

**VOTING RIGHTS FOR MILLENNIALS:
BREATHING NEW LIFE INTO THE TWENTY-SIXTH
AMENDMENT**

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INTRODUCTION

Throughout the seemingly endless 2016 presidential campaign, the media breathlessly—if intermittently—debated the role of young voters. In the Democratic primaries and caucuses, fervent support from “millennials”¹ sustained septuagenarian Senator Bernie Sanders’s candidacy far beyond anyone’s expectations.² Heading into the general election, pundits argued heatedly whether Democratic nominee Hillary Clinton could count on this same youthful support, which had been an

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1. The Census Bureau has not defined this generation. However, in popular parlance, “millennials” has come to mean the group of Americans born between 1982 and 2004. See Philip Bump, *Here Is When Each Generation Begins and Ends, According to Facts*, ATLANTIC (Mar. 25, 2014), <http://www.theatlantic.com/national/archive/2014/03/here-is-when-each-generation-begins-and-ends-according-to-facts/359589/>.

2. See *Young v Old Votes for Bernie and Hillary in the 2016 Primaries*, ECONOMIST (Apr. 27, 2016), <http://www.economist.com/blogs/graphicdetail/2016/04/daily-chart-19>; see also Aaron Zitner et al., *How Clinton Won*, WALL STREET J. (June 7, 2016, 9:00 AM), <http://graphics.wsj.com/elections/2016/how-clinton-won/>.

important element of Barack Obama's 2008 and 2012 victories.³ Would young voters turn out for Clinton? Or would significant percentages of young voters cast ballots for third-party candidates, vote for Republican nominee Donald Trump, or just stay home?⁴

For all of the drama, however, young voters behaved fairly predictably in 2016. Among eighteen- to twenty-nine-year-old citizens, turnout was about fifty percent, approximately the same as in the 2012 presidential election.⁵ As usual, this was a lower percentage than among the general voting age eligible population, sixty percent of whom turned out to vote.⁶ Also as expected, young voters supported Hillary Clinton much more strongly than did their older counterparts. Fifty-five percent of voters aged eighteen- to twenty-nine cast ballots for Hillary Clinton and thirty-five percent voted for Donald Trump.⁷ Nationally, Hillary Clinton won forty-eight percent of the popular vote, while Donald Trump earned forty-six percent.⁸

These broad generalizations conceal many complexities, of course, and as political scientists and others delve further into the election data we can expect to see much more detailed analyses. For example, while young voters have consistently broken for the Democratic presidential candidate since 1992,⁹ the generation gap has been significantly more marked in the last three presidential elections.¹⁰ Young voters' identification with one of the two main political parties continues to

3. See *How Groups Voted in 2012*, ROPER CTR. FOR PUB. OPINION RES., <https://ropcenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2012/> (last visited Mar. 26, 2017).

4. See, e.g., Harry Enten, *Young Millennials Love Obama, but Clinton Is Struggling to Win Them Over*, FIVETHIRTYEIGHT (Sept. 12, 2016, 6:30 AM), <http://fivethirtyeight.com/features/young-millennials-love-obama-but-clinton-is-struggling-to-win-them-over/>; see also Jeremy W. Peters & Yamiche Alcindor, *Hillary Clinton Struggles to Win Back Young Voters from Third Parties*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/us/politics/hillary-clinton-millennials-third-party.html>.

5. CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *YOUNG VOTERS IN THE 2016 GENERAL ELECTION 1–2* (2016), http://civicyouth.org/wp-content/uploads/2016/11/CIRCLE-Full-Exit-Poll-Analysis_Final.pdf.

6. Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016g> (last visited Mar. 26, 2017).

7. *YOUNG VOTERS IN THE 2016 GENERAL ELECTION*, *supra* note 5, at 1.

8. David Wasserman, *2016 Popular Vote Tracker*, COOK POL. REP. (Jan. 2, 2017), <http://cookpolitical.com/story/10174>.

9. *YOUNG VOTERS IN THE 2016 GENERAL ELECTION*, *supra* note 5, at 10.

10. See Philip Bump, *The Lopsided Age Distribution of Partisan Politics, Visualized*, WASH. POST (Mar. 20, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/03/20/the-lopsided-age-distribution-of-partisan-politics-visualized/>; David A. Hopkins, *An Underappreciated Fact About the 2016 Election: The Massive Generation Gap*, WASH. POST (Dec. 10, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/10/an-under-appreciated-fact-about-the-2016-election-the-massive-generation-gap/>.

decline,¹¹ and a whopping eight percent of voters eighteen to twenty-nine voted for a third-party candidate in 2016, a notably higher percentage than in 2012.¹²

Recently, however, the relative predictability of youth voting has intersected with another political flash point: the voting process itself. Since 2010, twenty states—most of them with Republican-controlled legislatures—have established new limitations on voting.¹³ Most commonly, these include requirements that voters show photo ID, but new laws also restrict voter registration drives, curtail early voting, and limit the distribution and collection of absentee ballots.¹⁴ The Supreme Court's 2013 decision in *Shelby County v. Holder*¹⁵ lifted a significant barrier to such legislation in a number of states, and heading into the 2016 election fourteen states had new restrictive voting laws in place.¹⁶

Voting rights organizations, minority groups, and Democrats have vigorously challenged such provisions in court, generally arguing that they are a deliberate attempt to suppress voting by minorities, the poor, and young Americans, all of whom tend to vote Democratic.¹⁷ States have defended their legislation as minimally burdensome and necessary to deter voter fraud.¹⁸ Courts have generally sided with the states,¹⁹ but in 2016, the Fifth Circuit, the Fourth Circuit, and a Wisconsin district court struck down voting laws in Texas,²⁰ North Carolina,²¹ and Wisconsin,²² respectively.

11. YOUNG VOTERS IN THE 2016 GENERAL ELECTION, *supra* note 5, at 2–3.

12. Polly Mosendz, *What This Election Taught Us About Millennial Voters*, BLOOMBERG (Nov. 9, 2016, 4:05 PM), <https://www.bloomberg.com/news/articles/2016-11-09/what-this-election-taught-us-about-millennial-voters>.

13. *See Voting Laws Roundup 2016*, BRENNAN CTR. FOR JUST. (Apr. 18, 2016), <https://www.brennancenter.org/analysis/voting-laws-roundup-2016>.

14. *Id.*

15. 133 S. Ct. 2612 (2013).

16. *See Voting Laws Roundup 2016*, *supra* note 13.

17. Maggie Haberman & Amy Chozick, *Democrats Wage a National Fight Over Voter Rules*, N.Y. TIMES (June 3, 2015), <https://www.nytimes.com/2015/06/04/us/politics/democrats-voter-rights-lawsuit-hillary-clinton.html>.

18. *Id.*

19. The 2008 Supreme Court case of *Crawford v. Marion County Election Board* has been highly significant. 553 U.S. 181, 204 (2008). In *Crawford*, the Supreme Court upheld the constitutionality of Indiana's voter ID law on the grounds that the minimal burdens that the photo ID requirement imposed on voters were outweighed by the state's interests in preventing fraud and protecting confidence in the voting process. *Id.* at 233–37.

20. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016).

21. *N.C. State Conference of the NAACP v. McCrory (McCrory II)*, 831 F.3d 204, 215 (4th Cir. 2016).

22. *One Wis. Inst., Inc. v. Thomsen (Thomsen I)*, No. 3:15-CV-324, 2016 U.S. Dist.

This Article focuses on one specific thread in litigation over voting rights: challenges based on the Twenty-Sixth Amendment. The Twenty-Sixth Amendment was ratified in 1971 and lowered the minimum voting age in state and federal elections from twenty-one to eighteen.²³ Over the last few years, a growing number of plaintiffs have argued that state voting restrictions had the purpose and effect of suppressing young voters and therefore violate the Twenty-Sixth Amendment.²⁴ These are novel arguments, however, and courts have struggled with how to interpret the voting age Amendment.²⁵

I argue that the Twenty-Sixth Amendment should be read to prohibit legislation that has the purpose, at least in part, of suppressing voters because of their age.²⁶ Just as the Fifteenth Amendment prohibits intentional voter discrimination on the basis of race, so too does the Twenty-Sixth Amendment forbid intentional voter discrimination on the basis of age. The appropriate test for evaluating claims of intentional discrimination against young voters—or, for that matter, any group of voters claiming age discrimination—is the framework that the Supreme Court established for evaluating claims of intentional racial discrimination in *Village of Arlington Heights v. Metropolitan Housing Development*.²⁷

This is not a wholly new argument,²⁸ and indeed, as I show in Part I, the federal courts that have recently heard Twenty-Sixth Amendment claims are tentatively coalescing around this same approach. However, I offer a stronger theoretical basis for interpreting the voting age Amendment in this way by emphasizing the Amendment's text rather than its history. In Part II, I summarize the

LEXIS 100178, at *182 (W.D. Wis. July 29, 2016).

23. See U.S. CONST. amend. XXVI, § 1; CONG. RESEARCH SERV., NO. 108-17, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 43 n.18 (2013).

24. See *infra* Part I.

25. See *infra* Part I.

26. See *infra* Part II.

27. *Arlington Heights*, 429 U.S. at 265–66.

28. See, e.g., Nancy Turner, Note, *The Young and the Restless: How The Twenty-Sixth Amendment Could Play a Role in the Current Debate Over Voting Laws*, 64 AM. U. L. REV. 1503, 1515 (2015) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977)); see also Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1172 (2012) (arguing that the Twenty-Sixth Amendment gave Congress the authority to override state laws that burden young people's voting rights); Caitlin Foley, Note, *A Twenty-Sixth Amendment Challenge to State Voter ID Laws*, 2015 U. CHI. LEGAL F. 585, 586–87 (2015) (citing *Arlington Heights*, 429 U.S. at 252) (expressing skepticism about analogizing to the Fifteenth Amendment but urging an *Arlington Heights* approach).

long and surprisingly complicated history of the Twenty-Sixth Amendment, and I challenge claims about original intent that both sides in these various cases have made. In Part III, I argue that an intratextualist approach to the Twenty-Sixth Amendment, in which the parallel language of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendment are read in parallel, makes the most sense. Furthermore, I suggest that demographic changes among the U.S. population are blurring the difference between voter discrimination on the basis of age and that based on race. Finally, I conclude with a few remarks about the Amendment's future in a hyperpartisan era.

I. THE EMERGING CONSENSUS

The Twenty-Sixth Amendment declares that “the right of citizens . . . who are eighteen years of age or older shall not be abridged . . . on account of age.”²⁹ It was the most quickly ratified constitutional Amendment in American history, breaking the record that had previously been set by the Twelfth Amendment.³⁰ As discussed at length below, the Amendment itself had been nearly thirty years in the making, with origins in the debates over the World War II draft.³¹

As most of the judges hearing contemporary Twenty-Sixth Amendment claims have noted, until recently the Amendment was rarely invoked in litigation.³² In the immediate wake of ratification, a number of courts heard cases in which college students challenged voter registration requirements as violating the Twenty-Sixth Amendment.³³

29. U.S. CONST. amend. XXVI.

30. See *An Overview of the 12th Amendment*, LAWS, <http://constitution.laws.com/12th-amendment> (last visited Mar. 26, 2017); *Historical Highlights: The 26th Amendment*, U.S. HOUSE REPRESENTATIVES HISTORY ART & ARCHIVES, <http://history.house.gov/Historical-Highlight/Detail/37022> (last visited Mar. 26, 2017).

31. See *infra* Part II.

32. See *Thomsen I*, No. 3:15-CV-324, 2016 U.S. Dist. LEXIS 100178, at *44–45 (W.D. Wis. July 29, 2016); *Lee v. Va. State Bd. of Elections*, No. 3:15CV357, 2016 U.S. Dist. LEXIS 67707, at *87 n.18 (E.D. Va. May 19, 2016); *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 976 (W.D. Wis. 2016) (quoting N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322, 365 (M.D.N.C. 2014)); N.C. State Conference of the NAACP v. McCrory (*McCrory I*), 182 F. Supp. 3d 320, 522 (M.D.N.C. 2016).

33. See, e.g., *Walgren v. Howes*, 482 F.2d. 95, 96–98 (1st Cir. 1973) (reversing grant of summary judgment in case where students challenged setting of primary election date during University of Massachusetts winter break), *remanded sub nom.* *Walgren v. Bd. of Selectmen*, 373 F. Supp. 624, 635 (D. Mass. 1974) (holding election schedule constitutional), *aff'd* 519 F. 2d. 1324 (1st Cir. 1975); *Sloane v. Smith*, 351 F. Supp. 1299, 1305 (M.D. Pa. 1972) (holding unconstitutional county voter registration procedures that required Penn State college students to meet a more stringent residency test than other applicants); *Bright v. Baesler*, 336 F. Supp. 527, 532, 534 (E.D. Ky. 1971) (holding it unconstitutional to require college students only to submit additional proof of domicile, but stipulating that the basis of

However, no dominant interpretation emerged from this case law, and the Supreme Court has never directly considered a case involving the voting age Amendment.³⁴

The interpretation of the Twenty-Sixth Amendment, then, is up for grabs. There are three main possibilities: States defending restrictive voter laws have argued that the Amendment merely forbids states from setting their minimum voting ages any higher than eighteen.³⁵ A considerably broader, and, as I show, increasingly popular reading is that as an analogue to the Fifteenth Amendment, the Twenty-Sixth Amendment prohibits intentional discrimination against voters on the basis of age.³⁶ Finally, commentators have occasionally suggested that the amendment could be interpreted as a general prohibition against age-based discrimination.³⁷

As the remainder of this section demonstrates, the federal courts hearing these cases are moving toward a consensus on the middle ground of interpretation. To varying degrees, they have been cautiously willing to entertain the theory that the Twenty-Sixth Amendment bans legislation intended to suppress turnout among young voters. However, they have been reluctant to find evidence of such discriminatory purposes, and none of these courts have yet actually overturned a challenged provision on Twenty-Sixth Amendment grounds.

A. North Carolina

In July 2013, the Republican-dominated North Carolina legislature enacted the Voter Information Verification Act in July 2013 on a strict party-line vote, and Republican governor Pat McCrory promptly signed the bill into law.³⁸ The law established a new photo ID requirement for

the court's decision was the Equal Protection Clause of the Fourteenth Amendment, not the Twenty-Sixth Amendment).

34. In *Symm v. United States*, the Supreme Court summarily affirmed the district court's finding that a Texas voting registrar had violated the Twenty-Sixth Amendment by refusing to register college dormitory residents unless they established that they intended to remain permanently in the county after graduation. See 439 U.S. 1105, 1105 (1979); *United States v. Texas*, 445 F. Supp. 1245, 1261–62 (S.D. Tex. 1978).

35. See *infra* Part I.

36. See *infra* Part I.

37. See, e.g., Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 990–95 (2002); see also Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 29 (2008). But see Eric S. Fish, *Originalism, Sex Discrimination, and Age Discrimination*, 91 TEX. L. REV. SEE ALSO 1, 2–4 (2012).

38. William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-

voters and eliminated or restricted a number of voting and registration mechanisms that previous Democratic legislatures had passed, such as early voting and same-day registration.³⁹

Both the NAACP and the League of Women Voters immediately sued to enjoin the new law on the grounds that it violated the Fourteenth and Fifteenth Amendments, as well as section 2 of the Voting Rights Act.⁴⁰ A few months later, five young North Carolina voters, all twenty years old, filed a complaint in intervention alleging that the state law also violated the Twenty-Sixth Amendment.⁴¹ The plaintiffs pointed specifically to the parts of the bill that eliminated same-day registration, removed pre-registration for sixteen- and seventeen-year-olds, and excluded student ID cards as voter identification.⁴² These provisions, they argued, had the “purpose and effect” of suppressing young voters and were therefore unconstitutional.⁴³ The Twenty-Sixth Amendment, they suggested, prohibits “laws that have the purpose of denying or abridging the right to vote on account of age.”⁴⁴

The state resisted not only the student intervenors’ claims but also their theory of the Twenty-Sixth Amendment.⁴⁵ Citing a 1972 Ohio district court case, the defendants insisted “that the Twenty-Sixth Amendment ‘simply bans age qualifications above 18.’”⁴⁶ Nothing in the new election law, they argued, could reasonably be construed as denying eighteen-year-old citizens the right to vote.⁴⁷

After holding two different trials on the merits, the U.S. District

the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html; Michael Wines & Alan Blinder, *Federal Appeals Court Strikes Down North Carolina Voter ID Requirement*, N.Y. TIMES (July 29, 2016), <https://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html>.

39. See *McCrory I*, 182 F. Supp. 3d 320, 332–33 (M.D.N.C. 2016) (quoting Act effective July 20, 2007, No. 253, § 1, 2007 N.C. Sess. Laws 406, 407).

40. This litigation was ultimately consolidated together with the United States’ complaint into *McCrory I. Id.* at 332.

41. Complaint in Intervention of Louis M. Duke, Charles M. Gray, Asgod Barrantes, Josue E. Berduo, & Brian M. Miller Seeking Declaratory & Injunctive Relief Ex. A, 2–6, *League of Women Voters of N.C. v. North Carolina*, No. 1:13CV660 (M.D.N.C. Jan. 27, 2014) [hereinafter Complaint in Intervention].

42. *Id.* at 2.

43. *Id.* at 2–3; see Matt Apuzzo, *Students Joining Battle to Upend Laws on Voter ID*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-discriminate-based-on-age.html>.

44. Complaint in Intervention, *supra* note 41, at 22.

45. Defendants’ Trial Brief at 32, *McCrory I*, 182 F. Supp. 3d 320 (Nos. 1:13CV658, 1:13CV660, 1:13CV861).

46. *Id.* (citing *Gaunt v. Brown*, 341 F. Supp. 1187, 1191 (S.D. Ohio 1972)).

47. *Id.* at 31.

Court for the Middle District of North Carolina upheld the law.⁴⁸ Writing in April 2016, Judge Thomas Schroeder cautiously entertained the plaintiffs-intervenors' interpretation of the Twenty-Sixth Amendment but ultimately rejected their claim.⁴⁹ After noting that the existing case law offered little guidance, Judge Schroeder characterized the plaintiffs' theory of the Amendment as "effectively the Fifteenth Amendment but with young voters as the relevant class."⁵⁰ On this interpretation, he explained, "plaintiffs must prove that the State acted with a discriminatory purpose."⁵¹ Reviewing the plaintiffs' evidence, however, Judge Schroeder decided that the North Carolina legislature had offered "at least plausible" and "non-tenuous" reasons for changing voting and registration procedures.⁵² He concluded that the plaintiffs had failed to show evidence of discriminatory intent against young people, and he dismissed their Twenty-Sixth Amendment claim.⁵³

The plaintiffs appealed and on July 29, 2016, the Fourth Circuit reversed much of the district court's decision.⁵⁴ In a strongly worded opinion, the court held that the challenged provisions were enacted with racially discriminatory intent and therefore violated both the Equal Protection Clause of the Fourteenth Amendment and section 2 of the Voting Rights Act.⁵⁵ Writing for the court, Judge Diana Motz declared, "Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist."⁵⁶ With respect to the Twenty-Sixth Amendment, however, the Fourth Circuit left the lower court's reasoning entirely untouched, omitting any mention of the Amendment or of young voters.⁵⁷

48. The first trial, in July 2015, considered all claims except those challenging the voter ID provision. *McCrory I*, 182 F. Supp. 3d at 331. In January 2016, the court held a second trial about the voter ID law. *Id.* The student intervenors elected not to participate in the second trial, relying on the evidence presented in the July 2015 trial. *Id.* at 525 n.246.

49. *McCrory I*, 182 F. Supp. 3d at 531.

50. *Id.* at 523.

51. *Id.* (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997)).

52. *Id.* at 523–24.

53. *McCrory I*, 182 F. Supp. 3d at 523.

54. *McCrory II*, 831 F.3d 204, 242 (4th Cir. 2016).

55. *Id.* at 219.

56. *Id.* at 214.

57. *See id.* The State of North Carolina appealed this decision to the Supreme Court. *See generally* Petition for Writ of Certiorari, N.C. State Conference of the NAACP v. *McCrory* (*McCrory III*), No. 16-833 (U.S. filed Dec. 27, 2016). However, in February 2017, the newly elected Governor Roy Cooper, a Democrat, and the North Carolina Attorney General formally withdrew the state's petition for a Writ of Certiorari and discharged outside counsel. *See generally* Motion of Petitioners the State of N.C. & Governor Roy Cooper to Dismiss the

B. Tennessee

Unlike their young counterparts in other states, whose Twenty-Sixth Amendment claims were part of broader legal challenges to state election laws, Tennessee college students launched an independent lawsuit against the state's voter ID statute.⁵⁸ Tennessee law requires that voters show photo identification but specifically excludes both student ID cards and out-of-state ID cards.⁵⁹ Current and retired faculty and employee ID cards from public colleges and universities in Tennessee, however, are accepted as voter identification.⁶⁰

In March 2015, the Nashville Student Organizing Committee and several student plaintiffs filed a complaint alleging that Tennessee's voter ID law violated the Fourteenth and Twenty-Sixth Amendments.⁶¹ The complaint did not articulate a clear Twenty-Sixth Amendment test but implied that the correct standard was intentional discrimination.⁶² The plaintiffs argued that in formulating the list of acceptable forms of voter ID, the legislature had deliberately sought to suppress young voters, especially out-of-state college students.⁶³ They also claimed that the law ran afoul of the Equal Protection Clause, as it amounted to differential treatment between out-of-state and in-state students and between students and employees of Tennessee's public colleges and universities.⁶⁴ The exclusion of out-of-state IDs and student IDs from public colleges was irrational, they alleged.⁶⁵

On review for summary judgment, the district court rejected the

Case, *McCrory III*, No. 16-833 (U.S. filed Feb. 21, 2017); Imani Gandy, *North Carolina Governor and Attorney General Take Steps to Withdraw from Voting Restrictions Lawsuit*, REWIRE (Feb. 21, 2017, 6:44 PM), <https://rewire.news/article/2017/02/21/north-carolina-governor-attorney-general-take-steps-withdraw-voting-restrictions-lawsuit/>. The North Carolina General Assembly has fought the withdrawal, however, and at the time of this writing the Supreme Court has yet to resolve the dispute. See generally Conditional Motion to Add the N.C. Gen. Assembly as an Additional Petitioner, *McCrory III*, No. 16-833 (U.S. filed Feb. 27, 2017); Objection by Petitioner State of N.C. to the N.C. Attorney Gen.'s Motion to Dismiss Under Rule 46.2 & to the Private Respondents' Request for an Order of Dismissal Under Rule 46.1, *McCrory III*, No. 16-833 (U.S. filed Feb. 27, 2017); Private Respondents' Opposition to the State's "Objection" & "Conditional Motion to Add the N.C. Gen. Assembly as an Additional Petitioner," *McCrory III*, No. 16-833 (Mar. 9, 2017).

58. Complaint at 4, Nashville Student Org. Comm. v. Hargett (*Hargett I*), 123 F. Supp. 3d 967 (M.D. Tenn. 2015) (No. 3:15-CV-0210) [hereinafter *Hargett I* Complaint].

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 30–36.

62. *Id.* at 31.

63. *Hargett I* Complaint, *supra* note 58, at 31–33.

64. *Id.* at 33–35.

65. *Id.* at 36.

plaintiffs' arguments and dismissed the case for failure to state a claim.⁶⁶ Judge Aleta Trauger found that the state's articulated concerns about false student ID cards were sufficient to survive rational basis review under the Equal Protection Clause of the Fourteenth Amendment.⁶⁷ Addressing the plaintiffs' Twenty-Sixth Amendment claim, Judge Trauger first rebuffed the state's argument that the Amendment was designed to prohibit voter discrimination against eighteen- to twenty-year-olds only, and that because student ID holders were not necessarily within this age range the plaintiffs' claim failed.⁶⁸ "[T]he plain language of the Amendment" the judge noted, "broadly prohibit[s] abridgment of the right to vote on the basis of age."⁶⁹ However, citing the Supreme Court's decision in *Crawford*, Judge Trauger held that "similarly, the Tennessee Voter ID Law is not an abridgement of the right to vote, let alone a denial of it, for purposes of a Twenty-Sixth Amendment claim."⁷⁰

Notably, the district court implied that a state law that imposed a "unique burden" on students might be prohibited by the Twenty-Sixth Amendment.⁷¹ Judge Trauger noted that the few previous cases that had found a Twenty-Sixth Amendment violation had involved statutes that set a heightened standard for voters under age twenty-one.⁷² In this case, though, the court suggested that students could use any one of the same photo ID options that were available to nonstudents; the fact that they could not also use their student IDs did not amount to an unconstitutional burden on their voting rights.⁷³

C. Virginia

Virginia's most recent voter ID law was enacted in 2013 by a Republican legislature on a party-line vote and restricts the types of ID that were previously acceptable for voting.⁷⁴ As in Tennessee, Virginia voters must present photo identification; however, unlike the Tennessee statute, Virginia law permits the use of student IDs from private schools,

66. Nashville Student Org. Comm. v. Hargett (*Hargett II*), 155 F. Supp. 3d 749, 758 (M.D. Tenn. 2015).

67. *Id.* at 756.

68. *Id.* at 757.

69. *Id.*

70. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 235 (2008)).

71. See *Hargett II*, 155 F. Supp. 3d at 757.

72. *Id.* at 757–58 (citing *Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971)).

73. *Id.* at 757.

74. Trip Gabriel, *Virginia Lawmakers Pass Photo-ID Requirement for Voters*, N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/us/virginia-passes-photo-id-voting-requirement.html>.

colleges, and universities located in Virginia.⁷⁵ The Democratic Party of Virginia sued to enjoin the voter ID law on the grounds that it violated section 2 of the Voting Rights Act, as well as the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments.⁷⁶

The plaintiffs charged that “[i]n enacting the voter ID law . . . the General Assembly intended, at least in part, to suppress the number of votes cast by young voters.”⁷⁷ This intentional discrimination on the basis of age, they implied, rendered the law unconstitutional under the Twenty-Sixth Amendment.⁷⁸

After a seven day trial, the District Court of the Eastern District of Virginia upheld the voter ID law.⁷⁹ Judge Henry Hudson rejected the plaintiffs’ section 2 claim that the statute had an adverse disparate impact on African-American and Latino voters.⁸⁰ Citing *Crawford*, he also found that the ID requirement did not amount to an undue burden on the right to vote under the First and Fourteenth Amendments.⁸¹ Finally, he dismissed the charges that the Virginia legislature passed the voter ID law with the intent to discriminate against both minority and young voters in violation of the Fifteenth and Twenty-Sixth Amendments, respectively.⁸² Judge Hudson noted that the photo ID requirement enjoyed considerable public support in Virginia and “voter confidence, uniformity, and fraud prevention all stood as legitimate reasons to enact [the law].”⁸³

The district court, did, however, explicitly adopt the plaintiffs’ argument that intentional discrimination is the proper standard for Twenty-Sixth Amendment review.⁸⁴ Judge Hudson suggested that in looking for evidence of discrimination on the basis of age, courts should look to the *Arlington Heights* factors, including the law’s history and the

75. VA. CODE ANN. § 24.2-643 (2016).

76. Complaint at 37, *Lee v. Va. State Bd. of Elections (Lee I)*, 188 F. Supp. 3d 577 (E.D. Va. 2016) (No. 3:15CV357) [hereinafter *Lee I* Complaint]. The two named plaintiffs in the Virginia case were both Democratic organizers; the younger of the two was twenty-nine at the time of filing. *Id.* at 3–4.

77. *Id.*

78. *Id.* at 36.

79. *Lee I*, 188 F. Supp. 3d at 610.

80. *Id.* at 607.

81. *Id.* at 609 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199–200 (2008)).

82. *Id.* at 610.

83. *Id.* at 608–10.

84. *Lee I*, 188 F. Supp. 3d at 609 (“Unquestionably, as Plaintiffs point out in their post-trial memorandum, [l]egislation enacted with the intent, at least in part, to discriminate on the basis of race [or age] in the voting context violates the Fourteenth [,] Fifteenth [and Twenty-Sixth] Amendments.” (alterations in original)).

sequence of events leading up to the passage of the law.⁸⁵

The plaintiffs appealed to the Fourth Circuit, which upheld the district court's decision in December 2016.⁸⁶ Writing for the panel, Judge Neimeyer expressed skepticism about the theory that the Twenty-Sixth Amendment prohibits intentional discrimination based on age: "[I]t is far from clear that the Twenty-Sixth Amendment should be read to create a cause of action that imports principles from Fifteenth-Amendment jurisprudence."⁸⁷ Like Judge Hudson, though, Judge Neimeyer quickly moved on to evaluate the case as if this were the correct interpretation, concluding that even if the Twenty-Sixth Amendment did function like the Fifteenth Amendment, the plaintiffs had not proven intentional discrimination.⁸⁸

D. Wisconsin

Of all the voting rights cases currently winding their way through the courts, the litigation in Wisconsin has featured the most significant wrangling over the proper interpretation and application of the Twenty-Sixth Amendment.⁸⁹ Beginning in 2011, the year after a Republican governor and Republican majorities in both state houses were elected, the Wisconsin state legislature passed a series of laws significantly modifying the state's election system.⁹⁰ These changes included a photo ID law, an increase in the durational residency requirement from ten to twenty-eight days, limitations on early voting, and assorted new restrictions on voter registration.⁹¹ Two progressive organizations and a number of named plaintiffs—including a twenty-one-year-old college

85. Compare *id.* at 610 ("In examining circumstantial evidence to discern the intent of legislative action, courts consider its historical background [and] the sequence of legislative events"), with *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (citations omitted) (laying out factors such as historical background and sequence of events as other evidence the Court must look to in deciding invidious discriminatory purpose).

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

87. *Id.* at 607. The plaintiffs-appellants had further elaborated on this theory in their brief. Brief of Appellants at 62–63, *Lee II*, 843 F.3d 592 (No. 19-1605). Interestingly, in its own brief the state did not meaningfully challenge the appellants' interpretation of the Twenty-Sixth Amendment, focusing its argument more on the appellants' allegedly shifting definition of "young voters." Brief of Appellees at 56, *Lee II*, 843 F.3d 592 (No. 19-1605).

88. See *Lee II*, 843 F.3d at 607.

89. See, e.g., *Thomsen I*, No. 3:15-CV-324, 2016 U.S. Dist. LEXIS 100178, at *70 (W.D. Wis. July 29, 2016) (citing *McCrary I*, 182 F. Supp. 3d 320, 381 (M.D.N.C. 2016)).

90. *Scott Walker's File*, POLITIFACT, <http://www.politifact.com/personalities/scott-walker/> (last visited Mar. 26, 2017); Jason Stein & Annysa Johnson, *Republicans Take Over State Senate, Assembly*, J. SENTINEL (Nov. 2, 2010), <http://archive.jsonline.com/news/state-politics/106582898.html>; see generally Act of May 25, 2011, No. 23, 2011 Wis. Sess. Laws 103 (amending, repealing, renumbering, creating statutes relating to requirements to vote).

91. *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *13–14.

student—sued to enjoin Wisconsin’s new laws.⁹² Their claims were similar to those leveled in other states, citing both section 2 of the Voting Rights Act and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments.⁹³

The Wisconsin plaintiffs, who submitted their brief nearly simultaneously with the Virginia plaintiffs, made almost identical arguments about the Twenty-Sixth Amendment. They maintained that the Amendment prohibited intentional discrimination against young voters: “[L]aws that have the purpose, at least in part, of denying or abridging the right to vote on account of age are unconstitutional.”⁹⁴ They charged that the Wisconsin legislature had enacted a number of the challenged provisions deliberately to suppress young voters.⁹⁵ The plaintiffs devoted particular attention to a change in the law regarding college students’ voter registration: before 2011, Wisconsin college and university students were able to register by using their student IDs in conjunction with “dorm lists” that their schools compiled for municipal clerks.⁹⁶ The legislature changed the law to require that the dorm lists also indicate whether students are U.S. citizens, which is information that the Family Educational Rights and Privacy Act prohibits educational institutions from disclosing.⁹⁷ As a result, most Wisconsin colleges and universities stopped providing dorm lists to clerks.⁹⁸ “The Wisconsin legislature,” the plaintiffs argued, “also overtly targeted young people in making it more difficult to register to vote.”⁹⁹

Moving for summary judgment, the state offered an unusually thorough rebuttal to an intentional discrimination theory of the Twenty-Sixth Amendment: “[Plaintiffs’] theory has no foundation in the text or history of the Amendment, and courts that have interpreted the Twenty-Sixth Amendment do not embrace Plaintiffs’ premise.”¹⁰⁰ The Wisconsin defendants, like those in North Carolina, argued that the Amendment merely prohibits states from setting voter qualifications above

92. See Complaint at 2, 4, *Thomsen I*, 2016 U.S. Dist. LEXIS 100178 (No. 3:15-CV-324) [hereinafter *Thomsen I* Complaint].

93. Compare *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *3, with *Lee I*, 188 F. Supp. 3d 577, 581 (E.D. Va. 2016).

94. *Thomsen I* Complaint, *supra* note 92, at 53.

95. *Id.*

96. *Id.* at 33.

97. *Id.* at 33–34 (citing 20 U.S.C. § 1232g (2012)).

98. See *Thomsen I* Complaint, *supra* note 92, at 33–34.

99. *Id.* at 33.

100. Defendants’ Brief in Support of Their Motion for Summary Judgment at 52–56, *Thomsen I*, No. 3:15-CV-324, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016) (No. 3:15-CV-324) [hereinafter *Thomsen I* Defendants’ Brief].

eighteen.¹⁰¹

On July 29, 2016, the district court for the Western District of Wisconsin struck down some of the challenged provisions and upheld others.¹⁰² In the most far-reaching opinion about the Twenty-Sixth Amendment to date, Judge James Peterson wholeheartedly endorsed the argument that the Amendment prohibits intentional voter discrimination based on age and that courts should apply the *Arlington Heights* framework to such claims.¹⁰³

Looking at the facts before the court, however, Judge Peterson held that there was insufficient evidence that the Wisconsin legislature had purposely intended to suppress young voters.¹⁰⁴ The state's rationale for restricting the use of college IDs, in particular, were "not so feeble as to suggest intentional discrimination."¹⁰⁵

The district court went on, however, to overturn some of these same provisions on different grounds.¹⁰⁶ Judge Peterson held that the requirement that dorm lists include citizenship information, for example, violated both the First and Fourteenth Amendments.¹⁰⁷ He analyzed the plaintiffs' challenge to this law under the flexible standard that the Supreme Court set out in *Anderson v. Celebrezze*¹⁰⁸ and *Burdick v. Takushi*,¹⁰⁹ which requires courts to balance the burden of a given voter restriction against the state's justification for it.¹¹⁰ The judge concluded that even though the changes to the dorm list law "impose[d] only slight burdens, the state has not offered even a minimally rational justification for the law."¹¹¹

The court also invalidated Wisconsin's prohibition on using expired college or university IDs to vote as violating the Equal Protection Clause of the Fourteenth Amendment.¹¹² Given that the law also required voters using student identification to present proof of current enrollment, the court found, a requirement that the identification card itself be valid was redundant: "[E]ven under an exceedingly deferential rational basis

101. *Id.*

102. *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *182–84.

103. *Id.* at *72.

104. *Id.* at *86, *99.

105. *Id.* at *74.

106. *Id.* at *182–84.

107. *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *183.

108. *Id.* at *8; *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983).

109. *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *8; *see also* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

110. *Thomsen I*, 2016 U.S. Dist. LEXIS 100178, at *142.

111. *Id.* at *107.

112. *Id.* at *177–78.

review, the state has failed to justify its disparate treatment of voters with expired IDs[.]" wrote Judge Peterson.¹¹³

Both parties have cross-appealed to the Seventh Circuit. In its brief, the state accuses the district court of "rewrit[ing] eight of Wisconsin's voter-friendly election laws."¹¹⁴ The plaintiffs-appellees, for their part, push back hard on the district court's holding that these laws were not passed with the goal of suppressing minority and youth voters.¹¹⁵ Highlighting various statements by legislators, the plaintiffs argue that "the extraordinary direct evidence of discriminatory intent . . . sets this case apart."¹¹⁶

II. THE AMBIGUITY OF ORIGINAL INTENT

Confronting the open text of the Twenty-Sixth Amendment, commentators, advocates, and courts have often drawn on selected bits and pieces of the Amendment's history to bolster their arguments. For example, the plaintiffs-appellants in North Carolina argued that the Twenty-Sixth Amendment had a "broad anti-discriminatory purpose."¹¹⁷ They asserted that "[t]he framers of the Twenty-Sixth Amendment . . . sought to ensure 'that citizens who are 18 years of age or older shall not be discriminated against on account of age' in the voting context."¹¹⁸ The state of Wisconsin, on the other hand, claimed that nothing in the history of the Twenty-Sixth Amendment supported the notion that it was

113. *Id.* at *178.

114. Brief and Short Appendix of Defendants-Appellants, Cross-Appellees at 3, *Thomsen II*, Nos. 16-3091, 16-3083 (7th Cir. filed Sept. 12, 2016).

115. Plaintiffs-Appellees' Response & Cross-Appeal Brief at 11, *Thomsen II*, Nos. 16-3091, 16-3083 (7th Cir. filed Oct. 19, 2016).

116. *Id.* at 19. The nonprofit organization Common Cause has also filed an amicus brief urging the appeals court to strike down fourteen different Wisconsin provisions on Twenty-Sixth Amendment grounds. Brief of Amicus Curiae Common Cause in Support of Plaintiffs-Appellees Supporting Affirmance and Reversal in Part, *Thomsen II*, Nos. 16-3091, 16-3083 (7th Cir. filed Oct. 31, 2016). A three-judge panel of the Seventh Circuit heard oral argument in late February 2017. News reports suggested that the judges were critical of the plaintiffs-appellees' claims of voter discrimination, but at the time of this writing a decision had not yet been issued. See *Judges Express Skepticism Over Claims in Voting Cases*, MINNEAPOLIS STAR TRIB. (Feb. 24, 2017, 2:20 PM), <http://www.startribune.com/appeals-court-hearing-arguments-in-wisconsin-voting-cases/414715943/>.

117. Joint Reply Brief of Plaintiffs-Appellants at 32, *McCrary II*, 831 F.3d 204 (4th Cir. 2016) (Nos. 16-1468, 16-1469, 16-1474).

118. *Id.* (quoting 117 CONG. REC. 7534 (1971)); see also Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 117-18, *Thomsen I*, No. 3:15-CV-324, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016) (No. 3:15-CV-324) (quoting the same language); Sarah Fearon-Maradey, Note, *Disenfranchising America's Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U. N.H. L. REV. 289, 290-91 (2014); Fish, *supra* note 28, at 1175 n.26.

intended to prohibit intentional age-based discrimination.¹¹⁹

Examined carefully, however, the history of the voting age amendment offers little guidance for choosing between such normative arguments. Indeed, the story of the Twenty-Sixth Amendment—a story that I have told more fully elsewhere¹²⁰—reveals that advocates and opponents of eighteen-year-old voting had a range of goals and rationales, many of which shifted over time in response to immediate political circumstances.¹²¹ A complete retelling is beyond the scope of this Article, but the following is a condensed version.

The story of the Twenty-Sixth Amendment begins during World War II.¹²² Faced with rising military needs, Congress had to decide between drafting more married men or lowering the minimum draft age from twenty-one to eighteen.¹²³ The legislature chose to lower the draft age, and on October 19, 1942, just hours after the House vote, Representative Victor Wickersham (D-OK) offered the first of the dozens of proposed constitutional amendments that eventually led to the Twenty-Sixth Amendment.¹²⁴

This initial burst of interest in eighteen-year-old voting lasted about five years and largely revolved around the perceived injustice of drafting soldiers who were considered too young to vote.¹²⁵ Despite majority public support for a lower voting age,¹²⁶ nearly all state and federal proposals for eighteen-year-old voting failed.¹²⁷ The sole exception was Georgia, which lowered its minimum voting age to eighteen in 1944.¹²⁸ The well known slogan, “old enough to fight, old enough to vote,” which would be a rallying cry decades later, likely dates from the campaign in

119. *Thomsen I* Defendants’ Brief, *supra* note 100, at 55.

120. See 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 (follow “Open PDF in Browser” hyperlink); Jenny Diamond Cheng, *Uncovering the Twenty-Sixth Amendment* (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library). [The following portion of Section II contains reprinted material from Professor Cheng’s manuscript and dissertation *supra*. For this reason, with the author’s permission, quotation marks, alterations, and omissions are not included, unless another author’s work is being cited.—Eds.]

121. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 22.

122. *Id.*

123. *Id.* at 15.

124. *Id.* at 9–10 (Wickersham’s proposal would have lowered the voting age in federal elections only).

125. *Id.* at 8, 10.

126. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 11.

127. *Id.*

128. *Id.* at 10.

Georgia.¹²⁹

During the immediate postwar period, the minimum voting age was not an intensely partisan issue.¹³⁰ Polls showed little difference between Democratic and Republican opinions about lowering the voting age.¹³¹ A few commentators suggested that eighteen-year-old voting would likely benefit the Democrats as young people leaned strongly Democratic.¹³² Nevertheless, the most vocal Congressional opponents of a constitutional amendment lowering the voting age were the liberal Democrat Emanuel Celler (D-NY) and the conservative Southern Democrat Richard Russell (D-GA).¹³³ Indeed, as the chairman of the House Judiciary Committee, Celler would stymie advocates for decades by steadfastly refusing to hold hearings on any and all proposals for a voting age amendment.¹³⁴

The idea of lowering the voting age surfaced again in the early 1950s.¹³⁵ The Korean War prompted new complaints that it was unfair to draft soldiers who could not vote.¹³⁶ Furthermore, advocates argued that given improved education and technological advances—such as television and radio—contemporary eighteen-year-olds were simply more qualified to vote than previous generations had been.¹³⁷ Such claims, while controversial, resonated in the context of the postwar baby boom, which put children and youth at the center of a newly prosperous, buoyant society.¹³⁸ Public support for eighteen-year-old voting soared.¹³⁹

In the 1950s, though, Republicans took up the cause of eighteen-year-old voting.¹⁴⁰ Young voters, who had leaned strongly Democratic from the New Deal through the 1940s, began to shift toward the Republican Party in the early-to-mid 1950s.¹⁴¹ In January 1954, a Republican-sponsored constitutional amendment to lower the voting age reached the Senate floor; it failed to reach the necessary two-thirds majority, with Republicans solidly in favor, but Democrats—especially

129. *Id.* at 11.

130. *Id.*

131. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 11.

132. *Id.*

133. *Id.*

134. *Id.* at 21–22.

135. *Id.* at 22.

136. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 22.

137. *Id.*

138. *See id.* at 26 (citing JAMES PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 311 (1996)).

139. *Id.* at 18.

140. *Id.* at 19.

141. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 19.

Southern Democrats—skewing against the bill.¹⁴²

From the mid-1950s through the late 1960s, the minimum voting age remained a low-level but perennial issue. State legislatures regularly considered—and voted down—proposals to lower their voting ages.¹⁴³ The few constitutional amendments that passed were almost always rejected by voters.¹⁴⁴ Advocates of eighteen-year-old voting continued to hammer away both at the injustice of denying the franchise to draftees and the ways in which modern young people were especially knowledgeable about public affairs.¹⁴⁵ Furthermore, they argued that lowering the voting age would improve turnout rates and mitigate apathy.¹⁴⁶ The schools' good work in educating citizens, they argued, was undone by the three-year wait for voting rights after graduation.¹⁴⁷ In 1963, the President's Commission on Registration and Voting Participation recommended lowering the voting age specifically to remedy low voter turnout rates among the young.¹⁴⁸

Eighteen-year-old voting began to gain real momentum in the late 1960s, with an increasing number of state and federal legislators introducing constitutional amendments to lower the voting age.¹⁴⁹ The intensifying war in Vietnam, of course, lent new urgency to the longstanding argument that it was unfair to draft soldiers who could not vote for the leaders sending them into battle.¹⁵⁰ The social unrest of the era, particularly among college students, also contributed to a new interest in lowering the voting age, although it had contradictory effects.¹⁵¹ On the one hand, the campus demonstrations significantly weakened public support for eighteen-year-old voting and directly led to the defeat of a number of state proposals.¹⁵² At the same time, the notion that reducing the voting age would stem the rising tide of student unrest by channeling youthful energies into less-frightening forms of political

142. *Id.* at 20 (citation omitted).

143. *Id.* (citing WENDELL CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 54, 57 (1992)).

144. *See id.* at 84. The sole exception was Kentucky, where voters approved eighteen-year-old voting for state elections in 1955. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 20; *Kentucky Ok's Cut in Voting Age by 64,916 Majority*, *CHI. TRIB.*, Nov. 13, 1955, at 22F.

145. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 22, 25, 32–33.

146. *Id.* at 33, 38.

147. *Id.* at 38.

148. *Id.*; *see also* PRESIDENT'S COMM'N ON REGISTRATION & VOTING PARTICIPATION, *REPORT ON REGISTRATION AND VOTING PARTICIPATION* 43 (1963).

149. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 39.

150. *Id.* at 43.

151. *See, e.g., id.* at 46.

152. *Id.* at 46.

expression gained a surprising amount of traction, especially among federal legislators.¹⁵³

By 1968, the voting age had once again become a Democratic cause.¹⁵⁴ Both Republican and Democratic politicians continued to support eighteen-year-old voting, at least publicly, although Republicans began to openly disagree with the idea of lowering the voting age through federal constitutional amendment. However, by this point, the conventional wisdom was that young voters would likely skew Democratic, and both Republican and Democratic politicians frequently assumed that lowering the voting would disproportionately benefit the Democratic party.¹⁵⁵ Politicians from both parties, though, were clearly awed by Senator Eugene McCarthy's 1968 presidential campaign, which galvanized squads of enthusiastic young volunteers.¹⁵⁶ Some could barely contain their hopes that they, too, might be able to inspire the same sort of dedication, especially if young people were given the vote.¹⁵⁷

The question of the voting age finally came to a head in early 1970, when Senators Edward Kennedy (D-MA) and Mike Mansfield (D-MT) successfully offered an eighteen-year-old voting amendment to the legislation renewing the Voting Rights Act of 1965.¹⁵⁸ This was, essentially, an end run around Congressman Celler, who was implacably opposed to eighteen-year-old voting but also strongly supported the Voting Rights Act.¹⁵⁹

In making their case, the two senators and their allies echoed many familiar rationales for a lower voting age, pointing to the injustice of denying soldiers the vote, modern improvements in education, and the hope that the vote could act as a sort of safety valve for young people's discontent.¹⁶⁰ However, they also stressed the idea that denying the vote to eighteen-, nineteen-, and twenty-year-olds was both legally and politically analogous to voting discrimination against African-Americans and other minority groups.¹⁶¹ Advocates framed eighteen-year-old voting as the inevitable next step in a bigger movement toward a broader and

153. *Id.*

154. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 39.

155. *Id.* at 40 (citing Ronald Sullivan, *Vote for 18-Year-Olds is Facing Trouble in Jersey*, N.Y. TIMES, Oct. 13, 1969, at 59).

156. *Id.* at 41; see WILLIAM CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 348 (1995); LANDON Y. JONES, *GREAT EXPECTATIONS: AMERICA & THE BABY BOOM GENERATION* 98 (1980); see also PATTERSON, *supra* note 138, at 690.

157. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 41.

158. *Id.* at 58.

159. *Id.* at 60.

160. *Id.* at 22, 51, 58.

161. *Id.* at 58.

more meaningful franchise, enforced by the federal government.¹⁶²

For a variety of reasons, the Mansfield-Kennedy proposal was the right idea at the right time. Despite angry objections from conservative Southern legislators who viewed the eighteen-year-old voting provision as yet another nail in the coffin of state sovereignty, the Voting Rights Extension Act passed both houses and was grudgingly signed by President Nixon.¹⁶³

With the 1972 elections looming, the Supreme Court quickly decided a set of cases challenging the constitutionality of the eighteen-year-old voting provision, among other parts of the Voting Rights Act. In *Oregon v. Mitchell*,¹⁶⁴ the Court upheld the eighteen-year-old voting statute with respect to federal elections, but struck it down as it applied to state and local elections.¹⁶⁵

For the forty-seven states that had minimum voting ages over eighteen, the Supreme Court's holding presented a massive administrative problem. State election officials reported that the costs of administering a dual-age voting system—with one age limit for elections of federal officials and another for elections of state and local officials—would be staggering.¹⁶⁶ Many worried that the logistical complications would create serious delay and increase the possibility of election fraud.¹⁶⁷

In response, both houses of Congress quickly passed a constitutional amendment lowering the voting age to eighteen in both state and federal election.¹⁶⁸ Within an hour, both the Delaware and Minnesota legislatures ratified the new amendment and other states followed swiftly.¹⁶⁹ On July 1, 1971, North Carolina officially became the thirty-eighth state to ratify the voting age amendment.¹⁷⁰ On July 5, President Nixon signed the Twenty-Sixth Amendment to the U.S. Constitution.¹⁷¹

162. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 58.

163. *Id.* at 64, 74.

164. 400 U.S. 112 (1970).

165. *Id.* at 118.

166. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 83.

167. *Id.*

168. *Id.* at 6.

169. Uncovering the Twenty-Sixth Amendment, *supra* note 120, at 26.

170. CONG. RESEARCH SERV., *supra* note 23, at 43 n.18. The night before, the Ohio legislature had hurriedly approved the amendment, rushing to beat the Oklahoma legislature for the coveted thirty-eighth slot. North Carolina outmaneuvered Ohio, however, by delaying its official bill-signing until the next morning. See R.W. Apple Jr., *The States Ratify Fuel [sic] 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>.

171. Uncovering the Twenty-Sixth Amendment, *supra* note 120, at 27.

As this historical recitation demonstrates, questions about how to interpret the Twenty-Sixth Amendment cannot be resolved by looking to original intent. The lawmakers who drafted and ratified the voting age amendment were animated by a range of motives and rationales, ranging from naked partisan preferences to genuine belief about the contours of citizenship, the capacities of young people, and the meaning of the franchise.¹⁷² The power of these different arguments and counterarguments waxed and waned over the course of three decades, as both advocates and opponents responded to immediate events and trends.¹⁷³ Many times logic seemed to have little to do with the balance of persuasive power, and arguments that seem unconvincing to many contemporary readers were nonetheless powerful at the time.¹⁷⁴

Along similar lines, the eighteen-year-old voting issue was always bound up with immediate electoral concerns.¹⁷⁵ Partisan alignments shifted as election results and public opinion polls suggested that youthful voters might swing one way, or another.¹⁷⁶ Despite repeated suggestions by close observers that lowering the voting age was unlikely to have meaningful political consequences, both Democratic and Republican politicians consistently viewed eighteen-year-old voting through the lens of electoral politics.¹⁷⁷

Searching for a dominant “original intent” behind the Twenty-Sixth Amendment, then, is a quixotic task.¹⁷⁸ It is true that, as both the North Carolina and Wisconsin plaintiffs argued, many of the framers of the Twenty-Sixth Amendment intended the amendment to broadly redress unfair discrimination against young voters, as well as to meaningfully encourage disaffected young people to participate in electoral politics.¹⁷⁹ It is also correct—as the state of Wisconsin suggested in its brief—that plenty of the lawmakers who ratified the Twenty-sixth Amendment simply intended to lower the age qualification for voting to eighteen, nothing more.¹⁸⁰ For judges faced with choosing between such competing interpretations, the actual historical record is of limited use.

172. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 87.

173. *Id.* at 7.

174. *Id.*

175. *Id.*

176. *Id.*

177. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 7.

178. *Id.*

179. See Joint Reply Brief of Plaintiffs-Appellants at 32–33, *McCrory II*, 831 F.3d 204 (4th Cir. 2016) (Nos. 16-1468, 16-1469, 16-1474); *Thomsen I* Complaint, *supra* note 92, at 53.

180. See *Thomsen I* Defendants’ Brief, *supra* note 100, at 52–56.

III. AN INTRATEXTUALIST APPROACH

Intratextualism, on the other hand, offers a much sturdier footing for interpreting the Twenty-Sixth Amendment. On this theory of constitutional interpretation, clauses in the Constitution that share similar words or phrases should be read in a similar way.¹⁸¹ As constitutional scholar and intratextualist Akhil Amar has said, “What’s sauce for one [constitutional command] must be sauce for the other.”¹⁸²

The Twenty-Sixth Amendment is well suited to an intratextual reading because it shares nearly identical wording with the Fifteenth Amendment—as well as with the Nineteenth and Twenty-Fourth Amendments.¹⁸³ Indeed, the language is so close that reading the amendments together seems to be the most obvious approach.¹⁸⁴

One of the great virtues of an intratextualist approach to the Twenty-Sixth Amendment is that it does not tempt us to oversimplify the historical record in a search for original intent. Indeed, intratextualists argue compellingly that similar constitutional texts should be read similarly regardless of whether the drafters consciously intended the parallels.¹⁸⁵ This is especially helpful when considering the Twenty-Sixth Amendment, which was drafted by anonymous staffers and the precise text of which was virtually never discussed in three decades of debate.¹⁸⁶

181. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

182. *Id.* at 794.

183. Compare U.S. CONST. amend. XXVI, §§ 1–2 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. The Congress shall have power to enforce this article by appropriate legislation.”), with U.S. CONST. amend. XV, §§ 1–2 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.”), and U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.”), and U.S. CONST. amend. XXIV, §§ 1–2 (“The right of citizens of the United States to vote in any primary or any other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. The Congress shall have power to enforce this article by appropriate legislation.”).

184. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 25 (3d ed. 2007) (discussing an intratextualist approach to the Nineteenth and Twenty-Sixth Amendments); Amar, *supra* note 181, at 789 (“Their strongly parallel language is a strong (presumptive) argument for parallel interpretation.”).

185. Amar, *supra* note 181, at 789.

186. The exact wording of the Twenty-Sixth Amendment is identical to the core text of a proposal first made in 1942. See *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 7. In a brief interchange in a 1943 House subcommittee hearing, one member reported that the proposal had been drafted by the legislature service and another implied that it had been

The Supreme Court has interpreted the Fifteenth Amendment as prohibiting election laws or practices that are motivated by a racially discriminatory purpose.¹⁸⁷ This is generally regarded as a relatively narrow construction,¹⁸⁸ but the Court has also noted that the Fifteenth Amendment “nullifies sophisticated as well as simple-minded modes of discrimination.”¹⁸⁹ The Twenty-Sixth Amendment, then, invalidates laws that are intended, at least in part, to suppress any particular age group of voters.

Arlington Heights, as many have argued and the Wisconsin district court agreed, offers the most sensible framework for evaluating these sorts of claims.¹⁹⁰ *Arlington Heights* itself involved a Fourteenth Amendment challenge to a denial of rezoning.¹⁹¹ In assessing whether the local authorities had been motivated by racial discrimination, the Court directed lower courts to perform “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”¹⁹² In extreme cases, the Court noted, disparate impact may be enough to prove intentional discrimination.¹⁹³ Generally, however, courts will have to investigate more closely, and the Court set out a non-exhaustive list of factors to be considered, including legislative and administrative history, possible departures from usual procedures, and statements by lawmakers.¹⁹⁴

One counterargument to this interpretation of the Twenty-Sixth Amendment is that discrimination based on age is simply not like discrimination based on race, or for that matter, on gender.¹⁹⁵ After all, age-based voter discrimination is baked into the Twenty-Sixth Amendment itself, which still contemplates a minimum voting age of eighteen. During the debates leading up to ratification, opponents of eighteen-year-old voting frequently made this same point.¹⁹⁶ Along similar lines, one can argue that age-based discrimination—at least

modeled on other suffrage amendments. *See id.* at 17–18. This was clearly not a subject of much interest, however, either in 1943 or over the decades to come. Legislators would offer dozens of proposed voting amendments, nearly all with the same core text, but there is no other recorded discussion of the amendment’s language. *Id.*

187. *City of Mobile v. Bolden*, 446 U.S. 55, 101 (1980).

188. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 184, at 562.

189. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

190. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977).

191. *Id.* at 254.

192. *Id.* at 266.

193. *Id.* at 258.

194. *Id.* at 265–66.

195. *Uncovering the Twenty-Sixth Amendment*, *supra* note 120, at 122.

196. *How Eighteen-Year-Olds Got the Vote*, *supra* note 120, at 70–71.

against the young—is less deeply pernicious than race or sex discrimination. Evaluating analogies between age and race, the late political theorist Judith Shklar noted acerbically, “Being young is, of course, not a permanent physical or social condition, and in a society that worships youth it is anything but degrading.”¹⁹⁷

In response, while intentional discrimination against young voters might seem somewhat less morally problematic—for both historical and social reasons—than discrimination against African-American voters, it is profoundly anti-democratic. As political scientists have shown, voting is a habit.¹⁹⁸ Deliberately making it more difficult for new voters to build that habit of political participation quite literally threatens the future of participatory democracy.

Furthermore, in recent years age and race have become strikingly more intertwined. The population of young Americans is dramatically more diverse than are older age groups; one 2015 study found that while three-quarters of Americans age fifty-five or older identify as white, only about fifty-six percent of those age eighteen to thirty-four do.¹⁹⁹ Indeed, there is good reason to think that much of the generation gap in the 2016 election was due to race, rather than simply age; Trump won white voters age eighteen to twenty-nine by five points, but there were far fewer white voters in that age group.²⁰⁰ Are efforts to suppress young voters because they are likely to vote Democratic better characterized as discrimination based on age, or on race? Given rapidly shifting demographics, the difference between the two may be eroding.

From a different perspective, some may worry that interpreting the Twenty-Sixth Amendment like the Fifteenth Amendment will effectively defang claims of age-based voter discrimination, given courts’ notorious reluctance to impute discriminatory intent to state legislatures.²⁰¹ In an amicus brief to the Seventh Circuit, the nonprofit group Common Cause applauded the district court’s finding that the challenged provisions violated the First and Fourteenth Amendment but criticized the court for sidestepping the Twenty-Sixth Amendment²⁰²: “By failing to consider the

197. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 18 (1991).

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

199. William H. Frey, *Diversity Defines the Millennial Generation*, BROOKINGS INSTITUTION (June 28, 2016), <https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/>.

200. Emma Fidel, *White People Elected Donald Trump*, VICE (Nov. 9, 2016), <https://news.vice.com/story/white-people-voted-to-elect-donald-trump>.

201. See *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

202. Brief of Amicus Curiae Common Cause, *supra* note 116, at 5–6.

legislature's aim—to keep young people from the ballot box—the district court rendered the Twenty-Sixth Amendment obsolete.”²⁰³

This is a valid concern. If courts read the Twenty-Sixth Amendment as prohibiting intentional discrimination but then impose an impossibly high standard for finding evidence of such discrimination, then the interpretation will be meaningless. Scholars and advocates would also do well to look closely at how the rules of evidence are being deployed in voting rights cases. In North Carolina, the defendants successfully managed to both exclude a newspaper article quoting a state legislator saying “college students don’t pay squat taxes” and quash a subpoena to question that same legislator.²⁰⁴

Despite these reservations, an *Arlington Heights* approach to the Twenty-Sixth Amendment remains the most workable, theoretically sound approach for courts addressing claims of unconstitutional discrimination against young voters.

CONCLUSION

Fierce partisan battles over the nation’s voting apparatus are not going to end any time soon. Despite winning the Electoral College vote and thus the presidency, Donald Trump has repeatedly claimed—without any evidence—that millions of Americans illegally cast votes for Hillary Clinton in the 2016 election. The new U.S. Attorney General, Jeff Sessions, has clearly signaled that under his leadership the Department of Justice will be far less interested in challenging state voter restrictions.²⁰⁵ A number of states are considering new restrictive legislation, while other states are moving in the opposite direction by expanding absentee voting, early voting, and online registration.²⁰⁶

Young voters will continue to be a flashpoint in these debates. Millennials are now the nation's largest generation, surpassing the “baby boomers,” or Americans between the ages of fifty-one and sixty-nine.²⁰⁷ There are profound demographic differences between older and younger Americans, and—in a likely related trend—a historically large generation

203. *Id.*

204. Transcript of the Trial/Day Nine, *supra* note 48, at 149.

205. See, e.g., *Justice Department Changes Its Position in High-Profile Texas Voter-ID Case*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html.

206. See *Voting Laws Roundup 2017*, BRENNAN CTR. FOR JUST. (Mar. 27, 2017), <https://www.brennancenter.org/analysis/voting-laws-roundup-2017>.

207. Richard Fry, *Millennials Overtake Baby Boomers as America’s Largest Generation*, PEW RES. CTR. (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

gap in political preferences. For the immediate future, at least, Democrats probably will try to maximize youth voting while Republicans will seek to minimize it. We can therefore expect to see more litigation over the Twenty-Sixth Amendment in the coming years.

The Twenty-Sixth Amendment was, in many ways, a product of the baby boom. As I have argued elsewhere, it is no coincidence that the eighteen-year-old voting movement really took off in the late 1960s, just when the first baby boomers turned twenty-one.²⁰⁸ Many of today's millennials are, of course, the baby boomers' children. There is a certain narrative satisfaction in these young voters using their parents' Amendment to push back against efforts to abridge their voting rights.

208. How Eighteen-Year-Olds Got the Vote, *supra* note 120, at 37.