(39875)

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 and 47, Original

STATE OF OREGON, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

STATE OF TEXAS, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF ARIZONA, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF IDAHO, *Defendant.*

BRIEF OF INTERVENOR NEW YORK CITY BOARD OF ELECTIONS IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1970

J. LEE RANKIN
Corporation Counsel
Attorney for Intervenor
New York City Board of Elections
Municipal Building
New York, N. Y. 10007

NORMAN REDLICH
LEONARD BERNIKOW
PAULA OMANSKY
Of Counsel

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Statement

The original cases, consolidated for hearing by this Court on October 19, 1970, test the constitutionality of the

Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314 (1970). In *Oregon* v. *Mitchell,* No. 43 Original, and *Texas* v. *Mitchell,* No. 44 Original, the states are asserting the invalidity of Title III of the Amendments, which confers the right to vote on citizens between the ages of 18-21. In *United States* v. *Arizona,* No. 46 Original, and *United States* v. *Idaho,* No. 47 Original, the Government seeks to compel those states to comply with Titles I, II, and III of the Amendments. Title I eliminates literacy tests in counties where less than 50% of the persons of voting age residing therein were registered on November 1, 1968, or voted in the Presidential election of November, 1968. Title II abolishes the durational residency requirement as a pre-condition to voting for electors for President and Vice-President.

This brief is submitted by the New York City Board of Elections in support of the constitutionality of Title III of the Voting Rights Act Amendments of 1970, the issue raised in Original cases Nos. 43 and 44. The Board of Elections argues two points: (1) Congress has the power pursuant to § 5 of the Fourteenth Amendment to establish 18 years of age as a minimum voting age, based upon its legislative findings that state laws setting the voting age at 21 interfere with the guarantees of equal protection and invidiously discriminate against 18-21 year olds, independently of a judicial determination that such state laws are unconstitutional; and (2) a 21 year old voting requirement, as exemplified in New York's constitutional and statutory provisions, is an invidious and arbitrary classification in violation of the Fourteenth Amendment. Such a requirement is, therefore, unconstitutional, even in the absence of congressional legislation. The Supreme Court, then, can uphold the validity of the Voting Rights Act Amendments of 1970 on the ground that the Amendments represent appropriate congressional legislation to correct unconstitutional state laws and practices.

Questions Presented

May Congress, pursuant to its power to enforce the provisions of the Fourteenth Amendment, establish 18 years of age as a minimum voting age, based upon legislative findings that State laws setting the voting age at 21 interfere with the guarantees of equal protection and invidiously discriminate against 18-21 year olds, independently of a judicial determination that such State laws are unconstitutional?

Is the 21 year old voting requirement an invidious and arbitrary discrimination in violation of the Fourteenth Amendment, thereby requiring corrective action by Congress?

Constitutional & Statutory Provisions Involved

VOTING RIGHTS ACT AMENDMENTS OF 1970

PUBLIC LAW 91-285
91ST CONGRESS, H.R. 4249
JUNE 22, 1970

AN ACT

To extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Act Amendments of 1970".

Sec. 2. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by inserting therein,

immediately after the first section thereof, the following title caption:

"TITLE I—VOTING RIGHTS".

Sec. 3. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by striking out the words "five years" wherever they appear in the first and third paragraphs thereof, and inserting in lieu thereof the words "ten years".

Sec. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: "On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."

Sec. 5. Section 5 of the Voting Rights Act of 1965 (79 Stat. 439; 42 U.S.C. 1973c) is amended by (1) inserting after "Section 4(a)" the following: "based upon determinations made under the first sentence of section 4(b)", and (2) inserting after "1964," the following: "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek

to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968,".

Sec. 6. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by adding at the end thereof the following new titles:

"TITLE II—SUPPLEMENTAL PROVISIONS

"APPLICATION OF PROHIBITION TO OTHER STATES

"Sec. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.

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

"RESIDENCE REQUIREMENTS FOR VOTING

"Sec. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

"(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such offices because of the way they may vote;

"(5) has the effect of denying to citizens the quality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

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

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (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.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors

for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such elections, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdi-

vision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement or registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11 (c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

"JUDICIAL RELIEF

"Sec. 203. Whenever the Attorney General has reason to believe that a State or political subdivision (a)

has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 210, or (b) undertakes to deny the right to vote in any election in violation of section 202, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2282 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

"PENALTY

"Sec. 204. Whoever shall deprive or attempt to deprive any person of any right secured by section 201 or 202 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"SEPARABILITY

"Sec. 205. If any provision of this Act or the application of any provision thereof to any person or circumstances is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"Sec. 301. (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 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.

"PROHIBITION

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"Sec. 303. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to insti-

tute in the name of the United States such actions against States or political subdivision, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"Sec. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Approved June 22, 1970.

U. S. Constitution, XIV Amendment, Sections 1, 2, and 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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

Constitution of the State of New York, Article II, Section 1

ARTICLE II

SUFFRAGE

[Qualifications of voters.] Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election.

Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 2, 1943, November 6, 1945; November 6, 1951; November 8, 1966.)

New York Election Law, Section 150

QUALIFICATION OF VOTERS. A person is a qualified voter in any election district for the purpose of having his or her name placed on the register if he or she is or will be on the day of the election qualified to vote at the election for which such registration is made. A qualified voter is a citizen who is or will be on the day of election twenty-one years of age or over, and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election and has been duly registered in the election district of his residence. In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A "new voter," within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.

POINT I

Congress has the power under §5 of the Fourteenth Amendment to determine that a state law impedes the guarantee of equal protection and has the power to enact legislation to contravene that state law.

(a)

The Voting Rights Act Amendments of 1970 represent an effort on the part of Congress to broaden the right of suffrage. By lowering the voting age and abolishing literacy tests in federal, state or local elections, and by removing residency requirements in Presidential and Vice-Presidential elections, Congress has acted to guarantee to previously disenfranchised citizens this most fundamental right, which the Supreme Court has described as "preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886).

In the original actions before the Supreme Court the states of Oregon, Texas, Arizona and Idaho challenge the amendment relating to lowering the voting age and assert that Congress cannot intrude upon the States' prerogative to set voter qualifications. We are thus faced with the issue of whether Congress has the constitutional power to enact this enfranchising legislation.

It has been traditionally assumed that the States have broad powers to establish voting requirements. *Lassiter* v. *Northhampton Elections Board,* 360 U.S. 45 (1959); *Pope* v. *Williams,* 193 U.S. 621 (1940); *Minor* v. *Happersett,* 21 Wall (88 U.S.) 162 (1874). "But of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of

the Fourteenth Amendment than any other action." *Katzenbach* v. *Morgan,* 384 U.S. 641, 647 (1966). In recent years the Supreme Court has overturned many state requirements as violative of the Equal Protection Clause and in effect has sanctioned the review of voting requirements by the Federal Courts. See, *Evans* v. *Cornman,* ——, U.S. ——, 26 L. Ed. 2d 370 (1970); *Phoenix* v. *Kolodziejski,* ——, U.S. ——, 26 L. Ed. 2d 523 (1970); *Hadley* v. *Junior College District of Metropolitan Kansas City,* 397 U.S. 50 (1970); *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Carrington* v. *Rash,* 380 U.S. 89 (1965).

But courts are not the only forum for the review of voting rights requirements. In *United States* v. *County Board of Elections of Monroe Co.,* 248 F. Supp. 316 (W.D.N.Y., 1965), app. dis. 383 U.S. 575 (1966), a three-judge court unanimously upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965 and the court stated that "Congress pursuant to the Fourteenth Amendment was empowered to correct what it reasonably believed to be an arbitrary state-created distinction" (at p. 321). Congressional power to eliminate unreasonable discrimination and assure equal protection of the laws was found to be expressly granted by the Fourteenth Amendment (§ 5). The court cited *Ex parte Virginia,* 100 U.S. 339 (1875), where the Supreme Court held, with respect to the Fourteenth Amendment (at pp. 345-6):

> "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view * * * and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protec-

> tion of the law against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis in original.)

See also, *United States* v. *Classic,* 313 U.S. 299, 314-316, 319-320 (1941); *Virginia* v. *Rives,* 100 U.S. 313, 318 (1876).

And, as the Supreme Court noted in *Ex Parte Virginia, supra,* when Congress exercises its constitutional powers under the Fourteenth Amendment, the powers which the State might have enjoyed give way to those enactments (100 U.S. at p. 346). Further, in discussing the Equal Protection Clause of the Fourteenth Amendment, and the specific language of the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court emphasized the role of Congress to "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws." The Court pointed out that the amendments specifically enlarged the powers of Congress, and stated (100 U.S. at p. 345):

> "It is not said that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged." (Emphasis in original.)

See, *Fay* v. *New York,* 332 U.S. 261, 283 (1947); *Monroe* v. *Pape,* 365 U.S. 167, 171-2 (1961).

The principles thus set forth in *Ex parte Virginia* in 1879 were restated, and with equal emphasis, by the Supreme Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), upholding sections of the Voting Rights Act of 1965 adopted pursuant to Congressional enforcement

powers under the Fifteenth Amendment and in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), upholding § 4(e) of the Act adopted pursuant to the same powers under the Fourteenth Amendment.

(b)

Katzenbach v. *Morgan,* is clear authority for the validity of the statute which is the subject of these cases. In *Morgan,* the Supreme Court upheld the constitutionality of § 4(e) of the Voting Rights Act of 1965 as appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. Section 4(e) provided that no person who has successfully completed the sixth grade in an American-flag school in which the language of instruction was other than English should be denied the right to vote in any election because of his inability to read or write English. This legislation conflicted with the New York voting requirement of literacy in English. The Court found that "§ 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e)" (384 U.S. at pp. 646-647).

By equating the scope of Congressional power under § 5 to the Necessary and Proper Clause, the Court applied as the measure of what constitutes appropriate legislation under § 5 the test formulated by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat (17 U.S.) 316, 421 (1819):

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

Applying this test, the Court upheld § 4(e) using two rationales. First, Congress, based upon legislative findings, can determine that a State law must be invalidated in order to enlarge the Fourteenth Amendment's guarantee of equal protection. Second, Congress can invalidate a State law which it has found to be an invidious discrimination in violation of the Fourteenth Amendment.

Under the first rationale, even where there has been no judicial determination that a State law is unconstitutional, Congress can act independently to advance the purposes of the Fourteenth Amendment. With its independent judgment, Congress can overturn a State law which Congress reasonably believes interferes with equal protection, even though a Court might allow this law to stand as a reasonable exercise of a State interest. All that is necessary to sustain Congressional legislation under this Amendment is that the Court "perceive a basis" upon which Congress acted; the legislation must be a rational means towards a reasonable end. *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966).

The Court in *Morgan* did not make any finding that the New York English literacy requirement violated the Equal Protection Clause. Rather, it limited itself to reviewing the appropriateness of Congressional action. In making this review, great deference was afforded to the determination of Congress. Thus,

> "It was for Congress, as that branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors." (384 U.S. at p. 653).

The language of *Morgan* is very broad, particularly in defining the scope of § 5 of the Fourteenth Amendment (at p. 651):

> "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

This power pertains most clearly to Congressional efforts to extend Fourteenth Amendment protections (at p. 651, footnote 10). Congress is not limited to legislation which corrects State acts which have been judicially determined to violate the Fourteenth Amendment. It has authority to establish affirmative enactments for the advancement of equal protection of the law independent of any such judicial determination.[1]

Nor can it be argued that Congress' powers under § 5 are limited by the provisions of § 2 of the Fourteenth Amendment which reduce a State's representation in the

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[1] Congress, however, does not appear authorized to enact legislation under §5 which would in effect restrict rights to be guaranteed by the Fourteenth Amendment. This limitation would apply most clearly in areas such as school integration and criminal procedure, where the Supreme Court has set forth the minimum basic rights to be afforded to all citizens. 384 U.S., at p. 651, footnote 10. But Congress is not limited to situations involving discrimination against ethnic minorities, for nothing in the Fourteenth Amendment or in *Morgan* suggests such a conclusion.

"The view that the Equal Protection Clause of the Fourteenth Amendment was intended primarily to limit state restrictions on ethnic minorities, which was strongly urged by many, including some Justices of the Supreme Court, in the period immediately following its adoption is a relic of the 19th century. The Equal Protection Clause in recent years has been applied to many types of state legislation having no relation to ethnic minorities. Therefore, to argue that the doctrine of *Katzenbach* v. *Morgan* should be continued in this way is to argue for a restriction that does not appear in the Court's statement of the doctrine, and more importantly, to suggest a limitation of at least one aspect of the Fourteenth Amendment by returning to a view that was rejected in the 19th century." 116 *Cong. Rec.* S7279 (daily ed., May 18, 1970) (letter of Prof. Kaufman).

House of Representatives when the State denies the vote to any male citizen twenty one year of age. Clearly that section was aimed at State action limiting the franchise rather than at federal efforts expanding it. If Congress' action is otherwise justified in achieving the objectives of the Fourteenth Amendment, the limitation imposed by § 2 on State power is constitutionally irrelevant.[2]

The *Morgan* case was, therefore, a declaration that Congress had an independent role to play in expanding the enforcement of rights guaranteed by the Fourteenth and Fifteenth Amendments. This was particularly true in matters involving the franchise.

That Congressional proponents of the legislation interpreted *Morgan* to authorize further voting legislation is clearly borne out by the legislative history.[3] Senator Edward M. Kennedy, for example, said [116 Cong. Rec. S3059 (daily ed., March 5, 1970)]:

> "The historic decision by the Supreme Court in the case of *Katzenbach* v. *Morgan* in June 1966 provides

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[2] Professors Freund and Cox of Harvard Law School point out that §2 was directed at restriction of the franchise and had nothing to do with enlargement, "as is apparent from state laws reducing the voting age below 21. The most that can be inferred is that in 1866-68 Congress and the State legislatures were willing to accept 21 years as a reasonable measure of the maturity and responsibility necessary to vote *at that time*." They go on to say that it "is nowise inconsistent to conclude that *in our time* a 21-year requirement unreasonably discriminates against eighteen, nineteen and twenty year olds because of changed conditions . . ." New York Times, April 12, 1970, §IV, p. 131.

As to the legislative history of this section, see, Van Alstyne, *The Fourteenth Amendment, The 'Right' to Vote, And The Understanding of the Thirty-Ninth Congress,* 1965 The Supreme Court Review 33.

[3] See, generally, 116 Cong. Rec. H5639-H5678 (daily ed., June 17, 1970); 116 Cong. Rec. S3057-S3065 (daily ed., March 5, 1970); 116 Cong. Rec. S7277-S7285 (daily ed., May 18, 1970); 116 Cong. Rec. S6228-S6230 (daily ed., April 27, 1970); 116 Cong. Rec. S3474-S3525 (daily ed., March 11, 1970).

> a solid constitutional basis for Congress to act by statute rather than by constitutional amendment to reduce the voting age to 18. This power exists not only for Federal elections, but for state and local elections as well.
>
> "* * * it was a decision characterized by clear judicial restraint and exhibiting generous deference by the Supreme Court toward the actions of Congress."

In developing this Act, Congress made a legislative determination that the constitutional privileges of 18-21 year olds would be enhanced by the lowering of the present voting age requirement. Since here, as in *Morgan,* we are dealing with a statute which enforces Fourteenth Amendment rights and is, therefore, within Congress' clearly prescribed powers under § 5 of the Fourteenth Amendment, Congress' action must be sustained unless it is without rational basis. As was stated in *Morgan,* all that is necessary to uphold this legislation is that the Court be able to "perceive a basis" upon which Congress made this determination. In this respect the test by which Courts judge Congress' powers under § 5 are the same as those which have been established for other grants of power to Congress, *e.g.,* the Commerce Clause. In these areas congressional action will be sustained unless there is a specific constitutional prohibition or unless there is no rational basis for the exercise of congressional power. No constitutional provision bars the extension of the franchise to 18-year olds. Therefore, Congress' decision to lower the voting age must be sustained as a valid exercise of its power to enforce the provisions of the Fourteenth Amendment unless it is shown to be without rational foundation.

Far from being without rational foundation, Congress could clearly have found that lowering the voting age was an effective means of assuring that state and federal

officials would be responsive to all citizens affected by general legislation and thus necessary to avoid discrimination against the 18-21 year old class. To this effect, Senator Kennedy stated, [116 Cong. Rec. S3059 (daily ed., March 5, 1970)]:

> "Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the nation's youth in the public services they receive. By reducing the voting age to 18, we can enable young Americans to improve their social and political circumstances, just as the Supreme Court in the *Morgan* case accepted the determination by Congress that the enfranchisement of Puerto Ricans in New York would give them the sort of political power they need to eliminate discrimination and inequities in the public services they receive, and to give them a role in influencing the laws that protect and affect them. Although 18-21 year olds are not subject to the same sort of discrimination in public services confronting Puerto Ricans in New York, the many discriminations worked against millions of young Americans are no less real in our society. We know, for example, that increasing numbers of Federal and State programs, especially in areas like education and manpower, are directed toward our youth. We can no longer discriminate against them by denying them a voice in the political process that shapes these programs."

Congress declared that the purpose of Title III of the Voting Rights Act Amendments of 1970 was to secure, to those citizens 18 to 21 years of age, ". . . equal protection of the laws guaranteed to them under the Fourteenth Amendment of the Constitution." The new law enhances the political power of 18-21 year olds and helps gain for them non-discriminatory treatment in public services and

programs. In this respect the purpose of the new law parallels that of the act which was upheld in *Morgan,* and which was sustained, in part, because Congress could validly enhance the political power of Spanish-speaking citizens, thereby eliminating discrimination in public benefits and other programs. The same rationale which sustained the 1965 legislation in *Morgan* supports the Voting Rights Act Amendments of 1970.

To sustain this Act on the authority of the *Morgan* case, it is enough that the Court perceive a basis upon which Congress acted and find this legislation a reasonable means toward that desirable end. To ". . . require a judicial determination that the enforcement of the State law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Katzenbach* v. *Morgan,* 384 U.S. at p. 648.

(c)

As a second rationale, the *Morgan* Court ruled that it would uphold § 4(e) if this was "legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications" (at pp. 653-654). The Court in *Morgan* perceived a basis upon which Congress concluded that the requirement of English literacy was unfair as applied to Spanish speaking Americans. As with the first rationale, no judicial determination of a Fourteenth Amendment violation was requisite to legislative action. Professor Paul Freund has observed [(116 Cong. Rec. S6226 (daily ed. April 27, 1970) (letter to Sen. Mansfield)]:

> ". . . the Supreme Court emphasized that the judgment of unreasonable discrimination was one that Congress had appropriately made for itself, and that its judgment would be upheld unless it were itself an unreasonable one."

During the Congressional hearings and debate, the familiar political and philosophical arguments were advanced to demonstrate the irrationality of the 21 year old voting requirement. The 21 year old standard had few defenders; the present debate focused on the means, rather than on the need, for change.

There is ample evidence that Congress made a determination that denying the franchise to citizens between 18-21 constitutes an invidious and arbitrary classification in violation of the Equal Protection Clause. As Senator Bible observed [116 Cong. Rec. S3500 (daily ed. March 11, 1970)]: "There is no special wisdom that is magically acquired on reaching age 21. And indeed, heavy responsibilities come to young Americans long before they reach the present magic age." Senator Cook elaborated on these responsibilities (at S3499):

> Insurance companies hold a person to be an adult at the age of 18; 18-year olds are treated as adults by the penal code; they are allowed to obtain a driver's license; they can enter the Federal civil service at the age of 18; they may be taxed at the age of 18; and they can be married at the age of 18.
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> . . . As of June 1968 the statistics of the Department of Defense show there was a standing military force of 3,510,000 men. Of these 3,510,000 men the 18-year-olds constituted 123,000, the 19-year-olds constituted 226,000 and 20-year-olds constituted 567,000. In other words, in those three age categories of 18-, 19-, and 20-year-olds, in a standing army of 3.5 million men, 956,000 of them were under 21 years of age and denied the right to vote.
>
> . . . as of December 30, 1969, in the present conflict in Southeast Asia the United States had lost 40,028 men. Of these losses 2,413 were 18 years of age, 6,368

were 19 years of age, and 10,421 were 20-year-olds; or 19,202 out of 40,000 men.

While emphasizing these responsibilities, the legislators also noted the educational qualifications of the youth of today. Congressman Robison found [116 Cong. Rec. H5671 (daily ed., June 17, 1970)]:

> "Age 18 is normally the age at which most young people finish high school, and having thus completed the basic portion of their education they have absorbed a great deal of their education about our Nation's history, our Government, our national objectives, and our shortcomings. This information and knowledge about our basic political structure allows them to be better voters—better in many cases than their parents since the knowledge is so fresh in their minds."

Further, "in 1920 only 17 per cent of 18-to-21-year olds were high school graduates; now the figure is 79 percent. In 1920 only 8 percent of the 18-year-olds went on to college; now it is 41 percent." [116 Cong. Rec. S3478 (daily ed., March 11, 1970) (Sen. Kennedy)]. In addition to this expanded formal training, the impact of the mass media has been to increase the awareness of these young citizens.

In view of the responsibilities and attainments associated with the 18-21 year olds, Congress decided that withholding the franchise from this group is arbitrary and unreasonable. But, in addition, Congress found that no reasonable state interest was served by the 21 year old requirement. A forceful statement to this effect was provided by Congressman Robison [116 Cong. Rec. H5672 (daily ed., June 17, 1970)]:

> "What are the possible State interests to be protected by limiting the right of suffrage to those 21 or older?

First, is the interest of having an electorate which is sufficiently aware of the issues to cast an intelligent vote. Although this would appear to be a valid State interest, denying the vote to 18-year-olds does not seem to further that State interest. All of the evidence would suggest that present-day 18-year-olds are as intelligent and knowledgeable as ever before, and certainly as much so as the 21-year-old of 50 or 100 years ago.

Second, a State has an interest in having its electorate cast a mature vote. This likewise is a valid interest, but once again that interest does not appear to be served by denying 18-year-olds a vote for we are all constantly made aware of the increasing maturity of the vast majority of our young people, of their ability to digest sophisticated ideas, and of their ability to perform tasks requiring great emotional restraint.

Third, it is argued that a State has a valid interest in insulating itself from radical political thought-but this is not a legitimate State interest. It is imperative to distinguish between poor judgment and radical political opinion. The danger is evident: If we allow States to preclude 18-year-olds from voting because of their possible political opinions, the next step is to deny the vote to others who harbor similar opinions. As the Supreme Court noted in Carrington against Rash:

'Fencing out from the franchise a sector of the population because of the way they made vote is constitutionally impermissible.'

Additionally, in looking at State interest, it is helpful to note that those States which have already granted the vote to those under 21 have experienced no harmful effects. It would seem, then, that no valid State interest is served by denying the vote to 18-year-

olds and therefore the conclusion must follow that denying suffrage to that segment of our population is constitutionally impermissible."

The *Congressional Record* makes clear that, in passing this legislation, the legislators believed they were removing an invidious practice. It is not necessary that this Court agree with the Congressional determination. Just as in *Morgan,* where the Supreme Court stated that it was "enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause," 384 U.S. at p. 656, here too, it is enough that the Court perceive a basis upon which Congress has acted.

Such a basis clearly exists.

POINT II

State voting laws which require a citizen to be 21 years of age represent arbitrary and invidious classifications and are therefore unconstitutional, pursuant to the Fourteenth Amendment.

(a)

Even without the supporting authority of *Katzenbach* v. *Morgan,* the Voting Rights Act Amendments of 1970 should be sustained as a proper exercise of Congress' power to abrogate State laws or practices which violate the Fourteenth Amendment. In assessing the constitutionality of State laws which set the voting age at 21, courts may rely upon the evidence assembled by the Congress when it acted

to invalidate such laws. As Mr. Justice Harlan noted in his *Morgan* dissent, 384 U.S. 641, 669-670:

> "Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."

Any state law restricting the franchise must be subjected to a stringent standard of review. "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." *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621, 626 (1969).

For the State practice to stand, the State interest must be compelling where the fundamental right of voting is involved. *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621. "And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans* v. *Cornman,* —— U.S. ——, 26 L. Ed. 2d 370, 374 (1970). We submit there is no compelling State interest present which can withstand such close scrutiny; the burden is on the plaintiffs to prove otherwise.[4] And

[4] We submit further that even if the State does not have to show a compelling state interest, it could not sustain the practice under the traditional equal protection standard, the rational basis test. This test as set forth in *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961), is that: "[a] statutory discrimination between classes will not be set aside if any state of facts reasonably may be conceived to justify it". The present requirement does not bear any reasonable relationship to the states' legitimate interest in setting a minimum age for voters.

the legislative history of Title III of the Voting Rights Act Amendments of 1970 provides support for the conclusion that the 21 year old voting requisite violates the Fourteenth Amendment.

(b)

The State interest which is most often asserted as being served by the 21 year old voting requirement is the need to preserve an informed, mature and responsible electorate. The evidence in the *Congressional Record* clearly demonstrates that 18 year olds are sufficiently mature to vote in that they have assumed many of the responsibilities of adulthood. At 18, one or both sexes can marry without parental consent (applicable in 39 states); they can make wills (26 states); they can obtain a driver's license; they are subject to personal income and social security taxes; and they are treated as adults by the criminal law (49 states). 116 Cong. Rec. S3518 (daily ed., March 11, 1970) (Senator Randolph). It is further shown in the *Record* that improved and widespread education[5] as well as advanced

[5] In considering the levels of educational achievement, it should be noted that public education in America has developed from a system of church supported and private schools existing at the time of the Revolutionary War to a modern, heavily financed system of free and compulsory schools. In New York City, for example, the first free school—originally intended for the impoverished—did not open its doors until May of 1806. It was not until 1853 that the present Board of Education assumed direction of public education in New York City. It was 1874 before the first Compulsory Education Law was enacted. In 1890, there were 228 schools, 257,561 students, 3,517 teachers and total expenditures of approximately $5,500,000. *Palmer, The New York Public School, Being A History of Free Education In the City of New York* 182 (1905). Today, there are 916 school organizations, 1,123,165 pupils, 62,891 day school teachers, an expense budget of $1,599,608,627 and a capital budget of $193,149,075. Board of Education, City of New York, *Facts and Figures* 1969-1970, pp. 62, 68, 58, 8.

The development of compulsory education along with increased population and the need for modern equipment for specialized training, inevitably gave rise to government funding of education. The

means of communication have made today's 18 year old far better informed than his predecessor. See, e.g., Memorandum of Senator Kennedy at 116 Cong. Rec. S3057 (daily ed., March 5, 1970).

Nor can it be argued that recent campus unrest justifies a conclusion that 18-21 year olds should be disenfranchised because they are not responsible citizens. The percentage of students engaged in violent activities is small. The overwhelming percentage of students operate within our political system. Large numbers actively engage in such programs as Vista and the Peace Corps [see 116 Cong. Rec. S3057 (daily ed., March 5, 1970) (Senator Kennedy)]. Even if a large number of 18-21 year olds espouse radical philosophies they could not, for this reason, be disenfranchised. The Supreme Court has clearly stated that the States cannot exclude those who may vote in a certain way.

> " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,'

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expansion of federal assistance reflects the nation's goal of providing the best available education to every student and contributes to the attainment of that goal. In the last fifteen years, there has been a sharp rise in federal aid: see Meranto, *The Politics of Federal Aid to Education in 1965: A Study in Political Innovation*, 6 (1967).

Equally important, a greater proportion of students complete high school and receive college training. Approximately half of those who graduate from high school enter college and, of these, more than half receive a diploma. Mason and Rice, *Earned Degrees Conferred 1964-1965* pp. 1-3 (1967). See also 116 Cong. Rec. S3484 (daily ed., March 11, 1970) (Senator Kennedy's Testimony). Through the expansion of public universities and government assistance to private colleges, the opportunity for higher education should become available to an increasing number of students. See, generally, Millett, *Financing Higher Education in the United States* ("The Staff Report of the Commission on Financing Higher Education") (1952).

> *Schneider* v. *State,* 308 U.S. 147, 161, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Carrington* v. *Rash,* 380 U.S. 89, 94 (1965).

The experience in those states which allow voting at 18, 19, or 20 indicates that the concerns of the other states are unfounded. For, indeed, the younger voters do possess the necessary knowledge, maturity and responsibility to cast a fair and informed ballot.[6] In discussing the experience in those states which have reduced the age, Senator Harris said [116 Cong. Rec. S3493 (daily ed., March 11, 1970)]:

> "There is no evidence that the reduced voting age has caused any special difficulty whatever in those States. In fact, former Governors Carl Sanders and Ellis Arnall of Georgia have testified in the past that permitting 18-year-olds to vote in their States has been a highly successful change."

Those challenging the validity of Title III may refer to recent referenda in South Dakota, Idaho, Michigan, Maryland, Nebraska, North Dakota, Tennessee, Ohio, New Jersey, and Oregon in which voters rejected proposals to lower the voting age. That already enfranchised citizens have resisted efforts to broaden the franchise is by no means dis-

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[6] Certain studies, in fact, suggest that 18-21 year olds are more politically informed than are adults. See, e.g., 100 Cong. Rec. A 1777 (March 5, 1954). And the addition of younger voters revitalizes the political process. "Because of built-up interest by young voters and candidates, says Howard Rock, editor of 'The Fairbanks Tundra Times', there is a 'new vigor in the villages of the North . . . The younger crop is more aware of the problems and has a real good knowledge.'" US News & World Report, August 12, 1968, p. 37.

positive of whether the State interest is strong.[7] It has often been seen that federal intervention is required to ensure that all citizens enjoy their basic rights. See *Brown* v. *Board of Education of Topeka, Kan.,* 347 U.S. 483 (1954); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); Civil Rights Act of 1964 (Pub. L. 88-352; 78 Stat. 241); Voting Rights Act of 1965 (Pub. L. 89-110; 79 Stat. 437). The trend of these referenda suggests that, if left alone, the States would not lower the voting age. Indeed, this trend may have impressed Congress with the urgency of new federal legislation.

(c)

It should be noted that many of these same arguments as to the maturity and education of 18-year-olds were recently debated in Great Britain—which had originally given us the magic age of 21 as the standard of majority—when that nation lowered the age to 18. An exhaustive study had been conducted, by a committee chaired by the Hon. Mr. Justice Latey, to consider whether any changes were desirable in the age of majority. *Report of the Committee on the Age of Majority,* London: H.M. Stationery Office, 1967 (commonly referred to as the Latey Report). The Report of the Committee recommended that the age of majority be lowered to 18.[8] This recommendation was

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[7] The trend of these referenda may not reflect national sentiment on the issue. A Gallup Poll of April, 1967 found that 64% of present voters favored lowering the required age to 18; a similar poll before World War II found only 17% in favor of such a change. US News & World Report, August 12, 1968, p. 36.

[8] In rejecting the age of 21 the Latey Committee concluded "that the historical causes for 21 are not relevant to contemporary society" (at p. 125). It determined that 18 would be the most suitable age of majority, finding (at pp. 39-40):

"(1) There is undeniably a great increase in maturity towards that age.

adopted and incorporated in the Family Law Reform Act, 1969, 1 Eliz. 2, C. 46.

While the Latey Committee did not consider the age of public rights, such as voting, this issue was resolved by Parliament. In the Representation of the People Act, 1969, 1 Eliz. 2, C. 15, the voting age was lowered to 18.[9]

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(2) That vast majority of young people are in fact running their own lives, making their own decisions and behaving as responsible adults by the time they are 18.

(3) Those of our witnesses who seemed most closely in touch with the young favored 18 as the age at which it was not only safe to give responsibility, but undesirable, if not indeed dangerous, to withhold it.

(4) This was the age at which on the whole the young themselves seemed to reckon themselves of age. Some of their arguments may not be sound; and we have already said that popular preconception was not influencing us more than we could help. Nevertheless this was a point which weighed with us. We felt that an important factor in coming of age is the conviction that you are now on your own, ready to stand on your own feet and take your weight off the aching corns of your parents', fully responsible for the consequences of your own actions. . . .

(5) 18 is already an important watershed in life. To mention some examples of the freedom attained at this stage, at 18 you become liable for full National Insurance contributions; liable for military service when there is conscription; able to drink alcohol in public; no longer liable to care, protection or control orders; free to carry on street trading; and, of course, you can apply for a commercial balloon pilot's licence. And by 18 you can drive a car or motor bicycle, be treated as an adult when in need of treatment for mental disorder and choose your own doctor and dentist within the National Health Service. In a sentence, at 18 young people nowadays already become emancipated for many purposes of their personal and private lives and are free to order them as they will.

[9] Presently, 18 year olds may vote in Israel, Ceylon, Egypt, West Germany, South Africa, Mexico (if married), South Vietnam, Laos, Brazil, Uruguay, Venezuela, Bolivia (if married), many Communist nations, and in many of the Canadian provinces and Swiss Cantons. The minimum age is 19 in Austria and some Canadian provinces; it is 20 in Japan, Norway, and Switzerland. It remains 21 in Australia, France and Italy.

Certain members of Parliament, in opposing this change, expressed doubt as to the maturity and intelligence of 18-year-olds in connection with voting. However, a majority of Parliament, many relying on the Latey Report, decided that 18 should be the age for voting as well as for private responsibilities. This determination reveals a belief that rights and responsibilities should vest at the same age. As to the fear that 18-year-olds were not sufficiently mature to cast a reasonable ballot, some Members dismissed any attempt to correlate age and maturity. For example, Mr. Richard said [774 H.C. Deb. (5th ser.) 341 (1968)]:

> "If one attempts to equate maturity with the age of voting, one is bound to run into difficulties, because, clearly, there are sections of the adult population who would not be entitled to take part in an election if they first had to pass a maturity test of responsibility or intelligence. I therefore utterly reject this equation of maturity with age.
>
> What one ought to try to do is to arrive at a more sensible test as to the age at which people ought to be allowed to vote and I would suggest one very simple test. People ought to have the right to vote and to have a say about the way in which their lives are governed and in which their country is run, at the age at which society expects them to assume adult social responsibilities."

(d)

It is therefore, apparent that no compelling State interest is advanced by the present age requirement. Beyond that, however, excluding 18-21 year olds from voting bars from the political process those who have a clear and direct stake in elections. To exclude such voters is a denial of the Fourteenth Amendment's guarantee of equality of franchise.

Evans v. *Cornman,* —— U.S. ——, 26 L. Ed. 2d 368 (1970); *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969).

In *Evans,* the Supreme Court reviewed a Maryland determination which excluded from voting, as non-residents, citizens living on the grounds of the National Institutes of Health (NIH), a federal enclave situated within the geographical boundaries of Maryland. The State argued that residents of a federal enclave are not bona fide residents of Maryland and that—even if they were residents of Maryland—"the State may constitutionally structure its elections laws so as to deny them the right to vote." 26 L. Ed. 2d at p. 374. The Court found that the NIH residents are subject to and affected by changes in state criminal laws, spending and taxing decisions, workmen's compensation and unemployment laws, and motor vehicle regulations. The Court further noted that these residents have resort to the State courts and can send their children to Maryland public schools. The Court therefore concluded (26 L. Ed. 2d at pp. 376-7):

> "In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they . . . were prior to 1953 when the area came under federal jurisdictions and as are their neighbors who live off the enclave. In nearly every election, federal, state and local, for offices from the presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents. As the District Court concluded, they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote."

Following the decision in *Evans,* the Supreme Court can determine that 18-21 year olds have a clear stake in the

state, federal and local elections, equal to that of older voters. In most states they can obtain a regular driver's license and are thus concerned with and affected by changes in gasoline and highway taxes, licensing and registration procedures and motor vehicle misdemeanor and insurance laws. Many are employed, heads of households and parents and are thus concerned with income and property taxes, workmen's compensation and social security programs, and public education and cultural resources. And, as active members of society, they are concerned with issues facing the nation and their locality—the War, the economy, the environment.

Further, at eighteen in effect a citizen comes of age. Although there has not been—as occurred in Great Britain —a formal lowering of the age of majority, the age of adulthood now appears to be 18. Before the criminal courts an 18 year old is an adult. At that age, he can enter government service, make a will and can serve civil process. Further, he can marry without parental consent. He can purchase alcoholic spirits and beverages. Females who have reached the age of 18 are no longer protected by statutory rape laws; without parental consent, they can marry and seek an abortion in those states where abortions are permitted.

The laws and programs which affect 18-21 year olds in almost the same manner as they do adults illustrate that the younger citizens have a definite stake in the outcome of public elections. Although affected by these laws, these citizens in a very real sense are unrepresented in the framing of them. In addition, there are several programs of particular concern to younger citizens. Financial aid programs to assist young people seeking higher education are of great importance. More compelling, men of this age group are subject to military conscription and, with it, combat service.

That at 18 there is an obligation to fight but an inability to vote is perhaps the most repeated argument for lowering the voting age. This discrepancy makes the state voting requirement appear invidious. As Dr. S. I. Hayakawa has stated: "If taxation without representation was tyranny then conscription without representation is slavery." The impact of the war in Indo-China has made this discrepancy all the more ironic.[10] During the congressional debates, Congressman Matsunga observed, 116 Cong. Rec. H5640 (daily ed. June 17, 1970):

> ". . . I thing [sic] the minimum age requirement is both arbitrary and archaic. The use of '21' as an indication of adulthood and maturity originated during the medieval times when it was generally believed that a male at 21 was old enough for literally bearing the weight of arms and armor. While we have revised the age for bearing arms to 18, we have kept the age for voting at 21. Surely, this discrimination was not intended by Congress. It is noteworthy in this connection that approximately one-half of Americans killed in combat in Vietnam fall within the age group of 18 to 21."

It is contended that drafting 18 year olds is not a novel policy and that such conscription has never warranted an imposition of a lowered voting age requirement on the States (memorandum, pp. 3-5). It might be said that the inequity of denying the franchise to those liable to the draft has become increasingly clear in recent years, as younger citizens come to comprise the bulk of our military force.

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[10] Between January 1, 1961 to January 1, 1969 44% of the approximately 34,000 American soldiers killed in Indo-China were under the age of 21 and another 15% were only 21. US News and World Report, April 28, 1969. See also 16 Cong. Rec. S3499 (daily ed., March 11, 1970) (Senator Cook).

Before World War II, the draft primarily concerned those above 21. Both the Selective Draft Act of 1917 (Act of May 18, 1917; 40 Stat. 76) and the Selective Training and Service Act (Act of September 16, 1940; 59 Stat. 885-886) originally imposed liability on those above 21; it was not until the crisis of global war became severe that these acts were amended to lower the draft age to 18. Once the present "peacetime" draft lottery system is fully operative, however, men will be required to register at 18 and will be liable to induction at 18. Save for those with expiring deferments, men above 19 will no longer be drafted unless a general mobilization is required. In effect, the draft will concern only those the States keep disenfranchised, those who are therefore unable to use the strength of the ballot to pressure for a volunteer army.

It is clear then that the stake of the eighteen year olds in the outcome of elections is great and in view of the burdens that attach at 18, the traditional 21 year old yardstick appears arbitrary.[11] The law should reflect changes in the age of responsibility and in the notion of maturity. As Justice Douglas observed in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 669 (1966):

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[11] The use of 21 is derived from the age at which a man could physically bear the weight of arms and armor; it further reflected the time required for "the study of militaryy skill and the laborious training in the custom of chivalry". James, *The Age of Majority,* 4 The American Journal of Legal History 22, 28 (1960). And this weight was considerable; e.g., Field armor, Greenwich, c. 1950 weighed 71 lb. 14 oz. Blair, *European Armor* 192 (1958). See also Grancey, *The Armor of Galiot de Genouilhac,* Metropolitan Museum of Art Papers, No. 4, 35 (1937). Yet it is likely that today's 18 year old could bear such weight, for the process of physical maturation has accelerated. See 116 Cong. Rec. S3510 (daily ed., March 11, 1970) (Senator Bayh); "Latey Report" at p. 28; Tanner, *Earlier Maturation of Man,* 218 Scientific American No. 1 (January 1968), pp. 21-7. In fact, it has been suggested that American soldiers—including 18 year olds called to service—have carried such weight into battle. See Blair, supra, at p. 191.

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, anymore than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

It is not enough to assume that elected officials will be responsive to the needs of all citizens, voters or not. In *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964), the Supreme Court made clear that an equal vote is requisite to equal rights:

> "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live."

And the Supreme Court has recently noted that ". . . a lesser rule could hardly be applicable to a complete denial of the vote." *Evans* v. *Cornman,* —— U.S. ——, L. Ed. 2d 370 (1970).

It is therefore our contention that this Court should determine that the 21 year old voting requirement violates the Equal Protection Clause. The existing requirement does not advance any compelling state interest. But even more it works a true injustice upon members of the 18

to 21 year old group. A determination that the 21 year old voting requirement violates the Equal Protection Clause clears the way for sustaining Congress' power to eliminate the invidious discrimination which the States have imposed.

CONCLUSION

Since

1. The legislative record establishes that Congress had a rational basis for concluding that extending the franchise to 18-21 year olds was a reasonable method of assuring that government benefits and programs would not operate to the detriment of this age group, and

2. The legislative record supports the conclusion that Congress acted reasonably in concluding that the 21 year old voting requirement is arbitrary and prejudicial to the basic rights of disenfranchised young citizens, and

3. The present 21 year old voting requirement is a violation of the Equal Protection Clause because no compelling state interest can be shown to justify the classification which excludes the 18-21 year olds from voting and any state interest is far outweighed by the adverse effect on a group of citizens who have a direct stake in the electoral process,

then the Voting Rights Act Amendments of 1970 are constitutional.

September 3, 1970

Respectfully submitted,

J. Lee Rankin
Corporation Counsel
Attorney for Intervenor New York City Board of Elections
Municipal Building
New York, N. Y. 10007
566-4517

Norman Redlich
Leonard Bernikow
Paula J. Omansky
of Counsel.