

ARTICLES

YOUTH VOTING RIGHTS AND THE UNFULFILLED PROMISE OF THE TWENTY-SIXTH AMENDMENT

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ABSTRACT

The Twenty-Sixth Amendment was designed to bring young people into the political process by constitutionalizing their right to vote. However, the last fifty years have shown that ratification has not been enough: the Amendment has remained largely untouched by the courts since the 1970s, even as voter suppression increasingly threatens access to the franchise for students and other young voters. This Article argues that, when interpreted in the larger context of the Supreme Court's equal protection jurisprudence, the Amendment should serve as an independent and meaningful source of a substantive right to vote.

The handful of courts considering Twenty-Sixth Amendment claims in the modern era have reasoned in dicta that such claims' analysis should be informed by a discriminatory purpose standard, while acknowledging inherent problems with this assumption. Indeed, courts have reflected on the dearth of guidance on how to handle such claims, admittedly stumbling through their analysis and applying only arguably apposite precedent by analogy. I suggest that the searching approach that has evolved is not necessarily wrong, but that it merely sets the floor to evaluating youth voter claims, rather than the ceiling. Instead, this Article proposes a Twenty-Sixth Amendment standard that draws on both modern right-to-vote and equal protection doctrines. In other words, claims arising under the Twenty-Sixth Amendment may benefit from a hybrid test that incorporates prima facie, intentional discrimination, and "right to vote" balancing analyses.

There exists little scholarship on the appropriate framework for evaluating claims that state action unduly abridges the right to vote on account of age as prohibited by the Twenty-Sixth Amendment; this Article thus offers a new way of thinking of the voting rights of this often-forgotten group and proposes a solution for examining future claims on behalf of this class.

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INTRODUCTION

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Congress shall have power to enforce this article by appropriate legislation.

Twenty-Sixth Amendment to the U.S. Constitution

[T]he time has come to extend the vote to 18-year-olds in all elections: because they are mature enough in every way to exercise the franchise; because they have earned the right to vote by bearing the responsibilities of citizenship; and because our society has so much to gain by bringing the force of their idealism and concern and energy into the constructive mechanism of elective government.

Senate Judiciary Committee Report¹

For nearly fifty years, access to the ballot, free of age discrimination for those over eighteen, has been explicitly protected under the U.S. Constitution. The Twenty-Sixth Amendment (the “Amendment”) was ratified by the states to protect citizens over the age of eighteen from denial or abridgement of the right to vote on account of age.² The Amendment is the most recent voting rights-related amendment to be ratified, and the quickest amendment ratified in U.S. history—gaining the support of bipartisan supermajorities and the states in less than 100 days.

Yet, student voting rights continue to be under threat.³ Today’s young people face invidious threats to their voting rights through targeted voter identification restrictions; cuts to early voting and same-day voter registration opportunities; cuts to programs that pre-register sixteen- and seventeen-year-olds to vote; the failure to place or adequately resource polling sites on-campus; prosecution by election officials against students exercising their right to vote; voter intimidation by election officials who misinform students

¹ S. REP. NO. 92-26, at 5 (1971) (recommending referral of the Twenty-Sixth Amendment to the states for ratification).

² The Twenty-Sixth Amendment provides 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.” U.S. CONST. amend. XXVI. Note that the text of the Twenty-Sixth Amendment does not particularize its protection for a specific group of voters by age, such as youth, students, military personnel, or the elderly; it simply provides protection from age-based discrimination in the denial or abridgement of the right to vote for citizens over the age of eighteen. While this Article focuses on age-based discrimination related to youth voters, and sometimes refers to students as a proxy for youth, the protections of the Twenty-Sixth Amendment need not be so narrowly interpreted as to only apply to the newly enfranchised class of voters between the ages of 18–21. The text of the Nineteenth Amendment is analogous in this respect. While the Nineteenth Amendment was borne out of the suffragist movement, it is not so narrow as to only confer the franchise to women, but prohibits denial or abridgement of the right to vote more broadly—“on account of sex.”

³ See *infra* Part III.

of their rights to vote from campus; gerrymanders that cut through college communities and lessen youth voting power; and the mistreatment of—and inappropriate imposition of—provisional ballots.⁴

Part III of this Article describes these obstacles in further detail; however, one statistic stands out in demonstrating the structural obstacles that young voters face at the polls due to voter restrictions: one in four Millennials polled after the 2016 presidential election reported being required to vote by provisional ballot due to questions related to voter eligibility.⁵ By comparison, only 6% of Baby Boomers and 2% of the Greatest Generation polled reported being required to vote provisionally.⁶

One need only speak to college students about their election experience to understand their unique obstacles in accessing the franchise. However, the public discourse too often dismisses young voters as disengaged and apathetic to political realities, discrediting their important (and powerful) role in our democracy. We are unaccustomed to thinking of youth access to the ballot within a voting rights framework, and our courts have followed suit, failing to create a robust Twenty-Sixth Amendment jurisprudence that protects access to the ballot free of age discrimination.

The 2018 midterm election marked a twenty-five-year high in youth turnout, jumping a remarkable ten points from just four years prior.⁷ In some jurisdictions, voter turnout increased exponentially. For example, Texas and Nevada saw five-fold increases in early youth turnout; Georgia saw a four-fold increase; and Arizona saw a three-fold increase.⁸ In the lead up to the 2020 presidential election, which will trigger a new Census that will inform the drawing of updated voting districts, coupled with the upcoming fiftieth anniversary of the Twenty-Sixth Amendment, a unique opportunity is presented to reexamine the critical role of youth voter participation in our democratic republic.

⁴ Provisional ballots, created under the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 20901 (2002), the first comprehensive federal election law, enable voters to cast a ballot if they are not on the voting rolls when they arrive to vote. However, while provisional ballots were intended to expand access to the franchise, provisional ballots are often rejected for a myriad of reasons, such as where there is no signature match or where a jurisdiction does not count provisional ballots cast in the wrong precinct such as in nearly half the states. See discussion *infra* Part III.D.

⁵ “Who Voted, Who Didn’t and Why?,” PR NEWSWIRE (Dec. 14, 2016), <https://www.prnewswire.com/news-releases/who-voted-who-didnt-and-why-300378000.html>. The survey polled 3,050 people in both states where voter restrictions have been introduced and those where they were not introduced, indicating a disproportionate impact on younger voters and people of color. *Id.* The study additionally found that Black and Hispanic voters were nearly two times more likely than White voters to vote provisionally as a result of having their eligibility challenged. *Id.*

⁶ *Id.*

⁷ *Young People Dramatically Increase their Turnout to 31%, Shape 2018 Midterm Election*, CTR. FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT (Nov. 7, 2018), <https://civicyouth.org/young-people-dramatically-increase-their-turnout-31-percent-shape-2018-midterm-elections/>.

⁸ Reid Wilson, *Young and New Voters Surge in Early Voting*, HILL (Oct. 31, 2018, 1:46 PM), <https://thehill.com/homenews/campaign/414098-young-and-new-voters-surge-in-early-voting>.

Young voters are increasingly identifying as politically independent. Tuft University's Center for Information & Research on Civil Learning & Engagement ("CIRCLE") is dedicated to tracking trends in youth civic participation. In its post-election analysis of Millennial voters participating in the 2016 presidential election, CIRCLE found that youth increasingly identify as political independents, with the proportion of self-identified independent Millennials increasing six percentage points from 2008 to 2016.⁹ This trend is on track with Pew Research Center's findings that, while the share of self-described independents has increased across generations, it has increased most among the Millennial generation—with 50% identifying as detached from traditional party structures in 2014, up ten percentage points from just seven years prior.¹⁰

As President Nixon noted during the ceremonial certification of the Twenty-Sixth Amendment, young people serve a critical role in the democratic process, infusing the practice of democracy with "some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country, throughout history, we find, goes through ebbs and flows of idealism."¹¹

As this Article sets forth, young voters face unique and persistent attacks on their access to the franchise. But all is not lost. While many localities and states target young voters with restrictive election laws, regulations, and practices, others illustrate how sound reforms expand youth participation. For example, the implementation of Automatic Voter Registration in Oregon boosted youth turnout by seven percentage points in the first year of its implementation—an increase of 45,988 new young voters.¹² Of the more than 226,094 Oregonians registered through this measure in that race, over forty percent were under the age of thirty.¹³ By comparison, that demographic comprises only twenty percent of the state's eligible voting

⁹ CTR. FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT, 2016 ELECTION: YOUNG VOTERS IN THE 2016 GENERAL ELECTION, (2016), http://civicyouth.org/wp-content/uploads/2016/11/CIRCLE-Full-Exit-Poll-Analysis_Final.pdf.

¹⁰ *Millennials in Adulthood*, PEW RES. CTR. (Mar. 7, 2014), <http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/#fnref-18663-1>.

¹¹ Richard Nixon, U.S. President, Remarks at the Ceremony Marking the Certification of the 26th Amendment to the Constitution (Jul. 5, 1971).

¹² Oregon is the first state in the nation to implement Automatic Voter Registration, a state modification to the National Voter Registration Act of 1993 ("NVRA"). The NVRA requires that most states provide eligible citizens an opportunity to register to vote at public agencies, such as when applying for or renewing a driver's license. Automatic Voter Registration goes one step further by reformulating the policy as an "opt-out" rather than an "opt-in." In other words, instead of assuming that an eligible voter is not interested in registering to vote and providing an option for participation, Automatic Voter Registration assumes interest and provides an option of refusal. Henry Kraemer et al., *Millennial Voters Win with Automatic Voter Registration*, CTR. FOR AM. PROGRESS (July 19, 2017, 1:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/07/19/436024/millennial-voters-win-automatic-voter-registration/#fn-436024-56> (analyzing U.S. Census data, "Citizen Voting-Age Population: Oregon.>").

¹³ *Id.*

population, revealing that younger voters disproportionately take advantage of these common-sense measures.¹⁴ To be sure, this statistic represents those beyond the pool of youth that the Amendment newly enfranchised. Nonetheless, the data point is significant in illustrating the clear connection between age, access to the ballot, and election modernization—particularly for generations raised with the Internet.

Similar success with youth voter engagement has been found through the implementation of Same Day Registration, a measure which allows an eligible voter to register to vote when they cast their ballot, rather than having to meet advanced registration deadlines.¹⁵ In the 2008 presidential election, 21% of unregistered eighteen- to twenty-nine-year-olds indicated that they did not vote because they failed to meet the registration deadline, compared to 12% of those older than thirty.¹⁶ By comparison, in 2018, young voters who lived in Election Day Registration states voted at a rate of nine percentage points higher than those who live in deadline-only states.¹⁷

The success of measures such as Automatic Voter Registration, Same Day and/or Election Day Registration,¹⁸ and Online Voter Registration for voters in general, and for young people specifically, begs the question of the degree to which states can continue to get away with failing to implement these easily-available common-sense measures. In other words, seventeen states and the District of Columbia have now passed Automatic Voter Registration laws and the same number of states and the District of Columbia offer Same Day and/or Election Day Registration.¹⁹ Ubiquitous technological advancements should serve to universally expand access to the franchise, but that has not been true in practice. While many states have incorporated technology to improve and increase access to the franchise, other states have been markedly reluctant. That reluctance begs the question

¹⁴ *Id.*

¹⁵ Most advanced voter registration deadlines today are between 3–4 weeks prior to an election. In contrast, several states allow for same day or election day registration opportunities, even those that additionally maintain advanced voter registration deadlines. In 1973, the Supreme Court concluded that a fifty-day voter registration period was reasonable at the time, but “approaches the outer constitutional limits” under the Federal Constitution. *Burns v. Fortson*, 410 U.S. 686, 687 (1973) (per curiam); *Marston v. Lewis*, 410 U.S. 679 (1973).

¹⁶ SURBHI GODSAY, FACT SHEET: VOTER REGISTRATION AMONG YOUNG PEOPLE IN 2008 (Nov. 2010), https://civicyouth.org/wp-content/uploads/2010/11/FS_10_Registration.pdf.

¹⁷ *Youth Voting*, CTR. FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT, <https://civicyouth.org/quick-facts/youth-voting/> (last visited May 14, 2019).

¹⁸ Same Day Registration is slightly distinct from Election Day Registration, in that Same Day Registration refers to the opportunity for one-stop registration and voting on early voting days, whereas Election Day Registration refers to one-stop registration and voting on Election Day.

¹⁹ See *Automatic Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Apr. 22, 2019), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>; *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Apr. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

of *why* certain states have chosen not to take advantage of these opportunities, at the expense of all voters, and at the expense of young voters in particular.

The nation finds itself in what may prove to be, as Reverend Barber proposes, “the embryonic stages of a Third Reconstruction,” in response to structural obstacles that reinforce and exacerbate social division, starting with a manipulation of the democratic process—specifically, a new wave of voter restriction laws introduced after the 2008 election and the *Shelby County v. Holder* decision.²⁰

In response to these new structural obstacles emerging post-*Shelby*, modern voting rights cases are just starting to include the Twenty-Sixth Amendment among their causes of action. Of this recent jurisprudence, courts uniformly recognize the lack of guidance on which standard of review to apply.²¹ Courts considering Twenty-Sixth Amendment claims have reasoned in dicta that they should be informed by a Fifteenth Amendment analysis based on the two amendments’ textual similarities, while acknowledging skepticism with this assumption.²² One recent decision notes that, despite this uncertainty, an “emerging consensus” points to the application of an intentional discrimination standard.²³ Meanwhile, when considering voter suppression challenges that include the Twenty-Sixth Amendment among the listed causes of actions, courts generally apply the Fourteenth Amendment to voter infringements at-large, or to the impact on people of color through the added protections afforded by Section 2 of the

²⁰ REVEREND DR. WILLIAM J. BARBER II & JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR* 121 (2016). Barber proposes a Third Reconstruction framework to recognize emerging patterns from the First and Second Reconstruction: “Past is prologue: This history lays out how efforts to stop fusion movement have always consisted of direct acts of deconstruction on these fronts.” *Id.* at 117.

²¹ *See, e.g., Lee v. Virginia Board of Elections*, 843 F.3d 592, 607 (4th Cir. 2016) (“[I]t is far from clear that the Twenty-Sixth Amendment should be read to create a cause of action that import principles from Fifteenth-Amendment jurisprudence.”); N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 522 (M.D.N.C. 2016) (“Few cases have considered the Twenty-Sixth Amendment. Accordingly, this court faces a dearth of guidance on what test applies to Twenty-Sixth Amendment claims.”), *rev’d on other grounds*, 831 F.3d 204 (4th Cir. 2016); Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015) (“[T]here is no controlling case law . . . regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote.”).

²² *See, e.g., One Wis. Inst. Inc. v. Thomsen*, 186 F. Supp. 3d 958 (W.D. Wis. 2016) (acknowledging the lack of clarity on what standard of review to apply, but applying a Fifteenth Amendment intentional discrimination analysis to Twenty-Sixth Amendment claims due to the textual similarities of the amendments, and suggesting that doing so provides added protection to youth voters compared to a Fourteenth Amendment undue burden analysis); *McCroy*, 182 F. Supp. 3d at 522–23 (expressing doubt that Fifteenth Amendment principles regarding intentional discrimination are applicable to the Twenty-Sixth Amendment, but doing so anyway based on the plaintiffs’ theories of the case); *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (same).

²³ *League of Women Voters of Fla. v. Detzner*, 314 F.Supp.3d 1205, 1221 (N.D. Fla. 2018).

Voting Rights Act, but have given short shrift to claims concerning the impact on youth as a class.²⁴

This Article concludes that an approach which allows for either the application of an intentional discrimination standard pursuant to the Fifteenth Amendment, or the lumping of youth with undifferentiated voter infringement claims brought under the Fourteenth Amendment, is harmful because it overlooks protections specifically afforded by the Twenty-Sixth Amendment. Instead, the Amendment requires its own legal standard, sensitive to the particularities of young voters, who are especially susceptible to suppression in part because they are most likely to be voting for the first time.

What is remarkable about the Amendment's reach is that it encompasses the entire voting pool. Simply put, all voters *age*—independent of partisanship, race, gender, or class. Age is both fixed as a state of being for a class, or perhaps for a generation, and yet, ever-changing on an individual basis.²⁵

Statistical studies reinforce the habit-forming nature of voting, making it all the more important that voting becomes normalized at an early age through unobstructed access to the ballot.²⁶ In other words, the act of voting today increases the likelihood of voting in the future. One recent study found that on average, voting in one election increases the probability of voting in a future election by ten percentage points.²⁷

This Article aims to shed light on how laws and regulations disenfranchise this overlooked class. To be sure, youth impact may be a design of its own,

²⁴ See, e.g., *McCrary*, 831 F.3d 204 (focusing analysis on the Fourteenth Amendment and Section 2 of the Voting Rights Act claims, and avoiding the lower court's Twenty-Sixth Amendment analysis); *Thomsen*, 186 F. Supp. 3d 958 (reserving just nine short paragraphs of the 119-page decision to a summary analysis of the Twenty-Sixth Amendment claim); *Lee*, 843 F.3d at 607 (noting that it is "far from clear" what standard to apply to Twenty-Sixth Amendment claims, focusing analysis on claims brought under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments).

²⁵ See Alexander A. Boni-Saenz, *Age, Time and Discrimination*, 53 GA. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3276514 (stating that age is both immutable like race or sex, and mutable like religion, class, and disability because it changes over time); see also Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to A Decades-Old Consensus*, 44 U.C. DAVIS. L. REV. 213, 236 (2010) ("Chronological age is mutable in the sense that it changes over time. Yet it is simultaneously immutable in that an individual has no ability to control it Examined from a control-based definition of immutability, it readily becomes apparent that chronological age is a human's most immutable characteristic. In an era when both race and gender are increasingly understood to be social constructed and fluid classifications, and gender can be altered through medical means, time travel remains a figment of the imagination, and it is thus utterly impossible to change one's chronological age.").

²⁶ Thomas Fujiwara, Kyle Meng & Tom Vogle, *Habit Formation in Voting: Evidence from Rainy Elections*, 8 AM. ECON. J. 160 (2016); see also Alan S. Gerber, Donald P. Green & Ron Shachar, *Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment*, 47 AM. J. POL. SCI. 540 (2003).

²⁷ Alexander Coppock and Donald P. Green, "Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities." 60 AM. J. OF POL. SCI. 1044 (2016).

in addition to a design of race-based or partisan-based legislation, but it may also be a circumstance of race or partisan appeals.

North Carolina's overruled omnibus election law provides a good example of this interplay. There, a comprehensive law imposed a series of restrictions: implementation of strict voter identification; elimination of same day registration during the early-voting period; shortening of the state's early voting period by a full week; elimination of a popular pre-registration program for sixteen- and seventeen-year-olds; and prohibition of the counting of ballots cast in the wrong precinct, even for statewide or national races.

The Fourth Circuit Court of Appeals issued a sweeping decision reversing the lower court, finding that the law illegally intended to discriminate on account of race.²⁸ The decision observes that the lower court "seems to have missed the forest in carefully surveying the many trees. This failure of perspective led the court to ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina."²⁹ The appellate decision is remarkable in its wholesale denunciation of the lower court's reasoning, and in its flat rejection that certain voting tools are mere preference: "Registration and voting tools may be a simple 'preference' for many [in the majority group], but for many [in the minority group], they are a necessity."³⁰

The Fourth Circuit invalidates the law on race-based grounds, for good reason—the "inextricable link between race and politics in North Carolina" was the legislature's fundamental reason in designing the law. "[I]n what comes as close to a smoking gun as we are likely to see in modern times, the State's very justifications for a challenged statute hinged *explicitly* on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise."³¹

At the same time, an expert report quantified the impact of each of these individual restrictions on North Carolinian youth.³² The law banned measures that had rendered North Carolina one of the nation's most voter-

²⁸ *McCroy*, 831 F.3d 204.

²⁹ *Id.* at 214.

³⁰ *Id.* at 232.

³¹ *Id.* at 226 (emphasis in original).

³² See Expert Report Submitted on Behalf of the Duke Intervenor-Plaintiffs, League of Women Voters of N.C. v. North Carolina, No. 1:13-CV-660-TDS-JEP (M.D.N.C. May 19, 2014). Approximately 14% of the state's young voters would not meet the new strict photo ID requirements. *Id.* at 6. Despite having comprised 9% of the state's voters, young voters had overwhelmingly utilized same day registration during the early voting period—comprising over 20% of those using the measure. *Id.* at 5. Over 160,000 North Carolinians aged sixteen and seventeen pre-registered during a robust pre-registration program that brought county clerks into high schools as a part of a robust civics curriculum between 2010 to 2013. *Id.* Over 25% of young voters who cast provisional ballots in the 2012 presidential election in the state did so because they were in the wrong precinct or had not reported moving. *Id.* at 6.

friendly states; in a fifteen-year period, the state improved from forty-third to eighth in the nation for youth registration, and from thirty-first to tenth in the nation in youth turnout.³³

There are clear overlaps in the measures which disproportionately impacted people of color and youth in North Carolina, such as reliance on early voting and same day voter registration opportunities. These measures may be examples where youth impact is a circumstance of race-based design, or simply a convenient benefit when the true motivation is rigging elections for partisan advantage.

Other measures in North Carolina were more blatantly targeted at youth. For example, the law eliminated a robust pre-registration program that brought county clerks into high schools as a part of a popular civics curriculum. The program pre-registered over 160,000 North Carolinians ages sixteen and seventeen in just three years. Similarly, the original bill proposed would have permitted voters to identify themselves at the polls using either a college ID card or an out-of-state government-issued card, the latter being particularly helpful for out-of-state students. The enacted version of the bill, however, severely curtailed the forms of acceptable identification, eliminating use of both college and out-of-state government-issued IDs, except under very limited circumstances.

The manner by which strict voter identification bills are carved to exclude youth from accessing the ballot is relatively underexamined. A Common Cause study found that of the fifteen states with strict voter identification, seven do not accept student ID cards for voting, and twelve do not accept out-of-state government issued identification such as a driver's license.³⁴ Taken together, six of the fifteen strict voter identification states accept neither a student ID nor an out-of-state government issued ID, forcing students who want to vote to acquire new, in-state identification in the few weeks between their move-in date and the advanced voter registration deadline.³⁵ Given that many students do not drive at school and may have trouble accessing a DMV, especially in the narrow window afforded between moving onto campus and meeting advanced registration deadlines amid other new responsibilities, these hurdles may be insurmountable.

As our understanding of the Twenty-Sixth Amendment evolves, there will undoubtedly be a myriad of ways in which challenged laws and regulations are found to unconstitutionally discriminate on account of age alone, and it is likely that there will, at times, be an overlap with race and

³³ Yael Bromberg, Allegra Chapman & Dale Eisman, TUNING IN & TURNING OUT: MILLENNIALS ARE ACTIVE BUT NOT VOTING; WHAT'S STOPPING THEM AND HOW CAN THEY MAKE THEIR VOICES COUNT? 13–16 (Sept. 2016), <https://www.commoncause.org/resource/tuning-in-turning-out/>.

³⁴ *Id.*

³⁵ *Id.*

partisanship. For example, where a Historically Black College & University (“HBCU”) is situated in an otherwise primarily white district, such as the case with Prairie View A&M University in Texas, the failure to provide equal early voting opportunities in the city of Prairie View or on-campus leading up to the 2018 election, could reasonably be found to be violative on account of both age and race, and indeed resulted in a quickly-settled lawsuit.³⁶ Similarly, on HBCU campuses such as Prairie View A&M or North Carolina A&T University, district lines cut through the middle of campus, and may result in future novel gerrymander cases that interlay youth, race, and partisan-based motivations in drawing local, state, and/or federal districts.³⁷ Indeed, the Amendment has not yet been a basis for a gerrymander challenge. Be it with respect to gerrymandering or other ballot-access infringements, the intersectional, compounded discrimination resulting from ageism with another protected characteristic such as race, may render a particularly pernicious result.³⁸

Local election administration decisions uniquely illustrate the impact of age independent of partisanship. For example, Rutgers students in New Brunswick, New Jersey, a Democratic Party stronghold, must overwhelmingly travel off-campus to vote, rather than being able to vote at centrally-located spaces they are familiar with, such as college student centers or gymnasiums.³⁹

While decisions to locate and equip polling stations are made on the local level, they are sometimes influenced by formal or informal state directives. A recent directive by the Florida Secretary of State, which has since been preliminary enjoined on Twenty-Sixth Amendment grounds, categorically

³⁶ See Matt Zdun, *Waller County Expands Early Voting for Prairie View A&M Students*, TEX. TRIB. (Oct. 25, 2018, 12:00 PM), <https://www.texastribune.org/2018/10/25/waller-county-expands-early-voting-prairie-view-m-students/>; see also *Complaint, Allen v. Waller Cty.*, 4:18-CV-3985 (S.D. Tex. Oct. 22, 2018).

³⁷ See John Newsom, *As the Supreme Court Takes up Redistricting, N.C. A&T Students Offer up Evidence of a Split Campus*, GREENSBORO NEWS & REC. (Mar. 26, 2019), https://www.greensboro.com/news/education/as-the-supreme-court-takes-up-redistricting-n-c-a/article_35aa2581-200e-5976-ad22-f3d49920f398.html (describing how the largest HBCU in the country is gerrymandered and cracked into two congressional districts and that students regularly cross the district line to go in-between their dormitories, the cafeteria, the library, and their classrooms).

³⁸ Boni-Saenz, *supra* note 25, at 13 (“While age certainly possesses unique characteristics, it is worth noting that age does not exist in a vacuum. Other traits, such as class, disability, gender identity, race, religion, sex, or sexual orientation, intersect with age to produce different types of lived experiences. Further, the intersection of ageism with discrimination on the basis of other identity characteristics can create particular forms of disadvantage that are unique and more pernicious than just the compound disadvantage that one might experience from each characteristic individually.”).

³⁹ See, e.g., *Rutgers Polling Locator*, RUTGERS CTR. FOR YOUTH POL. PARTICIPATION, <http://cyp.p.rutgers.edu/ru-voting/voter-information/rumbpollfinder/> (last visited Jan. 26, 2019). Note that twenty-five student dormitories must travel off-campus to vote at two public elementary schools which are little-known to university students.

bans campuses from the list of permissible early-voting locations.⁴⁰ There, the United States District Court for the Northern District of Florida finds that the exclusion “lopsidedly impacts Florida’s youngest voters,” “creating a secondary class of voters . . . prohibit[ed] from even seeking early voting sites in dense, centralized locations where they work, study, and in many cases, live.”⁴¹

The preliminary results of a quantitative study by University of Florida Professor Daniel Smith demonstrate the impact of these new early on-campus voting opportunities in Florida.⁴² Every one of the new early voting campus locations had at least one third of the total ballots cast by eighteen- to twenty-nine-year-olds.⁴³ For comparison purposes, that age group accounted for only 10.1% of the more than 2.7 million votes cast statewide at early voting locations.⁴⁴ Thus, students are three times more likely to take advantage of early-voting opportunities when they can do so from campus.⁴⁵ Moreover, early voting locations on campus have a notable impact on youth turnout: of the more than 6,800 voters who cast an early in-person ballot on a college campus in 2018 who were eligible but who did not vote in 2016, over 80% were under the age of thirty.⁴⁶

This Article provides a fresh look at youth voting rights. Its primary purpose is to address the still unanswered question of how to fulfill the promise of the Twenty-Sixth Amendment. The Article contributes to the scant, budding discussion of how litigants and the judiciary may fulfill this promise by applying an appropriate standard of review to future claims. Specifically, the Article analyzes the relevant standards of review that have emerged through the modern right to vote and equal protection doctrines, and how these doctrines, along with the origin and history of the Amendment, should inform Twenty-Sixth Amendment jurisprudence today. The Article concludes that litigants are “playing it safe” with alternative theories that unnecessarily restrict this unexplored and untapped well of justice.

⁴⁰ *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018) (granting plaintiffs’ motion for preliminary injunction).

⁴¹ *Id.* at 1216–17.

⁴² Daniel A. Smith, *Early in Person Voting on Public College and University Campuses in Florida, 2018 General Election* (June 9, 2019) (unpublished manuscript) (on file with author).

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 14.

DISCUSSION

The Twenty-Sixth Amendment was ratified in 1971 with strong bipartisan supermajorities of Congress. Impressively, the Amendment took less than 100 days to be ratified by thirty-eight states—making it the quickest ratification in U.S. history. However, the Amendment had been generating for three decades before it was ever posed to the states. The measure was first introduced by Congress in 1942, and more than 150 similar proposals followed, at least one in each subsequent Congress.⁴⁷ Prior to its ultimate ratification, a Joint Resolution was only once reported out of committee, in 1954, when it fell just five votes shy of the required two-third majority to send the proposal to the states. The most comprehensive hearings were held in 1968 and 1970.⁴⁸

The wording ultimately ratified in 1971 is identical to the original text of the first proposal in 1942.⁴⁹ The legislative history fleshes out rationale for the Amendment but sheds barely any light on its chosen text and intended scope.⁵⁰ Professor Jenny Diamond Cheng, one of the few scholars who has studied the Amendment in hopes of informing a standard of review, explains:

In a brief interchange in a 1943 House subcommittee hearing, one member reported that the proposal had been drafted by the legislature service and another implied that it had been modeled on other suffrage amendments. This was clearly not a subject of much interest, however, either in 1943 or over the decades to come. Legislators would offer dozens of proposed voting amendments, nearly all with the same core text, but there is no other recorded discussion of the amendment’s language.⁵¹

Clearly, one cannot directly glean from its text what standard of review Congress intended to be applied to Twenty-Sixth Amendment claims. Professor Diamond Cheng recognizes as much: a “search[] for a dominant

⁴⁷ See H.J. Res. 352, 77th Cong. (Oct. 17, 1942) (proposing that the voting age be lowered for federal elections); S.J. Res. 166, 77th Cong. (Oct 19, 1942) (proposing the original language of the Twenty-Sixth Amendment); H.J. Res. 354, 77th Cong. (Oct 21, 1942) (introducing a joint resolution in the House similar to Vandenberg’s Senate proposal); see also S. REP. NO. 92-26, at 5 (1971).

⁴⁸ Thorough study of the proposal was conducted in committee, with hearings conducted by the Senate Judiciary Committee in the 82nd, 83rd, 87th, 90th, and 91st Congresses. The most comprehensive hearings were held by the Senate Subcommittee on Constitutional Amendments on May 14, 15, and 16 of 1968 in the 90th Congress, and on February 16 and 17 and March 9 and 10 of 1970, in the 91st Congress. S. REP. NO. 92-26, at 7–8.

⁴⁹ Compare S.J. Res. 166, 77th Cong. (1942), with U.S. CONST. amend. XXVI.

⁵⁰ See Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 674–75 n.186 (2017).

⁵¹ *Id.* (internal citation omitted) (citing Jenny Diamond Cheng, How Eighteen-Year-Olds Got the Vote 17–18 (Aug. 4, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818730).

‘original intent’ behind the Twenty-Sixth Amendment . . . is a quixotic task,⁵² and the interpretation of these claims is “up for grabs.”⁵³

Cheng offers an interpretive technique called “intratextualism” to support her conclusion that claims under the Amendment should be analyzed by an intentional discrimination standard: “[S]imilar constitutional texts should be read similarly regardless of whether the drafters consciously intended the parallels. This is especially helpful when considering the Twenty-Sixth Amendment, which was drafted by anonymous staffers and the precise text of which was virtually never discussed in three decades of debate.”⁵⁴

Akhil Reed Amar, who invented intratextualism, explains how it is different from the two main strands of textualism:

A plain-meaning textualist might look to today’s dictionaries to make sense of a contested term like “commerce” or “cruel” or “privileges” or “process,” whereas an original intent textualist might look to eighteenth-century dictionaries. But intratextualism tries to use the Constitution as its own dictionary of sorts, yielding a third distinct approach.⁵⁵

Amar then uses the Amendment to illustrate this method of comparing and contrasting identical or similar words or phrases throughout the Constitution:

If it seems clear (as in fact, it does) that the Fifteenth Amendment, ratified in 1879, was drafted to encompass the political right of citizens to serve and “vote” on juries, this fact about word usage and constitutional meaning in 1870 would be relevant to an intratextualist confronting a different (but parallel) amendment adopted 100 years later.⁵⁶

Thus, Amar concludes, that the use of the word “vote” in the Fifteenth Amendment should be imported to the use of the word in the Twenty-Sixth Amendment and interpreted to apply to juries as much as it does to the ballot box.

Using intratextualism to inform a standard of review for the Amendment may seem, at first-glance, the least complicated approach to solving the conundrum of how to evaluate claims made under the Amendment. Yet, courts have struggled with this for good reason. As Amar acknowledges, “like all legitimate forms of argument, intratextualism can often be used on both sides of a given issue.”⁵⁷ As set out in Part IV, the standard of review applied to the right to vote has evolved over time. Interestingly, the only time the Supreme Court has passed any judgment on the Amendment was in 1979,

⁵² *Id.* at 673.

⁵³ *Id.* at 658.

⁵⁴ *Id.* at 674 (relying on Akhil Reed Amar).

⁵⁵ Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–89 (1999).

⁵⁶ *Id.* at 789.

⁵⁷ *Id.* at 772.

and there it upheld application of a heightened scrutiny analysis, rather than the intentional discrimination standard that emerged two years earlier in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).⁵⁸ Thus, the question is not “what does the right to vote mean?” but is “how do we apply it to the Twenty-Sixth Amendment?”

As Cheng notes, pure textualism does not offer a clear answer to this question. However, the other basic building blocks of conventional constitutional interpretation—historical, structural, doctrinal, and prudential, coupled with the sixth modality additionally offered by Professor Philip Bobbit, ethical—point the query in a fundamentally different direction.⁵⁹ Indeed, as Amar suggests, “no tool of interpretation is a magic bullet,” each can offer a valuable lens.⁶⁰

A search of the Amendment’s history—politically, socially, legislatively, structurally, and doctrinally—reveals that the Amendment was heavily influenced by the Fourteenth Amendment, as demonstrated in Part I below. Indeed, as explained in Part I, the Supreme Court case that reviewed the first legislative expansion of youth voting rights upheld it on Fourteenth Amendment grounds, at least as applied to federal elections. The Amendment was quickly ratified thereafter to prevent a bifurcation of youth voting rights as applied to federal and state elections.

While the Amendment has largely been abandoned, there was a robust jurisprudence around it in the decade following its ratification. Part II demonstrates how, doctrinally, courts originally applied heightened scrutiny to Twenty-Sixth Amendment claims based on the fundamental right to vote.

Part III brings recent history to the fore by examining the impact of infringements on young voters today, along with vignettes that offer a glimpse of the personal impact of these measures on student voters. This Part illustrates how the promise of the Amendment is as yet unfulfilled.

Finally, Part IV seeks a solution to this problem by describing the tests that have evolved under the modern right to vote doctrine and the modern equal protection doctrine. The analysis reveals the illogic in weakening protections to a class based on age through the application of a standard more arduous to meet than the modern right to vote doctrine permits.

⁵⁸ *Symm v. United States*, 439 U.S. 1105 (1979), *aff’d* *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978).

⁵⁹ See PHILIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying and describing six modalities of constitutional interpretation as: “historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average ‘man on the street’); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).”).

⁶⁰ Amar, *supra* note 55, at 801.

Indeed, the Amendment must necessarily contribute protections beyond the Fourteenth Amendment—if not, the Amendment has no independent value.⁶¹ This is a structural argument but has prudential and ethical components. As Professor Diamond Cheng explains, discrimination based on age is “simply not like discrimination based as race,” since studies show that voting is a habit, “[d]eliberately making it more difficult for *new* voters to build that habit of political participation quite literally threatens the future of participatory democracy.”⁶²

I. HISTORY OF THE TWENTY-SIXTH AMENDMENT

A. *Expansion of the Youth Vote as an Integral Part and Natural Extension of the Second Reconstruction*

Although the Twenty-Sixth Amendment is not traditionally considered as being part of the Second Reconstruction (1954–1968),⁶³ youth were an integral part of the era, and youth enfranchisement in 1971 was its natural outcome.

It was tens of thousands of African American southern college students who staged historic sit-ins throughout southern cities. Although *Brown v. Board of Education* outlawed segregation in 1954, the rule of law was flagrantly ignored. Intent on challenging the institution of segregation, four freshmen students from North Carolina A&T University lead the first sit-in in February 1960 at a Woolworth counter in Greensboro, North Carolina.⁶⁴

As the sit-ins spread, the students recognized the need to come together for central-coordination. The formation of Student Nonviolent Coordinating Committee (“SNCC”) resulted in April 1960. SNCC launched a popular voter registration and desegregation coalition with

⁶¹ See, e.g., *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (“*Anderson-Burdick* likely is unfitting because applying it would indicate the Twenty-Sixth Amendment “contributes no added protection to that already offered by the Fourteenth Amendment.” (internal quotation marks omitted) (quoting *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016)).

⁶² Cheng, *supra* note 50, at 676.

⁶³ The term “Second Reconstruction” was first offered by American historian C. Vann Woodward in 1957. See C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. NEGRO EDUC. 231, 240 (1957). The era began with the Supreme Court’s shattering of the concept of separate but equal in the 1954 precedential case *Brown v. Board of Education*. This ushered-in a new push of integration of public spaces such as schools, swimming polls, and restaurants, supported by an upswell in activism. The period is marked by federal legislation known as the “child of the storm” due to the popular unrest at the time, including the assassination of John F. Kennedy (the Civil Rights Act of 1964); “the crown jewel” (the Voting Rights Act of 1965); and “the voice of justice” (the Fair Housing Act of 1968) in honor of Martin Luther King Jr. whose assassination days prior ushered in the stalling bill.

⁶⁴ See BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 216 (2003).

established civil rights organizations.⁶⁵ Ella Baker, who led NAACP's southern voter registration field efforts during the 1940s,⁶⁶ went on to mentor these student organizers and taught them how to work with poor, rural southern Blacks in voter registration campaigns, applying her iconic "lead from behind" facilitative leadership style.⁶⁷

Mississippi Freedom Summer of 1964 marked the culmination of these efforts and gained national attention as the media televised violent resistance to voter registration efforts, including wide coverage of the murder of three young organizers—James Chaney, Michael Schwerner, and Andrew Goodman—who joined the southern migration of activists called to action that summer.

The media coverage continued into 1965. On March 7 of that year, the National Chair of SNCC, John Lewis, then 25 years of age (now Congressman John Lewis) and other activists, organized a large march attempting to walk from Selma to Montgomery protesting the killing of an African American voting rights activist. Hundreds of non-violent protesters were brutally beaten, and Lewis was almost killed by mounted Alabama police as they tried to cross the Edmund Pettus Bridge in Selma.⁶⁸ All of the violence carried out by state officers was captured by the media and played on television into the bedrooms of Americans with tremendous impact. Two weeks later, Dr. Martin Luther King joined John Lewis and, with military protection, successfully made the Selma to Montgomery march a historical landmark showing that, when young people become activists, they can make democracy work. Selma marked a turning point, and on March 15, President Johnson convened a joint session of Congress to outline what would become the Voting Rights Act of 1965.

It was the upswell of 1960s activism that manifested as the nation's Second Reconstruction that ultimately expanded the vote to youth. Every movement at the time had a youth culture—be it the civil rights movement, the anti-war movement, the Red Power and Chicano movements, the women's liberation

⁶⁵ See *id.* at 274–82, 299–317.

⁶⁶ REVEREND DR. WILLIAM J. BARBER II & JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: MORAL MONDAYS, FUSION POLITICS, AND THE RISE OF A NEW JUSTICE MOVEMENT* 45 (2016).

⁶⁷ RANSBY, *supra* note 64, at 274–82, 299–317.

⁶⁸ March 7, 1965 is known in history books as "Bloody Sunday" and is celebrated in Selma, Alabama each year as a seminal day recognizing efforts made by young Americans upholding American democratic ideals. See, e.g., JOHN LEWIS, *ACROSS THAT BRIDGE: A VISION FOR CHANGE AND THE FUTURE OF AMERICA* (2012); DANNY LYON, *MEMORIES OF THE SOUTHERN CIVIL RIGHTS MOVEMENT* 166 (2010); *Selma to Montgomery March*, MARTIN LUTHER KING JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/selma-montgomery-march> (last visited May 14, 2019).

movement, or the gay rights movement—but it was at the turn of the decade that the youth enfranchisement movement itself took off.⁶⁹

To be sure, the military-franchise connection had been a persistent theme since the beginning of American History, catching steam during World War II when the Twenty-Sixth Amendment was first introduced,⁷⁰ and reemerging during the Korean War and the Vietnam War. The military-suffrage connection even draws back to the nation's first legislative assembly, the House of Burgesses on July 30, 1619, when the franchise was extended to seventeen-year-old men since that was the age of conscription and of paying taxes.⁷¹ The slogan “old enough to fight, old enough to vote,” originally borne out of the Revolutionary War,⁷² was echoed two centuries later by President Eisenhower, former-Commander of the Allied Forces in World War II in his 1954 State of the Union.⁷³

The late sixties, however, marked the tipping point on youth enfranchisement. In the end of 1968, a youth movement called Let Us Vote (“LUV”) was founded on a college campus in Stockton, California with the mission to enfranchise young adults because they should be given a “piece of the action” through “constructive dissent and active participation.”⁷⁴ In just six weeks, LUV expanded into a national movement of 3,000 high schools and over 300 college campuses in all fifty states.⁷⁵ LUV captured the nation's attention, landing the cover story of *TIME* Magazine on January 31, 1969; multiple television appearances; and a 1969 single record release titled “LUV” by the popular songwriter duo Boyce and Hart, known for writing songs for The Monkees.

⁶⁹ See JAMES MAX FENDRICH, *IDEAL CITIZENS: THE LEGACY OF THE CIVIL RIGHTS MOVEMENT* xxi (1993) (stating that the civil rights movement “laid the groundwork for a nationwide network of activists in a variety of civil rights and progressive organizations” such as the antiwar, student rights, and women's movements); FRANCISCO ARTURO ROSALES, *CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* xv (1996) (“It was a time when young people from ethnic and mainstream groups in various parts of the country sought to express their hopes for their country. In the history of the U.S., no other era embodies the rise of youthful self-conscious idealism. The period produced a generation that questioned the premises and values sacred to their parents.”); Interview with Heather Booth, Founder of the Midwest Academy (Sept. 20, 2017) (discussing her role as a young civil rights organizer with various movements throughout the 1960s, including in the Congress of Racial Equality (“CORE”), SNCC, women's liberation, and anti-war efforts, and her view of the era specifically vis-à-vis youth leadership and youth enfranchisement).

⁷⁰ See S. REP. NO. 92-26, at 7–8 (1971).

⁷¹ See WENDELL W. CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 3 (1992).

⁷² *Id.* at 5.

⁷³ See President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, (Jan. 7, 1954), https://www.eisenhowerlibrary.gov/sites/default/files/file/1954_state_of_the_union.pdf (“For years our citizens between the ages of 18 and 21 have, in time of peril, been summoned to fight for America. They should participate in the political process that produces this fateful summons. I urge Congress to propose to the States a constitutional amendment permitting citizens to vote when they reach the age of 18.”).

⁷⁴ CULTICE, *supra* note 71, at 98.

⁷⁵ *Id.*; *Youth: Can Law Conquer All?*, *TIME*, Jan. 31, 1969, at 20.

A broad coalition called the Youth Franchise Coalition quickly formed to foster the first coordinated national push.⁷⁶ The coalition was comprised of thirty-three prominent civil rights, education, labor, and youth organizations. In addition to LUV, it included groups like the National Education Association, the Southern Christian Leadership Conference, the NAACP, Common Cause, the American Jewish Committee, the National Association of Autoworkers, the National Student Association with its 385 student government groups, and millions of young people affiliated with the YMCA, YWCA, and U.S. Youth Council. When the NAACP Youth & College Division hosted a coalition lobbying effort in Washington D.C. in April 1969, the stage was set in anticipation of the first session of the 91st Congress in 1970.⁷⁷ By early 1971, Ian MacGowan and Pat Keffer transitioned from leading the Youth Franchise Coalition to joining the citizen's lobby Common Cause. Common Cause staff members then mobilized its membership across the country to provide technical assistance to state legislators in the successful push for ratification.⁷⁸

In sum, the ultimate expansion of youth access to the franchise is a part of the narrative and immediate aftermath of the Second Reconstruction, and it was a natural extension of the nation's arc towards democratic inclusion.

B. Youth Enfranchisement's Circuitous Route

The coordinated outside push by organizers and advocates to expand the franchise was met by an inside strategy within the halls of Congress, albeit a circuitous one. Unexpectedly, it was a statutory approach in 1970 that catalyzed the final, successful push for ratification in 1971. The resulting statute—the 1970 Amendments of the Voting Rights Act of 1965 (“VRA”)—and its aftermath in the expedited Supreme Court case *Oregon v. Mitchell*,⁷⁹ is therefore critical to interpreting the Twenty-Sixth Amendment.

The statute is worthy of study because it results from Senate debates of the over 150 prior proposals introduced over the past three decades to expand the franchise via constitutional amendment, including recent extensive hearings before the Senate Subcommittee on Constitutional

⁷⁶ *Lowering the Voting Age to 18: Hearing on S.J. Res. 7, S.J. Res. 19, S.J. Res. 32, S.J. Res. 34, S.J. Res. 38, S.J. Res. 73, S.J. Res. 87, S.J. Res. 102, S.J. Res. 105, S.J. Res. 141, and S.J. Res. 147 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 43 (1970) [hereinafter *1970 Hearing*] (statement of Ian MacGowan, Executive Director, Youth Franchise Coalition); see also CULTICE, *supra* note 71, at 98.

⁷⁷ See CULTICE, *supra* note 71, at 44–45.

⁷⁸ *Id.* at 190, 204; see also Anne Frazier Yowell, *Ratification of the Twenty-Sixth Amendment* (May 1973) (unpublished M.A. thesis, Virginia Polytechnic Institute and State University), https://vtechworks.lib.vt.edu/bitstream/handle/10919/43549/LD5655.V855_1973.Y69.pdf?sequence=1&isAllowed=n (describing the organizing behind the ratification effort and Common Cause's leadership role, based on interviews with Ian MacGowan and Pat Keffer).

⁷⁹ *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970).

Amendments in 1968 and 1970.⁸⁰ The statute also set-off an expedited chain of events that finally achieved ratification.⁸¹

This Part highlights Fourteenth Amendment principles that underscore the thirty-year legislative history of the Twenty-Sixth Amendment. These principles set the stage for informing the appropriate standard of review to apply to modern Twenty-Sixth Amendment claims, discussed in Part IV below.

1. *The Voting Rights Act Amendments of 1970: The First Federal Statute to Enfranchise Youth*

The idea to lower the voting age by statute, rather than amendment, was borne out of a seminal Supreme Court 7-2 decision in 1966, *Katzenbach v. Morgan*.⁸² Therein, the Court upheld Congress's ban on literacy tests that disenfranchised minority voters. *Morgan* considered whether congressional action was permissible pursuant to the Fourteenth Amendment's enforcement clause, notwithstanding a separate provision of the Constitution which places the determination of voting qualifications within the domain of the states.

The focus on the *Morgan* decision is not whether the states violated the Equal Protection Clause by using literacy tests, but the judicial deference afforded to Congress pursuant to its authority to make such determinations and act accordingly.

Morgan holds that Congress can determine whether invidious discrimination is violative of the Fourteenth Amendment, and whether Congress is empowered to enact a legislative remedy. Essentially, *Morgan* holds that courts should not second guess Congress's determinations to adopt affirmative legislation to apply or expand equal protection guarantees:

A construction of §5 that would require a judicial determination that the enforcement of the state law . . . violated the Amendment, as a condition sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of §1 of the Amendment.⁸³

There are certain limitations to Congress's power, of course. Courts must conduct a review of the interest served by the proposed congressional remedy

⁸⁰ See *supra* notes 47–48 and accompanying text.

⁸¹ See Kenneth J. Guido, Jr., *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. REV. 32, 38–40 (1972) (describing the chain of events leading to ratification).

⁸² *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁸³ *Id.* at 648–49.

and determine whether a compelling state interest is served by continuing its action. There must be a “perceived basis” on which Congress “might predicate” its judgment to define the scope of Fourteenth Amendment guarantees.

Influenced by *Morgan*, the 1970 hearings to lower the voting age by constitutional amendment include testimony of Congress’s alternate authority to act via statute.⁸⁴ Prior to the Senate’s consideration of the Voting Rights Act, Senator Kennedy circulated a memorandum to his colleagues advocating for such a statutory approach, the essence of which became his testimony in the 1970 hearings.⁸⁵ Kennedy was resolute that the preferred method for federal change on the youth vote was via statute, rather than by constitutional amendment or time-intensive litigation.⁸⁶

Thus, a second track to expand the youth franchise was mobilized. On March 4, 1970, Senate Majority Leader Mike Mansfield first introduced the youth enfranchisement proposal within the Voting Rights Act Amendments of 1970, alongside provisions related to literacy tests and durational residency requirements.⁸⁷ Senator Mansfield urged that it may be “the last chance” to lower the voting age because the House and Senate Judiciary Committees were proving to be “burial grounds” for constitutional amendments.⁸⁸ The Mansfield amendment was approved one week later, by a sixty-four to seventeen roll call vote.⁸⁹

The question of whether youth enfranchisement could be achieved via statute rather than ratification was hotly contested, and expert opinions by constitutional scholars on both sides of the question entered the 1970 congressional debates to amend the statute.⁹⁰

⁸⁴ See Lewis J. Paper, *Legislative History of Title III of the Voting Rights Act of 1970*, 8 HARV. J. ON LEGIS. 123, 137–38 (1970) (citation omitted).

⁸⁵ *Id.* at 138.

⁸⁶ Senator Edward M. Kennedy, *Lowering the National Voting Age to 18: Testimony Before the Senate Subcommittee on Constitutional Amendments*, TEDKENNEDY.ORG (Mar. 9, 1970), http://www.tedkennedy.org/ownwords/event/voting_age.html (“There are obvious similarities between legislation to reduce the voting age and the enactment of Section 4(e) of the Voting Rights Act. Just as Congress has the power to find that an English literacy test discriminates against Spanish-speaking Americans, so Congress has the power to recognize the increased education and maturity of our youth, and to find discrimination in the fact that young Americans who fight, work, marry, and pay taxes like other citizens are denied the right to vote—the most basic right of all. The *Morgan* decision is thus a sound precedent for Congress to act by statute to eliminate this inequity in all elections—Federal, State and local.”).

⁸⁷ 116 CONG. REC. 5950–51 (1970) (statement by Sen. Mansfield).

⁸⁸ John W. Finney, *Senate Approves 18-Year-Old Vote in All Elections*, N.Y. TIMES (Mar. 13, 1970), <https://www.nytimes.com/1970/03/13/archives/senate-approves-18yearold-vote-in-all-elections-adopts-6417.html>.

⁸⁹ *Id.*

⁹⁰ Letters by constitutional experts on both sides of the debate were entered into the congressional record by Senator Edward M. Kennedy. 116 CONG. REC. 15,869–78 (1970) (statement of Sen. Kennedy). Senator Kennedy and former Solicitor General Archibald Cox argued that youth enfranchisement could be accomplished through congressional action, a theory encapsulated in a

Senator Kennedy's legal position was supported by two eminent constitutional authorities from Harvard Law, Professor Paul A. Freund, and Professor Archibald Cox of Harvard Law School, former Solicitor General of the United States. Buttressed by *Morgan*, the Kennedy-Cox-Freund position was that youth enfranchisement could be conferred pursuant to Congress's power to enforce the equal protection guarantee of the Fourteenth Amendment.

The opposing position did not take issue with the merit of expanding the franchise; indeed, the twenty-one-year age requirement was largely viewed as an anachronism. However, the opposition argued that the path to youth enfranchisement required a constitutional amendment, not statute.⁹¹ Nonetheless, the Kennedy-Cox-Freund position withstood in Congress, and the resulting statute passed the Senate by a sixty-four to twelve vote, and the House 237-132.

The Voting Rights Act Amendments of 1970 marks the first bipartisan federal statute to enfranchise youth. In Title III, Congress declared that the twenty-one-year age requirement:

1. "[D]enies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote[:]"
2. Has the effect of denying those disenfranchised "the due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment[:]" and
3. "[D]oes not bear a reasonable relationship to any compelling State interest."⁹²

letter from Harvard Law Professor Paul Freund to Senator Mansfield. *Id.* at 6954-55 (statement of Sen. Mansfield) (entering Letter by Prof. Freund into the record); *id.* at 6649-53 (statement of Sen. Kennedy); *id.* at 6934-36 (statement of then-Law Professor Cox). The Kennedy-Cox-Freund position was opposed by what was known as the Bickel letter, a letter to President Nixon submitted by five Yale professors, a version of which ran in the New York Times. *Id.* at 20,168 (statement of Rep. MacGregor) (entering the Bickel letters into the record); see also Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 474-85 (1970) (describing the legislative history of the Act).

⁹¹ 116 CONG. REC. 20,168 (1970) (statement of Rep. MacGregor) (entering the Bickel letters into the record).

⁹² Pub. L. No. 91-285, §§ 301-305 (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 primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

The statutory language is significant. First, Congress expressly recognizes the constitutional right of youth over eighteen years of age to vote. Second, Congress documents the entwinement of Fourteenth Amendment equal protection and due process principles with respect to youth enfranchisement.

Third, the statutory language parallels the strict scrutiny test applied to fundamental rights or suspect classifications—the highest standard of review afforded to constitutional rights, as discussed further below. Indeed, Senator Allen proposed striking the explicit statement in Title III that no compelling state interest was served by setting the voting age at twenty-one.⁹³ However, he could not define the state interest he sought to protect, and his amendment to strike this language was defeated by a Senate vote of sixty-four to twenty.⁹⁴

President Nixon ultimately signed the Voting Rights Act Amendments of 1970, expressing support for the youth franchise, but doubting that Congress had the power to enfranchise youth via statute. Upon signing the statute,

(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 institute in the name of the United States such actions against States or political subdivisions, 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.

⁹³ 116 CONG. REC. 7004 (1970) (statement of Sen. Allen).

⁹⁴ *Id.* at 7009.

Nixon instructed his Attorney General to expedite litigation to test the constitutionality of the provision.⁹⁵

The States of Oregon, Texas, Arizona, and Idaho challenged various provisions of the Voting Rights Act Amendments of 1970, including the grant of youth enfranchisement. The case was consolidated for Supreme Court review in *Oregon v. Mitchell*, 400 U.S. 112 (1970). With regard to the youth enfranchisement provision, the narrow question presented is whether Congress is empowered to conclude, as it did, that citizens eighteen to twenty-one years of age are not substantially less capable than those over twenty-one years of age to exercise of the right to vote.

2. *The Supreme Court Upholds the Act in Part*

The landmark *Oregon v. Mitchell* case resulted in a 5-4 split on Congress's power to expand youth access to the ballot.⁹⁶ The majority found that the youth enfranchisement provision of the Voting Rights Act Amendments of 1970 was constitutional with respect to federal elections, but not as to state and local elections. Unfortunately, it is difficult to garner a majority reasoning as to how Fourteenth Amendment principles support the judgment.

This lack of clarity is a result of the odd posture of the decision. The opinion is penned by Justice Black "announcing the judgments of the Court in an opinion expressing his own view of the cases."⁹⁷ None of the eight remaining Justices join his opinion, thereby rendering it a plurality decision. Four dissenting opinions remain.⁹⁸ Thus, one may only glean Justice Black's

⁹⁵ Statement on Signing the Voting Rights Act Amendments of 1970, 1970 PUB. PAPERS 512 (June 22, 1970) ("Although I strongly favor the 18-year-old vote, I believe—along with most of the Nation's constitutional scholars—that Congress has no power to enact it by simple statute, but rather it requires a constitutional amendment.").

⁹⁶ See *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970).

⁹⁷ *Id.* at 117.

⁹⁸ The dissenting opinions are ordered as follows: First, by Justice Douglas, who determines that Congress has authority to act on both federal and state elections. Justice Douglas's dissent directly responds to Justice Black's opinion. *Id.* at 135 (Douglas, J., concurring in part and dissenting in part). The second listed dissent is by Justice Harlan, who goes as far as to argue that the Fourteenth Amendment does not support the enfranchisement of African Americans. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part). Justice Harlan is fortified by the Court's lack of uniformity in *Oregon v. Mitchell* and explains that he is not shackled by stare decisis to determine that the Fourteenth Amendment can be extended to age-based disenfranchisement. *Id.* at 218. The third dissenting opinion is by Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, which argues against further expansion of the Fourteenth Amendment. *Id.* at 296 (Stewart, J., concurring in part and dissenting in part). The last dissenting opinion is by Justice Brennan, joined by Justices White and Marshall. *Id.* at 229 (Brennan, J., concurring in part and dissenting in part). There is some speculation as to whether this last opinion was originally drafted as the majority opinion of the Court. See CULTICE, *supra* note 71, at 173 ("It began with the procedural context of the cases; used the pronoun 'we,' whereas most dissents are written in the first person singular; and did not respond to Justice Black's expressed view.")

judgment, and not his reasoning, as reflective of the majority; his opinion expressly represents his views alone.

The remaining Justices were evenly divided 4-4 as to Congress's power to alter the age-based voting requirements. Chief Justice Burger and Justices Blackmun, Harlan, and Stewart believed that Congress does not have the power to lower the voting age with respect to neither federal nor state elections. Justices Douglas, Brennan, White, and Marshall believed that Congress was empowered to act with respect to both federal and state elections.

The Court was therefore split 4-4 on an all-or-nothing approach. Justice Black split the baby: Congress could act to expand the youth franchise for federal elections, but not state and local races. Justice Black essentially reached his conclusion by balancing Congress's supervisory power over elections pursuant to Article I, Section 4,⁹⁹ with the states' power to regulate elections as provided under that section,¹⁰⁰ coupled with the state's power to determine the qualifications of electors pursuant to Article I, Section 2.¹⁰¹

A close reading of Justice Black's decision reveals that he does not directly acknowledge Congress's power to lower the voting age in federal elections pursuant to its broad enforcement power under the Fourteenth Amendment. Instead, Justice Black relies on Congress's supervisory power over elections, and its more general necessary and proper power.¹⁰² If Justice Black were to find that Congress could act pursuant to its Fourteenth Amendment power to enfranchise voters in federal elections, he would then have to grapple with the untenable notion that Fourteenth Amendment protections may be unequally extended in federal and state races.

Specifically, Justice Black explains that the Fourteenth Amendment could not, "under the guise of insuring equal protection, blot out all state power, leaving the 50 States as little more than impotent figureheads."¹⁰³ He continues: "In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history."¹⁰⁴

⁹⁹ U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except to the Places of chusing Senators.")

¹⁰⁰ *Id.*

¹⁰¹ U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.")

¹⁰² U.S. CONST. art. I, § 8, cl. 18 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.")

¹⁰³ *Mitchell*, 500 U.S. at 126.

¹⁰⁴ *Id.*

Justice Black then draws a tortured distinction between the breadth of the Fourteenth Amendment's protection based on age discrimination, and its original design to blot out discrimination based on race.¹⁰⁵ He sets out that the Fourteenth Amendment:

was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.¹⁰⁶

Justice Douglas's dissent directly responds to this argument, listing the string of cases upholding the right to vote pursuant to the Fourteenth Amendment, independent of race-based considerations. Moreover, the Douglas Dissent describes the plethora of precedents outside of the voting context which strike down state statutes based on equal protection on grounds independent of race. These categories included statutes which discriminated against, or favored, certain businesses; tax regulations; and statutes governing the treatment of convicted criminals, indigents, illegitimate children, and aliens.

Based on this accounting, the Supreme Court appears split on the narrow, substantive question of whether Congress is authorized to act pursuant to the Fourteenth Amendment to eliminate age-based discrimination in voting in both federal and state races. The eight dissenting Justices are evenly split on this question, while Justice Black avoids answering it head on.

The *Oregon v. Mitchell* decision is not only peculiar because of the posture of the case,¹⁰⁷ and because of its inconsistency with basic Fourteenth Amendment jurisprudence as evident by the Black-Douglas colloquy, but also because it directly contradicts the Supreme Court's reasoning just four years earlier in *Harper v. Virginia State Board of Elections*.¹⁰⁸

In *Harper*, the Court invalidates poll taxes in state and local elections on equal protection grounds. *Harper* is a 6-3 majority determination that discrimination based on a voter's wealth is inherently invidious and violative of the Fourteenth Amendment. The decision does not rest on race-based discrimination but focuses on class as a protected classification pursuant to the Fourteenth Amendment. Justice Douglas pens the majority opinion, and explains: "In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of inequality Notions of what constitutes equal treatment for the purpose of the Equal Protection

¹⁰⁵ *Id.* at 126-27.

¹⁰⁶ *Id.* at 127.

¹⁰⁷ *See supra* note 98 and accompanying text.

¹⁰⁸ 383 U.S. 663 (1966).

Clause *do* change.”¹⁰⁹ The Court appears unbothered with the federalist concerns it later maintains in *Oregon v. Mitchell*, despite the decades-long legislative history establishing the invidiousness of age-based discrimination in exercising the franchise.¹¹⁰

Putting aside the Supreme Court’s lack of clarity regarding the application of Fourteenth Amendment principles in upholding the *Oregon v. Mitchell* judgment, Fourteenth Amendment principles expressly premise the Voting Rights Act Amendments of 1970, along with its statutory language.¹¹¹ This remained good law for the purpose of the upcoming 1972 presidential election—at least, with regard to federal races.

3. *The Urgency of Ratification and the Reiteration of Fourteenth Amendment Principles*

With the 1972 presidential elections looming, Congress returned to the effort to expand the franchise to youth in state and local elections via constitutional amendment. A sense of urgency arose after *Oregon v. Mitchell*, based on the inherent unfairness that would result in allowing young people to vote in federal races but not state or local races, and based on the massive bureaucracy and cost required in implementing a dual voting-system—one for federal elections that would have to accommodate everyone eighteen and older, and one for state elections that would not.¹¹²

A variety of reasons were advanced to support ratification of the Amendment.¹¹³ The emerging themes included:

1. the value of the idealism, courage, and moral purpose that youth provide in reenergizing the practice of democracy;¹¹⁴

¹⁰⁹ *Id.* at 669.

¹¹⁰ A three-judge district court would later apply the principle upheld in *Oregon v. Mitchell*—that states have the power to set voting qualifications of their electors—to dismiss a Fourteenth Amendment equal protection challenge of an Ohio statute that precluded seventeen-year-olds from participating in a federal primary election although they would be eighteen in time for the general election. *Gaunt v. Brown*, 341 F. Supp. 1187, 1191 (S.D. Ohio 1972), *aff’d*, 409 U.S. 809 (1972).

¹¹¹ *See supra* Part I.B.1.

¹¹² STAFF OF S. COMM. ON THE JUDICIARY, 92D CONG., REP. ON LOWERING THE VOTING AGE TO EIGHTEEN 12 (Comm. Print 1971) (“The Supreme Court’s decision on the voting age provisions in P.L. 91-285 had caused concern in the States about the costs and administrative cumbersomeness of maintaining dual voting rolls.”).

¹¹³ There were extensive hearings and debates held, which are summarized in the Senate Report accompanying Senate Joint Resolution 7, later enacted as the Twenty-Sixth Amendment. S.J. Res. 7, 92d Cong. (1971); S. REP. NO. 92-26, at 5 (1971). The 92-26 Senate Report sets out a “Case for 18-Year-Old Voting.” For a comprehensive legislative history of the Twenty-Sixth Amendment, see CULTICE, *supra* note 71, at 113 (1992) (“[D]uring the First Session of the Ninety-first Congress, dozens of resolutions calling for constitutional amendments to lower the voting age were pending before the respective Houses of Congress.”); Cheng, *supra* note 51, at 5 (drawing on “exhaustive primary source research to present a thorough history of how the U.S. voting age was lowered from twenty-one to eighteen.”).

¹¹⁴ *See, e.g.*, President Richard Nixon, Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution (Jul. 5, 1971), <https://www.presidency.ucsb.edu/node/240368>;

2. the increased political competence of young people compared to prior generations, due to greater access to information through standardized education and technology;¹¹⁵
3. the increased responsibilities assumed by the group as they fought in war, assumed debt, and lived independently;¹¹⁶
4. a general recognition of the nation's expansion toward a more inclusive suffrage;¹¹⁷ and
5. the stemming of unrest by encouraging institutionalized mechanisms to advance change.¹¹⁸

S. REP. NO. 83-1075, at 2 (1954) (arguing in the Senate Judiciary Committee that “young people are enthusiastic in their desire to participate in political decisions, especially those which vitally affect their existence. It was contended at the hearings on a similar resolution in the 82d Congress that if the right to vote is withheld until attainment of the age of 21 years, this enthusiasm diminishes. Any less in enthusiasm for exercise of the franchise represents a loss to the United States, as well as a loss to the individual himself.”); S. REP. NO. 82-2036, at 2 (1952) (same); S. REP. NO. 92-26 at 6 (1971) (“The [Senate Judiciary] Committee believes that we must channel these energies into our political system and give young people the real opportunity to influence our society in a peaceful and constructive manner.”); *Id.* at 4 (summarizing the testimony of Former Attorney General Ramsey Clark that the “urgent reason” to support the effort “is need, and that need is to involve the young people in our processes and to learn the message that they have to tell us.” Clark believed that by letting young people vote soon after high school, Congress can “involve them in our system” and “keep them in meaningful participation in the system.”); 117 CONG. REC. 5817 (1971) (statement of Sen. Percy) (“[T]he argument that the vote should be denied to young people because a small minority of them hold views that are unacceptable to many adults would not be worth discussing if it were not so prevalent Diversity of belief is one of the country’s most important assets. It must be encouraged—not merely tolerated—if we wish to avoid the intellectual stagnation that is characteristic of nations in which ideas are imposed upon the people.”).

- 115 *See, e.g., Lowering the Voting Age to 18: Hearing on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78 Before the S. Subcomm. on Constitutional Amendments of the S. Comm on the Judiciary*, 90th Cong. 7–8 (1968) [hereinafter *1968 Hearing*] (remarks by Sen. Michael Mansfield and Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments) (discussing the educational attainment of youth); S. REP. NO. 92-26, at 3 (1971) (stating that the Cox Commission found the then-present generation to be “the most intelligent,” the “most idealistic,” the “most sensitive to public issues,” and with a “higher level of social conscience than preceding generations.”); *id.* at 4 (Senator Goldwater, testifying that “this generation of young people is the finest generation that has ever come along.”); *id.* (Anthropologist Dr. Margaret Mead testifying that young people “are not only the best educated generation that we have ever had, and the segment of the population that is better educated than any other group, but also they are more mature than young people in the past.”).
- 116 *See, e.g., S. REP. NO. 92-26*, at 6 (The Senate Judiciary Committee believes that “[o]ur 18-year-old citizens have earned the right to vote because they bear all or most of an adult citizen’s responsibilities.”); 117 CONG. REC. 5826 (1971) (statement of Sen. Tunney) (“They carry all of the responsibilities of adults and yet they do not carry the most important right that can be granted to any citizen, the right to vote.”); *see also* REBECCA DE SCHWEINITZ, *The Proper Age for Suffrage*, in *AGE IN AMERICA: THE COLONIAL ERA TO THE PRESENT* 212 (Corinne T. Field, Nicholas L. Syrett eds., 2015) (“For politicians as well as organizations allied with the Vote 18 movement, the eighteen-year-olds risked their lives for the common good and readily ‘mastered the art of mechanized, complicated warfare’ indicated that they would ‘perform with equal distinction at the ballot box.’”).
- 117 *See, e.g., H.R. REP. NO. 92-37*, at 2 (1971) (“The proposed new article of amendment is part of a constitutional tradition of enlarging participation in our political processes.”); 117 CONG. REC. 7532 (1971) (statement of Rep. Celler, bill sponsor); *1968 Hearing*, *supra* note 115, at 4 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments).
- 118 *See, e.g., 1970 Hearing*, *supra* note 76, at 22 (statement by Dr. W. Walter Messinger, Rep. of the National Commission on the Causes and Prevention of Violence) (“The anachronistic voting-age limitation tends to alienate [youth] from systemic political processes and to drive them into a search

In referring the Twenty-Sixth Amendment to the states for ratification, Congress invoked the Voting Rights Act, and the right to vote principles protected by the Fourteenth Amendment. Specifically, the Senate Report accompanying the Senate Joint Resolution which was later enacted as the Twenty-Sixth Amendment, provides:

[F]orcing young voters to undertake *special burdens*—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. *This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.*¹¹⁹

Similarly, the parallel House Committee Report emphasizes the intended scope of the Amendment to address both discriminatory intent and effect, and the role of the right to vote doctrine as protected by other amendments in interpreting infringements of the youth vote:

[W]here a state law restricts [the right to vote] . . . on a basis other than age . . . and it is claimed that such law has either the purpose or effect of discriminating on account of age, resolution of the claim depends on decisional law concerning the right to vote as protected by other provisions of the Constitution.¹²⁰

Thus, to the extent that any shadow of a doubt remains as to the influence of Fourteenth Amendment principles in expanding the youth franchise through the legislative history of the Voting Rights Act Amendments of 1970, and through a study of the availability of good law following the Supreme

for an alternative, sometimes violent, means to express their frustrations over the gap between the nation's ideals and actions. Lowering the voting age will not eliminate protest by the young. But it will provide them with a direct, constructive and democratic channel for making their views felt and for giving them a responsible stake in the future of the nation.”); *1968 Hearing, supra* note 115, at 4 (Senator Pearson argued that “[o]ne of the great things that causes so much unrest in this country today, it seems to me, is some sort of a feeling on the part of so many people that they no longer can express themselves, they no longer have any way to participate in the public business.”).
¹¹⁹ S. REP. NO. 92-26, at 14 (1971) (emphasis added) (accompanying S.J. Res. 7, 92d Cong. (1971)). The Senate Judiciary Committee Report text is an abbreviated version of that in the sub-committee report, which explains in further detail:

[I]t would seem unfair to force the young voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote. And requiring all younger voters to undertake special burdens to exercise their franchise might well serve to dissuade them from participating in the election. Absentee ballots might have to be filled out before the election, and obtaining them might require going through a good deal of bureaucratic red tape. The travel to a centralized voting place might be impossible for many young people. Indeed, to force younger voters to go to greater pains in order to exercise their right to vote is at least inconsistent with the purpose of the Voting Rights act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.

117 CONG. REC. 5496 (1971).

¹²⁰ H.R. REP. NO. 92-37, at 8 (1971).

Court's plurality decision in *Oregon v. Mitchell*, finality lies in the congressional reports that ultimately accompany the ratification of the Twenty-Sixth Amendment.

Taken as a whole, the narrative of the thirty-year legislative effort beginning with the first proposal for ratification in 1942 in light of young people's involvement in World War II, and ending in 1971 in light of young people's involvement in the Second Reconstruction and the Draft, is a story of the nation's struggle to form a more perfect union by recognizing the critical voice that young people offer in a healthy constitutional democracy. As detailed in Part II below, this value was protected by the judiciary in the decade following ratification, but has since been largely forgotten, as detailed in Parts III and IV.

II. JUDICIAL PROTECTIONISM IMMEDIATELY AFTER RATIFICATION

When cases involving student voting rights were litigated in the decade following ratification, the challenged laws were subject to strict scrutiny in the courts, which viewed voting as an unqualified fundamental right.

The Supreme Court has ruled only once on a Twenty-Sixth Amendment claim. *Symm v. United States* summarily affirms 7-2, without opinion,¹²¹ the judgment of a three-judge district court to invalidate voter registration practices in Waller County, Texas.¹²²

The United States brought the voting rights challenge on behalf of Prairie View A&M students based on the Fourteenth, Fifteenth, and Twenty-Sixth Amendments. The county registrar was screening voter registrants for proof of permanent residency. The registrar took into consideration whether a student was married and living with a spouse, or whether a student secured post-graduate employment within the county. The three-judge district court found that the registrar unlawfully discriminated against students when he singled them out in administering the questionnaire, and when he falsely presumed students' inability to establish residency to vote.

¹²¹ See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (“[L]ower courts are bound by summary decisions by this Court ‘until such time as the Court informs (them) that (they) are not.’” (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)); *Picou v. Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987) (“A summary affirmance by the Supreme Court has binding precedential effect.”); cf. ROBERT STERN ET AL., *SUPREME COURT PRACTICE* 287 (6th ed. 1986) (explaining that such affirmances still have precedential value). The precedential value of summary affirmances is not limitless, however. See *Anderson v. Celebrezze*, 460 U.S. 780, 784–85 n.5 (1983) (“We have often recognized that the precedential value of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.” (internal quotation marks omitted)).

¹²² *Symm v. United States*, 439 U.S. 1105 (1979), *affg* *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (holding that the Twenty-Sixth Amendment renders unconstitutional a residency questionnaire that is a part of a more pervasive pattern of conduct to limit student voter registration from college campus addresses, and that treats young registrants differently than other voters).

To reach this conclusion, the court engages in a detailed recounting of the 1970 Amendment to the Voting Rights Act, *Oregon v. Mitchell*, and the push to ratification. The court reviews the bevy of litigation brought following ratification and finds that this lineage is consistent with the right to vote doctrine's application of strict scrutiny.

In another student voting rights case considered seven years before *Symm*, the Supreme Court examines two fundamental rights protected under the Fourteenth Amendment—the right to travel, and the right to vote—to invalidate a state durational residency requirement pursuant to strict scrutiny.¹²³ The challenge in *Dunn v. Blumstein* involves a Tennessee requirement that voters reside in the state for one year, and reside in the county for three months. Although the plaintiff in *Dunn* is a law professor who recently moved to the state and sought to register to vote, the Supreme Court notes the law's impermissible purpose of youth voter discrimination with respect to students and military personal.¹²⁴

The Court applies strict scrutiny to evaluate the two reasons advanced by the state to justify the residency requirements: purity of the ballot box against fraud through colonization by outsiders, and surety that the voter is familiar with community interests and therefore will vote intelligently. *Dunn* concludes that these are not adequate justifications for the durational residency law; the law is not necessary to further a compelling state interest.¹²⁵

Time and time again, federal and state courts considering student voting rights claims in the 1970s applied strict scrutiny to invalidate denial or abridgment of students' voting rights through the mechanisms such as special questions, forms, identifications or other unnecessary burdens and barriers to the ballot.¹²⁶

¹²³ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹²⁴ *Id.* at 356 n. 28 (1972). In particular, the Supreme Court quotes a portion of the Tennessee state brief which advocates:

[T]here are many political subdivisions in this state, and other states, wherein there are colleges, universities and military installations with sufficient student body or military personnel over eighteen years of age, as would completely dominate elections in the district, county or municipality so located. This would offer the maximum opportunity for fraud through colonization, and permit domination by those not knowledgeable or having a common interest in matters of government, as opposed to the interest and the knowledge of permanent members of the community.

Brief for Appellants 15–16, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (No. 70-13).

¹²⁵ *See Dunn*, 405 U.S. at 337–42 (arguing that “[i]n the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote Absent a compelling state interest, a State may not burden the right to travel in this way”).

¹²⁶ *See, e.g.,* *Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367–68 (1st Cir. 1975) (determining that, even under a rigorous standard of review, the holding of a special contest during winter break is not unconstitutional under the Twenty-Sixth Amendment based on the particular underlying facts where the election board made a good faith attempt to reschedule the special contest and the novel issue was raised at the last minute, but looking askance at local elections held over students' break, cautioning “we would be disturbed if . . . a town continued to insist on

As summed-up by the New Jersey Supreme Court in *Worden*, the legislative history of the Twenty-Sixth Amendment “clearly evidences the purpose not only of extending the voting right to young voters but also of encouraging their participation by *the elimination of all unnecessary burdens and barriers.*”¹²⁷ Indeed, the earliest cases involving the Twenty-Sixth Amendment are not limited to voter registration, but relate to political participation in general. For example, the Supreme Court of Colorado in 1972 invalidated age-based restrictions on students’ rights to circulate and sign petitions for initiative and referendum.¹²⁸

Similarly, in another Twenty-Sixth Amendment case, the United States Court of Appeals for the First Circuit in 1975 cautions against the scheduling of special elections during college winter breaks despite reasonable alternatives. The appeals court suggests that reliance on students having to return to campus to vote, or to vote by absentee ballot, is a significant burden on students’ right to vote.¹²⁹

These rulings are consistent with the original right to vote doctrine, which protects voting as a fundamental right through the application of strict scrutiny.¹³⁰ In 1886, the Supreme Court first recognizes in *Yick Wo v. Hopkins*

elections during vacations or recess, secure in the conviction that returning to town and absentee voting would be considered insignificant burdens.”); *Newburger v. Peterson*, 344 F. Supp. 559, 561–62 (D.N.H. 1972) (applying strict scrutiny to strike down, pursuant to the Fourteenth Amendment, a state law that disqualified voters, primarily students, with the firm intent to leave their towns at a fixed time in the future, based on the fundamental right to vote and the right to travel); *Worden v. Mercer County Bd. Of Elections*, 294 A.2d 233, 244–45 3 (N.J. 1972) (invalidating, under the Twenty-Sixth Amendment, county policy of refusing voter registration to students who live on campus); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972) (applying heightened scrutiny to invalidate, pursuant to the Twenty-Sixth Amendment and the state constitution, age-based restrictions on the right to circulate and sign referenda petitions); *Bright v. Baesler*, 336 F. Supp. 527, 533 (E.D. Ky. 1971) (invalidating, pursuant to strict scrutiny under the Fourteenth Amendment, domicile requirements that are more stringently applied to students than to other voter registration applicants); *Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (invalidating, under the Twenty-Sixth and Fourteenth Amendments, a state statute providing different criteria for determining voting residency for voters age 18–21 than for voters over the age of 21); *Jolicoeur v. Mihaley*, 488 P.2d 1, 2 (Cal. 1971) (applying heightened scrutiny to invalidate, pursuant to the Twenty-Sixth Amendment, a state policy that allowed only unmarried minors to register to vote from their parents’ addresses rather than their college addresses); *Wilkins v. Bentley*, 180 N.W. 2d 423, 426–27, 434 (Mich. 1971) (applying strict scrutiny to invalidate a state residency requirement pursuant to the Fourteenth Amendment as applied to students, finding that “students must be treated the same as all other registrants. No special questions, forms, identification, etc., may be required of students.”).

¹²⁷ *Worden*, 294 A.2d at 237 (emphasis added).

¹²⁸ See *Colo. Project-Common Cause*, 495 P.2d 220 at 223 (“Throughout the Congressional hearings related to Title III of the Voting Rights Act of 1970 and the Twenty-Sixth Amendment was the recurring theme of Congress’ distress with youths’ alienation and its hope that youths’ idealism could be channeled within the political system itself.”).

¹²⁹ *Walgren*, 519 F.2d at 1368.

¹³⁰ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370–71 (1886) (explaining that if a State’s regulation of the right to vote is merely a pretext for subverting the right, it will be invalidated by the courts); *United States v. Classic*, 313 U.S. 299, 322–25 (1941) (upholding a statute which “protects from injury and oppression” the “constitutional right” to vote); *Baker v. Carr*, 369 U.S. 186, 236 (1962) (affirming the justiciability of a voting rights claim under the “well developed and familiar” standards of the

that a facially-neutral law administered in a prejudicial manner is an infringement of equal protection. The Court holds that voting is “a fundamental political right” because it is “preservative of all rights.”¹³¹ In 1964, the Supreme Court reiterates, “[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”¹³² Where “fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”¹³³ Under this analysis, individuals may only be excluded from the franchise if “necessary to promote a compelling state interest.”¹³⁴

In sum, courts reviewing obstacles to young people’s political participation in the decade following ratification of the Twenty-Sixth Amendment applied the highest standard of review available to strike down discriminatory state conduct. Yet, as Part III reveals next, student voting rights continue to be obstructed nearly fifty years after ratification.

III. THE UNFULFILLED PROMISE: YOUTH VOTING RIGHTS TODAY

Despite the nation’s growing recognition through the Second Reconstruction of voting as a right of citizenship rather than a mere privilege, access to the ballot for young people continues to be obstructed today. This Part highlights how the promise of the Twenty-Sixth Amendment has yet to be fulfilled. First, this Part describes some types of obstacles that youth voters face. Following a description of these categories, this Part provides vignettes of the personal impact of these measures in Wisconsin, Texas, and New Jersey.

Equal Protection Clause); *Reynolds v. Simms*, 377 U.S. 533, 562 (1964) (“[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Carrington v. Rash*, 380 U.S. 89, 90, 96 (1965) (“The right to choose . . . that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.” (internal quotation marks omitted)); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668–70 (1966) (holding that any attempt to regulate voting rights must serve the state’s “limited” interest in determining voter qualifications, and that such qualifications “must be closely scrutinized and carefully confined.”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (stating that a “close and exacting examination” of a voting rights statute was required because “statutes distributing the franchise constitute the foundation of our representative society.”); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (expressly rejecting the “rational basis” standard of review for voting rights cases, and reaffirming the application of strict scrutiny in such instances).

¹³¹ *Yick Wo*, 118 U.S. at 370.

¹³² *Reynolds*, 377 U.S. at 561–62.

¹³³ *Harper*, 383 U.S. at 670.

¹³⁴ *Kramer*, 395 U.S. at 627; see also *Cipriano*, 395 U.S. at 704 (citing *Kramer*, 395 U.S. at 627).

A. Voter Registration and the Conflation of Residency and Domicile

One type of barrier is the confusion and intimidation that results when election administrators conflate the concepts of domicile and residency as they apply to student voting rights. Individuals may have multiple residences—temporary places of dwelling, such as in the case of vacation homes. However, in the voting context, residence is synonymous with domicile—one singular fixed, permanent, principal home where one intends to return although she may not currently reside there.¹³⁵ In the case of college students who may not know where they will live after graduation, the determination of domicile is a highly personal, individualized assessment. It may be the case that students wish to return to a parents' address after graduation, or to remain near campus after graduation. It may also be the case that students simply do not know where they might live after graduation at all. These concepts were perhaps clearer when people were less transient.

Happily, as set out in Part II, the Supreme Court, federal courts, and state supreme courts settled this issue in the 1970s—students have the right to vote from their college addresses.¹³⁶ Yet, some states continue to require voters to jump through additional obstacles to prove the sufficiency of their ties to their residence to establish the right to vote there. The states of New Hampshire and Michigan provide two current illustrations of how these laws have a disparate effect on student voters.

1. New Hampshire

In 2012, a New Hampshire law amended the state voter registration form with confusing language, suggesting that voters must demonstrate a permanent residency within the state, such as by obtaining an in-state driver's license, to vote. The new law required voter registrants to affirm:

In declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire, which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire's driver's license within 60 days of becoming a resident.¹³⁷

¹³⁵ See *Hadnott v. Amos*, 320 F. Supp. 107, 114 (M.D. Ala. 1970) (“For election law purposes ‘resident’ means a domiciliary.”), *aff’d*, 401 U.S. 968 (1971); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3612 (2d ed. 1984) (“A person has only one domicile at a particular time, even though he may have several residences.”); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 11(2) cmt. k, m (1989) (“In the absence of evidence of a contrary legislative intent, ‘residence’ in a statute is generally interpreted [a]s being the equivalent of domicil in statutes relating to . . . voting . . .”); see also Joseph H. Beale, *Residence and Domicile*, 4 *IOWA L. BULL.* 3, 3–4 (1918) (contemplating various applications of the word “domicile”); Willis L. M. Reese & Robert S. Green, *That Elusive Word, “Residence,”* 6 *VAND. L. REV.* 561, 571 (1953) (“So far as eligibility to vote is concerned [residence] is usually synonymous with domicile.”).

¹³⁶ See *supra* Part II (analyzing an array of cases in which the court applied strict scrutiny to determine that students had the right to vote at their college addresses).

¹³⁷ *Guare v. State*, 117 A.3d 731, 733–34 (N.H. 2015) (internal quotation marks and citation omitted).

The New Hampshire Supreme Court determined in 2015 that the challenged language imposes an unreasonable burden on the right to vote. The court notes that the significant likelihood of voter confusion, since the affidavit's language may be read in such a way as to imply a false obligation to obtain an in-state driver's license to prove permanent residency as a condition of voter registration.¹³⁸

A January 2018 New Hampshire bill repeats the previously failed attempt to force voters to take extra steps to affirm their intention to remain in the jurisdiction.¹³⁹ Specifically, H.B. 372 seeks to amend the residency standard in the motor vehicle laws, to compel certain voters to obtain a driver's license and car registration within sixty days of voting.¹⁴⁰ The bill ties non-compliance to a crime, thereby posing a potential chilling effect on the vote. Moreover, there is good reason to believe that the requirement to pay fees associated with obtaining these licenses amounts to a poll tax. H.B. 372 passed both chambers in January 2018 but has since been adjourned without date. Unfortunately, a functionally identical bill, H.B. 1264, passed the legislature months later, and is the subject of a new lawsuit premised in part on the Twenty-Sixth Amendment.¹⁴¹

A fourth New Hampshire bill again repeats the trend of student voter confusion and disparate effect.¹⁴² First, S.B. 3 requires anyone who registers to vote within 30 days up to and including Election Day to sign a lengthy affidavit written in legalese.¹⁴³ The New Hampshire Superior Court agreed

¹³⁸ *Id.* at 737–38 (holding the challenged language imposes an unreasonable burden on an otherwise qualified voter).

¹³⁹ *See* H.B. 372, 165th Gen. Court, Reg. Sess. (N.H. 2018) (modifying the general statutory definition of “resident or inhabitant” and “residence or residency”).

¹⁴⁰ *See id.*

¹⁴¹ *See* H.B. 1264, 165th Gen. Court, Reg. Sess. (N.H. 2018) (enacted) (modifying the general statutory definition of “resident or inhabitant” and “residence or residency”); *see also* Complaint, Casey v. Gardner, No. 1:19-cv-00149 (D.N.H. Feb. 13, 2019).

¹⁴² *See* S.B. 3, 165th Gen. Court, Reg. Sess. (N.H. 2017) (enacted) (modifying the definition of domicile for voting purposes and modifying requirements for documenting the domicile of a person registering to vote).

¹⁴³ *See* Order on Preliminary Injunction at 2–3, League of Women Voters of N.H. v. Gardner, No. 226-2017-CV-00433 (N.H. Super. Ct. Oct. 22, 2018) (emphasis in original), *stayed*, Petition of N.H. Sec’y. of State & N.H. Attorney Gen., No. 2018-0208 (N.H. Oct. 26, 2018). The affidavit required to vote set out two options. The first option (“Option 1”) reads as follows:

I understand that to make the address I have entered above my domicile for voting I must have an intent to make this the one place from which I participate in democratic self-government and must have acted to carry out that intent.

I understand that if I have documentary evidence of my intent to be domiciled at this address when registering to vote, I must either present it at the time of registration or I must place my initials next to the following paragraph and mail a copy or present the document at the town or city clerk's office within 10 days following the election (30 days in towns where the clerk's office is open fewer than 20 hours weekly).

___ By placing my initials next to this paragraph, I am acknowledging that I have not presented evidence of actions carrying out my intent to be domiciled at this address, that I understand that I must mail or personally present to the clerk's office evidence of actions carrying out my intent within 10 days following the election (or 30 days in towns where

with college students testifying that the affidavit form is confusing and intimidating, and issued a preliminary injunction.¹⁴⁴ Specifically, the court notes that S.B. 3 is expected to have a disparate effect on students, since students use same-day registration at higher rates and are therefore likely to experience a greater negative impact from the bill.¹⁴⁵ The court also notes that students tend to reside in high-turnout locations, and will therefore experience increased registration times and longer lines at the polls due to the length and unclear language set out in the affidavit.¹⁴⁶

Despite this disparate burden, which the superior court found was “unreasonable and discriminatory,”¹⁴⁷ the New Hampshire Supreme Court stayed the preliminary injunction, allowing the provision to be implemented in the 2018 midterm elections. The state high court invokes what is called the *Purcell* principle—that a change in the law immediately before Election Day, even if it is to restore the status quo, causes voter confusion, and must therefore be delayed.¹⁴⁸

The second troubling portion of S.B. 3 has been enjoined, and remained so for the 2018 midterm. Nonetheless, its extremity indicates the nefariousness of the law. S.B. 3 threatens a \$5,000 fine and a year in jail should someone fail to provide documentary proof of residence within ten days of voting and deputizes public agents to pay home visits to verify one’s domicile. Early in the litigation, the state superior court judge enjoined this civil and criminal penalties provision, on the basis that it would chill voting and act “as a very serious deterrent on the right to vote.”¹⁴⁹

the clerk’s office is open fewer than 20 hours weekly), and that I have received the document produced by the secretary of state that describes the times that may be used as evidence of a verifiable action that establishes domicile.

Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile by the secretary of state to verify the validity of your claim to a voting domicile at this address.

N.H. REV. STAT. § 654:7 (2017). The second option (“Option 2”) states:

___ By placing my initials next to this paragraph, I am acknowledging that I am aware of no documentary evidence of actions carrying out my intent to be domiciled at this address, that I will not be mailing or delivering evidence to the clerk’s office, and that I understand that officials will be sending mail to the address on this form or taking other actions to verify my domicile at this address.

Id.

¹⁴⁴ Order on Preliminary Injunction, *supra* note 143, at 7–17.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 17 (holding “that the burdens imposed by SB3 are unreasonable and discriminatory”).

¹⁴⁸ See Petition of N.H. Sec’y. of State & N.H. Attorney Gen., No. 2018-0208 (N.H. Oct. 26, 2018) (citing cases that discuss the variety of ways last-minute rule changes can cause voter confusion); see also *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (per curiam) (vacating a Ninth Circuit injunction that temporarily blocked Arizona’s strict new voter identification law). For more information on the *Purcell* Principle, see Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. UNIV. L. REV. 427 (2016).

¹⁴⁹ League of Women Voters of N.H. v. Gardner, No. 226-2017-CV-00433, slip. op. at 11 (N.H. Super. Ct. Sept. 12, 2017).

Taken together, the trend evident in New Hampshire is one that seeks to impose obstacles to the ballot that disparately impact students by requiring that voters take extra steps such as obtaining a driver's license and a vehicle registration card to establish a right to vote, and sign long, confusing affidavits about domicile written in legalize, at the risk of serious civil and criminal penalties and home visits by public officials.

2. Michigan

In March 2018, the Michigan Secretary of State at the time—the chief election administrator for the state—advised Greek life students that they should not register from their campus address, because it would not be “fair,” since it is not their true home.¹⁵⁰ This sentiment is revealed in Michigan laws which, taken together, until recently, blocked the student vote. Michigan stills requires that a voter's residence for voter registration purposes match the address listed on her Michigan driver's license.¹⁵¹ The requirement is particularly untenable for high-mobility populations such as students. Moreover, it presents students with a narrow time frame to act between moving to their campus residence and meeting the thirty-day advanced registration deadline.

Until recently, a long-standing separate Michigan law required first-time voters who register to vote by mail or through third-party registration drives, to cast their ballot in-person.¹⁵² To be sure, the majority of first-time voters are youth voters, and most youth voters do not register in person with the county board of election. Thus, a student who wished to vote from her parents' home address was required to travel home to cast her ballot in person. The scenario impacted both students who study in other parts of the state, and students who studied out-of-state.

When these two laws acted in concert, voter confusion was inevitable. For the student who sought to vote at her college domicile but did not update her driver's license, she was required to drive to her original jurisdiction for want of the availability of absentee voting. Students who simply sought to vote absentee from the campus address due to busy schedules could not do so based on the lack of availability of no-excuse absentee voting. The

¹⁵⁰ See First Amended Complaint for Declaratory & Injunctive Relief at 6, Coll. Democrats at the Univ. of Mich. v. Johnson, No. 3:18-cv-12722-RHC-SDD (E.D. Mich. Sept. 7, 2018).

¹⁵¹ MICH. COMP. LAWS §§ 257.307(1)(c), 257.315(1) (2018).

¹⁵² MICH. COMP. LAWS § 168.509t(2) (2018); see also MICH. CONST. art. II, § 4 (amended by Michigan Proposal 18-3); *Secretary Benson Announces Steps to Promote College-age Voter Participation, Initiatives to Resolve Suit*, OFF. OF SECRETARY OF ST. JOCELYN BENSON (June 5, 2019), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-499139--,00.html.

labyrinth of laws in place stood in stark contrast to states which employ modernized election systems.¹⁵³

Fortunately for Michigan students, a statewide referendum for a constitutional amendment to modernize elections succeeded in November 2018. As a result, the “First-Time/In-Person” law has been stricken, and same day and election day registration opportunities are now constitutionally mandated, thereby lessening the blow of the address-match requirement.

The Michigan and New Hampshire illustrations demonstrate what happens when voter registration laws go awry by requiring a voter to take unnecessary extra steps to legitimize her right to vote from the domicile of her choosing, and the disparate impact that such laws have on students as a class.

An extreme version of these strict documentary proof of residency laws is a proof of citizenship requirement. For example, a Kansas law, eventually struck down on equal protection grounds, required documentary proof of citizenship in order to register to vote.¹⁵⁴ A *New York Times* analysis found that more than half of voters impacted by the requirement were under the age of 35; 20% were aged eighteen to twenty; and 90% were new voters.¹⁵⁵

These identification requirements drastically outstrip built-in identification requirements in place by the Help America Vote Act of 2002 (“HAVA”), the first comprehensive federal election administration law.¹⁵⁶ For first-time voters who register by mail without providing a copy of a valid ID or a driver’s license number that matches state records, HAVA requires minimal voter identification at the polls such as a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the voter.¹⁵⁷

¹⁵³ See Letter of Understanding from Heather S. Meingast, Div. Chief, Civil Litig., Emp’t, and Elections Div., Dep’t of the Att’y Gen., State of Mich., to Marc Elias, Partner, Perkins Coie LLP (June 5, 2019) (on file with author) (memorializing discussions related to lawsuit on behalf of College Democrats at the University of Michigan, to enhance election administration “to better ensure that Michigan’s youthful voters have ready access to the voting process.”); see also Claire Hao & Melanie Taylor, *College Dems Lawsuit Brings About New Changes to Promote College-Age Voting*, MICH. DAILY (June 11, 2019, 5:24 PM), <https://www.michigandaily.com/section/government/college-dems-lawsuit-brings-about-new-changes-promote-college-age-voting>.

¹⁵⁴ *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1106 (D. Kan. 2018) (striking down the proof of citizenship for voter registration eligibility law, finding it violates the National Voter Registration Act and the U.S. Constitution); see also *Belenky v. Kobach*, No. 2013-cv-1131 (Kan. Dist. Ct. Jan. 15, 2016) (striking down Kansas’s two-tiered voter registration system which requires documentary proof of citizenship for state and not federal voter registration).

¹⁵⁵ Julie Bosman, *Voter ID Battle Shifts to Kansas*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/2015/10/16/us/politics/kansas-voter-id-law-sets-off-a-new-battle-over-registration.html>; see also *Fish*, 309 F. Supp. 3d at 1069 (relying on expert testimony by Dr. Michael McDonald, that 43.2% of motor vehicle applicants held in suspense or canceled were between the ages of eighteen and twenty-nine, and 53.4% of suspended and canceled applicants were unaffiliated registrants).

¹⁵⁶ 52 U.S.C. § 20901 (2012).

¹⁵⁷ See *Id.* § 21083(b).

B. Strict Voter Identification

The voter identification law required by HAVA is narrow—it covers new registrants who have not previously voted in federal elections in the state, and who registered to vote by mail or through a third-party without providing a valid ID or a state-matching driver’s license number. The spirit behind this requirement is some minimal showing by a new voter of proof that she is who she says she is. The identification need not include a photo, and need not necessarily include a current address. Moreover, only first-time voters in the state must make this showing, not voters at-large.

However, after the Supreme Court’s decision in *Shelby County v Holder*, gutting key Voting Rights Act protections, strict voter identification laws spread across the country, impacting protected classes of voters, including students.¹⁵⁸ States like Texas allow a hand-gun license to vote and not a student ID.¹⁵⁹ Meanwhile, Tennessee allows faculty to use their faculty IDs to vote, but students may not use student IDs produced by the same institutions.¹⁶⁰

A Common Cause survey of the fifteen states with strict voter identification laws reveals that seven do not accept student ID cards for voting, and twelve do not accept out-of-state government-issued identification such as a driver’s license.¹⁶¹ Six states accept neither a student ID nor an out-of-state government-issued ID, forcing students who want to vote to acquire new, in-state identification when they move to campus. Given that many students do not drive at school and may have trouble accessing a DMV, especially in the narrow window afforded between moving onto campus and meeting advanced registration deadlines amid other new responsibilities, these hurdles may be insurmountable.¹⁶²

C. Polling Places

An often-overlooked barrier that disproportionately impacts youth voters includes local decisions set by the county board of elections, regarding the placement and maintenance of polling places on campus. These localized

¹⁵⁸ There are two types of voter identification laws—strict and non-strict. Strict voter identification require that a voter provide an acceptable identification to vote, and that if she does not do so, she must take additional steps in the days after Election Day to secure her ballot. In contrast, non-strict voter identification laws allow for an alternative form of identification at the polls, such as an affidavit with a signature match, and do not require additional steps after Election Day for the ballot to be counted. For more information, see Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (January 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Table 1>.

¹⁵⁹ See TEX. ELEC. CODE § 63.0101 (2018).

¹⁶⁰ See TENN. CODE ANN. 2-7-112(c)(2)(B) (2018).

¹⁶¹ See BROMBERG, CHAPMAN & EISMAN, *supra* note 33, at 13–16.

¹⁶² *Id.*

decisions may result in the failure to put polling places on campus; the failure to adequately resource on-campus polling places, threatening excessively long lines; and the removal of polling places from campus.

For example, students at Appalachian State University in Boone, N.C. sued in state court when an early voting plan removed a polling site from campus.¹⁶³ The trial judge ruled in favor of the students, finding that it “can conclude no other intent from the board’s decision other than to discourage student voting. A decision based on that intent is a significant infringement of students’ rights to vote and rises to the level of a constitutional violation of the right to vote.”¹⁶⁴ The county registrar ultimately relocated the polling location after an appeal was denied by the state appeals court.¹⁶⁵

Students have not only responded to the removal of polling places from campus but have affirmatively compelled registrars to place new polling site on campus. For example, students across partisan lines at Prairie View A&M University united in 2013 to win a decades-long battle to gain an on-campus polling location.¹⁶⁶

While these decisions are made by election administrators at the local level, they are often influenced by formal or informal state policy. For example, after the Fourth Circuit invalidated North Carolina’s reduction in early voting, county boards of elections were poised to implement early voting schedules, including setting the number, location, and hours of polling places to be open during the early voting period.¹⁶⁷ The Executive Director of the North Carolina Republican Party, Dallas Woodhouse, instructed Republican members of county board of elections throughout the state—who are appointed to their positions—to not implement early voting opportunities on campuses.¹⁶⁸

In Florida, an opinion issued by the Secretary of State directed local election administrators that college and university campuses can

¹⁶³ Anderson v. N.C. State Bd. of Elections, No. 14-CVS-012648, 2014 WL 6771270, at *1 (N.C. Super. Ct. Oct. 13, 2014).

¹⁶⁴ *Id.*

¹⁶⁵ Sharon McCloskey, *State Board of Elections Calls Emergency Meeting for Voting Site at Appalachian State*, N.C. POL’Y WATCH: PROGRESSIVE PULSE (Oct. 22, 2014), <http://pulse.ncpolicywatch.org/2014/10/22/state-board-of-elections-calls-emergency-meeting-for-voting-site-at-appalachian-state/>; Sharon McCloskey, *What’s Happening With the Appalachian State Voting Site*, N.C. POL’Y WATCH: PROGRESSIVE PULSE (Oct. 22, 2014), <http://pulse.ncpolicywatch.org/2014/10/22/breaking-whats-happening-with-the-appalachian-state-voting-site/>.

¹⁶⁶ Reeve Hamilton, *A Polling Place of Their Own: Students Win a Long Battle*, N.Y. TIMES (Sept. 28, 2013), <http://www.nytimes.com/2013/09/29/us/a-polling-place-of-their-own-students-win-a-long-battle.html>.

¹⁶⁷ U.S. CIVIL RIGHTS COMM’N, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 72 (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

¹⁶⁸ Colin Campbell, *NC Republican Party Seeks ‘Party Line Changes’ to Limit Early Voting*, NEWS & OBSERVER (Aug. 17, 2016, 1:55 PM), <https://www.newsobserver.com/news/politics-government/election/article96179857.html> (last updated Aug. 18, 2016, 4:17 PM).

categorically not be designated as early voting locations.¹⁶⁹ A federal court preliminarily enjoined the ban, freeing up local supervisors of elections to exercise their discretion to situate early voting polling sites on campus.¹⁷⁰ The court explains that the prohibition “has the effect of creating a secondary class of voters who Defendant prohibits from even seeking early voting sites in dense, centralized locations where they work, study, and, in many cases, live. This effect alone is constitutionally untenable.”¹⁷¹

One need not look to the south for these examples. At Bard College, a private liberal arts college idyllically located along the Hudson River just 100 miles north of New York City, students must travel three miles to access their assigned polling location.¹⁷² The assigned site is particularly troublesome in that approximately 70% of the eligible voters in the voting district reside on-campus.¹⁷³ Moreover, the polling place itself does not comply with New York’s Election Law which requires that it be directly situated along a public transportation route.¹⁷⁴ Issues abound with the adequacy of the physical space as well—at only 550 square feet, it struggles to accommodate seven standing voting booths, a handicap-accessible ballot marking device, an optical scanner for completed ballots, and a registration table. This space makes it very difficult for even able-bodied voters to maneuver, never mind less-abled voters. The inadequate polling location is a part of a pattern of student voter suppression in Dutchess County, which has resulted in litigation or the threat of litigation by students at least four times since 2000.¹⁷⁵

D. Provisional Ballots

Millennials’ outsized reliance on provisional ballots demonstrates the structural obstacles they face due to voter restrictions: one in four Millennials voted provisionally in 2016, compared to 6% of Baby Boomers and 2% of

¹⁶⁹ Fla. Dep’t of State, Div. of Elections, Opinion Letter on DE 14-01: Early Voting – Facilities, Locations § 101.657, Florida Statutes (Jan. 17, 2014) (rescinded).

¹⁷⁰ League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1225 (N.D. Fla. 2018).

¹⁷¹ *Id.* at 1217.

¹⁷² See *Election@Bard*, BARD CCE, <https://cce.bard.edu/community/election/> (last visited Apr. 25, 2019) (stating that Bard students empowered through the Andrew Goodman Foundation Vote Everywhere project are driving the advocacy campaign to secure a polling place on campus).

¹⁷³ *Id.*

¹⁷⁴ See *id.*; see also N.Y. ELEC. LAW § 4-104(6)(a) (McKinney 2019) (“Each polling place designated, whenever practicable, shall be situated directly on a public transportation route.”).

¹⁷⁵ Jonathan Becker, *Colleges Should Promote and Defend Student Voting Rights*, HUFFPOST (Aug. 12, 2016, 2:59 PM), https://www.huffingtonpost.com/entry/american-colleges-should-promote-and-defend-student_us_57ae185fe4b0ae60ff026711 (Becker is the Vice President for Academic Affairs and Director of the Center for Civic Engagement at Bard College); Nina Schutzman, *Dutchess Democrats Say Poughkeepsie Polling Site Illegal, Push for Move to Vassar College*, POUGHKEEPSIE JOURNAL (May 1, 2018, 6:47 AM), <https://www.poughkeepsiejournal.com/story/news/2018/05/01/dutchess-county-democrats-say-arthur-may-polling-site-illegal-request-move-vassar-college/565306002/>.

the Greatest Generation.¹⁷⁶ Students rely on provisional balloting for a range of reasons, including but not limited to appearing at the wrong polling place due to voter confusion stemming from their high mobility, administrative errors in processing voter registration forms, and compounded information costs associated with campus gerrymandering.

Indeed, students at Alabama A&M and Rutgers University separately brought right to vote cases when they were not on the rolls when they showed up to vote, despite having registered to vote in advance of the voter registration deadline.¹⁷⁷ The cases called attention to the state election administration policies which treat rejected provisional ballots as de facto voter registration forms for future elections. In other words, the cases argued that because the students' voter eligibility is not in question, particularly since they were registered to vote for future races, their provisional ballots should be counted for the election in which they intended to participate.

In addition to voting provisionally at disproportionate rates, young voters' provisional ballots are also disproportionately rejected. As explained by a Florida federal court:

Younger voters are more likely to have their provisional ballots rejected because they have showed up at the wrong precinct, a not uncommon miscalculation for people who move at least once a year from dorm-to-dorm, dorm-to-apartment, house-to-dorm, apartment-to-apartment, Greek-house-to-house, among others. In Florida, voters aged 18 to 21 had provisional ballots rejected at a rate more than *four times higher* than the rejection rate for provisional ballots cast by voters should between the ages of 45 to 64.¹⁷⁸

Indeed, Florida joins the ranks of nearly half of the states in the country that fully toss provisional ballots cast in the wrong precinct.¹⁷⁹ By comparison,

¹⁷⁶ See *supra* notes 5, 6 and accompanying text.

¹⁷⁷ The Alabama case was ultimately dismissed after the federal court denied the plaintiffs' motion to certify and count the four students' provisional ballots in question, due to a question related to the chain of custody of the registration forms pursuant to third-party registration efforts. See *Jackson v. Madison Cty. Bd. of Registrars*, No. 5:18-cv-01855 (N.D. Al. 2018) (denying plaintiff's motion to certify and count the provisional ballots); Ivana Hryniw, *Votes Cast by Four Alabama A&M Students Won't Count, Judge Rules*, AL.COM (Nov. 13, 2018), <https://www.al.com/news/huntsville/2018/11/votes-cast-by-four-alabama-am-students-wont-count-judge-rules.html>. The Rutgers case argued for a larger change in election administration, pointing to the 16,308 provisional voters in the 2008 election whose rejected ballot served as a de facto voter registration form. See *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408 (N.J. Super. Ct. 2014) (reversing and remanding lower court's determination), *aff'd after remand* 141 A.3d 335 (2016) (lock-stepping the federal standard of review to the state constitutional analysis); see also Frank Askin, *Protecting the Right to Vote on Election Day*, 21 CLINICAL L. REV. 323, 327 n.7 (2015) (noting that the 16,308 provisional ballots in New Jersey were accepted as registrations for future elections).

¹⁷⁸ *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1219 (N.D. Fla. 2018) (internal quotation marks and citations omitted) (emphasis in original).

¹⁷⁹ See JON SHERMAN, *SAVING VOTES: AN EASY FIX TO THE PROBLEM OF WASTING PROVISIONAL BALLOTS CAST OUT OF PRECINCT 1* (2014), <http://fairelectionsnetwork.com/wp-content/uploads/Provisional-Ballot-Rejection-Memo-FINAL.pdf> (outlining twenty-two states which fully reject provisional ballots cast in the wrong precinct: Alabama, Arizona, Arkansas, Delaware,

the rest of the country manages to partially or fully count such provisional ballots with little ado. For example, three states (Maryland, Oregon, Washington) count every vote the voter was eligible to cast, regardless of where the ballot is cast in the state. Twelve states salvage some portion of the vote if the vote is cast in the correct county or city.

Provisional ballots are standardized pursuant to Section 15482 of HAVA.¹⁸⁰ Such a vote, even if eventually rejected, creates a paper trail which informs election administration practices. Nonetheless, one must not overlook the placebo effect associated with provisional ballot voting. When viewed within a Twenty-Sixth Amendment framework, the treatment of these provisional ballots and their impact on the youth vote should be viewed cautiously.

In sum, students face a variety of obstacles in accessing the ballot, such as proof requirements that obscure a student's right to vote from her domicile, outstripping the built-in verifications already set out by federal law. While barriers to voter registration and strict voter identification may seem the most obvious methods of youth voter suppression, a variety of laws disproportionately impacts this population, particularly when the laws work in combination. These include inaccessible or poorly-equipped polling places; campus gerrymanders; and the over-reliance and treatment of provisional ballots. Certainly, there may exist a reasonable state interest in preventing a certain subgroup from voting in an election in which there is no reasonable affiliation. However, the laws that have spread across the country are broadly defined, and the extent of the disenfranchisement seen today betrays their motivation.

E. Personal Illustrations

The following vignettes offer a glimpse of the personal impact of these measures on student voters in Wisconsin, Texas, and New Jersey.

1. Wisconsin

Catelin Tindall was a spring 2015 graduate of the Milwaukee Institute of Art and Design when she went to her precinct to vote in November 2016 with an out-of-state government-issued identification, her Wisconsin student identification, and copies of her Wisconsin lease and utility bill.¹⁸¹ Her student identification included her name, photo, a barcode, school logo, and

Florida, Hawaii, Indiana, Kentucky, Michigan Mississippi, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and West Virginia).

¹⁸⁰ 52 U.S.C. § 21082 (2012) (originally enacted as 42 USCA § 15482); *see also supra* note 4.

¹⁸¹ Christina A. Cassidy, *In Wisconsin, ID Law Proved Insurmountable for Many Voters*, ASSOCIATED PRESS (May 14, 2017), <https://www.apnews.com/dafac088c90242ef8b282fbebddd5b56>.

the most recent academic year she attended. Despite being able to prove her identity and residence, Catelin voted provisionally because of state restrictions on her student ID card,¹⁸² and because Wisconsin did not accept the other forms of identification she brought with her to the polls.

Catelin's provisional ballot was ultimately thrown out because she could not remedy the problem in time. She did not own a car and took an Uber to the DMV to get an in-state government-issued identification; however, her work schedule did not permit her to go to the local clerk's office to validate her provisional ballot after her Wisconsin ID arrived by mail.

Had Catelin had a Wisconsin driver's license, a U.S. passport, a student ID that met state requirements, or a certificate of naturalization issued within two years of the election, she would have been able to cast a valid ballot. Any ID that is not included on the state's strict list would not suffice as proof of her identification—that includes a state or federal government employee ID, an out-of-state driver license or identification card, an employment ID, or a certificate of citizenship.

The rejection of Catelin's vote results from a slew of laws imposed in Wisconsin during a window between 2011 and 2015, fourteen of which limit youth access to the ballot.¹⁸³ These include, among others: imposition of strict voter identification requirement; imposition of citizenship checks for student dorm lists to register to vote, which create a direct conflict for colleges due to federal law governing student privacy rights; uniform cancellation of high school voter-registration programs across the state; and preemption of local ordinances popular in college towns that encourage voter registration amid the high tenant turnover.

The Wisconsin laws are currently the subject of ongoing litigation, even as most of the restrictions have been applied to elections since the first law was introduced in 2011.¹⁸⁴ The restrictions have depressed voter participation. According to the National Study of Learning, Voting, and

¹⁸² Wisconsin law requires that student identification include the date of issuance, signature, and an expiration date within two years of issuance, and that the card additionally be accompanied by a separate proof of enrollment, such as a tuition fee receipt, enrollment verification letter, or a class schedule. *Id.* Catelin did not meet this requirement because her student ID lacked an expiration date and an issue date, and she would not have been able to produce proof of current enrollment since she recently graduated. *Id.*

¹⁸³ *See* Motion of Common Cause, for Leave to File a Brief as Amicus Curiae in Support of the Plaintiffs-Appellees-Cross-Appellants & Affirmance in Part & Reversal in Part of District Court's Order at 5, *One Wis. Inst., Inc. v. Thomsen*, 835 F.3d 649 (7th Cir. 2016) (Nos. 16-3083, 16-3091) [hereinafter *Common Cause Brief*].

¹⁸⁴ A July 2016 court decision lifted some of the restrictions in time for the November 2016 general election, such as the limit on the absentee voting period; restrictions on absentee voting sites; and the requirement that citizenship certification be included with college-provided dorm lists. *One Wis. Inst. Inc. v. Thomsen*, 186 F. Supp. 3d 958 (W.D. Wis. 2016). Although these are positive changes, which are currently on appeal, the state provided minimal education or outreach of these changes in the three months leading up to the 2016 general election. *Id.* The photo ID restriction went into effect for the first time for the 2016 presidential election. *Id.*

Engagement (“NSLVE”) report, Wisconsin saw one of the largest declines in voter turnout among college students in the nation from 2012 to 2016.¹⁸⁵ A recent University of Wisconsin-Madison survey found that the photo ID law deterred 11.2% of eligible voters from coming out to vote in the 2016 general election, affecting between 16,801 and 23,252 voters in Wisconsin’s two largest counties alone.¹⁸⁶ The NSLVE report further found a “significant” decline of student registration rates in Wisconsin (7%) compared to the nation.¹⁸⁷

2. Texas

Imani Clark was a 22-year old college student at Prairie View A&M University, a historically Black public university, located in rural Waller County. Ms. Clark previously voted in person in Texas using her student identification.¹⁸⁸ However, within hours of the Supreme Court decision in *Shelby County v. Holder*, Texas announced that it would implement a new strict voter identification law to remove student IDs from the list of acceptable forms of identification. Imani does not own a car, nor has she ever driven one. As a result, she does not have a driver’s license. Waller County has no public transportation that would provide Imani access to a state office that issues election ID. In Texas, voters may cast a valid ballot by showing a handgun license, but not a student identification card.¹⁸⁹

The Texas strict voter ID requirement was signed into law in 2011, and impacted an estimated 600,000 registered voters, and many more unregistered but eligible voters. In July 2016, the law was ultimately found by the Fifth Circuit Court of Appeals to be violative of the Voting Rights Act, and in April 2017 was found to be intentionally discriminatory by the federal district court. In the interim, the discriminatory law was applied in local and state elections for nearly five years, until August 2016.

¹⁸⁵ NANCY THOMAS ET AL., DEMOCRACY COUNTS: A REPORT ON U.S. COLLEGE AND UNIVERSITY STUDENT VOTING 14 (2017), https://idhe.tufts.edu/sites/default/files/NSLVE%20Report%202012-2016_1.pdf.

¹⁸⁶ Kenneth R. Mayer & Michael G. DeCrescenzo, Supporting Information: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election (Sept. 25, 2017) (unpublished Ph.D. dissertation, University of Wisconsin–Madison), <https://elections.wiscweb.wisc.edu/wp-content/uploads/sites/483/2018/02/Voter-ID-Study-Supporting-Info.pdf>.

¹⁸⁷ *Id.*; see also INST. FOR DEMOCRACY & HIGHER EDUC., 2012 & 2016 CAMPUS REPORT: STUDENT VOTING RATES FOR UNIVERSITY OF WISCONSIN–MADISON (2017), <https://morgridge.wiscweb.wisc.edu/wp-content/uploads/sites/4/2017/09/2012-and-2016-NSLVE-Report-University-of-Wisconsin-Madison.pdf>.

¹⁸⁸ Amended Complaint in Intervention of Plaintiff-Intervenors Texas League of Young Voters Education Fund, Imani Clark, Aurica Washington, Crystal Owens, & Michelle Bessiack, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Nov. 14, 2013); see also Manny Fernandez, 2 *Sides Cite Discrimination as Battle on Texas Voting Law Heads to Court*, N.Y. TIMES (Sept. 1, 2014), https://www.nytimes.com/2014/09/02/us/both-sides-cite-discrimination-in-battle-over-texas-voter-id-law.html?mcubz=0&_r=0.

¹⁸⁹ See TEX. ELEC. CODE § 63.0101 (2018).

3. *New Jersey*

Annalee Switek was a Rutgers student when she registered to vote for the 2008 presidential election.¹⁹⁰ She registered to vote while residing at a dorm address, however when she went to her designated off-campus polling station, for reasons unknown to her, her name was not on the rolls. As a result, she was directed to vote by provisional ballot. Her ballot was determined to be ineligible because she did not meet the advanced voter registration deadline. However, pursuant to state law, her ballot affirmation statement was accepted as a de facto voter registration for future elections.

Annalee joined a lawsuit with other students and statewide organizations, to challenge the twenty-one-day advanced voter registration requirement as an undue burden of the right to vote pursuant to the state constitution. The lawsuit argued that the modernization of election administration systems pursuant to HAVA allows for the rapid verification of voter information and identity. Moreover, the lawsuit argued that these rejected provisional ballots should count in the election in which they are cast, particularly when the state already uses them for purposes of registration for future elections. The record called attention to the 16,308 provisional ballots in the 2008 election which were rejected but served as voter registrations for future elections.

Although a favorable decision was initially reached by the state appellate court, ultimately the challenge was unsuccessful when the state supreme court denied certification to review the permissibility of the lower court's lock-stepping the federal standard of review to the state constitutional analysis.¹⁹¹

IV. IN SEARCH OF A SOLUTION

The promise of the Twenty-Sixth Amendment clearly has yet to be fulfilled. Part of the reason for this is that the Amendment has laid largely dormant since the 1970s, when strict scrutiny was the applicable test. Where

¹⁹⁰ Complaint, Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections, 102 A.3d 408 (N.J. Super. Ct. 2014).

¹⁹¹ See Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections, 102 A.3d 408 (N.J. Super. Ct. 2014) (reversing and remanding lower court's determination), *aff'd after remand* 141 A.3d 335 (2016) (lock-stepping the federal standard of review to the state constitutional analysis). A similar case was subsequently brought in Massachusetts, on the theory that the 20-day advanced voter registration deadline is a denial of the right to vote under the state constitution. Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth, 100 N.E.3d 326 (Mass. 2018). The Massachusetts Supreme Court acknowledged that "with the passage of time, voting regulations once considered constitutionally permissible may come to significantly interfere with the fundamental right to vote in light of conditions existing in contemporary society." *Id.* at 334. However, the state high court ultimately declined to apply heightened scrutiny pursuant to the state constitutional analysis, noting that "specially qualified voters" such as those who become a citizen after the registration deadline but before the election, are exempt from the advanced voter registration deadline. *Id.* at 335.

it left off, at the end of the Warren Court and through the first half of the Burger Court, the modern equal protection analysis has since emerged with rigid tiers of scrutiny or a requirement for discriminatory purpose.¹⁹² The modern right to vote doctrine has since developed as well, applying varying tests depending on the nature of the injury alleged.

Since 2008, there has been a small but notable resurgence in Twenty-Sixth Amendment litigation in response to new voter restriction laws. Unfortunately, this litigation has done little to advance the promise of the Twenty-Sixth Amendment due to the dearth of guidance available on how to handle such claims.¹⁹³ Reviewing courts generally apply the Fourteenth Amendment to voter infringements at-large, or to claims of disparate impact on people of color, but they have given short shrift to claims concerning the impact of voter suppression measures on youth as a class.¹⁹⁴

The problem with this approach, however, is that, unlike race, color, or sex, youth are not considered a protected class under Fourteenth Amendment jurisprudence. In other words, courts are unaccustomed to thinking of age-based discrimination under a standard of review that affords heightened protections. Rather, state restrictions that discriminate based on age are generally governed by the lowest standard of review, rational basis, which essentially serves as a rubber-stamp.¹⁹⁵

For example, when students challenged a strict voter identification law in Tennessee that allows faculty, but not students, to vote with a college-issued ID, a district court reasoned that under rational basis review, the court is

¹⁹² See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?* 43 CONN. L. REV. 1059, 1076 (2011) (discussing how the Supreme Court's structural choices have created a framework that dramatically limits the reach of equal protection through the creation of rigid tiers of scrutiny and a mandate for discriminatory purpose).

¹⁹³ See *supra* notes 21–22.

¹⁹⁴ See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (focusing analysis on the Fourteenth Amendment and Section 2 of the Voting Rights Act claims, and avoiding the lower court's Twenty-Sixth Amendment analysis); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016) (reserving just nine short paragraphs of the 119 page decision to a summary analysis of the Twenty-Sixth Amendment claim); *Lee v. Va. Bd. of Elections*, 843 F.3d 592, 607 (4th Cir. 2016) (noting that it is “far from clear” what standard to apply to Twenty-Sixth Amendment claims, focusing analysis on claims brought under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments).

¹⁹⁵ See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam) (holding that a mandatory retirement age of fifty for police officers was subject to rational basis review because it implicated neither a fundamental right nor a suspect class, explaining “even old age does not define a ‘discrete and insular’ group in need of ‘extraordinary protection from the majoritarian process.’ Instead, it makes a stage that each of us will reach if we live out our normal span”); see also *Chelsea Collaborative v. Galvin*, No. 16-3354, 2017 WL 4125039, at *36 (Mass. Super. Ct. July, 24, 2017) (explaining that if the rational basis test were to apply to a challenge of the 20-day advanced voter registration deadline, the ease and convenience in election administration that the deadline afforded would be the determinative factor, “even though [the deadline] is not actually necessary to avoid fraud, ensure accuracy or prevent disorderly elections.”), *vacated*, *Chelsea Collaborative, Inc. v. Sec’y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018) (declining to apply heightened scrutiny).

“unconcerned with the actual motivations of the legislature so long as there is any conceivable rational relationship between the state’s interests and the challenged statute.” The district court explained that “[i]t is not relevant to the outcome of the court’s analysis whether there is any empirical basis to support” the state’s claimed interests regarding the extent to which fake student ID cards are used for voting, or “whether these considerations actually motivated the legislators who enacted” the law.¹⁹⁶ In other words, under rational basis review, the court takes the state for its word, regardless of accuracy or truthfulness.

A more troublesome problem with the Fourteenth Amendment approach, particularly as it applies in the voting context, is that it allows courts to side-step an evaluation of how the challenge specifically denies or abridges voting based on age.

For example, in a pending challenge to multiple voter restriction laws, the United States District Court for the Western District of Wisconsin failed to consider how fourteen of the challenged provisions were aimed at and affecting youth voters.¹⁹⁷ The district court does so by considering the inquiry under the Fourteenth Amendment as applied to all voters, causing it to invalidate some cuts to strong election reforms while upholding others that were specifically aimed at students. The court reached this result by lumping student voter issues into its Fourteenth Amendment analysis without any separate treatment of the class, and then by summarily treating the Twenty-Sixth Amendment analysis in only nine paragraphs.

The Common Cause amicus brief filed on appeal to the United States Court of Appeals for the Seventh Circuit argues that, through this treatment, “the district court rendered the Twenty-Sixth Amendment obsolete, notwithstanding its clear purpose.”¹⁹⁸ The amicus brief cautions:

[B]y overlooking the provisions under the Twenty-Sixth Amendment inquiry while invalidating them under other constitutional protections, the court effectively did what it itself acknowledged would be “difficult to believe” – render the Twenty-Sixth Amendment less protective than the Fourteenth and First Amendments, particularly where the provision is “*imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of the amendment.*”¹⁹⁹

While the Fourteenth Amendment may inform age discrimination claims related to exercise of the franchise, particularly in a search for an appropriate

¹⁹⁶ Nashville Student Organizing Comm. v. Hargett, 155 F. Supp. 3d 749, 756 (M.D. Tenn. 2015) (upholding the disparate treatment between faculty student identification cards and student identification cards issued by the same institutions, through application of the rational basis test because age is not a suspect class).

¹⁹⁷ *Thomsen*, 186 F. Supp. 3d at 958 (challenging Section 2 of the Voting Rights Act, and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments).

¹⁹⁸ Common Cause Brief, *supra* note 183, at 6 (internal citation omitted). The brief was filed by the Author, on behalf of Common Cause.

¹⁹⁹ *Id.* (emphasis in original).

standard of review as discussed further below, it is not a substitute for, or interchangeable with, the Twenty-Sixth Amendment.

A. *The Modern Right to Vote Doctrine and Anderson-Burdick*

When it comes to voting-related challenges, where the burden on the right to vote is “severe” such that an individual outright loses the ability to vote, or where proof of discriminatory purpose against a suspect class is evident, such as in the express or admitted use of a protected classification, the standard of review applied is strict scrutiny. There remains confusion as to what type of regulation imposes a “severe” burden on the right to vote, sufficient to trigger strict scrutiny.²⁰⁰

For substantial but not severe burdens on the right to vote, a heightened level of scrutiny is now applied under Fourteenth Amendment jurisprudence through the *Anderson-Burdick* flexible balancing test. Pursuant to this test:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.²⁰¹

In *Anderson v. Celebrezze*, the Supreme Court in 1982 invalidated by a margin of 5-4 an Ohio early filing deadline for independent presidential candidates.²⁰² The question presented is whether Ohio’s early filing deadline places an unconstitutional burden on the voting and associational rights of an independent candidate’s supporters. The regulation was challenged on First and Fourteenth Amendment grounds. The Court closely scrutinizes the legitimacy of the state interests claimed. Even where the Court finds that the state’s interest is important and legitimate, such as with regard to supporting an informed and educated electorate, the Court concludes that the interest did not justify the burden placed on the rights of independent voters.

Ten years later in *Burdick v. Takushi*, the Supreme Court applies this balancing test to uphold a Hawaii law that banned write-in voting. The

²⁰⁰ David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 492 (2008) (stating that this failure to describe how to draw the distinction ultimately “creat[ed] confusion about which standard applies to which regulation. This confusion set the stage for later disputes over efforts to enact voter ID laws.”).

²⁰¹ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (relying on the standard set out in *Anderson*).

²⁰² *Anderson*, 460 U.S. at 780.

challenger is a registered voter who claims that his First and Fourteenth Amendment rights are violated when he cannot write-in vote in an election in an uncontested state house race in which only one candidate is listed on the ballot. The Court reasons that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”²⁰³

Burdick pronounces that where a right is subject to “severe” restrictions, strict scrutiny applies. “But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”²⁰⁴

Justice Stevens, who delivered the majority decision in *Anderson*, joins the dissent in *Burdick*. The dissenting opinion agrees that the balancing test should apply, but scrutinizes the underlying evidence, and finds that it does not support the state’s claimed interests. The dissent concludes that the state’s proffered justifications do not support the impairment on the constitutional rights of Hawaiian voters. In retrospect, the *Burdick* dissent foreshadows the need to scrutinize the factual evidence supporting the state’s proffered claims to justify changes to election law, rather than assuming their veracity at face value.

Although both *Anderson* and *Burdick* dealt with candidates’ access to the ballot, and the right of voters to support those independent candidates, the resulting balancing test has been applied to other types of voting rights cases brought under the First and Fourteenth Amendment.²⁰⁵ The Supreme Court confirms this approach in *Crawford v. Marion County* by connecting the flexible standard set out by *Anderson-Burdick* with the equal protection voting rights jurisprudence provided in *Harper v. Virginia State Board of Elections*.²⁰⁶

Crawford involves a Fourteenth Amendment challenge to Indiana’s strict voter ID law, the strictest in the nation at the time. Both the majority and the dissenting opinion by Justices Souter and Ginsburg agree on the applicability of the *Anderson-Burdick* test, but the majority and the dissent disagreed on the outcome.^{207,208} The *Crawford* majority concludes that the

²⁰³ *Burdick*, 504 U.S. at 433.

²⁰⁴ *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

²⁰⁵ See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J. concurring in the judgment); *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (applying *Anderson-Burdick* to analyze Ohio’s elimination of in-person early voting for non-military voters during the three days before Election Day).

²⁰⁶ *Crawford*, 553 U.S. at 181.

²⁰⁷ *Id.* at 209 (Souter, J., dissenting).

²⁰⁸ Justice Breyer penned a separate dissent, but articulated a slightly different test to apply. *Id.* at 237 (Breyer, J., dissenting) (“I would balance the voting-related interests that the statute affects, asking ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s

state's proffered interests: to prevent fraud, to build confidence in the voting system, and to thereby maintain the integrity of the voting process, outweigh the facial challenge to the statute based on a lack of supporting evidence.

Like the *Burdick* dissent, the *Crawford* dissent finds that the resulting burdens on voting-eligible citizens are nontrivial and outweigh the lack of evidence to support the state's proffered justifications. The *Crawford* dissent considers the travel costs, worktime loss, and fees necessary to comply with the law, including the limited availability of public transportation, and the second financial hurdle associated with the need to obtain and present underlying documentation such as a birth certificate, certificate of naturalization, or U.S. passport.

Whereas the majority frames the challenge as a facial one based on a deficiency of evidence on the record to support an inference of significant voter impact, the *Crawford* dissent refers to the record, showing that at least 43,000 voters are impacted, and the likelihood that a large proportion of those lacking sufficient identification also struggle financially.²⁰⁹

In evaluating the state's interests, the *Crawford* dissent explains that the photo identification requirement leaves untouched problems of absentee-ballot fraud—the only documented type of “voter fraud” ever documented in Indiana. The dissent highlights the state's failure to show a single instance of in-person voter impersonation fraud in all of Indiana's history. The dissent summarizes that, “[w]ithout a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country.”²¹⁰

The Supreme Court's reasoning in *Burdick* weakens the fundamental right to vote by moving away from strict scrutiny to a balancing test. Whereas the older test only allows disenfranchisement through a “closely scrutinized and carefully confined” inquiry to deem “if necessary to promote a compelling state interest,”²¹¹ the newer test creates a new category for voting restrictions now ambiguously deemed less-than-severe, and examines such restrictions based on “the magnitude of the asserted injury,” the strength of each of the state's “precise interests,” and “the extent to which those interests make it necessary to burden the plaintiff's rights.”²¹² It is noteworthy that this backslide does not apply to political speech; First Amendment jurisprudence

salutary effects upon the others (perhaps but not necessarily, because of the existence of a clearly superior, less restrictive alternative).’ Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.” (internal citation omitted) (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

²⁰⁹ *Id.* at 187–88 (majority opinion).

²¹⁰ *Id.* at 236 (Souter, J., dissenting).

²¹¹ *Harper v. Va. Bd. of Elections*, 383 U.S. at 670; *see also supra* Part II.

²¹² *Anderson*, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434 (relying on standard set out in *Anderson*).

directs that a strict scrutiny test applies to infringements on speech in the elections context.²¹³

The reason this is important is because which test is applied can be outcome-determinative if the decision-maker is persuaded by a state's argument that the measure is not an outright ban on the right to vote, and if the decision-maker does not truly scrutinize the data proffered.

Judge Posner penned the Seventh Circuit decision in *Crawford* that would later be upheld by the Supreme Court. Although he did not take issue with the applicable test, he later reflected that courts at the time were unprepared to understand the burden of Indiana's strict voter ID law on voters, and the strength and necessity of the state's justifications.²¹⁴ Judge Posner explained that "[t]he evidentiary gaps that proved decisive in *Crawford* were a product of the relative novelty of voter identification laws and the lack of mainstream scholarly and journalistic attention dedicated to its potential effects."²¹⁵

While it may be true that strict voter identification laws were novel at the time, state-sponsored attempts to suppress the vote are as old as the nation's founding. When new voter infringement challenges present today, including those that methodically target young voters, a court should take seriously the number of voters impacted, and young voters' relative vulnerability as first-time voters. Moreover, the availability of data offered to justify these restrictions should be closely scrutinized. To the extent that litigators develop these challenges, personal narratives of disenfranchisement help to carry the day, along with strong evidence of the burden on voters. One hindrance to a more robust Twenty-Sixth Amendment jurisprudence may be that these narratives are difficult to develop when they arise in the context of a motion for a preliminary injunction filed on an emergency basis leading up to an election.

Judge Posner's reflection offers an important reminder that the judiciary is responsive to public opinion, and that the judiciary's understanding of constitutional rights is not stagnant, and may evolve over time. Judge Posner emphasizes the importance of the word "now" in his evaluation of the photo ID law at issue in *Crawford* as "a type of law *now* widely regarded as a means of voter suppression rather than of fraud prevention." He explains that "now" refers "to the fact there has been a flurry of such laws since 2007, when my opinion in the *Crawford* case was issued, and they have been sharply criticized." Given the relative novelty of youth voting rights claims in the

²¹³ See, e.g., *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 149 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990).

²¹⁴ Richard A. Posner, *I Did Not 'Recant' on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013) ("The Supreme Court and the lower federal courts have managed to enmesh themselves deeply in the electoral process without understanding it sufficiently well to be able to gauge the consequences of decisions.").

²¹⁵ *Id.* (quoting Richard Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, 16 LEGIS. & PUB. POL'Y 515 (2013)).

modern era, scholars and advocates would do well to continue to ring the bell on disparate impact of restrictive laws on the class, which is uniquely vulnerable due to its predominance of first-time voters and highly mobile voters.

More recently, as they should, courts are starting to peek behind the curtain of the state's proffered justifications that its aims are to combat putative voter fraud, ensure public confidence in elections, and promote election integrity. Courts are starting to require states to prove that these concerns are real and not imagined. For example, in invalidating North Carolina's omnibus voter suppression law, the Fourth Circuit Court of Appeals notes that the state had "failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina," while the legislature had evidence of alleged cases of mail-in absentee voter fraud which the law did not address.²¹⁶ The United States Court of Appeals for the Fifth Circuit reaches a similar finding in evaluating Texas's justifications for enacting a strict photo ID bill.²¹⁷ The Fifth Circuit panel explains that "the articulation of a legitimate interest is not a magic incantation a state can utter Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted."²¹⁸

The undue burden test arising out of the modern right to vote doctrine informs the availability of a similar balancing test for youth voter claims pursuant the Twenty-Sixth Amendment, along with best practices and pitfalls to avoid in vetting those claims.

B. *The Modern Equal Protection Doctrine and Arlington Heights*

There has been advocacy for the application of another test, the *Arlington Heights* test, to Twenty-Sixth Amendment claims.²¹⁹ This is problematic

²¹⁶ N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016). Similarly, an en banc panel in the Fifth Circuit Court of Appeals examining the impact of Texas's strict photo ID bill found that "the evidence before the Legislature was that in-person voting, the only concern addressed by [the bill] yielded only two convictions for in-person voter impersonation fraud out of 20 million votes case in the decade leading up to SB 14's passage. The bill did nothing to combat mail-in ballot fraud, although record evidence shows that the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting." Veasey v. Abbott, 830 F.3d 216, 238–39 (5th Cir. 2016) (en banc).

²¹⁷ *Veasey*, 830 F.3d at 241.

²¹⁸ *Id.* at 262.

²¹⁹ See Jenny Diamond Cheng, *supra* note 50, at 674–75, 677 (noting that *Arlington Heights* provides "the most sensible framework for evaluating these sorts of claims," based on the nearly identical wording it shares with the Fifteenth Amendment); see also *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 609 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) ("A consensus has been emerging . . . as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims.");

because the test's singular focus is the intent of legislators. *Arlington Heights* is a double-edged sword—it can be met where discrimination is obvious, but it is precarious where discrimination is subtle or where the legislature masks its intent, which a legislature is apt to do if it intends for its laws, when challenged, to pass constitutional muster.

Twenty-Sixth Amendment litigants in the modern era have largely, although not exclusively, focused on the intentionality of discrimination against youth voters.²²⁰ Relatedly, the handful of courts that have entertained Twenty-Sixth Amendment claims in recent years presume in dicta that *Arlington Heights* applies, but have expressed skepticism with this assumption.²²¹

As described above, Professor Diamond Cheng, one of the few scholars on the Twenty-Sixth Amendment, reasons that *Arlington Heights* provides “the most sensible framework for evaluating these sorts of claims,” based on the nearly identical wording it shares with the Fifteenth Amendment, and due to the ambiguity of the Amendment's original intent given its thirty-year legislative history.²²² Nonetheless, Cheng acknowledges that “[n]o dominant interpretation has emerged from the case law, and the Supreme Court has never directly considered a case involving the Twenty-Sixth Amendment. The interpretation of the Twenty-Sixth Amendment, then, is up for grabs.”²²³

There is room for debate as to whether *Arlington Heights* simply establishes the baseline for Twenty-Sixth Amendment claims. The Fourth Circuit Court of Appeals explains that simply because the language of the Twenty-Sixth Amendment parallels that of the Fifteenth Amendment, “it is far from clear that the Twenty-Sixth Amendment should be read to create a cause of action that imports principles from Fifteenth-Amendment jurisprudence.”²²⁴ In

One Wis. Inst. Inc. v. Thomsen, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016) (noting that the Twenty-Sixth Amendment's text is “patterned on the Fifteenth Amendment . . . suggest[ing] that *Arlington Heights* provides the appropriate framework”); N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 488 (M.D.N.C. 2016), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016).

²²⁰ See, e.g., Complaint in Intervention of Louis M. Duke, Charles M. Gray, Asgod Barrantes, Josue E. Berduo, & Brian M. Miller Seeking Declaratory & Injunctive Relief at 24, League of Women Voters of N.C. v. North Carolina, 156 F. Supp. 3d 683 (M.D.N.C. 2016) (No. 1:13-CV-660) (challenging the “purpose and effect” of the North Carolina omnibus law as a violation of the Twenty-Sixth Amendment); Complaint, Nashville Student Organizing Comm. v. Hargett, 155 F. Supp. 3d 749, 751-52 (M.D. Tenn. 2015) (challenging the unequal treatment of student identification cards and faculty identification cards as a prima facie showing of intentional discrimination in violation of the Twenty-Sixth Amendment); Complaint, *Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018) (challenging the state's decision to exclude campuses from the list of permissible early voting locations as a prima facie violation of the Twenty-Sixth Amendment).

²²¹ See *supra* notes 21–24 and accompanying text.

²²² Cheng, *supra* note 50, at 674–75.

²²³ *Id.* at 658.

²²⁴ *Lee*, 843 F.3d at 607.

other words, the Fourth Circuit deems it uncertain that plaintiffs must demonstrate an intent to discriminate on the basis of age in order to prevail.²²⁵ A string of other courts similarly acknowledge this tension.²²⁶

The *Arlington Heights* test was articulated by the Supreme Court in 1977 in a Fourteenth Amendment case that had nothing to do with voting rights or the Fifteenth Amendment—the case was about racially discriminatory rezoning for affordable housing.²²⁷ The test sets out a non-exhaustive list of factors that may be used to establish that discriminatory intent or purpose was a motivating factor in state decision-making:

1. impact of the challenged action, i.e., whether it disproportionately impacts one group;
2. historical background of the decision;
3. specific sequence of events leading up to the challenged decision, including departures from the normal procedural sequence and substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;
4. legislative or administrative history, especially where there are contemporary statements made by members of the decision-making body, minutes of its meetings, or reports.

Arlington Heights is significant in the modern equal protection jurisprudence because it offers a roadmap to prove discriminatory intent or purpose behind facially-neutral laws through an examination of the decision-making process. The test arose following *Washington v. Davis*, when the Supreme Court held in 1976 that disparate impact by itself is not enough to establish unconstitutional discrimination; one must prove intent.²²⁸

The burden of establishing discriminatory intent is extremely difficult for a plaintiff to overcome, and the intentional discrimination analysis often times sends courts into Kafkaesque searches for magic words and procedural anomalies. Like the rational basis test,²²⁹ a search for discriminatory intent often results in upholding the state regulation, even when it has a decidedly disparate *impact* on a particular class voter. Nonetheless, it is clear that courts should not simply ignore discriminatory outcomes. Even *Arlington Heights* reminds us that, although “it is not the sole touchstone,” “disproportionate

²²⁵ *Id.*

²²⁶ See *supra* notes 21–24 and accompanying text.

²²⁷ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (detailing a Fourteenth Amendment challenge of a town’s refusal to grant a developer a zoning reclassification to build multi-family affordable housing units in a primarily white suburb of Chicago).

²²⁸ *Washington v. Davis*, 426 U.S. 229 (1976). Some scholars argue that *Davis* is where the equal protection doctrine went awry. See Barnes & Chemerinsky, *supra* note 192, at 1084 (arguing that one should start with “the premise that persons—including governmental actors—actually intend the likely consequences of their actions”).

²²⁹ See *supra* note 195 and accompanying text.

impact is not irrelevant.”²³⁰ *Arlington Heights* further explains, in reference to the original fundamental right to vote cases, that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”²³¹

Nor can one ignore the emerging scholarship on implicit bias. The Supreme Court’s recent major disparate impact case, *Inclusive Communities*, instructs that disparate impact “plays a role in uncovering discriminatory intent” by permitting “plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification of disparate treatment. In this way disparate-impact liability may prevent . . . patterns that might otherwise result from covert and illicit stereotyping.”²³²

Perhaps in some cases, the *Arlington Heights* test appears the most obvious to apply to Twenty-Sixth Amendment claims. This may seem sensible where revealing testimony is captured by legislators, and where the legislative process has not been obfuscated to hide the original intent of a bill, or simply where a prima facie violation exists. Indeed, in *League of Women Voters of Florida, Inc. v. Detzner*, a federal court applies the test in issuing a preliminary injunction on a Twenty-Sixth Amendment challenge.²³³ The circumstances presented in *Detzner* are fairly unique, however. There, a statute allows for the placement of early voting sites in various locations, including convention centers and community centers. However, the Secretary of State interpreted the statute to categorically exclude facilities related to colleges and universities, even those akin to convention centers and community centers. The court explains that the benefit of an intentional discrimination analysis is the increased willingness “to call out a pretextual rationale—or ‘a banana a banana,’ in Plaintiffs’ counsel’s words.”²³⁴ Thus, *Detzner* involves a facially discriminatory law where a protected group is overtly and expressly singled out, and therefore it is not necessary to prove malice of discriminatory animus.²³⁵

Perhaps as public opinion continues to take hold about the lack of evidence for claims of in-person voter fraud, and the threat to public confidence in elections that these unsupported claims promote, courts may start to veer toward applying a careful eye to the unique rash of voter

²³⁰ *Arlington Heights*, 429 U.S. at 265.

²³¹ *Id.* at 266 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

²³² *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512, 2522 (2015).

²³³ *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018).

²³⁴ *Id.* at 1221 n.17.

²³⁵ *See, e.g., Int’l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 (11th Cir. 1999).

restrictions imposed in the aftermath of the 2008 election and *Shelby County v. Holder*. Courts have already begun to dissect state justifications to reach a finding of discriminatory intent. For example, both the Texas strict voter ID law and the North Carolina omnibus voter suppression laws were found to be intentionally discriminatory through application of *Arlington Heights*.²³⁶ Thus, it is not necessarily the case that *Arlington Heights* sets an impossible standard to dismantling voter suppression.

However, reliance on *Arlington Heights* may prove problematic, because the inquiry ignores the basic nature of discrimination—that due to its invidiousness, it is often hidden. Moreover, resting sole reliance on *Arlington Heights* in evaluating Twenty-Sixth Amendment claims is precarious, as it ignores the equal protection and due process principles that underscore the history of the Twenty-Sixth Amendment and informed the immediate jurisprudence following its ratification, as set out in Parts I and II. The application of the intentional discrimination standard in the Twenty-Sixth Amendment context is based on thin reasoning—it simply rests on the similarity of its text to that of the Fifteenth Amendment, without further explanation. This overlooks that the legislative history sheds barely any light on its chosen text and intended scope. In contrast, the legislative history reveals an overwhelming influence of Fourteenth Amendment principles embedded in the push for ratification. In fact, the only time the Supreme Court ruled on a Twenty-Sixth Amendment challenge was in 1979,²³⁷ and there it upheld the application of heightened scrutiny—two years after *Arlington Heights* was decided.

C. *The Path Forward*

The struggle in reconciling how to approach Twenty-Sixth Amendment claims lies in the presumption that only one standard of review must apply to the exclusion of another. On the one hand, it is illogical to weaken the protections to a class based on age through the application of a standard more arduous to meet than the modern right to vote doctrine permits. On the other hand, the Twenty-Sixth Amendment affords protections greater than those already provided by the Fourteenth Amendment, which does not treat age as a suspect classification.²³⁸

²³⁶ See *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 876 (S.D. Tex. 2017). The Fifth Circuit previously affirmed en banc the discriminatory effect claim as well. See *Veasey v. Abbott*, 830 F.3d 216, 230–32 (5th Cir. 2016) (en banc).

²³⁷ See *supra* note 122.

²³⁸ See, e.g., *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (“Anderson-Burdick likely is unfitting because applying it would indicate the Twenty-Sixth Amendment ‘contributes no added protection to that already offered by the Fourteenth Amendment.’” (quoting *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016)).

When reviewing courts consider Twenty-Sixth Amendment claims, they generally do so after a discussion of more familiar and well-established Fourteenth Amendment arguments. The trouble with this approach arises when the plaintiffs include nonstudents, because the burden met by youth becomes an afterthought. The issue could potentially be overcome if, in considering a Fourteenth Amendment analysis, courts dedicate an independent study to youth voters. However, it is more sensible to simply ensure these protections are additionally read into the Amendment dedicated to both the class and the right at issue. The Amendment's history is replete with Fourteenth Amendment considerations, after all. Moreover, the Amendment specifically contemplates protections for this class. Given the Amendment's history, and the structural and prudential concerns at issue, one cannot reasonably argue it should be limited to only an intentional discrimination standard.

One approach need not be to the exclusion of the other. Both the modern right to vote doctrine and the modern equal protection doctrine recognize their necessary evolutionary nature. During the Second Reconstruction, the Supreme Court instructed that:

[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, any more 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.²³⁹

More recently, the Supreme Court again reminds us in 2015 that “[t]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a character protecting the rights of all persons to enjoy liberty as we learn its meaning.”²⁴⁰

Larry Tribe describes this type of merging of liberty and equal protection interests as a “narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly

²³⁹ Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966) (internal citation omitted) (citing Malloy v. Hogan, 378 U.S. 1, 5–6 (1964)); see also *id.* (“This Court, in 1869, held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. Seven of the eight Justices then sitting subscribed to the Court’s opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the ‘separate-but-equal’ doctrine of Plessy.” (internal citation omitted) (citing Plessy v. Ferguson, 163 U.S. 537 (1869)).

²⁴⁰ Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

interlocked in a legal double helix.”²⁴¹ Correspondingly, Kenji Yoshino describes the evolution of liberty-based dignity claims as a “we”-centered framework, rather than stressing individual distinctions or special rights.²⁴²

Youth enfranchisement entwines two constitutional amendments—the Fourteenth Amendment pursuant to both its equal protection clause and its due process guarantee, and the Twenty-Sixth Amendment to expand access to the ballot free of age discrimination.

The Supreme Court applies heightened constitutionalism where the protections of two constitutional amendments intertwine. In *Graham v. Oklahoma*, life sentences without parole are invalidated for non-violent juveniles, based on the combined implication of the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fifth Amendment’s guarantee of liberty interests.²⁴³ Similarly, in *Pena-Rodriguez v. Colorado*, the Supreme Court carves a rare exception to the Sixth Amendment’s no-impeachment rule, which generally prohibits post-trial inquiry of jury deliberations to contest the validity of a verdict or indictment.²⁴⁴ There, an intersecting Fourteenth Amendment equal protection interest to root out racial bias in the justice system warrants the creation of a very rare exception to the rule.

In *Dunn*, the Supreme Court in 1972 applied heightened constitutionalism where two fundamental rights within one amendment intertwine—the right to travel, and the right to vote, pursuant to the Fourteenth Amendment. The Court similarly applies a form of heightened constitutionalism under the Fourteenth Amendment in rare scenarios where a vulnerable group, such as undocumented youth or mentally disabled persons, is denied a strong interest such as access to K–12 public education or housing.²⁴⁵ Although those groups do not fall under the traditionally protected classes under the Fourteenth Amendment, nor are the rights involved classified as fundamental rights, the challenge is reviewed beyond the deferential rational basis test.

²⁴¹ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749, 792–94 (2011) (explaining the evolution of liberty-based dignity claims, and that whereas equal protection stresses individual distinctions or special rights, liberty and due process emphasizes a human rights “we”-centered framework).

²⁴² Yoshino, *supra* note 241, at 792–94.

²⁴³ *Graham v. Florida*, 560 U.S. 48 (2010).

²⁴⁴ *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

²⁴⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating a municipal zoning ordinance as applied to deny a special permit to an intellectually disabled community); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating a Texas law excluding undocumented youth from K-12 education); see also *United States v. Windsor*, 570 U.S. 744 (2013) (applying no express standard of review to DOMA, but invalidating the law based on its actual purpose rather than any conceivable rational purpose); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment that deprived gay activists the ability to meaningfully lobby for legislation); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (invalidating the denial of appeal to an impoverished mother protecting her parental rights).

One need not search for added protections within the Fourteenth Amendment for youth voters, since this class already has an amendment dedicated to it. Just as the Fourteenth Amendment jurisprudence covers *prima facie*, intentional, and disparate impact claims, so too can the Twenty-Sixth Amendment. In other words, enfranchisement need not be a zero-sum game.

A consolidated approach to future Twenty-Sixth Amendment claims brought by youth voters embraces Fourteenth Amendment influences rather than splicing them. Pursuant to this consolidated approach, plaintiffs may show that a state has violated the Amendment in one of three ways:

1. Direct evidence of *prima facie* intentional discrimination, such as express or admitted use of a classification, where a policy singles out a protected group for disparate treatment, or where there is substantial negative reliance on an illegitimate criterion.
2. A variety of factors are present which are probative of intent to discriminate, such as those set out in the non-exhaustive list provided in the *Arlington Heights* framework.
3. An undue burden specifically and disproportionately affects an age-based class, as provided in the *Anderson-Burdick* framework.

D. Further Research and Policy Opportunities

Future research on the quantitative impact of election laws on voters based on age, be it youth or the elderly,²⁴⁶ may further inform our understanding of disproportional effect on vulnerable age groups. Another under-explored area is the quantitative impact based on age of election laws and regulations in relation to the criminal justice system.

In addition to opportunities for further areas of research to deepen our understanding of how to protect access to the ballot free of age discrimination, there exists state and federal legislative solutions. For example, state laws leverage already-available and reliable election systems to support policies such as online voter registration, same day registration, automatic voter registration, and the partial or full counting of provisional ballots cast in the wrong polling place. Indeed, there is a nascent discussion of how evolving technology which lowers the government's election administration burden, affects the progressive application of constitutional protections for increased access to the ballot. In other words, to what degree does the availability of reliable technology move the constitutional needle on how states must modernize elections in order to ensure access to the ballot?

²⁴⁶ For example, a recent report by the U.S. Senate Special Committee on Aging and the U.S. Senate Committee on Rules & Administration explains how state election laws create barriers for seniors through strict voter ID laws, limitations on voter assistance, inaccessibility of polling locations and ballots, and limitations on early and absentee voting. See U.S. SENATE, BARRIERS TO VOTING FOR OLDER AMERICANS: HOW STATES ARE MAKING IT HARDER FOR SENIORS TO VOTE 4-9 (2017).

Additionally, restoration of the VRA would allow for certain proposed changes in election laws to be vetted prior to application, rather than bogging the courts in protracted, costly litigation.

One proposal worthy of further exploration, is the protections that may be afforded by including age among the classifications protected from discriminatory voting practices or procedures under Section 2 the Voting Rights Act,²⁴⁷ particularly since the VRA already grants the Attorney General power to enforce the Twenty-Sixth Amendment.²⁴⁸ This proposal should explicitly be coupled with the availability of shifting attorney fees for successful Twenty-Sixth Amendment litigants, like those already provided within the VRA pursuant to Fourteenth or Fifteenth Amendment guarantees.²⁴⁹ The United States Commission on Civil Rights may be well-positioned to survey the issue specifically, just as it did in the compilation of a massive record through public hearings held across the country in the 1960s, which went on to inform the creation of the VRA.

In sum, there exists litigious and non-litigious avenues for protecting the youth vote, along with a need for further quantitative and qualitative research to deepen our understanding of how to better meet the promise of the Twenty-Sixth Amendment.

CONCLUSION

The paradox of voting in America is that the group that has the most to gain or lose from policies that emerge from political campaigns, has long been the group that has participated the least in the process, although it is the most independent-minded. The Twenty-Sixth Amendment was in part designed to remedy that problem and to bring in more young people into the process by constitutionalizing their right to vote. If the evidence of the last fifty years has shown anything, it is that ratification is not enough. One of the reasons for this is that the Twenty-Sixth Amendment has for too long been dormant. It need not remain so. Litigants and the courts need not feel hamstrung by searching for magic words and procedural abnormalities in order to protect the youth vote.

²⁴⁷ Section 2 of the Voting Rights Act prohibits voting practices or procedures that discriminate on the basis of race, color, membership in an identified language minority group. 52 U.S.C. §§ 10301, 10303 (2012).

²⁴⁸ *See Id.* § 10701 (originally enacted as 42 U.S.C. § 1973bb). The 1975 amendment of Title III of the Voting Rights Act granted the Attorney General the power to enforce the Twenty-Sixth Amendment; granted jurisdiction to the district courts of the United States to convene a three-judge court to hear such claims, with direct appeal to the Supreme Court; and provided that “[w]homsoever shall deny or attempt to deny any person of any rights secured” by the Twenty-Sixth Amendment “shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

²⁴⁹ *See Id.* § 10310(e) (“In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses, as part of the costs.”).

The history of the Twenty-Sixth Amendment demonstrates a commitment to the principles of equal protection and due process which would trigger the application of strict scrutiny, consistent with the standard of review applied to Twenty-Sixth Amendment claims in the decade following ratification. More recently, a balancing test has emerged in the modern right to vote doctrine that offers relief for youth voters. As public awareness has grown around this new generation of voter suppression laws, the modern right to vote jurisprudence is starting to use this form of heightened scrutiny to require that the state prove that its concerns are real and not imagined, and to pay attention to the comparative burden that these restrictions pose on voters.

The few courts that have been presented with Twenty-Sixth Amendment claims have uniformly expressed skepticism with the notion that one must prove intentional discrimination through application of the *Arlington-Heights* test to be on good footing. Indeed, it is illogical to weaken the protections to youth voters through the application of a standard more arduous to meet than the modern right to vote doctrine permits. Such an approach effectively penalizes youth voters, negating the purpose of the Amendment.

Heightened constitutionalism resolves the uncertainty of what standard of review to apply to Twenty-Sixth Amendment claims. Unobstructed access to the ballot for youth is protected by both the Twenty-Sixth Amendment, and by the equal protection and due process principles enshrined in the Fourteenth Amendment. The modern right to vote and modern equal protection doctrines direct that a flexible balancing test be applied to evaluate such claims where discrimination is hidden due to its invidiousness, in which case, the state's articulated interests are closely scrutinized and not simply taken at face value. Additionally, an intentional discrimination test must be available to root out pretext, free of the presumption that a restriction is nondiscriminatory. Twenty-Sixth Amendment remedies need not involve a zero-sum game.

In many ways, the neglect of the Amendment may be a reflection that our respect for voting rights has too often been observed in the breach. If voting is as important as we always claim it is, now is the time to constitutionally treat it as such. The future of our young people, and our democracy, depends on it.