

## CHILDREN AND THE MOST ESSENTIAL RIGHT

Any discussion of rights arguably begins and ends with the right to vote. If you have it, all rights are achievable. Without it, whatever rights you have are dubious. As has been frequently articulated by the Supreme Court, “no right is more precious in a free country than that of having a choice in the election of those who make the laws under which...we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>1</sup> The Court recognized voting as a fundamental right because it is the foundation for and springboard to all other rights. In her book on Susan B. Anthony, *Failure is Impossible*, Lynn Sherr noted that “what distinguished Anthony from so many others working for women’s rights was her uncompromising insistence that no other right was more central, no other need more pressing. Despite her passionate concern for just marriage laws, for equal pay, for coeducation, Anthony lectured time and time again that the key was suffrage; that without the vote, none of the others would last; that with the vote, all others would flow.”<sup>2</sup>

This shared perspective between the Court and Anthony is not limited in application to particular groups or individuals. It crosses boundaries of race, gender, abilities, and age. It is just as true for children as it was for women and blacks. Although children have been imbued with certain limited rights by the Supreme Court, these rights lack the protection provided by suffrage and children lack the ability to accumulate rights that comes from suffrage.

Every extension of the voting franchise in American history has been met with resistance. Whether landless frontiersmen, freed slaves, women, immigrants, or the young, those already enjoying the franchise have warned that the prospective voters

lacked the competence and commitment to the community necessary for responsible electoral participation.<sup>3</sup> Gradually, however, suffrage has broadened to the point where it is now a right inherent in citizenship, rather than a privilege based on wealth, race, or gender.<sup>4</sup>

In her very timely and relevant article, *What Ever Happened To Children's Rights?*, Martha Minow bemoans the failure of the children's rights movement and lists as the first cause of failure, the fact that children do not vote and their voice is not adequately represented.<sup>5</sup> What Minow intuits is that without the vote children encounter a deaf judicial ear, a blind legislative eye, and a dumb executive voice in their plea for greater rights. It is a hallmark of our rights history that unless moved by extraordinary events, overwhelming opposition, or confronted with incontrovertible evidence, rights are not granted simply because it is the right thing to do.

### **Voting Age History**

The twenty-one-year-old voting age arose from the English heritage in requiring that age for knighthood.<sup>6</sup> Choice of the age of twenty-one was an outgrowth of medieval requirements of time necessary for military training and development of a physique able to bear heavy armor.<sup>7</sup> Almost all countries within the British Commonwealth that practiced suffrage set the voting age at twenty-one.<sup>8</sup> The first mention of voting age in the U.S. Constitution was in § 2 of the Fourteenth Amendment in 1868 mandating that “a state's representation in congress will be decreased if it keeps male citizens, who are twenty-one or older, and who have not committed crimes, from voting.”<sup>9</sup> At the time, all thirty-four states already set the voting age at twenty-one.<sup>10</sup> The language of § 2 very

clearly ensures that states retain the right to establish a voting age of less than twenty-one years old.

Every subsequent state entered the union with a voting age of twenty-one except Alaska (age eighteen in 1959) and Hawaii (age twenty in 1959).<sup>11</sup> It wasn't until 1943 that Georgia became the first state to set its voting age below twenty-one when it lowered the age to eighteen.<sup>12</sup> Kentucky (age eighteen in 1955), Massachusetts, Minnesota, and Montana (age nineteen in 1970), and Maine and Nebraska (age twenty in 1970) followed.<sup>13</sup>

Although voting age debates were a common occurrence accompanying every war since the civil war, no effort to lower the national voting age to eighteen had gotten off the ground. Voting age has historically been attached to the age of military service not only in the U.S., but throughout the world.<sup>14</sup> Iran<sup>15</sup>, Nicaragua<sup>16</sup>, and Indonesia<sup>17</sup> have a voting age lower than eighteen because each country conscripted younger citizens into the military during their respective revolutions. The Vietnam War and the national strife it engendered, was the impetus behind the first concerted effort to effectively address the voting age issue. The question rose as a proposed constitutional amendment, but because the opposition appeared too great and the process would likely run beyond the 1972 presidential election, it was withdrawn and replaced by an amendment to the Voting Rights Act of 1965.<sup>18</sup>

Congress debated and determined that they had the authority, based on the Supreme Court's 1966 decision in *Katzenbach v. Morgan*, to lower the voting age by statute under the implementation clause found in § 5 of the Fourteenth Amendment.<sup>19</sup> Although very controversial, the amendment to the Voting Rights Act of 1965 extending

the right to vote to those eighteen years and older was approved by both the House and the Senate and was signed into law by President Nixon on June 22, 1970.<sup>20</sup>

States reacted instantly to the new law. Challenges were filed from Iowa, Texas, Oregon, Idaho, and Arizona intent on striking down the statute as unconstitutional and a violation of state's rights.<sup>21</sup> In October 1970, the Supreme Court ruled in *Oregon v. Mitchell* that Congress had the authority, under the First and Fourteenth Amendments, to lower the voting age by statute for federal elections only.<sup>22</sup>

### **The Twenty-Sixth Amendment**

In distinguishing federal age qualifications from state age qualifications, the Court created two separate classes of voters. States would have to accommodate the eighteen-year-old voter for federal elections and the twenty-one-year-old voter for state elections. This accommodation would necessitate two separate voting systems. States recognized the complexity and added expense related to this problem. The potential for confusion, fraud, and delay would increase and the number of people needed at the polls to ensure proper ballots for different aged voters would be necessary. The bifurcated system was no blessing to either federal or state election committees. The need for a constitutional amendment setting the age at eighteen was imperative, and to avoid chaos, it needed to be accomplished before the 1972 presidential election.

On January 25, 1971 Senator Jennings Randolph, a West Virginia democrat, introduced a resolution to amend the Constitution to allow eighteen-year-olds to vote in all elections.<sup>23</sup> By mid-March the amendment had passed in both the House and Senate.<sup>24</sup>

The next step was for the states to act. Thirty-eight states were needed to amend the Constitution. Common Cause and the Youth Franchise Coalition were the primary movers of the amendment within each state.<sup>25</sup>

By the end of March, ten states had ratified the amendment, by May, twenty-five states had ratified and by June, the number was thirty.<sup>26</sup> On the 100<sup>th</sup> day of consideration of the amendment, Ohio became the thirty-eighth state to ratify.<sup>27</sup> It was the fastest passage of a constitutional amendment by ninety-one days.<sup>28</sup>

### **Legal Standard**

In *Oregon v. Mitchell*, the Court concluded that Congress had acted within its power in establishing a statutory federal voting age. Eight of the nine Justices also suggested that had they been asked to decide the constitutionality of the twenty-one-year-old voting age and they applied the compelling interest standard, the age may well have been found unconstitutional.<sup>29</sup> But is the compelling interest standard the appropriate standard for this analysis?

In 1886, the Supreme Court ruled in *Yick Wo v. Hopkins* that the political franchise of voting was a fundamental political right because preservative of all rights.<sup>30</sup> Generally, the Court has held that where fundamental rights and liberties, such as voting, are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.<sup>31</sup> The legal standard for gauging the constitutionality of state voter qualifications is however, somewhat muddy.

The specific question of the legal standard to use when age is at issue has been addressed by the Court on very few occasions. There is a long line of cases in which the

Court has held that in an election of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack.<sup>32</sup> In *Davis v. Beason*, the Court suggests that this list is not comprehensive stating that “residence requirements, age, and previous criminal record are obvious *examples* indicating factors which a state may take into consideration in determining the qualifications of voters.”<sup>33</sup> This line of cases seems, on its face, to insulate states residence, age, citizenship, and other qualifications from the close scrutiny of a compelling state interest analysis required when a fundamental right has been abridged.

This interpretation is reinforced by the Court’s language in *Carrington v. Rash* where it held that states have;

unquestioned power to impose reasonable residence restrictions on the availability of the ballot. There can be no doubt either of the historic function of the states to establish, on a nondiscriminatory basis, and in accordance with the constitution, qualifications for the exercise of the franchise. Indeed, the states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the federal constitution.<sup>34</sup>

But this apparently sweeping endorsement of the states right to establish qualifications for the franchise was tempered by the Courts assertion that we “must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.”<sup>35</sup>

In looking at the history of legal challenges to state voter qualifications another picture emerges. The Court has often stated that;

in determining whether or not a state law violates the equal protection clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. And we must give the statute a close and exacting examination. Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.<sup>36</sup>

In *Reynolds*, the Court concluded that “focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the state’s citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. These cases touch a sensitive and important area of human rights, and involves one of the basic civil rights of man, presenting questions of alleged invidious discriminations...against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>37</sup> In *Williams*, the Court held that in “determining whether the state has power to place unequal burdens on minority groups where rights of this kind are at stake, the decisions of this court have consistently held that only a compelling state interest in the regulation of a subject within the states constitutional power to regulate can justify limiting first amendment freedoms. The state has failed to show any compelling interest that justifies imposing such heavy burdens on the right to vote and to associate.”<sup>38</sup> In *Evans*, although recognizing that states have long been held to have broad powers to determine voter qualifications,<sup>39</sup> the Court offered that “there can be no doubt at this date that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the fourteenth

amendment.<sup>40</sup> And before the right can be restricted, the purpose of the restriction and the compelling interests served by it must meet close constitutional scrutiny.<sup>41</sup>

### **Oregon v. Mitchell**

In the wake of Congress' passing of the 1968 amendments to the Voting Rights Act of 1965 lowering the voting age to eighteen, numerous states challenged the statute to the Supreme Court. Oregon, Texas, Idaho and Arizona were all parties to the contest. Each state asserted that they had a compelling interest in assuring an intelligent and responsible electorate.<sup>42</sup> The Court found no reason to question the state's assertion of this interest.<sup>43</sup> What the Justices did question was whether there was sufficient evidence to warrant the exclusion of eighteen-year-olds while twenty-one-year-olds were included?<sup>44</sup> Four of the five Justices voting to uphold the statute ruled on equal protection grounds.<sup>45</sup> Justice Black concluded that Congress' authority to lower the voting age in national elections was found under Article 1, § 4, Article 2, § 1, and the Necessary and Proper Clause of the Constitution.<sup>46</sup> Justice Black chose not to breach the equal protection argument.<sup>47</sup>

Justices Douglas, Brennan, White, and Marshall all found an equal protection violation and upheld Congress' authority to lower the voting age by statute.<sup>48</sup> These four Justices found it applicable to both state and federal elections where Justice Black found that Congress' authority extended only to federal elections.<sup>49</sup> The majority therefore, upheld Congress' authority to set the voting age in federal elections only.

But Justices Brennan, White, and Marshall, and Douglas in a separate opinion, spoke clearly about the equal protection argument. In his opinion, Douglas almost invites the future opportunity to directly decide the voting age question. "It is said, why draw

the line at eighteen? Why not seventeen? Congress can draw lines and I see no reason why it cannot conclude that eighteen-year-olds have that degree of maturity which entitles them to the franchise.”<sup>50</sup> In defending Congress’ authority to lower the voting age Douglas pointed out that eighteen-year-olds are generally considered mature enough to contract, marry, drive, own a gun, are treated as adults in criminal matters, and that mandatory school attendance does not extend beyond the age of eighteen.<sup>51</sup>

Justice Brennan’s opinion, which was joined by Marshall and White, opens by expressing serious doubt as to whether a statute granting the vote to twenty-one-year-olds and not eighteen-year-olds could withstand scrutiny under the Equal Protection Clause.<sup>52</sup> He goes further to suggest that state practices in other areas undermine such a distinction.<sup>53</sup> These practices included the fact that eighteen-year-olds were treated as adults in criminal matters in forty-nine states, which suggests that there is a general consensus among state legislatures that the differences in intelligence and responsibility between eighteen-year-olds and twenty-one-year-olds is not substantial enough to provide for differing treatment in criminal matters.<sup>54</sup> Justice Brennan also points out, as did Justice Douglas, that thirty-nine states allow eighteen-year-olds to marry without consent, that no state requires school attendance beyond eighteen, and further, that eighteen-year-olds as a class are better educated than some of their elders.<sup>55</sup> With these statements, Justice Brennan also appears to invite the opportunity to consider an equal protection judicial challenge to the voting age. It seems clear that Justices Brennan, White, Marshall, and Douglas had serious doubts about voting age statutes and how they would hold up to equal protection scrutiny.

Justice Brennan next reiterates Congress' argument that evidence of social and biological maturity has been consistently decreasing and cites Dr. Margaret Mead's testimony that the age of physical maturity has dropped over three years in the past century.<sup>56</sup> Recent evidence, as indicated in newspapers and on television news, suggests that the age of physical maturity has dropped even further, to the point that parents are seeking hormone treatment for their daughters as a means of delaying puberty.<sup>57</sup>

In upholding Congress' authority to legislate voting age, Justice Brennan states that when "discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional under the Equal Protection Clause and Congress has the power to forbid it under § 5 of the Twenty-sixth Amendment."<sup>58</sup> This strongly worded statement not only validates Congress' conclusion that the twenty-one-year-old voting age violated the Equal Protection Clause, but also signals that he, Brennan, found it discriminatory and unnecessary to promote any state interest.

The dissenters (Harlan, Stewart, Burger, and Blackmun) did not address the question of whether a lowered voting age was supported by the Equal Protection Clause. Instead, they concluded that the Fourteenth Amendment did not vest Congress with the authority to statutorily lower the voting age. They argued that the voting age can only be lowered by an amendment to the Constitution and therefore, Congress' action was unconstitutional. This view combined with Justice Black's view that Congress could lower only the federal voting age, created a two tiered system with the age for voting in federal elections at eighteen or younger and for voting in state elections any age up to twenty-one.

But even in dissent, Justice Stewart made certain that he was not perceived to be specifically denying eighteen-year-olds the right to vote. He pointed out that the Court was not attempting to determine the value of lowering the voting age. “Our single duty as judges is to determine whether the legislation before us was within the constitutional power of the Congress to enact. A casual reader could easily get the impression that what we are being asked is whether or not we think allowing people eighteen-years-old to vote is a good idea. Nothing could be wider of the mark.”<sup>59</sup> He later concluded that if the government was correct in applying the compelling state interest standard, then a substantial question would exist whether a twenty-one-year-old voting age was constitutional even without congressional action.<sup>60</sup>

Although the Court was equally divided, there are clear indications from eight of the nine Justices, Justice Black being the only exception, that a case brought challenging the constitutionality of the twenty-one-year-old voting age would be found unconstitutional as a violation of the Equal Protection Clause if the compelling state interest standard was applied.

### **Blassman v. Markworth**

A second case exploring the constitutional implications of age qualifications is *Blassman v. Markworth*, a 1973 District Court case from the Northern District of Illinois. The court was asked to rule on the constitutionality of a state qualification requiring that a candidate be twenty-one-years-old to run for a seat on the school board.<sup>61</sup> In its analysis of the Equal Protection argument, the court engaged in an extensive analysis of the Equal Protection ramifications of voting age statutes.<sup>62</sup> The court wrestled with the level of scrutiny to apply evidenced by its reference to the “apparent anomaly between

holding the states to a strict standard of scrutiny when regulation of the franchise is involved and, at the same time, supporting the principle that the states have the unfettered power to regulate the terms and mechanics of their own elections.”<sup>63</sup> Also recognized was the power reserved to the states to establish some qualifications immune from compelling interest justification, although the court failed to list any immune qualifications.<sup>64</sup> In this court’s opinion, discrimination based on race and invidious discrimination are the two areas where a law would be unconstitutional, and prior to the Twenty-Sixth Amendment age qualifications were not considered invidiously discriminatory.<sup>65</sup>

As to the compelling interest standard, the court asserts that its application would deny a state any choice at all, because no state could demonstrate a compelling interest with respect to one age over another.<sup>66</sup> The court did acknowledge the dicta in *Oregon v. Mitchell* that suggests the compelling interest standard is the correct standard, and agreed it would raise a substantial question over a particular age requirement.<sup>67</sup> Yet, it relies on Stewart’s dissenting opinion in *Oregon* to muddy the waters further.

Yet it is inconceivable that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority. Moreover, so long as a state does not set the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies. Section 2 of the amendment provides for sanctions when the right to vote is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the U.S.<sup>68</sup>

From Stewart’s opinion, and in absence of the Nineteenth Amendment, it would also follow that since women are not a discrete and insular minority they would also be denied Fourteenth Amendment protection because the “reasonableness” of only men

voting “is confirmed by the very Fourteenth amendment upon which the Government relies.”<sup>69</sup> This circular reasoning is inadequate to carry either argument. That women could not successfully assert an Equal Protection argument, were the circumstances different, defies logic as well as the Supreme Court’s recognition that “notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”<sup>70</sup>

The other substantial problem with this analysis is that it compares the eighteen-year-old-voting age with the twenty-one-year-old voting age, assuming an analytical context of age versus age. As argued elsewhere in this note, age is an inexact substitute for intelligence and level of responsibility.<sup>71</sup> In 1970 and 1972, when Oregon and Blassman were decided, there were no groups included in the voting process developmentally subordinate to twenty-one-year-olds (1970) or eighteen-year-olds (1972). Mentally retarded (MR) adults, mentally ill (MI) adults and all those voluntarily and involuntarily institutionalized checked their right to vote at the institutional door.<sup>72</sup> Naturally, the only available and the most relevant comparative analysis at the time was age versus age. With the passage of the Civil Rights Acts of the 1960’s, the subsequent elimination of literacy tests and intelligence tests, and the de-institutionalization of thousands during the Reagan years, these developmentally subordinate groups were gradually added to the voter rolls. By the late 1980’s, all barriers to the ballot had been removed and all MR and MI adults, institutionalized or not, were eligible voters (subject, of course, to the same restrictions as all other voters).

The impact of this resonates in Equal Protection analysis. The comparative analysis now required by the Equal Protection Clause is not age versus age, but the more exacting developmental level versus developmental level. After all, 17-year-olds are not

denied the vote just because they are 17, but because they lack the intelligence and level of responsibility<sup>73</sup> necessary to make an intelligent, informed ballot choice. We are now able to comparatively analyze these developmental assumptions against an existing, easily identifiable, and readily measurable group of eligible voters. Not only are we able to do so, but we are compelled to do so by the Equal Protection Clause.

### **Voting Rights Act of 1970 - 42 USCS § 1973bb**

In 1968, Congress amended the Civil Rights Act of 1965 to address voting age, literacy tests, residency requirements, absentee registration, and absentee ballot requirements for presidential elections.<sup>74</sup> On lowering the voting age to eighteen, Congress said;

- (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—
  - (1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;
  - (2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and
  - (3) does not bear a reasonable relationship to any compelling State interest.
- (b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.<sup>75</sup>

Very clearly, in § (a)(3), Congress asserts its interpretation of the Constitution as requiring a compelling interest standard in resolving questions of voting age qualifications.<sup>76</sup> At a minimum, Congress is stating that where voting age qualification issues arise regarding the appropriate age for voting in presidential elections, that issue must be resolved under a compelling state interest standard. Also, in § (b), Congress declares that it is “necessary” to lower the voting age. This necessity is the result of

Congress' interpretation of the Equal Protection Clause, their determination that the compelling state interest standard is the appropriate standard, and that in light of these findings, they are left without choice, they are compelled to act. Nothing has changed in the ensuing years. The current age of eighteen is as unconstitutional as the previous age of twenty-one because it is arbitrary and disconnected from intelligence and responsibility. Congress remains in a continuous state of compulsion on this question because they have yet to address the bedrock questions of intelligence and responsibility and their relationship to voting age.

### **Residency**

Residency has historically been categorized with age and citizenship as a state voter qualification held immune from a compelling interest analysis.<sup>77</sup> As such, its treatment by both the judiciary and congress is relevant to the question of what standard applies in an Equal Protection analysis of voting age? Age and residency are also similar in that both typically provide for eventual inclusion of the excluded voter. Whether waiting for your eighteenth birthday or waiting twelve months before residency is established, eventually the right to vote is yours. The fundamental distinction, of course, is that residency means nothing more than living in a state a statutorily predetermined amount of time. Age on the other hand, is not about age, but about intelligence and level of responsibility.<sup>78</sup>

### **Carrington v. Rash**

In 1965, Carrington was the first residency case to bring state voter qualifications under the rubric of the Equal Protection Clause. In the words of Justice Harlan's dissent, "[a]nyone not familiar with the provisions of the Fourteenth Amendment, the history of

that Amendment, and the decisions of the Court in this constitutional area, would gather from today's opinion that it is an established constitutional tenet that state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause. Yet any dispassionate survey of the past will reveal that the present decision is the first to so hold.”<sup>79</sup>

Carrington addressed a Texas residency requirement that denied military personnel transferring to Texas the vote.<sup>80</sup> Military personnel could never establish residency, so the restriction was permanent.<sup>81</sup> The Court acknowledged Texas right to establish voter qualifications saying:

Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, “the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.”<sup>82</sup>

The Court also pointed out that just because a State treats the members of a distinct class equally judicial inquiry does not end.<sup>83</sup> “The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.”<sup>84</sup>

Texas asserted two “legitimate interests” to justify the exclusion; (1) immunizing its elections from the concentration of military personnel and (2) protecting the franchise from transients.<sup>85</sup> In assessing the first contention, the Court ruled that denying the franchise to a sector of the population because of the way they may vote is unconstitutional because “[t]he exercise of rights so vital to the maintenance of

democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group.”<sup>86</sup> On the second, the Court pointed out that Texas accommodates students in colleges and universities, patients in hospitals, and civilian employee’s of the U.S. Government.<sup>87</sup>

On the Equal Protection question the Court ruled that forbidding a soldier ever to controvert the presumption of nonresidence is an invidious discrimination in violation of the Fourteenth Amendment. While emphasizing that Texas is free to take reasonable and adequate steps to see that all applicants for the vote are bona fide residents “the presumption here created is...incapable of being overcome by proof of the most positive character.”<sup>88</sup>

This analysis looks like a subtle compelling interest analysis without identifying it as such. Texas asserted two legitimate interests for denying military personnel the vote. Under a rational relationship analysis the Texas statute should have been found constitutional as Justice Harlan pointed out in his dissent.<sup>89</sup> Only through a strict scrutiny lens can this decision be understood. In clearly stating that the statute “imposes an invidious discrimination”<sup>90</sup> the Court confirms its application of a compelling interest analysis. With no racial question and no discreet and insular minority, only a compelling interest analysis could result in a finding of invidious discrimination sufficient to overturn a state voter qualification statute where the restriction is rationally related to a legitimate state interest.

### **Evans v. Cornman**

Evans was decided by the Court in June of 1970, four months before *Oregon v. Mitchell*, ruling that the federal government had the authority to establish residency

requirements for presidential elections. The question addressed was a Maryland residency statute invoked by Montgomery County to deny the vote to persons living on the grounds of the National Institutes of Health, a federal enclave located in the county.<sup>91</sup> As with Carrington, the Court noted the long history of federal respect for state voter qualification statutes.<sup>92</sup> However, this time the Court clearly stated that before the right to vote can be restricted, “the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.”<sup>93</sup>

Maryland’s Attorney General asserted Maryland’s interest as insuring that only citizens primarily interested in or affected by the election have a voice in the election.<sup>94</sup> The Court, without deciding the question, assumed this interest could be sufficiently compelling to justify limitations on the suffrage.<sup>95</sup> The Court held that the differences existing between those living at the federal enclave and those who do not, “do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise.”<sup>96</sup> On the Equal Protection question the Court concluded that federal employees living at the enclave are entitled under the Fourteenth Amendment to exercise the equal right to vote.<sup>97</sup> Eight of the nine justices signed on to the majority opinion including Harlan, the lone dissenter in Carrington.<sup>98</sup>

Carrington and Evans illustrate the oft-stated maxim that the Equal Protection Clause is not subservient to the political theory of a particular era and notions of what constitutes equal treatment do change.<sup>99</sup> State residency statutes had been immunized from compelling interest analysis since *Pope* was decided in 1904. It took 61 years before the inoculation wore off, but Carrington and Evans particularly, demonstrate that state residency statutes are subject to a compelling interest analysis.

## **Voting Rights Act of 1970 - 42 USCS § 1973aa**

The Voting Rights Act of 1970 expanded on both the Civil Rights Act of 1965 and 1968.<sup>100</sup> Section 1973aa-1 specifically addresses state voter qualifications regarding durational residency requirements and absentee registration and balloting standards.<sup>101</sup> In § 1973aa-1(a)(5) & (6) and (b), Congress found that durational residency requirements and absentee registration and balloting in presidential elections;

(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 USCS Constitution, Amendment 14; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Upon the basis of these finding, 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 USCS Constitution, Amendment 14, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.<sup>102</sup>

Congress made the determination, as evidenced by § 1973aa-1(a)(6), that in their considered, thorough, and informed opinion, state residency voter qualifications were subject to a compelling interest analysis in terms of presidential elections.<sup>103</sup> Further, Congress concluded it had the authority to supercede state residency voter qualifications to establish federal residency voter qualifications for presidential elections.<sup>104</sup>

Subsequently, in *Oregon v. Mitchell*, the Supreme Court upheld Congress' authority under the Equal Protection Clause, to impose federal residency voter qualifications for presidential elections.<sup>105</sup>

The combination of Court rulings and congressional action subjecting state residency voter qualifications to a compelling interest analysis has restricted State's immunity status to non-presidential elections. The effect is that states have adopted the federal residency standard as their own. These actions also have the consequence of exposing all voter qualifications to a compelling interest analysis in presidential elections. It goes without saying that the right to qualify voter participation based on citizenship, age, residency, and felony status remains immune from such an analysis, but the reasonableness of the specific restriction, at least as far as presidential elections are concerned, is now subject to the exacting standard of a compelling interest analysis.

### **Youth Voting Rights**

The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns. So while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that congress, acting pursuant to its constitutional powers, has imposed.<sup>106</sup> There can be no doubt at this date that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.<sup>107</sup> In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the federal constitution.<sup>108</sup> Residence requirements, age, citizenship, previous criminal

record are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters.<sup>109</sup>

But age doesn't fit very comfortably with residence, criminal record, or citizenship. In limitations on the franchise each requirement means what it indicates. Residence is about living in the geographic area encompassed by the election for a minimal number of days, weeks, or months. Criminal record is typically about a felony conviction although, under the language of the Fourteenth Amendment, it needn't be so restricted. Citizenship is about being a member of a nation and owing allegiance to it by birth or naturalization. But age isn't about being eighteen, it's about intelligence and responsibility.<sup>110</sup> It is the substitution of age for intelligence that sets it apart from the other restrictions.

Residency is not difficult to understand. It is about living within the boundaries of a given election. We expect only those people living in the city to vote in city elections, those living in the county to vote in county elections and so forth. There can be debate over the length of time one must live in an area before becoming eligible to vote or whether due to annexation of your land you then have a right to vote in city elections, but fundamentally residency is a sensible qualification and stands on its own. It doesn't matter whether you are well informed, intelligent, aware, interested, or responsible. Residency is neither a façade for nor an inexact measure of some other questionable characteristic. It is only about residency.

The same can be said for citizenship. It is only logical that to vote in a U.S. election you must be a U.S. citizen, or to vote in a Brazilian election you must be a citizen of Brazil. This limitation makes sense. It is about being born or choosing,

through naturalization, to officially identify with a specific country. As a result, you are eligible to participate in the electoral process. A given state or municipality may choose to allow non-citizens to vote, but restricting their voting is not problematic. It isn't about whether they are informed enough, care enough, understand the community or are invested in the outcome of the election. All these things may be true, but if you are not a citizen your knowledge and preparation are irrelevant. These are not the fundamental reasons for the exclusion. You are simply not a citizen. Citizenship is neither a façade for nor an inexact replacement for some other characteristic. It is what it is, citizenship.

Criminal record is a bit different. The exclusion of criminals does seem to be for other reasons. It seems designed to increase the punishment one receives for their crime and it also seems intended to serve as a deterrent to committing crimes. Whether these rationales are sufficient to deny the franchise is evidenced by the growing number of states that are now allowing convicted felons to regain their voting rights. Unlike residency or citizenship, states are deciding that a criminal conviction on its own is insufficient to justify continued exclusion from the ballot.

Age is unique. The age exclusion has never been about age per se. Age has and always will be a façade or imprecise substitute for intelligence and level of responsibility.<sup>111</sup> Historically, there is justification for this façade. During a time when adults of all varieties were excluded from voting, age must have seemed of little consequence. As more and more adults, white-male-non-property-owners, women, minorities, the poor, the illiterate and the uneducated became voters age continued to maintain its place of honor. But age eventually came under attack. With the Fourteenth Amendment, states were told that those as young as twenty-one were intelligent and

responsible enough to be trusted with the ballot. Again, first with a federal statute and then with the Twenty-sixth Amendment, states were told that eighteen-year-olds were now intelligent and responsible enough to be trusted with the ballot.

Through the many years since passage of the Fourteenth Amendment it has been reasonable to rely upon age as the best and most efficient method for determining the appropriate level of competence needed to cast an informed ballot. In spite of the fact that some under the age of eighteen are better able to cast an informed ballot than many of those over eighteen it was simply too difficult, too comprehensive, and too costly to determine who those young people might be. An age requirement made perfect sense. It was logical, reasonable, conformed to the age of conscription, and was based on sound judgement and available information. Everyone allowed to vote was probably more intelligent and responsible than most of those excluded due to age. It could be argued with reasonable certainty that the number of eligible voters that were intellectually subordinate to those under the age of eighteen was insignificant.

But in the 1970's a monumental shift affecting this approach began. Mentally retarded and mentally ill adults, previously universally denied the franchise, were given access to the ballot.<sup>112</sup> The expansion of this access continued until all mentally retarded and mentally ill adults are now eligible voters (subject to the same restrictions as others). Now everyone allowed to vote can not be presumed to be more intelligent and responsible than most of those excluded due to age. Now an age based voter requirement is not logical, reasonable, or based on sound judgement and available information. There is now an opportunity to determine voter eligibility based on comparative measures of intelligence and responsibility which is far superior to the arbitrary and inexact measure

of age. In fact, the Equal Protection Clause requires that we revisit the voting age question in light of the changes that have taken place since passage of the Twenty-sixth Amendment in 1970. In *Harper*, Justice Douglas spoke of the Court not acting upon their thoughts of what governmental policy should be, but on what equal protection requires.<sup>113</sup>

The Equal Protection Clause is not restrained by the limited intentions of those that enacted it.<sup>114</sup> In determining what lines are unconstitutionally discriminatory, the court has never been confined to historic notions of equality, nor has the court restricted [equal protection] to a fixed set of what was at a given time deemed to be the limits of fundamental rights.<sup>115</sup> Notions of what constitutes equal treatment for purposes of equal protection do change.<sup>116</sup>

The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance... We must therefore conclude that its framers understood the Fourteenth Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.<sup>117</sup>

It is the recognition that profound change has occurred in voting rights that compels us to revisit the age question. As the Court suggested in *Oregon v. Mitchell*, the voting age of twenty-one was unlikely even in 1970 to withstand strict judicial scrutiny.<sup>118</sup> The age of eighteen is even more vulnerable in light of the last thirty years of change.

In those thirty years we have become more aware of the incredible poverty that millions of children suffer from. We have become more aware of the unacceptable level of both physical and sexual abuse that children are subjected to. We have developed

greater insight into the developmental level of children of all ages and are beginning to recognize that their skills exceed our expectations. We have expanded and improved education to the point that today's children are the most and best educated children our country has ever seen. We also continue to fail to ensure the general health of our children by denying them, by the millions, the health care they need. We also continue to assault our children by subjecting greater numbers and ever-younger children to the cruelty of our adult criminal justice system. We have also, through the measured consideration of our Supreme Court, come to the point at which children as young as sixteen and potentially fifteen can be executed for their crimes.

It has been a constant of suffrage struggles that voting is directly related to a group's ability to self-protect. It has been, in fact, one of the driving forces behind the efforts of women and blacks to gain the ballot. Although white males consistently argued that their political input was sufficient to provide for the well-being of women and blacks, both groups concluded that with the ballot, they would see to their own well-being and protection. This is equally true for children. Just as it was inadequate for women to place their protection in the hands of men and for blacks to place their protection in the hands of whites, so too is it inadequate for children to be forced to place their protection in the hands of adults. The best protection adults can provide children pales in comparison to the protection children would be able to provide for themselves if they had the vote.<sup>119</sup>

A prime example of this is Sweden's attempt to eliminate corporal punishment from Swedish society. In withholding from their legislation the deterrent effect of negative consequences Swede's chose to deny children the same protection they provide

adults.<sup>120</sup> With the vote, Swedish children would be more likely than adults to aggressively pursue consequences for hitting children.

### *Youth Enfranchisement and the Potential for Change*

There are three broad areas of potential change identified by Bob Franklin in his chapter on children's voting rights from the book *The Rights of Children*.

First, it would be reasonable to speculate that all political parties would give higher priority and emphasis to policies relating to youth affairs that at present are given nothing more than lip service. There would be a new section of the electorate to be wooed which, if disappointed, could hold the parties to account.

Second, it would lead to the democratization of the whole range of educational, social and welfare institutions of which young people are currently the major consumers. Young people would probably demand greater participation in all aspects of the operation of their school communities and possibly initiate substantial reforms concerning children's rights in care and within the juvenile justice system.

Finally, young people could develop skills and potentials at a much earlier age. If young people's efforts were taken seriously, criticized, evaluated and assessed in the way that we assess each other's work in a dialogue between equals, then children's skills and intellectual achievements could be enhanced to a degree which would appear precocious. Political equality would require adults to take young people more seriously and abandon patronizing attitudes which systematically demean and disrespect children's abilities.<sup>121</sup>

There is reason to believe that with over seventy million youth under the age of eighteen compared to roughly thirty-five million seniors over the age of sixty-five, young people will influence four areas in which children and the elderly are currently treated differently by federal funding policy.

The elderly receive most of their benefits through two programs (social security and medicaid) rather than from a confusing array of agencies. Equally important is that elderly programs are nationally standardized, they can relocate without jeopardizing their benefit checks. Families with children may find themselves eligible for

assistance in one state, but not in another and often must negotiate numerous agencies to access benefits.

The elderly can also supplement their benefits with income from their own resources. Programs benefiting children often require that almost all family resources be spent to receive benefits.

The elderly are more likely to receive their benefits as a matter of right than as a handout. This distinction in perception between right and handout perpetuates the myth that the elderly have earned their share while children are undeserving and feeding at the taxpayers trough.

The final area that will experience some restructuring is national health insurance. A system of national health insurance would very likely be developed extending to all households the medical benefits now enjoyed by those over the age of sixty-five.<sup>122</sup>

The potential for these changes is evident. Should they come to pass they will likely occur slowly, over time. I anticipate a number of additional changes not mentioned by Franklin or Peterson. Children's status will be enhanced, they will experience a collective increase in self-esteem and they will feel greater control over their lives and believe they can change their lives. By recognizing their right to vote society will be saying don't lose hope, this is how you change things, this is how you improve society, we value you, we respect you and your opinions, we recognize you as a person and as a citizen, we acknowledge that we cannot solve societies problems without your input, and we want you to participate in developing a more just, compassionate, and equitable society.

As Susan B. Anthony said:

It was not because the three-penny tax on tea was so exorbitant that our revolutionary fathers fought and died, but to establish the principle that such taxation was unjust. It is the same with this woman's revolution; though every law were as just to woman as to man, the principle that one class may usurp the power to legislate for another is unjust, and all who are now

in the struggle from love of principle would still work on until the establishment of the grand and immutable truth, all governments derive their just powers from the consent of the governed.<sup>123</sup>

But it is not voting age per se that is the issue. Age simply serves as a substitute for intelligence and responsibility. As argued in *Oregon v. Mitchell*, the compelling state interest asserted was not authority to set the age of voters, but the onus of insuring an intelligent and responsible electorate.<sup>124</sup> In order for a voting age of eighteen to be justified under the Equal Protection Clause, we must accept that the level of intelligence and responsibility exhibited by eighteen-year-olds is comparable to the level of intelligence and responsibility exhibited by member groups in the existing electorate. In *Oregon v. Mitchell*, the Court compared eighteen-year-olds to twenty-one-year-olds to establish that they were similarly situated and of a comparable level of intelligence and responsibility.<sup>125</sup> We are therefore compelled to analyze the various groups currently enfranchised to determine if intellectual comparisons are valid and if sufficient evidence is available to draw any definitive conclusions. Should the available evidence reveal that the present electorate includes groups whose intelligence and responsibility falls short of that of eighteen-year-olds we are then compelled to either exclude those groups or lower the voting age to include those similarly situated and of comparable levels of intelligence and responsibility.

There are numerous groups enjoying the franchise whose intellectual abilities raise questions. The mentally ill, victims of Alzheimer's and other mentally debilitating illnesses, and the mentally retarded to name a few. For purposes of this note and because countless studies are available comparing the developmental level of the mentally

retarded adolescents and the non-mentally retarded children that is where we will focus our analysis.

### **Enfranchisement of the Mentally Retarded (MR)**

Efforts to expand ballot access to MR adults were predicated on the Supreme Courts interpretation of the Equal Protection Clause and the 1970 voting Rights Act.<sup>126</sup> The Act banned all tests intended to determine a voter's ability to read, write, understand, interpret in any matter, demonstrate any educational achievement or evidence knowledge of any particular subject.<sup>127</sup>

In 1976, the Federal District Court in the Western District of Pennsylvania issued an Order establishing that institutionalized mentally retarded and mentally ill persons must be allowed to register and vote by absentee ballot in Pennsylvania.<sup>128</sup> The court held that persons confined to mental institutions must be considered qualified absentee electors with no distinction made between varying degrees of mental competency or ability.<sup>129</sup> Pennsylvania's response to this Order was the subject of a report to the U.S. Commission on Civil Rights in June of 1978.

The Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights found that the status of MR adults as eligible voters differed from state to state.<sup>130</sup> At the time only twelve states appeared to allow MR adults to vote.<sup>131</sup> The other 38 states and the District of Columbia employed a variety of qualifications which tended to exclude MR adults from voting.<sup>132</sup> Three states denied the franchise to anyone confined to an institution and twenty-one states denied the franchise to the insane, idiots, persons of unsound mind, the feeble-minded, or non compos mentis.<sup>133</sup> State legislatures rarely defined these terms and left it up to volunteers at the polls to exercise discretion in

determining who should and shouldn't vote.<sup>134</sup> Institutionalization was often considered prima facie evidence of insanity.<sup>135</sup> Of the twelve states that appeared to allow MR adults to vote, residence requirements typically defeated their attempts to register.<sup>136</sup> They were simply unable to travel to their old residences to register and vote.<sup>137</sup>

Presently, no state impedes the right of a mentally retarded adult to vote.<sup>138</sup> Every state does however, exclude those who have been found incompetent by a court.<sup>139</sup> In a phone survey of state election offices it became clear that even those who are severely and profoundly retarded are eligible voters because they are typically not adjudicated incompetent.<sup>140</sup> An election supervisor in the Massachusetts state election office commented at length on the fact that even institutionalized MR adults with no measurable IQ are eligible voters in that state.<sup>141</sup> From conversations with election officials in other states it is clear that this is not the exception, but the rule. Alabama, Arkansas, Colorado, Hawaii, Illinois, Maryland, Massachusetts, North Dakota, and Oregon all confirmed employing standards similar to Massachusetts.<sup>142</sup> Oregon, which is an entirely absentee ballot state, outlined the method by which a profoundly retarded individual's ballot would be cast. A parent or guardian completes a voter registration form and acknowledges having assisted in completing the form. The absentee ballot is mailed to the parent or guardian who completes the ballot, acknowledging again the assistance provided, and forwards it to the appropriate address to be added to the totals.<sup>143</sup> Unless the profoundly retarded individual has been found incompetent by a court (the voter registrations are checked against updated lists) the ballot counts.

What percentage of MR adults are adjudicated incompetent? According to The ARC's (formerly the Association for Retarded Citizens) national headquarters in

Washington D.C., not many. The ARC representative stated that it is rare for MR adults to go through a competency hearing today unless large amounts of money from a trust or inheritance are involved. This view was shared by election officials in each of the state election offices participating in the survey.<sup>144</sup>

How many MR adults actually vote? Data in this area is scarce and to date unobtainable. Two presumptions are worth exploring. First, it is reasonable to believe that MR adults from families that are politically active participate in voting or have their ballot cast for them by a family member. Second, in light of the fact that roughly 50% of eligible voters actually vote in presidential election years<sup>145</sup>, it is reasonable to believe that MR adults are represented as voters in roughly similar numbers. These presumptions seem credible given that whether or not an MR adult is registered and votes is typically up to the discretion of a parent or guardian. The parents of an eighteen-year-old MR adult are roughly thirty-five-years-old or older. Statistics from the 1994, 1996, and 1998 elections show that political activity increases with age.<sup>146</sup> It is reasonable that this increase also reflects an increase in a parent's willingness to cast a ballot on behalf of an MR adult child.

### **Developmental Level of the MR Population**

For the last forty years there has been an on-going debate among developmental researchers regarding the cognitive development of the MR population. One side of the debate suggests that MR adolescents pass through cognitive developmental stages in the same order as non-MR children, but at a slower rate and with greater limitations on the upper limit of their development.<sup>147</sup> This is referred to as the developmental theory.<sup>148</sup> The other school of thought, the differential theory, asserts that MR adolescents differ

from non-MR children in more ways than simply the rate of and upper limit on cognitive development.<sup>149</sup> They also differ in the cognitive processes they use in reasoning.<sup>150</sup>

The developmental theory has two separate hypotheses, the similar sequence hypothesis and the similar structure hypothesis.<sup>151</sup> Similar sequence suggests that both MR adolescents and non-MR children pass through developmental stages in the same order.<sup>152</sup> Similar structure suggests that MR adolescents and non-MR children are similar with respect to their cognitive structure.<sup>153</sup> With both, when controlled for mental age (MA), the hypotheses hold that the two groups will not significantly differ.<sup>154</sup>

Differential theory also is comprised of two separate hypotheses.<sup>155</sup> The first or conventional difference hypothesis argues that MR adolescents will always prove inferior because intelligent quotient (IQ) and not MA is the predictor of problem solving ability.<sup>156</sup> The second or general experience hypothesis argues that general experience is the trigger behind reasoning skills.<sup>157</sup> Therefore, when controlled for MA, MR adolescents will display a higher cognitive developmental level because they have lived longer, have a greater range of experience and more fully developed reasoning skills.<sup>158</sup>

In testing both the developmental and differential hypothesis, researches have generated a body of research that goes directly to the question of comparative cognitive developmental levels between MR adolescents and non-MR children. These MA studies measure the cognitive development of MR adolescents vis a vis the cognitive development of non-MR children. "Mental age is a measure of mental development as determined by intelligence tests, generally restricted to children and persons with intellectual impairment and expressed as the age at which that level of development is typically attained."<sup>159</sup> Researchers rely on a formula that provides a rough approximation

of mental age. The formula multiplies chronological age (CA) with IQ and divides by 100, or  $[CA \times IQ] \div 100 = MA$ , to determine the corresponding MA.<sup>160</sup> Someone with a CA of 20 and an IQ of 70 would have an MA of 14,  $[20 \times 70] \div 100 = 14$ . This method is limited as MR adults age out of the formula because their developmental level has an upper limit rendering the formula inoperable. For example, an MR adult of with a CA of 40 and an IQ of 60, doesn't fit the formula,  $[40 \times 60] \div 100 = 24$ . Mentally retarded adults do not achieve a cognitive developmental level comparable to a non-retarded twenty-four-year-old adult.

Our interest in these studies is not the controversy between developmental theorists and differential theorists, but the findings of their studies as they relate to the comparative cognitive development of MR adolescents and non-MR children. By analyzing these studies and their findings we can identify an age for voting that does not violate the Equal Protection Clause and that is supported by legitimate, accepted, and solid social science research in cognitive development. This is a far better basis for determining a voting age than simply asserting that if you're eighteen you must be intelligent and responsible enough to vote. The first approach, supported by research and directly addressing cognitive abilities, represents an enlightened, logical, intelligent, informed and justifiable method of determining an appropriate voting age. The most that can be said of the second approach is that it's arbitrary and used to have something to do with compulsory military service.

## **Mental Age Studies in Cognitive Development**

### *Weiss Article*

In 1986, Bahr Weiss, John R. Weisz, and Richard Bromfield published an article reviewing twenty-four developmental/differential theory studies comparing 59 groups of MR adolescents and non-MR children and analyzed the results.<sup>161</sup> They found an average MA difference of 4.1 years between the MR adolescents and the non-MR children.<sup>162</sup> This suggests that an MR adult of 18 years is comparable in cognitive development to a non-MR child of 13.9 years. Of thirty-three separate cognitive measures tested two MR groups outperformed two non-MR groups in two areas, the ability to sustain attention and short-term-memory ordered-recall. Thirty-one groups were equal in sixteen cognitive categories and twenty-six non-MR groups outperformed the MR groups in fifteen cognitive categories.<sup>163</sup>

One MR group displayed an MA difference of 6 years, six MR groups displayed an MA difference of 5 years, fourteen MR groups averaged a 4 year MA difference, two averaged a 3 year MA difference and one manifested a 2 year MA difference.<sup>164</sup> The average chronological age of all MR group members was 13 while the average chronological age of non-MR group members was 9. The younger the MR groups and non-MR groups were the closer they became chronologically and also the closer the scores were. Thus, the 2 year MA difference was between the youngest of both groups. As the age of the MR groups rose so to did the difference in chronological age and more significant differences in MA were manifested. Thus, the 5 and 6 year MA differences included the oldest MR groups.

*Groff Study:*

Three additional studies support the conclusions of the Weiss article. The Groff study, conducted in 1982, compared factor scores on the Wechsler Intelligence Scale for Children-Revised (WISC-R)<sup>165</sup> for two groups of cultural-familial MR adolescents and one group of non-MR children.<sup>166</sup> The older group of 50 MR adolescents had a mean chronological age of 15.5 years while the comparison group of 50 non-MR children had a mean chronological age of 9.5 years.<sup>167</sup> The younger group of 50 MR children is not relevant to this analysis.

The studies authors collapsed ten WISC-R protocols into three broad categories they identified as Verbal Comprehension, Perceptual Organization, and Freedom from Distractibility.<sup>168</sup> Mean factored scores for each group were charted on an 11 point scale with 11 the highest possible score.<sup>169</sup> In Verbal Comprehension the non-MR group of 50 children scored 9.5 and the older group of 50 MR adolescents scored 4.5. In Perceptual Organization the non-MR children scored 10.5 and the older MR adolescents scored 6. In Freedom from Distractibility the scores were 9.3 and 4.5 respectively.<sup>170</sup> In each category the non-MR children outperformed the MR adolescents by 5, 4.5, and 4.8 points respectively.

The results suggest that the cognitive developmental difference between MR adolescents and non-MR children is closer to 6 years rather than the 4 years suggested in the Weiss article. In fact, the Groff study, although an older study, may be more representative of the actual developmental difference because the mean chronological age of the MR group was 2.5 years older than the mean age of the MR groups in the Weiss

article. As older MR adolescents are engaged in MA studies with non-MR children, we get closer to discovering the actual developmental differential between eighteen-year-old MR adults and non-MR children. The older the MR group tested, the greater will be the differential in developmental level. The younger the MR group, the lessor the differential.

*Kumar Study:*

The Kumar study, conducted in Japan in 1999, compared test scores of 40 MR adolescents having a mean chronological age of 16.5 years with test scores of 40 non-MR children having a mean chronological age of 10.2 years.<sup>171</sup> The test examined awareness of learning, semantic content, response strategy, processing strategy, summarization, and memory.<sup>172</sup> The non-MR children performed better than the MR adolescents in both semantic content and memory while in response strategy, processing strategy and summarization the groups scores were comparable.<sup>173</sup>

Again, in the Kumar study, there is evidence that the disparity in cognitive developmental level is closer to 6 years rather than the 4 years evidenced in the Weiss article. The chronological age difference here is 6.3 years. This study again highlights that the older the MR group the greater the developmental differential will be. Perhaps more significant is that the Kumar study is a 1999 study and therefore more relevant to today's circumstances. However, the results of the Kumar study may also represent differences in the Japanese and U.S. educational systems as well as differences in the level of energy and commitment each provides to the MR population.

*Vakil Study:*

The Vakil study, conducted in 1997, measured learning and retention of procedural versus declarative memory tasks with twenty-six MR adolescents and twenty-seven non-MR children matched for MA.<sup>174</sup> The MR adolescents had a mean chronological age of 18.6 years and the non-MR children had a mean chronological age of 10.7 years.<sup>175</sup> The non-MR children performed better in both the procedural memory tasks and the declarative memory tasks.<sup>176</sup> This study suggests an even greater differential in cognitive development between MR adolescents and non-MR children than the Kumar study, thus supporting the view that a 6-8 year age difference in measurable cognitive developmental level is a more accurate reflection of the developmental differential. Here the difference in chronological age is a healthy 7.9 years. The Vakil study is a 1997 study and perhaps has more significance today than the Weiss article. The other significant factor is that the MR groups mean CA (18.6) is very close to the current voting age. With a mean CA of 18.6, the MR group has again shown that as their age increases so to does the developmental differential between MR adolescents and non-MR children. These factors suggest the Vakil study may be most representative of the developmental differential we are attempting to identify. On the other hand, it does not measure as many relevant areas of development and is limited to memory processes. The trend, however, suggests that the difference in cognitive development between the general MR population and non-MR children is closer to 6 years than to 4 and that as the MR group approaches adulthood, the developmental differential increases.

Regardless, it is clear from these studies that MR adolescents are developmentally comparable to non-MR children that are between 4-8 years younger, with the evidence strongly supporting a difference closer to 8 years rather than 4. It is estimated that 7.5 million Americans experience MR.<sup>177</sup> Of that number, 80% or 6 million are believed to be diagnosed as experiencing mild MR (IQ scores of 50 to 69).<sup>178</sup> Those with mild MR develop reasonably effective social and communication skills and are capable learners up to about the sixth year of schooling.<sup>179</sup> If we take the mean IQ score of this group (60) and the age at which they are eligible to vote (18) we can calculate an MA by using the MA formula referred to previously  $[60 \times 18] \div 100 = 10.8$ . The formula reveals a developmental differential of 7.2 years which is in harmony with the studies we've reviewed and the observation that as the MR group ages the differential will increase. Recognizing that all MR adults over the age of eighteen are eligible voters, we must conclude that the available social science research in cognitive development supports lowering the voting age anywhere from 4 to 8 years and that the Equal Protection Clause compels us to do so.

### **Criticisms of a Lowered Voting Age**

#### *Exposure to Adult Court*

A significant criticism of a lowered voting age is that if we lower the voting age, we increase the probability that juvenile offenders will be treated as adults in the criminal justice system. Another way of looking at this criticism is that because juveniles are currently treated as adults by the criminal justice system and in ever increasing numbers are at risk of prosecution as adults, they should be able to vote. In *Oregon v Mitchell*, the Supreme Court referenced the fact that eighteen-year-olds were treated as adults by the

criminal justice system as compelling evidence that eighteen-year-olds were similarly situated to twenty-one-year-olds.<sup>180</sup> When *Oregon v. Mitchell* was decided, it was not common practice to waive children to adult court.<sup>181</sup> Presently, there are three mechanisms for transferring children to adult court; judicial waiver, legislative waiver and prosecutorial waiver. The practice of transferring children is not only more common today, but is considered the politically appropriate thing to do.

### *Judicial Waiver*

In judicial waiver, authority rests with a juvenile court judge who typically weighs a variety of factors in determining whether to waive a child to adult court.<sup>182</sup> The age for judicial waiver of children to adult court ranges from “any” in twelve states to sixteen in four states.<sup>183</sup> The type of offense that could result in waiver to adult court ranges from “any” to “any act that would constitute a crime if committed by an adult” to “any felony” to “murder, rape, or kidnapping”.<sup>184</sup> Presently, there are thirty-five states with some form of judicial waiver.<sup>185</sup>

Waiver to adult court was originally intended to provide for prosecution as adults of those juveniles who committed violent crimes.<sup>186</sup> The current trend belies that original intent. Studies from the early 1990’s show that most children waived to adult court were charged with property crimes and drug offenses.<sup>187</sup> A 1990 study by Robert Shepherd Jr. showed that 60% of all transferred cases were for property or drug offenses while 35% were for violent and serious offenses.<sup>188</sup> In 1991 a study conducted by Donna Bishop and Charles Frazier found that 85% of children transferred in Florida were charged with misdemeanors, property offenses or were first-time, low-level offenders in spite of the expressed transfer intent of keeping violent juvenile offenders detained.<sup>189</sup> A third study,

from 1992, by the National Center for Juvenile Justice found that 57% of all children transferred to adult court were transferred for drug or property offenses.<sup>190</sup>

These studies clearly manifest a trend away from the original emphasis of transferring only violent children to adult court to a broader, more aggressive approach of also transferring children charged with non-violent or less violent crimes to adult court.

### *Legislative Waiver*

Legislative waiver automatically transfers a child to adult court based on age and the specific crime the child is charged with. The automatic transfer is one of the characteristics that distinguish legislative waiver from judicial waiver in that no consideration is given to mitigating factors.<sup>191</sup> If a child is of the age set out in the legislation and is charged with a crime the statute includes, waiver is automatically triggered. Thirty-one states now apply some level of legislative waiver.<sup>192</sup> The three most aggressive states in this area are Florida, Nevada and New York.<sup>193</sup>

Florida enforces a Legislative waiver against “any” child charged with any offense, which would be a felony if committed by an adult plus 3 prior adjudications. Nevada enforces a legislative waiver against “any” child for any felony plus one prior delinquent felony.<sup>194</sup> New York triggers it’s automatic waiver for any child sixteen or under charged with any crime plus evidence of reasonable cause to believe the child is criminally responsible.<sup>195</sup>

In the 1990’s, five states passed their first automatic transfer statutes and many states enhanced existing statutes.<sup>196</sup> Clearly, states are interested in subjecting greater numbers of children to the jurisdiction of and potential penalties of the adult court system.

### *Prosecutorial Waiver*

In a prosecutorial waiver the prosecutor has the option of filing a charge against a child in adult criminal court or in juvenile court. This option is, of course, limited by the individual states age criteria and crime specifications for transfer, however, some states have concurrent jurisdiction over any offense that a minor of the specified age commits.<sup>197</sup> Nebraska, for example, provides for a prosecutorial waiver of any child under the age of sixteen for any crime charged<sup>198</sup>, while Wyoming prosecutors may waive a child of thirteen for any felony.<sup>199</sup> All told, fourteen states currently provide for prosecutorial waiver.<sup>200</sup>

Thirty-eight states provide for either/or legislative and prosecutorial waiver.<sup>201</sup> All fifty states are represented when judicial waiver is added.<sup>202</sup> Arizona and Wyoming share top honors in the blending and reach of their waiver options. Arizona uses the legislative waiver to automatically waive any youth fifteen and up who are chronic felony offenders,<sup>203</sup> prosecutorial waiver for any youth of fourteen who is a chronic felony offender<sup>204</sup> and judicial waiver for youth of any age who are charged with any felony.<sup>205</sup> Not to be outdone, Wyoming provides for prosecutorial waiver of any youth thirteen and up for any felony<sup>206</sup> and judicial waiver for any youth twelve and under for any felony or a misdemeanor punishable by six months in jail.<sup>207</sup> These states have children covered from the cradle to the age of majority.

### *Legitimacy of Waiver Concerns*

Even if the waiver concern proves to be valid, if the age is lowered and juveniles are increasingly being treated as adults by the courts, is that impact alone enough to abandon the opportunity to lower the voting age? Looking at the population numbers and juvenile crime statistics helps shed some light on this dilemma. According to population estimates based on the 1990 census (2000 census numbers were unavailable at the time of this writing), the population of youth under the age of eighteen in the U.S. in the year 2000 is approximately 70,580,000 or roughly 3,921,000 for each year from birth to age seventeen.<sup>208</sup> There are 51,539,000 youth between the ages of five and seventeen.<sup>209</sup> For our purposes let's focus on the number of youth between the ages of ten and seventeen, approximately 31,781,000.<sup>210</sup>

The most recent statistics on juvenile court cases are from the year 1997. There were 996,000 juvenile delinquency cases petitioned in 1997.<sup>211</sup> Of those, 0.8% or 7,968 were waived to adult court.<sup>212</sup> This number reveals a decline of 0.6% in the percentage of juvenile cases waived when compared to 1993.<sup>213</sup> For argument's sake, let's accept that all juvenile delinquency cases petitioned are subject to waiver and that juveniles between the ages of ten and seventeen represent all cases petitioned. We are left with 996,000 juveniles subject to waiver out of a total youth population in this age range of 31,781,000. This figure represents a little over 3% of all youth between the ages of ten and seventeen. Is the potential exposure to adult court of 996,000 juveniles sufficiently alarming enough to justify relinquishing legitimate claims to the ballot of the 30,784,000 other youth? And what of the potential impact these additional votes could have on society generally

and the juvenile justice system specifically? Is it not reasonable to believe that with the ballot any potential losses would be more than offset by potential gains?

As children's advocates we have choices to make. We can fearfully dig in to protect the limited advances that have been made over the years in the name of children. We can hold our tongues in an attempt to avoid provoking the political right into sacrificing more and more children to the adult system in exchange for votes. Or we can respond to the continued assault on children by asserting those rights that are justified, attainable, and supported by sound legal arguments and thorough social science research. We can raise the justified alarm that too many children are already exposed to the adult system and assert a child's right to participate in the political process as a means of protecting themselves from opportunistic politicians. Our silence will not make the debate over children in adult courts go away. It is no advantage to allow those who want to increase the number of children charged as adults to pick the time, place, and context in which the debate will occur.

### *The Argument is Demeaning*

It has been said that putting forward this argument is demeaning to children and the mentally retarded. It is easy to see and understand this view. While the argument presented here may be unattractive to some it is also essential. Compare it to an argument that must be considered to some extent more demeaning. There was a time in the U.S. when children received no protection against the abuses they suffered at the hands of adults. It wasn't until 1874, in response to the case of Mary Ellen, that a civil child protection system was introduced.<sup>214</sup> No laws specifically protecting children were in place to protect Mary Ellen. The President of the New York Society for the Prevention

of Cruelty to Animals brought the abuse case arguing that as an animal, Mary Ellen should at least have the rights of animals in the street.<sup>215</sup> Working as a reporter, Jacob Riis wrote, “I saw a child brought in, carried in a horse blanket, at the sight of which men wept aloud...I knew I was where the first chapter of children’s rights was being written.”<sup>216</sup> To the credit of the President of the New York Society for the Prevention of Cruelty to Animals, she didn’t succumb to the potential criticism that the argument may be perceived as demeaning. We read or hear about another Mary Ellen every day, if we don’t, it’s only because she is still waiting for someone to find her.

*Can’t We Just Let Children be Children?*

A colleague in the LLM program took umbrage to the suggestion that the voting age should be lowered and assertively asked, “why can’t we just let children be children?”. I think the answer is relatively simple. Are we talking about the millions of children that routinely suffer physical punishment at the hands of their adult caretakers? Are we talking about the hundreds of thousands of children that are sexually victimized by adults? Are we talking about the millions of children that have no health care available to them? How about the children that our school systems abandon because they are too difficult to teach? And what of the thousands of children waived into the adult criminal justice system? Is this what is meant by “just letting children be children”? Obviously, the children the questioner had in mind do not come from these categories. The children my colleague was speaking of are those that come to mind when we envision them happily playing in the park, chasing each other in games, and lovingly sharing their discoveries with their parents. But these are not the only children.

Women suffered longer than necessary from similar arguments. Today, it can truthfully be said that those arguments were in many ways, correct. Women are no longer women as they were before receiving the ballot. The idea of what women are and can become has been completely redefined. Those who warned at the turn of the 20<sup>th</sup> century that the nature of woman was not suited to the ballot and that women needed to be allowed just to be women were partially right. The vote has contributed to a metamorphosis of womanhood to the point that “just being a woman” today would scare the bejabbers out of a turn of the century man. Today, thankfully, we welcome the changes that have occurred in women’s roles. Their inclusion in all walks of life is now not extraordinary, but ordinary. The changes women have introduced make our lives, culture, and society a more dynamic and enjoyable experience.

Although I take my colleagues comments seriously, limiting children’s potential based upon our current understanding of what being a child is, is no more acceptable than limiting women’s potential based on a 19<sup>th</sup> century understanding of what a woman was. Just as women have taken their political power and fashioned for themselves protections that exceed what men would have sought, so to should children have the right to explore their potential and the opportunity to alter adult perceptions of what being a child is. A child is no more defined by what adults determine them to be than are women defined by what men determine them to be. I submit that only through the right to vote, can children begin to successfully overcome the deeply held prejudices, biases, and stereotypes that adults perpetuate. This narrow-mindedness towards children I’ve labeled “infantism”. And like sexism and racism, it cannot be effectively addressed until children are part of the political process.

## CONCLUSION

This note has focused generally on the legal argument for lowering the voting age and the use of social science research to buttress that argument. After thoroughly analyzing the judicial and legislative history of voting age in America it is clear that if a compelling interest standard is applied, the age of eighteen would not pass constitutional muster. It also seems clear that the compelling interest standard is the correct standard to apply. From the decision in *Oregon v. Mitchell* to the 1970 Voting Rights Amendments to the Civil Rights Act of 1965, every indication is that the compelling interest standard is correct. Further, from the judicial opinions of both *Oregon* and *Blassman v. Markworth*, it's clear that voting age qualifications are in trouble if directly challenged. Along with the social science research on the comparative developmental levels of MR adolescents and non-MR children, this "trouble" becomes a lost cause.

It's not a question of if the voting age should be lowered, but when? International efforts have lowered the voting age in three countries and this trend will likely continue. The few voices currently crying in the wilderness will bear fruit much as the voices of Sojourner Truth, Susan B. Anthony, Elizabeth Cady Stanton, and Frederick Douglas. Every voting rights struggle in our history has been successful. No group that has stood up and declared their right to the vote has met defeat. There is no reason that this children's struggle should fail. As high profile children's advocates begin to embrace the idea, arguments will be strengthened, new perspectives will surface, and the debate will take on a more acceptable image. It is a sad commentary on the state of children's advocacy that this effort is as poorly received as it is. It is even sadder that our most revered children's advocates refuse to stand up for children on this important issue.

Every self-labeled children's advocate should be discussing this issue and engaging others in debate. Consider for a moment this role-play. You are a white, adult, male in 1910. You support enhanced educational opportunities for women, a woman's right to her paycheck, her right to a divorce and custody of her children, and any number of other reforms to benefit women. But you hold to the position that women should not vote. You have dozens of reasons ranging from their lack of political understanding to "they really don't want the vote themselves". Are you really an advocate for women or just someone that helps the less fortunate because it makes you feel good and justifies your existence? Can a genuine advocate hold such a demeaning view of those advocated for? Isn't that kind of paternalism the antithesis of advocacy? Isn't it counter intuitive for an "advocate" to buy into the dominant social construct that the group you advocate for is not intelligent enough or responsible enough to participate in the process that shapes their lives?

When the law is constructed in such a way as to unjustifiably deny rights, protections, and privileges advocates are compelled to creatively seek out the arguments that will gain access to those rights, protections, and privileges. That is what advocates do. That is what advocacy is all about. Accept the challenge. If you do, this note will serve as another chapter on children's rights that began in 1874.

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- <sup>1</sup> *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964).
- <sup>2</sup> LYNN SHERR, *FAILURE IS IMPOSSIBLE* 55 (1995).
- <sup>3</sup> Pennsylvania Advisory Committee to the United States Commission on Civil Rights, *The Last Suffrage Frontier: Enfranchising Mental Hospital Residents*, 1 (June 1978).
- <sup>4</sup> *See id.*
- <sup>5</sup> Martha Minow, *What Ever Happened to Children's Rights?*, 80 Minn.L. Rev. 291, 295 (1995).
- <sup>6</sup> WENDELL W. CULTICE, *A HISTORY OF VOTING AGE IN AMERICA* 2 (1992).
- <sup>7</sup> *Oregon v. Mitchell*, 400 U.S. 112, 279 (1970).
- <sup>8</sup> *See* CULTICE, *supra* note 10, at 2.
- <sup>9</sup> U.S.CONST. amend. XIV, § 2.
- <sup>10</sup> *See* CULTICE, *supra* note 10, at 12.
- <sup>11</sup> *See id.* at 251 & 257.
- <sup>12</sup> *See id.* at 257.
- <sup>13</sup> *See id.* at 257-262.
- <sup>14</sup> *See* CULTICE, *supra* note 10, at 1-19.
- <sup>15</sup> Interview with Hamid Saadat, Public Relations Assistant, Iranian Embassy, Washington D.C. (Feb. 2, 2001).
- <sup>16</sup> NICAR. CONST. ch. II, Art. 51 at 10.
- <sup>17</sup> *See* CULTICE, *supra* note 10, at 77.
- <sup>18</sup> *See id.* at 113-119. Senator Kennedy introduced the statute supported by a 1966 *Harvard Law Review* article by Archibald Cox analyzing the impact of the Supreme Court's ruling in *Katzenbach v. Morgan*. Cox speculated that Congress could, under the enforcement clause of the 14th Amendment, supercede state legislation and it would be upheld by the Court if Congress might reasonably have found the state legislation violated the Equal Protection Clause.
- <sup>19</sup> *See* CULTICE, *supra* note 10, at 117.
- <sup>20</sup> *See id.* at 138.
- <sup>21</sup> *See id.*
- <sup>22</sup> *Oregon v. Mitchell*, 400 U.S. 112.
- <sup>23</sup> *See* CULTICE, *supra* note 10, at 181.
- <sup>24</sup> *See id.* at 187-188.
- <sup>25</sup> *See id.* at 99. The Youth Franchise Coalition included Americans for Democratic Action; Baltimore Youth Franchise Coalition; Democratic Party Citizens Division; Citizens for Vote 18; College Young Democratic Clubs; Episcopal Church; Let Us Vote (LUV); National Association for the Advancement of Colored People; National Education Association; National Student Caucus YMCA; Southern Christian Leadership Conference; Southern Committee on Political Ethics; Student World Federalists; numerous state Teacher's Associations; American Jewish Committee; Council on International Relations and UN Affairs; National Association of Colored Women's Clubs; National Association of Social Workers; National YMCA; and the United Auto Worker's.
- <sup>26</sup> *See id.* at 196-201.
- <sup>27</sup> *See id.* at 215.
- <sup>28</sup> *See* CULTICE, *supra* note 10, at 215.
- <sup>29</sup> *Oregon v. Mitchell*, 400 U.S. 112, Douglas opinion at 142, Brennan opinion at 240, Stewart opinion at 295.
- <sup>30</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370.
- <sup>31</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966). *See also* *Skinner v. Oklahoma*, 316 U.S. 535, 541; *Reynolds v. Sims*, 377 U.S. 533, 561-562 and *Cox v. Louisiana*, 379 U.S. 536, 580-581.
- <sup>32</sup> *Hill v. Stone*, 421 U.S. 289, 295. *See also* *Kramer v. Union Free School District*, 395 U.S. 621, 625; *Cf. Carrington v. Rash*, 380 U.S. 89, 91; and *Pope v. Williams*, 193 U.S. 621.
- <sup>33</sup> *Davis v. Beason*, 133 U.S. 333, 345-347.

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- <sup>34</sup> Carrington v. Rash, 380 U.S. 89, 91. See generally Pope v. Williams, 193 U.S. 621, 632; Lassiter v. Northampton Election Bd., 360 U.S. 45, 50; Cf. U.S. v. classic, 313 U.S. 299; Ex parte Yarbrough, 110 U.S. 651.
- <sup>35</sup> McLaughlin v. Florida, 379 U.S. 184, 191.
- <sup>36</sup> Kramer v. Union Free School District, 395 U.S. 621, 626. See also Williams v. Rhodes, 393 U.S. 23, 30-31; Reynolds v. Sims, 377 U.S. 533, 562; Wesberry v. Sanders, 376 U.S. 1, 17.
- <sup>37</sup> Reynolds v. Sims, 377 U.S. 533, 541.
- <sup>38</sup> Williams v. Rhodes, 393 U.S. 23, 31. See also NAACP v. button, 371 U.S. 415, 438.
- <sup>39</sup> Evans v. Cornman, 398 U.S. 419, 422. See also Lassiter v. Northampton Election Bd., 360 U.S. 45, 50.
- <sup>40</sup> See *id.* see also Harper v. Virginia Board of Elections, 383 U.S. 663, 665; Williams v. Rhodes, 393 U.S. 23, 29.
- <sup>41</sup> See *id.*
- <sup>42</sup> See *id.* at 242.
- <sup>43</sup> See *id.*
- <sup>44</sup> Oregon v. Mitchell, 400 U.S. 112, Douglas opinion at 142 and Brennan, White and Marshall opinion at 243 (1970).
- <sup>45</sup> See generally Oregon v. Mitchell, 400 U.S. 112 (1970).
- <sup>46</sup> See *id.* at 112.
- <sup>47</sup> See generally Oregon v. Mitchell, 400 U.S. 112 (1970).
- <sup>48</sup> See *id.* at 112-113.
- <sup>49</sup> See generally Oregon v. Mitchell, 400 U.S. 112 (1970).
- <sup>50</sup> See *id.* at 142.
- <sup>51</sup> See *id.*
- <sup>52</sup> See *id.* at 240.
- <sup>53</sup> See *id.*
- <sup>54</sup> Oregon v. Mitchell, 400 U.S. 112, 243 (1970).
- <sup>55</sup> See *id.* at 243-245.
- <sup>56</sup> See *id.* at 280.
- <sup>57</sup> William Hageman, *Healthy End to Early Puberty*, CHI. TRIB., December 17, 2000, at Health and Family.
- <sup>58</sup> Oregon v. Mitchell, 400 U.S. 112, 280-281 (1970).
- <sup>59</sup> See *id.* at 282.
- <sup>60</sup> See *id.* at 295.
- <sup>61</sup> Blassman v. Markworth, 359 F. Supp. 1.
- <sup>62</sup> See *id.*
- <sup>63</sup> See *id.* at 5.
- <sup>64</sup> See *id.*
- <sup>65</sup> See *id.*
- <sup>66</sup> See *id.*
- <sup>67</sup> See *id.*
- <sup>68</sup> See *id.* Cf. U.S. v. Carolene Products Co., 304 U.S. 144, 152 n. 4; Oregon v. Mitchell, 400 U.S. 112, 294-295.
- <sup>69</sup> See *id.*
- <sup>70</sup> Harper v. Virginia Board of Elections, 383 U.S. 663, 669. See also Malloy v. Hogan, 378 U.S. 1, 5-6.
- <sup>71</sup> Oregon v. Mitchell, 400 U.S. 112, 242.
- <sup>72</sup> See Pennsylvania Advisory Committee *supra* note 3, at 8.
- <sup>73</sup> Oregon v. Mitchell, 400 U.S. 112, 242.
- <sup>74</sup> 42 USCS § 1973.
- <sup>75</sup> See *id.* at § 1973bb. History: Ancillary Laws and Directives (a) (1,2,3) and (b).
- <sup>76</sup> See *id.* at (a)(3).
- <sup>77</sup> Hill, *supra* note 1
- <sup>78</sup> Oregon v. Mitchell, 400 U.S. 112.
- <sup>79</sup> Carrington v. Rash, 380 U.S. 89, 97.
- <sup>80</sup> See *id.* at 89.
- <sup>81</sup> See *id.*
- <sup>82</sup> See *id.* at 91.

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- <sup>83</sup> *See id.* at 93.
- <sup>84</sup> *See id.* at 93. See also *McLaughlin v. Florida*, 379 U.S. 184, 191.
- <sup>85</sup> *See id.*
- <sup>86</sup> *See id.* See also *Schneider v. State*, 308 U.S. 147, 161.
- <sup>87</sup> *See id.* at 95.
- <sup>88</sup> *See id.* at 96. See also *Heiner v. Donnan*, 285 U.S. 312, 324.
- <sup>89</sup> *See id.* at 99-101.
- <sup>90</sup> *See id.* at 96.
- <sup>91</sup> *Evans v. Cornman*, 398 U.S. 419.
- <sup>92</sup> *See id.* at 422.
- <sup>93</sup> *See id.*
- <sup>94</sup> *See id.*
- <sup>95</sup> *See id.*
- <sup>96</sup> *See id.* at 425-426.
- <sup>97</sup> *See id.* at 426.
- <sup>98</sup> *See id.* at 419. J. Blackmun did not participate.
- <sup>99</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669. See also *Malloy v. Hogan*, 378 U.S. 1, 5-6.
- <sup>100</sup> 42 USCS § 1973aa-1 (1970).
- <sup>101</sup> *See id.*
- <sup>102</sup> *See id.*
- <sup>103</sup> *See id.*
- <sup>104</sup> *See id.*
- <sup>105</sup> *Oregon v. Mitchell*, 400 U.S. 112.
- <sup>106</sup> *Lassiter v. Northhampton Board of Elections*, 360 U.S. 45, 50-51 (1959).
- <sup>107</sup> *Evans v. Cornman*, 398 U.S. 419, 422 (1970).
- <sup>108</sup> *Carrington v. Rash*, 380 U.S. 89, 91 (1965).
- <sup>109</sup> *Lassiter v. Northhampton Board of Elections*, 360 U.S. 45, 51 (1959).
- <sup>110</sup> *Oregon v. Mitchell*, 400 U.S. 112, 242.
- <sup>111</sup> *See id.*
- <sup>112</sup> *See generally* Pennsylvania Advisory Committee *supra* note 3.
- <sup>113</sup> *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670.
- <sup>114</sup> *See id.* at 663.
- <sup>115</sup> *See id.*
- <sup>116</sup> *See id.*
- <sup>117</sup> *Oregon v. Mitchell*, 400 U.S. 112, 278.
- <sup>118</sup> *See id.* at 240 and 295.
- <sup>119</sup> This is a variation on Mohandas Gandhi's assertion to the British that the best government offered by an occupying country is not as acceptable nor as effective as the worst government the citizens of that country can provide themselves.
- <sup>120</sup> Philip Greven, *Spare The Child*, 219 (1990). The Swedish law states; "A child may not be subjected to physical punishment or other injurious or humiliating treatment." The law carries no civil or criminal penalties.
- <sup>121</sup> BOB FRANKLIN, *THE RIGHTS OF CHILDREN* 24-25 (1986).
- <sup>122</sup> Paul E. Peterson, *An Immodest Proposal*, *Daedalus: J. of the Amer. Acad. of Arts and Sciences*, Fall 92, at 151, 171.
- <sup>123</sup> *See* SHERR, *supra* note 2, at 55.
- <sup>124</sup> *Oregon v. Mitchell*, 400 U.S. 112, 242 (1970).
- <sup>125</sup> *See id.* at 142 (Douglas opinion) and at 243 (Brennan, White and Marshall opinion).
- <sup>126</sup> *See* Pennsylvania Advisory Committee *supra* note 3, at 8.
- <sup>127</sup> *See id.*
- <sup>128</sup> *See id.* at 12-14.
- <sup>129</sup> *See id.* at 32.
- <sup>130</sup> *See id.* at 31.
- <sup>131</sup> *See* Pennsylvania Advisory Committee, *supra* note 3, at 31.
- <sup>132</sup> *See id.* at 8.

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<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See Pennsylvania Advisory Committee, *supra* note 3, at 8.

<sup>137</sup> See *id.* at 9.

<sup>138</sup> Federal Election Commission, *State Voter Registration Requirements*, (visited Feb. 4, 2001) <<http://www.fec.gov/pages/voteinst.htm>>. Supplemented with a phone survey of nine states election offices. Alabama, Arkansas, Colorado, Hawaii, Illinois, Maryland, Massachusetts, and North Dakota, Oregon. Alabama contact: Joetta White, Chairperson of the Board of Elections-1-800-274-VOTE, Arkansas contact: Michael Scott, Voting Supervisor-1-800-482-1127, Colorado contact: Karen Gatchett, Election Division Trainer-303-894-2680 ext. 385, Hawaii contact: Estelle Allen, Voter Services Coordinator-808-455-8683, Illinois contact: Don Schultz, Director of Election Operations-217-782-4141, Maryland contact: Joe Torre, Voter System Certification Coordinator-1-800-222-8683, Massachusetts contact: Peter Montalto, Election Supervisor-617-727-2828, North Dakota contact: LeeAnn Oliver, Election Specialist-701-328-2900, Oregon contact: Scott Tighe, Operations Manager Elections Division-503-986-1518.

<sup>139</sup> See *id.*

<sup>140</sup> A phone survey of nine states election offices was conducted. Alabama, Arkansas, Colorado, Hawaii, Illinois, Maryland, Massachusetts, and North Dakota, Oregon. Alabama contact: Joetta White, Chairperson of the Board of Elections-1-800-274-VOTE, Arkansas contact: Michael Scott, Voting Supervisor-1-800-482-1127, Colorado contact: Karen Gatchett, Election Division Trainer-303-894-2680 ext. 385, Hawaii contact: Estelle Allen, Voter Services Coordinator-808-455-8683, Illinois contact: Don Schultz, Director of Election Operations-217-782-4141, Maryland contact: Joe Torre, Voter System Certification Coordinator-1-800-222-8683, Massachusetts contact: Peter Montalto, Election Supervisor-617-727-2828, North Dakota contact: LeeAnn Oliver, Election Specialist-701-328-2900, Oregon contact: Scott Tighe, Operations Manager Elections Division-503-986-1518.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> U.S. Census Bureau, *Reported Voting and Registration, by Sex and Single Years of Age* (visited Feb. 2, 2001) <<http://www.census.gov/population/socdemo/voting/cps1996/tab01.txt>>.

<sup>146</sup> See *id.* at <<http://www.census.gov/population/socdemo/voting/cps1998/tab01.txt>> & <<http://www.census.gov/population/socdemo/voting/work/tab01.txt>>. For the three election years of 1994, 1996, and 1998 47.3% of 35-44-year-olds, 56% of 45-54-year-olds, 61.5% of 55-64-year-olds, 65.9% of 65-74-year-olds, and 63.4% of 75-84-year-olds voted.

<sup>147</sup> Bahr Weiss et al., *Performance of Retarded and Nonretarded Persons on Information-Processing Tasks: Further tests of the Similar Structure Hypothesis*, 100 *Psychological Bulletin* 157, (1986).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> See Weiss et al., *supra* note 45, at 157.

<sup>153</sup> See *id.* at 158.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See Weiss et al., *supra* note 45, at 158.

<sup>158</sup> See *id.*

<sup>159</sup> *The American Heritage Dictionary of the English Language: Fourth Edition 20000* (visited Jan. 27, 2001) <<http://www.barleby.com/61/13/MO221300.html>>.

<sup>160</sup> Eli Vakil et al., *Procedural and Declarative Memory Processes: Individuals With and Without Mental Retardation*, 102 *American Journal on Mental Retardation* 147, 149 (1997).

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- <sup>161</sup> See generally Bahr Weiss et al., *Performance of Retarded and Non-retarded Persons on Information-Processing Tasks: Further tests of the Similar Structure Hypothesis*, 100 *Psychological Bulletin* 157, (1986).
- <sup>162</sup> See *id.* at 166-167.
- <sup>163</sup> See *id.*
- <sup>164</sup> See *id.*
- <sup>165</sup> The WISC-R is made up of twelve sub-tests measuring Information, Similarities, Vocabulary, Comprehension, Picture Completion, Picture Arrangement, Block Design, Object Assembly, Arithmetic, Coding, Mazes and Digit Span. The scores from Information, Similarities, Vocabulary and Comprehension were collapsed into the single category of Verbal Comprehension. Picture Completion, Picture Arrangement, Block Design and Object Assembly were collapsed into the single category of Perceptual Organization. Arithmetic and Coding were collapsed into the single category of Freedom from Distractibility. Mazes and Digit Span were not included because sub-test scores were not available for all retarded subjects.
- <sup>166</sup> M.G. Groff and K.W. Linden, *The WISC-R Factor Score Profiles of Cultural-Familial Mentally Retarded and Non-retarded Youth*, 87 *American Journal of Mental Deficiency* 147 (1982).
- <sup>167</sup> See *id.* at 148.
- <sup>168</sup> See *id.* at 149.
- <sup>169</sup> See *id.*
- <sup>170</sup> See *id.*
- <sup>171</sup> Surender Kumar et al., *Responses of Low-IQ Students on the Learning Awareness Questionnaire compared to Students Matched on Mental and Chronological Age*, 85 *Psychological Reports* 432 (1999).
- <sup>172</sup> See *id.*
- <sup>173</sup> See *id.* at 437.
- <sup>174</sup> Eli Vakil et al., *Procedural and Declarative Memory Processes: Individuals With and Without Mental Retardation*, 102 *American Journal on Mental Retardation* 147 (1997).
- <sup>175</sup> See *id.* at 149.
- <sup>176</sup> See *id.* at 148.
- <sup>177</sup> President's Committee on Mental Retardation, *Mission Statement* (visited Jan. 29, 2001) <<http://www.acfs.dhhs.gov/programs/pcmr/mission.hem>>.
- <sup>178</sup> The Penguin Dictionary of Psychology, *xrefer* (visited Jan. 29, 2001) <<http://www.xrefer.com/entry/152311>>.
- <sup>179</sup> See *id.*
- <sup>180</sup> *Oregon v. Mitchell*, 400 U.S. 112, Douglas opinion at 142 and Brennan, White and Marshall opinion at 243 (1970).
- <sup>181</sup> Lisa Beresford, Note, *Is Lowering the Age at Which Juveniles can be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State by State Assessment*, 37 *San Diego L. Rev.* 783, 790. See also BARRY KRISBERG & HAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 50 (1993).
- <sup>182</sup> See *id.* at 794.
- <sup>183</sup> See *id.* at 829-840, Appendix A.
- <sup>184</sup> See *id.*
- <sup>185</sup> See *id.*
- <sup>186</sup> See Beresford, *supra* note 106, at 794. See also Robert E. Shepherd Jr., *Juvenile Justice: The Rush to Waive Children to Adult Court*, 10 *Crim. Just.* 39, (1995). Vincent Schiraldi & Jason Ziedenberg, *The Florida Experiment: Transferring Power from Judges to Prosecutors*, 2000 *A.B.A. Sec. Crim. Just.* 47, Susan Guarino-Ghezzi & Edward J. Loughran, *Balancing Juvenile Justice* 1-2 (1996).
- <sup>187</sup> See *id.* at 794.
- <sup>188</sup> See *id.* See also Robert E. Shepherd Jr., *Juvenile Justice: The Rush to Waive Children to Adult Court*, 10 *Crim. Just.* 39, 40 (1995).
- <sup>189</sup> See *id.* See also Vincent Schiraldi & Jason Ziedenberg, *The Florida Experiment: Transferring Power from Judges to Prosecutors*, 2000 *A.B.A. Sec. Crim. Just.* 47.
- <sup>190</sup> See *id.* See also Susan Guarino-Ghezzi & Edward J. Loughran, *Balancing Juvenile Justice* 1-2, 19 (1996).
- <sup>191</sup> See Beresford, *supra* note 106, at 806.
- <sup>192</sup> See *id.* at 841-847, Appendix B.

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- <sup>193</sup> *See id.*
- <sup>194</sup> *See id.* at 841.
- <sup>195</sup> *See id.* at 843.
- <sup>196</sup> *See* Beresford, *supra* note 106, at 807.
- <sup>197</sup> *See id.* at 814.
- <sup>198</sup> *See id.* at 850, Appendix C.
- <sup>199</sup> *See id.* at 851.
- <sup>200</sup> *See id.* at 848-851.
- <sup>201</sup> *See* Beresford, *supra* note 106, at 841-851, B & C.
- <sup>202</sup> *See id.* at 829-851, Appendix A, B & C.
- <sup>203</sup> *See id.* at 841, Appendix B.
- <sup>204</sup> *See id.* at 848, Appendix C.
- <sup>205</sup> *See id.* at 829, Appendix A.
- <sup>206</sup> *See* Beresford, *supra* note 106, at 851, Appendix C.
- <sup>207</sup> *See id.* at 840, Appendix A.
- <sup>208</sup> U.S. Census Bureau Homepage, <<http://www.census.gov/population/estimates/nation/intfile2-1.txt>>.
- <sup>209</sup> *See id.*
- <sup>210</sup> *See id.*
- <sup>211</sup> CHARLES PUZZANCHERA et al., National Center for Juvenile Justice, *Juvenile Court Statistics 1997*, Table 10 at 12, (May 2000) <<http://www.ncjrs.org/pdffiles1/ojdp/180864.pdf>>.
- <sup>212</sup> *See id.* Table 11.
- <sup>213</sup> *See id.*
- <sup>214</sup> DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 278 (2000). *see also* ROBERT W. TEN BENDEL et al., CHILDREN IN A WORLD OF VIOLENCE: THE ROOTS OF CHILD MALTREATMENT IN THE BATTERED CHILD 3 (Mary Edna Felfer et al., eds., 5<sup>th</sup> ed. 1997), quoting Jacob Riis, *Children of the Poor* (1894).
- <sup>215</sup> *See id.* at 279.
- <sup>216</sup> *See id.*