

# THE TWENTY-SIXTH AMENDMENT AND PROTECTING THE YOUTH VOTE

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*Recent elections have demonstrated the transformative impact of young voters on elections, and the surge in youth electoral participation may have played a key role in several close elections in 2020. Election procedures and policies impact youth turnout and voter registration rates, and the Twenty-Sixth Amendment is an important potential avenue for challenging voting restrictions that burden the youth vote. Courts have been unclear and inconsistent in their interpretation of the Twenty-Sixth Amendment, often acknowledging that there is no clear framework.*

*This Note examines the historical context for the Twenty-Sixth Amendment as well as early and contemporary litigation to better understand the ways that courts have and will continue to grapple with various interpretations of the Twenty-Sixth Amendment. This Note first analyzes the language of the Twenty-Sixth Amendment, comparing it to the language of the Fifteenth and Nineteenth Amendments, which forbade the denial and abridgement of the right to vote on the basis of race and sex, respectively. It then outlines the historical context of the path to passage of the Twenty-Sixth Amendment and its legislative history. This Note proceeds to survey early and contemporary litigation concerning the Twenty-Sixth Amendment before considering takeaways, challenges, and recommendations for litigation. Though several issues in interpretation raised in recent litigation may arise, the Twenty-Sixth Amendment can be a powerful tool in protecting the youth vote.*

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INTRODUCTION

In the aftermath of the 2020 election—an election year marred by COVID-19 pandemic challenges, a dramatic week of post-election vote counts and recounts, months of post-election litigation, and attempts by the sitting President of the United States to subvert the elec-

tion outcome, culminating in the violent January 6 riot upon the U.S. Capitol—one hopeful theme emerged that highlighted the transformative impact of young voters on American politics. Young voters have comprised a growing portion of the electorate in recent elections, and voting-eligible people aged eighteen to twenty-nine years old turned out to vote at a record rate<sup>1</sup> of roughly 50% in 2020, an 11-point increase from 2016 and likely one of the highest rates of youth voter turnout since the voting age was lowered to eighteen.<sup>2</sup> Young voters under thirty years old preferred Joe Biden by 24-points (Biden 59%, Trump 35%),<sup>3</sup> with youth votes in Biden’s favor exceeding his margin of victory in key battleground states like Arizona, Georgia, Michigan, and Pennsylvania.<sup>4</sup> The surge in youth electoral participation may have played a key role in several close elections and helped carry Biden to victory.<sup>5</sup> Youth electoral engagement is projected to remain high, with youth turnout in the 2022 midterm elections likely to match 2018 turnout rates and young voters currently projected to prefer Democrats by a 12-point to 21-point margin.<sup>6</sup>

Election procedures and policies play a major role in encouraging youth turnout and registration rates. States with at least four youth

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1. All turnout rates in this section discussing youth turnout refer to turnout as a percentage of all voting-eligible young people aged eighteen to twenty-nine. CIRCLE at Tufts University, where many of the turnout rates were obtained, uses aggregated voter files from Catalist for votes cast by young people and citizen population estimates from the American Community Survey one-year estimates. See *State-by-State 2020 Youth Voter Turnout: West and Southwest*, TUFTS CIRCLE (Mar. 24, 2021), <https://circle.tufts.edu/latest-research/state-state-2020-youth-voter-turnout-west-and-southwest>; *Election Week 2020: Young People Increase Turnout, Lead Biden to Victory*, TUFTS CIRCLE (Nov. 25, 2020), <https://circle.tufts.edu/latest-research/election-week-2020#young-voters-and-youth-of-color-powered-biden-victory>.

2. *Half of Youth Voted in 2020, an 11-Point Increase from 2016*, TUFTS CIRCLE (Apr. 29, 2021), <https://circle.tufts.edu/latest-research/half-youth-voted-2020-11-point-increase-2016>; Charlotte Alter, *The 2020 Election Was a Breakthrough Moment for Young Voters*, TIME (May 18, 2021), <https://time.com/6049270/2020-election-young-voters/>.

3. Ruth Igielnik, Scott Keeter & Hannah Hartig, *Behind Biden’s 2020 Victory*, PEW RSCH. CTR. (June 30, 2021), <https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/>.

4. *Election Week 2020: Young People Increase Turnout, Lead Biden to Victory*, *supra* note 1.

5. Lili Pike, *Why So Many Young People Showed Up on Election Day*, VOX (Nov. 7, 2020), <https://www.vox.com/2020/11/7/21552248/youth-vote-2020-georgia-biden-covid-19-racism-climate-change>.

6. Forty percent of Americans under thirty prefer Democratic control of Congress, compared to 28% preferring Republicans and 32% unsure. The 12-point margin widens to 21 points when focused on likely voters. *Harvard Youth Poll*, HARV. KENNEDY SCH. INST. OF POL. (Apr. 25, 2022), <https://iop.harvard.edu/youth-poll/spring-2022-harvard-youth-poll>.

vote-enhancing policies—like automatic voter registration, online voter registration, same-day registration, early voting, no-excuse absentee voting, pre-registration, and required voter registration programming in high schools—had a higher youth turnout than states with fewer than four policies (53% compared to 43%).<sup>7</sup> Particularly critical in 2020, states that expanded vote-by-mail opportunities saw significant increases in youth turnout, with 57% youth turnout and the largest increases in turnout in states that automatically mailed ballots to voters, compared to 42% youth turnout in states with the most restrictive vote-by-mail laws.<sup>8</sup>

While states can largely dictate election procedures that enhance or restrict the ability of young voters to register and vote—with the Constitution delegating to states the responsibility to determine the “Times, Places and Manner of holding Elections” and conferring onto Congress the right to “make or alter” those regulations<sup>9</sup>—Constitutional amendments have played an important role in ensuring that states do not abridge the right to vote on the basis of race,<sup>10</sup> sex,<sup>11</sup> or age (once over the age of eighteen)<sup>12</sup> and that all citizens are subject to equal protection of the laws.<sup>13</sup>

This paper explores the potential of the Twenty-Sixth Amendment as an avenue for challenging voting restrictions that burden the youth vote. Courts have been unclear and inconsistent in their interpretation of the Twenty-Sixth Amendment, often acknowledging that there is no clear framework. As the caselaw demonstrates, there are a few ways to interpret the protections of the Twenty-Sixth Amendment:

1. The Twenty-Sixth Amendment merely lowers the voting age to eighteen. The scope of the Amendment is limited to prohibiting measures that set a minimum voting age higher than eighteen years old.
2. The Twenty-Sixth Amendment prohibits the abridgement or denial of the right to vote as it existed when it was enacted in 1971—primarily in-person, Election Day voting—and does not extend to measures like absentee voting and in-person early voting.

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7. *Half of Youth Voted in 2020, an 11-Point Increase from 2016*, *supra* note 2.

8. *Id.*

9. U.S. CONST. art. I, § 4, cl. 1.

10. U.S. CONST. amend. XV.

11. U.S. CONST. amend. XIX.

12. U.S. CONST. amend. XXVI.

13. U.S. CONST. amend. XIV.

3. The Twenty-Sixth Amendment affords a similar level of protection as the Fifteenth Amendment. Thus, bringing a Twenty-Sixth Amendment claim requires proving intentional discrimination against voters on the basis of age, and courts may use the *Arlington Heights* framework<sup>14</sup> to analyze claims.
4. Claims made under the Twenty-Sixth Amendment alleging burdens on young voters may be evaluated like many Fourteenth Amendment voting restriction challenges under the *Anderson-Burdick* framework, weighing the burdens imposed on voters against the justification provided by the state.<sup>15</sup>
5. The Twenty-Sixth Amendment provides a general prohibition against age-based discrimination.

This paper examines the historical context for the Twenty-Sixth Amendment as well as early and contemporary litigation to better understand the ways that courts have and will continue to grapple with various interpretations of the Twenty-Sixth Amendment. Part I commences by analyzing the language of the Twenty-Sixth Amendment and comparing it to the language of the Fifteenth and Nineteenth Amendments, which forbids the denial and abridgement of the right to vote on the basis of race and sex, respectively. Part II outlines the historical context of the path to passage of the Twenty-Sixth Amendment, while Part III sheds further light on its legislative history. Parts

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14. Discrimination claims brought pursuant to the Fourteenth and Fifteenth Amendments generally require proof of discriminatory purpose. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016). To determine whether a law was passed with a discriminatory purpose, courts apply the framework articulated in *Arlington Heights*, considering five factors: “1) the historical background of the decision, 2) the specific sequence of events leading up to the decision, 3) departures from the normal procedural sequence, 4) substantive departures, and 5) legislative history, especially where there are contemporary statements by members of the decision-making body.” *Id.* at 230–31 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267–68 (1977)).

15. Courts apply the *Anderson-Burdick* framework to evaluate constitutional challenges to voting restrictions, weighing the injury to a voter’s First and Fourteenth Amendment rights against the state’s interest in imposing the election regulation: “[T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626–27 (6th Cir. 2016) (citing *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015)). *See also Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992).

IV and V survey early and contemporary litigation concerning the Twenty-Sixth Amendment, and Part VI considers takeaways, challenges, and recommendations.

## I.

### LANGUAGE OF TWENTY-SIXTH AMENDMENT

Before delving into the history of implementation and litigation surrounding the Twenty-Sixth Amendment, it may be useful to start by analyzing the language of the Twenty-Sixth Amendment. The text of the Twenty-Sixth Amendment reads:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.<sup>16</sup>

The language in Section One is closely modeled after the language found in the Fifteenth and Nineteenth Amendments, which prohibit states from denying or abridging the right to vote on account of race or gender, respectively. The legislative history of the Twenty-Sixth Amendment seems to reflect this interpretation. In Congressional debates, Rep. Richard Poff of Virginia stated that

the proposed constitutional amendment. . . guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting. . . . [T]he proposed amendment would protect not only an 18-year-old, but also the 88-year-old.<sup>17</sup>

The Senate Committee on the Judiciary also viewed the Twenty-Sixth Amendment as “embod[y]ing the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls.”<sup>18</sup> The Committee furthermore noted that Section Two confers onto Congress “the power to enforce the Article by appropriate legislation” and “parallels the reserve power granted to the Congress by numerous amendments to the Constitution.”<sup>19</sup>

A possible criticism of interpreting the Twenty-Sixth Amendment in parallel with the Fifteenth and Nineteenth Amendments is that

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16. U.S. CONST. amend. XXVI.

17. 117 CONG. REC. 7534 (1971).

18. S. REP. NO. 92-26, at 2 (1971).

19. *Id.*

age discrimination is simply not as problematic as discrimination based on race or sex. While such discrimination may be less morally and historically problematic, construing the Twenty-Sixth Amendment as a more powerful protection of the right to vote is important in at least three ways: 1) the protection of the right to vote encompasses and is offered to everyone; 2) voting is a habit,<sup>20</sup> and making it harder for young voters to participate weakens democracy and disadvantages those who have not yet developed a habit of voting (either from personal experience, family, or institutions); and 3) disregarding the protections of the Twenty-Sixth Amendment detracts from the possibility of intersectional approaches to voting rights (for example, when voting restrictions target Historically Black Colleges and Universities (HBCUs)<sup>21</sup> or gerrymandering lines cut through campuses, raising complicated, novel issues involving age, race, and partisanship).

## II.

### HISTORY, CONTEXT, AND THE INTENT BEHIND THE TWENTY-SIXTH AMENDMENT

While it's not entirely clear how the minimum age to vote was originally set at twenty-one years old, the colonies at the time of the Founding seem to have followed British common law, which set the age of majority at twenty-one.<sup>22</sup> While some states briefly considered lowering the voting age during their Constitutional Conventions, these attempts were rejected.<sup>23</sup> Proposals to lower the voting age to eighteen were not seriously considered until World War II, when Congress

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20. See Alexander Coppock & Donald P. Green, *Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities*, 60 AM. J. POL. SCI. 1044 (2016) (using new detailed statistics regarding random shocks to turnout and analyzing them over time to demonstrate the persistent stability of voter turnout); see also Thomas Fujiwara, Kyle Meng & Tom Vogl, *Habit Formation in Voting: Evidence from Rainy Elections*, 8 AM. ECON. J.: APPLIED ECON. 160 (2016).

21. See, e.g., *Johnson v. Waller Cnty.*, No. 4:18-CV-03985, 2022 WL 873325 (S.D. Tex. 2022) (holding that the Twenty-sixth Amendment does not protect the right to in-person early voting and ending a §1983 action alleging racial and age discrimination by allocating fewer hours for in-person early voting at an HBCU than the surrounding counties); *Symm v. United States*, 439 U.S. 1105 (1979), *aff'g* *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (upholding an injunction ending the use of a discriminatory voter registration scheme in a predominantly Black county, in which the voting registrar required HBCU students to complete a residency questionnaire to register to vote).

22. Jenny Diamond Cheng, *How Eighteen-Year-Olds Got the Vote* 9 (Aug. 4, 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2818730](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818730).

23. WENDELL CULTICE, *YOUTH'S BATTLE FOR THE BALLOT* 5, 7 (1992).

lowered the draft age from twenty-one to eighteen.<sup>24</sup> Within hours of the House vote to lower the minimum draft age, Representative Victor Wickersham (D-OK), Senator Arthur Vandenberg (R-MI), and Representative Jennings Randolph (D-WV) led the charge by proposing constitutional amendments to lower the voting age.<sup>25</sup> Interest in what would become the Twenty-Sixth Amendment focused on the perceived injustice of denying the right to vote to soldiers who were old enough to be drafted, a sentiment encompassed in the rallying cry “old enough to fight, old enough to vote”<sup>26</sup> and echoed by President Eisenhower in his 1954 State of the Union address.<sup>27</sup> The postwar baby boom as well as the Korean War prompted renewed public support for eighteen-year-olds to be granted the right to vote.<sup>28</sup> Despite this support in the 1950s, Congress was unable to pass legislation or a constitutional amendment lowering the voting age,<sup>29</sup> and, while state legislatures frequently considered proposals to lower their voting ages, only a handful were successful, including Georgia in 1943, Kentucky in 1955, the territories of Guam in 1954 and American Samoa in 1965, the then-Territory of Hawaii in 1958, and Alaska in 1959.<sup>30</sup>

In the 1960s, an increasing number of state and federal legislators proposed constitutional amendments to lower the voting age, in part due to the intensifying Vietnam War and the refrain of eighteen-year-olds being drafted but denied the right to vote.<sup>31</sup> The era also coincided with the rise of student movements and protests. Let Us Vote, a youth movement that sought to enfranchise young adults so they could engage in “constructive dissent and active participation,” expanded into a national movement at three thousand high schools and on over

24. Cheng, *supra* note 22, at 9.

25. See 88 CONG. REC. 8312 (H.R.J. RES. 352); 88 CONG. REC. 8316 (S.J. RES. 166); 88 CONG. REC. 8507 (H.R.J. RES. 354).

26. Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 668 (2017).

27. President Dwight D. Eisenhower, State of the Union Address (Jan. 7, 1954), [https://www.eisenhowerlibrary.gov/sites/default/files/file/1954\\_state\\_of\\_the\\_union.pdf](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.”).

28. Cheng, *supra* note 26, at 669.

29. Cheng, *supra* note 22, at 20.

30. *Id.* at 11. See also Melanie Jean Springer, *Why Georgia? A Curious and Unappreciated Pioneer on the Road to Early Youth Enfranchisement in the United States*, 32 J. POL’Y HIST. 273, 274 (2020) (noting that Georgia became the first state to lower the voting-age requirement in 1943 and was the only state with a voting age below twenty-one for twelve years); Jennifer Frost, *On Account of Age*, 40 AUSTRALASIAN J. AM. STUDS. 49, 64 (2021).

31. Cheng, *supra* note 22, at 39.

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three hundred college campuses, while the Youth Franchise Coalition, comprised of twenty-three prominent civil rights, education, labor, and youth organizations, mobilized the first coordinated national effort to push for ratification.<sup>32</sup> The social unrest on campuses in the 1960s also led some legislators and commentators to take an increased interest in expanding the franchise under the theory that redirecting young people towards conventional political participation would detract from the more militant, radical forms of political expression like protests.<sup>33</sup>

This decades-long debate finally culminated in the 1970 Amendment to the Voting Rights Act, which granted eighteen- to twenty-year-olds the franchise. In a bipartisan federal statute that lowered the voting age to eighteen in federal, state, and local elections, Congress declared that the twenty-one years of age precondition to voting:

- [(a)] (1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;
  - (2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and
  - (3) does not bear a reasonable relationship to any compelling State interest.
- (b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.<sup>34</sup>

Note that the text of this legislation recognized the youth vote as an inherent constitutional right, aligned the right with due process and equal protection under the Fourteenth Amendment, and acknowledged and dismissed any “compelling State interest[s],” a phrase which often signals strict scrutiny.

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32. CULTICE, *supra* note 23, at 98–99.

33. See *Lowering the Voting Age to 18: Hearing on S.J. Res. 8, S.J. Res. 14, and S.J. Res 78 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary, 90th Cong. 3, 74* (1968) (“This force, this energy, is going to continue to build and grow. The only question is whether we should ignore it, perhaps leaving this energy to dam up and burst and follow less-than-wholesome channels, or whether we should let this force be utilized by society through the pressure valve of the franchise” (statement of Sen. Birch Bayh); “At this crucial point, if we deny the right to vote to those young people between the ages of 18 and 20, it is entirely possible that they will join the more militant minority of their fellow students and engage in destructive activities of a dangerous nature.” (statement of Rep. Ken Hechler)).

34. Act of June 22, 1970, Pub. L. No. 91-285, §§ 301-305, 84 Stat. 314, 318–319 (1970).

Following the passage of the statute, only twenty states agreed to allow eighteen-year-olds to vote,<sup>35</sup> and several states challenged various provisions of the Voting Rights Act Amendments of 1970 in the cases consolidated in *Oregon v. Mitchell*.<sup>36</sup> The Supreme Court upheld the youth enfranchisement provision for federal elections but struck it down as applied to state and local elections.<sup>37</sup> With the 1972 presidential elections rapidly approaching and forty-seven states with minimum voting ages set at over eighteen, this split approach seemed to be unworkable,<sup>38</sup> in part due to the perceived unfairness of allowing young people to vote in federal but not state or local elections but also due to the massive costs and logistical, bureaucratic difficulties associated with administering a dual-age voting system.<sup>39</sup>

In response, Congress quickly passed a constitutional amendment to address youth enfranchisement in both state and federal elections on March 23, 1971.<sup>40</sup> Delaware and Minnesota ratified the Twenty-Sixth Amendment within an hour, and other states followed suit in the months thereafter. Ohio and North Carolina were the last states to approve the amendment before it took effect on July 1, 1971.<sup>41</sup> On July 5, 1971, the Nixon administration certified ratification.<sup>42</sup> The process was completed in record time, gaining the support of bipartisan supermajorities in Congress and approval of the states in less than 100 days and beating the previous ratification record, held by the Twelfth Amendment, by half.<sup>43</sup>

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35. Cheng, *supra* note 22, at 81.

36. *Oregon v. Mitchell*, 400 U.S. 112, 112, 117 (1970).

37. *Id.* at 112, 117–118. Justice Black wrote the majority opinion and concluded that Congress had exceeded its powers in lowering the voting age in state and local elections. However, Justices Douglas, Brennan, White, and Marshall opined that Congress had authority over both federal and state elections, while Chief Justice Burger and Justices Harlan, Stewart, and Blackmun maintained that Congress lacked authority to lower the voting age in all elections. Although Justice Black's opinion became binding, there was no real agreement over Congress's authority over the voting age in elections.

38. Cheng, *supra* note 22, at 83.

39. S. REP. NO. 92-26, at 11–17 (1971).

40. 117 CONG. REC. 7338, 7569–70 (1971).

41. CONG. RSCH. SERV., NO. 108-17, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 43–44 n.18 (2004) (noting that North Carolina concluded ratification on July 1, 1971, which made it the 38th state); R.W. Apple Jr., *The States Ratify Full Vote at 18*, N.Y. TIMES (July 1, 1971), <http://www.nytimes.com/1971/07/01/archives/the-states-ratify-full-vote-at-18-ohio-becomes-38th-to-back-the.html> [<https://perma.cc/NFU4-5PDV>]; Cheng, *supra* note 26 at 672.

42. CONG. RSCH. SERV., *supra* note 41.

43. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1107 (2019); Cheng, *supra* note 22, at 84.

## III.

## LEGISLATIVE HISTORY OF THE PASSAGE OF THE TWENTY-SIXTH AMENDMENT

Three consistent themes emerged from the debates in the House and Senate over the passage of the Twenty-Sixth Amendment and prior legislative efforts: 1) youth were viewed as more informed and mature than at any other point before in history;<sup>44</sup> 2) over half the deaths in Vietnam were of men aged eighteen to twenty;<sup>45</sup> and 3) various members of Congress highlighted the alienation felt by youths and the hope that their political energy could be channeled within the electoral system instead.<sup>46</sup>

The legislative history of the Twenty-Sixth Amendment also bears the hallmarks of the previous decades of organizing and advocacy around granting youth enfranchisement, evoking notions of maturity, the responsibilities of citizenship, and the importance of channeling energy into the democratic process:

[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.<sup>47</sup>

Both the Senate Report and the House Committee Report go further and portray the Twenty-Sixth Amendment as extending the right to vote protected by the Fourteenth Amendment (and in parallel with the protections granted under the Fifteenth Amendment):

[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

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44. *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, S.J. Res. 147 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 91st Cong. 380 (1970) (statement by President Richard Nixon in the Presidential Campaign of 1968); 116 CONG. REC. 6434 (1970); 116 CONG. REC. 6111 (Sen. Kennedy), 6434 (Sen. Goldwater), 20173 (Rep. Boland), 20180 (Rep. Stokes) (March 9, 10, and June 17, 1970).

45. 116 CONG. REC. 6111 (Sen. Kennedy), 6433 (Sen. Cook), 20165 (Rep. Long), 20174 (Rep. McCloskey), 20180 (Rep. Stokes) (March 5, 9 and June 17, 1970).

46. 116 CONG. REC. 20175–76 (Rep. Ottinger), 20163 (Rep. Anderson) (June 17, 1970).

47. S. REP. NO. 92-26, at 7 (1971).

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.<sup>48</sup>

[W]here a State law restricts [the right to vote] . . . on a basis other than age . . . and it is claimed that such State law has either the purpose or effect of discriminating on account of age, resolution of the claim will depend on decisional law concerning the right to vote as protected by other provisions of the Constitution.<sup>49</sup>

Both of these Committee Report statements suggest that Congress intended for the protections of the Twenty-Sixth Amendment against voting rights discrimination on the basis of age to parallel the protections offered by the Fourteenth and Fifteenth Amendments. The statements also suggest that both the purpose and effect of election laws and regulations on the voting behavior of young people—as well as any “special burdens” imposed on young voters—are pertinent to the inquiry of a potential Twenty-Sixth Amendment violation. This legislative history serves as a useful starting point in understanding the scope of the Twenty-Sixth Amendment, which has been subject to a variety of different interpretations by courts in the decade immediately following passage and in more recent litigation.

#### IV.

##### EARLY LITIGATION

The first case litigating the Twenty-Sixth Amendment was *Walker v. Dunn*, in which Tennessee residents challenged the ratification of the Twenty-Sixth Amendment by the Tennessee General Assembly and Governor as ultra vires and void per the procedures set out in the Tennessee Constitution.<sup>50</sup> The Supreme Court of Tennessee found that the reconvening of the General Assembly to ratify the Amendment was in compliance with the provisions of the Tennessee Constitution and was therefore lawful.<sup>51</sup>

In the decade after the enactment of the Twenty-Sixth Amendment, there was a flurry of litigation to consider the scope of its protections and as state and local officials adapted to its requirements. Many of the challenges dealt with the treatment of student voters by local election officials.

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48. *Id.* at 14

49. H.R. REP. NO. 92-37, at 8 (1971).

50. *Walker v. Dunn*, 498 S.W.2d 102, 103 (Tenn. 1972).

51. *Id.* at 106.

### A. *Residency for Voter Registration*

Several of the early cases concerning the substance, scope, and interpretation of the Twenty-Sixth Amendment were largely focused on residency requirements for young voters to register to vote, particularly as applied to students. In the 1971 case *Bright v. Baesler*, the registrar refused to register students to vote in their university community until they successfully completed a series of questions to overcome the presumption that they were domiciled at their parents' homes.<sup>52</sup> The court enjoined the registrar from imposing additional criteria for proof of domicile upon students.<sup>53</sup> This case, however, was resolved on equal protection grounds, and the court expressed skepticism that the Twenty-Sixth Amendment applied, characterizing the dispute as a "student voting rights case, rather than a minor voting rights case."<sup>54</sup> Similarly, in *Sloane v. Smith*, the court did not directly address the Twenty-Sixth Amendment question, instead pronouncing that the requirement that voting-age students who wanted to register to vote meet a more stringent test of residency than other applicants was unjustifiable and violated the Equal Protection Clause of the Fourteenth Amendment.<sup>55</sup> *Ownby v. Dies*, on the other hand, addressed the Twenty-Sixth Amendment application question directly, finding that a Texas statute determining residency for voting purposes for people under twenty-one years old on a different basis than for those twenty-one and over violated both the Equal Protection Clause as well as the Twenty-Sixth Amendment.<sup>56</sup>

State courts similarly upheld the protections guaranteed by the Twenty-Sixth Amendment. In 1971, the Supreme Court of California in *Jolicoeur v. Mihaly* concluded that young people aged eighteen and

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52. *Bright v. Baesler*, 336 F. Supp. 527, 532 (E.D. Ky. 1971).

53. *Id.* at 534.

54. *Id.* at 531–32.

55. *Sloane v. Smith*, 351 F. Supp. 1299, 1305 (M.D. Pa. 1972). Student applicants were required to either produce a Pennsylvania driver's license containing a county address or two or more credit cards demonstrating an account with a county commercial establishment, checking or savings account with a county bank, lease, passport, or other evidence of business or commercial activity in the county. The following documentation were specifically rejected as evidence of residency: a single credit card, lease, or bank account; rent receipts; utility bills; university ID cards; bursar's receipts; and dining hall meal tickets. If the student's driver's license showed an address outside of the county, the application was rejected unless there was "an abundance of other documentation indicating residency" in the county. *Id.* at 1301.

56. *Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971). *See also* *Auerbach v. Kinley*, 499 F. Supp. 1329, 1343 (N.D.N.Y. 1980) (preliminarily enjoining county board of elections and commissioners of the New York State Board of Elections from requiring additional documentation from students beyond what is required from all other applicants).

older residing apart from their parents are to be treated like other voters in terms of their voting residence in light of the Twenty-Sixth Amendment and that “strong state policies require that voters participate in elections where they reside.”<sup>57</sup> A California Attorney General Opinion had stated that the residence of an unmarried minor was presumed to be with their parents for voting purposes; relying upon that opinion, voting registrars declined to register students.<sup>58</sup> The Supreme Court of California, invoking the text, purpose, and legislative history of the Twenty-Sixth Amendment, concluded that denying youth the right to vote in the communities in which they live and forcing students to travel to their parents’ towns or vote absentee burdened their right to vote.<sup>59</sup>

The Supreme Court of New Jersey reached the same conclusion in 1972 and held that all bona fide resident students were entitled to vote in their college or university communities.<sup>60</sup> In *Worden v. Mercer Cnty. Bd. of Elections*, the court found that students who lived on campus were improperly discriminated against when they were denied the right to register to vote in their college community, and, as a class, they could not be subjected to questioning beyond what all other residents were subjected to.<sup>61</sup> The court specifically included all resident students in its analysis, regardless of whether they planned to stay in the college community permanently, move back home, obtain employment elsewhere, or were uncertain about their plans after college.<sup>62</sup> After tracing the ratification, history, and implications of the Twenty-Sixth Amendment in New Jersey, the New Jersey Supreme Court concluded that the goal of the Amendment was “not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions.”<sup>63</sup>

In 1979, the only Supreme Court decision regarding the Twenty-Sixth Amendment solidified this understanding of its application to

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

58. *Id.* at 3.

59. *Id.* at 4–7. The Supreme Court of Iowa later reached the same result, holding that students who declared their college town as their home were qualified voting residents and interpreting the voting eligibility statute through the lens of the Twenty-Sixth Amendment. *Paulson v. Forest City Cmty. Sch. Dist. in Winnebago*, 238 N.W.2d 344, 349–51 (Iowa 1976).

60. *Worden v. Mercer Cty. Bd. of Elections*, 294 A.2d 233, 245 (N.J. 1972).

61. *Id.*

62. *Id.*

63. *Id.* at 243.

residency voter registration practices. In *Symm v. United States*, the Court summarily affirmed, without a written majority opinion, the ruling of a three-judge district court enjoining the voter registration practices of a Texas voting registrar, who refused to register college students who lived on campus unless they established their intent to remain in the community after graduation.<sup>64</sup> The United States brought the challenge on behalf of Prairie View A&M students, alleging that the registrar had abridged the rights of students residing on campus to vote in violation of the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.<sup>65</sup> During a student voter registration drive in 1976, over a thousand applications were sent to the voting registrar, but only twenty-seven students were permitted to be registered—limiting voter registration to students who were either county natives or married students.<sup>66</sup> As evidence of the onerous burden of these registration practices, a student was compelled to drive 300 miles to their parents' home to vote in the 1976 election.<sup>67</sup> Assessing both the lineage of cases applying the Twenty-Sixth Amendment and the broader category of cases addressing state restrictions on the right to vote, the district court found that the fundamental right to vote cannot be restricted unless the purpose and interests served by the restriction met “close constitutional scrutiny” and determined that the registrar’s practices were inconsistent with the “philosophy and trend” of the right to vote cases.<sup>68</sup>

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64. *Symm v. United States*, 439 U.S. 1105, 1105 (1979), *aff'g* *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). The county registrar looked to evidence of marriage, obtaining a job offer in the county after graduation, and a permanent residence in the county as intent to remain. *United States v. Texas*, 445 F. Supp. at 1251–52.

65. *United States v. Texas*, 445 F. Supp. at 1247–48.

66. *Id.* at 1249.

67. *Id.*

68. *Id.* at 1260–61. The court specifically points to *Carrington v. Rash*, 380 U.S. 89 (1965) (rejecting Texas’s contention that servicemen were mere transients who would not remain in the state for an extended time period because “[f]encing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights [is] so vital to the maintenance of democratic institutions . . .” (quotation marks and citations omitted)) and *Evans v. Cornman*, 398 U.S. 419 (1970) (holding that Maryland could not constitutionally deprive the right to vote from residents of a federal reservation or enclave—“the right to vote, as the citizen’s link to his laws and government, is protective of all fundamental rights and privileges. . . . And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.” (quotation marks and citations omitted)).

### B. *Burdens on Political Participation*

The protections of the Twenty-Sixth Amendment are not limited to voter registration procedures but have been applied to opportunities for political participation more broadly. For example, the Colorado Supreme Court in *Colorado Project-Common Cause v. Anderson* relied on the Twenty-Sixth Amendment and the public policy and intent underlying its passage and ratification that sought to favor “full participation of young voters in the political process” to invalidate a statute that prohibited voters aged eighteen to twenty years old from circulating and signing petitions for initiatives and referenda.<sup>69</sup>

In *Walgren*, a 1975 Massachusetts case in which the primary election date for town officer and town meeting member was moved to coincide with the winter recess of the University of Massachusetts, when many students would be out of town, the First Circuit suggested that forcing students to either return during winter recess to vote in person or undertake the application and notarial execution process of absentee voting were significant burdens on the right to vote given reasonable alternatives to scheduling the election during vacations or recesses.<sup>70</sup> Though the court acknowledged that there was no clear test to evaluate and determine whether a Twenty-Sixth Amendment violation had occurred, the court, alluding to cases undertaking Fifteenth Amendment analyses, opined that:

[I]t seems only sensible that if a condition, not insignificant, disproportionately affects the voting rights of citizens specially protected by a constitutional amendment, the burden must shift to the governmental unit to show how the statutory scheme effectuates, in the least drastic way, some compelling governmental objective.<sup>71</sup>

Though uncertain, the court appeared to follow Fifteenth Amendment jurisprudence to craft a test reminiscent of strict scrutiny, requiring a compelling government interest to justify government action infringing and bearing disproportionately on young people’s right to vote.

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69. *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972) (“We believe that the prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of the ballot and its concomitants. . . . [T]he Congressional hearings . . . [evidence] the recurring theme of Congress’ distress with youths’ alienation and its hope that youths’ idealism could be channelled within the political system itself. What better area for youth to express its ideals can there be than in the initiative process.”).

70. *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367–68 (1st Cir. 1975).

71. *Id.* at 1367, quoting *Walgren v. Howes*, 482 F.2d 95, 102 (1st Cir. 1973).



Furthermore, the Twenty-Sixth Amendment was found to apply to tribal constitutions and to compel a uniform federal age qualification for voters in Secretarial elections.<sup>72</sup>

*C. The Limits of the Application of the Twenty-Sixth Amendment*

Of course, states continue to have discretion to set voting and registration policies and procedures in ways that may impact the participation of young voters. For instance, while the Twenty-Sixth Amendment conferred the right to vote on eighteen-year-olds, it did not extend to young voters a right to hold elected office.<sup>73</sup> Moreover, the Twenty-Sixth Amendment does not appear to protect pre-registration. A federal district court in *Gaunt v. Brown* held that a statute prohibiting seventeen-year-olds who would turn eighteen by the time of the general election from voting in the primary election did not violate constitutional guarantees, and, even if a state was required to justify setting qualifications for registration at eighteen years of age, the standard should be reasonableness rather than a compelling state interest.<sup>74</sup>

Courts exhibited some uncertainty in grappling with the proper standard to apply in Twenty-Sixth Amendment litigation in the decade after ratification. However, they often modeled their analysis off of Fifteenth and Nineteenth Amendment voting rights cases, sometimes applying strict scrutiny to invalidate restrictions or burdens on the right to vote. From 1980 to about 2014, there was no further movement in Twenty-Sixth Amendment jurisprudence, leaving many of the

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72. *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1089 (8th Cir. 1977) (“The similarity of the language of the Twenty-Sixth and Fifteenth Amendments, coupled with the long-held construction of the latter as a self-executing declaration of right, lead us to construe the Twenty-Sixth Amendment to invalidate voter age qualifications which were set higher than eighteen years.”). *But see* *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Rsrv.*, 507 F.2d 1079 (8th Cir. 1975) (holding that the Twenty-Sixth Amendment is not applicable to tribal elections). *See* *Secretarial Election Procedures*, 80 Fed. Reg 63094 (Oct. 19, 2015) (to be codified at 25 C.F.R. pts. 81–82) (explaining that a Secretarial election is a federal election for which the Twenty-Sixth Amendment applies but that a tribe may hold a Secretarial election to decide to hold all future elections as tribal elections in accordance with tribal voting procedures).

73. *See, e.g.*, *Meyers v. Roberts*, 246 N.W.2d 186 (Minn. 1976); *Spencer v. Bd. of Ed. of City of Schenectady*, 334 N.Y.S.2d 783 (1972); *Blassman v. Markworth*, 359 F. Supp. 1 (N.D. Ill. 1973); *Opatz v. City of St. Cloud*, 196 N.W.2d 298 (Minn. 1972); *Wurtzel v. Falcey*, 354 A.2d 617 (N.J. 1976).

74. *Gaunt v. Brown*, 341 F. Supp. 1187, 1192 (S.D. Ohio 1972). *But see* *Potter v. Meier*, 458 F.2d 585, 589 (8th Cir. 1972) (finding the “constitutional question . . . substantial”).

questions concerning the scope, interpretation, and protections of the Amendment open.

## V.

### CONTEMPORARY CASES

A slew of state legislation concerning election procedures has been enacted in the last decade that either directly targeted or disproportionately impacted young voters, raising interesting Twenty-Sixth Amendment issues. Some were facially neutral laws and reminiscent of the early litigation concerning the scope of the Twenty-Sixth Amendment like residency and voter ID requirements. Other laws more directly targeted young voters and attempted to limit youth participation, including restrictions on early voting opportunities for college students, voter registration drives, and voting education on campuses. The Twenty-Sixth Amendment also came up in several cases concerning absentee voting opportunities during the 2020 election cycle, when the uncertainty of the COVID-19 pandemic increased interest in and highlighted the importance of absentee voting.

#### A. *In-person Early Voting Opportunities*

##### i. *Florida—League of Women Voters of Fla. v. Detzner and League of Women Voters of Fla. v. Lee*

In the 2012 election, Florida voters experienced unreasonably long lines to vote on election day—by some reports in Miami, for up to seven hours—and an estimated hundreds of thousands of voters gave up in frustration.<sup>75</sup> In response, the state legislature expanded opportunities for early voting, increasing the early voting period from eight to fourteen days and the minimum number of hours per day from six to eight hours.<sup>76</sup> Furthermore, the statute granted local election officials discretion to increase the number of eligible early voting facilities in “any . . . fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center.”<sup>77</sup> Early vot-

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75. Bob King & Josh Gerstein, *Voters Face Long Lines, Other Issues*, POLITICO (Nov. 6, 2012, 9:17 pm), <https://www.politico.com/story/2012/11/voters-face-long-lines-scattered-problems-083416> [<https://perma.cc/5TYK-C6XB>]; Scott Powers & David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines*, ORLANDO SENTINEL (Jan. 29, 2013), <https://www.orlandosentinel.com/business/os-xpm-2013-01-29-os-voter-lines-statewide-20130118-story.html> [<https://perma.cc/N5F5-TPD6>].

76. Fla. Stat. § 101.657(d) (2013).

77. Fla. Stat. § 101.657(1)(a). *See also* Amended Complaint at 3, League of Women Voters of Fla. Inc. v. Detzner, No. 4:18-cv-00251 (N.D. Fla. June 1, 2018),

ing had been previously limited to election supervisor offices, city hall, and permanent public library facilities.<sup>78</sup> However, Secretary of State Ken Detzner quickly issued an advisory opinion specifying that college or university facilities, and specifically the Reitz Union on the University of Florida campus, did not qualify as early voting sites, effectively prohibiting early voting on Florida college campuses, even as opportunities increased elsewhere statewide.<sup>79</sup>

In 2018, six university students and two organizations, the League of Women voters and the Andrew Goodman Foundation, filed suit, arguing that the interpretation espoused in the advisory opinion targeted young voters by eliminating accessible early voting sites, infringing upon their right to participate in elections and denying them an equal opportunity to vote early.<sup>80</sup> The District Court agreed, finding that students were “categorically prohibited from on-campus early voting because of [Secretary of State Detzner]’s Opinion . . . [which was] not a ‘nonsevere, nonsubstantial, or slight burden’” and pointing to the disparate effect on Florida’s youngest voters.<sup>81</sup> Considering the convenience of early voting as authorized by the statute, the court further admitted that “[c]onstitutional problems emerge . . . when conveniences are available for some people but affirmatively blocked for others.”<sup>82</sup> The court found that the opinion violated the Twenty-Sixth Amendment because “it is intentionally discriminatory on account of age.”<sup>83</sup> Though it acknowledged the lack of clarity on the proper test to apply, the court applied the *Arlington Heights* intentional discrimination standard, indicating that the text of the Amendment follows the pattern of the Fifteenth Amendment and reasoning that the *Anderson-Burdick* framework likely doesn’t fit because it would imply that the Twenty-Sixth Amendment provides no additional protection to what is already offered by the Fourteenth Amendment.<sup>84</sup> Enjoining the state’s ban on the placement of polling stations on college campuses during

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<https://www.democracydocket.com/wp-content/uploads/2020/07/Amended-Complaint.pdf> [<https://perma.cc/9GHP-V6CY>].

78. *Id.*

79. Division of Elections Advisory Opinion 14-01, Early Voting – Facilities, Locations – §101.657, Florida Statutes (Fla. Dep’t of State Jan. 17, 2014).

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

81. *Id.* at 1216.

82. *Id.* at 2017.

83. *Id.* at 1221.

84. *Id.* (citing *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) and *One Wis. Inst., Inc. v. Thomsen*, 198 F.Supp.3d 896, 926 (W.D. Wis. 2016)).

the early voting period, the court found that the ban was both “intentionally and facially discriminatory”:

Simply put, Defendant’s Opinion reveals a stark pattern of discrimination. It is unexplainable on grounds other than age because it bears so heavily on younger voters than all other voters. Defendant’s stated interests for the Opinion (following state law, avoiding parking issues, and minimizing on-campus disruption) reek of pretext. . . . While the Opinion does not identify college students by name, its target population is unambiguous and its effects are lopsided.<sup>85</sup>

In its analysis, the court furthermore noted the difference between an *Anderson-Burdick* analysis, which requires a balancing of burdens and presumably nondiscriminatory governmental interests, and an analysis in the Twenty-Sixth Amendment context, where “this Court is more willing to call out a pretextual rationale—or ‘a banana a banana.’”<sup>86</sup>

Due in part to the expansion of early voting sites on college campuses, Florida voters cast a record number of early votes in the 2018 midterms.<sup>87</sup> The availability of on-campus early vote locations greatly bolstered turnout, particularly for young voters, including those who didn’t vote in 2016, and nearly 60,000 voters—the majority of whom were aged eighteen to twenty-nine years old—cast early in-person ballots at on-campus locations.<sup>88</sup> However, despite the District Court order, the Secretary of State continued to deny wrongdoing in its 2014 advisory opinion and refused to offer unclear, shifting, and ambiguous directions regarding the permissibility of on-campus early voting locations, seeming to reembrace its prior conclusion that student unions do not qualify as early voting sites in a 2019 opinion.<sup>89</sup> Furthermore, the Florida Legislature amended the early vote statute in an attempt to codify its rationale for the Secretary of State’s interpretation and circumvent the court’s order. The statute included a Permitted Parking Prohibition, which required that early voting sites provide “sufficient

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85. *Id.* at 1222.

86. *Id.* at 1222 n.17.

87. Melanie Payne, *Early Voting Shows Record Numbers in Florida Election for Governor, Senator*, NAPLES DAILY NEWS (Oct. 30, 2018, 6:55 pm), <https://www.naplesnews.com/story/news/politics/2018/10/30/florida-early-voting-midterm-election-record-number/1825784002/> [<https://perma.cc/NVQ2-3XUV>].

88. DANIEL A. SMITH, THE ANDREW GOODMAN FOUND., *On-Campus Early In-Person Voting in Florida in the 2018 General Election* (Aug. 9, 2019), [https://andrewgoodman.org/wp-content/uploads/2019/07/On-Campus-Early-In-Person-Voting-in-Florida-in-the-2018-General-Election\\_FINAL.pdf](https://andrewgoodman.org/wp-content/uploads/2019/07/On-Campus-Early-In-Person-Voting-in-Florida-in-the-2018-General-Election_FINAL.pdf).

89. Supplemental Complaint at 2–4, 47, *League of Women Voters of Fla. v. Lee*, No. 4:18-cv-00251 (N.D. Fla. Aug. 1, 2019).

nonpermitted parking to accommodate the anticipated amount of voters,” which effectively eliminated sites in densely populated urban or college areas where the community relies on walking or public transit to access the early vote location.<sup>90</sup>

In 2019, plaintiffs filed a supplemental complaint to address the actions of the Florida Secretary of State and Legislature, alleging violations of the First, Fourteenth, and Twenty-Sixth Amendments.<sup>91</sup> In 2020, the case settled, and the Secretary of State rescinded the 2014 opinion and issued a new directive clarifying that early vote locations are permitted on college campuses and that they do not need to provide sufficient nonpermitted parking to accommodate all anticipated voters, taking into account demographics, geography, foot traffic, and other features of the community of the site.<sup>92</sup>

Despite the difficulties in subsequent enforcement, this case and the District Court’s analysis provide a roadmap for a successful challenge under the Twenty-Sixth Amendment. *See infra* Section VI(A).

ii. *Texas*—*Allen v. Waller Cnty. and Johnson v. Waller Cnty.*

A recent Texas case about the availability of in-person early voting locations on campus puts us back at Prairie View A&M University, a historically Black university in Waller County, Texas, and the site of *Symm*, where the voting registrar applied a presumption of non-residency towards students and improperly denied Black PVAMU students the right to vote within a decade of the ratification of the Twenty-Sixth Amendment.<sup>93</sup> The fight over student voting and the availability of early voting at Prairie View has been ongoing over the course of several decades. In 1992, a county prosecutor indicted PVAMU students, claiming they were illegally voting, though charges were dropped after the DOJ intervened.<sup>94</sup> In 2003, a PVAMU student ran for a commissioner’s seat, and the county responded by first threatening to prosecute students for voter fraud and then curtailing early voting opportunities.<sup>95</sup> In the 2008 election cycle, Waller County

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90. *Id.* at 4–5; Fla. Stat. § 101.657(1)(a) (2019).

91. Supplemental Complaint, *supra* note 89.

92. Memorandum from Laurel M. Lee to Supervisors of Elections, Directive 2020-01 — Early Voting Sites on College and University Campuses and Fla. Stat. 101.768(1)(a) (Apr. 2, 2020).

93. *Symm v. United States*, 439 U.S. 1105, 1105 (1979); *United States v. Texas*, 445 F. Supp. 1245, 1251 (S.D. Tex. 1978).

94. Complaint at 18, *Allen v. Waller Cnty.*, No. 4:18-cv-3985 (S.D. Tex. 2018), citing *Veasey v. Perry*, 71 F. Supp. 3d 627, 635-36 (S.D. Tex. 2014).

95. *Id.* The threatened prosecutions were enjoined, and Waller County reversed the changes made to early vote hours after the NAACP filed suit.

also made several changes without seeking preclearance, including rejecting incomplete voter registrations, limiting voter registration drives, and then cutting all early vote sites in and near Prairie View.<sup>96</sup>

The demographics of Waller County, a predominantly white county with Prairie View, a predominantly Black school, and the decades-long fight over student voting present interesting questions about the intersection of race and age discrimination in voting. Before the ratification of the Twenty-Sixth Amendment, Waller County had almost no Black voters, and, upon ratification, the primarily Black student population at PVAMU became a significant political force in the County.<sup>97</sup> Texas election law mandated that the county's main voting site remain open for five hours every day for the two weeks of early voting, and other sites in the county provided early vote opportunities on multiple days during both weeks of early voting, including weekends and evenings.<sup>98</sup> In contrast, there were only three days of early voting on the PVAMU campus during the second week of early voting, without any weekend availability or evening hours.<sup>99</sup> Though the case survived a motion for summary judgment,<sup>100</sup> the District Court ultimately disagreed with the PVAMU students and found that there were ample hours allocated at convenient early voting locations.<sup>101</sup>

Following the interpretation of the Fifth Circuit in *Tex. Democratic Party v. Abbott*<sup>102</sup> (see *infra* Section V(D)(i)), the court noted that the Twenty-Sixth Amendment prohibits “adopting rules based on age that deny or abridge the rights voters already have. . . . This means that denial or abridgment of the right to vote on the basis of age must be measured against the nature of the right as it existed at the time the Amendment was proposed and ratified in 1971.”<sup>103</sup> Just as the right to vote in 1971 did not include a right to vote by mail, per *Tex. Democratic Party v. Abbott*, the right to vote in 1971 did not include a right to vote early, so adoption of an early vote plan deemed to be “less favorable to PVAMU students between the ages of eighteen and

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96. *Id.*; Vann R. Newkirk II & Adam Harris, Fighting for the Right to Vote in a Tiny Texas County, Atlantic (Nov. 1, 2018), <https://www.theatlantic.com/politics/archive/2018/11/prairie-view-m-students-file-suit-over-voting-hours/574600/>.

97. Complaint, *supra* note 94, at 2.

98. *Id.* at 10–13.

99. *Id.* at 12.

100. Allen v. Waller Cnty., 472 F. Supp. 3d. 351 (S.D. Tex. 2020).

101. Johnson v. Waller Cnty., No. 4:18-CV-03985, 2022 WL 873325, at \*3 (S.D. Tex. Mar. 24, 2022).

102. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

103. Johnson v. Waller Cnty., No. 4:18-CV-03985, 2022 WL 873325, at \*55 (S.D. Tex. Mar. 24, 2022).

twenty—can’t be said to have denied or abridged their right to vote under the Twenty-Sixth Amendment,” characterizing the availability of early voting as a mere convenience.<sup>104</sup> The court also addressed the “blended right” of Black students between the ages of eighteen and twenty-one who fall within two protected classes under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments, finding that the hybrid claim does not assert a violation of “a cognizable, independent right as pleaded and factually supported.”<sup>105</sup> The court concluded that precedent did not recognize this hybrid constitutional claim and that Black students have the full protections of the Amendments to address discrimination on the basis of *either* race or age.<sup>106</sup>

The court’s narrow reading of the protections of the Twenty-Sixth Amendment, as well as its unwillingness to entertain a hybrid claim to address the intersectional nature of the harms to Black college students, goes against the original intent of the Twenty-Sixth Amendment and presents additional difficulties in asserting a successful claim to address unequal voting opportunities for students and other young voters.

### B. Residency

Though residency was already a heavily-litigated topic during the first decade after the enactment of the Twenty-Sixth Amendment, states have continued to enact burdensome residency requirements for voter registration, and residency has continued to be a disputed issue in cases concerning student voting.

#### i. *New Hampshire*—League of Women Voters of N.H. v. Gardner

In July 2017, the New Hampshire legislature enacted S.B. 3, which amended New Hampshire’s voter registration laws and imposed requirements for proving a “verifiable action of domicile.”<sup>107</sup> Voters seeking to register more than 30 days before an election must present documentation proving domicile in the town or ward before being permitted to register, while voters seeking to register within 30 days of an election must either present proof of domicile when registering to vote or by mailing the proof within 10 days after the election, under the threat of civil and criminal penalties.<sup>108</sup> The New Hampshire Superior

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104. *Id.* at \*55–56.

105. *Id.* at \*56–58.

106. *Id.*

107. N.H. Democratic Party v. Sec’y of State, 262 A.3d 366, 369–70 (N.H. July 2, 2021).

108. *Id.* at 369–71.

Court struck down S.B. 3, and the Supreme Court of New Hampshire affirmed, concluding that the requirements imposed unreasonable burdens on the right to vote and that the State failed to demonstrate that the bill was “substantially related to an important governmental objective.”<sup>109</sup> Though this case was resolved on state constitutional law grounds, the analysis and implications may affect litigation regarding burdens on student voting more broadly.

ii. *Texas*—*Tex. State LULAC v. Elfant*

During the 2021 legislative session, Texas legislators passed a plethora of voter suppression laws, including S.B. 1111, which prohibits establishing residence “for the purpose of influencing the outcome of a certain election,” restricts voter registration for voters who do not live at an address full-time, and adds burdensome documentation requirements for voters who rely on post office boxes for their residences.<sup>110</sup> Texas State LULAC and Voto Latino challenged the law, which imposed vague and confusing restrictions on the voter registration process, and alleged violations of the First, Fourteenth, and Twenty-Sixth Amendments, pointing to the burdensome impact of the law on college students and young voters generally.<sup>111</sup> S.B. 1111 serves to restrict access for voters who change addresses, students who have temporarily moved to attend school, and homeless voters who use the P.O. boxes of churches and other organizations for voter registration.<sup>112</sup> Citing recent cases like *Tex. Democratic Party* as well as older cases like *Worden*, *Jolicoeur*, and *Walgren*, the complaint argues that the Twenty-Sixth Amendment protects young voters against election laws, practices, and procedures designed to deny or abridge the right to vote, which covers “onerous procedural requirements which effectively handicap” the right.<sup>113</sup> Litigation is ongoing. In September 2022, the District Court enjoined several residency requirements in S.B. 1111—including provisions prohibiting voters from registering to vote using a prior address after moving and preventing voters from registering to vote at an address where they did not live full time—for violating the First and Fourteenth Amendments, apply-

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109. *Id.* at 382.

110. Complaint for Declaratory and Injunctive Relief at 3, *Texas State LULAC v. Elfant*, No. 1:21-cv-546, 2022 WL 14803780 (W.D. Tex. Sept. 21, 2022).

111. *Id.* at 3–4.

112. *Id.* at 9–12.

113. *Id.* at 17.



ing an Anderson-Burdick analysis.<sup>114</sup> In October 2022, the Fifth Circuit reversed, finding that the plaintiffs lacked standing.<sup>115</sup>

### C. Voter ID

In addition to residency requirements, the imposition of onerous voter ID requirements has raised numerous Twenty-Sixth Amendment challenges in several states.

#### i. North Carolina—N.C. State Conf. of NAACP v. McCrory

One of the first contemporary Twenty-Sixth Amendment cases was a challenge brought against the North Carolina omnibus elections bill enacted in 2013, which, among other restrictive measures, created a strict photo ID requirement, shortened the availability of early voting, eliminated same-day voter registration, and eliminated pre-registration for sixteen- and seventeen-year-olds.<sup>116</sup> The Department of Justice, the North Carolina State Conference of the NAACP, the League of Women Voters of North Carolina, and several other organizations and individual plaintiffs challenged the law, raising claims under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments and under Section Two of the Voting Rights Act of 1965.<sup>117</sup>

The District Court rejected the Twenty-Sixth Amendment argument, noting first that the group of young voters who intervened did not bring their claims on behalf of a class but only as individual plaintiffs.<sup>118</sup> The court was skeptical that the Twenty-Sixth Amendment standard ought to follow Fifteenth Amendment jurisprudence and that it was intended to address the “removal of the voting conveniences challenged in this case.”<sup>119</sup> In any event, the court found that the plaintiffs failed to prove that the restrictions were enacted with a discriminatory purpose against young voters, noting that there were other plausible, “non-tenuous” reasons for excluding student IDs, removing pre-registration, etc.<sup>120</sup> The court further found that plaintiffs failed to

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114. Texas State Lulac v. Elfant, No. 1:21-CV-546-LY, 2022 WL 14803780, at \*8–13 (W.D. Tex. Sept. 21, 2022), rev'd and remanded, 52 F.4th 248 (5th Cir. 2022).

115. Texas State LULAC v. Elfant, 52 F.4th 248, 2022 WL 14782530 (5th Cir. 2022).

116. N.C. State Conf. of NAACP v. McCrory, 997 F. Supp. 2d 322, 336 (M.D.N.C. 2014), *aff'd in part, rev'd in part, and remanded sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014).

117. *Id.* at 334.

118. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 521 (M.D.N.C. 2016), *rev'd and remanded sub nom.*, 831 F.3d 204 (4th Cir. 2016).

119. *Id.* at 523.

120. *Id.* at 523–24.

prove that the law imposes a heavier burden on young voters, citing North Carolina's "ample alternative registration and voting mechanisms," leading it to conclude that young voters' right to vote had not been denied or abridged.<sup>121</sup>

On appeal, the Fourth Circuit struck down the bill in its entirety but limited its analysis to its effect on Black voters, concluding that the restrictions were enacted with racially discriminatory intent in violation of the Fourteenth Amendment and Section 2 of the VRA and that the purported justification of preventing voter fraud did not hold up.<sup>122</sup> The Supreme Court declined to review the case in 2017.<sup>123</sup>

ii. *Tennessee*—Nashville Student Org. Comm. v. Hargett

In 2015, Tennessee students and the Nashville Student Organizing Committee challenged the Tennessee voter ID law, which expressly excludes student identification cards issued by an institution of higher education.<sup>124</sup> Plaintiffs pointed to the increased difficulty for students to obtain non-driver photo identification cards due to the burdens of gathering the necessary documentation like birth certificates and the inaccessibility of driver's service centers for students without access to vehicles.<sup>125</sup> Plaintiffs also alleged that the legislative history of the voter ID law demonstrated that legislators intentionally excluded student IDs to decrease the sway of the youth vote and that the legislature had repeatedly enacted measures to make voting easier for the elderly, including allowing voters over sixty years old to vote absentee without a photo ID, while rejecting measures that would make voting more accessible for students and young voters.<sup>126</sup>

The District Court was skeptical about the claims and granted the Defendants' motion to dismiss.<sup>127</sup> The court found that, following *Crawford*,<sup>128</sup> the burden of obtaining a photo ID was not substantial enough to warrant a heightened level of scrutiny, so the Tennessee voter ID law did not constitute an abridgement or denial of the right to

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121. *Id.* at 525.

122. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214–15 (4th Cir. 2016).

123. *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1399–40 (2017). In a statement by Chief Justice Roberts regarding the denial of cert, he noted the "blizzard of filings over who is and who is not authorized to seek review," considering motions by the new Attorney General, the North Carolina General Assembly, and the Speaker and the President *pro tempore* of the Assembly.

124. *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 751 (M.D. Tenn. 2015).

125. *Id.* at 751–52.

126. *Id.*

127. *Id.* at 758.

128. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

vote under the Twenty-Sixth Amendment.<sup>129</sup> Furthermore, the court did not find that the law imposed a unique burden on students, who could obtain a state-issued license or ID card or U.S. passport—options available to everyone.<sup>130</sup> While allowing students to use their student IDs would make it easier, not allowing them to use their student ID cards did not impose a severe burden or otherwise abridge their right to vote, suggesting there was a difference between state actions that blocked young people from voting and state actions that simply excluded measures that would make it easier for young people to vote.<sup>131</sup>

*iii. Virginia—Lee v. Va. State Bd. of Elections*

The Fourth Circuit was similarly skeptical of the Twenty-Sixth Amendment claims raised in *Lee v. Va. Bd. of Elections*, a challenge to a Virginia statute (S.B. 1256) requiring that voters present a photo ID when voting or shortly thereafter.<sup>132</sup> The court expressed doubt that the Twenty-Sixth Amendment standard should follow the principles from Fifteenth Amendment jurisprudence, and, if it did follow a similar standard, plaintiffs had merely stated that young people are less likely to possess photo IDs and failed to demonstrate the legislature’s intent to discriminate on the basis of age.<sup>133</sup>

*iv. Wisconsin—One Wisconsin Inst., Inc. v. Thomsen, Luft v. Evers, and Andrew Goodman Found. v. Bostelmann*

Litigation over voter ID requirements in Wisconsin has been long and complicated. I limit my analysis to the challenges and iterations of specific challenges raising Twenty-Sixth Amendment claims. In May 2011, Wisconsin enacted 2011 Wis. Act 23, which imposed a voter ID requirement, reduced the window of time in which municipalities were permitted to offer in-person early voting, eliminated “corroboration” as a way to demonstrate residence for voter registration, mandated that any dorm lists provided to a municipal clerk to allow for the use of college IDs to prove residence for voter registration include a certification that the students are U.S. citizens, increased the in-state durational residency requirement, and restricted third-party voter re-

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129. *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d at 757.

130. *Id.*

131. *Id.* at 758.

132. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016).

133. *Id.* at 607. As part of the legislative history, a Virginia legislator also made a comment about President Obama focusing on the support of young voters, a piece of evidence the Fourth Circuit did not find persuasive.

gistration, among other changes.<sup>134</sup> From 2011 to 2014, Wisconsin enacted several additional restrictions on absentee voting, voter registration in high schools, voter registration broadly, in-person absentee voting, and documentary proof of residence for voter registration—in total eight laws that transformed Wisconsin’s election system.<sup>135</sup>

Advocacy groups and individual voters raised claims under the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments and Section 2 of the Voting Rights Act in *One Wisconsin Institute*.<sup>136</sup> While the District Court acknowledged that there was no controlling caselaw regarding the proper standard for Twenty-Sixth Amendment claims and that the *Anderson-Burdick* framework could be used to evaluate the burdens on young voters against the state’s justification for those burdens, it also recognized that it is “difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the franchise by the benefactors of that amendment,” citing *Walgren*.<sup>137</sup> The court then applied the *Arlington Heights* framework and considered the disparate impact of the voting restrictions on young voters, along with the evidence presented of anti-youth comments made by state legislators in enacting the measures.<sup>138</sup> It concluded that there wasn’t strong evidence of a disparate impact on young people and that the Republican majority in the Wisconsin legislature was motivated by partisan objectives, not discrimination on the basis of age.<sup>139</sup> The court then applied the *Anderson-Burdick* framework to the restrictions on the use of college IDs, finding that they served a legitimate interest in election integrity, defeating the claim of intentional discrimination.<sup>140</sup> Moreover, as the final nail in the coffin, the court characterized the ability to use college IDs, though severely restricted, as the extension of an additional privilege beyond the options generally available to all citizens.<sup>141</sup>

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134. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 906 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), and *aff’d in part, vacated in part, rev’d in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), and *aff’d in part, vacated in part, rev’d in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). See WIS. STAT. §§ 5.02(6m), 6.34(3)(a)(7).

135. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d at 906–07.

136. *Id.* at 902.

137. *Id.* at 925–26.

138. *Id.*

139. *Id.* at 926–27.

140. *Id.* at 927.

141. *Id.*

While the appeal of *One Wisconsin Institute* was pending before the Seventh Circuit, the Andrew Goodman Foundation and a student voter challenged the strict requirements on the use of student IDs for voting solely on Twenty-Sixth Amendment grounds.<sup>142</sup> In contrast with other forms of acceptable IDs, student IDs are only permitted if it contains the date of issuance, an expiration date not more than two years from the date of issuance, and the signature of the holder and can only be used if the student can provide additional proof that they are enrolled in school.<sup>143</sup> The complaint traced the history of the enactment of the student ID restrictions, highlighting the strategic targeting of young voters after the 2008 election and citing the statements of Republican legislators urging support for the bill on partisan grounds.<sup>144</sup> The complaint also pointed out procedural abnormalities, substantive deviations, and historical context as evidence of intent to suppress the youth vote and the huge decline in student voter turnout in 2016.<sup>145</sup> The District Court was not swayed and found the challenges to be similar to issues already raised in *One Wisconsin Institute*, granting a stay in the case until the Seventh Circuit ruled on *One Wisconsin Institute*.<sup>146</sup> The court declined to grant a preliminary injunction, though it acknowledged that the plaintiffs offered data on the impact of the voter ID restrictions from the 2016 elections that had not been previously available.<sup>147</sup> The Seventh Circuit ultimately agreed with the District Court's interpretation of the Twenty-Sixth Amendment standard and analysis in *One Wisconsin Institute*.<sup>148</sup>

v. *Michigan*—Coll. Democrats at the Univ. of Mich. v. Johnson

In 2018, Michigan college students challenged two requirements that made it more difficult for college students to vote: 1) requiring voters who registered by mail or through a third-party voter registration drive to vote in-person their first time, and 2) requiring a voter's driver's license address to exactly match their voter registration ad-

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142. First Amended Complaint for Declaratory and Injunctive Relief at 4, Andrew Goodman Foundation v. Bostelmann, No. 19-cv-955-wmc; 2020 WL564571 (W.D. Wis. 2020).

143. *Id.* at 8.

144. *Id.* at 9–10.

145. *Id.* at 10–12.

146. Andrew Goodman Found. v. Bostelmann, No. 19-cv-955-wmc, 2020 WL 564571, at \*2 (W.D. Wis. Feb. 5, 2020).

147. *Id.* at \*3.

148. Luft v. Evers, 963 F.3d 665, 673 (7th Cir. 2020). Note that the provision allowing student ID cards for voting only with additional proof of current enrollment was found unconstitutional on Equal Protection Clause grounds.

dress.<sup>149</sup> Applying an *Arlington Heights* analysis for its Twenty-Sixth Amendment claim, the complaint alleged that the requirements targeted young voters, were unexplainable on grounds other than age discrimination, and, as reflected in its legislative history, were enacted with the intent to suppress the youth vote.<sup>150</sup> In 2019, the Secretary of State invalidated the in-person voting requirement and agreed to implement a major educational effort to help students register to vote at their campus addresses and to address confusion around the address match requirement.<sup>151</sup>

#### D. Absentee Voting During the COVID-19 Pandemic

In the 2020 election cycle, the COVID-19 pandemic had just begun, and lockdowns, social distancing requirements, and the unavailability of veteran poll workers—a group largely comprised of senior citizens who are more vulnerable to the virus—threatened to upend elections. States scrambled to adapt election procedures in light of the unique circumstances of running an election in the middle of a deadly pandemic.<sup>152</sup> For the 2020 general election, 29 states and D.C. enacted 79 bills to expand voting access. Different states took different approaches to expand access, and measures included automatically mailing all voters an absentee ballot, mailing all voters an absentee ballot application, expanding eligibility for voting by mail, enacting notice-and-cure procedures to help voters remedy vote-by-mail mistakes, providing prepaid postage for vote-by-mail ballots, extending ballot-receipt deadlines, and permitting the preprocessing of mail ballots.<sup>153</sup>

As these election procedure measures suggest, absentee voting was a crucial element of voting during the 2020 election cycle.<sup>154</sup>

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149. MICH. COMP. LAWS ANN. §§ 257.307(1)(c), 257.315(1), 168.509(2) (2019).

150. Complaint for Declaratory and Injunctive Relief, Coll. Democrats at the Univ. of Mich. v. Johnson, No. 3:18-cv-12722-RHC-SDD, 2018 WL 4207560 (E.D. Mich. 2019).

151. Memorandum from Att’y Gen. Dana Nessel to Marc Elias at 1-2, Coll. Democrats at the Univ. of Michigan, 2018 WL 4207560 (June 5, 2019). See also Amy Gardner, *Michigan Agrees to Make It Easier for College Students to Vote*, WASH. POST (June 6, 2019), [https://www.washingtonpost.com/politics/michigan-agrees-to-make-it-easier-for-college-students-to-vote/2019/06/05/5a5a24c8-87c3-11e9-a870-b9c411dc4312\\_story.html](https://www.washingtonpost.com/politics/michigan-agrees-to-make-it-easier-for-college-students-to-vote/2019/06/05/5a5a24c8-87c3-11e9-a870-b9c411dc4312_story.html).

152. See Nathaniel Persily, Charles Stewart III, Chelsey Davidson & Zahavah Levine, *The Virus and the Vote: Administering the 2020 Election in a Pandemic*, STANFORD-MIT HEALTHY ELECTIONS PROJECT (July 1, 2021), <https://paccenter.stanford.edu/wp-content/uploads/2021/06/The-Virus-And-The-Vote.pdf>, at 8.

153. *Id.* at 8.

154. Wendy R. Weiser, Eliza Sweren-Becker, Dominique Erney & Anne Glatz, *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. (Sept. 17, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed->

However, seven states—Indiana, Louisiana, Mississippi, South Carolina, and Texas—limited vote-by-mail opportunities to elderly voters.<sup>155</sup> During a pandemic in which waiting in line and contact with others pose a serious risk, limiting absentee voting to a group likely to vote Republican may have been problematic and consequential.<sup>156</sup> Voters and organizations brought suit in several states, alleging that voters under the age of sixty-five (or who otherwise did not fall into the elderly voter category to take advantage of absentee voting) faced an unconstitutional burden on their right to vote on account of their age during the pandemic in violation of the Twenty-Sixth Amendment.<sup>157</sup> These Twenty-Sixth Amendment arguments were largely unsuccessful, so I will focus on the cases brought in Texas and Indiana, the reasoning for which many of the other cases followed.

*i. Texas—Tex. Democratic Party v. Abbott*

Texas election law provides for early voting by mail only for voters who anticipate being absent from their county of residence, are sick or disabled, are sixty-five or more years of age, or are confined to jail.<sup>158</sup> Texas state officials adopted several emergency measures to address voting during the 2020 election cycle after the COVID-19 pandemic began, including declaring a state of disaster, postponing the May primary election until July, extending the period for early voting for the July primary, and issuing guidance concerning health and safety measures for in-person voting and early voting.<sup>159</sup> In March 2020, the Texas Democratic Party, its Chairman, and individual voters sought a declaration that the disability provision of the absentee voting statute could include “any eligible voter, regardless of age and physical condition . . . if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or dis-

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2020. See also Drew Desilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. (Oct. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread/>.

155. Indiana, Louisiana, Mississippi, South Carolina, and Texas permitted voters 65 years old and older to vote by mail, while Tennessee restricted it to voters 60 years old and older and Kentucky limits to voters of “advance age.” Mark Joseph Stern, *Seven States Restrict Mail-In Voting on the Basis of Age. That’s Unconstitutional*, SLATE (Apr. 29, 2020), <https://slate.com/news-and-politics/2020/04/26th-amendment-texas-absentee-ballots.html>.

156. *Id.*

157. See, e.g., Complaint at 18–19, *Tex. Democratic Party v. Abbott*, No. 5:20-cv-00438-fb (W.D. Tex. Apr. 29, 2020).

158. TEX. ELEC. CODE §§ 82.001–.004.

159. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

ease.”<sup>160</sup> While the case was pending, Texas Attorney General Ken Paxton sent a letter to Texas judges and election officials clarifying that “[b]ased on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail.”<sup>161</sup> In May, the Supreme Court of Texas held that the existence of COVID-19 by itself was not a ground for voting by mail and did not create the “physical condition” qualifying eligibility within the meaning of the statute, though a voter could “take into consideration aspects of his health and his health history” in deciding to apply to vote by mail.<sup>162</sup>

While the state court case was pending, a federal lawsuit was filed, alleging that the restriction of absentee voting to voters aged sixty-five and older violated the First, Fifteenth, and Twenty-Sixth Amendments and on vagueness grounds.<sup>163</sup> The district court issued a preliminary injunction, prohibiting election officials from issuing guidance or taking action to prevent eligible voters who wanted to vote by mail due to COVID-19.<sup>164</sup> The court applied strict scrutiny to the Twenty-Sixth Amendment claim, finding that voters under the age of 65 bore a disproportionate burden due to the age restrictions.<sup>165</sup> In fact, the court held that neither a legitimate interest nor a rational basis existed for the age-based restriction in the context of the pandemic.<sup>166</sup>

On appeal, the Fifth Circuit confirmed as an initial matter that the Twenty-Sixth Amendment confers “an individual right to be free from the denial or abridgement of the right to vote on account of age.”<sup>167</sup> The court understood the Twenty-Sixth Amendment as “a prohibition against adopting rules based on age that deny or abridge the rights voters already have.”<sup>168</sup> Following the interpretation of the Second Amendment in *District of Columbia v. Heller*, which examined the terms of the Amendment as understood at the time of ratification, the Fifth Circuit established the baseline by examining the right to vote at the time of the ratification of the Twenty-Sixth Amendment.<sup>169</sup> In 1971, the right to vote did not include a right to vote by mail; rather,

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160. *Id.*

161. *Id.*

162. *In re Texas*, 602 S.W.3d 549, 560 (Tex. 2020).

163. *Tex. Democratic Party v. Abbott*, 978 F.3d at 175.

164. *Id.*

165. *Id.*

166. *Id.* at 175–76

167. *Id.* at 184.

168. *Id.* at 189.

169. *Id.* at 184–85.



voting absentee was the exception.<sup>170</sup> The Fifth Circuit rejected the Twenty-Sixth Amendment claim, holding that an election law abridges a person's right to vote only if it makes voting more difficult for that person relative to the baseline set to the right to vote in 1971.<sup>171</sup> Here, the law simply made it easier for another class of voters (voters sixty-five years of age and older) to vote, which did not amount to an abridgement.<sup>172</sup>

The Fifth Circuit also addressed the issue of the proper level of scrutiny. A June 2020 motions panel, which resolved motions in the appeal before the final opinion and stayed the district court's preliminary injunction, followed *McDonald*<sup>173</sup> and applied rational basis review, characterizing "what is at stake here is not the right to vote but a claimed right to receive absentee ballots."<sup>174</sup> The Fifth Circuit, however, was uncertain whether *McDonald* should apply and clarified that the motions panel opinion regarding *McDonald* and the application of rational basis was not to be used as precedent.<sup>175</sup> Because the Fifth Circuit had no denial or abridgement to scrutinize, it could therefore not decide on the issue of the proper level of scrutiny.<sup>176</sup> However, the court suggested that possibilities for a Twenty-Sixth Amendment analysis included rational basis and *Anderson-Burdick* balancing but unlikely strict scrutiny, which is what the district court initially applied.<sup>177</sup>

One final interesting issue raised in the motions panel was the question of leveling up or leveling down as the remedy if there had been a violation. In the concurring opinion, Judge Ho explains:

[E]qual treatment can be achieved either by withdrawal of benefits from the favored class or by extension of benefits to the excluded class. . . . Under Texas law, in-person voting is the rule, and mail-in voting is the exception. . . . So if Plaintiffs are entitled to relief, it is presumably the "leveling-down" injunction noted by Texas—an injunction "requiring all to vote in person," not one "extend[ing] mail-in voting to those under 65."<sup>178</sup>

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170. *Id.* at 188.

171. *Id.* at 190–91.

172. *Id.*

173. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969).

174. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 408–09 (5th Cir. 2020) (citing *McDonald*, 394 U.S. at 807) (internal quotations and punctuation omitted).

175. *Tex. Democratic Party v. Abbott*, 978 F.3d at 193–94.

176. *Id.*

177. *Id.*

178. *Tex. Democratic Party v. Abbott*, 961 F.3d at 416–17 (Ho, J., concurring) (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017)) (internal quotations omitted).

The issue of leveling up or leveling down presents further challenges that litigants will need to overcome if the Twenty-Sixth Amendment is to be used to protect and enhance voting rights.

In June 2020, the Supreme Court denied the emergency application to vacate the stay of the injunction granted by the Fifth Circuit panel.<sup>179</sup> While there was no elaboration in the opinion denying the application, Justice Sotomayor commented that “[t]his application raises weighty but seemingly novel questions regarding the Twenty-Sixth Amendment. . . . I hope that the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election.”<sup>180</sup> Though the Twenty-Sixth Amendment framework is far from settled, this statement suggests an appetite to entertain challenges under the Twenty-Sixth Amendment and to further explore the scope of its protections.

ii. *Indiana—Tully v. Okeson*

The Seventh Circuit addressed a similar set of issues in Indiana’s election statute making absentee voting available only to several statutorily enumerated categories, including elderly voters, defined as sixty-five years of age and older.<sup>181</sup> During the June 2020 primary, the Indiana Election Commission made absentee voting available to all voters to address the difficulties of voting during the COVID-19 pandemic but declined to make it available during the general election in November, instead relying on an expansion of early voting and implementing safety guidelines and protective equipment for election day.<sup>182</sup> The Seventh Circuit found *McDonald* directly on point and characterized the Indiana age-based absentee voting law as “merely affect[ing] a privilege to vote by mail” rather than abridging a right to vote protected by the Twenty-Sixth Amendment.<sup>183</sup> The statute does not affect the ability of voters under sixty-five to exercise the fundamental right to vote, though the pandemic is “potentially guilty.”<sup>184</sup> Because the Twenty-Sixth Amendment protects only the right to vote and not the right to an absentee ballot, the court denied the claim.<sup>185</sup>

Furthermore, the Seventh Circuit cast doubt on whether the Fifteenth, Nineteenth, and Twenty-Fourth Amendments would provide

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179. *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).

180. *Id.*

181. *Tully v. Okeson*, 977 F.3d 608, 612 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2798 (2021). *See* IND. CODE ANN. § 3-11-10-24 (West 2021).

182. *Tully*, 977 F.3d at 612.

183. *Id.* at 613.

184. *Id.* at 614

185. *Id.*

protection against laws that would similarly restrict the ability of Black voters, women, or the poor to vote by mail, concluding that such laws would be subject to heightened scrutiny from the Fourteenth Amendment's Equal Protection Clause and its treatment of suspect classes.<sup>186</sup> The protection would not, however, stem from the Fifteenth, Nineteenth, or Twenty-Fourth Amendments and their protection of the right to vote, which does not extend to absentee voting.<sup>187</sup>

### *E. Political Speech on Campus*

In 2021, the Montana legislature passed S.B. 319, which, among other things, prohibits political committees, including student organizations, from directing, coordinating, managing, and conducting “voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts” in public college campus buildings like dorms, dining halls, and athletic facilities.<sup>188</sup> The Montana Democratic Party, Montanans for Tester, and an individual voter challenged the law as an unconstitutional effort to limit the organizing efforts and political speech of college students in violation of the First, Fourteenth, and Twenty-Sixth Amendments.<sup>189</sup> The complaint alleges that the ban targets college-age voters with “surgical precision,” limits political speech on college campuses to prevent political committees from reaching young voters, and facially discriminates on the basis of age in abridging the right to vote in violation of the Twenty-Sixth Amendment.<sup>190</sup>

While this case presented an interesting and novel application of the Twenty-Sixth Amendment, it was ultimately not resolved on Twenty-Sixth Amendment grounds. Rather, a different challenge to S.B. 319 alleged that the law violated the First Amendment and the Montana Constitution, which requires that a bill contain only one subject and prohibits the legislature from altering or amending a bill so much during the legislative process where the original purpose is changed.<sup>191</sup> The court agreed, finding that S.B. 319 was originally defined as a campaign finance bill, which evolved as legislators slipped in amendments targeting voter registration activities on campus and judicial campaign contributions at the last minute after a sixteen-min-

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186. *Id.*

187. *Id.*

188. S.B. 319, 67th Leg., Reg. Sess. § 21(1) (Mont. 2021).

189. Complaint at 4, Mont. Democratic Party v. Jacobsen, No. 9:21-cv-00119-dwm (D. Mont. Oct. 12, 2021).

190. *Id.* at 22.

191. Order on Motion for Summary Judgment at 5, Forward Mont. v. Montana, No. ADV-2021-611 (Mont. 1st Jud. Dist. Ct. Feb. 3, 2022).

ute hearing that was closed to the public.<sup>192</sup> The ban on voter registration and education activities on public college campuses was therefore invalid and permanently enjoined.<sup>193</sup>

## VI.

### TAKEAWAYS AND RECOMMENDATIONS

#### A. *Litigating under the Twenty-Sixth Amendment*

While courts have expressed uncertainty and disagreement about the proper framework under which to evaluate Twenty-Sixth Amendment claims, many have rejected the application of the *Anderson-Burdick* framework and found that the Twenty-Sixth Amendment provides additional protections beyond the guarantees of the Fourteenth Amendment. Many courts have instead entertained Twenty-Sixth Amendment arguments under an *Arlington Heights* intentional discrimination standard, citing the close alignment of its language with that of the Fifteenth Amendment.<sup>194</sup> As the court in *League of Women Voters of Fla. v. Detzner* recognized, there has been an emerging consensus among courts applying the *Arlington Heights* standard for Twenty-Sixth Amendment claims.<sup>195</sup>

The five-factor *Arlington Heights* inquiry into whether a law was enacted or a decision was made with a discriminatory purpose includes “(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body.”<sup>196</sup> A Twenty-Sixth Amendment claim would be stronger in light of evidence that legislators targeted young voters or college students and that the burden was experienced very distinctly by young voters.

Following the *Arlington Heights* analysis in *League of Women Voters of Fla. v. Detzner* as a roadmap, a successful Twenty-Sixth Amendment claim will likely need to show that the voting restriction

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192. *Id.* at 2–3, 9.

193. *Id.* at 11.

194. See *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016). *But see* N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 523 (M.D.N.C. 2016); *Lee v. Va. State Bd. of Elections*, 843 F.3d at 607; *Tex. Democratic Party*, 978 F.3d at 193–94 (expressing skepticism that the Twenty-Sixth Amendment standard should follow Fifteenth Amendment jurisprudence).

195. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d at 1221.

196. *Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (citing *Arlington Heights*, 429 U.S. at 267–68).

is “unexplainable on grounds other than age because it bears so heavily on younger voters than all other voters” and that the justifications for the restriction “reek of pretext.”<sup>197</sup> A successful claim might demonstrate that the targeting of young voters or college students is “unambiguous” and its impacts are “lopsided.”<sup>198</sup> While there might be such a stark pattern that the impact may be determinative on its own, a Twenty-Sixth Amendment claim is more likely to be successful if there’s circumstantial or direct evidence of intent.<sup>199</sup> Other traditional *Arlington Heights* factors are also informative to the inquiry, including the disproportionate impact on young voters, the historical background and other attempts to restrict voting by young voters or college students, the sequence of events leading up to the specific restriction, departures from normal legislative procedures, and statements by decisionmakers focused on young voters.<sup>200</sup>

While this formulation provides a promising tool to protect the youth vote, recent cases have also highlighted several challenges to litigating a successful Twenty-Sixth Amendment claim, including 1) framing the contested voting law or regulation as a privilege vs. abridgement; 2) arguing for the remedy of leveling up, rather than leveling down; and 3) the difficulty of separating partisanship motivations from age-based motivations.

*i. Privilege vs. abridgement*

The interpretation of the protections of the Twenty-Sixth Amendment espoused in *Tex. Democratic Party v. Abbott*<sup>201</sup> and *Johnson v. Waller Cnty.*<sup>202</sup> seems to be part of a trend of originalist interpretations of voting rights. The Fifth Circuit in *Tex. Democratic Party v. Abbott* pinned the baseline for Twenty-Sixth Amendment guarantees to the right to vote as it existed in 1971, the time of ratification.<sup>203</sup> Following that reasoning, neither vote-by-mail nor early voting are guaranteed rights under the Twenty-Sixth Amendment, and plans, laws, or regulations that disproportionately affect young voters can’t be said to deny or abridge their right to vote under the Twenty-Sixth

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197. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d at 1222.

198. *Id.*

199. *Id.*

200. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977).

201. *Tex. Democratic Party v. Abbott*, 978 F.3d at 184–88.

202. *Johnson v. Waller Cnty.*, No. 4:18-CV-03985, 2022 WL 873325, at \*56 (S.D. Tex. 2022).

203. *Tex. Democratic Party v. Abbott*, 978 F.3d at 184–91.

Amendment.<sup>204</sup> This interpretation is inconsistent with the text, intent, legislative history, and early cases addressing the scope of the Twenty-Sixth Amendment. For example, the New Jersey Supreme Court in *Worden* held that the goal of the Twenty-Sixth Amendment was “not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers.”<sup>205</sup> Furthermore, the Senate Report concluded that “forcing 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. . . . [which is] inconsistent with the purpose of the Voting Rights Act,” (the statute that preceded the Twenty-Sixth Amendment) “which sought to encourage greater political participation on the part of the young.”<sup>206</sup>

Unfortunately, this narrow interpretation of the protections guaranteed by the Twenty-Sixth Amendment seems to be an extension of the idea that developments in voting opportunities are mere conveniences, a proposition that has been espoused in cases concerning the availability of early vote opportunities,<sup>207</sup> the acceptance of student IDs as voter IDs,<sup>208</sup> same-day voter registration,<sup>209</sup> and voting by mail during a pandemic.<sup>210</sup> Furthermore, this interpretation seems to be in line with an increasingly-adopted originalist approach to defining voting rights and evaluating voting restrictions more broadly. In *Brnovich v. DNC*, a 2021 challenge to Arizona’s requirement that out-of-precinct ballots provisionally cast by in-person voters be discarded and a prohibition on third-party ballot collection, the Supreme Court found that “mere inconvenience cannot be enough to demonstrate a violation of §2 [of the Voting Rights Act].”<sup>211</sup> In the opinion, Justice Alito considered standard voting practices in 1982, when Section 2 of the VRA

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204. *Id.* See also *Johnson v. Waller Cnty.*, No. 4:18-CV-03985, 2022 WL 873325, at \*55–56 (finding that although the schedule of early voting in the 2018 election was “less favorable to PVAMU students between the ages of eighteen and twenty,” the court found the voters were not denied their rights to vote under the Twenty-Sixth Amendment).

205. *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 243, 243 (1972).

206. S. REP. NO. 92-26, at 14 (1971).

207. *Johnson v. Waller Cnty.*, No. 4:18-CV-03985, 2022 WL 873325, at \*55–56.

208. See *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 523–24 (M.D.N.C. 2016); *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015).

209. *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d at 523–24.

210. *Tex. Democratic Party*, 978 F.3d at 190–91.

211. *Brnovich v. DNC*, 141 S. Ct. 2321, 2338 (2021).

was amended, as a benchmark for assessing whether voting restrictions should be perceived as burdens and reasoned that, in 1982, voting primarily happened in person on election day, with absentee ballots permitted only in narrow instances.<sup>212</sup> While he did not go so far as to require full adherence to the 1982 benchmark, he found the inquiry useful in determining whether a challenged rule has a “long pedigree or is in widespread use.”<sup>213</sup> The reasoning espoused in *Brnovich*, though focused on Section 2 of the VRA rather than the Twenty-Sixth Amendment, highlights the importance of framing challenged voting restrictions as a denial or abridgement of a benchmarked right to vote, ideally one that has existed with a long pedigree or has been in widespread use. Otherwise, it might be characterized as a mere convenience.

ii. *Leveling up vs. leveling down*

Related to the challenge of framing a voting regulation as a privilege vs. abridgement is the question raised by Judge Ho in a concurring opinion in *Tex. Democratic Party v. Abbott*.<sup>214</sup> If in-person voting is characterized as the rule, with vote-by-mail considered the exception, Judge Ho was concerned that the right remedy would mean taking away vote-by-mail privileges for all voters.<sup>215</sup> This level-up vs. level-down question was first raised in *Sessions v. Morales-Santana*.<sup>216</sup> The case addressed a claim of derivative citizenship, for which different continuous physical presence requirements applied for children born of unwed mothers and children born of unwed fathers.<sup>217</sup> Though the Supreme Court found an equal protection violation, the appropriate remedy was to apply the more stringent requirement across the board rather than extend the more generous requirement.<sup>218</sup>

However, the question of leveling up vs. leveling down is not always a contentious issue in voting rights cases, and many courts do not seriously consider taking away voting privileges for a particular group as the proper remedy for the exclusion of other groups. In 2012, Ohio, through a series of laws, a referendum, and directives, sought to eliminate early voting during the three days just before election day

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212. *Id.* at 2338–39.

213. *Id.* at 2339.

214. *Tex. Democratic Party*, 961 F.3d at 416–17 (Ho, J., concurring).

215. *Id.*

216. *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

217. *Id.* at 1698.

218. *Id.* at 1700–01.

but made an exception for members of the military. The Sixth Circuit upheld the preliminary injunction in *Obama for Am. v. Husted*, prohibiting election officials from enforcing the statute on Equal Protection grounds and finding that “where the State has authorized in-person early voting through the Monday before Election Day for all voters, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>219</sup> The Supreme Court let stand the preliminary injunction without any noted dissents,<sup>220</sup> and a permanent injunction was later issued, requiring the Ohio Secretary of State to set uniform in-person early vote hours for all eligible voters during the three days before election day.<sup>221</sup> While the Sixth Circuit commended Ohio’s commitment to providing early vote opportunities for service members and their families and recognized the unique circumstances members of the military may face—justifying statutes like UOCAVA, the MOVE Act, and the Uniformed Services Employment and Reemployment Act—the court found that Ohio did not provide a satisfactory justification to prevent non-military voters from accessing the same opportunities provided to military voters.<sup>222</sup> In their reasoning, the District Court and Sixth Circuit did not even consider the possibility of the remedy of leveling down access to early voting for military voters.

*iii. Age-based vs. partisan motivations*

Furthermore, the overlap between voting restrictions with age-based motivations and voting restrictions with partisan motivations may present further complications. This has been an issue in the racial and partisan gerrymandering context, where partisan gerrymandering has been determined to be non-justiciable under the federal Constitution<sup>223</sup> and partisan motivation has been used and accepted as a successful defense to claims of racial gerrymandering.<sup>224</sup> Given the “yawning age gap in voter support”—with voters under thirty favoring Joe Biden by 24 percentage points in 2020 (Biden 59%, Trump

219. *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio), *aff’d*, 697 F.3d 423 (6th Cir. 2012) (internal quotations omitted).

220. *Husted v. Obama for Am.*, 568 U.S. 970 (2012).

221. *Obama for Am. v. Husted*, No. 2:12-CV-636, 2014 WL 2611316, at \*5 (S.D. Ohio June 11, 2014).

222. *Obama for Am. v. Husted*, 697 F.3d 423, 434–35 (6th Cir. 2012).

223. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

224. *See Easley v. Cromartie*, 532 U.S. 234 (2001); *Cooper v. Harris*, 137 S. Ct. 1455 (2017).



35%)<sup>225</sup> and favoring Democratic control of Congress by at least 12 points (Democrats 40%, Republicans 28%, and unsure 32%)<sup>226</sup>—Twenty-Sixth Amendment claims may similarly run into challenges where partisan objectives are used as a defense. In fact, in *One Wisconsin Institute*, the court concluded that the Republican-led legislature in Wisconsin enacted the election restrictions at issue based on partisan objectives rather than for age-motivated reasons, finding the Twenty-Sixth Amendment inapplicable.<sup>227</sup>

While the Twenty-Sixth Amendment has the potential to safeguard the youth vote, there are substantial challenges that need to be overcome for a successful claim, notably framing the issue as an abridgement vs. privilege, arguing for leveling up rather than leveling down, and distinguishing age-based motivations from partisan motivations.

#### B. *Legislation to Fulfill the Promise of the Twenty-Sixth Amendment*

In addition to novel litigation under the Twenty-Sixth Amendment, several pieces of proposed legislation seek to bolster the protections of the Twenty-Sixth Amendment or otherwise guarantee voting opportunities that would promote the youth vote.

One prominent example is the Protect the Youth Vote Act, which Congressman Chris Pappas introduced in 2020 and then again in 2021, alongside Representatives Joe Neguse, Ruben Gallego, Grace Meng, and Stephanie Murphy.<sup>228</sup> Among other provisions, the Protect the Youth Vote Act seeks to explicitly define violations of the Twenty-Sixth Amendment, allow voters or the Attorney General to receive preventative relief, and increase transparency and public notice for

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225. Ruth Igielnik, Scott Keeter & Hannah Hartig, *Behind Biden's 2020 Victory*, PEW RSCH. CTR. (June 30, 2021), <https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/>.

226. *When Narrowed to Likely Voters, the Margin for Democrats Widens to 21 Points*, Harvard Youth Poll, HARV. KENNEDY SCH. INST. OF POLS. (Apr. 25, 2022), <https://iop.harvard.edu/youth-poll/spring-2022-harvard-youth-poll>.

227. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926–27 (W.D. Wisc. 2016), *aff'd in part, vacated in part, rev'd in part*, *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

228. Press Release, Rep. Chris Pappas, Ahead of 50th Anniversary of 26th Amendment, Pappas Calls for Action to Protect Youth Voting Rights, (June 30, 2021), <https://pappas.house.gov/media/press-releases/ahead-50th-anniversary-26th-amendment-pappas-calls-action-protect-youth-voting> [<https://perma.cc/6VRN-3WX8>].

voting changes that might present potential violations of the Twenty-Sixth Amendment.<sup>229</sup>

Furthermore, H.R. 1, the For the People Act, would also strengthen the protections of the Twenty-Sixth Amendment by increasing opportunities for online voter registration, absentee ballots, campus voting education, rights restoration, and pre-registration.<sup>230</sup> Given the challenges associated with litigating Twenty-Sixth Amendment claims, legislation either bolstering the guarantees or defining violations of the Amendment could play an important role in fulfilling the promise of the Twenty-Sixth Amendment.

Legislators seeking to provide protections for young voters may need to be wary of the limitations on Congress's power to legislate with a broader interpretation of an Amendment than that determined by the Supreme Court. Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>231</sup> The enforcement language provision of the Twenty-Sixth Amendment is very similar and provides that "Congress shall have the power to enforce this article by appropriate legislation."<sup>232</sup> The Supreme Court has held in several cases that Congress cannot use its enforcement power—as provided in Section Five of the Fourteenth Amendment—to create new rights or to expand the scope of those rights beyond the Supreme Court's interpretation, and laws seeking to prevent or remedy the violation of rights as recognized by the Supreme Court must be congruent and proportional to the injury.<sup>233</sup> In *Oregon v. Mitchell*, a challenge to the statute preceding the Twenty-Sixth Amendment, the Supreme Court found that Congress lacked enforcement power under Section Five of the Fourteenth Amendment to compel states to allow eighteen- to twenty-year-olds to vote because the denial of the right was not a violation of the Equal Protection Clause as interpreted by the Court.<sup>234</sup> Indeed, "[a]s broad as the congressional enforcement power is, it is not unlimited."<sup>235</sup> Legislation seeking to safeguard the youth vote under the congressional enforcement power found in the Twenty-Sixth

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229. *Id.* See also Protect the Youth Vote Act of 2020, H.R. 8053, 116th Cong. (2020).

230. For the People Act of 2021, H.R. 1, 117th Cong. (2021).

231. U.S. CONST. amend. XIV, § 5.

232. U.S. CONST. amend. XXVI, § 2.

233. See *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *U.S. v. Morrison*, 529 U.S. 598 (2000); *Shelby County v. Holder*, 570 U.S. 529 (2013).

234. *Oregon*, 400 U.S. at 130.

235. *Id.* at 128.

Amendment may run into similar challenges, and it may be helpful to first develop a clear understanding of the scope of the Twenty-Sixth Amendment as interpreted by the Supreme Court.

#### CONCLUSION

As the 2020 election illustrated, guaranteeing the electoral participation of young voters can have dramatic, transformative impacts on election results and U.S. politics. The Twenty-Sixth Amendment may serve as one avenue to protect the youth vote. Though courts have been uncertain in their interpretation of the Twenty-Sixth Amendment, some claims have been successful by following the *Arlington Heights* framework for intentional discrimination. Though some recent cases have raised several potential challenges to bringing a successful Twenty-Sixth Amendment claim—in particular framing a voting restriction as an abridgement rather than as a privilege or mere convenience, arguing for a leveling up remedy rather than a leveling down remedy if a violation is found, and the difficulty of separating partisan motivations from age-based motivations—the Twenty-Sixth Amendment is still open for interpretation and has the potential to be an important, powerful tool in helping to safeguard youth voting rights.

