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The Twenty-Sixth Amendment Enforcement Power

ABSTRACT. This Note argues that the Twenty-Sixth Amendment did more than just lower the voting age. It also gave Congress the power to override state policies that disproportionately burden the voting rights of particular age groups, such as strict voter ID laws and onerous absentee ballot rules for overseas soldiers. The Note reasons from the Amendment's text and history, focusing on how the Twenty-Sixth Amendment parallels the Reconstruction Amendments, and how the Twenty-Sixth Amendment was generated by the political and jurisprudential battle over the Voting Rights Act. The Note also considers how a stronger Twenty-Sixth Amendment fits into current constitutional law.

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> *Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.*
> *Section 2. The Congress shall have power to enforce this article by appropriate legislation.*[1]

INTRODUCTION

The amendments that have been added to the Constitution since World War II are generally interpreted narrowly.[2] They achieved specific objectives—enfranchising residents of Washington, D.C.,[3] establishing the terms of presidential succession,[4] restricting congressional pay raises[5]—but did not shift broad zones of power between government institutions or create far-reaching new rights. Indeed, the most significant developments in constitutional law in the last sixty years have occurred outside of the amendment process. Statutes like the Voting Rights Act of 1965 (VRA)[6] and Supreme Court decisions like *Brown v. Board of Education*[7] have redefined the balance of power in our system and the content of our civil and political rights without altering the Constitution's text.

The Twenty-Sixth Amendment is conventionally understood as part of this pattern: a narrowly tailored response to the rise of youth activism in the 1960s and especially to the Vietnam War. Americans as young as eighteen were fighting and dying for their country in Southeast Asia, so why, Americans asked, could they not help choose its leaders? Finding no good answer, we lowered the national voting age to eighteen. Nothing more, nothing less. Because this narrow reading has become conventional, the Twenty-Sixth Amendment has received scant attention. It has been applied in only one Supreme Court case[8] and a handful of state and lower federal court cases.[9]

1. U.S. CONST. amend. XXVI.
2. Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1740-41 (2007) (explaining that it is a mistake to "tak[e] these amendments so seriously and look[] upon them as the source of large new principles").
3. U.S. CONST. amend. XXIII.
4. *Id.* amend. XXV.
5. *Id.* amend. XXVII.
6. 42 U.S.C. §§ 1973 to 1973bb-1 (2006).
7. 347 U.S. 483 (1954).
8. Symm v. United States, 439 U.S. 1105 (1979) (mem.). *Symm* summarily affirmed a three-judge district court's holding that a requirement for college student voters to swear that they will

Constitutional law professors have treated it as one small chapter in the constitutional story of ever-expanding enfranchisement,[10] but not as an independently interesting subject. It has been virtually ignored in the scholarly literature. Professor Bruce Ackerman's position is typical: "All [the Twenty-Sixth Amendment] did was change the voting age from twenty-one to eighteen. Nobody looked upon it as something more."[11]

Yet, this narrow reading misses two important features of the Twenty-Sixth Amendment. First, it was not written as a mere age limit for disenfranchisement, akin to the constitutional age requirements for Congress and the presidency.[12] Rather, it was deliberately modeled after the Reconstruction Amendments. Like the Fifteenth Amendment, the Twenty-Sixth Amendment contains a first section establishing a sweeping prohibition against franchise discrimination, proclaiming that the right to vote "shall not be denied or abridged . . . on account of age." Like all three Reconstruction Amendments, the Twenty-Sixth Amendment contains a second section granting Congress the power "to enforce this article by appropriate legislation."[13] This parallel construction strongly suggests that these amendments should be read *in pari materia*.[14] Second, the Twenty-Sixth Amendment was passed in the shadow of a debate between the President, leading members of Congress, the brightest lights of the legal academy, and the Supreme Court over the meaning of the phrase "Congress shall have power to enforce" in the Reconstruction Amendments. This debate concerned the statutory precursor to the Twenty-Sixth Amendment, Title III of the 1970 VRA

remain in the community after graduation violates the Twenty-Sixth Amendment. 445 F. Supp. 1245 (S.D. Tex. 1978).

9. *See, e.g.*, Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977); Walgren v. Bd. of Selectmen, 519 F.2d 1364 (1st Cir. 1975); Walgren v. Howes, 482 F.2d 95 (1st Cir. 1973); United States v. Duncan, 456 F.2d 1401 (9th Cir. 1972); Jolicoeur v. Mihaly, 488 P.2d 1 (Cal. 1971); Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233 (N.J. 1972).

10. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 461 (2005); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 99 (1980).

11. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 91 (1991).

12. U.S. CONST. art. I, § 2, cl. 2 (establishing a minimum age requirement for the House); *id.* art. I, § 3, cl. 3 (establishing a minimum age requirement for the Senate); *id.* art. II, § 1, cl. 5 (establishing a minimum age requirement for the presidency).

13. *Id.* amend. XXVI.

14. *Cf.* Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

renewal,[15] which lowered the voting age to eighteen in all state and federal elections. The Twenty-Sixth Amendment is thus properly understood as the outcome of a legal and political battle over the VRA, and it should be interpreted in light of the constitutional meanings that battle generated.[16]

This Note will use these features of the Twenty-Sixth Amendment to show that it should be read more broadly than the conventional narrative allows. It should be interpreted to protect voters of all ages from age discrimination, not merely the young. It should also be interpreted to permit Congress to enact legislation overriding state policies that abridge voting rights on the basis of age, even if such discrimination is not those policies' main purpose. The argument follows Philip Bobbitt's taxonomy of constitutional interpretation.[17] It proceeds in four Parts.

Part I looks at the Twenty-Sixth Amendment's text and uses it to make two interpretive arguments. First, Section 1 of the Twenty-Sixth Amendment protects people of all ages, not exclusively the young. Second, much like the Enforcement Clauses of the Reconstruction Amendments, Section 2 grants Congress broad power to prohibit practices that intentionally discriminate on the basis of age, as well as practices that merely have the effect of disproportionately burdening the franchise of certain age groups.

Part II then looks to the enactment history of the Twenty-Sixth Amendment, which confirms and deepens the interpretation generated by the textual arguments. It first explores how Title III of the VRA made its way through Congress in 1970. Senator Edward Kennedy, the architect of Title III, repeatedly propounded the arguments of Professor Archibald Cox that the Supreme Court's holding in *Katzenbach v. Morgan*[18] allowed Congress to lower the voting age statutorily through the Fourteenth Amendment's Enforcement Clause. The debate over Title III in Congress thus became, in effect, a debate over the reach of the Supreme Court's civil rights jurisprudence. The story then

15. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318-19, *invalidated in part by* Oregon v. Mitchell, 400 U.S. 112 (1970).

16. *Cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing that the historical debates over the Nineteenth Amendment ought to be synthesized with modern Fourteenth Amendment sex equality jurisprudence).

17. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982) (discussing five modalities of interpretation: textual, historical, doctrinal, structural, and prudential). The arguments in this Note are mainly textual and historical, although the Supreme Court's doctrine frequently becomes relevant insofar as the Court's interpretive gloss on constitutional phrases informs the meaning of new amendments containing the same phrases.

18. 384 U.S. 641 (1966).

moves to Justice Black's plurality opinion in *Oregon v. Mitchell*,[19] which held Title III unconstitutional as applied to the states while reaffirming *Morgan* and upholding a prohibition on literacy tests. Congress and the states responded to this opinion by passing the Twenty-Sixth Amendment, in which they included an enforcement clause granting Congress the power Justice Black had denied it.

Part II punctuates this analysis of the statute-opinion-amendment process with three interpretive arguments. First, the history shows that at the time the Twenty-Sixth Amendment was passed, the broad, *Morgan*-informed reading of "Congress shall have power to enforce" was predominant. Second, while Title III only protected young people who were "denied the right to vote,"[20] the Twenty-Sixth Amendment prevents that right from being "denied *or abridged*."[21] The addition of "or abridged" to the Amendment signals Congress's intention that the Twenty-Sixth Amendment empower it to do more than just police states' voting ages. Third, the enactment of the Twenty-Sixth Amendment closely parallels the enactment of the Fourteenth Amendment: both were passed in the shadow of major debates over the constitutionality of controversial statutes, and both should be interpreted in light of the constitutional meanings generated in those prefatory debates. Part II then examines the ratification debates in state legislatures, showing that they are consistent with a broad reading of the Twenty-Sixth Amendment enforcement power. Finally, Part II closes by examining the controversy over student voting in college towns that emerged after the Twenty-Sixth Amendment's ratification, as well as Congress's debate over the Equal Rights Amendment (ERA), both of which provide historical confirmation for this broad reading of the Twenty-Sixth Amendment.

Part III explores four highly contested areas of election policy in which Congress can legislate under this broad reading of the Twenty-Sixth Amendment. First, Congress can override strict voter ID requirements on the grounds that they disproportionately disenfranchise certain age groups. Second, Congress can expand the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)[22] to make it applicable to state as well as federal elections on the grounds that denying soldiers the right to vote burdens younger voters. Third, Congress can enact legislation protecting the voting

19. 400 U.S. 112 (1970).

20. Voting Rights Act Amendments of 1970, sec. 6, § 302, 84 Stat. at 318, *invalidated by* Oregon v. Mitchell, 400 U.S. 112 (1970).

21. U.S. CONST. amend. XXVI, § 1 (emphasis added).

22. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended in scattered sections of 18 U.S.C., 39 U.S.C., and 42 U.S.C.).

rights of college students from durational residency requirements and other tactics that are commonly used to disenfranchise them. Fourth, Congress can override state policies that interfere with the franchise rights of elderly citizens, such as those denying ballot access to the elderly disabled and those establishing confusing ballot designs that confound elderly voters. These four proposals are not meant to be exhaustive; they simply illustrate the extensive powers that Congress would wield under the Twenty-Sixth Amendment if it were properly interpreted.

Finally, Part IV considers two counterarguments to a broad reading of the Twenty-Sixth Amendment. The first argument is that the Supreme Court's opinion in *City of Boerne v. Flores*[23] and its successor cases limiting Congress's Fourteenth Amendment enforcement power are fatal to such a reading. Part IV shows that *Boerne* is perfectly compatible with most legislation that could be enacted under a revitalized Twenty-Sixth Amendment enforcement power. It further shows that the framework developed in *Boerne* does not apply to the Twenty-Sixth Amendment as a matter of original intent, and that the history of the Twenty-Sixth Amendment provides a reliance-based argument against narrowing the enforcement power. The second argument is that, if the Twenty-Sixth Amendment is truly age-neutral, then any laws enacted under it to protect the franchise rights of one age group also violate it by diluting the voting rights of other age groups. Part IV shows that this is not a problem, because such vote dilution claims would not be viable in the Twenty-Sixth Amendment context.

I. THE TEXT OF THE TWENTY-SIXTH AMENDMENT

This first Part opens the door to an expansive understanding of the Twenty-Sixth Amendment by looking to the text of the Amendment and comparing it to the rest of the Constitution. The primary argument made here is that both sections of the Twenty-Sixth Amendment are directly modeled after nearly identical phrases in several other amendments and should therefore bear the same meaning.

A. "[O]n account of age"

Section 1 of the Twenty-Sixth Amendment does not merely set a minimum voting age. It also establishes a general prohibition against age discrimination in voting rights: "The right of citizens of the United States, who are eighteen

23. 521 U.S. 507 (1997).

years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[24] The first eight words of this sentence establish the category of people to whom the right applies: citizens. The eight words between the commas limit that category to only those citizens over eighteen. The final twenty words establish that such citizens cannot be discriminated against on account of their age when they exercise their voting rights. Thus, a nineteen-year-old, a forty-year-old, and a ninety-year-old all have legitimate claims under Section 1 if their franchise rights are denied or abridged on account of age.[25]

This reading of the Twenty-Sixth Amendment parallels the prevailing understandings of the Fifteenth and Nineteenth Amendments. The authors of the Twenty-Sixth Amendment consciously modeled it after the Fifteenth and Nineteenth,[26] such that the texts of these three amendments are almost identical. Thus, the interpretations of the Fifteenth and Nineteenth Amendments should carry special force when deriving the Twenty-Sixth Amendment's meaning. Both the Fifteenth and the Nineteenth Amendments are understood to extend beyond their paradigmatic protected classes. The Fifteenth Amendment was ratified with the principal goal of enfranchising newly freed blacks, yet its race-neutral language has led the courts to apply its protections to citizens of all races,[27] including Latinos,[28] Native Americans,[29]

24. U.S. CONST. amend. XXVI, § 1.

25. *See* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 919 (2007) ("While the amendment was enacted for the purpose of extending the right to vote to younger citizens, it also clearly prohibits setting any upper age on eligibility." (footnote omitted)).

26. *See* 117 CONG. REC. 7539 (1971) (statement of Rep. Claude Pepper) ("What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents."); *id.* at 7534 (statement of Rep. Richard Poff) ("What does the proposed constitutional amendment accomplish? . . . [I]t guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting . . . ."); *id.* at 7533 (statement of Rep. Emanuel Celler) ("[Section 1 of the Twenty-Sixth Amendment] is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women."); *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 244-46 (1995) (discussing this parallel construction and using it to argue that the Twenty-Sixth Amendment confers a right to "vote" on juries).

27. United States v. Reese, 92 U.S. 214, 218 (1875) ("If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications

and even whites.[30] The Nineteenth Amendment was enacted with the principal goal of enfranchising women, yet the only Supreme Court decision to interpret the Nineteenth Amendment concluded that it "applies to men and women alike."[31] The Twenty-Sixth Amendment's closest models, then, both remedied franchise discrimination not by limiting their protection to the specific group that the amendments were enacted to help, but by banning all franchise discrimination along a particular axis of personal identity. This is a strong argument for reading the Twenty-Sixth Amendment the same way.[32]

The most plausible contrary interpretation of the Twenty-Sixth Amendment would read it as exclusively lowering the voting age to eighteen. But if the authors intended only to protect the young, why did they use the phrase "on account of age" as opposed to "on account of youth"? Alternatively, why did the authors not write that "no State shall set the minimum voting age above eighteen for any state or federal election"? If all the authors intended to do was change the age of enfranchisement, they had plenty of models elsewhere in the Constitution. The Fourteenth Amendment penalizes states for denying the franchise to "male inhabitants . . . being twenty-one years of age,"[33] and Articles I and II set the minimum ages for House members,[34]

must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is.").

28. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Katzenbach v. Morgan, 384 U.S. 641 (1966).

29. Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006) (applying section 2 of the VRA—which was enacted pursuant to Congress's Fifteenth Amendment enforcement power—to Native Americans in South Dakota).

30. United States v. Brown, 561 F.3d 420 (5th Cir. 2009) (applying section 2 of the VRA to white voters in a majority African-American county in Mississippi); United Jewish Orgs. of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 521-22 (2d Cir. 1975) (recognizing that white voters have standing to challenge a redistricting plan under the theory that it violates their Fifteenth Amendment rights), *aff'd sub nom.* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

31. Breedlove v. Suttles, 302 U.S. 277, 283 (1937).

32. *See* SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26, at 2 (1971) ("Section 2 confers on Congress the power to enforce the Article by appropriate legislation. The power conferred upon Congress by this section parallels the reserve power granted to the Congress by numerous amendments to the Constitution." (emphasis omitted)); *cf.* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) (arguing that the textual parallels between the Fifteenth and the Twenty-Sixth Amendments suggest that the latter should be interpreted to give eighteen-year-olds the right to serve on juries).

33. U.S. CONST. amend. XIV, § 2.

34. *Id.* art. 1, § 2.

senators,[35] and presidents.[36] By instead modeling the Twenty-Sixth Amendment after the Fifteenth and Nineteenth, its authors signaled their intention to do more than lower the voting age.[37]

B. "Congress shall have power to enforce"

Section 2 of the Twenty-Sixth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation."[38] This phrase mirrors nearly identical clauses in seven other amendments, a fact that was not lost on the Twenty-Sixth Amendment's authors.[39] Representative Emanuel Celler, the Amendment's primary advocate in the House, noted that the power conferred upon Congress by Section 2 "parallels the reserve power granted to the Congress by numerous amendments to the Constitution."[40] The frequent repetition of the phrase "power to enforce" in the Constitution suggests that these words should be read *in pari materia*.[41] Borrowing phrases like "power to enforce" is a concise way for constitutional framers to import sophisticated

35. *Id.* art. 1, § 3.

36. *Id.* art. 2, § 1.

37. *But cf.* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004). In *Cline*, the Court determined that a provision of the Age Discrimination in Employment Act (ADEA) prohibiting an employer from discriminating against an employee "because of such individual's age," 29 U.S.C. § 623(a)(1) (2000), does not apply to discrimination against the young. The Court decided that the ADEA's language should be interpreted in light of legislative history suggesting that Congress intended only to remedy discrimination against the elderly. 540 U.S. at 586-92. The Court's reasoning in this case can be distinguished from the present argument on two grounds. First, the ADEA protects only workers over forty, while the Twenty-Sixth Amendment covers all citizens over eighteen: the young, the middle aged, and the elderly. Thus, the Twenty-Sixth Amendment's age limitation is more consistent with an age-neutral antidiscrimination purpose, while the ADEA seems designed only to help older Americans. *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 990-95 (2002). Second, the Court held that Congress used the word "age" not in the sense of number of years old but in the sense of "old age." 540 U.S. at 592 n.5. It is not possible, however, to interpret "age" as meaning "youth." While one of the alternative meanings of age is "an advanced stage of life," *see Age*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/age (last visited Nov. 14, 2011), there is no definition of age that corresponds to "an early stage of life."

38. U.S. CONST. amend. XXVII, § 2.

39. *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XVIII, § 2; *id.* amend. XIX; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2.

40. 117 CONG. REC. 7533 (1971) (statement of Rep. Emanuel Celler).

41. *See* Amar, *supra* note 32, at 822-27 (using the observation that the enforcement clauses of the Thirteenth and Fourteenth Amendments are *in pari materia* to critique the Supreme Court's Fourteenth Amendment jurisprudence).

concepts that have been elaborated upon by the judiciary into new constitutional provisions. We should thus take note when the authors of a new amendment choose to copy an exact phrase from elsewhere in the Constitution.

When the Twenty-Sixth Amendment was enacted in 1971, the Enforcement Clauses of the three Reconstruction Amendments were understood to grant Congress wide latitude in defining both intentional and disparate impact violations of the rights conferred by those amendments. They were also understood to grant Congress broad power to override state laws in order to correct such violations. Congress's power was limited only by the test established in *McCulloch v. Maryland*: "[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[42] In *Oregon v. Mitchell*,[43] *Katzenbach v. Morgan*,[44] and *South Carolina v. Katzenbach*,[45] the Supreme Court determined that the Fourteenth and Fifteenth Amendments' Enforcement Clauses give Congress authority to prohibit literacy tests and force states to preclear changes to their election procedures. In *Jones v. Alfred H. Mayer Co.*,[46] the Court determined that the Thirteenth Amendment's Enforcement Clause allows Congress to prohibit private racial discrimination. These cases, all decided in the years immediately prior to the Twenty-Sixth Amendment's enactment, provide strong support for reading its Enforcement Clause to grant similarly broad powers.

Enforcement clauses can also be found in the Eighteenth, Nineteenth, Twenty-Third, and Twenty-Fourth Amendments.[47] The Eighteenth Amendment was no longer in force in 1971,[48] making it at best a dubious model. In any case, the Eighteenth Amendment's Enforcement Clause was interpreted under the *McCulloch* standard back when it was in force.[49] The Nineteenth Amendment's Enforcement Clause has not been interpreted by the

42. 17 U.S. (4 Wheat.) 316, 421 (1819).

43. 400 U.S. 112, 118 (1970) (holding that Congress can lower the voting age in federal but not state elections, and upholding a provision of the VRA that banned literacy tests).

44. 384 U.S. 641, 646-47 (1966) (upholding a provision of the VRA banning literacy tests for those educated in schools within the United States' jurisdiction in Puerto Rico).

45. 383 U.S. 301, 308 (1966) (upholding section 5 of the VRA).

46. 392 U.S. 409, 409 (1968).

47. *See* U.S. CONST. amend. XVIII, § 2 (repealed 1933); *id.* amend. XIX; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2.

48. *See id.* amend. XXI, § 1 (ratified Dec. 5, 1933) (repealing the Eighteenth Amendment).

49. *See* James Everard's Breweries v. Day, 265 U.S. 545, 558-59 (1924) (upholding the Supplemental Prohibition Act of 1921 under the Eighteenth Amendment's Enforcement Clause).

Supreme Court, as legislation enacted pursuant to the Nineteenth Amendment's Enforcement Clause has not been challenged in court.[50] This is likely because the enfranchisement of women did not face sustained resistance after the Nineteenth Amendment was adopted (unlike the enfranchisement of African Americans after the Fifteenth Amendment).[51] Nonetheless, the Nineteenth Amendment's framers modeled it after the Fourteenth and Fifteenth Amendments, and the Fourteenth Amendment's Enforcement Clause was governed by the *McCulloch* test at the time of the Nineteenth Amendment's passage.[52] Thus, the argument in this Note applies with equal or greater force to the Nineteenth Amendment: if a state systematically burdened the rights of women to vote, say by taxing female voters, Congress would surely have the power to enact a remedy.[53] The same basic story can be told about the Twenty-Fourth Amendment, which banned poll taxes for federal elections. While the poll tax was a powerful tool of Southern racial oppression, banning poll taxes in federal elections had become relatively uncontroversial by the 1960s.[54] Further, section 10 of the VRA[55] and the Supreme Court's opinion in *Harper v. Virginia Board of Elections*[56] subsequently banned *all* poll taxes, rendering the Twenty-Fourth Amendment redundant. Thus, while one can certainly imagine Congress using a broad enforcement power to police poll taxes, Twenty-Fourth Amendment legislation was never challenged in court.

The Twenty-Third Amendment's Enforcement Clause is the only potentially troublesome example because it is applied to such a narrow constitutional provision. Section 1 of the Twenty-Third Amendment

50. In the Lexis tab for Shepard's, the following search was executed on January 30, 2012: "U.S. Const. amend. 19, § 2."

51. *See* AMAR, *supra* note 10, at 422-25 (discussing the dynamics that made women's suffrage difficult to oppose politically once the movement began picking up steam, such as the large number of prospective women voters and the wariness of politicians to alienate such a large potential part of the electorate).

52. *See Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) (applying the *McCulloch* test).

53. *See* Siegel, *supra* note 16, at 976 ("The fact that the Fourteenth and Nineteenth Amendments are tied in the history of the Constitution's development supports the case for interpreting these two amendments together.").

54. *See* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 79-87 (2009) (showing that the Twenty-Fourth Amendment was approved in Congress by votes of 77 to 16 in the Senate and 294 to 86 in the House, and that the main debate was not over whether poll taxes should be banned, but whether it should happen through statute or constitutional amendment).

55. Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 437, 442-43 (codified as amended at 42 U.S.C. § 1973(b) (2006)).

56. 383 U.S. 663, 665 (1966) (holding that all poll taxes violate the Equal Protection Clause).

establishes that Washington, D.C.'s Electoral College members will be appointed "in such manner as the Congress may direct,"[57] while Section 2 establishes that "[t]he Congress shall have power to enforce this article by appropriate legislation."[58] This Amendment's Enforcement Clause cannot be read as conferring broad remedial powers akin to those conferred by the Reconstruction Amendments; it only allows Congress to dictate how three electors will be chosen. There are at least two possible explanations for its inclusion. First, the Twenty-Third Amendment's authors might have included the Enforcement Clause to ensure that Congress has the same power to determine the manner of appointing electors from Washington, D.C. that legislatures have in the several states.[59] That interpretation creates some redundancy: Section 1 of the Twenty-Third Amendment already gives Congress that power, and in any case Article I, Section 8 of the Constitution gives Congress plenary authority over Washington, D.C.[60] Such redundancy, however, is not uncommon in the Constitution, and thus not fatal to such an interpretation.[61] Second, perhaps the authors of the Twenty-Third Amendment modeled it after the Reconstruction Amendments for purely symbolic reasons, to signal that America was broadening its citizens' rights.[62] This second explanation, if correct, reveals a divide in the constitutional enforcement clauses.

57. U.S. CONST. amend. XXIII, § 1.

58. *Id.* § 2.

59. *Id.* art. 1, § 2, cl. 2; *cf.* Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (discussing reasons to "respect the legislature's Article II powers" in the selection of electors); McPherson v. Blacker, 146 U.S. 1, 27 (1892) (stating that the Constitution "leaves it to the legislature exclusively to define the method" of appointing electors).

60. U.S. CONST. art. 1, § 8, cl. 17.

61. *See* JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION §§ 1938-39, at 688-90 (William S. Hein & Co. 1994) (5th ed. 1891) ("The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; . . . even if wholly needless, the repetition of such securities may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist."); Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 2 (1998) ("A considerable number of constitutional clauses are redundant in a certain sense; they illuminate and clarify what was otherwise merely implicit.").

62. The Kennedy Administration used the Twenty-Third Amendment for this purpose. *See President Leads Notables in Capital Acclaiming D.C. Suffrage Ratification*, WASH. POST, Mar. 30, 1961, at A20 (quoting President Kennedy as stating that the Amendment demonstrates the nation's interest "in providing to all American citizens the most valuable of human rights—the right to share in the election of those [who] govern us").

If the Twenty-Third Amendment contains an enforcement clause for symbolic reasons, we need additional evidence that the Twenty-Sixth Amendment's Enforcement Clause should be read broadly like the Reconstruction Amendments, and not narrowly like the Twenty-Third Amendment. Two pieces of textual data point to this conclusion. The first piece of data arises from the relationship between the Twenty-Sixth Amendment's Enforcement Clause and the phrase "denied or abridged" in Section 1 of the Amendment. If the Twenty-Sixth Amendment only prohibited denials of the right to vote, then Congress would merely be empowered to prevent states from refusing to let citizens vote based on their age.[63] The Twenty-Sixth Amendment could then be analogized to the Twenty-Third: both enfranchise a new category of voters, and both only give Congress enough power to ensure that enfranchisement. However, the inclusion of "or abridged" in the Twenty-Sixth Amendment implies a much broader enforcement power. Consider all the policies that may abridge the right to vote on the basis of age: locating polling places away from colleges, requiring registrants to have drivers' licenses, splitting a college campus between two legislative districts, etc. The need for fine-grained policy judgments in determining which abridgements are forbidden invites a larger role for Congress. The word "abridged" in the Fifteenth Amendment empowered Congress to enact section 5 of the VRA, creating a two-tiered enforcement system in which some states must have changes to any "standard, practice, or procedure with respect to voting" scrutinized for even minor race-based abridgements, while other jurisdictions are largely left alone.[64] The broad role Congress thereby took in policing voting rights was upheld by the Supreme Court in 1966, a few years before the Twenty-Sixth Amendment was proposed.[65] Since the Fifteenth Amendment was a model for the Twenty-Sixth, it makes sense to read the word "abridged" in the latter as creating a similar congressional enforcement role.

The second piece of data can be found in the proposed ERA. The ERA received a two-thirds vote from both chambers of Congress in March 1972, roughly one year after the Twenty-Sixth Amendment passed the same hurdle.[66] Its first two sections read as follows: "Section 1. Equality of rights

63. In this hypothetical, Congress could create a cause of action under the Twenty-Sixth Amendment to sue a state for refusing to let people vote because of their age, but it could not enact broader legislation aimed at ending other forms of age-based voter discrimination.

64. 42 U.S.C. § 1973c (2006).

65. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

66. *See* 118 CONG. REC. 9598 (1972) (passage in the Senate); 117 *id.* at 35,815 (1971) (passage in the House).

under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[67] While the ERA was never ratified by three-quarters of the state legislatures, its text is clearly modeled after the Fourteenth and Fifteenth Amendments, which suggests that its authors viewed the phrase "Congress shall have the power to enforce" in the ERA as a broad grant of enforcement power. Indeed, the authors of the ERA explicitly stated that its Enforcement Clause should be read broadly.[68] This is especially significant because of the proximity between the ERA and the Twenty-Sixth Amendment: both were passed by the same Congress. Thus, the same people inserted the same phrase into both proposed amendments, suggesting that the clauses were understood to have the same essential meaning.

The phrase "Congress shall have power to enforce" appears in seven of the first twenty-five amendments. In six of those amendments it has either been construed to give Congress far-reaching enforcement powers or is consistent with such a construction. While the Twenty-Third Amendment might present an alternative model, the balance of the textual evidence supports reading the Twenty-Sixth Amendment's Enforcement Clause broadly, akin to the other six.

II. THE HISTORY OF THE TWENTY-SIXTH AMENDMENT

The above textual arguments point towards an enlarged Twenty-Sixth Amendment, one that protects adults of all ages and that confers extensive enforcement powers on Congress. This second Part confirms and deepens that interpretation by analyzing the history of the Twenty-Sixth Amendment. It shows that, in the political saga leading up to the Twenty-Sixth Amendment's enactment, both Congress and the Supreme Court repeatedly relied on and affirmed a broad interpretation of the phrase "Congress shall have power to enforce" in the Fourteenth Amendment. The methodology of this Part is entirely originalist, in that it looks at how the relevant constitutional phrases were understood at the time the Amendment was adopted. Such an approach is especially well suited to recently enacted constitutional amendments, because

67. H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) (as submitted to the states).

68. *See infra* notes 195-200 and accompanying text.

recent amendments lack the "dead hand" problem that living constitutionalists ascribe to originalism.[69]

A. Title III of the Voting Rights Act and the Constitutional Politics of the Enforcement Clause

In the 1970 renewal of the Voting Rights Act, Congress added a provision (Title III) that lowered the national voting age to eighteen in both state and federal elections. In enacting such a sweeping change without going through the Article V amendment process, Congress consciously and explicitly relied on a broad reading of Section 5 of the Fourteenth Amendment. This broad reading had not always been embraced by Congress. Indeed, less than a decade prior, in 1962, Congress decided after extensive debate that it should prohibit poll taxes in federal elections through the Twenty-Fourth Amendment,[70] by way of Article V, because doing so through a normal statute raised constitutional concerns.[71] By 1970, Congress had done an about-face on this question. Its members had by then enacted the VRA and seen the *Katzenbach v. Morgan* and *South Carolina v. Katzenbach* decisions, as well as the academic commentary interpreting them. Consequently, they understood themselves as wielding sweeping authority to ensure equal protection of the laws through bold civil rights legislation.[72] Thus, at the very outset of the saga that would culminate in the passage of the Twenty-Sixth Amendment, Congress had a concrete and decidedly expansive understanding of the power it wielded through the phrase "Congress shall have power to enforce this article by appropriate legislation."

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69. *See generally* Richard Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008) (arguing that originalist methods of interpretation lose their legitimacy over time as society changes).

70. U.S. CONST. amend. XXIV.

71. *See* Ackerman & Nou, *supra* note 54, at 79-86. Of particular note is the fact that liberal legislators, the NAACP, and other civil rights groups actually *opposed* the Twenty-Fourth Amendment, because they feared it set an unfortunate precedent that such changes had to happen through the Article V process. *See id.* at 83-84. The Kennedy administration, however, was unmoved by this opposition. Assistant Attorney General Nicholas Katzenbach firmly supported the Article V approach, noting, "While we think from the recent trend in decisions that the courts would ultimately uphold such a statute, the matter is not free from doubt." *Abolition of Poll Tax in Federal Elections: Hearings on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670, S.J. Res. 29 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 26 (1962) (quoting Assistant Att'y Gen. Nicholas B. Katzenbach) (statement of Sen. Spessard L. Holland).

72. *See infra* notes 86-92 and accompanying text.

Not coincidentally, Congress included that exact phrase in the Twenty-Sixth Amendment itself.[73]

Constitutional amendments to lower the voting age were proposed over 150 times in Congress between 1942 and 1970,[74] and all but one of them died in committee.[75] Nonetheless, support for a lower voting age grew over these three decades through a confluence of factors: outrage over the disenfranchisement of young soldiers, concern over the growing role of young people in politics, and sensitivity to deprivations of political rights due to the success of the civil rights movement.[76] The disenfranchisement of soldiers was an especially important factor.[77] The first significant shift in public opinion towards youth

73. This provides an additional distinction between the Twenty-Sixth Amendment and the Twenty-Third. The latter was enacted prior to the VRA and these two Supreme Court opinions, and so the words of its Enforcement Clause were not as strongly associated with expansive congressional authority as they would have been post-1965.

74. SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, 92D CONG., PASSAGE AND RATIFICATION OF THE TWENTY-SIXTH AMENDMENT: REPORT OF CONSTITUTIONAL AMENDMENT SUBCOMMITTEE 4 (Comm. Print 1971) (reporting that since the first resolution to pass an amendment lowering the voting age was submitted on October 19, 1942, there have been "more than 150 similar proposals, at least one in each subsequent Congress").

75. *Id.* (noting that only one voting age amendment resolution was voted out of committee prior to the 92nd Congress—in the 83rd Congress—and that it failed in the Senate "on a vote of 34 to 24"); *see also* 116 CONG. REC. 6945 (1970) (statement of Sen. Barry Goldwater) ("The amendments get into the Judiciary Committee and they just seem to rot and die there."); *Public Hearing Before S. & Gen. Assemb. Judiciary Comms. on S. Con. Res. No. 34 Proposing To Amend the N.J. State Constitution To Lower the Voting Age to 18*, 1969 Leg. 29 (N.J. 1969) [hereinafter *N.J. Public Hearing*] (statement of Rep. James J. Howard) ("Our difficulty in the past has been that the Dean of the House of Representatives, the Chairman of the Judiciary Committee, Emanuel Celler . . . is not so very strong for it, and we have had a difficult time in getting the hearings for this."); WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 52 (1992) (describing the repeated failure of a proposed constitutional amendment to lower the voting age).

76. *See* AMAR, *supra* note 10, at 445-47; Jenny Diamond Cheng, Uncovering the Twenty-Sixth Amendment 29, 91-92, 117 (2008) (unpublished Ph.D. dissertation, University of Michigan), *available at* http://search.proquest.com/docview/304573437/fulltextPDF/1347BB21CF934A2AE0D/1?accountid=15172.

77. As Ted Sorensen put it: "If taxation without representation was tyranny, then conscription without representation is slavery." *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 91st Cong. 15 (1970) [hereinafter *1970 Hearings*] (statement of Theodore E. Sorensen, formerly Special Counsel to President Kennedy); *see also N.J. Public Hearing*, *supra* note 75, at 28 (statement of Rep. James J. Howard) ("It used to be only, since the nineteen thirties, when this was being polled by the Gallup Poll people, that only during time of war did we get an expression of support for this."); Hazel Erskine, *The Polls: The Politics of Age*, 35 PUB. OPINION Q. 482, 494-95 (1971) (noting that, as of September 7, 1970, 69% agreed and 27% disagreed with the statement "If young people are old enough to serve in the armed forces, they are old enough

enfranchisement coincided with the reduction of the draft age to eighteen in the 1940s,[78] and President Eisenhower powerfully drew the soldier-franchise connection in his 1954 State of the Union Address.[79] When the Vietnam War started, this connection became especially salient.[80] Further, by the 1960s the public perception of young adults had been transformed by the postwar expansion of higher education and the explosion of youth involvement in politics.[81] This spawned two compelling arguments: the young were capable of

to vote"); *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 818 (2010) ("The chief selling point was that you had young men over there that were dying in the jungles, who weren't old enough to vote for the people that sent them there. That was a compelling feature." (quoting Sen. Birch Bayh)).

78. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 278 (2000) (noting that an amendment to lower the voting age was introduced in 1942 in response to the lowering of the draft age to eighteen); THOMAS NEALE, THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES OF NEWLY ENFRANCHISED AGE GROUPS 7 (1983) (demonstrating in a table that support for lowering the voting age grew from 17% in 1939 to 39% in 1943).

79. President Eisenhower urged:

> For years our citizens between the ages of 18 and 21 have, in time of peril, been summoned to fight for America. They should participate in the political process that produces this fateful summons. I urge Congress to propose to the States a constitutional amendment permitting citizens to vote when they reach the age of 18.

President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union (Jan. 7, 1954), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 7, 22 (1960). Every American President from the end of World War II to the passage of the Twenty-Sixth Amendment advocated lowering the voting age to eighteen, except for President Harry Truman, who actually advocated raising it to twenty-four. Jerry Klein, *Should 18-Year-Olds Be Allowed To Vote? President Johnson Says "Yes" While Former President Truman Says "No"; What's Your Opinion on This Important Question?*, FAM. WKLY., Mar. 15, 1964, at 12, 13 ("Particularly outspoken on the question is former President Harry S. Truman. 'The more a man knows, the more intelligently he can vote; a man ought to have greater education, especially in the history of his country, before he can vote. . . . I don't think they have that knowledge at 18. It's bad enough the way they vote now . . . . Twenty-one is a better age; 24 would be still better!'").

80. As of 1968, about 25% of the American troops in Vietnam were under age twenty-one, and 29% of combat-related deaths were of soldiers under age twenty-one. *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 90th Cong. 23 (1968) (statement of R. Spencer Oliver, President, Young Democratic Clubs of Am.).

81. *See* Press Release, Office of Senator Edward M. Kennedy, Senator Kennedy Testifies on Reducing the Voting Age to 18 by Statute 2 (Mar. 9, 1970) ("In 1920, just fifty years ago, only 17% of Americans between the ages of 18 and 21 were high school graduates. Only 8% went on to college. . . . Today, by contrast, 79% of Americans in this age group are high school graduates. 47% go on to college.").

voting responsibly,[82] and they should be incorporated into the political process to prevent radicalization.[83] Finally, the civil rights movement drew political attention to the issue of voting rights and provided advocates of a lower voting age with a morally powerful analogy.[84] By the 1960s, these three factors had ensured that the time was ripe to lower the voting age to eighteen.

But recognizing that the time for change has come is one thing; enacting change is entirely another, especially when one has to go through a process as burdensome as that in Article V. Fortunately, the legislative and judicial successes of the civil rights movement provided another strategy. The Supreme Court decisions upholding the VRA had demolished the limited understanding of congressional power that was exhibited in the debate over the Twenty-Fourth Amendment and opened up the possibility of lowering the national

82. *See* 116 CONG. REC. 6959 (1970) (statement of Sen. J. William Fulbright); Cheng, *supra* note 76, at 60-90; *see also* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 563 (2000) (observing that a Senate committee specifically noted that the young adults to be enfranchised under the proposed amendment were "mentally capable" of voting). President Nixon also publicly voiced his belief that eighteen- to twenty-year-olds were capable of voting, stating: "The reason the voting age should be lowered is not that 18-year-olds are old enough to fight—it is because they are smart enough to vote. They are more socially conscious, more politically aware, and much better educated than their parents were at age 18." Cheng, *supra* note 76, at 63 (quoting *Today's Youth: The Great Generation* (NBC radio broadcast Oct. 16, 1968)).

83. *See* BENJAMIN GINSBERG, THE CONSEQUENCES OF CONSENT: ELECTIONS, CITIZEN CONTROL AND POPULAR ACQUIESCENCE 9-15 (1982); Scott, *supra* note 82, at 564; Cheng, *supra* note 76, at 109-15. These arguments had varying degrees of public support in opinion polls. Erskine, *supra* note 77, at 495 (showing that, as of September 1970, 38% of people agreed and 57% disagreed with the statement "Until most people reach 21 years of age, they aren't mature enough to be given the vote," while 30% agreed and 56% disagreed with the statement "One way to keep young people from becoming radicals is to give them the vote at 18").

84. One member of Congress argued that "close parallels" existed between the situation of young people and "the struggle of black Americans for political freedom in this country." 115 CONG. REC. 21,301 (1969) (statement of Rep. Shirley Chisholm). Another went so far as to claim that "what [is] propose[d] to do in the Federal enfranchisement of those 18, 19, and 20 years of age is exactly what [was done] in enfranchising the black slaves with the 15th amendment and . . . in enfranchising women in the country with the 19th amendment." 117 *id.* at 7539 (1971) (statement of Rep. Claude Pepper). The NAACP lent its resources to the effort, holding a nationwide conference on youth voting rights, *see* CULTICE, *supra* note 75, at 103-06; organizing to support ratification, *see Ratify Youth Vote, NAACP Urges*, PHILA. TRIB., Apr. 13, 1971, at 14 ("Branches of the [NAACP] throughout the country have been called upon to mount intensive campaigns in their respective states to secure early ratification by their legislatures of the constitutional amendment to lower the voting age to 18 in all elections."); and testifying before Congress, *see 1970 Hearings*, *supra* note 77, at 150 (statements of James Brown, Jr., National Youth Director, NAACP, and of Philomena Queen, Youth Regional Chairman, NAACP).

voting age through a mere statute.[85] That idea first appeared in 1966, when Professor Archibald Cox published an article in the *Harvard Law Review* arguing that *Katzenbach v. Morgan* allowed Congress to lower the voting age without amending the Constitution:

> If Congress can make a conclusive legislative finding that ability to read and write English as distinguished from Spanish is constitutionally irrelevant to voting, . . . Congress would seem to have power to make a similar finding about state laws denying the franchise to eighteen, nineteen, and twenty year-olds even though they work, pay taxes, raise families, and are subject to military service.[86]

Cox's reasoning was that, through *Morgan*, the Supreme Court established that Congress receives substantial judicial deference when it identifies and remedies state violations of the Equal Protection Clause. *Morgan* gave Congress "power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."[87] Section 5 of the Fourteenth Amendment thus allowed Congress to define youth disenfranchisement as a violation of the Equal Protection Clause, as well as to remedy this violation by forcing states to enfranchise eighteen-year-olds.

Cox found a receptive audience for this theory in Senator Edward Kennedy. Frustrated by Congress's repeated failures to pass a constitutional amendment lowering the voting age, Kennedy seized on Cox's article and used it to justify doing so statutorily. The perfect vehicle soon presented itself: the VRA was up for renewal in 1970, and it provided both political attention to the issue of voting rights and a germane, popular law to which to attach the voting age proposal. Kennedy thus introduced Title III of the VRA, which would lower the voting age to eighteen for both state and federal elections. Kennedy used Cox's interpretation of *Katzenbach v. Morgan* to pitch this strategy to his fellow Senators,[88] and advocates of the strategy soon referred to it as the "*Morgan* approach."[89] Kennedy framed the issue as follows:

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85. *See supra* note 71 and accompanying text.

86. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

87. *Id.*

88. CULTICE, *supra* note 75, at 117-19.

89. *See, e.g.*, *1970 Hearings*, *supra* note 77, at 143 (statement of Sen. Barry Goldwater) ("Since I happen to like the idea of 18-year-olds voting, I feel it is entirely appropriate to use the Morgan [sic] approach.").

> Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the nation's youth in the public services they receive. By reducing the voting age to 18, we can enable young Americans to improve their social and political circumstances, just as the Supreme Court in the *Morgan* case accepted the determination by Congress that the enfranchisement of Puerto Ricans in New York would give them a role in influencing the laws [that] protect and affect them.[90]

Kennedy often stressed that this argument was supported by prominent constitutional scholars,[91] and he brought Cox in for legislative hearings to defend the theory.[92]

The opponents of Title III vigorously disputed Cox's argument. Many members of Congress held constitutional reservations, and Congress's legal research service even prepared a memorandum arguing that Title III did not pass constitutional muster.[93] Several Yale Law School professors spoke out against Title III in legislative hearings and in the pages of the *New York Times*,[94] and President Nixon even voiced his constitutional objections directly to Congress.[95] The principal arguments of these skeptics were threefold.[96] First

90. *Id.* at 167 (statement of Sen. Edward Kennedy).

91. *See, e.g.*, 116 CONG. REC. 6111 (1970) (statement of Sen. Edward Kennedy) ("[T]he authority of Congress to act by statute in this area is supported by two of the most eminent constitutional authorities in America. Both Prof. Paul Freund, the dean of the Nation's constitutional lawyers, and Prof. Archibald Cox, who served with distinction as the Solicitor General of the United States . . . have unequivocally stated their view that Congress has power under the Constitution to reduce the voting age by statute . . . .").

92. *Amendments to the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the Sen. Judiciary Comm.*, 91st Cong. 330, 702 (1969) (statement of Archibald Cox, Professor of Law, Harvard Law School).

93. ROBERT L. TIENKEN, LIBRARY OF CONG. LEGISLATIVE REFERENCE SERV., UNCONSTITUTIONALITY OF CONGRESSIONAL STATUTORY ENACTMENT OF A UNIFORM VOTING AGE OF 18 PURSUANT TO SECTIONS 1 AND 5 OF AMENDMENT FOURTEEN (1970).

94. *See, e.g.*, *1970 Hearings*, *supra* note 77, at 264 (statement of Louis Pollak, Dean, Yale Law School) ("*Katzenbach v. Morgan* is very unlike the far more diffuse 'discrimination' that we are concerned with in a proposal which seeks to enlarge the voter population by lowering the age from 21 to 18."); Alexander M. Bickel, Charles L. Black Jr., Robert H. Bork, John Hart Ely, Louis H. Pollak & Eugene V. Rostow, Letter to the Editor, *Amendment Favored for Lowering Voting Age*, N.Y. TIMES, Apr. 5, 1970, at E13. This letter was introduced into the Congressional Record by Senator Gordon Allott. *See* 116 CONG. REC. 10,396 (1970).

95. Letter from President Richard Nixon, to House Leaders Supporting a Constitutional Amendment To Lower the Voting Age (Apr. 27, 1970), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2487#axzz1G95ZeDQI.

was a doctrinal argument: *Morgan* did not provide adequate precedent because it was about *race* discrimination, while age was not a cognizable Fourteenth Amendment category. Second was a textual argument: Section 2 of the Fourteenth Amendment explicitly anticipated a minimum voting age of twenty-one. Third was a structural argument: setting voter qualifications for state and federal elections was a power quintessentially reserved to the states, and that Congress could only use the Fourteenth Amendment to override this power in paradigmatic cases of racial discrimination.[97] This third argument held particular force because it was connected to the broader federal-state struggle over control of elections.[98] Many legislators connected their objections to Title III with their broader objections to the VRA, arguing, for example, that Title III "shares a common evil with the 1965 Voting Rights Act, to which it is attached; both trample on the rights of the States."[99] Thus, the debate over Title III became in substance a debate about the proper reach of the Fourteenth Amendment Enforcement Clause.

In spite of these objections, Kennedy and his allies were successful in attaching Title III to the 1970 VRA extension.[100] Indeed, Title III was approved by large margins in both the House and Senate.[101] President Nixon signed the

96. *See* LIBRARY OF CONG. LEGISLATIVE REFERENCE SERV., POWER OF CONGRESS UNDER CONSTITUTION ART. 1, SEC. 4 TO SET AGE LIMITATIONS TO VOTE 456 (1969) (second and third arguments); TIENKEN, *supra* note 93 (all three arguments); Bickel et al., *supra* note 94 (all three arguments); Nixon, *supra* note 95 (all three arguments); *see also* 116 CONG. REC. 20,182 (1970) (statement of Rep. Edward Hutchinson) (third argument); *id.* at 20,179 (statement of Rep. George Bush) (first argument); *id.* at 20,167-73 (encompassing several letters from constitutional law professors that articulate all three arguments); *id.* at 6011 (statement of Sen. Samuel Ervin) (third argument). *See generally* Cheng, *supra* note 76, at 135-45 (providing many examples of these arguments in congressional debates).

97. Professors Cox and Freund responded to each of these arguments in their testimony, contending that under *Morgan*, Congress has the power and responsibility to judge the constitutionality of state laws, that the Equal Protection Clause does not only apply to racial discrimination, and that Section 2 of the Fourteenth Amendment does not set any kind of age limit. *See* BAYH, *supra* note 74, at 7 (briefly summarizing the arguments of Cox and Freund as well as the arguments of Bickel et al.).

98. 116 CONG. REC. 6013 (1970) (statement of Sen. Samuel Ervin) ("Are we going to strive to have an indestructible Union composed of indestructible States, or are we going to attempt to destroy, in an unauthorized manner, in an unconstitutional manner, that Union by usurping for the Congress the powers reserved to the States to prescribe the qualifications for voting?").

99. *Id.* at 20,164 (statement of Rep. George Andrews).

100. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318-19, *invalidated in part by* Oregon v. Mitchell, 400 U.S. 112 (1970).

101. The vote in the Senate for adding the voting age amendment to the Voting Rights Act was 67 in favor, 19 against, and 14 abstaining. 116 CONG. REC. 7095 (1970). The vote in the

VRA extension despite his constitutional objections to Title III, writing: "Despite my misgivings about the constitutionality of this one provision, I have today signed the bill. . . . If I were to veto, I would have to veto the entire bill—voting rights and all."[102] President Nixon also called for Congress to take further action to lower the voting age through constitutional amendment, noting the "likelihood that the 18-year-old vote provision of this law will not survive its court test."[103] The conflicting positions, at this point, were quite clear. Kennedy and his allies held the view that Congress could generally broaden the scope of the Equal Protection Clause, including by prohibiting franchise discrimination against the young. President Nixon and his allies held the view that the expansive Fourteenth Amendment Enforcement Clause power that was affirmed in *Morgan* was limited only to circumstances where Congress acted to alleviate racial discrimination, whereas Congress had less power over traditional state domains when it alleviated other forms of discrimination.

B. Oregon v. Mitchell *and the Amendment Process*

The authors of Title III thus had a clear and specific interpretation of Section 5 of the Fourteenth Amendment. This interpretation was informed by the broad Kennedy-Cox reading of *Morgan* and was consciously relied upon when Congress adopted Title III. But that is not the end of the story. By the time Congress proposed the Twenty-Sixth Amendment, the Supreme Court had also interpreted Section 5 by striking down Title III itself in *Oregon v. Mitchell*.[104] If the Court had rolled back its *Morgan* ruling and embraced a narrower vision of congressional enforcement power, it would be more difficult to read *Morgan* into the Twenty-Sixth Amendment's Enforcement Clause. That is not, however, what happened. The Supreme Court did strike down Title III, but in doing so it actually reaffirmed a broad reading of the Fourteenth Amendment's Enforcement Clause by upholding the constitutionality of several other VRA provisions. Thus, when the Twenty-

House was 224 to 183, with 20 abstaining. CULTICE, *supra* note 75, at 136-37. The vote count may overstate actual support for Title III in the House. Removing it would have forced a conference committee that would likely have watered down the VRA's other provisions. *Id.*

102. Pres. Richard Nixon, Statement on Signing the Voting Rights Act Amendments of 1970 (June 22, 1970), *in* PUBLISHED PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 512 (U.S. Gov't Printing Office ed., 1971) [hereinafter VRA Amendments Signing Statement].

103. *Id.* at 513.

104. *Mitchell*, 400 U.S. 112.

Sixth Amendment was adopted, both Congress and the Court had recently and authoritatively declared that the words of its Enforcement Clause should be interpreted broadly.

Once Title III was enacted, all eyes turned to the Supreme Court for resolution of the constitutional debate. The authors of Title III had even added language to ensure a speedy resolution of the constitutional questions it raised, providing for direct appeal from U.S. district courts to the Supreme Court and establishing that "[i]t shall be the duty of the judges designated to hear the case . . . to cause the case to be in every way expedited."[105] They would not have to wait long. President Nixon signed the VRA extension into law on June 22, 1970, and the Supreme Court ruled on the constitutionality of its provisions on December 21, 1970. In *Oregon v. Mitchell*,[106] the Court unanimously affirmed the provisions of the VRA extension that banned literacy tests, affirmed by an eight-to-one vote the provisions that restricted durational residency requirements, affirmed Title III by a five-to-four vote as it applied to federal elections, and struck down Title III by a five-to-four vote as it applied to state elections.

The breakdown on the Title III question was complex. Four conservative Justices—Harlan, Stewart, Burger, and Blackmun—concluded that Title III was unconstitutional as applied to both state and federal elections. Between them they made three separate arguments for this proposition. First, Justice Harlan argued that the Equal Protection Clause was understood by its framers not to protect political rights at all, based on an extensive survey of historical evidence from the time of the Fourteenth Amendment's enactment.[107] Second, Justices Stewart, Burger, and Blackmun concluded that Congress cannot define the substantive scope of the Equal Protection Clause by determining for itself which groups are protected or which state interests count as compelling.[108] Thus, Congress would have to wait for the Supreme Court to speak before defining a right through the Equal Protection Clause. Since the Court had not made age discrimination constitutionally suspect, Title III was beyond Congress's power. This second argument involved a dramatic narrowing of *Katzenbach v. Morgan*, in which the Court had affirmed broad congressional

105. Voting Rights Act Amendments of 1970, sec. 6, § 303(a)(2), 84 Stat. at 318, *invalidated in part by Mitchell*, 400 U.S. 112.

106. 400 U.S. 112. The case bypassed the lower courts because it was heard under the Supreme Court's original jurisdiction. *Id.* at 117 n.1. The judicial review process thus proceeded even faster than the mechanism established in § 303(a)(2).

107. *Id.* at 155-200 (Harlan, J., concurring in part and dissenting in part).

108. *Id.* at 293-96 (Stewart, J., concurring in part and dissenting in part).

power to define the content of the Fourteenth Amendment.[109] Third, all four conservative Justices asserted that states have the exclusive power to set qualifications for federal elections under both Article I and the Seventeenth Amendment.[110] Thus, Congress could not lower the federal voting age any more than it could lower state voting ages.

Four liberal Justices—Douglas, Brennan, White, and Marshall—would have upheld Title III in its entirety. They asserted the reverse of the above three arguments. First, contra Justice Harlan, they concluded that the Equal Protection Clause applies to voting rights.[111] Second, they asserted that the Fourteenth Amendment Enforcement Clause allows Congress to define violations of the Equal Protection Clause (and the force of countervailing state interests) so long as Congress stays within the bounds set by *McCulloch*. Further, they determined that in this case the *McCulloch* test permits Congress to determine the voting age in state elections.[112] They thus reaffirmed the key holding of *Morgan*, that Congress can unilaterally define the substantive rights that are guaranteed by the Fourteenth Amendment so long as Congress's ends are legitimate and it pursues them rationally. Third, the Justices concluded that Congress can set qualifications for federal elections pursuant to the Fourteenth Amendment, despite the fact that the Constitution generally gives that power to the states.[113]

This left Justice Black as the median vote. He sided with the liberal Justices on two of the three key questions: the Fourteenth Amendment did apply to voting,[114] and Congress could set the voting age for federal elections (though Justice Black located this power in Article I, not in the Fourteenth

109. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) ("It was for Congress . . . to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

110. *Mitchell*, 400 U.S. at 287-94 (Stewart, J., concurring in part and dissenting in part); *id.* at 209-12 (Harlan, J., concurring in part and dissenting in part); *see* U.S. CONST. art. I, § 4; *id.* amend. XVII, cl. 1.

111. *Mitchell*, 400 U.S. at 135-41 (Douglas, J., concurring in part and dissenting in part); *id.* at 250-78 (Brennan, J., concurring in part and dissenting in part).

112. *Id.* at 141-44 (Douglas, J., concurring in part and dissenting in part); *id.* at 278-81 (Brennan, J., concurring in part and dissenting in part).

113. *Id.* at 143-44 (Douglas, J., concurring in part and dissenting in part).

114. *Id.* at 129 (opinion of Black, J.).

Amendment).[115] However, he sided with the conservatives on the third: Congress could not, under the *McCulloch* test, use the Equal Protection Clause to lower the voting age for state elections.[116] Yet in so doing, he rejected the conservatives' argument that Congress has no power to define violations of the Equal Protection Clause and the strength of the countervailing state interests. He applied the same broad *McCulloch*-informed standard that the liberal Justices embraced and that he himself had embraced in *Katzenbach v. Morgan*, but he added one wrinkle. Under Justice Black's formulation, Congress could only use the Fourteenth Amendment's Enforcement Clause to legislate in areas generally reserved to state authority if it were remedying discrimination based on *race*, the central purpose of the Amendment.[117] Congress could legislate to reduce age-based discrimination and other forms of discrimination as well, but it could not do so in a domain "exclusively reserved by the Constitution to the states."[118] This provided a middle position between the liberals, who asserted that "Section 5 empowers Congress to make its own determination"[119] of whether any discriminatory state policy is justified, and the conservatives, who concluded that Congress entirely lacks the "power to determine what are and what are not 'compelling state interests' for equal protection purposes."[120] Under Justice Black's formulation, Congress's Fourteenth Amendment power was virtually plenary when Congress legislated to stop racial discrimination, but the power was more limited when Congress legislated to stop other forms of discrimination in areas of traditional state authority, such as setting minimum ages for voting.

If Justice Black intended to force a constitutional amendment lowering the voting age, he could not have written a better opinion.[121] Alaska, Georgia, and Kentucky were the only states that allowed eighteen-year-olds to vote at the time *Oregon v. Mitchell* came down.[122] The remaining forty-seven states suddenly had a choice to make before the 1972 presidential election: they could either lower the voting age to eighteen for all elections, or they would have to

115. *Id.* at 119-24.

116. *Id.* at 124-30.

117. *Id.* at 129 ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.").

118. *Id.* at 130.

119. *Id.* at 248 (Brennan, J., concurring in part and dissenting in part).

120. *Id.* at 295 (Stewart, J., concurring in part and dissenting in part).

121. Some have even speculated that Justice Black expected this outcome. *See* John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1192 (2001).

122. BAYH, *supra* note 74, at 3.

implement a dual voting system with different ages for federal and state elections. Implementing such systems would result in administrative costs for state governments.[123] After corresponding with state officials, Senator Birch Bayh concluded it would cost at least $10 million to $20 million throughout the country.[124] Moreover, roughly half of the states would be unable to change their minimum voting ages before the 1972 election because their voting ages were fixed by state constitutions and the amendment procedures were lengthy.[125] This left a national constitutional amendment as the quickest, easiest path to uniformity.

On top of these cost concerns, the Twenty-Sixth Amendment gained overwhelming support because it was suddenly seen as a fait accompli. There was no longer a chance of the Supreme Court undoing the eighteen-year-old vote, and a cost-based argument had emerged for supporting it. There was thus no longer a strong incentive for politicians to risk the wrath of the soon-to-be-voting youth by opposing their enfranchisement.[126] Even politicians with no formal role in ratification switched positions to favor the Twenty-Sixth Amendment, such as California Governor Ronald Reagan.[127] This should come as no surprise: prior voting rights movements have seen similar cascade effects.[128]

In light of these developments, the Twenty-Sixth Amendment saw little opposition when Senator Jennings Randolph introduced it in January 1971.[129] It was approved by Congress in March, and the last necessary state ratified it in June, making the Twenty-Sixth the most quickly ratified amendment in

123. KEYSSAR, *supra* note 78, at 281.

124. SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, 92D CONG., LOWERING THE VOTING AGE TO 18: A FIFTY-STATE SURVEY OF THE COSTS AND OTHER PROBLEMS OF DUAL-AGE VOTING 3 (Comm. Print 1971). These costs were not evenly distributed. For example, New York City estimated its costs at around $5,000,000 and Connecticut at around $1,300,000, while Indiana estimated its costs at only $170,000 and Arkansas estimated that its costs would be "negligible." *Id.* at 24-26, 29, 39.

125. *Id.* at 22-47 (summarizing a fifty-state survey, including excerpts of letters from state officials). The costs would only necessarily affect those states that could not change their age limits in time.

126. *See* KEYSSAR, *supra* note 78, at 214 (noting that as soon as it seems possible that a suffrage movement will succeed, "the potential political cost of a vote against enfranchisement r[ises] dramatically").

127. BAYH, *supra* note 124, at 24 ("Governor Ronald Reagan, who previously opposed such a move, has now indicated his support as a result of the Court's decision.").

128. *See* AMAR, *supra* note 10, at 424.

129. *See* KEYSSAR, *supra* note 78, at 281.

American history.[130] The Senate, which had failed to pass roughly 150 prior versions of the Amendment, and which had approved Title III with only sixty-seven votes a year earlier, voted for it unanimously.[131] The House, which had seen 183 votes against Title III, saw only 19 against the Twenty-Sixth Amendment.[132] Thirty-eight state legislatures quickly ratified the Amendment, even though only three states had lowered their own voting ages to eighteen by 1971, and dozens of efforts to lower state voting ages had failed in the preceding decades.[133]

C. Three Interpretive Arguments

In order to show that the Twenty-Sixth Amendment should be read broadly, it is necessary to deal with the most plausible contrary interpretation of the foregoing enactment history, which is also the prevailing interpretation of the Twenty-Sixth Amendment.[134] That interpretation focuses on the immediate purposes of the Amendment rather than the Amendment's text or broader political and legal context. It emphasizes that the authors and ratifiers of the Twenty-Sixth Amendment were not directly concerned with combating all forms of age discrimination in voting. They cared principally about two things: enfranchising eighteen- to twenty-one-year-olds and preventing states from having to administer dual voting systems.[135] Thus, the Amendment could be read narrowly as only achieving these two goals, and not broadly as empowering Congress to combat general age discrimination in voting.[136] While it is certainly true that the public discussion of the Twenty-Sixth Amendment in 1971 focused primarily on disenfranchisement and cost, and not on whether the Amendment empowers Congress to fight more subtle forms of

130. *Id.*

131. BAYH, *supra* note 74, at 4, 15.

132. *Id.* at 16; CULTICE, *supra* note 75, at 136-37.

133. CULTICE, *supra* note 75, at 88-91.

134. *See, e.g.*, ACKERMAN, *supra* note 11, at 91 ("All [the Twenty-Sixth Amendment] did was change the voting age from twenty-one to eighteen. Nobody looked upon it as something more.").

135. *See 1970 Hearings*, *supra* note 77; Cheng, *supra* note 76; *infra* Section II.D.

136. David Strauss has even gone so far as to argue that, due to the circumstances of its enactment, the Twenty-Sixth Amendment did not represent a decision by the people to enfranchise those between eighteen and twenty-one, but was merely a cost-saving measure. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1488-89 (2001).

age discrimination in voting,[137] this purposivist objection is misguided. The Twenty-Sixth Amendment can no more be restricted to its immediate purposes than can the Fifteenth Amendment, which was primarily enacted to end the blanket disenfranchisement of African Americans, but which has since been correctly interpreted to let Congress combat all manner of voting discrimination based on race. The narrower immediate goals of the Twenty-Sixth Amendment's enactors cannot override the plain meaning of the Amendment as it was understood by constitutionally literate people in 1971.

This Section will refute the narrow purposivist interpretation by showing that the above historical account of the Twenty-Sixth Amendment's passage, combined with the textual analysis in Part I, provides a compelling case that the Twenty-Sixth Amendment's Enforcement Clause should be read broadly. To do so, it will make three interpretive points. First, when Congress overrode *Oregon v. Mitchell* by passing the Twenty-Sixth Amendment, the Fourteenth Amendment's Enforcement Clause language had been interpreted broadly by both Congress (in passing Title III) and the Court (in *Mitchell* itself). Second, the Twenty-Sixth Amendment's language is even broader than that of Title III. While Title III only prevents the right to vote from being "denied" on account of age, the Twenty-Sixth Amendment prevents it from being "denied *or abridged*." Thus, Congress added the very word—"abridged"—that had given it so much power in section 2 and section 5 of the VRA and in the Fifteenth Amendment, while leaving that same word out of Title III. Third, the story of the Twenty-Sixth Amendment can be closely analogized to that of the Fourteenth: both amendments find their genesis in constitutional debates over statutes (Title III of the VRA in the former case, the Civil Rights Act of 1866 in the latter), and both should be interpreted in light of those debates.

First, the saga recounted in Sections II.A and II.B reveals that the authors of the Twenty-Sixth Amendment had a sophisticated understanding of the words "Congress shall have power to enforce this article by appropriate legislation" in the context of the Fourteenth Amendment. This understanding informed their decision to use the same words in the Twenty-Sixth Amendment. Supporters and opponents of Title III debated extensively over the proper scope of the Fourteenth Amendment's Enforcement Clause in light of *Katzenbach v. Morgan*. This debate was memorialized in the text of Title III itself. It authorized the Attorney General to initiate enforcement suits "[i]n the

137. For example, the major newspapers of the time focused on the dual voting issue and the enfranchisement of the young, not on the extent of Congress's power. *See* R.W. Apple Jr., *The States Ratify Full Vote at 18*, N.Y. TIMES, June 30, 1971, at 1; Noel Epstein, *Vote at 18 Ratified into Law*, WASH. POST, July 1, 1971, at A1; *Vote-at-18 Measure Now in Constitution Thanks to Ohio*, L.A. TIMES, July 1, 1971, at 1.

exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution."[138] The authors of Title III thus seem to have recognized in the very statutory text that, under *Morgan*, the Necessary and Proper Clause set the correct standard for reviewing Section 5 legislation. Yet, other provisions of Title III imply that its authors were unsure of its constitutionality under *Morgan*. The section guaranteeing that a test case would proceed quickly to the Supreme Court, for example, was no vote of confidence.[139]

During the enactment of Title III, then, there were two positions. First was the Kennedy-Cox position ("Position 1"): *Morgan* allowed Congress to define violations of the Equal Protection Clause against *any* group and to have Congress's remedial legislation reviewed under the permissive *McCulloch* test. Second was the Nixon-Yale position ("Position 2"): the holding in *Morgan* applied to congressional identification of equal protection violations only in the context of race, but did not let Congress override state law to protect other disfavored classes, such as the young. Politicians and the academy were thus only fighting over the full scope of *Morgan*. When the Supreme Court's opinion in *Oregon v. Mitchell* came down, however, the Justices fell into three camps.[140] First, the liberal Justices embraced Position 1: Congress could use the Fourteenth Amendment to lower the voting age. Second, Justice Hugo Black's plurality opinion embraced Position 2: he sided with the liberals in support of the holding in *Morgan*, but limited *Morgan*'s holding to the context of racial discrimination. The conservatives on the Court, however, staked out a third position ("Position 3"). They argued that *Morgan* was wrongly decided insofar as it provided Congress with *McCulloch* deference in defining violations of the Equal Protection Clause, and that Section 5 of the Fourteenth Amendment should be construed more narrowly. Position 3 was a stronger position on the Court in 1970 than it was when *Morgan* was decided in 1966, because Justice Fortas and Chief Justice Warren had been replaced by Justice Blackmun and Chief Justice Burger.

Thus, at the time Congress passed the Twenty-Sixth Amendment, there were three distinct interpretations of the Fourteenth Amendment Enforcement Clause on the table. The Twenty-Sixth Amendment could not have been

138. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 303(a)(1), 84 Stat. 314, 318, *invalidated in part by* Oregon v. Mitchell, 400 U.S. 112 (1970).

139. *Id.* sec. 6, § 303(a)(2), 84 Stat. at 318.

140. *See The Supreme Court, 1970 Term—Congressional Power To Enforce the Fourteenth Amendment*, 85 HARV. L. REV. 152, 154 (1971); *supra* notes 107-120 and accompanying text.

understood to embrace Position 3, as that position was not defended by any of the participants in the debate over enacting Title III, and it failed to control the Court's opinion in *Mitchell*. The more difficult question is whether the Twenty-Sixth Amendment embraced Position 1 or Position 2.[141] Position 1 was the preferred interpretation for the enactors of Title III, who overlapped closely with the sponsors of the Twenty-Sixth Amendment. Senators Bayh, Kennedy, Mansfield, and Randolph had all defended and voted for the Position 1 interpretation of the Fourteenth Amendment when it came to Title III, so it may be reasonable to read it also into the Twenty-Sixth Amendment.[142] On the other hand, thanks to Justice Black's opinion in *Mitchell*, Position 2 was the law of the land when the Twenty-Sixth Amendment was adopted. While Justice Black was the only member of the Court who believed Position 2, he was the median vote and could thus dictate the Court's Fourteenth Amendment Enforcement Clause jurisprudence. Perhaps the Court's authoritative statement of the Fourteenth Amendment's meaning should be read into the Twenty-Sixth Amendment, enacted a few months later with the same phrasing. Further, President Nixon had embraced Position 2 when calling for the enactment of a constitutional amendment at the time he signed Title III. Perhaps the President's interpretation of the enforcement clause language carries some weight here, since he correctly predicted that Title III would be held unconstitutional and called for an amendment to achieve the same purpose.[143]

Fortunately, we need not decide between Position 1 and Position 2. Both have the same implication for the Twenty-Sixth Amendment: Congress can prohibit instances of age-based franchise discrimination under the *McCulloch* test. The only difference between Justice Black and the liberals (and between President Nixon and Senator Kennedy) was over the reach of the *Morgan* holding: whether the Fourteenth Amendment Enforcement Clause should be broadly construed only in race cases, or whether it should be so construed for any policy that Congress might define as violating Equal Protection along any dimension of identity. Such a disagreement is impossible in the context of the

141. One intriguing suggestion, that the Twenty-Sixth Amendment increased the scrutiny that the Equal Protection Clause places on age discrimination, is explored in Dorf, *supra* note 37, at 990–95. The present Note develops a historical argument against Professor Dorf's position: the Twenty-Sixth Amendment was enacted in the immediate wake of the Supreme Court's rejection of a congressional attempt to expand the Fourteenth Amendment to cover age discrimination, and the Amendment only overrode that rejection in the narrow realm of voting rights.

142. *See supra* Section II.A.

143. *See* VRA Amendments Signing Statement, *supra* note 102, at 512–13.

Twenty-Sixth Amendment. By its terms, the Amendment *only* applies to age-based franchise discrimination. Congress could not plausibly claim that the Twenty-Sixth Amendment applies to a different form of discrimination, say disability discrimination, and legislate with that understanding. Thus, even the defenders of Position 2, who thought that expansive Fourteenth Amendment remedial powers were limited to the paradigm case of racial discrimination, would recognize the existence of similarly expansive remedial powers over the Twenty-Sixth Amendment's paradigm case of age discrimination.[144]

This argument is bolstered by the fact that there was no similar disagreement in 1971 over the proper interpretation of the Fifteenth Amendment, which was a

144. They might, however, make the subtle, purposivist argument that the Twenty-Sixth Amendment should be read in the same way that Justice Black reads the Fourteenth Amendment, as protecting only the paradigm class (the young for the Twenty-Sixth Amendment, African-Americans for the Fourteenth). This would refute the proposition, defended *supra* Section I.A, that the Twenty-Sixth Amendment is age-neutral. Yet this reading fails, because Justice Black's argument for preferring Position 2 to Position 1 in the Fourteenth Amendment context does not apply to the Twenty-Sixth Amendment. Justice Black articulated his argument as follows:

> [I]t cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

Oregon v. Mitchell, 400 U.S. 112, 127 (1970). Justice Black's logic here was that if Congress could use the Fourteenth Amendment to legislate in areas of traditional state authority to combat any form of discrimination, there would be no limit on what it could do. He therefore restricted Congress to only preventing racial discrimination when it legislates in such areas, thus providing a limiting principle for *Katzenbach v. Morgan*. 384 U.S. 641 (1966). However, this avoidance logic does not apply to the Twenty-Sixth Amendment, which is limited by its terms both to a single category of discrimination (age) and to a single category of rights (voting rights), and thus poses no risk of swallowing the Tenth Amendment whole. Further, both the Fifteenth and Nineteenth Amendments are much closer models for the Twenty-Sixth Amendment: they are both exclusively about voting rights, and they are both explicitly limited to a single category of discrimination (race and gender, respectively). Both have been interpreted to apply equally to their paradigm cases and their non-paradigm cases (the former to all races, the latter to both genders). The Twenty-Sixth Amendment should be similarly understood. *See supra* notes 27-31 and accompanying text (discussing a series of cases, some statutory and some constitutional, in which the Fifteenth and Nineteenth Amendments were applied beyond their paradigm cases). Therefore, while the expansion of the Fourteenth Amendment enforcement power in *Morgan* and *Mitchell* is properly read into the Twenty-Sixth Amendment, the purposivist limitation of that power as applied to the Equal Protection Clause in *Mitchell* is not.

much closer textual model for the Twenty-Sixth.[145] The former only prohibits discrimination on the basis of "race, color, or previous condition of servitude,"[146] just as the latter only prohibits discrimination on the basis of "age."[147] Thus, both lack the ambiguity that Justice Black was able to use in the Fourteenth Amendment context to limit Congress's enforcement powers for some types of discrimination and not others. In *Mitchell* itself, the Court followed *Morgan* and *South Carolina v. Katzenbach* in construing the Fifteenth Amendment to permit Congress to remedy race-based voting discrimination under *McCulloch* review.[148] The Court unanimously held that this power allowed Congress to ban all literacy tests throughout the fifty states.[149] The 1965 version of the VRA had only banned some literacy tests, and the Court in *Mitchell* did not analyze Congress's actual findings to see whether there was sufficient evidence that universalizing this ban would be justified by existing discrimination patterns.[150] This holding was therefore a resounding, unanimous reassertion of the deferential *McCulloch* standard over the Fifteenth Amendment Enforcement Clause, in the very case that partly invalidated Title III. Congress was, of course, keenly aware of the broad prevailing interpretation of the Fifteenth Amendment Enforcement Clause during the debates over lowering the voting age, since Title III was attached to the first renewal of the VRA. Thus, the Twenty-Sixth Amendment, with its nearly identical language, should be read similarly.

145. This does not imply that there was a difference between the prevailing understanding of the Fourteenth Amendment Enforcement Clause and the Fifteenth Amendment Enforcement Clause in 1971. Indeed, the disagreement between Position 1 and Position 2 over the Fourteenth Amendment's scope was inapplicable to the Fifteenth, which by its terms only addressed race. Thus, the conflict over the Fourteenth Amendment's scope was just as inapplicable to the Fifteenth as to the Twenty-Sixth Amendment, and either Position 1 or Position 2 is consistent with the prevailing interpretation of the Fifteenth Amendment. *See supra* note 144. If, however, there were a difference between the Fourteenth and Fifteenth Amendment Enforcement Clauses, such that one were forced to choose between them as a model for the Twenty-Sixth, there is a stronger argument for the Fifteenth since it is a closer textual model and thus a better candidate for an *in pari materia* reading.

146. U.S. CONST. amend. XV, § 1.

147. *Id.* amend. XXVI, § 1.

148. *Mitchell*, 400 U.S. at 128-29 (opinion of Black, J.).

149. *Id.* at 118 ("I believe that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment. Therefore the literacy-test provisions of the Act are upheld.").

150. *Id.* at 131-34.

Second, comparing the language of Title III of the VRA to that of the Twenty-Sixth Amendment reveals that Congress made a conscious choice that the Amendment would provide it with greater power. Title III establishes:

> Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.[151]

The Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[152]

There are two key differences between these texts. First, Title III contains the limiting phrase "in any primary or in any election," which is lacking in the Twenty-Sixth Amendment. This difference supports the proposition that the Twenty-Sixth Amendment protects a broader class of voting rights, including voting in caucuses, constitutional conventions, and juries.[153] Second, Title III lacks the word "abridged"[154]: it only protects people from having their right to vote "denied." This difference reveals a conscious choice by the authors of these texts to extend the Twenty-Sixth Amendment not only to outright denials of the right to vote, but also to more minor abridgements. Several provisions of the VRA itself illustrate how much power the word "abridged" confers on Congress in the context of voting rights. Section 2 and section 5 of the VRA

151. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 302, 84 Stat. 314, 318, *invalidated in part by Mitchell*, 400 U.S. at 112.

152. U.S. CONST. amend. XXVI, § 1. The final language of the Twenty-Sixth Amendment was virtually identical to the language that had originally been proposed by Senator Jennings Randolph in 1942 and that had been re-proposed over one hundred times from then until 1968. *Constitutional Amendment To Reduce Voting Age to Eighteen: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, H.R.*, 78th Cong. 1 (1943) ("Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. The Congress shall have power to enforce this article by appropriate legislation. Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."); BAYH, *supra* note 74, at 4. It is thus likely appropriate to think of Title III as deviating from the Twenty-Sixth Amendment, even though the latter was enacted later, because the prior drafts of the Twenty-Sixth Amendment provided a ready model.

153. This supports the proposition that the right to "vote" in the Twenty-Sixth Amendment incorporates jury service. *See* Amar, *supra* note 26, at 245-46.

154. *See supra* notes 63-65.

both prohibit actions that "deny or abridge" the right to vote, and they both apply to a wide variety of state electoral policies beyond formal voting qualifications: redistricting, adding territory to a political unit, choosing election dates, designing polling places, etc. The Twenty-Sixth Amendment therefore should be viewed as providing much more extensive protection from discrimination than Title III. Although the authors of the Twenty-Sixth Amendment certainly could have resolved the dual voting problem by enacting a narrower provision that would only lower states' official voting ages, the use of the word "abridged" clearly shows that this is not the path they chose.

Third, the story of the Twenty-Sixth Amendment is remarkably similar to that of the Fourteenth Amendment: both were enacted to resolve a debate over the constitutionality of a statute. The history of the Fourteenth Amendment thus provides a powerful analogy for that of the Twenty-Sixth. When the Civil Rights Act of 1866 was passed, its supporters argued that it was constitutional under an expansive view of the Thirteenth Amendment. They contended that the Supreme Court's decisions in *McCulloch v. Maryland*[155] and *Prigg v. Pennsylvania*[156] granting Congress broad enforcement powers, combined with the Thirteenth Amendment's Enforcement Clause, gave Congress the power to expand civil rights legislatively without needing to amend the Constitution.[157] Thus, a constitutional provision that by its text only banned slavery—and gave Congress the power to enforce that ban "by appropriate legislation"—also permitted Congress to enact a law providing that all persons (including African Americans) were born citizens and had the power to "make and enforce contracts, to sue, be parties, and give evidence," and have "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens."[158] The Fourteenth Amendment was ratified two years later, and it contained many of the same provisions as the Civil Rights Act of 1866 (including the Citizenship Clause and Equal Protection Clause), making it effectively a constitutionalization of the prior statute. Further, its authors added to the Fourteenth Amendment the same "Congress shall have power to enforce" language that they used to justify the Civil Rights Act of 1866. They thus ensured that their position in the prior debate over the scope of the Thirteenth Amendment's Enforcement Clause would be etched in the

155. 17 U.S. (4 Wheat.) 316 (1819).

156. 41 U.S. (16 Pet.) 539 (1842).

157. *See* AMAR, *supra* note 10, at 362.

158. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

Constitution by including that same clause in the Fourteenth Amendment.[159] Similarly, when Title III was enacted in 1970, its authors relied on the prevailing judicial interpretation of the Fourteenth Amendment's Enforcement Clause to justify lowering the voting age legislatively. When that strategy proved unsuccessful in the courts, Congress passed a constitutional amendment containing the same language as the Fourteenth Amendment's Enforcement Clause. Read in the context of these debates, the words "Congress shall have power to enforce this article by appropriate legislation" bore a clear connotation of expansive congressional power in both 1868 and 1971. Since that connotation has been read into the Fourteenth Amendment, it should similarly be read into the Twenty-Sixth.

D. The State Ratification Debates

Forty-two states voted to ratify the Twenty-Sixth Amendment in 1971, and the debates within these states provide an important source of information about the Amendment's meaning. Unfortunately there is no available evidence in the legislative history that any of the ratifying bodies in these states debated the meaning of the Twenty-Sixth Amendment's Enforcement Clause, or the question of whether the amendment is age neutral.[160] However, evidence from

159. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. James Wilson) (defending the Civil Rights Act of 1866 with reference to the enforcement power of the Thirteenth Amendment); AMAR, *supra* note 10, at 363.

160. I searched through the available legislative history material from these forty-two states, and while I only had access to an incomplete record due to different archiving practices in different states, none of the materials I found revealed any discussion of these two issues. For three states I obtained full audio recordings of the floor debates. Audio tape: Delaware House of Representatives Floor Debate Considering Senate Concurrent Resolution 13 (Mar. 23, 1971) (on file with author) (obtained from Brady Puffer, Chief Clerk, Delaware House of Representatives); Audio tape: Delaware State Senate Floor Debate of Senate Concurrent Resolution 13 (Mar. 23, 1971) (on file with author) (obtained from Bernard Brady, Secretary, Delaware State Senate); Audio tape: Tennessee State House Extraordinary Session Considering House Joint Resolution 1 (Mar. 23, 1971) (on file with author) (obtained from Tennessee State Archives); Audio tape: Tennessee State Senate Extraordinary Session Considering House Joint Resolution 1 (Mar. 23, 1971) (on file with author) (obtained from Tennessee State Archives); Audio tape: Washington State House Debate Considering Senate Joint Resolution 36 (Mar. 23, 1971) (on file with author) (obtained from Washington State Archives); Audio tape: Washington State Senate Debate Considering Senate Joint Resolution 36 (Mar. 23, 1971) (on file with author) (obtained from Washington State Archives). For twelve of the states, I obtained print material recording some or all of the floor debate, or other material that expressed substantive views on the merits of the Amendment. Arizona: Minutes of the Comm. on Judiciary, Suffrage & Elections (Ariz. 1971) (undated record) (on file with author), *described in* E-mail from Jeremy Herndon, Journal

the ratification debates does undermine the argument made by some commentators that the speed of ratification, the relative lack of opposition, and the cost-based motive stemming from fears of dual registration suggest that states believed the Amendment had a limited reach.[161] The record indicates that many state legislators opposed the Twenty-Sixth Amendment because it was a federalization of election law concerning the voting age, among other reasons, and that many also viewed it as a historically significant shift in favor of greater

Clerk, Ariz. House of Representatives, Ariz. State Library, Archives & Pub. Records, Law & Research Library Div. to author (Dec. 8, 2011, 10:13 AM) (on file with author) (confirming source and year of record). California: ASSEMB. DAILY JOURNAL, 1971 Leg., Reg. Sess., at 1419, 1487-88, 1561, 1651-52, 1772, 1775, 1911, 1956 (Cal. 1971), *available at* http://192.234.213.35/clerkarchive/archive/DailyJournal/1971/Volumes/Volume%201_8.PDF. Connecticut: 14 CONN. GEN. ASSEMB. H.R., H. 109, 1971 PROCEEDINGS, pt. 2 at 532-44, 949-59 (1971); 14 CONN. GEN. ASSEMB. S., S. 77, 1971 PROCEEDINGS, pt. 1 at 338-42, pt. 2 at 583-90 (1971). Hawaii: 1971 H. JOURNAL 393 (Haw. 1971); 1971 S. JOURNAL 309-10 (Haw. 1971). Idaho: Minutes of the H.R. Printing & Legis. Expense Comm., 41st Leg., 1st Sess. 1 (Idaho Jan. 21, 1971) (on file with author). Maine: 105 LEG. REC. 897, 904-08, 1060, 1360-62, 1389 (Me. 1971). Michigan: H. Con. Res. 58, 1971 H.R., Reg. Sess. (Mich. 1971). New Hampshire: JOURNAL OF THE H., 1971 SESS. 822-23 (N.H. 1971), *available at* http://ia700508.us.archive.org/16/items/journalofhouseof19711newh/journalofhouseof19711newh.pdf; JOURNAL OF THE S., 1971 Sess., at 680-82 (N.H. 1971), *available at* http://ia700504.us.archive.org/12/items/journalofsenateo19711newh/journalofsenateo19711newh.pdf. New Jersey: *Public Hearing Before S. Judiciary Comm. on S. Con. Res. No. 2003*, 1971 Leg., Reg. Sess. (N.J. 1971). Ohio: 49 Gongwer News Serv., Inc. Leg. Rep. No. 107, at 6 (Ohio 1971); 49 Gongwer News Serv., Inc. Leg. Rep. No. 125, at 2 (Ohio 1971); 49 Gongwer News Serv., Inc. Leg. Rep. No. 126, at 4 (Ohio 1971). Oregon: Minutes of the S. Elections and Reapportionment Comm., 56th Leg., Reg. Sess. 1-2 & exhibits (Or. June 2, 1971) (on file with author); Minutes of the S. Elections and Reapportionment Comm., 56th Leg., Reg. Sess. 1 (Or. June 1, 1971) (on file with author); Minutes of the S. Elections and Reapportionment Comm., 56th Leg., Reg. Sess. 1-3 (Or. May 31, 1971) (on file with author); Minutes of the S. Elections and Reapportionment Comm., 56th Leg., Reg. Sess. 2 (Or. May 27, 1971) (on file with author); Minutes of the H. State & Fed. Affairs Subcomm., 56th Leg., Reg. Sess. 1 (Or. May 6, 1971) (on file with author); Minutes of the H. State & Fed. Affairs Subcomm., 56th Leg., Reg. Sess. 5 (Or. Apr. 29, 1971) (on file with author); Minutes of the H. State & Fed. Affairs Subcomm., 56th Leg., Reg. Sess. 1-6 (Or. Apr. 21, 1971) (on file with author). Vermont: 1971 JOURNAL OF THE H. 551-52 (Vt. 1971). I also obtained material from Arkansas, Colorado, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, South Carolina, Texas, Wisconsin, and Wyoming, but this material was merely procedural and contained no indications of legislative intent. No material was available from Alabama, Alaska, Illinois, Georgia, Indiana, Maryland, New York, North Carolina, Oklahoma, Rhode Island, Virginia, or West Virginia.

161. *See* ACKERMAN, *supra* note 11, at 91 ("The speed of this response was a tribute to its proponents' success in explaining that they had a very narrow object: the problem was simply to guarantee eighteen-year-olds the vote that Congress had sought to assure by its original statute."); Strauss, *supra* note 136, at 1488-89 (suggesting that cost was the principal motivation for the Twenty-Sixth Amendment, and that its ratifiers did not meaningfully choose to lower the voting age).

rights for the young. Thus, while the records of the ratification debates do not provide affirmative evidence for the thesis of this Note, they do undermine the counterargument that the ratifications were perfunctory and solely cost-driven.

First, there was opposition to the Twenty-Sixth Amendment in many state governments on federalism grounds: states wanted to determine their voting ages through state law, not to have the matter constitutionalized. This resistance suggests that the opponents understood that the Twenty-Sixth Amendment was not just a cost-saving measure, but that it would shift an area of policymaking authority from states to the federal government. For example, Governor Ronald Reagan of California, despite ultimately endorsing the eighteen-year-old vote, argued that the "federal government has imposed on what I think is a state's right, the right to determine its own voting qualifications."[162] Virginia petitioned Congress to repeal Title III of the VRA as an alternative way to avoid dual registration costs, calling the statute an "act of usurpation" not within Congress's authority.[163] Similarly, a legislator in Rhode Island stated that while he supported a lower voting age, he disliked the Amendment because he was "opposed to giving up control over the franchise to the federal government."[164] A legislator in Vermont opposed the Amendment while supporting lowering the voting age through state law, because "the qualifications to vote in state elections should be left to the states and not to the federal government."[165] Much of the displeasure in the state legislatures stemmed from the fact that many states had recently held referenda on lowering the voting age that had failed, and legislators believed it wrong to turn around and pass the eighteen-year-old vote so soon after it had been rejected.[166] In Tennessee, opponents argued that they would violate their own

162. Tom Goff, *Reagan Sees States' Rights Violation in U.S. Teen Vote Act*, L.A. TIMES, Mar. 24, 1971, at 3 ("Gov. Reagan said Congress 'imposed' on states' rights Tuesday by approving an amendment to the U.S. Constitution which would extend the right to vote in all elections to 18-year-olds.").

163. Willard Edwards, *Congress Shuffles 18 Vote to States*, CHI. TRIB., Mar. 20, 1971, at 12.

164. *R.I. Is the 30th State To Ratify Vote at 18*, PROVIDENCE J., May 28, 1971, at 1.

165. 1971 JOURNAL OF THE H. 552 (Vt. 1971) (statement of Rep. Graves).

166. *See, e.g.*, 14 CONN. GEN. ASSEMB. H.R., H. 109, 1971 PROCEEDINGS, pt. 2 at 955-57 (1971) (quoting several Connecticut legislators as stating that they oppose the Twenty-Sixth Amendment because the electorate had voted against lowering the voting age); Audio tape: Washington State Senate Debate Considering Senate Joint Resolution 36 (Mar. 23, 1971) (on file with author) (statement of Sen. John H. Stender) ("Senator [Reuben A.] Knoblauch . . . forgets that this last November the people voted against the nineteen-year-old vote . . . . Apparently you're not concerned that the people aren't interested in allowing [the eighteen-year-old vote]. . . . I don't see any particular honor in being number one when the people have turned down the nineteen-year-old vote."); *26th Amendment: Voting at 18*,

Constitution if they ratified a federal constitutional amendment in the same session it was proposed.[167] Concerns that student voters would wield excessive political power in college towns dominated in states like Illinois, Missouri, Wisconsin, Rhode Island, and Texas.[168] The Twenty-Sixth Amendment was certainly ratified swiftly and overwhelmingly, but, as these debates show, it is wrong to claim that it was seen as a mere cost-saving measure or that it passed without serious consideration or controversy.

Further, the legislators of a significant number of states signaled that they viewed the ratification of the Twenty-Sixth Amendment as a historic event by conducting bizarre races to be either the first or the thirty-eighth vote to ratify the document. The legislatures of Connecticut, Delaware, Minnesota,

L.A. TIMES, July 4, 1971, at B5 ("The amendment drew opposition in the Ohio legislature, where some lawmakers sought to have the measure put to a public vote, largely because the state's voters rejected a measure of two years ago that would have lowered the voting age to 19."); Michael Kilian, *Illinois Senate O.K.'s Extending of Vote to 18 Year Olds*, CHI. TRIB., Apr. 2, 1971, at 7 ("Most of the disagreement, however, centered over the fact that Illinois voters voted, 1,052,924 to 869,816, against an 18-year-old vote in the Dec. 15 referendum on the new State Constitution."); Leonard Larsen, *Senate Approves 18-Year-Olds' Vote*, DENVER POST, Apr. 27, 1971, at 1 ("Plock, urging its defeat, cited the 1970 election when Colorado voters overwhelmingly defeated a proposal for a lower voting age."); Charles F.J. Morse, *Legislature Ratifies 18-Year-Old Vote*, HARTFORD COURANT, Mar. 24, 1971, at 1 (quoting State Senator Lucy T. Hammer as stating, "I don't want to run over people like a bulldozer. I think we are ignoring what the people have told us"). In the three years prior to the adoption of the Twenty-Sixth Amendment, sixteen out of twenty-one state referenda lowering the voting age failed to pass. Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 YALE L.J. 35, 36 (1971).

167. Audio tape: Tennessee State House Extraordinary Session Considering House Joint Resolution 1 (Mar. 23, 1971) (on file with author) (statements of Rep. William Richardson, Jr., and Rep. W.K. Weldon, arguing that ratification would violate the Tennessee Constitution); *see* Tenn. Const. art. II, § 32 ("No Convention or General Assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such Convention or General Assembly shall have been elected after such amendment is submitted.").

168. *See* Kenneth J. Guido, Jr., *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. REV. 32, 40-41 (1972) (discussing attempts in Illinois, Missouri, and Wisconsin to restrict the right of students to vote in their college towns before ratifying the Amendment); *R.I. Is the 30th State To Ratify Vote at 18*, *supra* note 164, at 1 ("Before giving final passage to the proposal by a 73-to-2 vote, the Rhode Island House engaged in a prolonged discussion of the residency requirements for prospective new young voters and their readiness to exercise the franchise responsibly."); Art Wiese, *Legislature OKs 18-Year-Old Vote*, HOUS. POST, Apr. 28, 1971, at 1 ("But the House adopted 91-55 an amendment by Rep[.] Harold Davis of Austin to force college students under the age of 21 who receive the majority of their financial support from their parents to vote in the parents' hometowns.").

Tennessee, and Washington all raced to be the first to ratify.[169] Minnesota ultimately won the contest by actually ratifying the Twenty-Sixth Amendment twenty-one minutes before the U.S. House of Representatives had finished passing it, which prompted a Delaware newspaper to write, "Such are the rewards of perfidy that the history books will almost certainly record, if they record it at all, that Minnesota was the first to ratify the 26th Amendment."[170] The contest to be the thirty-eighth and final vote was even more exciting. This time the race was between Ohio, North Carolina, Oklahoma, and Alabama. Alabama's legislature ratified the Amendment first, but withheld the signature of Governor George Wallace so as to fool the other legislatures into acting before Alabama's ratification was official.[171] North Carolina acted next (37th, assuming Alabama had already voted), wisely deciding that it was better to be vote 37 than to risk being vote 39 and not mattering.[172] Next came Ohio:

> An atmosphere of near-panic attended Ohio's climactic vote. . . .
>
> . . . [A]fter only three short speeches, the Republican floor leader, Robert E. Leavitt, interrupted to warn:

169. *See* Audio tape: Delaware State Senate Floor Debate of Senate Concurrent Resolution 13 (Mar. 23, 1971) (on file with author) (statement of Sen. Meg Manning) ("There are, however, at least four other states to my knowledge, and probably more, that are doing exactly what I hope we will do this afternoon, and racing to be the first state to ratify this constitutional amendment."); Audio tape: Tennessee State House Extraordinary Session Considering House Joint Resolution 1 (Mar. 23, 1971) (on file with author) (statement of Rep. Victor Ashe) ("I think we all know the reasons that we are here. This resolution will speed the process and perhaps place Tennessee first in the nation, certainly the first in the Southeast, in leading the way towards extending the franchise to eighteen-year-olds in state and local elections."); Audio tape: Tennessee State Senate Extraordinary Session Considering House Joint Resolution 1 (Mar. 23, 1971) (on file with author) ("If the Tennessee General Assembly passes this today, this is what the wire services report right now, that . . . we will at least have the honor of being first in the nation on something instead of being last . . . ."); Audio tape: Washington State Senate Debate Regarding Senate Joint Resolution 36, *supra* note 160 (statement of Sen. Francis Holman) (stating his hope that they will be "enjoying that high honor" of being the first to ratify); Arnold B. Sawislak, *18-Year-Old Vote Proposal Is Cleared by Congress; Five States Ratify Fast; 38 Are Needed; Minnesota, Delaware Set Pace After House OK's Amendment 400-19*, COM. APPEAL (Memphis), Mar. 24, 1971, at 1.

170. *Did Minn. Jump Gun? State Cries 'Foul' in Ratifying Race*, EVENING J. (Wilmington, Del.), Mar. 24, 1971, at 1.

171. Kate Harris & Ralph Holmes, *18-Year-Old Vote OK Also Has Honor Debate*, BIRMINGHAM NEWS, July 1, 1971, at 1.

172. *18-Year-Old Vote Now Law; N.C., Ohio Ratify Amendment*, CHARLOTTE OBSERVER, July 1, 1971, at 1 ("'This is a historic day for North Carolina,' [State Senator] Alley said after the bill was approved. 'We had to get this bill through today. If we had waited, we would have probably been the 39th state and it wouldn't have made any difference.'").

> "I've just been informed that the legislature of Oklahoma has gone into special session tonight. The time for debate and discussion is over. The time for action is here."[173]

As it turned out, Ohio had no cause to worry, because "[t]he Oklahoma Legislature was not scheduled to go into session until [the next day]."[174] Then Governor Wallace struck, signing Alabama's ratification measure late at night after Ohio had already acted, so that his state would cast the crucial deciding vote. Unfortunately for Governor Wallace, Article V provides no role for state governors in the ratification of constitutional amendments; the federal government sided with Ohio's claim to be the final vote.[175] Plainly, these are not the actions of state politicians simply looking to solve a cost problem. This odd display confirms that the state legislators believed that, whatever else it was, the Twenty-Sixth Amendment was a historically significant enactment, one that would bring prestige to their states if they could play a key role in its ratification.

E. External Evidence: The College Town Question and the Equal Rights Amendment

Two final sources of evidence from the period during and shortly after the enactment of the Twenty-Sixth Amendment confirm that it conferred broad powers upon Congress: the controversy over college student registration that arose shortly after the ratification of the Twenty-Sixth Amendment, and the debate over the meaning of the Enforcement Clause of the Equal Rights Amendment (ERA).

First, immediately upon ratification of the Twenty-Sixth Amendment, a number of localities began taking measures to ensure that students would not take over college towns' governments.[176] Several states, including New York, Indiana, and Texas, tightened residency requirements in order to diminish the

173. Apple, *supra* note 137.

174. *Id.*

175. Harris & Holmes, *supra* note 171, at 1.

176. The election in Berkeley, California in which students nearly took control of the city council even before the passage of the Twenty-Sixth Amendment helped stoke these fears. Willard Edwards, *18-Year-Old Vote Raises Questions*, CHI. TRIB., Apr. 17, 1971, at 8 ("The recent election results in Berkeley, Cal., where a radical coalition of students and blacks won near-control of the City Council, have stimulated fears in other college towns where students could, theoretically, take control.").

political power of students.[177] Some state attorneys general issued rulings on where college students could vote, whether at their parents' homes or at their colleges.[178] The Attorney General of Massachusetts, Robert H. Quinn, concluded that "[t]o restrict the 18-year-old's right to choose his residence for voting purposes, a right possessed by voters over 21 years of age, would be to 'abridge' his right to vote 'on account of age' in contravention of the 26th Amendment."[179] The attorneys general of eight other states agreed with Mr. Quinn, while the attorneys general of California and Kentucky took more narrow views and advised permitting restrictions on student voting.[180] Additionally, in response to this controversy over college student voting, U.S. Senator Alan Cranston introduced legislation to amend the VRA to guarantee college students the right to register wherever they please for federal elections.[181] Cranston's bill invoked the Fourteenth and Twenty-Sixth Amendments as a constitutional basis for legislating, finding that the imposition of residence requirements for student voting "denies or abridges the right to vote granted by the twenty-sixth Amendment," and concluding that

177. Samuel Lubell, *18-Year-Olds: A Lot Hinges on Where They Vote*, N.Y. TIMES, July 25, 1971, at E4.

178. *See, e.g.*, Tom Goff, *Rule on Registering of Young Voters Hit as Political Move*, L.A. TIMES, June 4, 1971, at 3.

179. Bill Kovach, *Residence Choice Held Voter Right: Attorney General in Boston Rules Youths May Select Site Where They Vote*, N.Y. TIMES, July 22, 1971, at L21 (quoting Massachusetts Attorney General Quinn's opinion, which ruled that voters under 21 have a right to choose their place of residence for voting purposes).

180. *See* Bright v. Baesler, 336 F. Supp. 527, 531 n.2 (E.D. Ky. 1971) ("In California the Attorney General had recommended and the State had adopted a conclusive presumption that for voting purposes the residence of an unmarried minor (whether student or not) would normally be his parents' home regardless of where the minor's present or intended future habitation might be. In Kentucky the Attorney General has recommended that the State presume that students (without reference to their age) are not domiciliaries of the university in which they have matriculated."); Gorenberg v. Onondaga Cnty. Bd. of Elections, 328 N.Y.S.2d 198, 207 n.2 (N.Y. App. Div. 1972) (Cardamone, J., dissenting) ("The attorneys general of the following states have also taken the constitutional position presented in this dissenting opinion [that requiring students to register at their parents' residences is unconstitutional]: Florida (Opinion No. 371-202, August 3, 1971); Georgia (August 20, 1971); Illinois (File No. S-335, September 29, 1971); Kansas (October 13, 1971); Louisiana (August 2, 1971); Massachusetts (Opinion 71/72-3, July 21, 1971); Nevada (Opinion No. 48, October 20, 1971); Oregon (Opinion No. 6870, October 20, 1971); Pennsylvania (September 9, 1971)."); Goff, *supra* note 178, at 3 (noting criticism of "a ruling by Republican Atty. Gen. Evelle J. Younger which would require 18- to 20-year-old voters to register at their parents' addresses").

181. Thomas J. Foley, *Student Voting Asked in Campus Precincts: Cranston Proposes Invalidation of Laws That Require Balloting at Parents' Polls*, L.A. TIMES, July 9, 1971, at 5.

"Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution . . . it is necessary to abolish any residency requirement which would preclude students attending institutions of higher education to register and vote at the campus where they are in attendance."[182] By listing a violation of the Twenty-Sixth Amendment alongside several violations of the Fourteenth and then invoking the congressional enforcement power, Senator Cranston—who was in the Congress that passed the Twenty-Sixth Amendment[183]—revealed his belief that the Twenty-Sixth Amendment empowers Congress to enact legislation combating abridgements of the right to vote. Senator Cranston's bill was never enacted, but its mere proposal provides compelling evidence that Section 2 of the Twenty-Sixth Amendment was understood to confer broad enforcement powers on Congress.

Working through the nonpartisan organization Common Cause, college students also brought a number of voting lawsuits in the early 1970s to enforce

182. A Bill To Amend the Voting Rights Act of 1965 To Provide for the Registration of Students at the Institutions of Higher Education Where They Are in Attendance, S. 2240, 92d Cong., § 206 (1971). The relevant text of the bill is as follows:

> (a) The Congress hereby finds that the imposition and application of certain residency requirements as a precondition to voting for the office of President and Vice President and United States Senators and Representatives, and the lack of sufficient opportunities for absentee registration and absentee balloting in elections where federal officials are chosen—
>
> > (1) denies or abridges the right to vote granted by the twenty-sixth amendment;
> > (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;
> > (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;
> > (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;
> > (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and
> > (6) does not bear a reasonable relationship to any compelling State interest in the conduct of elections where federal officials are chosen.
>
> (b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary to abolish any residency requirement which would preclude students attending institutions of higher education to register and vote at the campus where they are in attendance.

Id. § 206(a)-(b).

183. *See* 117 CONG. REC. 5830 (1971).

the protections of the Twenty-Sixth Amendment against attempts to disenfranchise them through residency requirements and other restrictions.[184] Not all such lawsuits were successful,[185] but those that were reveal that Section 1 of the Amendment was understood by contemporaries to achieve more than just lowering the voting age. For example, in *Ownby v. Dies*,[186] a federal district court in Texas declared that a statute that determined residency differently for voters under age twenty-one violated the Twenty-Sixth Amendment. In *Walgren v. Howes*,[187] a group of college students in Massachusetts argued that holding a local election during winter break had the effect of abridging their right to vote on the basis of age. In a subsequent opinion in the same case, the First Circuit held for the defendants but in doing so noted:

> [W]e are still without the assistance of any precedents guiding us in evaluating the impact of the Twenty-sixth Amendment. It is difficult to believe that it contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were

184. *See* Foley, *supra* note 181. Such lawsuits were not solely brought under the Twenty-Sixth Amendment. The Fifth Circuit Court of Appeals struck down a statute requiring students to declare their intention to remain in the place they live after graduation before registering to vote, but it did so on Fourteenth Amendment grounds. Whatley v. Clark, 482 F.2d 1230, 1233-34 (5th Cir. 1973). The Supreme Court of Michigan made a similar ruling on Fourteenth Amendment and state constitutional grounds, striking down a law that prevented students from becoming electors. Wilkins v. Bentley, 189 N.W.2d 423, 426-27 (Mich. 1971).

185. *See, e.g.*, Ramey v. Rockefeller, 348 F. Supp. 780, 790-91 n.7 (E.D.N.Y. 1972) ("[T]hese students were denied registration because their residency was in doubt and not because of their age. And there is no evidence that Congress and the states, in the enfranchisement of eighteen-year-olds, intended to modify the states' common law rules of residence."); *Bright*, 336 F. Supp. at 531-32 (rejecting a Twenty-Sixth Amendment challenge to a presumption that students are not domiciliaries at the universities where they have matriculated, on the grounds that there was "little or no persuasive evidence that the presumption against student domicil at the university community was contrived to disenfranchise the young"); Palla v. Suffolk Cnty. Bd. of Elections, 286 N.E.2d 247, 251 (N.Y. 1972) ("Examined in the context of the arguments advanced, the statutory scheme does not run afoul of recited constitutional strictures [including the Twenty-Sixth Amendment], but represents, at most, merely a permissible effort to insure that all applicants for the vote actually fulfill the traditional requirements of bona fide residence."). It is important to note that these decisions only establish that the Amendment did not prohibit the particular residence restrictions on student voting that were at issue. They do not show that the judges in these cases believed the Twenty-Sixth Amendment solely lowered the voting age.

186. 337 F. Supp. 38 (E.D. Tex. 1971).

187. 482 F.2d 95 (1st Cir. 1973), *remanded sub nom.* Walgren v. Bd. of Selectmen, 373 F. Supp. 624 (D. Mass. 1974), *aff'd*, 519 F.2d 1364 (1st Cir. 1975).

> found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment.[188]

The court thus reasoned (though it did not hold) that the Twenty-Sixth Amendment prevents state governments from burdening students' right to vote in ways that fall short of simple age requirements for voting. The Supreme Court eventually took the same position in its only Twenty-Sixth Amendment case (a summary affirmation of a decision by the Southern District of Texas). In *Symm v. United States*, the Court affirmed that requiring students to fill out a questionnaire stating that they will remain in the community after graduation before the students can register to vote violates the Twenty-Sixth Amendment.[189]

The most expansive Twenty-Sixth Amendment holdings in the early 1970s related to students' rights came at the state level. In the 1972 case *Worden v. Mercer County Board of Elections*,[190] the New Jersey Supreme Court held that the Twenty-Sixth Amendment conferred a right on college students to register and vote in their college communities, as well as a right not to be subjected to extra questions based on their status as students. It couched this conclusion in a sweeping statement about the Twenty-Sixth Amendment's purpose:

> On May 4, 1971 New Jersey approved the twenty-sixth amendment and it did so with full awareness of its history and its implications. Political activism on college campuses had become commonplace, youthful independence had become even more commonplace, and the ancient

188. *Walgren*, 519 F.2d at 1367 (footnote omitted). Here the First Circuit disagreed with the district court opinion it affirmed, which stated:

> Furthermore, we view the protection afforded students under the Twenty-sixth Amendment as fundamentally different than the protection afforded under the Thirteenth, Fourteenth and Fifteenth Amendments. . . . Regardless of how sympathetic one is to the extension of the vote to young people, the nature of the decision involved is simply not of the same kind. Moreover the extension of the ballot to young people does not have a historical background such as slavery, nor does it rectify a wrong which was as inconsistent with our constitutional scheme as the total denial of the vote of an otherwise qualified citizen on account of his race or poverty. For these reasons we have difficulty in conceiving that a burden on the exercise of the ballot would be invalid under the Twenty-sixth Amendment when it would not be similarly invalid under the Fourteenth.

Walgren, 373 F. Supp. at 633-34 (citation omitted).

189. Symm v. United States, 439 U.S. 1105 (1979) (mem.), *summarily aff'g* United States v. Texas, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge court).

190. 294 A.2d 233, 245 (N.J. 1972).

> concept of college as simply the interlude till the customary return home had become no longer viable. The goal was not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions.[191]

The court thus forcefully stated that the Twenty-Sixth Amendment removed minor barriers to the franchise as well as major ones, and that the Amendment had the broad purpose of bringing young voters into the political system. Similarly, the California Supreme Court embraced an expansive reading of the Twenty-Sixth Amendment in 1971 while deciding a challenge brought by college students against a law forcing them to vote at their parents' residences.[192] The court held: "The Twenty-Sixth Amendment, like the Twenty-Fourth, Nineteenth, and Fifteenth before it, 'nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted.'"[193] These cases do not directly contemplate Congress's role in enforcing the Twenty-Sixth Amendment because these courts were not reviewing acts of Congress. They do, however, confirm that the Amendment achieved much more than merely lowering the voting age to eighteen.

Second, in the contemporaneous debate over the ERA, members of Congress carefully considered several variants of a potential enforcement clause, and in doing so signaled a clear understanding that the phrase "Congress shall have power to enforce" conferred extensive powers. In an early draft of the ERA, its Enforcement Clause read as follows: "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."[194] On August 31, 1970, Dean Louis Pollak of Yale Law School wrote a letter to Senator Birch Bayh arguing that this language was poorly chosen. Dean Pollak stated the following:

> [T]he federal courts might read this provision as requiring the same degree of judicial deference to state statutes purporting to implement

191. *Id.* at 243.

192. Jolicoeur v. Mihaly, 488 P.2d 1 (Cal. 1971).

193. *Id.* at 4 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

194. The proposed version of the ERA is quoted in a letter from Dean Louis Pollak of Yale Law School. *See* Letter from Louis H. Pollak, Dean, Yale Law School, to Sen. Birch Bayh (Aug. 31, 1970).

> the amendment as would normally be given to federal statutes implementing the amendment: this could mean that the parochial (and, as might often be the case, mutually inconsistent) statutes of state legislatures would assume an unprecedented degree of apparent dignity and consequent unreviewability merely because they were denominated implementations of this amendment.[195]

Dean Pollak suggested that the sentence be amended to read "Congress shall have power to enforce this article by appropriate legislation,"[196] the same language that was used in the Twenty-Sixth Amendment. Senator Bayh, the recipient of this letter, was a key sponsor of both Title III and the Twenty-Sixth Amendment, and he received this letter between the passage of the former and the passage of the latter. Further, the letter was entered into the record during the Senate Judiciary Committee's hearings on the ERA.[197] Thus, Dean Pollak's argument likely informed Congress's understanding of not only the ERA's Enforcement Clause, but also the Twenty-Sixth Amendment's Enforcement Clause. Professor Paul Freund made similar objections in a congressional hearing, noting that:

> Congress can exercise its enforcement power under the 14th amendment to identify and displace State laws that in its judgment work an unreasonable discrimination based on sex. This would be done on the analogy of the 18-year-old voting legislation.
>
> In this connection let me point out a serious deficiency in the proposed amendment. Its enforcement clause gives legislative authority to Congress and the States "within their respective jurisdictions." This is a more restrictive authorization to Congress than is to be found in any other amendment, including the 14th. If the new amendment is deemed to supersede the 14th concerning equal rights with respect to sex, Congress will be left with less power than it now possesses to make the guarantee effective.[198]

Professor Freund thus noted a parallel between what the ERA would empower Congress to do and the contemporaneously passed voting age legislation (Title

195. *Id.*

196. *Id.*

197. Senator Marlow Cook inserted the letter into the record. *See Equal Rights 1970: Hearings Before the S. Comm. on the Judiciary on S.J. Res. 61 and S.J. Res. 231 Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women*, 91st Cong. 207-08 (1970).

198. *Id.* at 80 (statement of Paul Freund, Professor, Harvard University).

III), which was enacted under the Fourteenth Amendment. He also showed that by including a state enforcement clause in the proposed ERA its authors were actually diminishing congressional power to enforce equality.

Congress was ultimately persuaded by the objections of Pollak and Freund, and the authors of the ERA changed its language to reflect their recommendations. As one witness before Congress noted, "We understand the reasons for the deletions . . . are based on the concern expressed last year by Prof. Paul Freund of Harvard Law School and Dean Louis H. Pollak of Yale University Law School."[199] Congressman Abner Mikva, an author and key supporter of the ERA, drew a direct comparison to other constitutional provisions:

> [T]he reason for the proposal that I put in H.J. Res. 429, which does limit it to Congress, is that it is in the pattern of the 13th, 14th, and 15th amendments. . . . I wanted to have the breadth of the 13th, 14th, and 15th amendments in making it clear that Congress has a supreme power to enforce this proposal and that no State's claim to power can in any way allow them to do something inconsistent with the Federal power. . . .
>
> In fact, when Congress did act we wanted to make it clear that all the States' equivocations on the subject would not stand against the Federal power.[200]

Thus, the authors of the ERA consciously rewrote its Enforcement Clause to confer upon Congress the broad enforcement discretion that Congress was recognized to hold under the Reconstruction Amendments. And they were not the only ones to notice the expansive power conferred by the ERA's Enforcement Clause: as one professor testifying before Congress noted, "an Equal Rights Amendment would be more important for its enabling clause than for its direct substantive effect."[201] Based on this evidence, surely the textually identical Enforcement Clause of the Twenty-Sixth Amendment, which was passed almost simultaneously with these congressional debates over the ERA, reflects a parallel judgment about the degree of power Congress should wield.

199. *Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the H. Comm. on the Judiciary on H.J. Res. 35, 208, and Related Bills Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women and H.R. 916 and Related Bills Concerning the Recommendations of the Presidential Task Force on Women's Rights and Responsibilities*, 92d Cong. 143 (1971) (statement of Lucille H. Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc.).

200. *Id.* at 91-92 (statement of Rep. Abner J. Mikva).

201. *Id.* at 584 (statement of Professor Phillip Kurland).

III. SEVERAL APPLICATIONS OF A BROAD TWENTY-SIXTH AMENDMENT

The first two Parts established that the Enforcement Clause of the Twenty-Sixth Amendment should be read broadly, as empowering Congress to override any state law or policy that (a) intentionally burdens the right to vote on account of age or (b) has the effect of disproportionately burdening the voting rights of a certain age group. Under this interpretation, Congress can override a significant number of state policies, many of which are explored here in Part III. In analyzing the Twenty-Sixth Amendment's reach, it is crucial to distinguish between policies that the Amendment prohibits of its own force and policies that it merely empowers Congress to prohibit. Both the Fourteenth and the Fifteenth Amendments are interpreted to reach only intentional discrimination, and there is no reason to think that the Twenty-Sixth Amendment should be interpreted any differently.[202] However, like the other amendments, the Twenty-Sixth Amendment can be used by Congress to prohibit conduct that has a discriminatory effect even absent a discriminatory purpose.[203]

A. Overriding State ID Requirements

Congress has the power, under a revitalized Twenty-Sixth Amendment, to override stringent voter registration requirements that discriminate on the basis of age,[204] such as the ID rules that some states impose on voters. It can do

202. *See* Mobile v. Bolden, 446 U.S. 55, 62 (1980), *superseded by statute in part*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134. ("Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

203. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 158 (1980) ("Here, the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the Fifteenth Amendment's purposes, even if it is assumed that § 1 prohibits only intentional discrimination in voting.").

204. *Cf.* Amar, *supra* note 26, at 256 ("In any event, the appropriate question to ask with respect to any de facto or systematic exclusion of young jurors is whether such systematic exclusion would be tolerated with respect to voting; *intent should be treated similarly for voting and jury exclusion*. For this reason, we must ask ourselves whether the Government could, consistent with the Twenty-Sixth Amendment, hold brief voting registration periods only once every four years in the name of administrative convenience. The answer is clearly no. The infrequent (every four years) refilling of jury wheels ought to be equally suspect.").

so on the grounds that these rules discriminate against both the elderly and the young, two groups that disproportionately lack identification. State laws make it more difficult for the elderly to get drivers' licenses, and the elderly are less likely to have the physical and mental capacity to otherwise obtain valid IDs.[205] For example, a 2006 survey found that Indiana's voter ID law, which requires voters to show a valid government-issued photo ID before casting a ballot, would disenfranchise as many as 18% of Americans over the age of sixty-five if it were applied throughout the country,[206] and there is evidence that this law has disproportionately burdened elderly Indiana citizens.[207] College students are also significantly less likely to have valid IDs: 19% of people aged eighteen to thirty have no government identification that reflects their current address, according to a 2008 poll.[208] Such laws therefore discriminate against one of the paradigmatic categories of voters that the Twenty-Sixth Amendment was enacted to enfranchise.

In *Crawford v. Marion County Election Board*,[209] the Supreme Court heard a Fourteenth Amendment challenge to the aforementioned Indiana law. The Court determined that there was no constitutional violation, on the grounds that a state's neutral interest in preventing fraud is sufficiently strong to justify the policy despite its disproportionate impact on the voting rights of some citizens.[210] Similar legal challenges to ID requirements have been brought in Missouri,[211] Georgia,[212] Arizona,[213] and Michigan,[214] and all of these have

205. Brief Amici Curiae AARP and National Senior Citizens Law Center in Support of Petitioner at 8-12, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (No. 07-21).

206. *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUST. 3 (2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf (reporting on the results of a telephone survey conducted by the independent Opinion Research Group showing that as many as 18% of Americans over the age of sixty-five lack a photo ID).

207. *See Older Voters: Opportunities and Challenges in the 2008 Elections: Hearing Before the S. Special Comm. on Aging*, 110th Cong. 67 (2008) (statement of Wendy R. Weiser, Deputy Director, Brennan Center for Justice) (noting a report by the *New York Times* that showed at least two of the rejected provisional ballots in Indiana were from elderly citizens who had voted in the past); Brief of the League of Women Voters of Indiana, Inc., The League of Women Voters of Indianapolis, Inc. and the League of Women Voters of the United States as Amici Curiae Supporting Petitioners at 9-12, 15-17, *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25) (describing the difficulties several elderly Indiana citizens had with voting because of the ID law).

208. Laura Fitzpatrick, *College Students Still Face Voting Stumbling Blocks*, TIME, Oct. 14, 2008, http://www.time.com/time/nation/article/0,8599,1849906,00.html.

209. 553 U.S. 181.

210. *Id.* at 204.

211. Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).

proven unavailing. Ackerman and Nou have argued that the Twenty-Fourth Amendment is the best answer to onerous ID laws: the requirements they impose should be considered unconstitutional poll taxes.[215] The Twenty-Sixth Amendment provides another strategy. If Congress wishes to protect the rights of students and elderly voters, it can require states to loosen their ID requirements because they discriminate on the basis of age. Congress has already taken major legislative steps to ensure that states maintain minimum ID requirements for federal elections in order to prevent voting fraud.[216] It could just as easily play the reverse role: ensuring that states do not enact ID laws that are too stringent. Pursuant to the Twenty-Sixth Amendment, it could delve further into election ID policy by restraining states from imposing requirements that disproportionately disenfranchise certain age groups in both federal and state elections.

B. Protecting the Voting Rights of Overseas Military Personnel

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which requires that states preserve the right to vote in federal elections for soldiers and other citizens living overseas, provide absentee ballots for that purpose, and accept a standardized Federal Write-In Absentee Ballot from those voters.[217] Further, the Military and Overseas Voter Empowerment (MOVE) Act of 2009 requires states to make absentee ballots for federal elections available online for overseas soldiers and to provide a forty-five-day window for paper ballots to be mailed out and sent back.[218] While state compliance with these statutes has been mixed, they are essential to ensuring the franchise rights of overseas soldiers.[219] Unfortunately, these laws only apply to federal elections; there is no similar requirement that states

212. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

213. Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007).

214. *In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 721 N.W.2d 799 (Mich. 2006).

215. Ackerman & Nou, *supra* note 54, at 138-44.

216. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1710-14 (codified as amended at 42 U.S.C. § 15401 (2006)).

217. Pub. L. No. 99-410, 100 Stat. 924 (1986).

218. Pub. L. No. 111-84, §§ 578-79, 123 Stat. 2190, 2321-22 (2009).

219. *See* M. Eric Eversole & Hans A. von Spakovsky, *A President's Opportunity: Making Military Voters a Priority*, HERITAGE FOUND. (Legal Memorandum No. 71, 2011), http://thf_media.s3.amazonaws.com/2011/pdf/lm_0071.pdf (discussing the importance of UOCAVA and the MOVE Act, as well as gaps in state compliance during the 2010 elections).

protect the rights of service members to vote in state and local elections. The Uniform Law Commission has drafted model state legislation based on these federal statutes, titled the Uniform Military and Overseas Voter Act (UMOVA), designed to extend the same protections to voters in state elections.[220] To date, only six states have enacted UMOVA.[221]

Congress can remedy this disparity by using the Twenty-Sixth Amendment to extend UOCAVA and the MOVE Act to cover state and local elections under the theory that abridging the franchise rights of overseas soldiers is a form of age-based voting discrimination. It could do so by directly applying existing federal protections of soldiers' voting rights to state elections, or by giving states the option to enact their own statutes protecting soldiers' voting rights if they wish to avoid federal preemption.[222] Active-duty military personnel are substantially younger than the population at large: 41% of active-duty military are twenty-four years old or younger, as compared with only 14% of the general population, and 76% are thirty-four years old or younger, as compared with only 28% of the general population.[223] Further, using the Twenty-Sixth Amendment to protect the voting rights of soldiers is particularly appropriate given that one of the central purposes of the Amendment was to halt the disenfranchisement of young Americans fighting overseas in Vietnam.[224] The voting rate of soldiers is astonishingly low: around 5% voted in the 2010

220. UNIFORM MILITARY AND OVERSEAS VOTERS ACT (2010), http://www.law.upenn.edu/bll/archives/ulc/msocava/2010final.pdf; *see also* Press Release, Pew Ctr. on the States, Pew Commends Uniform Law Commission for Military and Overseas Voters Act 1 (July 16, 2010), *available at* http://www.pewcenteronthestates.org/news_room_detail.aspx?id=60028 (describing UMOVA's provisions as "mandating that absentee ballots for all elections be sent at least 45 days before an election; requiring electronic transmission of voting materials, including blank absentee ballots for all elections, upon request; eliminating the requirement for notarization of military and overseas ballots; and expanding acceptance of the Federal Write In Absentee Ballot . . . for all elections").

221. *See Legislative Enactment Status, Military and Overseas Voter Act*, UNIF. LAW COMM'N, http://www.nccusl.org/LegislativeMap.aspx?title=Military%20and%20Overseas%20Voters%20Act (last visited Nov. 14, 2011) (indicating enactment by Colorado, North Carolina, North Dakota, Nevada, Oklahoma, and Utah).

222. *Cf.* Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 11 J. AM. ACAD. MATRIMONIAL L.. 33, 43-48 (2011) (discussing how the federal government can use conditional spending to induce states to implement relatively uniform laws, with some variation, through "cooperative federalism"). The proposed strategy for protecting soldiers' voting rights in state elections would instead use conditional preemption as a tool of cooperative federalism.

223. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-952, MILITARY PERSONNEL: REPORTING ADDITIONAL SERVICEMEMBER DEMOGRAPHICS COULD ENHANCE CONGRESSIONAL OVERSIGHT 48 (2005), *available at* http://www.gao.gov/assets/250/247843.pdf.

224. *See supra* notes 77-80.

election.[225] Congress should legislate under the Twenty-Sixth Amendment to remove the obstacles to soldiers' franchise rights.

C. Protecting the Voting Rights of College Students

The Twenty-Sixth Amendment has been closely tied to the goal of student enfranchisement since its enactment.[226] As the First Circuit has noted:

> [T]he backers of the amendment argued that . . . the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote. . . . [W]hile the Twenty-Sixth Amendment speaks only to age discrimination, it has . . . particular relevance for the college youth who comprise approximately 50 per cent of all who were enfranchised by this amendment.[227]

During the ratification debates, significant blocs in the legislatures of several states, including Illinois, Missouri, Rhode Island, Texas, and Wisconsin, expressed concern that the Amendment would allow students to take over college towns.[228] Despite the Amendment's promise, state residency requirements to this day prevent many college students from effectively exercising their right to vote.[229] There are some important protections in place: the Supreme Court has struck down durational residency requirements lasting longer than a few months,[230] and it has affirmed that a county cannot deny the

225. *See* Eversole & von Spakovsky, *supra* note 219, at 7.

226. 117 CONG. REC. 5817, 5825 (1971) (statements of Sens. Charles Percy and Edward Brooke).

227. Walgren v. Howes, 482 F.2d 95, 100-01 (1st Cir. 1973) (footnote omitted).

228. Kenneth Guido observes:

> In Wisconsin, for example, ratification of the twenty-sixth amendment was delayed by efforts in the state senate to simultaneously enact a toughened student residence bill. The proponents of the amendment, however, forcefully advocated its ratification without the enactment of a student residence law and eventually prevailed. In Illinois, a similar attempt to attach a student residence bill to the twenty-sixth amendment was also unsuccessful, and in Missouri, the legislature delayed action for some time before ratifying the amendment over the objections of those who feared that students would take over their college towns.

Guido, *supra* note 168 (citations omitted); *see also supra* note 168 and accompanying text.

229. *See* Romeu v. Cohen, 265 F.3d 118, 126 (2d Cir. 2001) (upholding New York's residency requirement for voting); Fitzpatrick, *supra* note 208.

230. Dunn v. Blumstein, 405 U.S. 330, 345-49 (1972).

vote to college students for failing to sign a pledge to remain in the community.[231] Yet, several states still require that voters, to establish residency, demonstrate that they intend to remain in the area for an indefinite period of time and do not treat living as a college student as sufficient evidence of such intent.[232] New York's residency law is among the most restrictive, providing that for the "purpose of registering and voting, no person shall be deemed to have gained or lost a residence . . . while a student of any institution of learning,"[233] and many other states prevent students from voting through domicile laws or burdensome administrative rules.[234] Further, many states require first-time voters to vote in person,[235] which removes voting in one's home community as an option for students who have moved to a new state for college.

The Twenty-Sixth Amendment presents a solution to this problem. Congress could, invoking its power to prevent abridgement of the right to vote on the basis of age, force states to alleviate their residency requirements for those enrolled in college (indeed, Senator Alan Cranston tried to do exactly that through a bill introduced shortly after the Amendment's passage).[236] Congress presently imposes two restrictions on states' use of residency to deny the right to vote: Title II of the 1970 VRA amendments bans the use of durational residency requirements to prevent citizens from voting in presidential and vice presidential elections,[237] and UOCAVA forces states to accept ballots for federal elections from their former citizens now living or

231. Symm v. United States, 439 U.S. 1105 (1979) (mem.). This is the only Supreme Court case that applies the Twenty-Sixth Amendment.

232. *See* Elizabeth Aloi, *Thirty-Five Years After the 26th Amendment and Still Disenfranchised: Current Controversies in Student Voting*, 18 NAT'L BLACK L.J. 283, 293-96 (2005).

233. N.Y. ELEC. LAW § 5-104 (McKinney 2007).

234. John M. Greaebe, *A Federal Baseline for the Right To Vote*, 111 COLUM. L. REV. SIDEBAR (forthcoming 2012) (manuscript at 3-4), *available at* http://ssrn.com/abstract=1923980 ("Alabama, Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, Rhode Island, Utah, Vermont, and Wisconsin have laws that, if strictly enforced, would withhold domiciliary status from college students (and others) with a present intent to move in the future." (footnotes omitted)); Richard G. Niemi, Michael J. Hammer & Thomas A. Jackson, *Where Can College Students Vote? A Legal and Empirical Perspective*, 8 ELECTION L.J. 327 (2009) (discussing the substantial barriers to student voting).

235. Patrick J. Troy, *No Place To Call Home: A Current Perspective on the Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL'Y 591, 610 (2006).

236. *See supra* notes 181-182 and accompanying text.

237. 42 U.S.C. § 1973aa-1 (2006).

stationed overseas.[238] These statutes are, however, limited to federal elections under Congress's Article I powers. To protect college students from restrictive residency requirements for nonfederal elections, Congress would have to invoke its Twenty-Sixth Amendment power, which allows it to prohibit policies that the judiciary has not held foreclosed by the Amendment itself.[239] Doing so would help end confusion over residency requirements, which is a source of conflict during contested elections in areas with large student populations. Interested parties often try to suppress the student vote by frightening students with the possible negative consequences of voting without residency and by challenging students' eligibility at the polls.[240] Imposing a uniform national standard would prevent such conflicts and thus help ensure the orderly administration of elections in college communities. Indeed, the House of Representatives has recently held hearings investigating student disenfranchisement;[241] with a firmer constitutional basis, it might enact legislation.

D. Protecting the Voting Rights of the Elderly

Congress could also enact laws under the Twenty-Sixth Amendment to protect the voting rights of the elderly. It could do so by mandating states to

238. *Id.* § 1973ff-1.

239. There is a small academic literature discussing whether the Twenty-Sixth Amendment invalidates such residency restrictions absent congressionally enacted enforcement legislation, but it is not very conclusive. *See* Rakesh C. Lal, *What Johnny Didn't Learn in College: The Conflict over Where Students May Vote*, 26 BEVERLY HILLS B. ASS'N J. 28, 32 (1992) ("[A]n analysis of the relevant congressional materials supports the conclusion that most members of Congress, if they thought at all about the issue, assumed that students would vote by absentee ballot at their parents' addresses. Congress apparently failed to foresee the desire of at least some college students to register and vote in their school communities." (footnote omitted)); Note, *supra* note 166, at 37-38 (showing that members of Congress and state officials expressed a variety of conflicting views on how the Twenty-Sixth Amendment might affect student residency); Note, *Student Voting and the Constitution: New York State Bona Fide Residency Requirements*, 72 COLUM. L. REV. 162, 181 (1972) ("Although the recentness of the twenty-sixth amendment's enactment precludes any confident assertion as to its significance in this regard, it is not unreasonable to expect that future challenges to the New York law will provide an opportunity for the courts to elucidate the impact of the amendment."). For a discussion of the various judicial and state attorney general opinions concerning the Twenty-Sixth Amendment's implications for student residency requirements, see *supra* Section II.E.

240. *See* Troy, *supra* note 235, at 599-615 (detailing several incidents).

241. *See* Reeves Wiedeman, *Members of Congress Worry That Students Are Being Misled About Voting Rights*, CHRON. OF HIGHER EDUC., Sept. 24, 2008, http://chronicle.com/article/Members-of-Congress-Worry-That/41680.

provide services that reduce barriers to voting, such as transportation, easy-to-use voting equipment, and alternative means of casting one's ballot, such as voting by mail.[242] Congress could also override laws that directly disenfranchise the elderly mentally disabled. Forty-four states presently have statutes or constitutional provisions that disenfranchise those deemed mentally incompetent to vote, and eleven states disenfranchise those placed under guardianship.[243] These laws disproportionately burden the voting rights of the elderly. There are over 1.25 million adults in the United States under guardianship, most of them elderly, and many suffering from age-related disorders like Alzheimer's or dementia.[244] This population will only become larger as the number of elderly citizens in the United States increases.[245] Scholars have argued that these laws should be repealed or modified in order to protect the voting rights of these citizens.[246] Further, Maine's incompetency law was held unconstitutional by the U.S. District Court of Maine in *Doe v. Rowe*, in which a seventy-five-year-old woman under guardianship challenged the denial of her right to vote.[247] Other challenges to such laws have been unsuccessful.[248] Congress could, using the power conferred on it by the Twenty-Sixth Amendment, determine that such laws deny the rights of elderly citizens to vote on the basis of their age. It could then pass legislation requiring states to allow these citizens to vote, or narrowing the criteria that states can use to exclude them. This issue is complex: there are certainly arguments for denying the franchise to those who are so incapacitated that they cannot

242. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-442T, ELDERLY VOTERS: SOME IMPROVEMENTS IN VOTING ACCESSIBILITY FROM 2000 TO 2004 ELECTIONS, BUT GAPS IN POLICY AND IMPLEMENTATION REMAIN (2008), *available at* http://www.gao.gov/new.items/d08442t.pdf (outlining several barriers to voting that affect the elderly, including transportation, access to polling places, and ability to use voting machines).

243. Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 483-84 (2001); Kay Schriner, Lisa Ochs & Todd Shields, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 456-72 (2000).

244. Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 113 (2003).

245. By 2050, it is projected that over 16 million elderly Americans will have dementia. Ann Wislowski & Norma Cuellar, *Voting Rights for Older Americans with Dementia: Implications for Health Care Providers*, 54 NURSING OUTLOOK 68, 68 (2006).

246. *See* Karlan, *supra* note 25, at 922-23; Mary Schrauben, *Ensuring the Fundamental Right To Vote for Elderly Citizens in the United States*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 307, 309-18 (2007).

247. 156 F. Supp. 2d 35 (D. Me. 2001).

248. *See, e.g.*, Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803 (8th Cir. 2007) (upholding a guardianship disenfranchisement provision).

exercise it. However, there is significant evidence that existing laws are overbroad and disenfranchise people who can vote competently.[249]

IV. ADDRESSING TWO COUNTERARGUMENTS

A. *The* City of Boerne *Problem*

The most significant obstacle to interpreting the Twenty-Sixth Amendment's Enforcement Clause as governed by the *McCulloch* test is the fact that the Supreme Court has now abandoned the *McCulloch* test in its Fourteenth Amendment cases. In *City of Boerne v. Flores*, the Court announced a sweeping new theory of the separation of powers in civil rights constitutionalism by holding that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[250] It thus created a more searching standard that allows the Court to evaluate Congress's legislative findings and determine if particular remedial action is justifiable.[251] This standard has been applied to congressional action ensuring, among other things, religious exercise rights,[252] disability rights,[253] and rights against gender discrimination.[254] While it has not yet been applied outside of the Fourteenth Amendment context, the theory of limited judicial deference elaborated in *Boerne* seems easily applicable to the Fifteenth and the Twenty-Sixth Amendments. Based on this line of cases, then, the Supreme Court might conclude that some or most Twenty-Sixth Amendment legislation that preempts state law is unconstitutional. There are, however, three compelling arguments against reaching that outcome. First, most

249. *See* Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345, 1345 (2004).

250. 521 U.S. 507, 520 (1997).

251. Justice Kennedy's claim in the *Boerne* majority opinion—that the interpretation of *Morgan* as "acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment" is "not a necessary interpretation . . . or even the best one"—does not conflict with this Note's interpretation of the Twenty-Sixth Amendment. *See id.* at 527-28. Justice Kennedy was only arguing that, under *Morgan*, Congress did not have the power to unilaterally expand the rights protected by the Fourteenth Amendment. He was not contesting the fact that, under *Morgan*, Congress did have the power to *enforce* preestablished Fourteenth Amendment rights and received *McCulloch* deference when it chose how to do so. *Id.*

252. *Id*. at 529.

253. Tennessee v. Lane, 541 U.S. 509 (2004).

254. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

conceivable Twenty-Sixth Amendment legislation would pass constitutional muster under the congruence and proportionality test, so long as Congress generated a sufficient factual record and reasonably tailored the legislation to its purpose. Second, *Boerne* cannot apply to the Twenty-Sixth Amendment as a matter of original understanding: the Amendment was enacted during the *Morgan* era of expansive congressional enforcement power, and the Amendment's framers explicitly embraced and relied upon that expansive power while enacting it. Third, the enactment history of the Twenty-Sixth Amendment actually provides a reliance-based argument for the proposition that *Boerne* itself was wrongly decided.

If the Supreme Court applies the *Boerne* framework to the Twenty-Sixth Amendment, it would be feasible for Congress to enact meaningful anti-age-discrimination legislation that meets the "congruence and proportionality" test. Congress would only have to engage in sufficient legislative record-building to convince the Court that its intervention is sufficiently justified by evidence of age discrimination in voting. Congress has successfully met the *Boerne* standard twice before, with a provision of the Americans with Disabilities Act in *Tennessee v. Lane*[255] and a provision of the Family and Medical Leave Act in *Nevada Department of Human Resources v. Hibbs*.[256] In both cases, the Court took into account both the limited nature of the impairment on state sovereignty and the quality of the record Congress generated showing a pattern of discrimination.[257] The four proposals advocated in Part III of this Note would likely be similarly affirmed. First, they impose narrow, specific

255. 541 U.S. 509.

256. 538 U.S. 721.

257. *Lane*, 541 U.S. at 529 ("[T]he extensive record of disability discrimination . . . makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation."); *id.* at 531-32 ("The remedy Congress chose is nevertheless a limited one. . . . [Title II of the ADA] requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." (quoting 42 U.S.C. § 12131(2) (2000))); *Hibbs*, 538 U.S. at 735 ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."); *id.* at 738 ("Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. . . . We also find significant the many other limitations that Congress placed on the scope of this measure." (citing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997))).

obligations (such as accepting certain forms of identification for voting, or sending absentee ballots to overseas soldiers within a certain time frame) rather than broad, general mandates (like an obligation not to burden religious practice, or to accommodate all disabled employees). Second, there is significant evidence of age discrimination in each of the areas that the proposals remedy.[258] Third, while many of the proposals in Part III would have effects outside the realm of age discrimination (e.g., loosening ID requirements, which would affect the requirements for all voters, not just those in age groups less likely to have government-issued IDs), such spillover effects have not historically been a bar to constitutionality under *Boerne*. For example, the *Hibbs* Court upheld the Family and Medical Leave Act as a prohibition on sex discrimination against pregnant women, even though the Act applied to men as well as women.[259]

In addition, there is a good case to be made that *Boerne* does not apply to the Twenty-Sixth Amendment in the first place as a matter of original meaning. As has been shown, the authors of the Twenty-Sixth Amendment's Enforcement Clause explicitly modeled it after the Enforcement Clauses in the Thirteenth, Fourteenth, and Fifteenth Amendments.[260] This gives rise to two interpretive possibilities. On the one hand, the Twenty-Sixth Amendment's framers were very much aware of the fact that, in 1971, those other Amendments' Enforcement Clauses were interpreted under the *McCulloch* standard pursuant to *Katzenbach v. Morgan*,[261] *Jones v. Alfred H. Mayer Co.*,[262] and *South Carolina v. Katzenbach*.[263] Indeed, Congress extensively debated how far this standard went while enacting Title III, and Congress adopted the Twenty-Sixth Amendment immediately after the Supreme Court affirmed this standard for both the Fourteenth and Fifteenth Amendments in *Mitchell*. Congress might thereby have intended the prevailing interpretation in 1971 to be codified for all time in the Twenty-Sixth Amendment. On the other hand, modeling the Twenty-Sixth Amendment after the three Reconstruction Amendments might also be read as Congress signaling that these four Enforcement Clauses should always bear the same meaning. Congress might thereby have intended for the meaning of the Twenty-Sixth Amendment to change along with the meanings of the other Amendments. The emergence of

258. *See supra* Part III.

259. *Hibbs*, 538 U.S. 721.

260. *See supra* Sections I.B, II.A.

261. 384 U.S. 641 (1966).

262. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

263. 383 U.S. 301, 308 (1966).

Boerne thus forces a conflict between reading the Twenty-Sixth Amendment *in pari materia* with the Reconstruction Amendments and reading it in light of prevailing constitutional understandings in 1971.[264]

Fortunately, Professor Akhil Amar suggests a persuasive strategy for escaping this conundrum by way of intentionalism:

> Suppose those who draft clause 1 at time T_1 think it means *X*, and those who draft parallel clause 2 at time T_2 think it means *Y*. If we read clause 1 to mean *X*, and clause 2 to mean *Y*, we fail to do justice to the implicit idea that the two clauses are *in pari materia*. If we read both to mean *Y*, we fail to do justice to the intent of drafters at T_1. Likewise, if we read both to mean *X*, we fail to do justice to the drafters at T_2. One intentionalist approach to the paradox would be to pose a counterfactual: if the drafters of clause 2 had been made aware of the cycle, would they have rewritten clause 1 to mean *Y*, or would they upon reflection have decided that clause 2 should really mean *X*, or would they have said that the two clauses should not be interpreted *in pari materia*?[265]

The same logic applies to the present question. If Bayh, Mansfield, Randolph, Kennedy, and the other authors of the Twenty-Sixth Amendment had been warned about *Boerne* in 1971, would they have decided that the Twenty-Sixth Amendment should be understood the same way? No, they would not have. As legislators in the 1960s and 1970s, they were consumed with the question of how far the Reconstruction Amendments would let them go in expanding civil rights. As Sections II.A and II.B show, they believed strongly in an expansive conception of congressional power under these Amendments. Senator Kennedy, for example, vociferously opposed the holding in *Boerne* when it was announced.[266] If faced with a choice between a Twenty-Sixth Amendment that conferred *Morgan*-style enforcement powers and one that followed the Fourteenth Amendment down the road of *Boerne*, they would surely have chosen the former.

264. *Cf.* Amar, *supra* note 32, at 823-25 (arguing that *Boerne* was wrongly decided because it ignored the expansive interpretation of the Thirteenth Amendment's Enforcement Clause in *Jones*, 392 U.S. 409, which should be read *in pari materia* with the Fourteenth Amendment); Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 771-72 (2000) (suggesting that intratextual argument could be used to extend *Boerne* to the Thirteenth Amendment).

265. Amar, *supra* note 32, at 789 n.173.

266. *See* Neal Devins, *How Not To Challenge the Court*, 39 WM. & MARY L. REV. 645, 664 (1998).

Finally, the argument against applying *Boerne* to the Twenty-Sixth Amendment can be taken slightly further. *Boerne* has been thoroughly criticized in the academic literature,[267] and it is not necessary to discuss that criticism here. However, the Twenty-Sixth Amendment actually provides a novel argument that the Court should have been more hesitant to scale back the enforcement power in *Boerne*. The authors and ratifiers of the Twenty-Sixth Amendment relied on the holding in *Katzenbach v. Morgan* when they wrote the Amendment's Enforcement Clause, and that reliance should augment the constitutional status of *Morgan*'s reading of the Fourteenth Amendment's Enforcement Clause. In analogous circumstances, Justice Scalia has argued that the expansive reading of the Eleventh Amendment in *Hans v. Louisiana*[268] was constitutionalized when the enactors of the Seventeenth Amendment relied on its holding:

> The Seventeenth Amendment, eliminating the election of Senators by state legislatures, was ratified in 1913, 23 years after *Hans*. If it had been known at that time that the Federal Government could confer upon private individuals federal causes of action reaching state treasuries; and if the state legislatures had had the experience of urging the Senators they chose to protect them against the proposed creation of such liability; it is not inconceivable, especially at a time when voluntary state waiver of sovereign immunity was rare, that the Amendment (which had to be ratified by three-quarters of the same state legislatures) would have contained a proviso protecting against such incursions upon state sovereignty.[269]

Similarly, if Congress in 1971 had known that the Supreme Court could determine whether remedial legislation is unconstitutional for being insufficiently "congruent and proportional" to its ends, then it is conceivable that the authors of the Twenty-Sixth Amendment would have altered its language to avoid the limitations *Boerne* places on Congress's Fourteenth Amendment enforcement powers. Thus, not only were superstatutes like the VRA passed in reliance on Congress's broad, *Morgan*-informed enforcement

267. *See, e.g.*, Amar, *supra* note 32, at 818-27; Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010); Michael W. McConnell, The Supreme Court-Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 522-26 (2000).

268. 134 U.S. 1 (1890).

269. Pennsylvania v. Union Gas Co., 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part).

power, but so was a constitutional amendment. That fact should give the Court pause when it considers whether to limit Congress's enforcement powers.

One important caveat is in order. While *Boerne* does not properly apply to the Twenty-Sixth Amendment, this does not mean that Congress has free reign to enact any voting rights legislation so long as it can find some ostensible connection to age discrimination. The *Katzenbach v. Morgan* standard still requires that Congress show that its legislation is "plainly adapted to" the constitutionally permitted end in question.[270] *Oregon v. Mitchell* itself illustrates the limits of this test. Title III did in fact end a practice that discriminated based on race—the percentage of racial minorities between eighteen and twenty-one was higher than the percentage of racial minorities in the overall population.[271] Yet none of the Justices, not even those who sought to uphold all of Title III, argued that Title III could be constitutionally justified as legislation reducing racial discrimination, nor did Congress or the lawyers defending Title III seek to establish its constitutionality on that basis.[272] Presumably, they declined to pursue this argument because the racial difference was too slight, and the overwhelming concern of Congress was clearly to combat age discrimination, not race discrimination. This suggests a gloss on *Morgan* that provides a limiting principle for the Twenty-Sixth Amendment: if the age discrimination in question is so insignificant that Congress cannot draw a rational connection between the protections it is enacting and the general goal of combating age discrimination, then the legislation cannot be upheld even under the expansive *Morgan* test. One instructive example here is felon disenfranchisement. While felons are slightly younger than the general population, the difference between the average age of a felon and the average age of the general population is too small to draw a rational connection between age discrimination and the abolition of felon

270. 384 U.S. 641, 650 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)); *see also id.* at 652 (stating that the challenged section of the VRA meets the "plainly adapted" standard because it preserves the voting rights of Puerto Rican U.S. citizens); *id.* at 653 ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

271. *See* AMAR, *supra* note 10, at 447.

272. *See* Oregon v. Mitchell, 400 U.S. 112, 130 (1970) (opinion of Black, J.) ("In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence."); *see also* Recording of Oral Argument, *Mitchell*, 400 U.S. 112 (1970) (No. 43 Orig.), *available at* http://www.oyez.org/cases/1970-1979/1970/1970_43_orig.

disenfranchisement.[273] The age difference is not sufficient to perceive a basis on which Congress would think it was combating age discrimination, and abolishing felon disenfranchisement would clearly be aimed primarily at combating other forms of discrimination besides age. Thus, a federal law banning felon disenfranchisement would not be a constitutional means of enforcing the Twenty-Sixth Amendment, even under the *Morgan* "plainly adapted" test.[274]

B. The Disparate Impact Paradox

A broad reading of the Twenty-Sixth Amendment also runs into one of the most contested issues in antidiscrimination law: the debate over whether helping a disadvantaged group is itself discrimination. This paradox has arisen in cases touching on all the legal pillars of modern civil rights: Title VII,[275] the Voting Rights Act,[276] the Equal Protection Clause,[277] and the Due Process

273. In 2006, the median age of felons convicted in state court was thirty-one at the time of sentencing (with a mean sentence length of four years and eleven months), while the median age of the general population is 36.9. *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1, 16 (2009, rev. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssco6st.pdf; *The World Factbook, United States*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (expand "People and Society" tab) (last updated Jan. 19, 2012).

274. However, such a law could conceivably be upheld under the Fourteenth or Fifteenth Amendment. *Cf.* Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir.) (holding that a felon disenfranchisement statute violates the VRA), *rev'd en banc*, 623 F.3d 990, 993-94 (9th Cir. 2010) (reversing on statutory but not constitutional grounds). *But see* Christopher Re & Richard Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. (forthcoming 2012) (suggesting that the Fourteenth and Fifteenth Amendments sanctioned the disenfranchisement of felons as a matter of original intent). Such a law could potentially also be upheld under the Nineteenth Amendment, given that the overwhelming majority of felons are male. *Cf.* Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (stating that the Nineteenth Amendment "applies to men and women alike").

275. Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009) (holding that, for Title VII purposes, an employer must have a strong basis in evidence to believe it will be subject to disparate impact liability before it engages in intentional discrimination for the purpose of avoiding or remedying disparate impact discrimination).

276. Shaw v. Reno, 509 U.S. 630, 644 (1993) (holding that redistricting based on race must be held to a standard of strict scrutiny, even when race is being considered so that the redistricting plan will comply with the VRA).

277. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007) (holding that school districts may not use race as the sole factor for assigning students to schools, even when their purpose is to achieve racial integration); Regents of the Univ. of Cal. v.

Clause.[278] If the Twenty-Sixth Amendment is as broad as this Note suggests, covering people of all ages and giving Congress expansive power to define and remedy both intentional and effectual violations, it invites a similar challenge.

There is no strong anti-age-classification norm in current Fourteenth Amendment jurisprudence, and distinctions based on age are only subject to rational basis review.[279] Thus, if Congress exercised its Twenty-Sixth Amendment power by assigning voters additional protections based on their age, there would likely be no Fourteenth Amendment problem. There would, however, be a serious problem under the Twenty-Sixth Amendment itself. Because the Twenty-Sixth Amendment is properly read as age-neutral, any law that classifies voters by age and assigns additional protections to only some violates the Amendment by denying the same protections to other age groups. For example, if Congress determined that state voter ID laws discriminate against the elderly and invoked its Twenty-Sixth Amendment powers to loosen ID requirements for those over sixty-five, then voters under sixty-five would suffer impermissible discrimination on account of their age. They would be forced to meet a higher burden to vote by virtue of being under sixty-five.

The easiest way around this anti-age-classification problem is to write legislation that applies to all age groups, or to write legislation that targets certain age groups by classifying voters according to a category other than age. Just as formally race-neutral government policies that disproportionately advantage certain racial groups are permissible under *Washington v. Davis*,[280] age-neutral policies that disproportionately advantage certain age groups are permissible under an expansive Twenty-Sixth Amendment. The VRA provides good examples of this strategy. While the VRA is primarily intended to protect minorities' voting rights, it contains no provisions that only apply to specific races. It bans voting discrimination, literacy tests, and durational residency requirements for all races.[281] Some of its provisions apply only to certain categories of people, such as speakers of a limited set of languages,[282] or voters

Bakke, 438 U.S. 265, 379 (1978) (holding that an affirmative action system based on racial quotas is unconstitutional).

278. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications must be analyzed under a strict scrutiny standard, even those used by government agencies to determine to which businesses to give preference in contract bidding).

279. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

280. 426 U.S. 229, 242 (1976).

281. Voting Rights Act of 1965, 42 U.S.C. §§ 1973a to 1973c (2006).

282. *Id.* § 1973aa-1a.

educated in American flag schools in Puerto Rico.[283] Yet crucially, these provisions do not classify voters based on *race*, but use other categories to target the VRA's beneficiaries.

While restricting itself to formally age-neutral legislation immunizes Congress from claims of direct discrimination, such legislation might lead to vote dilution claims.[284] If, for example, a relaxed ID policy results in a greater proportion of elderly citizens voting, then members of other age groups would have their votes diluted by the new elderly voters. Here it is necessary to distinguish between zero-sum and positive-sum rights. The right to vote as an act of political expression is positive-sum: my vote does not take away yours. Yet, the right to have one's vote aggregated in a way that it is more likely to elect one's preferred candidate is zero-sum: my candidate and your candidate cannot both win. This duality tracks a second duality of voting rights: the distinction between individual rights and group rights.[285] As an individual, one has a dignitary interest in voting as an act of public participation. One lacks an instrumental interest, however, since there is nearly zero probability that a

283. *Id.* § 1973b(e).

284. It is worth noting that vote dilution claims can only be made under the Fourteenth Amendment and cannot be made under the Fifteenth Amendment. As the Court stated in *Mobile v. Bolden*,

> The Fifteenth Amendment does not entail the right to have Negro candidates elected . . . . That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

446 U.S. 55, 65 (1980), *superseded by statute in part*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134. Since the Fifteenth Amendment is a closer model for the Twenty-Sixth than is the Fourteenth, it might be reasoned intratextually that vote dilution claims ought not to be available under the Twenty-Sixth Amendment either. This Section proceeds under the assumption that vote dilution claims *can* be made under the Twenty-Sixth Amendment, but it does not defend that assumption. If the Twenty-Sixth Amendment does not give rise to vote dilution claims, then the antidiscrimination paradox poses no problem because age groups whose votes are diluted have no claim. *See supra* note 145 (discussing the superiority of the Fifteenth Amendment as a model in cases of conflict between the Fourteenth and Fifteenth).

285. *See* Joseph Fishkin, *Equal Citizenship and the Individual Right To Vote*, 86 IND. L.J. 1289, 1296 (2011) ("[T]here are multiple, irreducibly distinct interests at stake in voting controversies. Some of these interests are individual in nature, others are group interests, and still others are structural in that they are interests of the polity as a whole.").

single vote will decide an election.[286] Yet, as a member of a group, one has an instrumental interest in being able to select a representative, and with a government of limited size, this trades off with other groups' interest in selecting their own representatives.[287] Thus, vote dilution claims of the kind that might be brought under a revitalized Twenty-Sixth Amendment can only be understood with reference to individuals' rights as members of groups,[288] because only in that context does the protection of voting rights translate into concrete political losses and gains.

In cases like *Shaw v. Reno*, the Supreme Court has determined that the zero-sum nature of group representation creates a conflict between the Equal Protection Clause and the majority-minority district-drawing mandate of section 2 of the VRA.[289] When a state draws majority-minority districts to remedy the vote dilution claim of one group, it necessarily harms the political power of other groups. However, laws that dilute the votes of some groups by removing barriers to the franchise that affect other groups, such as literacy tests, do not involve such a clear tradeoff. These laws might theoretically give rise to vote dilution claims: protecting a group's voting rights diminishes the electoral clout of other groups. Courts have, however, been unwilling to hold that one's right to vote contains a right to prevent others from voting. Suing over district lines is one thing, but suing to disenfranchise others is entirely another. Thus, the right not to have barriers between oneself and the polls is conceived as a positive-sum right. For example, the antidiscrimination paradox did not arise in *Katzenbach v. Morgan*, even though section 4(e) of the VRA protects only those educated in Puerto Rico. In upholding section 4(e), the Court noted that its application to only one group was acceptable because it eliminated barriers to the franchise and thus gave further rights to some

286. *See id.* at 1342; Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 330 (1993) (discussing voting as a "meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity").

287. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 915-24 (1998) (arguing against the Supreme Court's expansion of colorblindness principles to political rights on the grounds that they fail to account for the instrumental and group dimensions of franchise rights and jury service).

288. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) ("Vote dilution claims implicate a special kind of injury, one that does not easily fit with a conventional view of individual rights. That is because they require a court to consider the relative treatment of *groups* in determining whether an *individual* has been harmed.").

289. 509 U.S. 630 (1993).

without restricting those of others.[290] More recently, circuit courts have upheld UOCAVA against Equal Protection challenges stemming from the fact that the statute only protects the voting rights of soldiers stationed overseas, not those who relocate within the United States.[291]

Thus, to the extent that voting rights jurisprudence runs into the disparate impact paradox, it does so only in the zero-sum realm of vote dilution claims—particularly district drawing and vote counting procedures—and not in the positive-sum realm of removing barriers to voting. It is unlikely that Congress would seek to create age-based districts or use quotas to ensure age-based representation in legislative bodies.[292] Any action taken by Congress under the Twenty-Sixth Amendment would be confined to ensuring equal access to the polls, and thus would pose no constitutional problems.

CONCLUSION

During the last century, the Article V amendment process has ceased to be an engine of significant legal change. Today, most of the foundational changes to our legal order take place through legislation or through judicial interpretations of the existing Constitution, but not through formal amendments. However, the resulting tendency to downplay the more recent amendments to our Constitution should not blind us to all that those amendments do achieve. The Twenty-Sixth Amendment is conventionally understood to do nothing more than lower the voting age. But this Note has shown that the conventional wisdom is wrong. Properly interpreted, the Twenty-Sixth Amendment establishes a broad constitutional prohibition against age discrimination in voting rights and grants Congress extensive powers to ensure state compliance with that prohibition. These powers allow Congress to take bold action to protect the rights of soldiers, students, senior

290. 384 U.S. 641, 657 (1966). *Morgan* is an old case, but it is still valid on this point. *See* Katherine Culliton-González, *Time To Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27 (2008) (showing that the statute upheld in *Morgan* is still enforceable, and that it protects language rights more extensively than other VRA language provisions).

291. *See* Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994).

292. However, state legislatures certainly might use redistricting to dilute the votes of certain age groups. For example, a Twenty-Sixth Amendment challenge to a redistricting plan brought by college students has been rejected by the Kansas Supreme Court, on the grounds that the students whose district was broken up do not form a "solid cohesive student body" for voting. *In re* House Bill No. 2620, 595 P.2d 334, 343-44 (Kan. 1979).

citizens, and any other group whose members suffer franchise discrimination on account of their age.