this case. *Id.* at 17–29. The Court was also not persuaded that education, although important, was a "fundamental right" protected by the Constitution. *Id.* at 29–39. Furthermore, the Court believed that strict scrutiny was inappropriate in the case of funding and taxation. *Id.* at 40–43. Thus, the appropriate test is rational basis, which this action easily clears. *Id.* 43–53.

40 *See id.* at 18 ("We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.")

41 *See id.* at 18–19 ("The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing.")

"relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[42] Then, addressing the issue of fundamental rights, the Court says that it is not a measure of its social importance, but rather "whether there is a right to [it] explicitly or implicitly guaranteed by the Constitution."[43]

The latter question will be addressed momentarily, but the former must be addressed now: do minors fit into Powell's indicia of suspectness? Minors, as a class, arguably fit all three indicia. First, minors are saddled with disabilities. They cannot drink, drive, smoke, go out unaccompanied after a certain time (in many cities), sleep with whomever they wish, or marry (in many states). They must pay taxes (sales and/or income), go to school until graduating high school, be tried as adults for certain crimes (in certain times and jurisdictions), and are controlled to a great extent by their guardians. It is fair to say that with all of this and no electoral voice that they are saddled.[44] Second, they have been subjected to a history of unequal treatment. Many of the situations above are unique to the regulation of minors or applied arbitrarily on some minors and not others (i.e., in deciding who is to be tried as an adult or at what age certain activities are open to them). It goes without citing that these are historical, traditional regulations. Finally, they are relegated to a position of political powerlessness. That is, after all, precisely what this paper addresses.

Compare that with *Craig v. Boren*[45] and women's "quasi-suspect" classification. No one can doubt the history of purposeful unequal treatment. However, how are women politically

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42 *Id.* at 28.

43 *Id.* at 33.

44 The great weakness in the argument is that they may not be *inappropriately* saddled. Powell makes no reference to propriety of the burdens, but it is clearly a factual distinction between racial/gender discrimination and age discrimination that these "disabilities" are entirely within the power of the State to perform.

45 See Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that a lower minimum age to purchase alcohol for woman than men violated equal protection). Craig concerned an Oklahoma statute that allowed the sale of "nonintoxicating" beer to males under 21 and females under 18. Id. at 191–92. The issue was whether the denial to males 18-20 constituted a violation of the Fourteenth Amendment. Id. at 192. The Court used

powerless or saddled with disabilities? If we assume that disabilities may be social (e.g., equal pay, etc.), then I will not dispute that, but one can hardly claim that women are politically powerless. They *are* the majority.[46] What powerlessness or disability that may have obtained for women is cured by the panacea of suffrage. And yet, gender discrimination warrants heightened review.

The index Powell formulated is clearly tailored to racial discrimination. That said, the disability, history of inequality, and political powerlessness all apply to minors. Even so, it is difficult to see what *Carolene Products* described (with respect to political processes) as going unsatisfied. The law has done all it can to purge itself of unequal treatment and grant full political power to non-whites. While social progress moves ahead in terms of race and gender, what of minors? Whatever the weaknesses in society in addressing historical, negative treatment to non-whites and women, it is accepted that those issues ought to be resolved. Not so, generally, for minors.

B. Fundamental Rights

Although a good faith argument might be made that minors are a suspect class, it is not my intention to pursue it. First, I do not believe that it is a strong legal claim despite some strong rhetorical points. Second, I believe minors should be granted the franchise because it is an important part of our government and not because of historical oppression. For this note, the ques-

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a standard of review which required "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Id. at 197. Oklahoma presented statistics that showed differential treatment was for the purpose of enhancing traffic safety. Id. at 199. The Court, however, found that "appellees' statistics in our view cannot support the conclusion that the gender=based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge." Id. at 200. The Court found that one study, that of "arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record" because ".18% of females and 2% of males in that age group were arrested" for drinking under the influence. Id. at 201. The Court holds that "Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age." Id. at 204. Thus, it "constitutes a denial of equal protection." Id. at 210.

46 *See* U.S. Census Table 2: Annual Estimates of the Population by Sex and Selected Age Groups for the United States: April 1, 2000 to July 1, 2007 (estimating that women represent 50.7% of the US population).

tion is whether the "right to vote" is a fundamental right. The second question is whether qualifications are treated given strict scrutiny.

The first case I use to examine this is *Reynolds v. Sims*.[47] Is *Reynolds* a prejudice case, a fundamental rights case, or neither?[48]

> But if, even as a result of a *clearly rational state policy* of according some legislative representation to political subdivisions, *population is submerged* as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.[49]

The last clause reads like a classic equal protection case (basic inequality), but the second clearly marks this as a heightened scrutiny case. But, as controlling precedent, it stands for the fundamental right that a vote must be evenly weighted, not the right to vote itself, even though the dicta points strongly in favor of a right-to-vote interpretation.[50] The Court said, "Undoubtedly, the

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47 *See* Reynolds v. Sims, 377 U.S. 533 (1964) (finding that legislative districts must be apportioned by population or else the state violates the Equal Protection Clause of the Fourteenth Amendment). The state of Alabama had not revised its apportionment of the seats for state representatives since 1901. *Id.* at 537–538. This was clearly in violation of the state constitution, which required decennial reapportionment. *Id.* at 538–540. By not reapportioning the districts, the changes in population from 1900 to 1960, the disparity was considerable. *Id.* at 340. Even so, the Alabama Supreme Court intended to do nothing about it under a separation of powers doctrine. *Id.* at 340–341, note 5. The issue in *Reynolds* was whether a state legislatures apportionment must be based upon population to avoid an equal protection violation. *Id.* at 561. "[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* at 562.

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted."

Id. Because our government is founded upon "full and effective participation," all must "have an equally effective voice in the election of members of his state legislature." *Id.* at 565. Thus, "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Id.* at 566, 568.

48 I point here to an interesting essay on the justiciability of our case on its own bottom as a "device of democracy." Jack Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUMBIA L. REV. 1326 (1994). The focus is on campaign finance, but it is equally applicable to this case. The idea is that antecedents to the government, like voting, are justiciable as such. But, for this paper, jurisdiction issues are secondary. I cannot expect someone to care about jurisdiction when the merits of the case are given so little credit.

49 *Reynolds*, 377 U.S. at 581 (emphasis added).

50 *See id.* at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.") However, not all of the Court's statements were favorable to this issue. The Court makes mention of "basic qualifications" of which age is undoubtedly one that was assumed. *Id.* at 558. That said, it would be unsound to give their untested assumption too much weight. After all, what qualifications are basic will take up a large part of the discussion in the coming sections.

right of suffrage is a fundamental matter in a free and democratic society."[51] The Court then said, "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment *just as much as invidious discriminations based upon factors such as race*."[52] By equating discrimination on a suspect classification with discrimination in voting implies that the Court must be equally cautious in its review of such issues (i.e. strict scrutiny).

Though this case supports the claim that the franchise is a fundamental right, does it fit into the instrumental or the definitional category? Like all of these cases, there are arguments on both sides. The definitional argument would be that states have the power to set the districts of representation because that is the foundational question of the government form. It is like deciding the baselines on a baseball field or how far the bases are from one another. Any change in those aspects changes the nature of the game. Note that, unlike other cases, this case concerned only *state* legislative districts.[53] Thus, it goes beyond the congressional power to alter regulations[54] and forcefully alters the rules not only of federal elections, but of all elections. This is strong precedent for the instrumentalist view. In essence, this would say, that the definition is made initially—"the People"[55]—and any qualification on that power must be justified by interests and tailoring.

Harper v. Virginia State Board of Elections[56] is the next case, and is more on point than *Reynolds* for two reasons. First, it considers a non-suspect classification.[57] Second, it is direct in

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51 *Id.* at 561–562.

52 *Id.* at 566 (emphasis added) (citing *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)).

53 *See id.* at 561 (stating the issue as whether the State may set districts in any way other than by population).

54 *See* U.S. CONST. art. I, § 4, cl. 1.

55 U.S. CONST. art. I, § 2, cl. 1.

56 *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (finding the imposition of a poll tax to violate the Equal Protection Clause of the Fourteenth Amendment). In *Harper*, the Court considered the validity of a poll tax required to vote. *Id.* at 666. The tax itself was only $1.50, but that any tax at all was too high. *Id.* at 668.

its consideration of the right to vote. *Harper* struck down the poll tax as unconstitutional: "Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications."[58] Here, the poll tax was not expressly racial in origin, but purely wealth-related. Wealth is neither a suspect nor a quasi-suspect classification.[59] Rather, this is a fundamental rights case. "We [the Court] have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[60] Further, "the right to vote is too precious, too fundamental to be so burdened or conditioned."[61] For those who find the "suspectness" of the class to be controlling, must find a way to undermine *Harper*. The case is perfectly clear and directly on point.

When considered under the distinction, however, it is less persuasive than *Reynolds* because the tax is not a qualification in the definitional sense. This case does, however, put the difficulty of this guiding distinction presents in a stark light. That is, "what is a qualification?" Recall Texas' method of "qualification" from footnote 7. That constitution states: "The following classes of persons shall not be allowed to vote in this State: (1) persons under 18 years of age."[62] If one reads "to be allowed" as "to be qualified," then the $1.50 poll tax is a qualification. If you do not have $1.50, then you are not allowed to vote. If one accepts this, then it follows that *Harper* is another instrumentalist case. However, I think not. The poll tax, if Virginia is to be taken at its word and was only a technique to bring in revenues, then it is not a definitional qualification. Thus, it would be a burden on voting, but not on the *right* to vote. It weighs down its use,

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The Court reasoned that because wealth had no relevance to voting, any such tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 670. Thus, this tax was unconstitutional. *Id.*

57 *See supra* note 28.

58 Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

59 *See supra* note 28.

60 *Harper*, at 670.

61 *Id.*

62 TEX. CONST. art. VI, § 1.

not its existence. Using the definitional argument, then, it would say that any burden on voting (instrumentally), which is a fundamental right for qualified voters, must satisfy strict scrutiny (while silent on definitional qualifications).

The next major case on point is *Oregon v. Mitchell*.[63] Three sections of the 1970 amendments of the Voting Rights Act[64] were challenged or enforced (and then challenged) in this case. The act renewed a ban on literacy tests, residency requirements for presidential and vice-presidential electors, and lowered the minimum voting age from twenty-one to eighteen in state and federal elections.[65] The latter being on point for this topic. The case comes very close to controlling for diametrically opposite holdings in our case. Four justices stand for the proposition that voting is a fundamental right and Congress is fully empowered to lower the age after finding age discrimination lacking in a compelling interest.[66] Four justices find no power in Congress to alter any qualifications for the franchise and equal protection to be inapplicable to

63 See Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, L.Ed.2d 272 (1970) (deciding that the Voting Rights Act amendment was valid insofar as lowering the voting age in national elections were concerned, but invalid insofar as state elections were concerned). Oregon concerned challenges to the Voting Rights Act of 1970 in that it lowered the voting age to eighteen, bars the use of literacy tests, and specified residency requirements for presidential elections. Id. at 117. The issue was whether these acts were beyond the power of Congress to alter election laws in state elections. Because Congress has the power under Article I, Section 4 of the Constitution to "make or alter" elections regulations, lowering the voting age to eighteen was explicitly valid. Id. at 119 – 125. Further, because this power only obtained for federal elections, Congress went beyond its powers to lower all minimum voting ages. Id. at127–130. The Fourteenth Amendment would not clothe Congress's actions because this was not a racial discrimination case. Id. at 130. The literacy test ban had been upheld by South Carolina v. Katzenbach, which was reaffirmed in this case. Id. at 131. Finally, because Article I, Section 4 applies to presidential and vice presidential elections, this as-pect of the statute was also entirely within Congress's power to enact. Id. at 134. Thus, the Act was upheld except in that it lowered the voting age in local elections. Id. at 134–35.

64 Pub. L. No. 91-285, 84 Stat. 314.

65 See *Mitchell,* 400 U.S. at 117 for a statement of the act's elements as follows:

> By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national, for a five-year period. Third: The Act forbids States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements.

66 *See id.* at 137, (Douglas, J concurring) (viewing the case as an equal protection issue rather than a federalism issue), *id.* at 231 (Brennan, J concurring) (same).

non-minority cases (and ignoring fundamental rights jurisprudence).[67] Justice Black decides, solomonically, that Congress has the power to alter the minimum age in federal but not state elections.[68] Black's opinion is limited in that he finds the right to vote for Congress to be set down in Article I, Section 2, and regulable by Congress.[69]

This is not a Fourteenth Amendment case for Black, but one of congressional power.[70] I submit that *Reynolds* and *Harper* show that the latter group of four make a dubious claim with respect to equal protection and the franchise. Thus, because their focus is also congressional power, I focus on the former group of four justices. Those aspects of Justices Black and Stewart's opinions that find Congress's lowering the voting age unconstitutional do so strictly on Article I grounds.[71] Justice Harlan's opinion stems from the perspective that the Fourteenth Amendment, based upon its history, cannot be applied to voting cases.[72] But as Justice Douglas says, "it is much too late in history to make that claim."[73] Thus, I submit that the applicable, sound doctrine, although not controlling, is found in the two concurrences by Douglas and Brennan.

Douglas's equal protection argument begins as follows:

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67 *See id.* at 212, (Harlan, J concurring) (focusing upon the federalism issue), *id.* at 281–2 (Stewart, J concurring) (same). Harlan's concurrence is explicit in this reasoning, while the Stewart concurrence is only conclusory on that subject.

68 *See id.* at 117–18 (Black, J) (finding only that Congress has the power to control its own elections, focusing on the federalism issue).

69 *See id.* at 119, 128 n. 10 ("The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters.") Also, Black is satisfied that Congress also has the power to regulate presidential elections as well as essential to its survival. *See Id.* at 164 n. 7. That outcome is hardly clear from the language of Article I, but the view is not controverted. For this reason, I accept it as a premise.

70 *See id.* at 130 (reasoning that because the Fourteenth Amendment was intended for racial discrimination, and this was not a racial distinction, there was no Fourteenth Amendment issue).

71 *See id.* at 117–8 (Black, J.) (arguing that the issue is not one of equal protection), *id.* at 281–2 (same).

72 *See id.* at 155-200 (describing, at length, his reading of the historical background of the Civil War Amendments).

73 *Id.* at 143 ("If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress.")

> This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 110, 86 L.Ed. 1655. The right to vote is, of course different in one respect . . . The right to vote is a civil right deeply embedded in the Constitution.[74]

In that way, it is similar to the right to travel[75] and the right to privacy[76] and is a fundamental right that warrants strict scrutiny.[77] This is, however, a congressional powers case, whether under Article I or the fourteenth Amendment, and must be recognized as such.[78] "[W]hy draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise."[79] That is, Congress's actions are subject to the rational basis test.

However, the Brennan opinion makes an interesting statement: "We believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause."[80] Brennan says exclusions to the franchise must be necessary to fulfill a "compelling state interest."[81] He does investigate the state interests asserted, which are "intelligent and responsible voting."[82] Brennan dismisses these interests as met in other ways by laws that test intelligence and maturity in other situations and are applied no differently for those un-

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74 *Id.* at 138.
75 *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding the right to travel to be a fundamental right).
76 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (describing a right to privacy in the purchase of contraceptives by married couples).
77 *See Mitchell*, 400 U.S. at 141 (discussing Phoenix v. Kolodziegski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d. 523 (1970), which invalidated a taxpayer qualification to vote on bond issues).
78 *See id.* ("The powers granted Congress by s 5 of the Fourteenth Amendment to 'enforce' the Equal Protection Clause are 'the same broad powers expressed in the Necessary and Proper Clause, Art. I, s 8, cl. 18.' (quoting Katzenbach v. Morgan, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828)).
79 *Id.* at 142.
80 *Id.* at 240.
81 *Id.* at 242 (citing Cipriano v. City of Houma, 395 U.S. 701, 704 (1969)).
82 *Id.* at n. 20.

der 21.[83] Also, there is no evidence brought forward that eighteen year olds are any less intelligent (though perhaps less educated) than those over 21.[84] The states that did have eighteen year old voters gave no proof that those voters acted any less intelligently or seriously than older voters.[85] Brennan all but says that this prohibition would not pass scrutiny.[86]

This case is especially mixed when analyzed under the definitional/instrumental distinction. Each of the three issues before the court concern qualifications that fit the definitional category: age, ability, and residency.[87] Justice Black's opinion, is generally supportive of the definitional approach by identifying congressional powers to allow the legislation but invalidate that which is inconsistent with Article I.[88] But the Douglas and Brennan opinions are thoroughly instrumental arguments. They approach the age issue squarely from the Fourteenth Amendment.[89] Using the Fourteenth Amendment, they accept that Congress has the power to cut across qualifications for both state and federal elections. I submit that this supports the instrumentalist view because it does not wither in the light of federalism. That is to say, these opinions raise the Fourteenth Amendment to the level of a fundamental rule of the game. One might say that this is obviously the case and Black and the other concurrences would not dispute it. I question this, because their interpretation of the Fourteenth Amendment is so limited in this case. Their view is

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83 *See id.* at 243 ("Each of the 50 States has provided special mechanisms for dealing with persons who are deemed insufficiently mature and intelligent to understand, and to conform their behavior to, the criminal laws of the State.")

84 *See id.* at 244–5 ("[W]e have been cited to no material whatsoever that would support the proposition that intelligence, as opposed to educational attainment, increases between the ages of 18 and 21.")

85 *See id.* at 245–6 ("We have not been directed to a word of testimony or other evidence that would indicate either that 18-year-olds in [Georgia and Kentucky] have voted any less intelligently and responsibly than their elders . . . .") One could question how either of those states (Georgia and Kentucky) could have known that eighteen year old voters were better, worse, or similar in their voting to older voters. For that matter, how would we know whether (if allowed) 10 year old voters did so better, worse, or the same as older voters?

86 *See id.* at 246 ("In short, we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted to rest.")

87 *See id* at 117–118 (describing, in summary, the issues and positions of the court).

88 *See id.* (same).

89 *See id.* at 135–144 (Douglas, J., concurring) (analyzing election law subject to the Fourteenth Amendment), *id.* at 231, 239–280 (Brennan, J., concurring) (analyzing the Fourteenth Amendment and congressional powers).

that the Fourteenth Amendment is ultimately an instrumental rule to negate racial discrimination.[90] That is, unlike a broad rule in favor of general equality (foundational), this view considers the Fourteenth Amendment as super-legislation. That idea may help to explain the ultimate instrumental/definitional issue with respect to the franchise.

There is one statement in the Stewart concurrence that should be discussed: "[N]o state could demonstrate a 'compelling interest' in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of states have done."[91] Stewart is saying, as many do, that a line must be drawn somewhere and there is no defense to any line drawn, and so this line is as good as any other. Douglas's response was that Congress only needed a rational basis and eighteen was a common minimum age for some things (notably military service), and sufficed.[92] But the Court will have to find a compelling state interest in this line over another in a judicial challenge. Stewart is clearly correct, but misses the significance of the claim. To distinguish by age would be to say that one's time on this planet had some intrinsic meaning or value. Thus, it does not *mean* intelligence or maturity (as we can see in precocious children and stupid adults). But this is why *age* (qua age) will never suffice without being used as a proxy for other characteristics.

One of the latest election cases taken up by the Supreme Court is *Crawford v. Marion County Election Board*.[93] Crawford considers (and upholds) an Indiana voter identification

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90 *See id.* at 126 (Black, J.) ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race."), *id.* at 296 (Stewart, J., concurring) ("The state laws that [the Act] invalidates do not invidiously discriminate against any discrete and insular minority.")

91 *Id.* at 294–295.

92 *See id.* at 144 ("The right to 'enforce' granted by s 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause").

93 *See* Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008) (finding an Indiana voting regulation that requires voters present photo identification is constitutional). "[A]n Indiana statute require[ed] citizens

law.[94] There was an economic component, but "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*."[95] The Court unanimously agrees that *Burdick v. Takushi*,[96] and the balancing test it applies, is appropriate to this case. The disagreement among the court is that the majority disagree as to the specific wording of the test, while the dissents only disagree as to the weight of the burden and interest. The lead opinion states the test as "[the burden] must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[97] The concurrence states the rule as follows:

> It is for the state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail *unless it imposes a severe*

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voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government." *Id.* at 1613. The issue was whether burdens the right to vote in violation of the Fourteenth Amendment. *Id.* at 1614. The Court used a balancing test of the "interests put forward by the State as justifications" against "the burden imposed by its rule." *Id.* at 1616. The Court finds that the interest in "deterring and detecting voter fraud" greatly outweighs the rather small burden of obtaining photo identification. *Id.* at 1617–21. Although the burden may be greater for some indigents, no credible evidence was raised of what that burden would be. *Id.* at 1622–23. Thus the requirement of identification "is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" *Id.* at 1624 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

94 *See id.* at 1613 (Stevens, J.) ("At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.")

95 *Id.* at 1616 (Stevens, J.) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

96 *See* Burdick v. Takushi, 504 U.S. 428 (1992) (holding that Hawaii's prohibition of write-in candidates does not unreasonably infringe upon a citizen's rights under the First and Fourteenth Amendments). A voter in Honolulu found that there was only one candidate for the Hawaii House of Representatives in his district and wished to vote for a person who had not filed the requisite papers to be a nominee or candidate. *Id.* at 430. The issue in *Burdick* was "whether Hawaii's prohibition on write-in voting unreasonably infringe[d] upon its citizens' rights under the First and Fourteenth Amendments." *Id.* The Court rejects the view that "any burden on the right to vote must be subject to strict scrutiny." *Id.* at 432. This is because such scrutiny would "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* at 433. The Court uses "a more flexible standard" instead, as found in *Anderson v. Celebrezze*. *Id.* at 434. This test is a balancing test of the injury against the State interest. *Id.* "[W]hen those rights are subject to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992). This was a reasonable, nondiscriminatory restriction, so "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* quoting *Anderson v. Celebrezze*, 460 U.S., at 788. Furthermore, Hawaii's system "provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary." *Id.* at 436. Thus, "any burden imposed by Haawaii's write-in vote prohibition is a very limited one." *Id.* at 437. The State's interest in avoiding "unrestrained factionalism," promoting a "winnowing out of candidates," and guarding against "party raiding" are all legitimate. *Id.* at 439–440. Thus, Hawaii's prohibition is constitution. *Id.* at 441.

97 *Id.* at 1616 (Stevens, J.) (quoting Norman v. Reed 502 U.S. 279, 288–9 (1992)).

> *and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.*[98]

Justice Souter's says that "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, . . . *or even compelling*, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."[99] The dissent reaffirms that it is "the fundamental right to vote."[100] However, in voting cases, Souter accepts that the Court "[has] avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis."[101] Souter notes the burden, but does not see a corresponding basis upon which to rest the interest.[102] Justice Breyer effectively says the same.[103]

So, *Crawford* puts forward a number of formulations of the appropriate test. The distinctions in these formulations, however, are small and the test can be restated as follows: the level of the burden defines the level of scrutiny and the relationship the interest must have with the means employed. This case is factually similar to *Harper* in that the burden is on exercising the right to vote and not on the right itself. Thus, the argument would be that the burdens referred to in *Crawford* are those that are to be scrutinized and not burdens in a definitional sense. However, the Courts use of *Burdick* undermines that reading. *Burdick* considered whether having no write-in capability was an infringement on Burdick's rights.[104] That ability defines the system and is a rules-of-the-game regulation like qualifications or districting. It is the possible methods

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98 *Id.* at 1625–7 (emphasis added) (Scalia, J.). Although the last clause may only apply to protected classes, that need not be the case, as in *Harper*.

99 *Id.* at 1627 (Souter, J., dissenting) (emphasis added).

100 *Id.* (Souter, J., dissenting) He then quotes *Burdick*: "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Id.* at 1627 (quoting Burdick, 504 U.S. 428, 433 (1992) (quoting Illinois Bd. Of Elections v. Socialist Workers Party, 440 U.S. 173 (1979))).

101 *Id.* at 1628 (Souter, J., dissenting).

102 *See id.* at 1628–43 (Souter, J., dissenting) (emphasizing the various burdens to voting).

103 *See id.* at 1643–45 (Breyer, J., dissenting) (finding no evidence to suggest "greater burdens than those of other States" is warranted).

104 *See* Burdick v. Takushi, 504 U.S. 428, 430 (1992) (stating the issue as "whether Hawaii's prohibition on write-in voting unreasonably infringe[d] upon its citizens' rights under the First and Fourteenth Amendments").

by which one expresses political will in elections. Thus, the precedent of *Burdick* and its support in *Crawford* actually represents an argument for the instrumental view by subjecting this regulation to means-ends analysis. This is the second branch of the paper. You may accept that qualifications are definitional and immune from challenge (which I think is rather implausible considering these prior cases). You may accept that qualifications are instrumental and subject to heightened scrutiny in Equal Protection challenges. Or, most likely, you may reserve judgment until we begin a substantive analysis of age qualifications.

VI. Application

The burden on the franchise for minors is absolute—they may not vote. Therefore, following *Crawford*, that burden must be balanced against the highest state interest. The highest standard used in Fourteenth Amendment cases has been strict scrutiny.[105] The interest in denying minors the vote must be compelling and the means of doing so must be necessary.[106] How one distinguishes a compelling interest is not clear. It appears to be an intuition by which one identifies an interest, quantifies its magnitude, and decides whether it is compelling.

A. State Interest

Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective.[107]

There are five interests that I will consider. These are what I consider to be both the strongest and nearest to what are generally considered to be interests at stake in this issue. Doubtless, others could be raised and discussed, but of the arguments I have seen, only these are

105 *See supra* notes 66, 81, 99 and accompanying text. This is not a foregone conclusion. The Court is not always clear on what standard is being applied. Furthermore, the difference between the standards is found more in the outcomes than in the content of their analysis. As the cases discussed show, the analysis is generally strict scrutiny, but when interests and tailoring is identified, the Court still has to decide whether they are compelling and narrow, respectively. Only then can we identify the "real" standard applied.

106 *See* ROTUNDA §18.3 (discussing equal protection generally).

107 Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

sound or irreducible. They are: (1) age itself, (2) maturity, (3) intelligence, (4) independence, and (5) necessary evil.

1. Age

The first analysis of any state interest, I think, has to begin by being clear in defining that interest. So, does the State have an interest in denying the franchise to individuals who are not eighteen because they are not eighteen? Is there an interest in having older voters because they are older? I think the answer to that is clearly "no." Why? Because age represents time of survival. Although it is very tempting to say that time creates experience and maturity, there are better ways to gauge those qualities in terms other than time of survival. Thus, time is not intrinsically valuable. When the other interests are considered, remember that they must be served by the qualification of time. In the film *Aliens*, the heroine, Ripley, travels through space while in hypersleep and is awoken to find herself on Earth fifty-seven years after her first alien encounter.[108] Assuming that puts Ripley in her eighties, if the age qualification were forty, would Ripley meet that requirement? Presumably, she would. That highlights how "age" (*qua* age) does not have substantial meaning that one would consider supportive of legislation.

However the most conceptually interesting issue, in my opinion, is reconsidering age as discrimination at all. Age is unique in that it is a transitory characteristic that naturally changes as long as one survives. Thus, the argument is that to deny the vote to those under eighteen is not a denial of a right because that right will obtain once the individual survives for eighteen years. Thus, it applies to everyone and is not an Equal Protection issue at all. However, this is just a trick of age and time. Ultimately, in 2008 there were a group of people who could vote and another group who could not. Those groups were grouped by a characteristic over which they had no control. This is a distinguishing fact about age that makes it different from other

108 ALIENS (20th Century Fox 1986).

qualities and, if accepted, could allow age discrimination. However, the Twenty-sixth Amendment may neutralize that question. The Twenty-sixth Amendment prevents the states from denying the vote on the basis of age (over eighteen).[109] Thus, it recognizes that age is a distinguishing characteristic that may entail discrimination. If it were not such a characteristic, how could the right be denied? The argument is that no right is *denied*, it is simply put off. But, of course, it is denied, and the Twenty-sixth Amendment allows that premise.[110]

2. Maturity

Maturity is, perhaps, the strongest argument in support of an age qualification. Does the State have an interest in having mature voters? That appears facially sound. But first we must answer what maturity means in this context. This is not a simple exercise. This interest and the two following interests almost certainly must be answered in the psychological arena. But the method of psychology does not allow us to simply harvest prior research. For example, what must we know to find the "right" age qualification? We need to define maturity, measure it in the field, decide the threshold level of maturity, and set the qualification where this is the case in individuals. In an ideal world, the State would have to make such decisions and findings and any failure to do so would be cause for invalidation as arbitrary and capricious. The world is not ideal. Even if it were, it would be valuable to skim through psychology as it stands on the issue of maturity if only to identify how difficult it is to find consensus and to make these ultimate decisions.

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109 U.S. CONST. amend. XXVI, § 1.

110 Some suggest that the Twenty-sixth Amendment implicitly allows discrimination on the basis of age under eighteen. Imagine an amendment which stated: "The right of citizens who are of European descent to vote will not be denied on the basis of nationality." Then, Virginia passes a law which denies the right to vote to former-Australians. Discrimination on the basis of national origin is subject to strict scrutiny. *See* ROTUNDA, at §§18.8(d)–18.10 (discussing the modern view of discrimination on the basis of national origin). Would that amendment overturn those cases by implication? I think not. It is not beyond the realm of possible argument, but the fact that the Fourteenth Amendment remains and has been interpreted in such a way for generations would greatly undermine such an argument. In the same way, Fourteenth Amendment jurisprudence of voting as a fundamental right, and the scrutiny that this entails, may not be undermined by the Twenty-sixth Amendment.

To what do we refer when we refer to maturity? The dictionary defines "maturity" as "the state of being mature."[111] I believe the appropriate use of the word "mature" as "4. pertaining to or characteristic of full development."[112] Maturity qualifies some ability or characteristic. "Mature judgment," "intellectual maturity," "social maturity," and "emotional maturity," are examples of the use of the term.[113] What sort of maturity is essential for voting? Each person has their own views in this regard. One may believe mature reasoning is paramount, another may argue that social maturity is. Thus, the maturity interest's great strength lies in its impenetrable ambiguity. It intuitively ties to age because, generally, one matures over time, but how we define maturity is nebulous. Because intellectual maturity falls more easily into the next section, I will assume that maturity means social and moral maturity in this context.

It is entirely sound to advocate the view that the State has a compelling interest in growing and nurturing social, moral, and intellectual maturity. That assumption is the foundation of the public school system and has been viewed as such by individuals.[114] This does not, however, entail that it is a sound qualification for voting. When deciding whether it is a state interest, one must ask "must the voter be mature?" We may prefer it, but ought the State to require it? Another formulation of the question is "if a person were immature, must we prohibit that person from voting?" Whatever the definition of maturity, this question should give us pause. One must imagine the immature person as an individual with all of the other human characteristics and then say that this individual ought not to have a voice in our elections. Even a brief over-

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111 Random House Webster's Unabridged Dictionary 1187 (2d ed. 2001).

112 *Id.* The first three definitions are "1. Complete in natural growth or development, as a plant and animal forms . . . 2. Ripe, as fruit, or fully aged, as cheese or wine. 3. Fully developed in body or mind, as a person." *Id.* Though the third does appear to be pertinent as an end result, I believe that the fullness of development is what one is truly attempting to convey when we refer to maturity. Thus, our definition is "the state of being developed."

113 *See* Constance Lovell, *Review*, 59 AM. J. PSYCHOL. 328 (1946) (reviewing LUELLA COLE, ATTAINING MATURITY (1944)).

114 *See* JOHN MARTIN RICH & JOSEPH L. DEVITIS, THEORIES OF MORAL DEVELOPMENT 3 (1985) [hereinafter RICH] ("Moral development was cited as a primary responsibility for public schools by more than two-thirds of the respondents to the 1975 and 1976 Gallup polls on education.")

view of judicial rhetoric which has been described above, shows the seriousness which courts, I believe appropriately, take such decisions.

It would be uncharitable to define immaturity simply as frivolity.[115] As alluded to above, I take maturity to be social or moral maturity. I will rely, to a great extent, upon David Moshman's *Adolescent Psychological Development: Rationality, Morality, and Identity* which is written in a highly accessible form for the layperson.[116] The first step in deciding upon moral maturity is to define morality itself. Adopting the views of a moral relativist or moral rationalist will dramatically alter the view of moral development.[117] A rationalist, such as Piaget, considers moral development as a reflective progression by peers in coming to increasingly complex views of social morality.[118] Relativism, popular in the mid-20th century, emphasizes "social conformity."[119] Thus, while the former entails maturity and progress, the latter entails mere indoctrination. I will take the former to be the case.

Lawrence Kohlberg's theory of moral development takes up a constructivists view of morality such that it "is neither innate nor learned, that its development involves active construction of a succession of cognitive structures, each able to resolve conflicts and contradictions produced by previous ways of thinking about moral issues."[120] It is based upon reasoning rather than be-

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115 It would also be remiss to suppose that none have such a view. As with all of these interests, when defining the interest as compelling one must be willing to accept the disenfranchisement of adults who share these qualities (at least in the abstract). Thought it may be impossible to set a bright-line rule on maturity levels, if one is unwilling to disenfranchise one who does not address the political process with the requisite level of severity, then one must accept that this, at least, is but another instance where strong preferences overcome reflective judgments.

116 DAVID MOSHMAN, ADOLESCENT PSYCHOLOGICAL DEVELOPMENT: RATIONALITY, MORALITY, AND IDENTITY (1999) [hereinafter MOSHMAN].

117 *See* MOSHMAN at 44–45 (describing moral relativism and Piaget's view of social, moral development among peers).

118 *See id.* (same).

119 *See id.* (same).

120 *Id.*at 46. Although Kohlberg's conception of morality may potentially skew his findings for cross-cultural assessment, that failure need not concern us because our society *does* share his conception. *But see id.* at 52–59 (considering other views of morality and assessing Kohlberg).

liefs.[121] His research led to a six-stage framework of development. The first stage is characterized by mere obedience and conceptualizing morality as "externally imposed rules."[122] The second stage involves and understanding of other individuals' interests that may not cohere with their own.[123] Thus, "[t]hey understand that to get what they want they must acknowledge and respond to the needs of others."[124] Although different from the first stage, these stages are not necessarily exclusive among age groups or even in individuals.[125] Stage 3 is characterized by a feeling of moral obligation beyond that of individual profit and to "live up to the expectations of those close to me."[126] The fourth stage sees the individual understand conventions "based on an abstract understanding of social institutions."[127] The fifth stage in moral development is characterized by viewing morality from the perspective of contractarianism.[128] One favors procedural fairness and "individual rights."[129] The final stage of moral development considers metaethical questions and justifications, but this only appears in those in moral philosophy and related fields.[130]

There is a good deal of empirical data to support Kohlberg's theory and it is dependably generalizable across cultures.[131] Although it "does not adequately account for substantial differences in moral judgments and feelings among individuals in the same stages of moral reasoning,

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121 *Id.* (discussing Kohlberg's theory).
122 *See id.* (discussing the "heteronomous" conception of morality).
123 *See id.* at 47 (discussing the "Individualism and Exchange" stage of moral development).
124 *Id.*
125 *Id.* ("Kohlbergian research suggests that Stage 2 moral reasoning is predominant by age 10, although Stage 1 thinking remains common at this age, and some Stage 3 thinking can already be seen in some individuals.")
126 *Id.* "[This] can be seen in some individuals as early as age 10 [and] becomes increasingly predominant over the course of adolescence." *Id.*
127 *Id.* at 48. "Stage 4 justifies and refines the Stage 3 concern for relationships by rooting this concern in a newly constructed abstract conceptions of one's society." *Id.*
128 *See id.* ("Society, at this very abstract moral level, is viewed as a rational contract for mutual benefit.")
129 *See id.* "Even in societies where such reasoning develops, however, it is virtually never seen before adulthood, and remains rare at any age." *Id.* at 49.
130 *See id.* at 49 (considering the "Universal Ethical Principles" stage).
131 *See id.* ("[C]ross-cultural studies, involving an impressively diverse set of cultural contexts, have shown the generality of this theory across cultures.")

nor for the relationship between abstract moral competencies and behavior,"[132] these failings are not fatal for our purposes. A theory of morality as justice is probably the dominant view in the United States. It is doubtless the theory of our Constitution and judicial system. Thus, I believe it is appropriate to move on to analyze moral maturity as a compelling interest of the State.

The first question is which stage is the necessary stage for a voter? One would expect and require at least a Stage 2 moral reasoned for a voter. If to vote is to express one's own needs and those of the community, one must be a Stage 2 or 3 moral reasoner to "vote." Stage 4 reasoners would understand the institutions to which one is subject and would make the voter informed and entail a capacity to vote wisely for one's own interests. One could certainly argue that to be a voter, one has to know who (as a candidate or party) furthers their interests and who does not. I submit, however, that this may ask too much of an individual as a voter. My view is that knowing one's interests and voicing them as one sees fit is all that one may require of a voter. This, like all interests, is open to debate and reflection. However, it would take a rather high form of elitism to require all voters to have read *The Second Treatise of Government* as Stage 5 reasoners—though I know that there are those who hold this view.

The second question is who can reason at the level of Stages 2–4? The answer appears to be adolescents, or those between the ages of 10 and 18.[133] Of course, this is only a conclusion derived after reading one book—and a short one at that—about adolescent psychological development. And although it does bring together large amounts of empirical data, we do not have the benefit of actually seeing this data or seeing strictly where these lines might be drawn (even in the aggregate). That, I submit, is just as well because, for the majority of individuals, we were utterly unaware of Kohlberg, his theory, or the development of moral reasoning. Furthermore,

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132 *Id.*

133 This is not to say that these are the ages of adolescents, but of the ages at which a person can be expected to reason at the Stage 2 level until one may well be able to reason at the Stage 4 level. *See id.* at 46–49.

although one may now find some cover for the eighteen age qualification, it is entirely coincidental and unreflective (unless one had researched the field). Still, I do accept that one may make age claims and support them with developmental psychology—but studies must be done. These studies must be specifically tuned to the issue because the link between the state interest and the age distinction made must be one of necessity.[134] Thus, there must be a strong correlation between the level of maturity the legislature finds to be required and the age qualification. This may be difficult, since, as Moshman says "[m]any adults, in fact, never proceed beyond the level of an average adolescent—and many adolescents function more rationally than an average adult."[135]

3. Intelligence

Intelligence has a number of sub-categories which one must identify, as the state interest, as necessarily developed for voters. One can generally distinguish between two categories of intelligence as (1) factual knowledge and (2) intellectual maturity or reasoning. The incredible difficulty of instituting knowledge tests should be enough to encourage one to find interests elsewhere.[136] One would also have to repeal part of the VRA.[137] The bastion of the intelligence

134 *See* ROTUNDA §18.3 (discussing equal protection generally).

135 *Id.* at 40.

136 If one is not immediately convinced of its quagmire-like qualities, consider the following questions (and note that I accept that knowledge need not be academic). Ought one to know the capital of the United States? Is that knowledge really essential to exercising the vote? Is it essential or even important to know certain dates, names, or events in history? Ought one to know the name of the candidates before one enters the voting booth? For President or for Congress (even if you are only voting for Senate)? Do you know the members of your City Council? Do your friends? Ought one to know the difference between the parties? Can you really say what those are? What is the difference between a moderate Democrat and a moderate Republican? Do you need to be aware of the Libertarian's or Communist's arguments? Do you have to read Howard Zinn, Mark Twain, Hemmingway, Sinclair, Huxley, or Plato? Is it really essential to have read a book at all? Eventually, you come to realize that either (1) drafting the questions is virtually impossible, (2) these questions are almost never going to be essential, or (3) intelligence has nothing to do with voting at all. We may value them. We may say that it is better to vote with a bank of knowledge, but that is not the same as saying that they are required.
This is not to say that such tests have never been employed. Georgia, for example, as a substitute for the literacy test required one to answer 20 of 30 questions of this sort: "How does the Constitution of Georgia provide that a county site may be changed?, what is treason against the State of Georgia?, who are the solicitor general and the judge of the State Judicial Circuit in which you live?" Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, n. 7

argument will almost certainly be in terms of generalized capacity rather than individual exercise. Thus, I will again consider Moshman's book which presents many parallels between the moral maturity and intellectual maturity issues.

It is much easier to make normative distinctions with intellectual maturity because it is linked to logic.[138] This is easy because logic is a system which is, in matters of deduction, irrefutable and not open to manipulation.[139] One may be able to fudge a test on the legibility of writing in a literacy test,[140] but one may not fudge a multiple-choice logic question.[141] This is because logic questions may be content-free. That is, the truth of the premises need not be correct in order to test one's ability to use logic. However, that requires a voter to have the ability to separate the truth of the premises from the logic of the argument. This is what Piaget called "Formal Operations."[142] This power is generally not present in individuals under 11, but attainable (with explanation) by those 12–13.[143] That said, it is not consistently applied even by those

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(1959) (citing GA.CODE ANN. §§ 34-117, 34-120). This is not to say knowledge tests are unjustifiable in the abstract, but one must first justify its importance in the abstract and then create specific questions. Neither is easy.

137 *See* 42 U.S.C. § 1973aa ("No citizen shall be denied, because of his 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.")

138 *See* MOSHMAN at 11 (discussing Piaget's definition of "Formal Operations").

139 This is not to say that one cannot construct a test that manipulates voters to think how they would like, but rather that once a question is decided upon it will be either right or wrong and not subject to interpretation (so long as ambiguous words are avoided).

140 *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, n. 7 (1959).

141 For example:

"Mice are bigger than dogs.
Dogs are bigger than elephants." MOSHMAN at 14.
What follows?
(A) Elephants are bigger than dogs
(B) Mice are bigger than elephants
(C) Dogs are bigger than mice
(D) Elephants are bigger than mice

142 MOSHMAN at 4.

143 *See id.* at 14–15("Without explanation or feedback, [seventh-graders'] performance was highly variable, with some reasoning at the level of the fourth-graders and others at the level of the best college students. With explanation or feedback, however, seventh-grade performance improved to the level of college students.")

of college age or adults.[144] In any case, it is "complete and consolidated by approximately age 14 or 15."[145]

However, this line of argument begs a question of intelligence and reasoning, which is that it is assumed that mature use of logic is mature use of intelligence. This view is far from universal. There are other forms of reason like dialectic reasoning or scientific reasoning.[146] Beyond logic, there is the concept of "metacognition" which is "cognition about cognition."[147] This is "[t]he ability to apply and coordinate logical inferences to achieve one's purposes."[148] Developing this capacity is where one can increasingly suspend disbelief for internal consistency.[149] "Correlational research has shown that metalogical understanding is indeed positively related to correct logical reasoning."[150] Furthermore, it encourages a "critical spirit" and is strongly linked to intellectual autonomy and freedom from undue influence.[151]

Thus, one could describe "formal operations" an easily applied standard and creates a bright line between ages (at least as a threshold) while metacognition is a deeper capacity and

144 *See id.* at 15, 17 ("College students generally did show such understanding regardless of condition, although many were inconsistent in applying that understanding.")

145 *Id.* at 11–12. There is one considerable limitation to using this capacity as a threshold—there is also a sunset. Human capacity grows precipitously during childhood, but then begins a slow decline after a certain age (in the aggregate. Robert Epstein reports one 1972 study, with a useful graph, showing roughly equal showings among those twelve and those fifty-four, with a peak at twenty. *See* ROBERT EPSTEIN, THE CASE AGAINST ADOLESCENCE: REDISCOVERING THE ADULT IN EVERY TEEN 167 (2007). However, he suggests that this decline in the sample, only of women, could be caused by the disuse of formal operations in middle-aged women. *Id.* This cuts both ways, he says, because of the inadequacies of education and expectation for children, which may cause *their* limited capacity. *Id.* Two studies of intelligence over time, produced in the 1940s, shows a parallel decline with one's teenage capacities, after a peak at around twenty, equaled in one's thirties. *Id.* at 173. This effect is brought out over and over through Epstein's book. The ability to make quick and accurate judgments, *id.* at 178, memory, *id.* at 184, brain volume, *id.* at 200, and physical abilities (hearing, smell, etc.), *id.* at 244.

146 *See* MOSHMAN at 19–23 (discussing dialectic and scientific reasoning and using examples).

147 *Id.* at 25.

148 *Id.* at 27.

149 *See id.* (discussing work by Bridget Francks).

150 *Id.* at 29 (citations omitted).

151 *See id.* at 29 – 31 (considering the extent to which metacognitive ability develops critical reasoning).

allows no real bright lines between ages.[152] That provides some factors in deciding whether the State *can* institute methods of achieving those interests, but first, the State must consider whether it *should*. That is, in what sort of capacity does the State have a compelling interest. Here, given a choice of this sort, the difficulty of deciding state interests presents itself again. How one might decide whether there is a state interest depends greatly upon how one conceives of the test: whether the interest may be *arguably* compelling or whether it must be *absolutely* compelling. Consider the choice presented here. The capacity for metacognition is arguably compelling because it is not beyond imagination to require that a voter be able to critically analyze statements. To decide whether it is absolutely compelling would be to say voters must, under some normative theory, have the capacity to critically analyze statements. Finding the latter is more difficult than finding the former because you must first declare an absolute normative theory and then find whether the act fits the theory. In either case, that debate will have to play out legislatively.[153]

4. Independence

Independence can be considered in a number of ways. The way in which I believe it is actually and most soundly applied is in one's independence of mind. Other forms of independence, like financial independence or physical independence, represent behavior and variety in a personal life story. These qualities go into the content of one's vote, not the capacity to vote. If they do, it is only coincident with one's mental independence. Here, I combine the moral reasoning and intellectual reasoning described above. This conception of independence qualifies

152 *See id.* at 29 ("As is typical with adolescents and adults, however, the relation of age to development is not strong. Some adolescents have already made considerable progress toward sophisticated epistemic conceptions, whereas some adults have made very little.")

153 That is a common refrain throughout this paper and is not intended to punt on the issue. Rather, this debate and the others, because of the level of disagreement at every turn, must be left to a different forum. We may dispute the issues, but my purpose here is only to claim that there is one that we must seriously confront.

reasoning and is implicit in Stage 3 or 4 in moral development and metacognition in intellectual development.[154] Thus, insofar as the State has a compelling interest in their voters being autonomous agents—which is sound—it incorporates by reference the moral and intellectual development discussed above.

One may make a different claim of independence. One might say that independence is a definitional qualification based in identity. That is, while autonomy is a virtue of a voter, an identity is necessary to be considered a voter. There is nothing, on its face, that appears unacceptable or controversial in this requirement. That said, if identity requires one to honestly state "I am Jason Ratigan and I am an individual," then our threshold age is, at the most, six.[155] Greater requirements, such as "strong, self-conscious, and self-chosen commitments in matters such as vocation, sexuality, religion, and political ideology" would be almost impossible to translate into a bright line between ages for the simple reason that they are fluid identities that may never settle.[156] Furthermore, making such a rule would entail a normative endorsement of static identity, which seems well beyond a legislature's ken. Thus, a limited requirement of identity, I submit, is both simple to apply and an appropriate definitional qualification.

Before moving on to the issue of qualifications as a "necessary evil," there are certain observations made by Moshman in connection with secondary education that are pertinent and fit neatly in a discussion of the relation of age and the interests presented above. First, a statistical point:

> [C]ategorical distinctions between groups of people require more than evidence of statistically significant differences. To support a categorical distinction, there

154 *See supra* notes 126, 127, 147–151 and accompanying text.
155 *See* MOSHMAN at 69 ("[This stage], associatied with toddlerhood, involves development of a sense of oneself as an autonomous agent.")
156 *See id.* at 71–75 (discussing the process of identity creation and modification).

> should be evidence that the difference between the groups is substantial compared to the diversity among and within individual members of the group.[157]

Then a substantive point:

> [W]ith respect to a wide range of basic psychological competencies, it is much easier to distinguish adolescents from children than it is to distinguish adolescents from adults. . . . With regard to a distinction between adolescents and children, I believe this criterion can be met. Adolescents differ from each other in their reasoning, their moral conceptions, and their theories of themselves and their worlds. Nevertheless, adolescents routinely show forms and levels of knowledge and reasoning rarely seen in children before approximately age 11. These include hypothetico-deductive reasoning, reflective coordinations of theories and evidence, sophisticated forms of epistemic cognition, principled forms of moral reasoning, and reflective self-conceptions.
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> . . . I am not aware, however, of any form or level of knowledge or reasoning that is routine among adults but rarely seen in adolescents. On the contrary, there is enormous cognitive variability among individuals beyond age 12, and it appears that age accounts for surprisingly little of this variability. Adolescents often fail to reason logically, but the same is true of adults. [Other failings of adolescents in reasoning are also seen in adults.] Adolescents, it may be argued, are still developing, but the sorts of developmental trends seen in adolescence typically extend well into adulthood.
>
> For the most part, the distinction between adolescence and adulthood is a matter of cultural expectations and restrictions rather than a matter of intrinsic psychological characteristics. With the understanding that development is not limited to childhood, adolescence may best be construed as the first phase of adulthood.[158]

5. Necessary Evil

The reason why the maturity, intelligence, and independence interest are strong arguments in favor of an age qualification is because an adjudicative test—one that is not a bright-line rule, but rather specific to the individual—would give unlimited discretion in the hands of the judge. This difficulty has been pointed out before.[159] What is more, it is the reason why Congress invalidated all literacy tests (as well as the view that literacy was no longer an appro-

157 *Id.* at 117.

158 *Id.* at 117–18 (citations omitted).

159 *See* Francis Schrag, *The Child's Status in the Democratic State*, 3 POLITICAL THEORY 441, 454 (1975) ("[O]ne of the defects of any voting fitness test is that it leaves the question of who shall and shall not participate within the realm of human control.")

priate test in an electronic age).[160] As shown through this history, the lack of a bright-line rule opens the door to invidious discrimination that we must avoid. Thus, age, though imperfect, is seen as a better qualification than allowing individual manipulation and discrimination.

I have two criticisms of this argument. First, the argument relies upon the premise that age qualifications are necessary or appropriate. That is, if one removes age qualifications, there are no lines to be drawn either by a rule or adjudication. Thus, discrimination is impossible because there is no distinction. This was the response of Congress to literacy tests.[161] To defend the age qualification, one must argue and show that appropriate interests are necessarily furthered through the use of age. Thus, the second criticism is that even if these qualities were correlated with age, even to a great degree, the current age qualifications are not supported. Relying on the limited evidence developed above, the maximum supportable age is around fifteen.[162] But the eighteen qualification was made from a defensive position—as compared to the twenty-one qualification—and not upon its own merits. Similar tactics are advanced by some who are attempting to lower the age qualification to sixteen or seventeen.[163] This is the difference between a political debate and the legal one—the status quo must defend itself in court.

In effect, my response to the Necessary Evil argument is that the qualification is not necessary, and if it is, it does not have to be evil. There is a spectrum of evil, which I submit is tied to the law's arbitrarity. The more evidence the legislature brings to support the age qualification, the more procedural justice is obtained and the content of the law is the less evil. I submit that

160 *See* S. REP. NO. 94-295, at 789 (1975) (stating "'[it was] the Congress' view that 'there is insufficient relationship between literacy and responsible interested voting to justify such a broad restriction of the franchise,'" and "such tests and devices have notoriously been abused to deny minorities the franchise").

161 *See supra* note 160 and accompanying text.

162 *See supra* note 145 and accompanying text.

163 *See* Pam Belluck, *Sixteen Candles, but Few Blazing a Trail to the Ballot Box*, N.Y. TIMES, Aug. 26, 2007, http://www.nytimes.com/2007/08/26/weekinreview/26belluck.html?ei=5088&en=bc29dc9fc645a652&ex=1345780800&partner=rssnyt&emc=rss&pagewanted=print.

one can only consider the qualification as a necessary evil if one accepts that there is something other than age to be used whereby age is an inexact barometer.

B. Legitimate and Compelling

> In reviewing any classification it must be determined whether or not the persons classified by the law for different treatment are in fact "dissimilar." The question relates to the basis upon which the government can distinguish between individuals in society. . .
> [C]lassifications are not tested by whether or not the individuals are truly different in some absolute sense from those who receive different treatment. For example, it is undeniably true that men and women are biologically different. However that difference does not mean that gender-based classifications will be generally upheld, for most often there is no difference between men and women in terms of the promotion of a legitimate governmental end. Thus, sex cannot be the basis for determining whether an individual is able to be the executor of an estate or mature enough to drink alcohol.[164]

Recall the *Crawford* analysis: the burden equal to the state interest and the means employed are necessary to that interest. The burden: the highest. The state interests: (1) mature voters, (2) intelligent voters, or (3) independent voters.

Is there a compelling interest in qualifying voters by their mental faculties? We are again faced with the problem considered earlier of how one decides that an interest is more or less compelling. There is no definition of what a compelling state interest is. We can only consider the interest and the intensity with which it is held and gauge its compelling nature.

What is our theory of voting? If the government is, as Lincoln said, "of the people, by the people, for the people"[165] (and no more), then these are not valid interests. So, if one thinks qualifications are valid, you must disagree with Lincoln. Why? Because a government run by the people would even include the unintelligent, immature, and dependent—no qualifications. If one disagrees with Lincoln and accepts these interests, then one must defend the means (denying the vote to minors) as accomplishing that interest. To be necessary, the denial may not be too

164 ROTUNDA §18.2 (citing Reed v. Reed, 404 U.S. 71 (1971) and Craig v. Boren, 429 U.S. 190 (1976)).
165 THE GETTYSBURG ADDRESS para. 3 (U.S. 1863).

overinclusive—it may not deny the vote to those who would be intelligent, mature, or independent. Further, it may not be too underinclusive—allowing unintelligent, immature, and dependent individuals to vote. So, one must claim that all (or virtually all) minors are unintelligent, immature, and dependent to say that the interest is satisfied. One could hardly suggest that this is the case.[166] The reason for this was considered in the discussion of *Oregon v. Mitchell*.[167] The interest is not discrimination for its own sake against minors, but because they have, as a class, lack some ability. Thus, to be necessary, the means must directly address the inability (or find a strong correlation).

This grants the premise that the State has a compelling interest in denying the vote to the unintelligent, immature, or dependent individual. The State may have an interest in an intelligent, mature, and independent electorate, but is it *compelling enough* to deny the vote to those who do not have these qualities? Administrative difficulties aside, it is difficult to accept so aristocratic a viewpoint in a country that, on its face at least, values its democracy. "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[168] Now, as described above, it may be uncharitable to characterize these interests as elitist, but in a narrow sense, they are. They do describe certain capacities as better than others and assign rights thereby. Again, this is where the definitional/instrumental view is important. If one views these capacities as de-

166 It is important to reintroduce the rationale for the necessity standard. It is because the State ought not to regulate by proxy. That is, they should not use stereotypes to regulate behavior. *See* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.") (referencing *Frontiero v. Richardson*, 411 U.S. 677, 684-685, 93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583 (1973) (plurality opinion)).

167 *See supra* note 83 and accompanying text.

168 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

finitional, which is a stretch for most of them, then it appears as though one is not making a claim of superiority, but merely definition. Perhaps it is only the modern instrumentalist indoctrination that forms my conception, but I submit that making definitional claims of mental characteristics is arbitrary. That is, why *this* characteristic and not *that* characteristic? If one subscribes to the definitional view, then that statement is obtuse because the power is given to the State to be exactly that sort of arbitrary, like in deciding how many outfielders are allowed on the field.

V. Conclusion

The cause of America is, in a great measure, the cause of all mankind. Many circumstances have, and will arise, which are not local, but universal, and through which the principles of all lovers of mankind are affected, and in the event of which, their affections are interested. The laying a country desolate with fire and sword, declaring war against the natural rights of all mankind, and extirpating the defenders thereof from the face of the earth, is the concern of every man to whom nature hath given the power of feeling; of which class, regardless of party censure, is - Thomas Paine[169]

If read in connection with this topic, the above quotation appears hyperbolic. By denying the right to vote to those under eighteen—which is unjust perhaps only to those between fourteen and seventeen—states are not "declaring war against the natural rights of all mankind."[170] But what I think Paine is saying there is that to deny rights to one should be perceived as an affront to all. And since this denial is relatively small in the number effected[171] it is the right being denied that is great. It is the fundamental right. Thus, as the title of this note suggests, it should be taken seriously and given consideration. "All governments derive their just power from the consent of the governed."[172]

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169 THOMAS PAINE, THE BASIC WRITINGS OF THOMAS PAINE iv (Willey Book Co. 1942).
170 *Id.*
171 There are an estimated 17,206,962 individuals between the ages of 14 and 17 and 73,901,733 individuals under the age of eighteen in the United States. That accounts for 5.7% and 24.5% of the population, respectively. U.S. Census Table 2: Annual Estimates of the Population by Sex and Selected Age Groups for the United States: April 1, 2000 to July 1, 2007.
172 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The appropriate remedy then, as I discussed in the introduction, is the invalidation of age qualifications as they stand. This would require all states to create their qualifications anew and formulate them with respect to compelling justifications. These qualifications need not be tied to age. I am not necessarily antagonistic to such references, if grounded in fact, but I am suspicious of them. Courts may be overly eager to accept less-than-strong evidence to support correlations to age. Legislatures may perceive their job as jury-rigging findings to keep the status quo. Thus, if the courts could formulate some better result, like giving a five year grace period to formulate new laws, that would serve all interests better.

There is also an aspect to this topic which is entirely unique in our modern experience. If a court were to pass such a judgment, it would force onto the general population the greatest and deepest philosophical question that any State must face: what is it to be a citizen? It is so rare that such a question leaves the journals of academia or the machinations of nation-builders. Perhaps that is being overly optimistic. Perhaps it would only inspire a political nightmare of deciding at what age qualification would do the least harm to sitting politicians. But perhaps not.