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Caitlin Foley

INTRODUCTION

On June 30, 1971, the requisite number of states ratified the Twenty-Sixth Amendment to the U.S. Constitution. The latest to join the Constitution’s short list of amendments giving fundamental rights to U.S. citizens, the Twenty-Sixth Amendment granted eighteen to twenty-one year olds the right to vote in state and federal elections. Enacted in reaction to state opposition of national legislation that would have achieved this goal, Congress enacted the Amendment to definitively extend the right to vote in state and federal elections to youth. Changes in perception of youth in society, a decades-long debate over soldiers dying for a country in which they could not vote, and incentives gained by contributions from their incorporation into political life all moved this far-reaching action.

Despite a drastic alteration to the U.S. electorate, apart from a spattering of litigation involving residency restrictions in state courts, the Amendment has been largely unused. This may be explained by various factors: a dearth of rights denied or abridged, or the conception of the Amendment as a “sword” for

† B.A. 2010, University of Pennsylvania; J.D. Candidate 2016, The University of Chicago Law School. I would like to thank Professors William Baude and Aziz Huq for their valuable contribution in helping me think about this topic in a different and more interesting light.


2 See S.J. Res. 7, 92d Cong., 1st Sess. (1971). See also infra Part II.B.

3 See id.
enfranchisement but not a “shield” to defend against subtle abridgements that do not deny political participation outright. As a result of this, when laws are enacted that target youth the question arises of how to apply the Amendment and who to apply it to. Only a portion of eighteen to twenty-one year olds have had their voting rights denied in a manner that implicates the Amendment’s protections. When this targeted class changes in composition over time, so do the limits of their protection under the Twenty-Sixth Amendment.\(^4\) To warrant application, then, a showing of target-by-proxy may be necessary. For instance a state’s action may target students through college identification as proxies for age, or restrict felons’ constitutional rights as proxies for targeting specific racial groups. Even further—and relevant to the population of United States’ college students—is their demographic distribution. It is harder to discern the constitutionality of a law that targets college students because of their race as a result of predicted indications that race can be used as a voting preference.

This Comment explores a current instance where such an abridgement, but not an outright ban, has risen—state voter ID laws that limit or prohibit the use of student IDs. It identifies the effect such state laws have on youth voting and whether a potential youth class could use the Twenty-Sixth Amendment to invalidate such a law. This Comment then argues that the Twenty-Sixth Amendment offers a viable challenge to state voter ID laws attempting to limit or deny youth voting rights when age and race are intertwined and intentionally targeted. Part I provides an overview of the enactment of the Twenty-Sixth Amendment, using the text and legislative history to support the contention that it was intended to operate as a sword to enforce and as a shield to protect youth voting rights.

Part II examines state control over the electoral process and litigation that limits and defines that control. Part III examines and defines existing Equal Protection challenges that courts could apply in a Twenty-Sixth Amendment claim against state voter ID laws. Finally, Part IV argues that based on the character of state voter ID laws that disparately impact minority youth voters, such legislation should be assessed under

\(^4\) In illustration, a law that abridges the voting rights of college-aged students because of educational membership or its associative quality with a political party presumably is not protected.
the Village of Arlington Heights v. Metropolitan Housing Development Corporation\textsuperscript{5} standard of review.

I. THE TWENTY-SIXTH AMENDMENT

A. The Text of the Amendment

Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.\textsuperscript{6}

Before analyzing whether the Amendment can be used against a state voter ID law that impermissibly abridges the youth vote, it is necessary to determine if the Amendment can be used outside a context of enfranchisement. The text of the Twenty-Sixth Amendment's enactment supports a view that it was intended to function both as a sword\textsuperscript{7} and a shield.\textsuperscript{8} This role is evident when comparing the text with amendments enacted with similar or identical language.\textsuperscript{9} The authors of the Twenty-Sixth Amendment modeled its text, particularly § 1, after the Fifteenth and Nineteenth Amendments.\textsuperscript{10} The

\textsuperscript{5} 429 U.S. 252 (1977) (concerning a city council's zoning measure restricting the construction of multi-family dwellings, challenged as racially discriminatory and motivated).

\textsuperscript{6} U.S. CONST. amend. XXVI (emphasis added).

\textsuperscript{7} See, e.g., 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, 30 (2008) (arguing that the Twenty-Sixth Amendment provided university students with full-fledged citizenship, protecting even their First Amendment free speech rights).

\textsuperscript{8} See, e.g., Eric S. Fish, The Twenty-Sixth Amendment Enforcement Power, Note, 121 YALE L.J. 1168, 1173 (2012) (stating the Twenty-Sixth Amendment should be "interpreted to protect voters of all ages from age discrimination, not merely the young. It should also be interpreted to permit Congress to enact legislation overriding state policies that abridge voting rights on the basis of age"). Voting legislation, such as the Voting Rights Act of 1965, is often described as serving two roles: an offensive "sword" to actively identify violations of law, and a defense-oriented "shield" to protect a party from challenges concerning their compliance with it. For instance, the Voting Rights Act serves as a shield by protecting jurisdictions that adhere to its provisions against challenge, and a sword by empowering prosecution of violators. See, e.g., Kareem U. Crayton, Sword, Shield & Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement, 64 RUTGERS L. REV. 973 (2012).

\textsuperscript{9} See Fish, supra note 8.

\textsuperscript{10} See id. at 1175 (quoting 117 CONG. REC. 7534 (1971) (statement of Rep. Richard
inclusion of “or abridged” speaks strongly to the intended “broad enforcement power” of the Amendment.11 “Abridged” in amendments such as the Fifteenth enabled Congress to enact §5 of the Voting Rights Act, which invalidated racially motivated suppression of the vote.12

The language of §2 is duplicative of other amendments with broad enforcement powers. The phrase “Congress shall have power to enforce” appears in six of twenty-five amendments that have “either been construed to give Congress far-reaching enforcement powers or is consistent with such a construction.”

The debates leading up to the Amendment’s passage show Congress’s intent to replicate the enforcement power of this language.14

The Amendment’s text is significant considering judicial interpretation of the Fifteenth and Nineteenth Amendments beyond mere enfranchisement of their respective enumerated and protected classes. Courts have broadened both amendments’ applicability past their initially designated beneficiaries to include other diverse classes and men alike.15 Prior to the Twenty-Sixth Amendment’s construction, Congress utilized enforcement provisions to invalidate state laws that implicated rights conferred by the Reconstruction-era Amendments, contributing to the idea that the provision’s text intentionally included a broad enforcement power by Congress.16

Poff (“[T]he 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.”). See also, SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26, at 2 (1971) [hereinafter S. COMM ON THE JUDICIARY REPORT] (stating that Section 1 of the Twenty-Sixth Amendment “embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls”).

11 See Fish, supra note 8, at 1181.
12 See id.
13 Id. at 1182 (quotations omitted).
14 S. COMM ON THE JUDICIARY REPORT at 2. As the Committee on the Judiciary noted, §2 “confers on Congress the power to enforce the Article by appropriate legislation” because the section “parallels the reserve power granted to the Congress by numerous amendments to the Constitution.” Id.
15 See Fish, supra note 8, at 1176.
16 Id. at 1176–80.
B. Legislative History of the Amendment

The enactment of the Twenty-Sixth Amendment encapsulated the concern over incorporating eighteen to twenty-one year olds into the political process, a concern that initially surfaced amidst World War II, and continued until its passage. Over 150 similar amendments were proposed before 1970, but none were adopted until a confluence of factors prompted a new look at the composition of the country’s electorate. The Senate Judiciary Committee Report noted these factors: maturity, the ability to mentally and emotionally contribute to democratic government, performance of civic responsibilities in roles as taxpayers and servicemen, and the social contribution of active participation.

The legislative history of the Amendment reveals Congressional concern over potential state restrictions on the youth vote. The Senate Judiciary Committee Report preceding the Amendment’s adoption gave wholehearted support for the extension of the right to vote while minimizing the perceived administrative burden it would create for states. It noted: “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 serve to dissuade them from participating in the election.” The Report emphasized the inconsistent nature of such election procedures against the purpose of the Voting Rights Act—to promote political participation among youth by eliminating barriers to their involvement.

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17 See H.J. Res. 352, 77th Cong., 2d sess., at 8312 (1942). The proposal to lower the voting age accompanied a proposal to lower the minimum draft age to eighteen.

18 S. Comm. on the Judiciary Report at 5 (quoting Vice President Agnew as stating that “young people today are better educated and they mature physically much sooner than they did even 50 years ago”).

19 Id. at 6 (noting that “more than half of the 18- to 21-year-olds are receiving some type of higher education . . . . It is interesting to compare these recent statistics with some from 1920, when less than 10 percent went on to college”).

20 Id. at 6.

21 Id.

22 Id. at 12-18.


24 Id. “This result,” the Report continues, consists of “such segregation [which] might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.” Id.
C. Interpretation by the Court

The Supreme Court has encountered few cases concerning the enforcement power of the Twenty-Sixth Amendment, simply affirming the only case of its kind without discussion of its reach. In *Symm v. United States*, a case similar to lower court cases involving residency restrictions, the Court affirmed a district court's holding that the county's action—requiring students to fill out a questionnaire denoting post-graduation residency to register to vote—violated the Twenty-Sixth Amendment. According to the district court, states may not treat students differently than other voters, consistent with the state's action of erecting hurdles that abridged their voting rights.

This does not mean the Court has not paid attention to the Amendment. In several cases concerning election law, the Court in dicta has discussed the Twenty-Sixth Amendment as a part of a federal power to enforce equality in voting. As discussed below, lower courts have initiated all the remaining interactions.

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26 *Id.*
27 See, e.g., *Ballas v. Symm*, 351 F. Supp. 876 (S.D. Tex. 1972) (challenging the constitutionality of residency questionnaires for students who sought to register to vote). See also infra Part II.A.
28 *Symm*, 439 U.S. at 1105.
30 *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2636 n.2 (2013) ("The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections.") (citing U.S. CONST. art. I, § 4 ("[T]he Congress may at any time by Law make or alter" regulations concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Lubin v. Panish*, 415 U.S. 709, 713 (1974) ("In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 et seq., reflect this shift in emphasis.") (emphasis added); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2263 (2013) ("Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which are not at issue here. This power is instead expressly reposed in the States.").
with the Amendment that signal its broadened application to youth voting rights.

II. STATE CONTROL OVER THE ELECTORATE

A. State Residency Restrictions

Alongside the Twenty-Sixth Amendment’s enfranchisement of eighteen to twenty-one year olds are permissible state regulations on the qualifications of their electorate. Congress, in keeping with the bifurcation of electoral control, can limit state power by “mak[ing] or alter[ing] such Regulations, except as to the Places of choosing Senators,” and “enforc[ing] by appropriate legislation” voting rights enumerated in the Constitution itself. Subject to such “appropriate legislation,” states’ restrictions on voting are generally valid as necessary regulations on the logistical aspects of the electoral process.

Residency is one such state limitation, an undefined category in either the Constitution or in federal law. As such, states retain significant discretionary authority over enacting statutes that define and limit who may vote and when. For example, in Dyer v. Huff, the court held that the Twenty-Sixth Amendment’s enfranchisement of eighteen to twenty-one year olds does not necessarily grant them a guarantee to vote wherever they wish. States may create legislation to safeguard

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31 U.S. CONST. art. I § 4.1. The Constitution provides a division of electoral control between the federal government and the states, prescribing to states the right to promulgate the “Time, Places and Manner of holding Elections for Senators and Representatives,” and modeling the election of federal Congressmen so that “the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.”


33 See, e.g., U.S. CONST. amend. XIV, § 5; amend. XV, § 2.

34 Most states define residency as (1) the location where a person has, or has had, physical presence, and (2) where there is an intent to remain. See Voting Residency Guidelines, FEDERAL VOTING ASSISTANCE PROGRAM, available at http://www.fvap.gov/info/laws/voting-residency-guidelines, archived at http://perma.cc/D7TG-ZTBP. See also Sarah Fearon-Maradey, 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, 298 (2014) (citations in original).


36 Id. at 1316 (“The Twenty-Sixth Amendment to the Constitution of the United States . . . do[es] not allow a citizen to vote anywhere he desires.”).
their voter rolls, guaranteeing that "bona fide residents" are in the state or municipality in which they intend to vote.37

In ensuring only "bona fide" residents are able to vote, states may enact restrictions that impact out-of-state college students attending school in a particular locality; for example, requiring students to sign statements of intent to remain in the locality after their graduation to qualify as residents.38 States may also apply a presumption against changing domicile, which designates students’ parents’ homes as such unless they affirmatively establish a new one.39 Yet permissible restrictions are not without limits. It is unconstitutional for a state to institute a presumption against entire groups when determining residency, specifically students and servicemen.40 Students also have a constitutional right to travel across state lines and thereby register to vote in the place they consider “home.”41

37 See Fearon-Maradey, supra note 34, at 298.

38 See John M. Greabe, A Federal Baseline For the Right to Vote, 112 COLUM. L. REV. SIDEBAR 62, 64–65 (2012) ("Alabama, Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, Rhode Island, Utah, Vermont, and Wisconsin have laws that, if strictly enforced, would withhold domiciliary status from college students . . . with a present intent to move in the future."). See also Joseph A. Bollhofer, Disenfranchisement of the College Student Vote: When a Resident is not a Resident, Comment, 11:3 FORDHAM URB. L.J. 489, 489–92 (1983) (discussing the need for education among election officials and students to rectify the struggle between states’ rights to establish residency requirements and students rights to equal protection of the law).

39 To do so, students must assert their intention to remain at their school’s locality indefinitely through the required process of their state. In North Carolina, students can establish residency at their school address as long as they intend to remain there at the time in question and make it their principal home. N.C. GEN. STAT. § 163-57(11) (2006). Even an intention to leave after graduation does not invalidate residency, as long as a student does not hold a present intent to return to their former home. See Lloyd v. Babb, 251 S.E.2d 843 (N.C. 1979). Challenges to a student’s residency status cannot be based on their status as students or out-of-state tuition status. See, e.g., N.C. GEN. STAT. § 163-87 (listing the acceptable challenges to a person voting in North Carolina’s election). In Texas a student has a right to establish residency in the state according to a present intent to remain there for the time being. According to the Texas Attorney General, the “intention of the voter registration applicant is crucial to a proper determination of residence, and every person is strongly presumed to have ‘the right and privilege of fixing his residence according to his own desires.’” Residency Requirements for Voting in an Election in Texas, Op. Att’y Gen. GA-0141, at 5 (Tex. 2004) (citing McBeth v. Streib, 96 S.W.2d 992, 995 (Tex. Civ. App.—San Antonio 1936)).

40 See Carrington v. Rash, 380 U.S. 89, 96 (1965) (stating that by “forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment”).

41 See Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (“[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution . . . [a]nd it is clear that the freedom to travel includes the freedom to enter and abide in any State in the Union.”) (internal citation omitted).
Uncertainty over the validity of state regulations arises when those barred from voting or inconvenienced by the restrictions have their constitutional rights infringed. State restrictions that employ durational residency requirements for example are commonly subject to constitutional challenge. The ability of each state to make ad hoc determinations of whether residency is met creates considerable opportunities for variance in voting ability across the nation. This flexibility grants states the opportunity to craft legislation that discourages students from voting, or simply results in their exclusion through local time and place regulations without any intent to "fence out" the population.43

1. Twenty-Sixth Amendment challenges to residency restrictions.

The Supreme Court established precedent concerning students and residency, defining permissible voting restrictions a state can place on out-of-state students without offering an analysis of the Twenty-Sixth Amendment. The lower courts, in contrast, provided protections for youth voting rights in a substantial number of cases involving residency and the Amendment that resulted in limitations on state control over portions of student voting rights.

In *Jolicoeur v. Mihaly*,44 the California Supreme Court considered the state’s proposed legislation that presumed residency according to youths’ parental homes. The court found “[r]espondent’s refusal to treat petitioners as adults for voting purposes violat[ed] the letter and spirit of the Twenty-Sixth Amendment.”45 Other state supreme courts have echoed this reasoning. In *Worden v. Mercer County Board of Elections*,46 the

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42 See, e.g., Whatley v. Clark, 482 F.2d 1230, 1231 (5th Cir. 1973) (striking down a state statute that required students to state an intention to reside in the college town after graduating).

43 See, e.g., Walgren v. Bd. of Selectmen of Town of Amherst, Mass., 373 F. Supp. 624 (D. Mass. 1974) aff’d sub nom., Walgren v. Bd. of Selectmen of Town of Amherst, 519 F.2d 1364 (1st Cir. 1975) (holding a student’s Twenty-Sixth Amendment claim without factual support to sustain an allegation of concrete harms suffered by eighteen to twenty-one year olds following the town’s acceptance of an election calendar that disadvantaged students as a class).

44 488 P.2d 1 (CA 1971).

45 *Id.* at 7.

court looked to the legislative history of the Twenty-Sixth Amendment to find it "clearly evidences the purpose not only of extending the voting right to younger voters but also of encouraging their participation by elimination of all unnecessary burdens and barriers."\(^47\) The court applied the compelling state interest test to evaluate its constitutionality, finding restrictions against students registering and voting in their college communities could not be validly infringed unless a compelling state interest so justified.\(^48\)

2. Equal protection challenges to residency restrictions.

In addition to employing the Twenty-Sixth Amendment in the name of student voting rights, courts have upheld the use of the Equal Protection Clause to advance students' newly granted right to vote.\(^49\) The question of whether age discrimination constitutes an acceptable challenge under the Fourteenth Amendment is controversial,\(^50\) yet some courts have characterized state or county attempts to limit youth voting as unjustifiable violations of the Fourteenth Amendment. In Sloane v. Smith,\(^51\) the court found a county's use of both a separate form and a requirement of more stringent proof of residency for voting-age students violated the Equal Protection Clause.\(^52\) Students invoked the Fourteenth Amendment in several other successful suits upon the Amendment's ratification,\(^53\) with the

\(^{47}\) Id. at 237 (emphasis added).

\(^{48}\) Id. at 244.

\(^{49}\) See U.S. CONST. amend. XIV, § 1. ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

\(^{50}\) Age is not conventionally treated as a suspect classification under the Equal Protection Clause. This is evident in the various age-based categorizations enforced throughout the states, such as restricting the right to use alcohol to those over twenty-one years of age. This may be the reason that the opportunity to challenge voter ID laws that disproportionately affect voters of a particular age, such as students, has not been explored by particular affected classes. See, e.g., Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus, 44 U.C. DAVIS L. REV., 213, 215 (2010).


\(^{52}\) Id. at 1299. The requirements for students included production of "a Pennsylvania driver's license containing a county address or two or more credit cards showing charge account with a county commercial establishment, checking or savings account with a county bank or savings and loan association, lease, passport or other similar indicia of business or commercial activity within county."

\(^{53}\) See, e.g., Whatley v. Clark, 482 F.2d 1230, 1231 (5th Cir. 1973) (striking down a state statute that required students to state their intention to be residents of the college
Supreme Court ruling on aspects of these age-based discrimination policies in *Dunn v. Blumstein*.\(^\text{54}\) In *Dunn*, the Court eliminated durational residency requirements that last longer than a few months, recognizing the independent rights of students to be treated in an equivalent manner as adults in the same locality.\(^\text{55}\)

The Equal Protection Clause has served as the primary sword to enforce youth voting rights, and the Twenty-Sixth Amendment did not supplant it in later claims. Yet the Fourteenth Amendment’s role in protecting youth from voting abridgment is limited as “youth” is not a protected class capable of receiving its full security. Its use in residency controversies and in determining the standards of review applied by the courts does offer a useful analogue for a Twenty-Sixth Amendment challenge, an Amendment that could offer broader protections for youth. As Section B explores, some state voter ID laws pose a significant and effective means to limit the youth vote and offer a potential platform to view a Twenty-Sixth Amendment challenge.

**B. State Voter ID Laws**

State legislation abridging youth voting rights takes creative forms, materializing in targeted laws that seek to restrict how college-aged students vote through the placement of polling places, division of a college campus into multiple legislative districts, or the alteration of residency eligibility requirements in a campus’s locality.\(^\text{56}\) A further addition is voter ID laws, currently enacted in thirty-four states,\(^\text{57}\) which require

\(^{54}\) 405 U.S. 330 (1972).

\(^{55}\) See id., at 345-49.

\(^{56}\) See generally Fish, supra note 8. Fish discusses how the legislative history and text of the Amendment evinces a Reconstruction-era motivation to empower Congress to actively police age-based voting rights. For an interesting discussion of the legislative history, social context, and originalist interpretation of the Amendment, Fish’s article discusses how the Amendment should be read to empower Congress to override state actions that intentionally burden the right to vote on the basis of age, or disproportionately burden the voting rights of a particular age group.

voters to present identification at a polling place—an act that can disproportionately affect the youth voting bloc. These laws, which are not all alike in content or constitutionality, generally aim to regulate the manner of elections. They thus require voters to show ID at the polling place for goals such as reducing voter fraud, increasing legitimacy in the electoral process, and making sure "when you show up to vote, you are who you say you are." As such, not every law is enacted with intent to suppress voting, nor does every state voter ID result in reduced voter turnout. Recently, however, courts in three separate states struck down or challenged the implementation of such laws intended to deflate or resulting in reduced voter turnout. Legislation in two states in particular, North Carolina and Texas, presents a practical look at what arguments can be raised against state legislation crafted to or resulting in a burden on youth voting rights.

1. North Carolina's voter ID law.

In 2013, the North Carolina Legislature enacted H.R. 589. This statute, which will go into effect in 2016, requires voters to present one of six types of photo identification when they arrive at the polls: a North Carolina driver license, a North Carolina special ID card, a U.S. passport, a U.S. military ID card, a Veterans ID card, or a tribal enrollment card. University-issued photo ID cards are not permitted, a change from previous law.

In North Carolina State Conference of NAACP v. McCrory, a group of college-aged students intervened as plaintiffs to bring a novel Twenty-Sixth Amendment challenge to H.R. 589. They challenged its elimination of Same Day Registration, preregistration of sixteen and seventeen year old voters, and the
elimination of student IDs as acceptable forms of identification. The court denied a motion for a preliminary injunction on the basis that the ten intervening plaintiffs failed to provide sufficient evidence that they would suffer irreparable harm before trial. The court did not rule on the merits of the Twenty-Sixth Amendment challenge. The case is notable for its proposal for the court to adopt the Arlington Heights framework to their claim, a standard argued below as the appropriate one for courts to assess a Twenty-Sixth Amendment challenge.

2. Texas’s voter ID law.

In contrast to the challenge against North Carolina’s law, which relied on the use of the Twenty-Sixth Amendment, the challenge against Texas S.B. 14, Texas’ voter ID law, relied on the Fourteenth. The plaintiffs in the case Veasey v. Perry argued the State used age or student status as a proxy to deny or abridge their right to vote. In Veasey, the Texas League of Young Voters joined a minority student voter in a suit against the State for its exclusion of student IDs as acceptable proof of state identification. The group asserted that S.B. 14 violated Section 2 of the VRA and the First, Fourteenth, Fifteenth, and Twenty-First Amendments. The complaint also alleged a

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65 See id.
66 See id. Instead the Fourth Circuit affirmed in part and reversed in part, remanding the case with instructions to enter a preliminary injunction for the claims concerning the elimination of same-day registration and the prohibition on counting out-of-precinct ballots. The Fourth Circuit affirmed the denial of injunctive relief and the Supreme Court stayed this mandate and denied a petition for a writ of certiorari. See League of Women Voters of N.C. North Carolina, 769 F.3d 224 (4th Cir. 2014) cert. denied, (U.S. Apr. 6, 2015).
67 429 U.S. 252 (1977) (concerning a city council’s zoning measure restricting the construction of multi-family dwellings, challenged as racially discriminatory and motivated).
68 See S.B. 14 § 20 (providing that voters without an acceptable form of ID can obtain an election identification certificate (EIC), issued by the Department of Public Safety, under the law; however, the transportation and documentation costs of obtaining the EIC are arguably prohibitive to many potential voters). Licenses for concealed handguns are one of several forms of ID permitted.
70 Id. at 632–33.
disproportionate impact on Black students in Texas, where 25 percent of young voters lack government-issued IDs.\textsuperscript{72}

The district court in \textit{Veasey} agreed with the plaintiffs, deeming S.B. 14 an unconstitutional burden on both minority and youth voters, identifiers notably correlated in the court’s decision-making process.\textsuperscript{73} The court found S.B. 14 disproportionately impacted the voting rights of African-Americans and Hispanics in the state\textsuperscript{74} noting, “[w]hen the legislature rejected student IDs, state government employee IDs, and federal IDs, they rejected IDs that are disproportionately held by African-Americans and Hispanics.”\textsuperscript{75} To arrive at this decision, the court applied the Anderson-Burdick standard to the subgroup of Texas voters who did not already possess an acceptable form of ID under the newly enacted law. The court considered the burden imposed on these voters as substantial, noting the time, travel, and cost involved in obtaining a valid ID,\textsuperscript{76} and ruled that S.B. 14 violated the VRA and the Fourteenth and Fifteenth Amendments.\textsuperscript{77} The court did not issue a final judgment.\textsuperscript{78} The Fifth Circuit, however, upheld the court’s finding that the Texas law was passed with discriminatory intent, had a disproportionate impact on Hispanic and Black voters, and interacted with historical conditions to further disadvantage the minority community’s equality in the electoral system.\textsuperscript{79}

\textsuperscript{72} The connection between racial status and age is notable in the effects that result from student voter ID restrictions. See infra Part IV.

\textsuperscript{73} \textit{Veasey}, 71 F. Supp. 3d at 652–53.

\textsuperscript{74} The district court noted in determining the presence of discriminatory intent in the legislative history that the “decision to bar the use of government employee and college and university photo IDs to vote while allowing concealed handgun permits made the voting requirements much more restrictive for African-Americans and Hispanics while making it less so for Anglos.” \textit{Id.} at 701.

\textsuperscript{75} \textit{Id.} at 658–59.

\textsuperscript{76} See \textit{id.} at 693.

\textsuperscript{77} \textit{Veasey}, 71 F. Supp. 3d at 699.

\textsuperscript{78} The Fifth Circuit stayed the district court’s decision to enjoin enforcement of the law, citing the timing of the decision just days before the election date. See \textit{id.} The Supreme Court denied the application to vacate the Circuit’s stay. See \textit{id.} Justice Ginsberg issued a fervent six-page dissent.

\textsuperscript{79} \textit{Veasey v. Abbott}, 796 F.3d 487, 487–88 (5th Cir. 2015) (affirming the district court’s finding of discriminatory effect in violation of § 2 of the VRA, and remanding for consideration of remedy and determination of whether discriminatory intent could be found). The court vacated the plaintiffs’ First and Fourteenth Amendment challenges.
III. TRANSLATING EQUAL PROTECTION ANALYSIS TO THE TWENTY-SIXTH AMENDMENT

Accepting the proposition that the Twenty-Sixth Amendment provides broad enforcement power to protect voting rights for eighteen to twenty-one year olds, the question becomes what standard of review courts can translate from analogous constitutional doctrines to assess whether voter ID laws withstand its constitutional scrutiny. In making this determination it is necessary to consider the implications of voter ID laws, which impact fundamental rights, state election regulation, intentional discrimination, disparate impact, and age-based discrimination, as each offers a range of constitutional and statutory challenges and their respective standards of review. What this Comment proposes below is adoption of the Arlington Heights test advanced by the plaintiff class in NAACP v. McCrory's challenge to North Carolina's voter ID law. The analysis under Arlington Heights offers an appropriate framework for analyzing discriminatory intent when a state action results in a subtle but disproportionate effect on subgroups of a particular class. Before discussing why Arlington Heights presents the most appropriate analogue, however, the Comment briefly offers why other standards applied in traditional voting discrimination claims fall short.

State election laws, which require and delineate acceptable forms of voting ID, are often questioned in legal disputes that challenge racial discrimination or race-associated impact. Consequentially, most challenges are brought under the Fourteenth, Fifteenth, and First Amendments, as well as under the statutory protections of the VRA. This section describes the

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80 If the right to vote is considered a fundamental one.
81 States have a legitimate and recognized role in controlling the manner and process of their elections, even when its election laws place incidental or indirect burdens on voting. See Burdick v. Takushi, 504 U.S. 428, 441 (1992) (holding that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system").
84 42 U.S.C. § 1973 et seq. Apart from constitutional claims, persons challenging
constitutional challenges and assesses the appropriateness of applying a similar standard of review to a Twenty-Sixth Amendment claim.

A. Challenges under the Fifteenth Amendment

The Fifteenth Amendment protects the right to vote from racially motivated abridgment. The Amendment is a substantive correlative of the Fourteenth Amendment’s procedural protections; both defend the voting rights of racial groups from unequal treatment yet the Fifteenth Amendment enfranchises former subjects of slavery as opposed to ferreting out and regulating against instances of discrimination, as the Fourteenth Amendment does. Adoption of a Fifteenth Amendment analysis for a Twenty-Sixth Amendment claim is in many ways natural; Congress modeled the Twenty-Sixth Amendment after the Fifteenth, signaling a belief that they state voter ID laws can utilize the VRA, passed by Congress pursuant to its authority under the Fourteenth and Fifteenth Amendments. Section 2 proscribes a state from enacting any voting scheme that “results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color,” 42 U.S.C. § 1973(a). "The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” League of Women Voters of N.C. v. North Carolina, 796 F.3d 224, 238–39 (4th Cir. 2014) (internal quotations omitted) (quoting Thornburg v. Gingles, 478 U.S. 30, 30 (1986)). Traditionally a bulwark of voting rights protection, § 2 challenges to voter ID laws were feared inadequate after the Supreme Court invalidated the VRA’s §5 preclearance requirement in Shelby County v. Holder, no longer requiring States with patterns of voting discrimination to submit changes in their voting legislation to the federal government for preapproval. See Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013). See also Ari Berman, Supreme Court Eviscerates Voting Rights Act in a Texas Voter-ID Decision, THE NATION (Oct. 20, 2014), available at http://www.thenation.com/blog/183561/supreme-court-eviscerates-voting-rig hts-act-texas-voter-id-decision# Archived at http://perma.cc/3EEG-H7NG. Following this change, voter ID laws such as Texas’ S.B. 14 proliferated, leaving §2 to fight against state voter ID laws alone, with little success, as three out of four cases before the Supreme Court in October 2014 challenging state voter ID laws under the VRA’s remaining provisions failed. See id. Notably, the Fifth Circuit invalidated Texas’ voter ID law, S.B. 14, under the VRA’s §2, with the court finding that it discriminated against Black and Hispanic voters. Veasey, 796 F.3d at 487–88.

85 U.S. CONST. amend. XV. See also Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (holding that Congress is empowered to enforce the right to vote against State efforts to restrict it on account of color or race).

86 See Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397, 1398 (2002) (proposing that the Fifteenth Amendment can be used to invalidate colorblind electoral rules that unintentionally abridge the voting powers of minority groups).
would be interpreted and enforced in a similar manner. Precedent also exists to guide its application in court.87

Yet there are two persuasive arguments against treating the Twenty-Sixth Amendment as an analogue to the Fifteenth.88 First, burdens on the voting rights of students arguably create restrictions on voting as a commonality of an individual's association with a school rather than age, presenting an issue of equal protection and not age discrimination. The Twenty-Sixth Amendment enfranchised eighteen to twenty-one year olds, but college students as a class includes graduate students and other individuals over twenty-one. Granting special protections to one subgroup of students means "only the fortuitous accident of birth supports any difference in treatment."89 If so, an equal protection analysis that highlights the unequal treatment of school populations among the broader community would be more appropriate than a broader Fifteenth Amendment claim.

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87 The First Circuit proposed an application of a Fifteenth Amendment inquiry to a Twenty-Sixth Amendment claim in Walgren v. Howes, 482 F.2d 95 (1st Cir. 1973), remanding the analysis to the district court. In Walgren v. Board of Selectmen of Town of Amherst, Mass., 373 F. Supp. 624, 625 (D. Mass. 1974) aff'd sub nom. Walgren v. Bd. of Selectmen of Town of Amherst, 519 F.2d 1364 (1st Cir. 1975), the district court considered an Equal Protection and Twenty-Sixth Amendment claim challenging the town of Amherst's decision to adopt a calendar that held elections during university break, when most students were absent. In evaluating the government's action under the Twenty-Sixth Amendment, the court adopted an analysis akin to the Fifteenth Amendment, but grudgingly so. Walgren, 373 F. Supp. at 632 (differentiating burdens from mere obstructions by the degree of difficulty imposed on a potential voter on the opportunity to vote, finding a burden on student voting did not exist as students were not "deprived of the opportunity to visit personally the polls . . . were not required to vote by absentee ballot . . . [and] could have remained on campus" and participated). The court emphasized the distinctions underlying the Twenty-Sixth Amendment and the Reconstruction-era Thirteenth, Fourteenth, and Fifteenth Amendments, noting the "differences between obstructing access to the political process and the placing of burdens on the exercise of voting rights." See id. at 634. Though the Twenty-Sixth Amendment claim in Walgren failed under a Fifteenth Amendment analysis analogue as a result of the plaintiff's inability to factually support a concrete burden on eighteen to twenty-one years' voting rights, the court recognized that the government action in question did not involve suspicion of invalid motives. The officials charged with changing the election date attempted to rectify the burden on students and, when they could not alter it for the year in question, adopted a calendar for the subsequent year that considered the students' presence in the town. Walgren, 373 F. Supp. at 636. As discussed below, invalid motives in state action could alter the success of youth-directed discrimination claims challenging voter ID laws.

88 These arguments apply equally to the Thirteenth and Fourteenth Amendments. The Thirteenth is not discussed here, but courts have interpreted the Fourteenth Amendment's powers as protecting a range of various classes and identifications distinct from the class of people it was enacted to protect.

89 Walgren, 373 F. Supp. at 633.
The second argument posits that the nature of evil addressed under the Twenty-Sixth Amendment is fundamentally different than that of the Reconstruction-era Amendments, particularly the Fifteenth. The empowerment of African-American men contained in an extension of equal protection and voting privileges involved an inherent constitutional right denied because of racial discrimination; the Twenty-Sixth Amendment’s enfranchisement of youth in comparison involved important but less fundamental values.90

B. Three Equal Protection Standards of Analysis

In general, when states enact legislation that intentionally discriminates against a minority class, or has an unequal or disparate effect, such statutes and regulations are subject to constitutional challenge. The most common form of challenge brought against election laws is under another Reconstruction-era act—the Fourteenth Amendment. The standards applied in those cases, many of which involve the unequal treatment of students in a residency context, provide the most relevant comparison to what standards may be used in a similar claim of age-based discrimination under the Twenty-Sixth Amendment. In an equal protection challenge, the level of scrutiny the court

90 The importance of the historical implications of either Amendment is also an important consideration. The court in Walgren noted: “the extension of the ballot to young people does not have a historical background such as slavery, nor does it rectify a wrong which was as inconsistent with our constitutional scheme as the total denial of the vote of an otherwise qualified citizen on account of his race of poverty.” Walgren, 373 F. Supp. at 634. The court, however, offered a paternalistic interpretation of the Twenty-Sixth Amendment’s adoption, attributing it to “an official acknowledgement of the new maturity, sophistication and responsibility of the T.V. generation,” without mention of the era of wartime that surrounded its introduction and passage. Id. It is also significant that in the shadow of voter ID claims based on racially motivated discrimination are claims of age-based discrimination. The allegation of age-motivated bias in the enactment of voting laws is a novel one in voter ID challenges. In addition to allegations that these laws infringe on a class of similarly aged individuals empowered with the right to vote, a correlation also exists between age and minority classes in many of these states. Discrete minority classes compose a large component of the youth block in many states that seek to restrict the “youth vote.” See Evan Walker-Wells, Blocking the Youth Vote in the South, INSTITUTE FOR SOUTHERN STUDIES (Oct. 29, 2014), available at http://www.southernstudies.org/2014/10/blocking-the-youth-vote-in-the-south.html, archived at http://perma.cc/S6KK-5JRA (noting that young people of color are disproportionately targeted by enforcement of voter ID laws). This presents a compelling question of what, if any, laws can be used to combat state voter ID laws that infringe youth voting rights, whether through legislation that protects minority voting rights or more generally college-aged students.
applies to a matter depends on the nature of the law and its effect, if any, on a protected class.

Applicable to state voter ID laws, the Supreme Court determined that the Equal Protection Clause applies to a neutral law91 when a state categorizes voters in disparate manners, or restricts the right to vote.92 However, for those race-neutral state actions that disproportionately affect a minority party, the burden of proving a particular law is invalid depends on proving a discriminatory intent, a high bar that often results in a victory for the defendant state.93 The appropriate standard to use depends on the "precise character of the state's action and the nature of the burden on voters."94

In Obama for America v. Husted,95 the Sixth Circuit separated the standards of review applicable to equal protection cases in an election law setting.96 When a plaintiff alleges unequal treatment but no associated burden on voting, a rational basis standard is applied.97 If a plaintiff alleges a severe burden, as with a poll tax, courts apply strict scrutiny.98 The Court emphasized that most cases fall in between these classifications, for example when the allegation is one of disparate treatment without a finding of discriminatory intent. In these cases, courts apply the Anderson-Burdick standard in which a court weighs the harm done to the constitutional rights of the affected parties against the justifications of particular interests provided by the State.99

How the Twenty-Sixth Amendment would apply, and if it would be more effective, is important in assessing whether the

91 Neutral denotes that the state action in question is not discriminatory on its face, but may have been enacted with discriminatory intent or have disparate effects.
93 West's ALR Digest Constitutional Law k3251, ALRDG 92K3251.
94 Obama, 697 F.3d at 428.
95 697 F.3d 423 (6th Cir. 2012).
96 Id. at 428–29.
97 Id. at 429.
98 Id.
99 Obama, 697 F.3d at 429. See also Crawford, 553 U.S. at 190. The Court determined that in evaluating voting rights under the Equal Protection Clause, "rather than apply[ ] a 'litmus test' that would neatly separate valid from invalid restrictions" courts "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." Id.
Amendment can provide the full potential of protections it was enacted to give. The claim of age-based discrimination involves disparate treatment and a discriminatory effect, and arguably warrants a standard above rational basis review. This section briefly explores the remaining options that a court would most likely apply: strict scrutiny, the Anderson-Burdick balancing test, and a novel use of Arlington Heights. The latter Arlington Heights test, which offers a predictable analysis to a claim of disparate impact from an official governmental action, provides a Twenty-Sixth Amendment claim the most suitable framework for a comprehensive analysis of individual state voter ID laws that impact youth voting rights.

1. **Anderson-Burdick standard: less than “severe.”**

If the court finds a state action does not have the necessary characterizations\(^\text{100}\) to warrant strict scrutiny review, such as when a state action indirectly or derivatively imposes a burden on the right to vote, the court applies a lesser standard. Strict scrutiny is applied when laws erect “a condition” on voting rights, while intermediate standards of review are applied when state action erects mere “barriers.”\(^\text{101}\) The Anderson-Burdick standard is one such intermediate standard\(^\text{102}\) with a judicial track record in voting rights claims that signals potential applicability in a voter ID case.\(^\text{103}\)

\(^{100}\) See infra Part III.C.2 (discussing characterizations such as fundamental right, suspect class, and/or colorblind or color-conscious legislation).

\(^{101}\) Bullock v. Carter, 405 U.S. 134, 143–44 (1972). The Court distinguished between conditions on the right to vote that trigger strict scrutiny, such as if a voter had to pay a tax to register, and barriers in the voting system, such as the requirement that candidates wishing to appear on the ballot pay a filing fee. The latter case does not involve direct burdens on voters but “tends to deny some voters the opportunity to vote for a candidate of their choosing.” *Id.* at 144.

\(^{102}\) See Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524 (6th Cir. 2014) (finding the provided statistical and testimonial evidence as a finding of a substantial burden on plaintiffs’ right to vote, rather than a severe burden).

\(^{103}\) Anderson v. Celebrezze, 460 U.S. 780 (1983), concerned an Ohio statute that established an early filing deadline for independent candidates to place their name on the ballot. The Court dismissed the notion that Ohio’s action denied the franchise of voting to citizens, but recognized the law had a “theoretical, correlative effect” on voters. *Id.* Burdick v. Takushi, 504 U.S. 428 (1992) concerned a Hawaii election law that banned write-in voting and consequently burdened the number of candidates who could be on the ballot. The Court, citing Anderson as “[t]he appropriate standard for evaluating a claim that a state law burdens the right to vote,” found a limited burden on voter’s rights as a group. This, the Court determined, required less than a compelling state interest to survive constitutional scrutiny.
The Anderson-Bur dick standard assesses constitutionality by employing a balancing test that weighs the state's justifications for a law against the burden on the right to vote.\textsuperscript{104} When a law purports to restrict a constitutional right, the court weighs:

The character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."\textsuperscript{105}

The restriction survives if the State shows "important regulatory interests . . . justify the restriction[]."\textsuperscript{106}

The first consideration by a court applying the standard is the burden imposed, if any, on students as a result of state voter ID laws. As "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not generally considered offensive,\textsuperscript{107} courts have not considered any state burden—voter ID or otherwise—substantial enough to warrant invalidation under this standard. In the Twenty-Sixth Amendment context, the burden would be the associated costs for students to obtain a state-approved ID, such as time or money expended as a consequence of the law's new requirements. The legitimacy of such a burden may depend on whether previous state law allowed student IDs for registration, and thus if the state created a burden by subsequently disallowing them. In \textit{Crawford v. Marion County Election Board},

\textsuperscript{104} \textit{Bur dick}, 504 U.S. at 434.
\textsuperscript{105} Id. (quoting \textit{Anderson}, 460 U.S. at 789).
\textsuperscript{106} \textit{Bur dick}, 504 U.S. at 434 (citing \textit{Anderson}, 460 U.S. at 788). In \textit{Bur dick} the Court noted since the burden on voters was slight, the interest of the state need not be compelling. The state's "interest in 'avoid[ing] the possibility of unrestrained factionalism at the general election' provides adequate justification for its ban on write-in voting in November." Id. at 439 (quoting \textit{Munro v. Socialist Workers Party}, 479 U.S. 189, 196 (1986)).
\textsuperscript{107} \textit{Crawford v. Marion Cnty. Election Bd.}, 553 U.S. 181, 189–90 (2008) (quoting \textit{Harper v. Virginia Bd. of Elections}, 383 U.S. 663, 788, n. 9 (1966)). The Court in \textit{Crawford} noted that such "even handed restrictions" satisfy the standard set forth in \textit{Harper}, a case in which the Court invalidated a poll tax levied by Virginia on its voters, thus establishing a standard by which a state action could be classified as "invidiously discriminate." Id. at 189–90.
the Court opted to apply the *Anderson-Burdiick* standard in place of a heightened standard and upheld the use of Indiana’s voter ID law.\(^{108}\) In *Crawford*, the plaintiffs brought an equal protection challenge in response to Indiana’s voter ID law. Under the analysis, the Court balanced the interests of the State against the burden imposed on all of the state’s voters, discrete classes of voters, and political parties,\(^{109}\) and found the interest of preventing voter fraud sufficiently weighty to justify the State’s action.\(^{110}\) This was especially true, the court argued, in light of the fact that Indiana provided free photo IDs for its residents as well as an alternative option for voters unable to acquire one by the time of voting.\(^{111}\)

The second consideration for the court under *Anderson-Burdiick* is whether the state’s justification outweighs the burden on the voter class. The state must “articulate specific, rather than abstract state interests, and explain why the particular restriction imposed... actually addresses, the interest put forth.”\(^{112}\) In the context of voter ID laws, this finding varies considerably. In *Husted*, for example, the Sixth Circuit found the general goal of preventing voting fraud insufficient to outweigh the burden on voters.\(^{113}\) The state’s testimony on preventing fraud, and “handful of examples of voter fraud” did not specifically support early voting restrictions the state sought to protect.\(^{114}\) Yet in *Crawford*, the Court advanced a different determination, finding the interests of detecting and deterring voter fraud, improving the electoral process, and increasing

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\(^{108}\) *Crawford*, 553 U.S. 181.

\(^{109}\) *Id.* at 189–90 (explaining that under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), a court “must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule”).

\(^{110}\) *Id.* at 198 (finding that “the inconvenience of making a trip to the BMV [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote [or] even represent a significant increase over the usual burdens of voting.”).

\(^{111}\) *Id.* at 199 (noting that a provisional ballot would allow voters who did not have acceptable forms of ID to vote, as long as within 10 days of casting their ballot they traveled to the circuit court’s office and executed an affidavit verifying their identity). Though the Court noted burdens would prove substantial on those voters without IDs, born out of state, or those who would have economic or personal impediments to securing the documents needed to acquire a new ID, the state’s provision of a free state ID and the option of using a provisional ballot mitigated that burden.

\(^{112}\) Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 545 (6th Cir. 2014).

\(^{113}\) *Id.* at 547.

\(^{114}\) *Id.*
voter confidence as legitimate and sufficiently weighty interests. Without evidence of actual in-person voter fraud, the interest of assuring an accurate voter roll substantiated the state's voter ID law.

Applied to a Twenty-Sixth Amendment claim following Crawford, plaintiffs will need to offer evidence of an actual burden on their right to vote, such as the number of African Americans negatively affected by a change in early voting. Plaintiffs may prove the additional time and expense devoted to acquiring an accepted form of ID as a burden, which itself will depend on the availability of free or subsidized IDs in the respective state. Testimonial or empirical evidence may overcome Crawford's challenges in this respect, though the fact-specific nature of balancing means particular state laws and their construction will vary in their success of withstanding Anderson-Burdick scrutiny.

Aside from establishing a burden, a plaintiff will also have to prove that the government regulation is not based on a necessary need to reduce voter fraud. Crawford shows that the interest of insuring voter integrity can be protected from constitutional challenge, potentially with little support of actual infringement. Yet the Sixth Circuit's decision in Husted, coming six years in Crawford's wake, suggests in some circuits

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115 Crawford, 553 U.S. at 202–03.
116 Id. at 195–96 (finding that there is no question of the legitimacy of the State's interest in assuring only eligible voters votes are considered, even in the absence of any detectable fraud).
117 See, e.g., id. at 181.
119 See, e.g., Crawford, 553 U.S. at 195–97. In Crawford, the Court considered three interests advanced by the government: deterring and detecting voter fraud, modernizing its election system, and safeguarding voter confidence. Id. at 191–92. The "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history," and the evidence advanced to show Indiana had an "inflated list of registered voters," including deceased and ineligible felons, was attributed to changes in federal law and "sloppy record keeping" by the state. Id. at 194–95. Nevertheless, the Court found that "the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification." Id. at 196–97. The interest of safeguarding voter confidence was likewise held significant because "it encourages citizen participation in the democratic process." Id. The Court cited no evidence to support either claim outside of conclusory statements.
there may be a burden on the government to provide proof of actual fraud. Additionally, the weight given to claims that such laws protect against voter fraud has waned in recent years in the face of mounting skepticism of their efficacy.

The Anderson-Burdick standard is in many ways a natural fit for a court to consider in assessing a student voter ID claim under the Twenty-Sixth Amendment. The application offers benefits in translation for the court, as the test is applied frequently and recently in cases concerning voter ID laws under Fourteenth Amendment claims where the interest in assuring election integrity often overcomes claims of unconstitutionality. The test ensures that reasonable restrictions on the right to vote, as expected and deemed valid by the courts, will be weighed in consideration with burdens that may be unequally imposed on different segments of society, such as the youth. In this respect, the balancing test is appropriate, requiring no suspect class or fundamental right (as strict scrutiny does, discussed below) but allowing discrete segments of society to advance their arguments against state-

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120 Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 542 (6th Cir. 2014). The Court evaluated the state’s claim of voter fraud, denying that the state met its burden to establish that their interest outweighed the burden on voters. The Court stated: “This does not mean . . . that the State can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters. Defendants did not provide more than a handful of actual examples of voter fraud, and their general testimony regarding the difficulties of verifying voter registration before counting ballots did not clearly pertain to problems with Golden Week” (the term used to describe the former state policy that allowed early voting without proof of inability to vote on election day). Id. at 547


122 See, e.g., Husted, 768 F.3d at 542 (finding that precise predictions of how many voters are affected by changes in early voting are not needed in determining that the state’s election law change would disproportionately affect minority, low-income, and homeless voters).

123 See, e.g., Crawford, 553 U.S. 181. See also Joshua Douglas, (Mis)Trusting States to Run Elections, 92 WASH. U. L. REV. 553 (2015) (arguing that the Court has replaced Congress in election law, partly through lowering the bar to meet the state interest prong in constitutional analysis).

124 Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (“It is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”) (internal quotations omitted).
enacted burdens on their voting rights. It also offers a higher level of scrutiny than the rational basis test traditionally applied to age discrimination claims.\textsuperscript{125}

Yet application of the \textit{Anderson-Burdick} standard is not necessarily the best fit, particularly due to the indeterminate guidance courts have given that has resulted in an uneven application of the test. Cases applying \textit{Anderson-Burdick} to voter ID challenges result in a balancing test analyzed either with incomplete evidence of interests and burdens or conclusory determinations of either (or both) by the court. Its manner of application is unpredictable, and complicates the notice of required pleadings for plaintiffs who argue under it. Even further, the elements characteristic of a Twenty-Sixth Amendment claim—the presence of a discrete class of voters and historical deprivation of a protected right—offer benefits of translation for the courts and parties that suggest a heightened standard of review, preferable to the plaintiff class, is a more appropriate analysis.

2. Strict scrutiny: fundamental rights and suspect class.

In an Equal Protection analysis, strict scrutiny applies when a legislative classification “impermissibly interferes with the exercise of a \textit{fundamental right} or operates to the peculiar disadvantage of a \textit{suspect class}.”\textsuperscript{126} The standard, which is applied in contexts from due process cases\textsuperscript{127} to restrictions on content-based speech,\textsuperscript{128} serves to “smoke out” impermissible government classifications based on race.\textsuperscript{129} It is applied


\textsuperscript{126} \textit{Id.} at 312 (finding that a mandatory retirement age involved neither an interference with fundamental rights or disadvantage to a suspect class) (citing San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973)). The Court found that the Equal Protection analysis requires strict scrutiny review only when a legislative classification “impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” A mandatory retirement age involved neither. \textit{Id.}


whether discrimination is found on the face of the statute, or where the state action is facially neutral but applied or enacted with discriminatory intent. It is also decisive; courts consistently invalidate discriminatory state actions when applying strict scrutiny.

Application of the standard begins by asking whether a compelling state interest supports the legitimacy of the government action under challenge. The “compelling state interest” test states that, because the right to vote is a fundamental one, a state must show a “compelling” rather than mere “rational” justification to restrict it. The Supreme Court has adopted a “casual” approach to identifying such interests, a precedent fatal to many claims. In regards to election law, fairly conducted elections are compelling interests.

\[\text{130 See Chambers, supra note 86, at 1398 (discussing affirmative action legislation as a common example of a color-conscious rule). See also Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. Rev. 1779, 1783-84 (2012) ("Under colorblindness, the remedial motives behind affirmative action are irrelevant. Indeed, frequently the Court asserts that whether the government’s motives are benign or invidious is inherently unknowable. Distrusting its ability to parse the state’s intentions, the Court under colorblindness subjects all affirmative action policies to the most stringent level of ‘scrutiny,’ which is to say, it requires the highest level of governmental necessity before such programs will be allowed."). Id. at 1783. Strict scrutiny is applied whether the state action benefits or burdens disadvantaged groups. See Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 503 (2003).}

\[\text{131 Chambers, supra note 86, at 1398. See also, Washington v. Davis, 426 U.S. 229, 240 (1976) (stating that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”). See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (noting that “[proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause”). Laws that abridge or deny the right to vote on account of race or color may be found to violate the VRA. See 42 U.S.C. § 1973(a). Id. at 1398-99.}

\[\text{132 See Kobick, supra note 129, at 522 (citing cases in support of the proposition that courts typically invalidate government action when applying strict scrutiny).}

\[\text{133 See Joseph A. Bollhofer, Disenfranchisement of the College Student Vote: When a Resident is not a Resident, Comment, 11:3 Fordham Urb. L.J. 489, 494 (1982).}

\[\text{134 See City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-09 (1970).}


\[\text{136 Though a recent Fourteenth Amendment claim against a voter ID law failed to}
scrutiny also requires that a state action be narrowly tailored to achieve its stated end. A state’s means of applying a restriction must be the most constricted available, providing further protections for the abridged plaintiff interests. This analysis includes several questions of its own, beginning with whether the infringement is necessary. A particular “law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights.”

Second, a court asks whether the infringement is under-inclusive of the goals it seeks to advance. The official action “will not survive strict scrutiny if it fails to regulate activities that pose substantially the same threats to the government’s purportedly compelling interest as the conduct that the government prohibits.” Finally, to assess the narrow tailoring of a governmental action, the court balances the government action to assess the extent to which it is over- and under-inclusive.

Applicable here, the Supreme Court has interpreted the test in the context of residency restrictions, shown above as precursors to age-based discrimination claims challenging voter ID laws. Yet, as mentioned above, the application of the analysis is invoked where a fundamental right or a suspect class is involved, a death toll to its use for a Twenty-Sixth Amendment claim. First, the Constitution does not explicitly define a right to vote; rather, voting as a fundamental right has evolved through its numerous prohibitions on restriction

reach this bar. See Crawford, 553 U.S. at 189.
138 Fallon, Jr., supra note 135, at 1326.
139 Fallon, Jr., supra note 135, at 1327. Though considered in the analysis, the under-inclusive question is not sufficient to invalidate a government statute. The court considers over-inclusiveness as well, though has not issued clear guidance on its use. Id. at 1329–30.
140 See Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (“It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.”) (internal quotations omitted).
embodied in the Fifteenth,¹⁴¹ Nineteenth,¹⁴² Twenty-Fourth,¹⁴³ and Twenty-Sixth Amendments. These restrictions on abridgment suggest that the “right to vote has become not merely a right to be distributed fairly to citizens regardless of race... but also a fundamental right to be protected against nonracial incursion.”¹⁴⁴ If voting is considered a fundamental right, the Twenty-Sixth Amendment has the power to protect it, and when the right to vote is denied strict scrutiny applies.¹⁴⁵

Yet this protection does not extend to burdens and abridgments¹⁴⁶ where courts have limited the application of strict scrutiny and applied a lesser standard of analysis. For example, the Seventh Circuit, in Crawford¹⁴⁷ weighed the justifications of early voting restrictions against those First and Fourteenth Amendment rights of the plaintiffs.¹⁴⁸ In the interest of equity and efficiency, the court rejected strict scrutiny as the proper measure through which to analyze the alleged infringement.¹⁴⁹ The circuit resorted to the Anderson-Burdick

¹⁴¹ U.S. Const. amend. XV § 1 (“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.”).

¹⁴² 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.”).

¹⁴³ U.S. Const. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or 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.”).

¹⁴⁴ Chambers, supra note 86, at 1425, n. 116.

¹⁴⁵ See Dunn, 405 U.S. at 366 (holding state laws governing elections completely denying an individual or group of individuals the right to vote are subject to strict scrutiny review).

¹⁴⁶ The Supreme Court has stated that the right to vote is “preservative of other basic civil and political rights,” unique among other derivative entitlements and privileges. Reynolds v. Sims, 377 U.S. 553, 562 (1963). The right to vote historically warranted greater protection as it is susceptible to abuse by those who gain from its manipulation, as seen through the events leading to enactment of the Civil Rights Act of 1964 and Voting Rights Act of 1965. Richard W. Trotter, Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and The Suppression of a Structural Right, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 520–21 (2013) (arguing for a strict scrutiny standard for assessing voter ID law challenges, and more broadly substantive challenges to the right to vote, after Crawford, given the increased evidence of disproportionate effect on minorities and lack of evidence of voter fraud).

¹⁴⁷ 472 F.3d at 949.

¹⁴⁸ Id.

¹⁴⁹ See Crawford, 553 U.S. at 204 (Scalia, J., concurring) (arguing that the Anderson-Burdick test should be applied, as it “calls for application of a deferential important regulatory interests standard for non-severe, nondiscriminatory restrictions, reserving
balancing test instead, recognizing the limited protection warranted.\(^{150}\) The Supreme Court affirmed the Seventh Circuit's finding in *Crawford*, agreeing that the legislation did not warrant strict scrutiny.\(^{151}\) Applying *Crawford*, if a state's voter ID law restricted the right to vote, but did not outright deny it, strict scrutiny would not apply.\(^{152}\) Arguably voter ID laws meet this classification; the laws restrict the votes of students without acceptable identification, but do not completely deny students the exercise of the right to vote. To warrant strict scrutiny, it would thus be necessary to argue that students are a protected class.

The argument that eighteen to twenty-one year olds are a suspect class is challenging, as age is not a recognized as such. Judicial precedent has narrowed the range of classifications entitled to this level of review, suggesting youth will not be added to the protected classes.\(^{153}\) The First Circuit in *Walgren v.*
Howes\textsuperscript{154} did suggest creating a suspect class for eighteen to twenty-one year olds in light of the Twenty-Sixth Amendment’s enactment.\textsuperscript{155} That no movement advancing the court’s suggestion has occurred adds to the evidence that the suggestion is at an impasse, unlikely to warrant strict scrutiny review under a suspect class status. Discussed below, an additional option is to present evidence that those members of the plaintiff youth class are also members of other protected classes, such as youth minority voters, and as such should be protected.\textsuperscript{156} This argument suggests that certain state acts target youth as a correlative to racial background, which itself can serve as a proxy for alternative identifications such as party leaning. The success of proving the contention would vary based on state composition and require further data to support the assertion.\textsuperscript{157}


A crucial element of Equal Protection analysis that triggers the application of strict scrutiny is the finding of intent. Courts may not invalidate a facially neutral state statute that produces them with a fundamental right was a means to empower their voices, which would have had to be considered formally suppressed to warrant the need to empower them. It is also significant that age is an important consideration when determining punishment and liberties, particularly for juveniles, though that discussion is beyond the scope of this comment. See Fallon, Jr., supra note 135, at 1318 (noting that courts have refused to automatically apply strict scrutiny to claims based on classes defined by gender, mental state, poverty, and race-based affirmative action, among others).

\textsuperscript{154} 482 F.2d 95 (1st Cir. 1973).

\textsuperscript{155} Id. at 102 (“Without attempting to define the boundaries of ‘abridgement’, we deem it sufficient to state . . . that it 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. In other words, the voting amendments would seem to have made the specially protected groups, at least for voting-related purposes, akin to a ‘suspect class’, to use the contemporary label.”).

\textsuperscript{156} See, e.g., Veasey, 71 F. Supp. 3d at 701–02 (describing an equal protection challenge brought by minority students against Texas’ voter ID law which excludes the use of student IDs to vote). The district court emphasized the connection between age, status as college students, and minority status in finding the discriminatory intent in the state’s action. Id. at *55–56.

\textsuperscript{157} Another option proposed to allow a strict scrutiny standard is to implement it for any substantive challenge to the right to vote See Trotter, supra note 146, at 521 (arguing for a bifurcated approach to voting infringement: the application of strict scrutiny to substantive restrictions on the right to vote and application of the Anderson-Burdick test to procedural restrictions).
a disproportionately harmful effect, even on a racial group, without proof that it was enacted with intent to discriminate.\textsuperscript{158} In the abstract, the application of strict scrutiny to a state action that illicitly and furtively restricts the voting rights of a protected class would broaden the types of state action subject to a heightened level of judicial review. In practice, however, the "intent doctrine" applied by the courts, which "demands that plaintiffs prove a state of mind akin to malice . . . is so exacting that, since this test was announced in 1979, it has never been met."\textsuperscript{159}

In the shadow of this largely impractical standard is the \textit{Arlington Heights} test, which seeks to identify state actions enacted with a discriminatory purpose and that result in disparate effects, though the laws are facially race neutral.\textsuperscript{160} Rather than finding discriminatory intent on the face of a statute—a virtual relic in modern litigation—it is inferred from a series of factors regarding the law's passage. The challenged action need not rest solely on discriminatory purposes, as long as a discriminatory purpose was one goal sought by the government action.\textsuperscript{161}

The Supreme Court formulated the test in \textit{Village of Arlington Heights},\textsuperscript{162} a case concerning a challenge to zoning policies that barred subsidized and integrated multi-family housing in an area designated for single family homes. To assess the presence of intent to discriminate the court employs six non-exhaustive factors: (1) degree of disproportionate impact on a (racial) group, (2) historical background of the decision, (3) the sequence of events leading to the action, (4) extent of departure


\textsuperscript{159} Ian Haney-Lópéz, \textit{Intentional Blindness}, 87 N.Y.U. L. Rev. 1779, 1783 (2012) ("Plaintiffs challenging affirmative action under colorblindness virtually always win; parties challenging discrimination under intent doctrine almost invariably lose.").

\textsuperscript{160} The analysis is a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decision making. See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 488 (1997). The Court shifted away from a "results" inquiry of effects on minorities and towards requiring discriminatory intent, or "purpose." By requiring proof of discriminatory intent, the Court created an imposed deference to the legislature on issues of segregation, integration, and affirmative action—race neutral laws with disparate impact on a minority group. See Riva Siegal, \textit{Forward: Equality Divided}, 127 HAR. L. R. 2 (2013). If discriminatory intent were discovered on a statute's face, strict scrutiny would apply.


\textsuperscript{162} \textit{Id.}
from typical procedural standards, (5) and from normally applied substantive rules, and (6) the legislative history of the decision.163 Combined with a finding of disproportionate effect,164 the court may find a government action impermissible under the Equal Protection Clause.165

The Arlington Heights framework is the standard advanced by the youth plaintiffs challenging North Carolina’s voter ID law in McCrory, and for good reason. The standard, developed from Fourteenth Amendment litigation, provides for fact specific analysis of state legislation that seeks to abridge the constitutional rights of a select group. As compared with tests under the Fifteenth Amendment or the unlikely application of strict scrutiny, a Twenty-Sixth Amendment student voter ID challenge under Arlington Heights would allow students to determine why and for what purposes their right to vote is being abridged. The Court has adopted and applied it for challenges brought under the Equal Protection Clause, partly to evaluate a §5 VRA claim,166 and to assess the motivations behind a jurisdiction’s change in voting laws.167 Its history of adoption in the analysis of varying statutory and constitutional challenges renders it particularly appropriate for translation by the courts.

IV. APPLYING ARLINGTON-HEIGHTS

Under Arlington Heights, student voter ID laws would undergo an analysis that traces the motives behind the law’s passage. When considering the impact of voter ID laws on youth, the lack of support for and legislative history of their enactment, and recent results of the 2014 election cycle, it is likely that several voter ID laws would be invalidated. This prediction rests

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163 See Arlington Heights, 429 U.S. at 266–68.
164 Burden does not equate with disproportionate impact. Disproportionate Impact denotes an unequal effect on a, traditionally racial, group. See Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 546 (6th Cir. 2014) (stating “not all restrictions on voting will be struck down simply because they impose any kind of burden”).
165 See id. at 264–65. The Court states that under Washington v. Davis, 426 U.S. 229 (1976), “official action will not be held unconstitutional solely because it results in a racially disparate impact . . . . Proof of racially discriminatory intent or purpose is required to find a violation of the Equal Protection Clause.” Id.
167 See id. (applying Arlington Heights test to assess the a redistricting plan that resulted in diluted minority voting power, but remanding application of the test to the district court).
on the nature of the state's action, severity of the burden on subgroups of students, and the words and actions of state leaders in the history of its enactment. The next section seeks to explore these areas, using data from recent elections as support for the contention that certain student voter ID laws could violate the Twenty-Sixth Amendment under the proposed *Arlington Heights* framework.

A. Severe and Disproportionate Burden on Students

The effects of an official action can be extreme enough to warrant a finding of discriminatory intent by the court without applying each of the *Arlington Heights* six steps, such as gerrymandering an entire minority population to dilute their vote.\(^{168}\) These "cases are rare,"\(^{169}\) and more often a challenged governmental action will be questionable enough in intent to require further scrutiny. The first prong of the test therefore looks to whether a court would find that a state voter ID law "bears more heavily" on one age-group—youth, here—"than another."\(^{170}\) A marginal showing of inequity and prejudice with evidence attesting to the discriminatory impact is customarily enough to satisfy this prong.\(^{171}\) Thus, even as student voter IDs are singular components of larger voter ID laws applicable across age-groups, the argument proposes that youth are disproportionately affected because the laws deprive them of the ability to use college-issued IDs for voter identification.\(^{172}\)

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\(^{168}\) See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding the plaintiffs appealing from a motion to dismiss alleged sufficient details to infer purposeful discrimination in the gerrymandered boundaries of the city of Tuskagee, Alabama, which effectively disenfranchised the entire black population).


\(^{170}\) *Id.*

\(^{171}\) In *Arlington*, the Court determined that the impact of the Village's action "does arguably bear more heavily on racial minorities . . . [who] constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green," the planned racially-integrated housing development project whose construction was impeded by the Village's refusal to rezone the construction site. *See Arlington Heights*, 429 U.S. at 269.

\(^{172}\) Supporters of voter ID legislation offer the argument that there is no deprivation of a "right" in the imposition of ID requirements because voting without ID, or voting in general, is a privilege that the states can constitutionally terminate. *See* Ron Christie, *Opinion: Voting in America is a Privilege, Not a Right*, WNYC.ORG BLOG (Mar. 20, 2012, 3:30 PM), *available at* http://www.wnyc.org/story/193288-opinion-voting-america-privilege-not-right/, *archived at* http://perma.cc/3F48-5V6B (arguing that voting as a
The data on youth turnout following the implementation of the voter ID laws supports the argument of disproportionate effect. In recent elections, changes to state voter ID laws resulted in a larger decrease among younger, African-American registrants, as well as those voters recently registered in two states. After Kansas altered their voter ID laws, the affected turnout among eighteen year olds fell 7.1 percent more than that of adults between forty-four and fifty-three years of age when compared to pre-enactment turnout for both groups. A similar disproportionate effect resulted when comparing turnout among those aged nineteen to twenty-three years.

Youth are traditionally a concern when analyzing voter turnout, as hurdles to voting have impacted their participation disproportionate to voters across other age groups. A precinct-level study discovered that turnout among youth Floridian voters in the 2012 General Election disproportionately decreased when compared to older, white voters. The report did not address the results of voter ID restrictions, but on the turnout effect caused by precinct closing times. It found that closing privilege supports the contention that voter IDs are, and have been found by the Court to be, valid regulations on the right to vote. The status of voting as a "fundamental right" is a fractured one, with the Supreme Court unevenly applying two standards of review to cases implicating or denying voting rights but failing to delineate bright line tests for when either should apply. The public, however, believes the right to vote is a fundamental one, as opposed to a privilege. See Joshua A. Douglas, Is the Right to Vote Really Fundamental? 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008). I argue not that voter ID laws are inherently unconstitutional as abridgements of the right to vote, noting for instance that the Court has upheld reasonable regulations on the manner, time, and place of elections. The argument, instead, is that even though the State may determine acceptable forms of identification for its electorate, it cannot distinguish between protected subgroups (youth, here) in doing so. The allowance, for instance, of permits for concealed handguns or college Faculty IDs but the disallowance of student IDs issued from public universities cannot be distinguished and upheld on a privilege classification of the latter form of ID. This is especially true for laws enacted with a purpose of reducing voter fraud without a showing that student IDs issued from a governmental body pose a greater degree of risk than the other acceptable forms of ID. In other words, even if the use of certain forms of ID are privileges, the state may not allow privileges for some groups of voters over others.

173 GAO State Voter ID Laws, supra note 152.
174 Id. at 52.
175 Id.
times and early voting resulted in disproportionately longer waiting times in some counties with higher percentages of youth, Black, and Hispanic voters, respectively. The hurdles can easily be compared to voter ID restrictions as one of the many parallel concerns the legislature noted when passing the Twenty-Sixth Amendment.

The disproportional impact among minority youth is also critical under Arlington Heights. Racial and ethnic identity is often used as a proxy to age when comparing the effect of voter ID laws and general barriers to voting, as race and youth have converged as identifiers in the changing U.S. population. The declining percentage of non-Hispanic white voters under 30 years of age is met by a rise in African-American and Hispanic voters, with one in five voters under 30 years of age identified as Hispanic. This is crucial to the intent of voter ID law analysis, as race and background have contributed to the change in party preference across age groups in recent general elections, and these identifiers have served as recipients of voting rights abridgement by student voter ID laws by proxy. Voter ID laws also disproportionately abridge the rights of minority youth with Democratic leanings, a recent trend that portends discriminatory intent. Black and Hispanic voters voted in

177 Id. at 50–56. In comparison, in dense, urban centers Hispanic and Black voters had access to precincts with later closing times than White voters. The analysis as a whole, however, found the impact of these voting restrictions disproportionate on a whole to minority voters.

178 The Senate Committee on the Judiciary Report preceding the Twenty-Sixth Amendment’s adoption notes 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,” as a concern to be addressed by crafting it. See Rep. No. 26, 92d Cong., 1st Sess. (1971) at 14.

179 In Veasey v. Perry, the District Court found as much, stating “[w]hen the legislature rejected student IDs, state government employee IDs, and federal IDs, they rejected IDs that are disproportionately held by African-Americans and Hispanics.” Veasey, 71 F. Supp. 3d at 658–59. Data also supports this. The probability that a college student will be of a racial background that is not white is increasing. From 1976 to 2011, the representation of White students attending college decreased 23 percent while an increase resulted in the number of Hispanic, Asian and Pacific Islander, Black, and American Indian/Alaska Native students attending school. Enrollment has increased for: Hispanic students from 4 to 14 percent, Asian/Pacific Islander from 2 to 6 percent, Black from 10 to 15 percent, and American Indian/Alaska Native from 0.7 to 0.9 percent. See Digest of Education Statistics, 2012 (NCES 2014-015), U.S. Department of Education, Nat’l Ctr. for Education Statistics (2013) [hereinafter NCES Education Statistics], available at http://nces.ed.gov/programs/digest/d12/chr_3.asp. As the population of youth grows, college attendance increases, and the college population becomes more diverse, the implications that result from student voter ID laws become more complex.
unprecedented numbers for Democratic candidates, voting 95 and 60 percent respectively for Barack Obama in the 2008 General Election,\textsuperscript{180} contributing along with youth to the success of Obama's election to office. To compare, while 61 percent of all eighteen to thirty year old voters favored Obama, white voters within this percentage as a subgroup split evenly in favor of Obama and Romney.\textsuperscript{181} 58 percent of white voters—who tend to be older—voted for Mitt Romney.\textsuperscript{182} This suggests a large proportion of non-white voters under the age of 30 voted for the Democratic candidate.

There is doubt that current restrictions on the access to the polls have resulted in a wholesale abridgement of youth's right to vote. Voters under the age of thirty voted in a higher percentage in the 2014 mid-term elections than those in 2010, with a 13 percent turnout compared to a previous 12 percent.\textsuperscript{183} However, there is no analysis of subgroups within this population, such as what percentage of college-aged students turned out to vote in the face of early voting period reductions and polling place limitations enacted before the 2014 election. Overall, turnout in the 2014-midterm elections declined to 36.6 percent among registered voters from 40.9 percent in 2010.\textsuperscript{184} Turnout in Texas declined to 28.5 percent from the previous midterm turnout of 32.6 in 2010, while North Carolina experienced a slight increase in turnout to 40.7 percent, up from 39.8.\textsuperscript{185} The data on turnout, and in particular on Kansas and Tennessee's decrease in youth turnout as a result of the states' student ID restrictions, suggests a Twenty-Sixth Amendment

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claim would meet the disproportionate impact prong of *Arlington Heights*.\(^\text{186}\) The analysis depends on empirical evidence of the plaintiff class, which is also required to support the second prong—the historical background that laid the foundation for the instituted legislation.

B. Historical Background of the Decision

The second prong of the *Arlington Heights* analysis concerns the historical record supporting the government action, and whether it "reveals a series of actions taken for invidious purposes."\(^\text{187}\) Typically, the absence of a public safety, health, or welfare concern in the historical catalogue of asserted justifications advanced for adopting a government action is an indication that the prong will be met.\(^\text{188}\) Other times, "a clear pattern, unexplainable on grounds other than race [or age], emerges from the effect of the state action even when the governing legislation appears neutral on its face."\(^\text{189}\) In the case of voter ID laws, the absence of other grounds to explain the law's intentional exclusion of student IDs would strongly signify the prong as met.

As justification for the legislation, states with voter ID laws offer two reasons for their passage: the reduction of voter

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\(^\text{186}\) The data assessing impact is recent but no less relevant. Turnout among all voters was depressed in the 2014 midterm elections, the worst midterm turnout since 1942. Discerning cause and effect is not clear cut nor theoretically possible for determination of direct causation for any factor affecting voting, but the increase in voter ID legislation is arguably a contributor to the recent elections. See Trip Gabriel & Manny Fernandez, *Voter ID Laws Scrutinized for Impact on Midterms*, N.Y. TIMES (Nov. 18, 2014), available at http://www.nytimes.com/2014/11/19/us/voter-id-laws-midterm-elections.html?_r=0. Even if the data suggests student voter ID restrictions did not significantly affect turnout depression, the analysis is not lost. *Arlington Heights* does not employ a significance test, but merely requires a showing of disproportionate harm on racial groups (applied to youth here) as compared to the general population.

\(^\text{187}\) *Arlington Heights*, 429 U.S. at 267 (citing Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 231 (1964)). In a case concerning the state's action of signaling out one county and disallowing public school attendance for students within it, the court found that the historical background of the state's decision evinced a discriminatory intent. The "record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." *Id.*

\(^\text{188}\) See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

\(^\text{189}\) *Arlington Heights*, 429 U.S. at 266 (citing Yick Wo, 118 U.S.).
fraud and the increase of public confidence in the legitimacy of the voting system. States that exclude student IDs as a part of their voter ID scheme add the purpose of preventing out-of-state students from casting ballots in both their home state and where they attend college. In challenges to general voter ID laws, such as in Indiana, courts have found the proffered justification of reducing voter fraud legitimate. Whether the allegations are justified can arguably turn on whether there is a public concern in reducing voter fraud through voter ID legislation.

Though these goals are lofty, the purposes of voter ID laws are incompatible with these aims and the laws’ ability to address them. A 2012 study of election fraud suggests that in-person voter fraud is insignificant, while organized efforts of submitting fraudulent votes, such as absentee ballots, have a much higher incidence of fraud. Despite this, only two states require absentee voters to submit photo identification when voting. Theoretically, a student-resident whose parents live out of state or who is absent for the election cycle in their

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191 See, e.g., Crawford, 553 U.S. at 197.
192 See Matt Apuzzo, Students Joining Battle to Upend Laws on Voter ID, N.Y. TIMES (July 5, 2014), available at http://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-discriminate-based-on-age.html?_r=1. Jeff Tarte, one Republican state senator who supported the North Carolina Voter ID law, remarked his concern over the dual submission of absentee ballots and in-person voting in two states. Tarte stated, “[n]ot that they would necessarily... but why even offer that possibility to occur?” Id.
193 See, e.g., Crawford, 553 U.S. at 181 (citing the reduction of voter fraud as a legitimate purpose to enact state voter ID law under the Anderson-Burdick balancing test).
campus locality may vote without identification by absentee ballot, though they could not vote in person with student ID. This suggests voter ID laws that restrict the incidence of in-person voting, yet permit the use of absentee ballots without accompanying identification, actually increase the risk of fraud. Support for this contention is further found in the broader voting legislation itself. North Carolina's H.R. 589 restricts the use of student IDs for the purpose of preventing absentee ballot fraud. Yet H.R. 589 denies the ability of the state’s Department of Motor Vehicles to pre-register seventeen year olds, which would ensure they receive a government-issued acceptable ID and may vote. H.R. 589 allows other forms of ID, such as military and veteran IDs, though no evidence suggests that absentee ballots and ballot abuse are unique to student ID use.

Considering the favorable precedent supporting voter fraud justifications, the success of a Twenty-Sixth Amendment challenge under Arlington Heights depends on an ability to prove the lack of actual fraud occurring via voter ID use. As noted, recent studies suggest a dearth of information on actual voter fraud incidence, and may present substantial hurdles to this task. The laws consequentially exist amidst uncertainty. If they overcome the evidentiary burden, they would then need to offer historical background and the asserted rationale the legislation’s proponents' advanced.

C. Sequence of Events Leading up to Government Action

The Court in Arlington Heights noted the importance of considering the sequence of events that preceded the

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196 North Carolina’s voter ID law’s title demonstrates its stated purpose of preventing voter ID fraud: “An Act To Restore Confidence In Government By Establishing The Voter Information Verification Act To Promote The Electoral Process Through Education And Increased Registration Of Voters And By Requiring Voters To Provide Photo Identification Before Voting To Protect The Right Of Each Registered Voter To Cast A Secure Vote With Reasonable Security Measures That Confirm Voter Identity As Accurately As Possible Without Restriction, And To Further Reform The Election Laws.” See H.R. 589 (N.C. 2013) (emphasis added). See also Texas Bill Analysis, S.B. 14 (Mar. 23, 2011). Describing the arguments advanced by proponents, the Report states “CSSB 14 is commonsense legislation that would strengthen the election process. The bill would deter voter fraud, keep ineligible voters from voting, make voting correspond with other transactions that require photo ID, and restore and enhance public confidence in elections, which would promote higher turnout.” See id.

197 The state later reversed this policy without reason. See Matt Apuzzo, supra note 192.
government action when assessing discriminatory intent. In election law, this can take the form of previous state attempts to limit a class's vote. It can also be seen in the legislative history and timing of state voter ID law enactment, both portraying an illegitimate purpose in the implementation of student voter ID laws. The path to implementation and timing of student ID restrictions in voter ID legislation signals at the very least a correlation with the outcomes of the 2004 and 2008 elections, and thus a motive inspired more by political outcome than fraud. The difference in voting preferences across age groups—a recent occurrence borne out of the 2004 and 2006 elections—became a substantial factor in the 2008 General Election results.

Following the election, legislatures faced a growing minority-based and Democratic-leaning youth electorate replacing an aging and predictable base of support. This prompted concern in those legislatures in states with a significant youth electorate, predominately concentrated in college campuses, and perceived to hold a specific voting preference. In 2010, partisan control of state legislatures shifted to the Republican Party and newly minted Republican state legislators passed restrictive voter ID laws. State voter ID

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198 See, e.g., Lane v. Wilson, 307 U.S. 268, 275–76 (1939) (finding that a 12-day voting registration period which had the disparate effect of preventing black members of the community from voter registration violated the Fifteenth Amendment in light of the state's history of racial disenfranchisement).

199 Kiley, supra note 183 (citing The Generation Gap and the 2012 Election, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (Nov. 3, 2011), available at http://www.people-press.org/2011/11/03/section-2-generations-and-the-2012-election/, archived at http://perma.cc/94AE-AA2Q. In the 2008 General Elections, 66 percent of voters aged 18-29 years voted for Barack Obama, compared to only 45 percent of voters over the age of 65. The divide continued in 2012, with 62 percent of voters under 30 years of age and 42 percent of those over 65 years voting for Obama. The shift to Democratic voting, the report argues, is remarkably evident from the youth votes' traditional correlation with the preferences of the older generation, and the Republican Party in particular. In comparison to previous identification with the Republican Party, voters who turned 18 during the Clinton, Bush, or Obama presidencies have voted more Democratic than the average population.

200 From 2001 to 2011, the number of eighteen to twenty-four year olds in the general population increased from 28 million to 31.1 million, and enrollment in college increased 32 percent. See NCES EDUCATION STATISTICS.

201 Republicans gained 675 state legislature seats and control over both legislative chambers in twenty-six states. VOTING LAW CHANGES IN 2012, at 10.

202 VOTING LAW CHANGES IN 2012, at 9 (noting "[n]ewly elected legislators introduced about a quarter of these [strict voter ID] bills"). Though this covers other restrictive measures, such as elimination of early voting, the most common form of voting
laws proliferated, excluding the use of college-issued IDs and impacting the proportion of the populace enfranchised by the Twenty-Sixth Amendment. As three times as many students attend public degree-granting institutions as private colleges, so did laws that rid the use of these government-issued IDs become an effective way to limit students' voting power and lessen the Democratic voting bloc.

Concern over youth voting preferences and partisan control suggests a comprehensive effort to restrict this class of voters from exercising their rights. The Republican legislature in Wisconsin, for instance, passed its voter ID law in 2010, excluding the formerly permitted student ID use for registration. Several states followed, including Tennessee, where state law restricted the use of student college IDs but permitted the use of faculty IDs issued by the same institutions. The result: reduced youth and minority turnout restrictions is the requirement to present specified forms of photo ID. See Lori A. Ringhand, Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions, 13 ELECTION L.J. 288, 290 (2014).

In 2011, thirty-four states introduced some form of voter ID law. The number of states requiring government-issued photo ID quadrupled in the same year. See VOTING LAW CHANGES IN 2012, at 2.

As of 2014, accommodations for age-specific ID allowances are notably absent from the eleven states with the strictest limits on acceptable forms of photo ID. See Ark. CODE ANN. §§7-1-101, 7-5-201, 7-5-301, 7-3-321; Ga. CODE ANN. §21-2-417; Ind. CODE §§5-5-2-40.5, 3-11-8-25.1, 3-11-7-5-2.5; Kan. STAT. ANN. §§25-2908, 25-1122; Miss. CODE ANN. §§23-15-563; N.C. GEN. STAT. ANN. §163-200.1; N.H. REV. STAT. ANN. §659:13; Tenn. CODE ANN. §2-7-112; Va. CODE ANN. §§22.2-643, 22.2-653; Wis. STAT. ANN. §§5.02, 6.97(2), 6.97(3). Arkansas’ law was held unconstitutional and stayed pending appeal. See Ark. State Bd. of Election Comm’rs v. Pulaski Cnty. Election Comm’n, 437 S.W. 3d 80 (Ark. 2014). Oral arguments were heard on Oct. 2, 2014. Wisconsin’s law was enjoined, but reinstated upon appeal Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), still subject to further appeal.

As of 2010, over 15 million students enrolled in a public four- or two-year college, compared to 3.85 million enrolled in non-profit institutions and just over 2 million enrolled in private for-profit colleges. See NCES EDUCATION STATISTICS at Table 219.


See Wis. STAT. ANN. §§5.02, 6.79(2), 6.97(3). The Supreme Court blocked the 2014 implementation of Wisconsin’s Voter ID law on Oct. 9th, 2014. See Frank, 768 F.3d at 744, still subject to further appeal.

in the 2014-midterm elections. In North Carolina, youth aged between eighteen to twenty-nine years old have recently voted Democratic, and were the only age group that held a majority vote for Obama. Yet, in anticipation of the 2012 General Election, several county boards of elections closed early voting sites on college campuses in their regions and removed numerous colleges from on-campus election privileges.

The legislative history surrounding Texas’s voter ID laws lends support to the contention that the laws were passed over concern with how students vote. Texas has a history of limiting the voting rights of college-aged students and of racially polarized voting. The State placed a proverbial target on youths’ right to vote from enfranchisement. And when the

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209 See GAO, State Voter ID Laws, supra note 152. The GAO report found reduced turnout among young and minority voters in Tennessee and Kansas as a result of their voter ID laws.

210 Kiley, supra note 183. A majority of youth in this age range have leaned Democratic since 2004, whereas before 2004 the age-bracket was nearly equally divided in preference across parties.


212 In addition to these barriers, the legislature concurrently instituted H.R. 589, North Carolina’s voter ID law that excludes the use of student IDs. The results of the restrictions may have contributed to the decline in Democratic votes in 2014’s midterm elections. See Evan Walker-Wells, Blocking the Youth Vote in the South, COMMON DREAMS (Oct. 29, 2014), available at http://www.commondreams.org/views/2014/10/29/blocking-youth-vote-south, archived at http://perma.cc/3T3R-AQM9. Notable as well is a recent election that placed all of North Carolina’s 100 county boards under Republican control for the first time in 20 years. See Gary D. Robertson, N.C. elections chairman calls for respect on boards, HAMPTONROADS.COM (Aug. 21, 2013, 10:54 PM), available at http://hamptonroads.com/2013/08/nc-elections-chairman-calls-respect-boards.

213 See Veasey, 71 F. Supp. 3d at 637 (“Racially polarized voting exists when the race or ethnicity of a voter correlates with the voter’s candidate preference. In other words, and in the context of Texas’s political landscape, Anglos vote for Republican candidates at a significantly higher rate relative to African-Americans and Hispanics.”).

214 Immediately after the Amendment was ratified, Texas was one among few states that tightened residency requirements. See Fish, supra note 8, at 1208-09. See also Veasey, 71 F. Supp. 3d at 636 (describing Texas’ attempts to restrict college students’ voting rights over 37 years). The state passed a statute prohibiting students from acquiring domicile status at their college or university unless “he intends to remain there and to make that place his home indefinitely after he ceases to be a student.” See TEX. ELEC. CODE ANN. art. § 5.08(k) (Vernon Supp. 1982). The Fifth Circuit held the statute violated the Equal Protection Clause, and the Supreme Court intervened to enjoin its enforcement. See Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973); United States v. State of Tex., 445 F. Supp. 1245 (S.D. Tex. 1978) aff’d sub nom., Symm v.
population demographics of Texas changed, so too did their state election law. With 89 percent of their population growth attributable to minorities,215 the state has a predictably Democratic-leaning youth as its electorate. Greg Abbott, the Attorney General of Texas, even noted the law's concern with party strength, clarifying Texas's redistricting decisions as targeting not racial minorities, but Democrats.216

Texas’s original voter ID law accepted student IDs issued by public or private institutions of higher education.217 In 2007, it was changed to permit only the use of IDs issued by Texas-based institutions.218 Texas again changed the law in 2009 with S.B. 362, which completely omitted the use of student IDs.219 Republican state senators introduced Texas’ current law, passed in 2011, in spite of and in recognition of the fact that 4.5 percent of the state's registered voters would not be able to vote as a result.220 The legislature ignored amendments that would have expanded acceptable forms of ID,221 recognizing the reduction in voter eligibility as an expectation of the law’s implementation.

The historical context surrounding the passage of voter ID laws’ evinces concern over student voting, particularly after the

United States, 439 U.S. 1105 (1979). This led to the only case where the Court considered the Twenty-Sixth Amendment.


216 Abbott stated, “DOJ’s accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican Party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.” See Defendant’s Response to Plaintiffs, Perez v. State of Texas, Civil Action No. SA-11-CA-360-OLG-JES-XR (W.D. Texas 2013). The resulting redistricting of three new districts gained by the State was a white and Republican leaning demographic. See Texas Redistricting Fight is Boon To Lawyers, CBS NEWS.


219 See S.B. 362 (2009). Handgun licenses are still permitted for ID verification under the law.


221 See Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) vacated and remanded, 133 S. Ct. 2886 (2013). The legislature tabled or defeated an amendment, among others, that would have allowed student IDs.
2008 and 2012 election cycles. The history of each legislature’s adoption is unique, so that the Arlington Heights analysis will depend on the extent and obviousness of a particular state’s previous attempts to suppress youth voting. States such as Texas, with clear legislative attempts to restrict the youth vote through residency restrictions and student ID laws, will have a harder time defending their laws than states without such backgrounds. The three considerations above offer a substantial opportunity for challenges to student voter ID laws to succeed. The remaining considerations, applied sporadically as factors in the Arlington Heights analysis, may also provide a level of scrutiny to assess a state’s voter ID law.

D. Extent of Departure from Typical Procedural and Substantive Standards

The Court in Arlington Heights also noted briefly that evidence of a government’s departure from past procedures and substantive standards can be assessed to determine whether the action signals discriminatory intent. A change in election law enacted in time to hinder a successful candidate’s election can serve as this signal, while substantive departures in the content of laws hint of discriminatory intent, as when a law is applied unequally across groups or crafted to favor one class of voters over others. Texas’s unique series of procedural changes approaching S.B. 14’s passage raise relevant concerns. To pass the voter ID law, Governor Rick Perry and the legislature departed from procedural norms and designated the bill as emergency legislation. They also amended Senate rules to allow it to pass outside the traditional two-thirds majority.

The fourth and fifth prongs of the analysis offer a very fact-specific analysis of an individual state’s legislation and how it

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222 See, e.g., Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) (noting that a majority vote run-off statute signaled an attempt to reduce political opportunity for black candidates since it was passed only after a black candidate was successful).

223 See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding a city ordinance barring the operation of laundry services in wooden buildings was applied substantively unequally when supervisors granted variances to the restriction only to white-owned businesses).


was passed. Questionable substantive and procedural changes can be found in the allowance of some form of IDs over others, or in the opportune timing of their passage following the Democratic Party's success with youth voters in the 2008 elections. Voter ID laws that restrict some forms of ID over others similar in nature arguably depart from an adoption of a procedural standard of requiring government issued IDs. In Texas, a voter may present a license to carry a concealed handgun issued by the state's Department of Public Safety, but may not use a public student ID. Though there is no difference in quality among the IDs, with both issued by the state, one targets a segment of the population based on the type of ID they are most likely to carry. The success and applicability of the prongs to a claim will vary, supporting a Twenty-Sixth Amendment argument for states that reduced youth voting rights with other voting abridgment, or identified student IDs uniquely as prohibited forms of identification.

E. Legislative History

In Arlington Heights, the Court identified a final factor for suggested examination in determining whether a governmental action was enacted with invidious intent. The Court stated that in the analysis, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Inferences of ulterior motives, goals, or discriminatory statements said in the course of enacting the action at issue may contribute to the belief that a law serves an invalid purpose.

In the case of Texas, the history of S.B. 14 is etched in years of legislative debates and mutable stated goals. In 2012, prior to the law's passage, Texas sought approval for its program under the now defunct preclearance requirements of the VRA, and a three-judge panel in Washington, D.C. denied its implementation. The panel stated that rather than showing that it would not lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral

franchise . . . if implemented, S.B. 14 will likely have a retrogressive effect.”229 S.B. 14, the panel continued, “imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty.”230 Despite the court’s analysis that the law served invalid purposes, the nullification of the VRA’s preclearance provision allowed Texas to proceed on full notice of its discriminatory impact on minorities (and therefore youth).

A House Research Organization Report, released during the course of the bill’s path through the state legislature, stated as much, noting the inconsistencies between the perceived discriminatory results of the bill and the lack of government justification that would warrant the suppression of votes. The report, which took no outright position, summarized the bill’s opponents as citing the “little or no evidence of the voter fraud this bill purports to address.”231 The report’s analysis of S.B. 14 included two pages of concerns stated by opponents of its passage, compared to the one page of supporting rationale that contained no statistical evidence to warrant the stated goals.

The justifications asserted for Texas’s bill in debates leading up to its passage provide further indications that an invidious motive prompted its creation. On March 21, 2011, Representative Patricia Harless, the author of S.B. 14, stated the bill dealt with “potential voter fraud,” but when unable to provide empirical evidence of such stated “[t]he purpose of this legislation is that when you show up to vote, you are who you say you are . . . and we could stay here all day long discussing the fraud, but that is not what this bill is about.”232 When asked about the lack of absentee ballot legislation to detect fraud, Representative Harless responded that her concern was only about in-person fraud and public confidence in the election system.233

229 Id. at 114. Retrogressive effect is “the effect of denying or abridging the right to vote on account of race.” Id. at 117 (citing Georgia v. United States, 411 U.S. 526 (1973)).
230 Id. at 55.
232 Texas House Journal, 2011 Reg. Sess. No. 38 (statement of Representative. Harless). The Representative admitted the state did not have tools to deter or detect fraud.
233 Id. Mail-in ballot fraud constituted 70 percent of the Attorney General’s prosecutions at the time.
In the course of debate on the bill in the Texas legislature, Representatives opposing the enacted version of S.B. 14 provided evidence of voter suppression to advance support for amendments that would soften disenfranchisement. Representative Marc Veasey offered Amendment No. 55 to S.B. 14, which would have required the State to monitor the impact of the voter ID law on members of a racial or ethnic group, and allow members to vote with their voter registration certificate at the following election if a majority of their minority group lacked requisite ID.\textsuperscript{234} Representative José Menéndez summarized the course of the proceedings, stating: “Numerous amendments to improve SB 14 would have made the bill more fair [sic] by reducing the risk of disenfranchising eligible, registered Texas voters . . . High school students over 18 will not be able to vote with their school IDs. College students legally registered in Texas will not be able to vote with out-of-state driver’s licenses.”\textsuperscript{235}

Representatives offered evidence of disenfranchisement while no proponents of the bill defended of its potential to reduce voter fraud or increase confidence in the electoral system. Representative Richard Raymond stated that there were four million “poor people in the State of Texas . . . nearly three-fourths, of which are minority. And that’s why I believe this is aimed at minorities.”\textsuperscript{236} In response to questions regarding the bill’s effects on minorities, Representative Harless asserted the bill applied to “all Texans,” yet did not have any evidence of the impact on racial minorities from the bill’s passage.\textsuperscript{237} In the course of the debates, Representative Harless did respond to the question “[i]s it your intention for this bill to disenfranchise ethnic minority voters?” The lack of recognition of the potential

\textsuperscript{234} Amendment No. 55 stated, “Following a general election for state and county officers, the secretary of state shall determine whether . . . a majority of the persons who were required to cast a provisional vote under Section 63.011 because the voter lacked the photo identification required by Section 63.001(b), were members of a racial or ethnic minority protected by Section 5 of the federal Voting Rights Act. (b) If the secretary of state makes the determination under Subsection (a) that a majority of voters who lacked photo identification were members of a racial or ethnic minority, in all subsequent elections held in the state, a voter may be accepted for voting . . . by providing the voter’s voter registration certificate to an election officer at the polling place.” Rep. Harless voted to table the amendment. \textit{Id.}

\textsuperscript{235} \textit{Id.}


\textsuperscript{237} \textit{Id.}
impact of the bill on minority groups led Representative Lon Burnam to designate the legislative session as “shaping up to be the most overtly racist session that I have witnessed in 25 or 30 years.”

In North Carolina, the same issue exposed by the legislative debates was the lack of fraud to support the law’s passage. Asserting a relevant state interest in enacting the law without evidence of the need for it required particular dexterity. The Speaker of North Carolina’s House at the time H.R. 589 was enacted stated fraud was not the primary reason in instituting it.

V. CONCLUSION

Congress enacted the Twenty-Sixth Amendment as a tool to empower youth in choosing representatives leading them into war and as recognition of their emerging role as citizens in society. It crafted the Amendment to assure the right would extend to state elections, free from wholesale deprivation and abridgement. The legislative record discussed the need to diminish youth voting barriers, while the text of the Amendment included the power to protect voting rights from abridgement of varying forms. Though the courts have applied the Twenty-Sixth Amendment sparingly to protect these larger rights, the Amendment’s scope offers a viable tool to challenge voter ID laws. The impact of some state voter ID laws on voting rights is so stark and dramatic that it is unexplainable on non-age-based discrimination grounds and has resulted in a dramatic and disproportionate effect on youth, and in particular minority youth. The characteristics of such a claim also enable plaintiffs and courts to utilize a unique application of the Arlington Heights standard of constitutional analysis to assess the validity of these instances of state action.

238 Id.
239 “Well, we call this [H.B. 589] ‘restoring confidence in elections.’ There is some voter fraud, but that’s not the primary reason for doing this. There’s [sic] a lot of people who are just concerned with the potential risk of fraud, and in our state it could be significant. This is just a measure that we think makes three-fourths, nearly three-fourths of the population more comfortable and more confident when they go to the polls.” See MSNBC: Voter ID restores confidence in elections (MSNBC television broadcast Mar. 16, 2013, 3:49PM), available at http://www.wral.com/news/state/nccapitol/video/12231808/.