

TAKING (EQUAL VOTING) RIGHTS SERIOUSLY:  
THE FIFTEENTH AMENDMENT AS  
CONSTITUTIONAL FOUNDATION, AND THE  
NEED FOR JUDGES TO REMODEL THEIR  
APPROACH TO AGE DISCRIMINATION IN  
POLITICAL RIGHTS

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*This Essay explores the relationship between twentieth-century voting-discrimination amendments and the Fifteenth Amendment's antidiscrimination groundwork on which these later developments built. In particular, it examines ways in which the Twenty-Sixth Amendment, whose text and ratification conversations tightly track those of the Fifteenth Amendment, has been underimplemented, if not completely ignored, in recent debates and cases that are ever-more crucial to the meaning of political-rights equality under the Constitution. It ends by urging courts to take more seriously the similarities between the Twenty-Sixth and Fifteenth Amendments in adjudicating disputes involving facial or de facto age discrimination in political rights realms.*

The Reconstruction Amendments are designated by many as a Second Founding. And that is not an inapt characterization; the Thirteenth, Fourteenth and Fifteenth Amendments together do mark a new and sharply different constitutional creation, a chance to correct course and redress grievous mistakes from America's original Constitution.

But as the root of the word "founding" (from the Latin "fundus"—meaning bottom on which other matter accumulates or is

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built<sup>1</sup>) itself suggests, a second founding is also a second foundation; not so much the replacement of something old with something else, but the start or beginning (and not the end) of something new that is not yet fully constructed. As the introduction to Kurt Lash's helpful new compilation of primary legal source materials surrounding the Reconstruction observes, these postwar enactments didn't just amend the Constitution but reshaped it,<sup>2</sup> altering the contours of the footing on which future constitutional structures could and would be erected. When one lays a foundation, one may never be sure how many subsequent levels might be built, but the initial perimeter-beam layout bears the weight of later additions, and thus often substantially affects the shape, size, and material composition of these add-ons.

In this Essay, I explore the relationship between more recent constitutional stories (double entendre intended) and the Fifteenth Amendment's antidiscrimination groundwork. In particular, I look at the ways in which the Twenty-Sixth Amendment, whose text and winning ratification arguments tightly track those of the Fifteenth Amendment, has been underimplemented, if not completely ignored, in recent debates and cases that are crucial to the meaning of political-rights equality under the Constitution.<sup>3</sup>

## I. THE SCOPE AND MEANING OF THE FIFTEENTH AMENDMENT

### A. *The Void the Fifteenth Amendment Was Designed to Fill*

In prior works I have begun analysis of the Fifteenth Amendment by asking why the measure was necessary, as a legal matter, at all. In other words, why was discrimination on the basis of race in voting not already proscribed by the Fourteenth Amendment? Some might say, as did the second Justice Harlan in *Oregon v. Mitchell*, that the enactment of the Fifteenth Amendment is itself "evidence that [those responsible for the Fourteenth Amendment] did not understand [it] to have accomplished such a result."<sup>4</sup> Evidence, yes, but perhaps not conclusive evidence, given that the constitutional edifice doubtless contains redundancy that serves to strengthen and reinforce stress points, as Chief Justice Marshall pointed out in the Court's seminal

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1 *Found*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/founding> [<https://perma.cc/A7RU-D68K>].

2 See Kurt T. Lash, *Introduction to 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 5–14* (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 2].

3 While my focus is the Twenty-Sixth Amendment and age discrimination, many of my observations and arguments are applicable to the Nineteenth and (to a lesser extent because of some textual divergence) Twenty-Fourth Amendments.

4 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part).

*McCulloch v. Maryland*<sup>5</sup> opinion. Indeed, many modern cases and commentators appear to suggest (or at least assume) that the Fourteenth Amendment does address voting discrimination, even though this reading of the Fourteenth Amendment ignores some basics of reconstruction legal history, and in the process might tend to marginalize (if not make irrelevant altogether) the Fifteenth Amendment.

Within the Fourteenth Amendment, the two likeliest textual candidates to proscribe voting discrimination are the Privileges and Immunities and Equal Protection Clauses. But as a textual and historical matter, both clauses are hard sells. The Privileges and Immunities Clause does not prohibit race discrimination in the franchise because voting was not among the “privileges or immunities [of citizenship]” as that phrase was used in Article IV of the Constitution or elsewhere in legal discourse.<sup>6</sup>

For example, a citizen of Massachusetts visiting South Carolina would be entitled to many “civil” privileges and immunities, such as the right to own property, but would not be entitled to vote in South Carolina elections or exercise any other “political” rights. Thus, a key distinction drawn by the drafters of the Civil Rights Act of 1866 and the closely related Fourteenth Amendment was that between civil and political rights; only the former were intended to be safeguarded.<sup>7</sup>

Senator Stephen Douglas elaborated on this critical distinction between “civil” and “political” rights in an 1850 speech on the floor of Congress explaining that free blacks in Illinois were “protected in the enjoyment of all their civil rights,” but were “not permitted to serve on juries, or in the militia, or to vote at elections, or to exercise any other political rights.”<sup>8</sup> This distinction resurfaced frequently during the debate on the 1866 Act. For instance, in order to deflect fears that statutory language prohibiting discrimination in “civil rights and immunities” might apply to voting, Representative Martin Russell Thayer explained:

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5 17 U.S. (4 Wheat.) 316, 420 (1819) (Constitutional provision may exist simply to “remove all doubts” about a proposition that would be constitutionally correct even in the provision’s absence.)

6 See U.S. CONST. amend. XIV, § 2; U.S. CONST. art. IV, § 2.

7 Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 223 (1995) (footnotes omitted) (first citing Act of Apr. 9, 1866, ch. 31, 14 Stat. 27; then citing Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1244–46 (1992); and then citing *Mitchell*, 400 U.S. at 162–63).

8 JAMES WASHINGTON SHEAHAN, *THE LIFE OF STEPHEN A. DOUGLAS* 157 (New York, Harper & Bros. 1860).

[T]he words themselves are ‘civil rights and immunities,’ not political privileges; and nobody can successfully contend that a bill guarantying [sic] simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.<sup>9</sup>

Representative Wilson of Iowa made a similar observation. In discussing the proposed Act’s “civil rights and immunities” language, Wilson promised colleagues that the legislation would not affect the quintessential political rights of voting and jury service:

What do these terms [of the Act] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on juries . . . . These are not civil rights or immunities.<sup>10</sup>

Representative Lawrence, considering the same question, endorsed Wilson’s interpretive sentiments, again characterizing voting and jury service, along with office-holding, as a grouping of political rights that were unaffected by the proposed legislation: the Act speaks only to civil privileges and “does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c.”<sup>11</sup>

This important distinction, drawn repeatedly during consideration of the Act, carried over to, and informed interpretation of, the Privileges and Immunities Clause of the Fourteenth Amendment, which was intended to preserve the political-civil line. As Professor Harrison has observed, however “close [the] connection between [the Fourteenth Amendment’s] privileges and immunities [of citizenship language] and [the concept of] civil rights[,] neither was thought to extend to political rights, such as voting or serving on juries.”<sup>12</sup>

The Equal Protection Clause was similarly understood at the time of its enactment not to apply to political rights and not to require race

9 CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer).

10 CONG. GLOBE, 39th Cong., 1st Sess. 1115–22 (1866) (statement of Rep. Wilson) as reprinted in LASH, Vol. 2, *supra* note 2, at 119, 120; see also CONG. GLOBE, 39th Cong., 1st Sess. 476, 599, 606, 1151, 1159, 1757, 1836, 3035 (1866) (statements of Sen. Trumbull, Reps. Thayer, Kelley and Windom, and Sen. Henderson) (Civil Rights Bill does not encompass political rights). For many more examples of this distinction during this era, see Amar, *supra* note 7, at 222–37.

11 CONG. GLOBE, 39th Cong., 1st Sess. 1832–37 (1866) (statement of Rep. Lawrence) as reprinted in LASH, Vol. 2, *supra* note 2, at 147, 147.

12 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1417 (1992).

neutrality in voting. In language that addresses both the Equal Protection and Privileges and Immunities Clauses, Fourteenth Amendment coauthor Representative John Bingham reminded opponents that “[t]he [proposed] amendment [as a whole] does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.”<sup>13</sup> Even more explicitly, Senator Jacob Howard, when he introduced the Fourteenth Amendment in the Senate, reassured his fellow legislators that “the first section [which includes the Equal Protection Clause as well as the Privileges and Immunities and Due Process Clauses] of the proposed amendment does not give to either of these classes [blacks or whites] the right of voting.”<sup>14</sup>

And the broad phrasing of the Equal Protection Clause requires this historical understanding. The Equal Protection Clause (similar to the Due Process Clause but unlike the Privileges and Immunities Clause) applies to all persons, not just citizens, and was intended to afford some protection to noncitizens, including aliens. Yet if the drafters intended the Equal Protection Clause to apply to aliens, then freedom from voting discrimination could not have been considered a denial of equal protection, for the Constitution did not prohibit states from denying to aliens the right to vote and exercise other political participatory rights on the basis of their alienage.

Seeing that the Fourteenth Amendment left a void in the protection of political rights—such as voting, jury service, and office-holding—makes the existence and scope of the Fifteenth Amendment is much easier to understand. One early version of what became the Fifteenth Amendment set out clearly the drafters’ understanding that the Amendment would fill that void, by providing straightforwardly that “all provisions in the [C]onstitution or laws of any State whereby any distinction is made in political or civil rights or privileges on account of race . . . or color shall be inoperative and void.”<sup>15</sup> The draft went on to give “Congress . . . [the] power to make all laws necessary and proper to secure to all citizens of the United States in every State the same political rights and privileges.”<sup>16</sup> Given this consistent and well-understood emphasis on a package of political rights, the Fifteenth Amendment, as I have explained in detail elsewhere, is

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13 CONG. GLOBE, 39th Cong., 1st Sess. 2530–45 (1866) (statement of Rep. Bingham) as reprinted in LASH, Vol. 2, *supra* note 2, at 170, 178.

14 CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Sen. Howard) as reprinted in LASH, Vol. 2, *supra* note 2, at 185, 188.

15 CONG. GLOBE, 40th Cong., 3d Sess. 1032 (1869) (statement of Sen. Fessenden).

16 *Id.*

properly understood to prohibit discrimination on the basis of race not just in voting at the ballot box, but also in the jury box.<sup>17</sup>

*B. The Primary Arguments for Black Suffrage*

The congressional debates surrounding the enfranchisement of black Americans after the Civil War illustrated, in ways that would foreshadow the Nineteenth and Twenty-Sixth Amendment debates, that voting rights involve both group interests and individual respect and thereby further instrumental as well as dignitary objectives.<sup>18</sup> Although the Supreme Court of the late twentieth and early twenty-first centuries often suggests that governments may not constitutionally suggest a commonality of interests and perspectives among black voters, that modern doctrinal notion would have struck the Republican sponsors and supporters of the Reconstruction Amendments as wrong if not ridiculous.

To be sure, congressional supporters of black suffrage certainly insisted that black men as individual citizens deserved the franchise as individual freemen in a constitutional republic:

The individual rights argument for black suffrage was a critical weapon in the Republican arsenal. According to this perspective, every citizen had a natural right to vote and express his support for, or opposition to, the government. This was an essential characteristic of the republican form of government guaranteed in the Constitution and the distinguishing characteristic of the democratic principle on which the United States had been founded: that government derived its legitimacy from the consent of the governed.<sup>19</sup>

Take, for instance, Senator Ferry's assertion, in support of the Fifteenth Amendment, that:

In this land Government does not make voters, but voters make the Government. To vote, under every principle upon which our Government is based, is a right of man because of his manhood, and it comes to every citizen because of that truth in our fundamental charter which proclaims that "governments derive all their just powers from the consent of the governed." And herein lies the essential distinction between the European and the American social theories. By the former, all political functions find their source in the governing authority, and descend from it to the subject. By the latter, all political functions originate from the people, in whom alone is inherent sovereignty. The European

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17 See Amar, *supra* note 7, at 223.

18 For much more elaboration on the observations that follow, see Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

19 *Id.* at 929–31 (footnotes omitted).

petitions for franchises; the American asserts rights. This amendment only forbids the denial of these rights.<sup>20</sup>

Moreover, Republicans argued, blacks as individuals had earned the right to vote by their service in the Union armies during the war. No country with integrity could accept a person's service in arms to save the nation and then repudiate that same individual by denying him the right to vote. Indeed, even an uneducated but loyal emancipated slave, the argument ran, had a more deserving claim to the right to vote than the traitors and rebels who made up much of the voting white South. Representative Whittemore made the point in these terms:

Shall we trust the pardoned rebel and not the patriot black man, whose severed limb lies moldering at Fort Pillow, Port Hudson, Olustee, Battery Wagner, or Petersburg mine? . . .

Give to the colored man his vote. . . . On staff and crutch he stands demanding his rights; with scars and empty sleeves he pleads an equal franchise; with uplifted hands, which have borne the musket in the defense of your altars and your homes, of that flag, emblem of freedom, of the future greatness of our Republic, he asks, not social, but political equality.<sup>21</sup>

These individual rights and basic fairness arguments were formidable, but by no means conclusive. The arguments in favor of black suffrage thus demanded additional support.

When forced to confront the issue in Congress after the Civil War, legislators determined that the right to vote necessarily involved more than the honor of equal manhood, more than the dignity and respect due a citizen, and even more than the power to express one's refusal to consent to a government deemed unjust. The ballot was the "buckler and shield" of the poor, the weak, and the despised. It provided not only respect, but "protection and justice." While it bestowed "dignity" on a voter, it also conferred "power" and made "the Government his agent and protector instead of his master and oppressor."

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Arguments extolling the instrumental value of the franchise to the black communities in the South provided a new and powerful

20 CONG. GLOBE, 40th Cong., 3d Sess. 858 (1869) (statement of Sen. Ferry).

21 CONG. GLOBE, 40th Cong., 3d Sess. app. 93 (1869) (statement of Rep. Whittemore). The connection between prior military service and the right to vote was also invoked in the ratification debates taking place in the state houses; "most Republican legislators simply argued that if the Negro was good enough to fight and die for the Union during the war, he was a good enough citizen to vote. The importance and influence of this argument cannot be overestimated." WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 81, 85 (1965) (citation omitted).

foundation for granting freemen the vote. Foremost among these arguments was the claim that black people needed the right to vote in order to be able to protect themselves against the enactment of pernicious laws by white southerners. Republicans anticipated that the black populations in the South would be under siege and believed that political influence and voting power would be their sole means of defense. The only alternative to the franchise was the continued military occupation of the South or, at a minimum, continued intrusive civil intervention into the affairs of southern states.<sup>22</sup>

It is obvious that this instrumental justification for expanding the franchise presumed that black voters would act collectively in exercising political power. The individual black voter acting alone would have minimal impact on political outcomes. Legislators anticipated that the majority of whites, who harbored virulent ill will toward their former slaves, would engage in racial bloc voting; only the votes of the black masses could offset this white political aggression.

Finally, extending the franchise promised to benefit the Republican Party. New black voters were anticipated to vote Republican and, in doing so, would ensure that men who were disloyal to the Union would not lead the postwar governments of the southern states. And Republican legislators did not hesitate to openly acknowledge this partisan purpose. Senator Sumner, surely as devoted to black suffrage as a matter of justice and right as any member of the Senate, repeatedly emphasized the value of the black vote to Republican Party ascendancy. In 1869, Sumner exhorted his colleagues as follows:

I do not depart from the proprieties of this occasion when I show how completely the course I now propose harmonizes with the requirements of the political party to which I belong. Believing most sincerely that the Republican party, in its objects, is identical with country and with mankind . . . I cannot willingly see this agency lose the opportunity of confirming its supremacy. . . .

Pardon me; but if you are not moved by considerations of justice under the Constitution, then I appeal to that humbler motive which is found in the desire for success. Do this and you will assure the triumph of all that you can most desire. Party, country, mankind will be elevated . . .<sup>23</sup>

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22 Amar & Brownstein, *supra* note 18, at 938–40 (citations omitted) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 119 (1867) (statement of Rep. Ashley)).

23 CONG. GLOBE, 40th Cong., 3d Sess. 904 (1869) (statement of Sen. Sumner). On an earlier occasion, Sumner had emphasized the political benefits to the Republican Party in supporting a bill to provide blacks the vote in both northern and southern states in particularly partisan terms:

I appeal to Senators to look at this measure as a great measure of expediency as well as of justice. How are you going to settle this question in the loyal States?

Republican aspirations regarding the support of black voters, in both the North and South, rested on a solid political foundation. Democrats' opposition to black suffrage would certainly have cemented the allegiance of the new voters to the party of Lincoln. Moreover, the bitter history and legacy of the war and slavery caused many blacks to openly proclaim their Republican allegiance.

"'We would vote the way we shot,' declared one Negro. Another predicted that Negroes would vote Republican 'as naturally as water flows downward.'" In Pennsylvania, the President of the State Equal Rights League, an association of black citizens, "urged that the organization become a political one, aligned with the Republicans, by which the 'power of the colored voters of the state of Pennsylvania can be used as a unit.'"<sup>24</sup>

Historians debate whether Republican supporters of the Fifteenth Amendment were primarily motivated by the partisan goal of preserving the political power of the Republican Party or by a more idealistic commitment to giving black citizens political weapons to protect their communities against hostile white forces. But both arguments are grounded on a collective understanding of black political interests being, as a general matter, distinct from those of whites.

Moreover, in addition to these arguments, members of Congress demonstrated their recognition of the collective political unity of black Americans in other ways. For example, both proponents and opponents of black suffrage assumed that black voters would support black candidates for office. Democrats vigorously opposed legislation giving black residents of the District of Columbia the right to vote because they feared that the large number of black residents would almost certainly elect black municipal leaders. This potential for black

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Here are Delaware, Maryland . . . and Kentucky, in each of which this measure is the only salvation of Union citizens. Then there are other States like Pennsylvania, where this measure will give at once—I am speaking now on the question of expediency—twenty thousand votes to the Union cause. There is Indiana, too, where this bill will settle the suffrage question. I will say nothing about Iowa. There is Wisconsin.

. . . .

. . . . There is Connecticut. Let us secure three thousand votes in Connecticut for the good cause. You can secure them by act of Congress. A little, short act of Congress can determine the political fortunes of Connecticut for an indefinite period by securing three thousand additional votes to the right side. There is New York, also, where the bill would have the same excellent, beneficent influence.

CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner).

<sup>24</sup> Amar & Brownstein, *supra* note 18, at 946 (quoting GILLETTE, *supra* note 21, at 119, 132–33 (1965)).

political dominance rendered black suffrage in the District even more dangerous and unacceptable to Democrats than extending the franchise in southern or northern states, where the black population was relatively smaller and more dispersed. One Democrat stated this argument bluntly:

Sir, there are about thirty-five thousand of this class of people [(blacks)] now in this District I am told. There are about one hundred thousand inhabitants I am informed in the District. Pass this bill, and this "paradise," as the District was said to be when the bill giving freedom to the slaves of this District was passed, will be their paradise indeed, and in less than two years from this time it will be flooded by negroes from all parts of the country, and your mayors and your corporation officers will be composed of negroes. . . .

. . . . Sir, it may do very well for gentlemen representing States in which there are not enough of the negro race to make mile-posts along the public roads to vote for a measure of this kind, because it is hardly within the range of possibility that any great amount of injury can result to such States; but where the races are so nearly equal [in number], and where it is reasonable to suppose that the "paradise" opened up for negroes will be filled with more negroes than whites, I hold that I should be derelict in duty to my own race, which I believe to be superior in all respects to the negro race, if I were to vote to give them the right of suffrage under any circumstances whatever.<sup>25</sup>

## II. TWENTY-SIXTH AMENDMENT—TEXT AND JUSTIFICATION

The Twenty-Sixth Amendment was passed and ratified in 1971. The amendment process gained momentum after the Court in *Oregon v. Mitchell* held, by a 5–4 vote, that a federal statute which prohibited age discrimination in voting against persons over eighteen years of age in elections for state and federal offices could not constitutionally be applied to elections for state offices.<sup>26</sup>

The operative text of the Amendment is, for citizens eighteen years or older, nearly identical to that of the Fifteenth, with the word "age" replacing "race, color or previous condition of servitude" in the prohibitory language of the Amendment. The Twenty-Sixth thus provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the

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25 CONG. GLOBE, 39th Cong., 2d Sess. 45–46 (1866) (statement of Sen. Saulsbury).

26 400 U.S. 112, 118 (1970); see S. CONST. AMEND. SUBCOMM., 92nd CONG., LOWERING THE VOTING AGE TO 18: A FIFTY-STATE SURVEY OF THE COSTS AND OTHER PROBLEMS OF DUAL-AGE VOTING I (Comm. Print 1971).

United States or by any State on account of age.”<sup>27</sup> Two aspects of this text cannot be overemphasized. First, the striking parallelism between it and the Fifteenth (and the Nineteenth as well) was obviously intentional. That is, the Twenty-Sixth *self-consciously* tracks the language of the Fifteenth (and Nineteenth) Amendment(s), with the same intended consequences.

As prominent House member Claude Pepper announced in an uncontested statement explaining the scope of the Amendment: “What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents.”<sup>28</sup> In the same vein, as to the sweep of the proposed amendment, hear the words of Representative Poff:

What does the proposed constitutional amendment accomplish? . . . [I]t guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting . . . .<sup>29</sup>

Second, as these passages make clear and as was true with the Fifteenth (and Nineteenth), the Twenty-Sixth Amendment does not merely confer the franchise on any particular group of people, but instead outlaws discriminatory treatment based on a particular criterion. Thus, the operative text of the Twenty-Sixth does not say merely that each state shall reduce its voting age to eighteen (just at the operative words of the Fifteenth do not merely say that adult black men shall enjoy the franchise) but instead provides that the right of persons eighteen or older to vote cannot be denied or abridged on account of age: textually, then, age cannot be used as a criterion for withholding the core political rights.

Moreover, as to what attentive folks at enactment understood as to scope, the text of the Twenty-Sixth’s reference to the “right to vote” was, as was true of the Fifteenth, a shorthand for a broad package of political-participation rights. For anyone who may not have been sure, Representative Poff was very explicit about the way in which the Amendment was meant to facilitate the fullest possible political participation. Addressing the House and quoting the committee report, he described the Amendment as “confer[ring] a plenary right on citizens 18 years of age or older to participate in the political

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27 U.S. CONST. amend. XXVI.

28 See 117 CONG. REC. 7539 (1971) (statement of Rep. Pepper).

29 *Id.* at 7534 (statement of Rep. Poff).

process, free of discrimination on account of age.”<sup>30</sup> Representative Poff also explained, in an address to his fellow House members, that “[t]he ‘right to vote’ is a constitutional phrase of art whose scope embraces the entire process by which the people make their political choices.”<sup>31</sup> Thus, noted Poff, unlike the congressional statute that was at issue in *Mitchell*, the Amendment was not limited to particular kinds of voting, but rather applied to nominating activities, and even to voting by which voters make law, as in the case of an initiative.<sup>32</sup> Indeed, the only limitations he saw on the “plenary right” were those which were already built into the Constitution and which the Twenty-Sixth Amendment did not purport to amend—the age limitations for elective office.<sup>33</sup>

Thus, the text and the intended application of the Twenty-Sixth builds on and seeks to mirror the Fifteenth. So too the reasons offered in support of prohibiting age discrimination in voting track the kinds of reasons offered for prohibiting race discrimination. First were arguments about respecting the rights of individual adults who were worthy of exercising the franchise. President Nixon’s deputy attorney general spoke for his boss by saying:

America’s 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplifies the highest qualities of mature citizenship.<sup>34</sup>

Second, again tracking the Fifteenth, the Twenty-Sixth Amendment’s case featured arguments about the moral imperative of allowing people eighteen years and older to vote given the substantial involvement of young persons in recent military service, namely the Vietnam War.<sup>35</sup> And finally, the reasons offered for inclusion of younger persons in the voting process drew on instrumental justifications that parallel the Supreme Court’s Sixth Amendment juror exclusion jurisprudence, which requires that a group bring

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30 *Id.* at 7535 (statement of Rep. Poff) (quoting H.R. REP. NO. 92-37, at 7 (1971)).

31 *Id.*

32 *Id.*

33 *See id.*

34 S. CONST. AMEND. SUBCOMM., 92nd CONG., *supra* note 26, at 9; *see also id.* at 10 (quoting Senator Kennedy’s testimony that “the time has come . . . to bring American youth into the mainstream of our political process. To me, this is the most important single principle we can pursue as a nation if we are to succeed in bringing our youth into full and lasting participation in our institutions of democratic government”); 117 CONG. REC. 7546 (1971) (statement of Rep. Ford) (proposed amendment “affords today’s youth a great opportunity to . . . make its voice heard at all levels of Government”).

35 *See, e.g.*, 117 CONG. REC. 7549 (1971).

something distinctive to the deliberative process to be found cognizable. The Senate report on the Twenty-Sixth Amendment observed:

[T]hese younger voters should be given the right to full participation in our political system because they will contribute a great deal to our society. . . . [T]he student unrest of recent years . . . reflects the interest and concern of today's youth over the important issues of our day. The deep commitment of those 18 to 21 years old is often the idealism which Senator Barry Goldwater has said "is exactly what we need more of in the country . . . ." <sup>36</sup>

If young people are mature enough to be responsible and distinct enough to contribute something special—an idealism that comes from youth—the case for including them free from age discrimination was similarly compelling to the case made for the Fifteenth Amendment.

### III. FAILURE TO TAKE THE TWENTY-SIXTH AMENDMENT SERIOUSLY

And yet, people continue to be discriminated against on the basis of their age when it comes to political rights. Let's start with jury service eligibility, one of the key components of the political rights package included in the intended scope of the Fifteenth Amendment, the Nineteenth Amendment, and the Twenty-Sixth Amendment. Race and gender are acknowledged by the Supreme Court as impermissible bases on which to exclude some from serving on juries,<sup>37</sup> but age has not been. Thus, lawyers and judges continue to exercise peremptory challenges based on age,<sup>38</sup> and there is no indication this will change anytime soon.

Even with regard to juror eligibility itself, age continues to play a constitutionally impermissible role. A number of states continue to make twenty or twenty-one (rather than eighteen, the cutoff included in the Twenty-Sixth Amendment's text) the age at which people are eligible to serve on juries<sup>39</sup> in what would seem to be a blatant violation of the very words of enactment. Moreover, and more pervasively, states often draw their juror rolls from voting records (which is innocuous enough) but fail to update the juror rolls with any reasonable frequency. As a result, even in states where young adults are technically

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36 S. CONST. AMEND. SUBCOMM., 92nd CONG., REP. ON PASSAGE & RATIFICATION OF TWENTY-SIXTH AMEND. 2 (Comm. Print 1971).

37 On race, see, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991). On gender, see, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

38 See, e.g., Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001 (2014).

39 See, e.g., MISS. CODE ANN. § 13-5-1 (1972); MO. REV. STAT. § 494.425 (1989).

eligible to serve on juries, their names and addresses are not included in the juror databases until they are twenty or older, meaning adults between eighteen to twenty—persons fully permitted to be free from age discrimination in political rights—are drastically underrepresented on juries.<sup>40</sup> This underrepresentation directly implicates some of the core arguments that drove enactment of the Twenty-Sixth Amendment in the first place. The arguments about moral and military worthiness and group perspective discussed above apply to the jury service question just as to the ballot-box voting question: just as it might be thought unfair for young adults to fight and die in a war without being able to voice their opposition to it in federal and state elections, so too it might be unfair to prosecute them for evading the draft or protesting the war without meaningfully allowing their peers to be on juries in those cases.

To be sure, this latter problem may be distinguishable from the problem raised in states that simply don't confer jury-service eligibility until age twenty or older on the ground that the latter involves facial discrimination whereas the former might seem more like a problem of disparate impact (which under general constitutional doctrine requires a finding of invidious intent before it is actionable). But notice that as to political-rights participation and race, at least with ballot-box voting, the Supreme Court has not infrequently found invidious intent to exist simply because of a pronounced disparate impact, and invalidated measures that were race neutral on their face simply because of their exclusionary effect.<sup>41</sup> Moreover, imagine that a state recognized that people were eligible to register to vote upon turning eighteen, but had only periodic windows of "open registration" (akin to open enrollment in health plans) such that many people who turned eighteen had to wait a year or more for the next window in order to vindicate their right. That, too, could be said to be facially age-neutral, but would anyone doubt that it violated the essence of the Twenty-Sixth Amendment?

And yet perhaps no one should be surprised that age discrimination in juries persists unabated since lower federal courts don't seem to be able to understand and apply the clear text of the Twenty-Sixth Amendment even in ballot-box voting cases, the core target of the antidiscrimination norm.

Consider, for example, a recent ruling by a divided three-judge panel of the U.S. Court of Appeals for the Fifth Circuit concerning race-based differential access to mail-in ballots. In a world of razor-

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40 See Amar, *supra* note 7, at 211–15.

41 See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960); Rogers v. Lodge, 458 U.S. 613 (1982). See generally Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1119–26 (1989).

thin statewide elections in purple states, cases like this one could easily affect national election outcomes. Above all that, it was clearly wrongly decided, and illustrates how some judges have terrible interpretive instincts when it comes to navigating the tricky but ultra-important voting rights realm, especially in the domain of age.

The case, *Texas Democratic Party v. Abbott* (one of many, unrelated cases bearing that name), involved a challenge to a relatively simple Texas statute that, as the Fifth Circuit put it: “permits early voting by mail [but only] for voters who: (1) anticipate being absent from their county of residence; (2) are sick or disabled; (3) are 65 years of age or older; or (4) are confined to jail.”<sup>42</sup> The third category of the statute thus prefers people who are 65 or older, giving them an entitlement to early voting by mail that younger persons do not enjoy unless they satisfy additional criteria.

Plaintiffs challenged this law as violative of the Twenty-Sixth Amendment of the Constitution, which straightforwardly provides, as noted earlier, that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”<sup>43</sup>

On the face of things, the plaintiffs’ challenge would seem strong. Texas definitely treats people under sixty-five differently with respect to voting “on account of [their] age.” (Indeed, no one even tried to deny that Texas was differentiating between would-be voters due to, or on the basis of, their age.) Nonetheless, the Fifth Circuit decided the plaintiffs’ Twenty-Sixth Amendment claim failed.

To its credit, the Fifth Circuit did not embrace the position, advanced by the defendants, that the claim should lose because the Twenty-Sixth Amendment does no more than lower the voting age to eighteen. As noted earlier, this reading would be impossible to square with the Amendment’s clear text, which does more than alter the minimum voting age; it prohibits discrimination “on account of age” against anyone eighteen or over in the right to vote.

Why, then, did two judges rule against the claim? Because, they said, the statute did not “deny or abridge” the right of anyone under sixty-five to vote.<sup>44</sup> The court interpreted “abridgment,” by reference to some dictionaries and a few cases not on point, as the taking away or reduction of meaningful voting liberties that someone enjoyed before the enactment in question was adopted:

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42 *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020) (citing TEX. ELEC. CODE ANN. §§ 82.001–.004 (West 2020)).

43 U.S. CONST. amend. XXVI, § 1.

44 *Tex. Democratic Party*, 978 F.3d at 192.

Rejecting the plaintiffs' arguments, we hold that an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced. . . .

. . . [A] law that makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment.<sup>45</sup>

Here, because the Texas statutory backdrop was that no early voting by mail was originally allowed—exceptions to that starting point were made beginning in 1917, culminating in the entitlement at issue today of persons over sixty-five in 1975, after the Twenty-Sixth Amendment had been ratified—persons under sixty-five had never enjoyed early voting privileges, so they lost nothing by the conferral of such privileges to older voters but not to younger ones.<sup>46</sup> Again, the idea is that giving something to older folks takes nothing away from younger folks.

This reasoning is flawed for many reasons. First, the Fifth Circuit's approach is open to seemingly arbitrary outcomes. The panel's reasoning suggests the result would have been different—even though the effect and words of the statute would have been the same—had early voting been the rule rather than the exception. In other words, if everybody had enjoyed early voting prior to 1975, and in that year, Texas revised the statute to limit it to only persons over sixty-five, now all of a sudden, the rights of younger folks have been abridged?

A related problem—one that the panel mentioned but did not address other than to say courts can manage such difficulties<sup>47</sup>—is that of manipulation. Suppose Texas wants to make it harder for young people to vote but has in place a law that allows everyone to vote early. Exempting only young people would, as just suggested, constitute an abridgment in the eyes of the panel. So what should Texas do? Repeal early voting for all, wait a while, and then reinstate it only for older persons—voilà! How is a court to know when such a sequence reflects a good-faith effort at legislative experimentation, or a cynical effort to circumvent a manipulable test? This is an especially dicey task in an era when the message the current Supreme Court generally sends is that inquiry into legislative motivations is to be avoided, and that statutes, rules, and executive orders should be analyzed on their face and by their operation.

But beyond (and much more important than) these practical concerns, the Fifth Circuit's reasoning is completely wide of the mark

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45 *Id.* at 190–91.

46 *Id.* at 192 (citing *In re State*, 602 S.W.3d 549, 558 (Tex. 2020)).

47 *Id.* at 191.

because it ignores the equality dimension—which is the essence—of the Twenty-Sixth Amendment. The words of and history behind the Twenty-Sixth Amendment make clear that its proponents thought not only that young people were responsible enough to vote, but also that they were—as a class—*equally valuable and entitled as older folks are to vote*.<sup>48</sup> Putting aside what the “right to vote” the Court has discussed in the context of the Fourteenth Amendment may mean, the voting rights covered by the Twenty-Sixth Amendment (and by the earlier specific voting rights amendments—the Fifteenth and Nineteenth—which served as intellectual and textual templates for the Twenty-Sixth) involve not an absolute right to vote, but a right to be treated equally with respect to the vote.

That is why, as discussed earlier, Representative Richard Poff, twenty-year Virginia Republican member of the House and one of the leaders behind the Amendment, described the Amendment as conferring “a plenary right on citizens 18 years of age or older to participate in the political process, *free of discrimination on account of age*.”<sup>49</sup>

And that is why the language of the Amendment is written the way it is. It bears repeating yet again that the Amendment does not say merely that every state shall reduce its voting age to eighteen. Rather, it provides that the right of persons eighteen or older to vote cannot be abridged on account of age: textually, then, age cannot be used as a criterion for regulating the core political right of voting, just as race and sex cannot, under the Fifteenth and Nineteenth Amendments. For the purposes of all these specific voting rights amendments, the meaning of “abridge” does not and cannot be limited to “take away or reduce what was enjoyed before,” but also has to include “deprive” (another dictionary definition of abridge) or “withhold” on unequal terms. In other words, although the Fifth Circuit may have been correct in suggesting that the word “abridge” implies a baseline, the baseline need not be a moment in the past; instead it can—indeed must—be what other people are currently receiving on account of their race or sex (or age).

Even the Fifth Circuit acknowledged, as it had to, that “[t]he language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendments”<sup>50</sup> and that it is proper, in interpreting a part of the Constitution, to “focus [on] . . . how the same or at least similar terms that also appeared elsewhere in

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48 See *supra* Part II.

49 117 CONG. REC. 7535 (1971) (statement of Rep. Poff) (emphasis added) (quoting H.R. REP. NO. 92-37, at 7 (1971)).

50 *Tex. Democratic Party*, 978 F.3d at 183.

the Constitution ha[ve] been interpreted.”<sup>51</sup> Indeed, comparison to the Fifteenth and Nineteenth Amendments led the Fifth Circuit to conclude that plaintiffs had individual rights under the Twenty-Sixth Amendment such that they could sue at all (a preliminary issue the court addressed).<sup>52</sup>

Given the obviously (and admittedly) intentional patterning of the Twenty-Sixth Amendment on the Fifteenth and Nineteenth, the case should have been a very easy one. The Fifth Circuit judges need merely have asked—and this really should have been enough to decide the case—what would happen if Texas had never permitted early voting by mail but then extended that option to whites but not blacks, or to men but not women. Would there be a question in anyone’s mind that the State had in these events violated the Fifteenth or Nineteenth Amendments, respectively? It would be absurd to say these laws did not “abridge” the freedom to vote within the meaning of the Fifteenth and Nineteenth Amendments simply because the laws weren’t taking anything away that blacks or women had previously enjoyed, but instead were simply giving something new to other groups. Indeed, the clear unconstitutionality of these laws would be evident even if early voting by mail weren’t a particularly useful option to have (which it is). A law that changed the preexisting (uniform) closing time for the voting polls such that whites but not blacks were given two additional minutes to vote would undeniably abridge voting rights of blacks and blatantly violate the Fifteenth Amendment.

The short of it is that when a state uses a facial classification based on race, sex, or age to condition access to voting in general or to any method of voting in particular, the government abridges the voting equality rights explicitly written into the Constitution. And unlike cases under the Fourteenth Amendment’s voting rights jurisprudence, we needn’t even ask what the “standard of review” is, or what interests the state might have to justify its differential treatment. As the Supreme Court observed in the Fifteenth Amendment context, “race. . . . [c]olor and previous condition of servitude, too, are [simply] forbidden criteria or classifications.”<sup>53</sup>

The Fifth Circuit intimated that plaintiffs may, on remand, be able to argue they have a claim under the Fourteenth Amendment’s Equal Protection Clause, in which case the strength of the government’s interest might be relevant (although it’s hard to imagine the government ever having a good reason to withhold any voting access on account of race, sex, or age).<sup>54</sup> But the Fourteenth Amendment

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51 *See id.* at 184.

52 *See id.* at 183–84.

53 *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

54 *See Tex. Democratic Party*, 978 F.3d at 193.

(under which age is ordinarily not a suspect classification) is simply beside the point. The voting equality amendments—including the Twenty-Sixth—cover voting much more explicitly than does the Fourteenth Amendment, the history of which suggests it was not designed to apply to political rights at all.<sup>55</sup> Plaintiffs clearly should have won under the Twenty-Sixth Amendment, regardless of what claim they might have been able to make in its absence. (And it is frankly bizarre that the Fifth Circuit even technically leaves open on remand the possibility that plaintiffs can pursue their Fourteenth Amendment claim—how on earth could they win on the Fourteenth and lose on the Twenty-Sixth?)

None of this is to say difficult questions might not arise concerning what “abridge” means in the context of laws that do not overtly make use of age (or race or gender) classifications but that have a disparate impact against groups along any of these lines. For example, if a state were to close its polls at 6:00 p.m. (which would be earlier than other states) and there were evidence that such a decision adversely impacted racial minorities or women or young adults in particular (because of the jobs they tended to have), there would be complicated questions of what level of improper intent a plaintiff challenging such a law would have to prove. As Professor Daniel Ortiz pointed out a few decades ago, in the voting rights context the intent requirement the Court normally insists on in the equality-rights realm has been watered down such that the Court has been much more willing to accept a disparate impact theory than in other areas of equal protection law.<sup>56</sup>

But in the *Abbott* case we needn’t even worry about such nuances. The law overtly discriminates against people based on their age. And that should have been the end of it.

The Fifth Circuit’s failure to understand any of this, and also to appreciate the group-equality nature of voting and voting rights, is extremely troubling, and somewhat surprising. The right to vote is an individual entitlement, to be sure. But voting is a hybrid right; the reason the Constitution singles out certain criteria, and the groups that are defined by those criteria, is that voting is more than an individual act—it involves a collective effort to exert political power to elect groups’ preferred candidates and enact groups’ preferred policies. There are obviously known (or knowable) partisan implications—both in the 1970s when the Twenty-Sixth Amendment and the Texas law were enacted and today as well—that ensue from giving any particular groups (including groups defined by age) greater or fewer voting

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55 See *supra* notes 6–15 and accompanying text.

56 See Ortiz, *supra* note 39, at 1126–30.

options; that is one reason why, as noted above, even certain disparate impacts alone are sometimes problematic in the voting rights arena. And overt, facial discrimination against persons—on the grounds explicitly identified by the Constitution’s clear words as impermissible—is impossible to countenance. And yet a Fifth Circuit panel did so.

Nor is Texas alone in this blatantly unconstitutional age discrimination in voting. A similarly illegal aspect of Georgia’s election system could easily have tipped the balance in the U.S. Senate runoff elections held there a year ago after the November 2020 election did not generate winners.<sup>57</sup> Georgia explicitly makes it easier for older folks to vote than younger folks. In particular, Georgia allows persons sixty-five years and older to get absentee ballots for all elections in an election cycle with a single request, whereas younger voters must request absentee ballots separately for the primary election, general election, runoff election, etc. In this way, Georgia facilitates the absentee voting device (which we saw in recent years is a very important method of voting) for older voters more than for younger voters.<sup>58</sup>

Why does age inequality matter so much? Because the Framers of the Twenty-Sixth Amendment fully understood that older voters and younger voters vote differently. Take the recent presidential election. According to exit polls, President Trump lost big among voters under forty-five, broke even among voters forty-five to sixty-four, and won significantly (by five points) among voters sixty-five or older.<sup>59</sup> The only age demographic group he carried in a significant way was older voters (a group which, it bears noting, has more whites and fewer blacks relative to other age groups).<sup>60</sup>

#### IV. COUNTERARGUMENTS?

What can be said by way of counterargument on behalf of the Fifth Circuit? To be frank, not a whole lot. To be sure, the phrase “denied or abridged” has to be interpreted, and not everything that creates the smallest disparate impact on account of race, gender, or age in voting is necessarily unconstitutional. But, as noted above, no sane person would dispute that a law that allowed whites but not blacks automatic access to absentee ballots would “den[y] or abridge[] . . . on account

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57 See, e.g., Nathan Layne, Joseph Ax & Rich McKay, *Democrats Win One Georgia Runoff and Lead in Second, Moving Closer to U.S. Senate Control*, REUTERS (Jan. 5, 2021), <https://www.reuters.com/world/us/democrats-win-one-georgia-runoff-lead-second-moving-closer-us-senate-control-2021-01-05/> [https://perma.cc/GSY8-VP2Q].

58 See GA. CODE ANN. § 21-2-381 (2021); GA. COMP. R. & REGS. 183-1-14.01 (2022).

59 *Exit Poll Results and Analysis for the 2020 Presidential Election*, WASH. POST, (Dec. 14, 2020, 12:29 PM).

60 *Id.*

of race.”<sup>61</sup> So unless “deny or abridge” means something different for age than for race (or gender), the Fifth Circuit’s position was frivolous. And as far as I know, while “deny or abridge” may be a term of art, there is nothing in the history behind any of the three Amendments (Fifteenth, Nineteenth, and Twenty-Sixth) to suggest a different general meaning.

Second, some folks might point out (as I did above) that legislative classifications based on age are generally treated differently (and with less suspicion) than classifications based on race and gender under the Fourteenth Amendment, perhaps because in many settings age is a more reasonable basis of government classification than are race and gender.<sup>62</sup> True as that is, it is beside the point. The voting rights amendments speak specifically to political rights and lay down a flat prohibition on certain criteria. Under the Fifteenth Amendment, for example (and thus presumptively under the Nineteenth and Twenty-Fourth), courts need not wade into the thicket of “standards of review” and “tiers of scrutiny,” and the like. As the Court has made clear, “race. . . . [c]olor and previous condition of servitude, too, are [simply] forbidden criteria or classifications”<sup>63</sup> in the political-rights realm. So too is age (and sex). These criteria have been constitutionally recognized to correlate with certain group perspectives and have been taken off the constitutional table by specific text. Putting aside whether the Court’s application of the Fourteenth Amendment to the voting realm has been historically grounded and correct, what’s the point of having specific text in the Fifteenth and Twenty-Sixth Amendments if it is not going to be respected?

All of this brings me to the third counterargument, one that recognizes that the Constitution itself does treat age differently than race or gender in the political rights realm. For federal elective office-holding, the Constitution itself sets up age discrimination: persons under twenty-five cannot serve in the House, persons under thirty cannot serve in the Senate, and persons under thirty-five cannot serve in the White House.<sup>64</sup>

If, as I have argued earlier, the “right to vote” is a shorthand for the right to vote in ballot boxes and on juries as well as the right to hold office (to be voted for, in essence), how do we square the Twenty-Sixth Amendment with the preexisting recognition that age ought to be able to be taken into account by government in regulating the political rights realm? One answer might be that the Twenty-Sixth

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61 U.S. CONST. amend. XV, § 1.

62 *See, e.g.,* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

63 *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

64 *See* U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3; *id.* art. II, § 1, cl. 5.

Amendment implicitly repealed those parts of Articles I and II that set up age requirements for federal elective office. But I reject that reading, largely because the drafters and proponents of the Twenty-Sixth Amendment made clear that in their minds elective office-holding was the one exception to the antidiscrimination norm they were enshrining. So, for example, in Representative Poff's mind, the right to be free from age discrimination in voting—that is, in “choos[ing]”—did not call into question the validity of age requirements for elective office “candidate[s]”—those who seek “to be a choice.”<sup>65</sup>

And here we see how the presumptive linkage between voting and office-holding could be broken by clear constitutional text to the contrary—presumptions are just that, they can be strong but are not insurmountable. But with that single, textually clear exception,<sup>66</sup> the freedom from age discrimination in the right to vote was understood as having subsumed all political voting activities. And unlike elective office-holding, there is nothing unusual about absentee-ballot access that the Fifth Circuit or anyone else could point to that would justify not applying the basic command of the Twenty-Sixth Amendment in ballot-voting settings.

## CONCLUSION

In twenty-first-century America, age—like race and gender—is a durable and often outcome-determinative characteristic in voting and other political-rights behavior. Framers and adopters of the Twenty-Sixth Amendment, rightfully viewing their work as the intellectual and

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65 117 CONG. REC. 7535 (1971) (statement of Rep. Poff); *see also id.* at 7540 (statement of Rep. Wiggins) (proposed amendment does not prevent states “if they wish[,] [from] follow[ing] the Federal pattern and impos[ing] more restrictive age standards . . . for holding any elective office”). And it is no accident that the Constitution provides age requirements for federal elective offices but not for juries. The elective office exception to the “plenary” right to be free from age discrimination in political participation makes sense when we remember, as Senator Edmunds observed over a hundred years ago, that political elective offices are in some important respects different than juries, which were intended to be filled by a much broader class of the electorate. *See* 3 CONG. REC. 1866 (1875) (remarks of Sen. Edmunds). Indeed, juries were to be populated by persons—rotating and common—who would not normally have an opportunity to be elective office holders. Treating jurors differently than elected officials also makes sense in light of the temporary nature of jurors' service. Like early militiamen, jurors are ordinary citizens, not permanent government officials on the government payroll.

66 In this regard, there is a strong argument to be made that Section 2 of the Fourteenth Amendment, which refers to voting rather than office-holding, was effectively altered by the Nineteenth and Twenty-Sixth Amendments, such that states that deny the franchise to any persons eighteen or older (rather than just men twenty-one or older) should have their representation in Congress reduced.

moral descendant of the Fifteenth Amendment, understood this modern political reality and chose their words carefully and with clear intended consequences. It is high time courts and other policymakers take seriously this constitutional addition from fifty years ago, just as they need to continue to honor the Reconstruction enactments from a century earlier, on which the Twenty-Sixth Amendment built.

