Washington and Lee Law Review

Volume 78 | Issue 4 Article 9

Fall 2021

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Ryan D'Ercole
Washington and Lee University School of Law, dercole.r22@law.wlu.edu

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Ryan D'Ercole*

Abstract

Throughout the 1960s, young people protested for racial and LGBTQ+ equality, women's rights, and an end to the Vietnam war. In the process, they earned the most fundamental right—the right to vote.

Fifty years ago, in the summer of 1971, the Twenty-Sixth Amendment was ratified. In addition to lowering the voting age to eighteen, the Twenty-Sixth Amendment prescribed that the right to vote "shall not be denied or abridged by the United States or by any State on account of age." But in the fifty years since ratification, states have continued to enact laws that abridge the right to vote of young people, particularly those who attend college. This Note begins by inventorying current restrictions on college student voting. Despite the persistent nature of these restrictions, the Twenty-Sixth Amendment has remained a little-used enforcement tool even as more states have moved to restrict student voting. As a result, this Note argues that

* J.D. Candidate, May 2022, Washington and Lee University School of Law. I would like to thank Professor Christopher Seaman for his advice, guidance, and encouragement throughout the Note writing process and to the *Washington & Lee Law Review* for guiding this Note through the publication process. A special thanks to my parents and siblings for supporting me throughout law school and in life. Finally, thank you to young activists—past and present—who constantly push our nation to live up to its high ideals.

Congress should use its authority under the Twenty-Sixth Amendment's enforcement clause to protect student voters.

This Note proposes three legislative solutions: (1) automatic voter registration at colleges and universities; (2) polling place requirements at colleges and universities; and (3) a statutory cause of action implementing a burden-shifting, disparate-impact framework to make it easier to bring and adjudicate Twenty-Sixth Amendment claims. All three of these solutions are analyzed in accordance with the Court's congruence and proportionality framework, first articulated in City of Boerne v. Flores. *Such analysis reveals that the proposed solutions are well within Congress's authority, especially given the history of voting discrimination against college students. As a result, Congress should take these actions to protect voters who have all too often served as our nation's conscience.*

Table of Contents

INTRODUCTION

Fifty years ago, in 1971, the ratification of the Twenty-Sixth Amendment[1] officially granted citizens eighteen years of age or older the right to vote.[2] Ratification occurred against the backdrop of a country in crisis.[3] For much of the previous

1. U.S. CONST. amend. XXVI.

2. *Id.*

> Section 1: The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
> Section 2: The Congress shall have the power to enforce this article by appropriate legislation.

3. *See* Jenny Diamond Cheng, How Eighteen-Year-Olds Got the Vote 46 (Aug. 4, 2016) (unpublished manuscript) [hereinafter Cheng, *Got the Vote*], https://perma.cc/3X7M-R95L (PDF) ("[D]uring the late 1960s the United States was in considerable turmoil. The general optimism of the previous two decades soured as the Vietnam War escalated, racial tensions worsened, and levels of violence and civic unrest rose quickly.").

decade, young people across the nation were mobilized—protesting for racial equality, women's rights, and an end to a war that killed nearly 60,000 of their peers.[4] Extensive student demonstrations on college campuses both helped and hindered the case for lowering the voting age.[5] Beginning in 1942, every legislative session introduced legislation expanding suffrage to America's youth.[6] By 1971, there was no more denying the most fundamental right to these active citizens. The Senate Judiciary Committee report recommending ratification of the Twenty-Sixth Amendment succinctly made the case as to why enfranchising young voters in America was a moral and political necessity:

> [T]he time has come to extend the vote to 18-year-olds in all elections: because they are mature enough in every way to exercise the franchise; because they have earned the right to vote by bearing the responsibilities of citizenship; and because our society has so much to gain by bringing the force of their idealism and concern and energy into the constructive mechanism of elective government.[7]

The amendment was ratified in a record 100 days.[8]

The era of youth mobilization in the 1960s was largely unparalleled until recently. In the summer of 2020, activists took to the streets in record numbers to protest police brutality.[9]

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4. *See* Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 PA. J. CONST. L. 1105, 1121–22 (2019) (noting that the civil rights movement, anti-Vietnam War movement, Mexican American civil rights movement, women's liberation movement, and LGBTQ+ rights movement all had substantial youth participation).

5. *See* Cheng, *Got the Vote*, *supra* note 3, at 46–58 (explaining that the sometimes-violent demonstrations on college campuses led to a dip in the general public support for lowering the voting age but at the same time, led congressional legislators to view lowering the voting age to eighteen as a way to "stem the growing tied of unrest").

6. *See* S.J. Res. 166, 77th Cong. (1942) (introducing a proposed amendment with nearly identical language to what became the Twenty-Sixth Amendment).

7. Bromberg, *supra* note 4, at 1107 (quoting S. REP. NO. 92-26, at 5 (1971)).

8. *Id.* (noting that this is the fastest that any amendment has been ratified in U.S. history).

9. *See* Larry Buchanan, et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://perma.cc/FB7P-FW6N (reporting that estimated turn out at the 2020 Black Lives Matter

Of the estimated fifteen to twenty-six million people who participated in these racial justice protests, 41 percent were between the ages of eighteen and twenty-nine.[10] Additionally, young people have organized and led movements to pressure leaders to address the world's climate crisis and prevent gun violence in schools.[11] While youth activism may be surging, so too have state lawmakers' efforts to keep young people, particularly college students, away from the ballot box.[12]

The historic voter turnout among young citizens and people of color in the 2008 election of President Barack Obama spurred Republican state lawmakers to begin a widespread, systematic effort to limit voting access.[13] The Supreme Court's decision in *Shelby County v. Holder*[14] bolstered Republicans' efforts.[15] The

protest across the country ranged from fifteen to twenty-six million, compared to the three million to five million who turned out for the 2017 Women's March).

10. Amanda Barroso & Rachel Minkin, *Recent Protest Attendees Are More Racially and Ethnically Diverse, Younger than Americans Overall*, PEW RSCH. CTR. (June 24, 2020), https://perma.cc/Y575-MBJP. Youth turnout at these protests was exceptionally high given that individuals between the age of eighteen and twenty-nine make up only 19 percent of the population. *Id.*

11. *See* Andrew Winston, *Young People Are Leading the Way on Climate Change, and Companies Need to Pay Attention*, HARV. BUS. REV. (Mar. 26, 2019), https://perma.cc/HG9T-2A8G (highlighting efforts by the Sunrise Movement, a youth-led environmental group in the United States, lobbying legislators on Capitol Hill to support climate policies); Jacqueline Alemany, *March for Our Lives Marches Toward November with New Campaign Ad*, WASH. POST (Aug. 6, 2020), https://perma.cc/A6N8-R93Z (describing efforts underway by the March for Our Lives movement, led by student activists, to bring attention to gun violence and drive change on gun policy).

12. *See* Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It.*, N.Y. TIMES (Oct. 24, 2019), https://perma.cc/VSP5-YZ93 ("Energized by issues like climate change and the Trump presidency, students have suddenly emerged as a potentially crucial voting bloc in the 2020 general election. And almost as suddenly, Republican politicians around the country are throwing up roadblocks between students and voting booths.").

13. *See* Jenny Diamond Cheng, *Voting Rights for Millennials Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 655 (2017) [hereinafter Cheng, *Voting Rights for Millennials*] ("Since 2010, twenty states—most of them with Republican-controlled legislatures—have established new limitations on voting.").

14. 570 U.S. 529 (2013).

15. *See id.* at 540 (striking down the preclearance requirement found in section 5 of the Voting Rights Act); Cheng, *Voting Rights for Millennials*, *supra* note 13, at 655 (noting that in 2016, the first presidential election since the Court's *Shelby County* decision, fourteen states had new restrictive voting laws

Court's decision in *Shelby County* gutted the preclearance requirement of Section 5 of the Voting Rights Act[16] that was designed to prevent state legislatures from enacting regressive, vote-inhibiting measures.[17] In addition to targeting minorities and the poor, many of these new restrictive voting laws took direct aim at college students.[18] For example, between 2011 and 2015, Wisconsin enacted fourteen laws that either had the purpose or effect of limiting youth access to the ballot.[19] This included: (1) restrictions of the use of student IDs when voting; (2) cancelling the state's high school voter registration programs; and (3) requiring that colleges and universities send students' federally protected personal information to local voting registrars to verify students' attendance and citizenship.[20] In 2011, New Hampshire attempted to institute a law that would have denied students the ability to register to vote at their university residences unless they or their parents

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on the books); William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, WASH. POST (Sept. 2, 2016), https://perma.cc/S63X-ELBJ (quoting a North Carolina Republican state senator hours after the Court's *Shelby County* decision saying that without the "legal headache" of preclearance the state Senate would introduce a much more extensive voting bill).

16. 52 U.S.C. § 10304.

17. Section 5 required that jurisdictions with a history of race-based voter discrimination submit proposed changes in voting laws to the Department of Justice, which then had sixty days to determine whether the proposed change had the purpose or effect of "denying or abridging the right to vote on account of race or color." *Id.* While Section 5 did not protect against age-based discrimination, preclearance did help protect Historically Black Colleges and Universities (HBCUs) and other minority-heavy campuses that are frequent targets for voter suppression. *See* Shelby County v. Holder, 570 U.S. 529, 573–76 (2013) (Ginsburg, J., dissenting) (listing examples of voting laws blocked by Section 5's preclearance requirement, including the attempt by a Texas county to reduce the availability of early voting at an HBCU).

18. *See* Wines, *supra* note 12 (reporting on efforts undertaken to limit student voting in Florida, New Hampshire, North Carolina, Tennessee, Texas, and Wisconsin). For the purposes of this Note, references to student voters refers to undergraduate and graduate students who reside at or near their university during the academic year, at a location different from a parent or guardian's home.

19. Bromberg, *supra* note 4, at 1148.

20. *See id.* (describing Wisconsin's new laws); WIS. STAT. § 5.02(6m)(f) (2020) (requiring that university-issued student IDs include the student's name, date of issuance, an expiration date no longer than two years after the issue date, and the student's signature).

previously established residence in the district.[21] And in 2013, North Carolina passed laws that limited early voting, eliminated same-day registration, and instituted their own strict voter ID laws, which excluded student ID cards as a form of eligible identification.[22]

These examples are particularly concerning because several lawmakers expressly indicated that their intent in enacting these measures was to limit student voting.[23] Additionally, reducing student turnout in these states was potentially outcome-determinative. In 2016, for example, Donald Trump won Wisconsin, a state with over 300,000 college students, by less than 23,000 votes.[24] Also that year, Maggie Hassan defeated then then-incumbent Senator Kelly Ayotte of New Hampshire by only 1,017 votes, in a state with nearly 150,000 college students,[25] and Roy Cooper won the governorship of North Carolina by approximately 10,000 votes in a state with over 500,000 undergraduates.[26]

Following the 2020 election of President Joe Biden, voter suppression efforts have redoubled.[27] President Biden narrowly won several states with Republican-controlled legislatures, including Arizona, Georgia, and Pennsylvania.[28] These wins,

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21. *See* Peter Wallsten, *In States, Parties Clash over Voting Laws that Would Affect College Students, Others*, WASH. POST (Mar. 8, 2011, 10:41 AM), https://perma.cc/K79C-23MY (describing the proposed legislation that failed).

22. Cheng, *Voting Rights for Millennials*, *supra* note 13, at 655–56.

23. *See* Wallsten, *supra* note 21 (quoting the Republican State House Speaker who described student voters, who he believed were more likely to vote for Democrats, as "foolish," lacking "life experience," and just "vot[ing] with their feelings"); Wan, *supra* note 15 (quoting a long time North Carolina Republican consultant explaining, that "of course [the new voting restrictions are] political. Why else would you do it?").

24. Wines, *supra* note 12; Hannah Muniz, *How Many College Students Are in the U.S.?*, BEST COLLEGES (Mar. 22, 2021), https://perma.cc/MK5W-GYVF.

25. Wines, *supra* note 12; Muniz, *supra* note 24.

26. Wines, *supra* note 12; Muniz, *supra* note 24.

27. *See State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), https://perma.cc/25BX-M3KE (last updated May 28, 2021) ("As of May 14, 2021, legislators have introduced 389 bills with restrictive [voting] provisions in 48 states.").

28. *See U.S. Presidential Election Results 2020: Biden Wins*, NBC NEWS, https://perma.cc/R6P7-LX2C (last updated Feb. 8, 2021, 12:20 PM) (indicating

compounded by widespread lies about non-existent voter fraud promoted by former President Donald Trump and other elected Republican officials, provide ample political incentive for Republican state officials to pass more restrictive laws.[29] The Twenty-Sixth Amendment and its enforcement clause provides an important mechanism by which Congress can protect the voting rights of vulnerable populations, such as college students.

Section 1 of the Twenty-Sixth Amendment states, "The right of citizens of the United States, who are eighteen years of age or older, to vote *shall not be denied or abridged* by the United States or by any State *on account of age*."[30] This Note builds upon previous scholarship that argues that the Twenty-Sixth Amendment should be interpreted to prohibit legislation enacted with the purpose of suppressing the youth vote.[31] Specifically, where other scholars have focused on litigation strategies to bring Twenty-Sixth Amendment claims,[32] this Note addresses potential legislative solutions under Section 2 of the Twenty-Sixth Amendment, which gives Congress broad power to enact remedial legislation to protect voters from age-based discrimination.[33]

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that Joe Biden won Arizona by 10,457 votes, Georgia by 11,779 votes, and Pennsylvania by 81,660 votes).

29. *See* Jim Rutenberg et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Dec. 26, 2020), https://perma.cc/2RGA-FDTA (last updated Jan. 7, 2021) (detailing widespread claims of voter fraud furthered by President Trump and other Republican leaders, despite no evidence and a string of court rulings dismissing such claims).

30. U.S. CONST. amend. XXVI, § 1 (emphasis added).

31. *See generally* Cheng, *Voting Rights for Millennials*, *supra* note 13; Bromberg, *supra* note 4; Nancy Turner, Note, *The Young and the Restless: How the Twenty-Sixth Amendment Could Play a Role in the Current Debate Over Voting Laws*, 64 AM. U. L. REV. 1503 (2015).

32. *See* Cheng, *Voting Rights for Millennials*, *supra* note 13, at 656 (arguing that the proper framework to assess Twenty-Sixth Amendment claims is the test for intentional discrimination developed by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)); Bromberg, *supra* note 4, at 1164 (advocating that plaintiffs should be able to bring Twenty-Sixth Amendment claims by satisfying either the *Arlington Heights* or *Anderson-Burdick* tests, or through "direct evidence of *prima facie* intentional discrimination").

33. *See* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1177–82 (2012) (arguing that the Twenty-Sixth

Part I of this Note comprehensively details the tactics used to abridge or deny college students' right to vote.[34] This inventory is crucial in laying the foundation that such tactics are pervasive, and as a result, support Congress's power under the Twenty-Sixth Amendment's enforcement clause to enact legislative remedies to protect student voters.[35] Part II then provides a brief overview of the current jurisprudence surrounding Twenty-Sixth Amendment claims, before Part III discusses three potential legislative solutions: (1) automatic voter registration at colleges and universities; (2) polling place requirements at colleges and universities; and (3) a statutory cause of action implementing a burden-shifting, disparate-impact framework to make it easier to bring Twenty-Sixth Amendment claims. These legislative reforms should be viewed as a small piece in a much larger federal effort to shore up our democracy and protect individuals most fundamental right—the right to vote.[36] Finally, using the Court's congruence and proportionality test from *City of Boerne v. Flores*,[37] Part IV explains how these proposed legislative remedies can overcome the close judicial scrutiny they will likely receive.[38]

Amendment's enforcement clause provides Congress with broad authority to enact far reaching remedial legislation).

34. Specifically, this Part will look at voter registration requirements, *infra* Part I.B., gerrymandering, *infra* Part I.C., voter identification laws, *infra* Part I.D., poll place accessibility, *infra* Part I.E., and mail-in voting requirements, *infra* Part I.F.

35. 521 U.S. 507 (1997); *see id.* at 525 ("'[T]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects.'" (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966))).

36. *See generally* H.R. 1, 117th Cong. (2021).

37. 521 U.S. 507 (1997).

38. *See* Ari Berman, *A 5-4 Supreme Court Threatened Voting Rights. A 6-3 Court Could Finish Them Off.*, WASH. POST (Sept. 24, 2020, 11:41 AM), https://perma.cc/NBP9-J3QN (discussing the Court's recent track record on voting rights and the likelihood that appointment of a new justice to replace Justice Ruth Bader Ginsburg will result in more decisions that grant states the authority to enact restrictive voter laws).

I. RESTRICTIONS ON STUDENT VOTING

A. *The Motivation of Lawmakers and Vulnerability of College Students*

State and local governments' efforts to inhibit student voting is neither new nor infrequent. In fact, attempts to restrict the ability of students to vote pre-date the Twenty-Sixth Amendment's ratification.[39] Historically, imposing onerous voter registration requirements is the most common tactic to deter students from registering to vote in the locality where they go to school.[40] College campuses have also been frequent targets of gerrymandering in an effort to dilute students' voting power in federal, state, and local elections.[41] Additionally, in recent decades, state governments have adopted new practices aimed at burdening the student vote, such as instituting strict voter identification laws,[42] manipulating the hours and locations of

39. *See* Elizabeth Aloi, *Thirty-Five Years After the 26th Amendment and Still Disenfranchised: Current Controversies in Student Voting,* 18 NAT'L BLACK L.J. 283, 286 (2004) (detailing how three states, Illinois, Wisconsin, and Missouri, delayed ratification of the Twenty-Sixth Amendment until they could enact more stringent residency requirements to keep students from voting in their local college communities).

40. *See* YAEL BROMBERG ET AL., COMMON CAUSE, TUNING IN & TURNING OUT 11–12 (2016), https://perma.cc/BUS4-5B7N (PDF) (highlighting that the practice of instituting "complex residency" test in an attempt to limit student registration began in the 1970s in direct response to the ratification of the Twenty-Sixth Amendment, and that erecting registration barriers for student voters has continued to be a common practice to today).

41. *See, e.g.*, David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NEW YORKER (Sept. 6, 2019), https://perma.cc/V29C-RE7V (describing how map drawers in North Carolina split North Carolina A&T State University into two different congressional districts in an attempt to dilute student voting power); ELLEN KOLASKY & LORA WONDOLOWSKI, LEAGUE OF CONSERVATION VOTERS EDUCATIONAL FUND, NOT HOME, NOT WELCOME: BARRIERS TO STUDENT VOTERS 15 (2004), https://perma.cc/3HPW-KTCJ (PDF) (detailing how the city wards of Ann Arbor, Michigan divide the University of Michigan into five different municipal precincts diluting students' voting power to elect members to the city council).

42. *See Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 9, 2021), https://perma.cc/XXN6-DGVP (explaining the different photo ID requirements across the United States).

polling places at or near college campuses,[43] and limiting college students' ability to vote by mail.[44] All of these practices point to a pattern of state governments attempting to deny or abridge college students' right to vote.[45]

State and local policy makers' motivation to pass these laws often follow two strands. The first motivation stems from the "town and gown" dynamic.[46] Towns surrounding college campuses fear having their local politics dominated by college students, who they view as transient visitors not invested in their community.[47] The second motivation (more prevalent among statewide actors) is to restrict the student vote for partisan advantage.[48] The partisan implications of expanding the vote to young Americans were part of the political discussion surrounding ratification of the Twenty-Sixth Amendment itself; however, support for the amendment remained largely bipartisan.[49] In recent decades, the partisan interest in preventing young people in general, and college students in particular, from voting has increased as both groups have

43. *See* Anderson v. N.C. State Bd. of Elections, No. 14-CVS-012648, 2014 WL 6771270, at *1 (N.C. Super. Ct. Oct. 13, 2014) (detailing the Watauga County Board of Elections' attempt to eliminate an early voting site at Appalachian State University).

44. *See* HARROW ET AL., AGE DISCRIMINATION IN VOTING AT HOME 1–2 (2020), https://perma.cc/FA82-6A57 (PDF) (identifying states that restricted the practice of voting by mail without an excuse to only older voters).

45. As a result, Congress is likely to have the power to enact remedial legislation. *See infra* Part. V.

46. *See* Margaret P. O'Mara, *Beyond Town and Gown*, 37 J. TECH. TRANSFER 234, 235–36 (2012) ("Universities and cities simultaneously admire, mistrust, and misunderstand each other. . . . [T]he connection between locality and university can waver between wary goodwill and outright hostility . . . .").

47. *See* Ramey v. Rockefeller, 348 F. Supp. 780, 788 (E.D.N.Y. 1972) (noting state legislators' fear that a person temporarily in a community "may be less likely to vote for financing of such long-term needs as schools or roads . . . or, *per contra*, may be more likely to vote for improvements in whose costs he will not long have to share").

48. *See* Wines, *supra* note 12 (quoting a 2011 statement by New Hampshire's House Speaker, a Republican, in which he promised to prevent unrestricted student voting, referring to these student voters as "kids voting liberal, voting their feelings, with no life experience").

49. *See* Cheng, *Got the Vote*, *supra* note 3, at 40 (noting that both parties endorsed lowering the voting age to eighteen in their 1968 platforms despite the conventional wisdom at the time that "lowering the voting age would disproportionally benefit the Democratic Party").

become more reliable Democratic voters.[50] This partisan motivation, as well as latent racism, has made Historically Black Colleges and Universities (HBCUs) frequent targets for those seeking to limit the voting power of students and Black Americans.[51]

There are three reasons why college students specifically are vulnerable to voter suppression efforts. First, a significant portion of college students move to a new district in the fall immediately preceding an election, making it confusing to determine where to register to vote and what forms of identification they may need to cast a ballot.[52] Second, the geographic clustering of college students makes them fairly easy targets for vote dilution and suppression tactics, such as gerrymandering and restrictions on poll place locations.[53] And lastly, state legislators and local officials prey on college students' unfamiliarity as first time voters to intimidate or confuse them.[54] The following subsections examine specific ways that state and local officials attempt to inhibit students' ability to exercise their right to vote.

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50. *See* PEW RSCH. CTR., THE PARTIES ON THE EVE OF THE 2016 ELECTION: TWO COALITIONS, MOVING FURTHER APART 19, 25 (2016), https://perma.cc/Q8W8-65BB (illustrating that between 1992 and 2016, college-educated voters have shifted from favoring Republicans by a 4 percent margin to favoring Democrats by 12 percent and that adults eighteen to twenty-five years old favor Democrats by 22 percent).

51. *See* Symm v. United States, 439 U.S. 1105, 1105 (1979) (noting that the voter registration requirement was targeted at students who attended Prairie View A&M University, a predominantly Black university in Texas); Daley, *supra* note 41 (explaining that North Carolina A&T State University—a predominantly Black university in North Carolina—was gerrymandered between two congressional districts).

52. *See* BROMBERG ET AL., *supra* note 40, at 6 ("Collegians tend to move every August, often settling into a new address and/or campus . . . . In the midst of those adjustments . . . many have only about one month to register to vote or update their registration for the November election.").

53. *See* Daley, *supra* note 41 (detailing the precise efforts that GOP map makers went to identify where college students lived at North Carolina A&T State University before splitting the campus into two different congressional districts); FLA. STAT. § 101.657 (2020) (restricting the availability of early voting locations on college campuses).

54. *See* KOLASKY & WONDOLOWSKI, *supra* note 41, at 10–11 (describing misinformation and intimidation directed at University of New Hampshire and Skidmore College students).

B. *Voter Registration Requirements*

Forty-nine states and the District of Columbia require registration prior to voting.[55] While these laws differ, their general contours are consistent. All states employing registration systems require voters to identify their place of residence, even if it is not fixed or permanent.[56] When establishing residency, the U.S. Supreme Court has struck down laws that require an individual registering to vote to live in the community more than a couple months prior to an election.[57] Even so, states have duration requirements,[58] and many of them require voters to demonstrate an intent to remain in the area indefinitely.[59] Much of the manipulation of voting requirements to inhibit student voting occurs in this grey area.

1. Registration Requirements in the Immediate Aftermath of Ratification

There is a long history of states and localities making it more difficult for college students to register to vote compared to other residents. Prior to the ratification of the Twenty-Sixth Amendment, twenty-four states had residency statutes that created a presumption against students registering to vote at the location where they attended school.[60] In many cases, these laws required students attempting to register to vote to answer

55. *See Voter Registration Laws*, VOTE AM., https://perma.cc/9EVK-9A85 (last updated June 21, 2021) (inventorying voter registration laws in the United States).

56. *See* Pitts v. Black, 608 F. Supp. 696, 710 (S.D.N.Y. 1984) (finding that transient individuals with non-permanent addresses can still establish residency).

57. *See* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (striking down a Tennessee law that required voters to establish residency in the state for a year prior to the election and in their specific county for three months prior).

58. *See Voter Registration Laws*, *supra* note 55 (noting that twenty-four states have durational requirements requiring that a voter reside in the state between twenty to thirty days prior to the election).

59. *See, e.g.*, N.Y. ELEC. LAW § 5-104 (McKinney 2020) (describing the criteria that the registrar may consider when determining an individual's intent to remain).

60. *See* Richard Singer, *Student Power at the Polls*, 31 OHIO ST. L.J. 703, 721–23 (1970) (inventorying statutes and key cases in all twenty-four states).

an additional set of questions to prove their residence.[61] For example, in 1970, in Michigan, registrars in the three biggest college towns, Ann Arbor, Kalamazoo, and East Lansing, required students to fill out supplemental questionnaires to establish residency.[62] The city of Ann Arbor's questionnaire was the most extensive, asking whether the student was married, employed in Ann Arbor, owned any taxable property, and how he or she was paying for school.[63] Such questionnaires imposed a higher burden on students registering to vote than other members of the voting-eligible public.[64]

Likewise, during this time, even in states without statutes explicitly subjecting students to additional scrutiny when registering, state and local officials interpreted state domicile laws to either flatly prohibit students from registering at their university community[65] or required students to declare their intention to live in the community indefinitely in order to register to vote.[66] For example, in 1971, registrars in four New Jersey counties turned students away who indicated that they were "uncertain" if they were going to stay in the county after graduation.[67] Similarly, in one of the most egregious policies, California's Attorney General issued guidance that required

61. *See id.* at 705 (describing Alabama's adoption and use of a questionnaire just for students registering to vote).

62. *See* W. Perry Bullard & James A. Rice, *Restrictions on Student Voting: An Unconstitutional Anachronism?*, 4 U. MICH. J.L. REFORM 215, 239–43 (1970) (appending the questionnaires used in Ann Arbor, Kalamazoo, and East Lansing).

63. *See id.* at 239.

64. *See id.* at 222 (describing how Michigan's statutory provision and corresponding questionnaires "place[d] on students a burden of demonstrating a sufficient nexus with the locality" and that such burden is not similarly placed on older citizens or nonstudent members of the community).

65. *See* Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 235 (N.J. 1972) (describing the practice of New Jersey clerks to routinely deny registration to students if they resided on campus and their parents lived outside of the state).

66. *See* Bright v. Baesler, 336 F. Supp. 527, 534 n.2 (E.D. Ky. 1971) (indicating that a student's ability to prove domicile should not be contingent on him declaring that he intends to permanently live in the university community).

67. *See Worden*, 294 A.2d at 234 (detailing the registrar's rejection of a student's attempt to register to vote when that student indicated that after college he planned to be "teaching someplace" but that that "could be anywhere").

unmarried minors to register to vote at their parent's address, regardless of where they resided to attend school.[68] This resulted in thousands of students being told that they had to register in their home states or locations within California hundreds of miles from where they attended school.[69]

Shortly after the Twenty-Sixth Amendment's ratification in 1971, courts began to strike down these additional registration requirements and affirmed students' ability to register where they attend school.[70] However, states did not abandon tactics to restrict student voting following the ratification of the Twenty-Sixth Amendment.

2. Registration Requirements Today

The practice of subjecting students to additional questionnaires or requiring they affirm their intention to remain in the community continues to the present. As recently as 2016, local registrars in one South Carolina county still required college students to complete additional questionnaires to demonstrate their residency.[71] The county board of elections issued an eleven-question form to every student attempting to

68. *See* Jolicoeur v. Mihaly, 488 P.2d 1, 3 (Cal. 1971) (describing the California Attorney General issuing this policy and local registrars refusing to register nonmarried students accordingly).

69. *See id.* (explaining that the state told two of the petitioners to register to vote in their home states of Hawaii and Arizona, and told six others to register in other California districts, some up to 700 miles away).

70. *See* Wilkins v. Ann Arbor City Clerk, 189 N.W.2d 423, 434 (Mich. 1971) ("In the future, students must be treated the same as all other registrants. No special questions, forms identification, etc., may be required of students."); *Worden*, 294 A.2d at 245 (concluding that questioning students' residency beyond what would be asked of other registrants "improperly discriminated" against the students and upheld their ability to register from their school addresses); *Bright*, 336 F. Supp. at 534 (prohibiting registrars from imposing special criteria or proof on students and requiring that "each registration applicant should be asked the same questions . . . and the questions should reasonably relate to proof of domicil[e]"); Ownby v. Dies, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (finding that subjecting persons under the age of twenty-one to different registration criteria "abridges" their right to vote in violation of the Twenty-Sixth Amendment).

71. *See* Nathaniel Cary, *Furman Students Will Get to Vote After Judge Issues Injunction,* GREENVILLE NEWS (Oct. 7, 2016, 6:44 PM), https://perma.cc/EHM8-RZFG (describing the questionnaires as being in use since "at least the early 1970s").

register in the county using an on-campus address.[72] The questionnaire inquired into "where the students banked, what community activities they are involved in, if they've voted elsewhere in the past and where their parents live."[73] The county imposing the additional questionnaire contained four state higher education institutions with a combined total of nearly 20,000 students, many of whom lived on campus.[74]

On occasion, state courts have subjected students to heightened registration requirements or refused to allow them to register all together. In 2004, students at the College of William & Mary in Virginia filed a claim in state court challenging the registrar's denial of their voter registration.[75] The Virginia circuit court applied an out-of-date domicile test, ultimately denying a student the ability to register in the district because she lived in a college dormitory and indicated that she intended to pursue the best employment opportunity possible after graduation, regardless of location.[76] Additionally, in Clark County, Arkansas, in 2002, a non-student community member claimed his vote was being diluted by the registration of college students at Ouachita Baptist University and Henderson State College.[77] As a result, he sought a writ of mandamus from a state judge to prevent students from

72. *See id.* ("The county's Board of Voter Registration and Elections had a longstanding policy of issuing an 11-question form to every student who registers to vote using an on-campus address.").

73. *Id.*

74. *See id.* (noting that the county included Furman University, Bob Jones University, North Greenville University, and Greenville Technical College); *South Carolina Colleges Ranked by Largest Enrollment*, COLLEGESIMPLY, https://perma.cc/7WQW-NP2D (listing the colleges' student populations: Furman University, 2,947; Bob Jones University, 3,005; North Greenville University, 2,578; Greenville Technical College, 10,864).

75. Patrick J. Troy, Note, *No Place to Call Home: A Current Perspective on the Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL'Y 591, 605 (2006).

76. *See id.* at 605–07 (explaining that the court allowed one of the student-plaintiffs to register after they proved that they were enrolled in the Virginia National Guard but refused to allow another student to register because she indicated her intent to seek employment wherever she could find it post-graduation).

77. Copeland v. Huckabee, No. 4:02CV00675 GH, 2002 U.S. Dist. LEXIS 29976, at *17–18 (E.D. Ark. Oct. 30, 2002).

registering.[78] The judge found as a matter of law that "persons temporarily living in Clark County for the purposes of attending a university as a student do not establish residence in Clark County."[79] The judge granted the writ and ordered the county clerk to purge the voter rolls of "all persons listing as their address a university post office box, university dormitory, or other university owned student housing . . . and to refuse to accept voter registrations from persons listing as their addresses any of these places."[80] Prior to a federal district court granting a preliminary injunction against the court order, the ruling effectively stripped the ability of nearly 5,500 students to register to vote.[81]

State legislators continue to develop new, yet similar, ways to suppress student voting via voter registration laws. In 2018, the New Hampshire legislature passed a law that effectively required all individuals who registered to vote to obtain a New Hampshire driver's license and register their car in the state.[82] This bill, passed by a Republican-controlled statehouse and signed into law by a Republican governor, came on the heels of narrow statewide wins of Democratic presidential candidate Hillary Clinton and Democratic senate candidate Maggie Hassan in 2016.[83] In passing the bill, state legislators openly admitted that one of their motives was to inhibit student voters

78. *Id.* at *17.

79. *Id.* at *18.

80. *Id.* at *18–19.

81. *ACLU of Arkansas and ACLU Voting Rights Project Sue to Restore Voting Rights of College Students*, ACLU (Oct. 25, 2002), https://perma.cc/Y6BQ-XD6N; *see Largest Arkansas Colleges with Most Enrollment*, IVSTATS, https://perma.cc/7HKS-2CYS (noting that the student population for Ouachita Baptist is 1,660 and for Henderson State is 3,961).

82. *See* H.B. 1264, Gen. Assemb., Reg. Sess. (N.H. 2018) (expanding the definition of resident so that anyone who registered to vote in the state was declaring residency and as a result required to get a New Hampshire driver's license and register their car in state or face penalties).

83. *See* Anthony Brooks, *New Residency Law in N.H. Sparks Charges of Voter Suppression and a Lawsuit*, WBUR NEWS (Nov. 8, 2019), https://perma.cc/44SG-W5FL ("[I]n 2016, Sen. Maggie Hassan, the Democratic incumbent, beat Republican Kelly Ayotte by just over 1,000 votes, while Hillary Clinton beat Donald Trump in New Hampshire by fewer than 3,000 votes.").

who were likely to vote for Democrats.[84] In fact, in 2011, New Hampshire Republicans attempted to institute an even stricter law which would have permitted students to vote at their college residences only if they or their parents had previously established residency in that district.[85] At the time, the GOP state speaker of the house described student voters, who he believed were more likely to vote for Democrats, as "foolish," lacking "life experience," and "vot[ing] with their feelings."[86]

Likewise, between 2011 and 2015, Wisconsin enacted a slew of voting laws that impacted young people's access to the ballot.[87] One of these laws required colleges and universities to provide proof of the students' U.S. citizenship to corroborate students' ability to register to vote in the district by sending over a list of students who lived on-campus.[88] This put Wisconsin colleges and universities in the impossible position of either refusing to send in the list to assist students in registering to vote or violating federal privacy laws.[89]

Even if students face no technical legal obstacles to registering, they are frequently subject to misinformation and intimidation campaigns in an attempt to prevent them from registering in their college communities. Between 2000 and 2003, New Hampshire students were incorrectly told by election officials that they were ineligible to register if they only lived in their college town during the school year and that they faced significant consequences, such as losing scholarships, if they listed the town as their residence in voter registration applications.[90] Likewise in 2011, the Secretary of State of Maine, at the urging of the head of the state Republican Party, sent a

84. *See id.* (quoting state lawmakers who said that out-of-state college students do not have "skin in the game" and that "if [a student is] from Boston and . . . here eight months out of the year . . . [he or she] shouldn't be able to vote here").

85. *See* Wallsten, *supra* note 21 (describing the failed legislation).

86. *Id.*

87. *See* Bromberg, *supra* note 4, at 1148 (identifying fourteen laws that were likely to limit youth access to the ballot).

88. *Id.*

89. *See id.* (noting that this law "create[d] a direct conflict for colleges due to federal law governing student privacy rights").

90. *See* KOLASKY & WONDOLOWSKI, *supra* note 41, at 10 (describing misinformation that was directed at students attending Dartmouth and the University of New Hampshire).

threatening letter to 200 college students incorrectly implying that they may have illegally registered to vote in the state and encouraged them to re-register elsewhere.[91] This residency misinformation has also subjected student voters to intimidation on election day itself. At one New York precinct, a poll watcher challenged the residency of nearly 300 Skidmore College students by requiring them to sign an affidavit attesting to their residency and submit it along with their ballot.[92] This misinformation and increased questioning contributes to confusion among student voters and results in a chilling effect on students exercising their right to vote.[93]

C. *Gerrymandering*

Generally, college campuses consist of compact communities of interest. But at both the congressional and local levels, legislators gerrymander campuses to dilute the power of student voters.[94] Gerrymandering is the practice of drawing congressional, state, or municipal district lines in a way that maximizes the efficacy of a particular group's vote at the expense of an out-group.[95] Legally, this concept is known as vote

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91. *See* Scott Keyes, *Maine Elections Chief Uses GOP List to Intimidate Student Voters and Encourage Them to Re-Register in Another State*, THINK PROGRESS (Sept. 29, 2011, 9:10 PM), https://perma.cc/YE8M-G8E9 (noting that the letter stated that the Secretary of State was "asked to investigate allegations of election law violations," that his research showed that the letter recipient was registered to vote in Maine, and implied that the student may be registered incorrectly).

92. *See* KOLASKY & WONDOLOWSKI, *supra* note 41, at 11 (explaining that this widespread challenge came on the heels of a failed 2001 attempt to remove the polling location from campus all together).

93. *See, e.g.*, Keyes, *supra* note 91 (reporting that students who received the threating letter from Maine's secretary of state were "scared and freaked out" with some even canceling their voter registration).

94. *See, e.g.*, Daley, *supra* note 41 (describing North Carolina Republicans' attempt to split North Carolina A&T State University into two congressional districts); Austen Hufford, Letter to the Editor, *Drawing the Vote: Ann Arbor City Wards Split Students*, MICH. DAILY (Feb. 3, 2015), https://perma.cc/QS2M-M9XW (describing how the University of Michigan is split among five city council wards).

95. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting) (describing vote dilution as "the devaluation of one citizen's vote as compared to others").

dilution.[96] Claims of illegal vote dilution are based on Article I, Section 2 of the Constitution[97] for federal elections and the Equal Protection Clause of the Fourteenth Amendment for state and local elections.[98] These rights are further bolstered by Section 2 of the Voting Rights Act.[99] The Supreme Court has recognized claims of racial gerrymandering,[100] but held that political gerrymandering is non-justiciable.[101] Notably, the Court has not addressed a purely student-based vote dilution claim.[102]

This section primarily assesses vote dilution tactics aimed at students on both the congressional and local levels.[103] The motivation behind splitting college campuses into multiple congressional districts is almost entirely driven by a desire to increase partisan advantage by diluting the impact of young voters, who are more likely to support Democratic candidates.[104] Conversely, college campuses are often split into multiple

96. *Id.*

97. *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States.").

98. *See id.* amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1110 (2016) (describing how the Court's "one person, one vote" principle is derived from these two constitutional foundations).

99. *See* 52 U.S.C. § 10301 (providing that racially discriminatory voting practices such as gerrymandering may be proven by demonstrating discriminatory effect).

100. *See* Shaw v. Reno, 509 U.S. 630, 657–58 (1993) (finding that plaintiffs adequately stated a claim of an unconstitutional racial gerrymander).

101. *See Rucho*, 139 S. Ct. at 2506–07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

102. Lower courts have struck down maps that have diluted the power of student voters at HBCUs for racial reasons. *See* Harper v. Lewis, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at *16–18, 22 (N.C. Super. Ct. Oct. 28, 2019) (granting a preliminary injunction against a map that would have split N.C. A&T State University, an HBCU, in half).

103. In discussing access to polling places, Part I.E assesses a similar tactic, the manipulating of voting district boundaries, which makes it more challenging for students to access a polling place.

104. *See* Daley, *supra* note 41 (detailing the "dozens of intensely detailed studies of North Carolina College Students" used by Republican map drawers in North Carolina to create two safe Republican congressional seats).

municipal districts for local elections to keep college students from influencing local government.[105] Regardless of the motivation, breaking up college campuses into multiple districts is particularly concerning because a college campus squarely fits into the traditional districting criteria of keeping communities of interest intact.[106]

1. Congressional District Gerrymandering

The gerrymander of North Carolina A&T State University, the largest HBCU in the country with a student population of 13,000,[107] presents the clearest example of a congressional gerrymander targeted at students. In 2016, North Carolina's attempt to draw a new congressional map was tossed out for being an impermissible racial gerrymander.[108] In the second attempt, the Republican-controlled legislature split the campus of North Carolina A&T down the middle, placing half in North Carolina's sixth congressional district and the other in the thirteenth.[109] While North Carolina Republicans initially claimed that this was not based on any impermissible motives, publicly disclosed files of a GOP redistricting consultant later revealed that they intended to dilute the voting power of students and Black voters.[110] The mapmakers used a database detailing the racial make-up, voting patterns, and residence halls of North Carolina A&T students.[111] With this information, the mapmakers identified the dorm rooms of those college students and drew the new congressional district lines

105. *See* Hufford, *supra* note 94 (detailing Ann Arbor's current ward which splits students between all five wards so that no more than 29 percent of the student population is represented in a single ward).

106. *See Redistricting Criteria*, NAT'L CONF. OF ST. LEGISLATURES (July 16, 2021), https://perma.cc/9A6X-4HKA (identifying the six traditional measures of redistricting: compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, preservation of the cores of prior districts, and avoiding pairing incumbents).

107. Lewis Kendall, *How a Republican Plan to Split a Black College Campus Backfired*, GUARDIAN (Nov. 1, 2020, 6:00 PM), https://perma.cc/TV8P-PNW4.

108. Harris v. McCrory, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016).

109. Kendall, *supra* note 107.

110. Daley, *supra* note 41.

111. *Id.* The data was so granular that it also identified 5,429 students who were unlikely to have the required ID to vote. *Id.*

accordingly.[112] Ultimately, a court ordered that a remedial map be used for the 2020 congressional races.[113] But while in effect, the original map essentially split the university, and the city of Greensboro more broadly, into two voting districts, both of which were represented by white Republicans.[114]

Montclair State University in New Jersey and Louisiana State University in Louisiana are also gerrymandered in a way that dilutes the power of student voters.[115] Montclair State University, designated as a Hispanic-Serving Institution, has over 20,000 students who attend class on campus.[116] Its campus is currently divided into three congressional districts.[117] Louisiana State University, home to 31,000 students, is split between two congressional districts.[118] There is less direct evidence in both of these cases that mapmakers intentionally sought to dilute the impact of student voters. But each seemingly violates the principle of keeping communities of interest together.[119]

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112. *Id.*

113. *See* Harper v. Lewis, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at *16–18 (N.C. Super. Ct. Oct. 28, 2019) (granting a preliminary injunction against the implementation of the 2016 map since the plaintiffs were likely to win on the merits of their claim of extreme partisan gerrymandering in violation of the North Carolina state constitution).

114. *See* Kendall, *supra* note 107 (noting that the representatives for these two districts were Mark Walker and Ted Budd, both white Republicans).

115. *See* Ryan Spain, *The Consequences of Gerrymandering on the Student Vote*, ANDREW GOODMAN FOUND. (May 22, 2019), https://perma.cc/372L-VK6P (calling attention to the issue of gerrymandered college campuses).

116. *Id.*; *see Helping Hispanic Students Achieve College*, MONTCLAIR ST. UNIV. NEWS CTR. (July 30, 2020), https://perma.cc/J2DW-8MLG (noting that one-third of the university's students are Hispanic, many of whom are also first-generation college students).

117. *See Federal Relations*, MONTCLAIR ST. UNIV. GOV'T RELATIONS, https://perma.cc/UNB2-NU84 (noting that the campus is in parts of the ninth, tenth, and eleventh congressional districts).

118. Spain, *supra* note 115.

119. *See Redistricting Criteria*, *supra* note 106 (defining communities of interest as "[g]eographical areas, such as neighborhoods of a city or regions of a state, where the residents have common political interests that do not necessarily coincide with the boundaries of a political subdivision, such as a city or county").

2. Municipal Gerrymandering

Another attempt to dilute the power of student voters occurs on the local level when cities split college campuses among different wards for municipal elections and, as a result, prevent student-backed representatives from being elected to city council. For example, Ann Arbor, Michigan, home of the University of Michigan, enrolls 48,090 students[120]—a sizable portion of the city's population of approximately 120,000.[121] Ann Arbor's city government is divided into five different municipal wards, each of which elects two members to the city council.[122] However, the structure of the city wards makes it nearly impossible for student voters to elect a council member of their choosing.[123] No more than 29.4 percent of students registered to vote fall into any single ward.[124] As a result, despite accounting for more than a third of the city's population, students have been ineffective at winning spots on city council.[125]

Until recently, student voters at University of California, Berkeley, faced a similar challenge to get students elected to the city council. A student first served on the Berkeley City Council in 1984.[126] Two years after this accomplishment, the city council adopted a new district-based voting system that split student housing among four different council districts.[127] The city made

120. *Facts & Figures*, U. MICH., https://perma.cc/9L92-M3VV.

121. *See Quick Facts: Ann Arbor City, Michigan*, U.S. CENSUS BUREAU, https://perma.cc/PB52-XQP4 (providing population estimates for July 1, 2019).

122. Hufford, *supra* note 94.

123. *Id.*

124. *See id.* (listing the percentage of registered students found in each ward as: Ward 1, 24.54 percent; Ward 2, 29.40 percent; Ward 3, 14.72 percent; Ward 4, 20.30 percent; and Ward 5, 10.64 percent).

125. *See Despite Efforts, Students Fail to Gain Council Seats*, MICH. DAILY (Nov. 5, 2003), https://perma.cc/XY5Z-EHSW ("Voters reelected four City Council incumbents yesterday, while denying spots on the council to three University students and an alum.").

126. Sarah Mohamed, *Panel Discusses Possibility of Student Supermajority District*, DAILY CAL. (Sept. 23, 2011), https://perma.cc/CJ68-XB42.

127. *See id.* (quoting Nancy Skinner, the 1984 student councilmember, as stating that "[t]heir purpose was to divide the student and progressive votes . . . . They divided up the student housing into at least a minimum of four districts—they were very specific, and they were trying to ensure that their intent would be permanent").

this disadvantage permanent by mandating in the city charter that future redistricting must resemble the 1986 district boundaries as closely as possible.[128] UC Berkeley students attempted to change these district lines in 2001, but had their proposal overridden since it did not adhere to this charter provision.[129] It was not until 2012 that students successfully forced a vote amending the city charter.[130] Another two years passed before a student-majority district was adopted by the city council and then by Berkeley voters themselves.[131] In 2018, a twenty-two-year-old recent graduate of UC Berkeley was elected to the council from the new student-majority district,[132] demonstrating that students will vote as a cohesive unit to elect a candidate who represents their interests when given the opportunity.

D. *Voter Identification Laws*

For the vast majority of United States history, voter identification was not required for individuals to exercise their right to vote. Not until 2002, when Congress passed the Help America Vote Act (HAVA),[133] was there a federal requirement that some voters must present identification when voting.[134] Specifically, HAVA requires first-time voters who registered by mail to present identification when voting for the first time in federal elections.[135] While this only impacts a small number of voters, college students were disproportionately affected

128. *Id.*

129. *See id.* (noting that the 2001 proposal was "not charter-compliant because it deviated too far from the 1986 boundaries").

130. *See* Daphne Chen, *Student Majority Precincts Impact Local Elections, Report Says*, DAILY CAL. (Dec. 5, 2012), https://perma.cc/C4VQ-C8RJ (noting that Measure R, which amended the redistricting provision in the city charter, passed with 65.9 percent of the vote).

131. *See* Holly Honderich, *In Year of the Millennial, Berkeley Elects its Youngest Council Member Yet*, S.F. CHRON. (Nov. 22, 2018, 8:40 PM), https://perma.cc/ESP7-RJQS (reporting that the measure was approved in 2014).

132. *Id.*

133. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901–21145).

134. *Id.*

135. 52 U.S.C. § 21083(b).

because so many of them were first time voters.[136] Problematically, HAVA paved the way for states to institute their own voter identification laws.

In 2006, Indiana became the first state to require all voters to provide photo identification when casting their ballot.[137] As of 2020, thirty-six states have laws that require or request that voters show some form of identification when voting.[138] These laws can be divided into four categories: photo and non-photo identification laws and strict and non-strict identification laws.[139] Strict states require voters without the required identification to cast a provisional ballot and then take additional steps after election day to present an acceptable ID for their vote to count.[140] Non-strict states allow voters to cast an actual ballot on election day, either by signing an affidavit or having a poll worker vouch for them, or they allow voters to cast a provisional ballot that is then confirmed through signature matching or a similar verification process.[141]

Student voters are particularly vulnerable to strict voter identification laws. A 2016 survey found that of the fifteen states with strict voter ID laws, seven did not accept student ID cards when voting.[142] Additionally, six states did not accept a student ID or an out-of-state government issued ID.[143] This poses a substantial challenge to college students. College students are a highly mobile population, many coming from out of state and

136. *See* Aloi, *supra* note 39, at 286–87 (explaining that "18-year-old college freshmen are all first-time voters by virtue of their age" and face difficulties voting under HAVA since they often do not change their state-issued driver's license to their college residence and do not tend to have utility bills which can be used for identification purposes).

137. Grace Panetta & Yuqing Liu, *In 34 States, You'll Need to Show ID to Vote on Election Day.*, BUS. INSIDER (Nov. 2, 2020, 8:49 AM), https://perma.cc/47UU-LAJT.

138. *Voter Identification Requirements*, *supra* note 42.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* BROMBERG ET AL., *supra* note 40, at 14 (identifying Arizona, North Carolina, North Dakota, South Carolina, Tennessee, Texas, and Ohio as states that do not accept any student ID cards as proper proof of identity when voting and that Georgia and Indiana only permit student IDs from state-supported institutions).

143. *See id.* at 15 (listing Arizona, North Carolina, Ohio, South Carolina, Tennessee, and Texas).

most moving into new residences each August.[144] These moves often come at a crucial time, just months before an election, making it a challenge for these voters to secure the proper identification.[145]

Many of the state-adopted identification laws purposefully manipulate what type of identification qualifies to advantage or disadvantage specific populations. For instance, Tennessee first passed its strict voter identification law in 2011.[146] It initially required that voters present one of five types of photo IDs in order to vote: (1) a Tennessee driver license; (2) a special voter identification card; (3) a United States passport; (4) a state employee identification card; or (5) a United States military identification card.[147] The state amended the statute in 2012 to allow retired state employees to keep their state-issued ID and use it to vote in future elections.[148] Conspicuously missing from the forms of appropriate identification? A student ID. Egregiously, this is despite the fact that employees of state colleges and universities receive IDs from the same institutions that are nearly identical to student IDs and may use those IDs to vote.[149] As a result, tens of thousands of students at public institutions in Tennessee are subject to a higher burden than state employees when attempting to provide proof of ID to vote.

Similar discrepancies exist in other states. Texas has an extremely limited list of approved photo identification. Student IDs are not included, but handgun licenses are.[150] South

144. *Id.* at 6.

145. *Id.*

146. 2011 Tenn. Pub. Acts 323 (codified as amended at TENN. CODE ANN. § 2-7-112) (2021).

147. *Id.*

148. 2012 Tenn. Pub. Acts 938 (codified as amended at TENN. CODE ANN. § 2-7-112) (2021).

149. *See* BROMBERG ET AL., *supra* note 40, at 16 (noting that, in addition to prohibiting the use of student IDs issued by the same institutions as the employer IDs, the statute also bans the use of out-of-state identification cards). In 2015, students attempted to challenge this law on both Twenty-Sixth and Fourteenth Amendment grounds, but the court dismissed their case. *See* Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749, 754–57 (M.D. Tenn. 2015) (finding that the burden of obtaining a state issued photo ID card does not abridge the right to vote (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008))).

150. TEX. ELEC. CODE § 63.0101 (2021).

Carolina allows Military IDs and South Carolina driver's licenses to serve as proof of identification, but does not allow Student IDs or out-of-state driver's licenses.[151] North Dakota provides exceptions from its voter identification laws for people living in "special circumstances"; the exceptions include individuals living in long-term care facilities or members of the military and their spouses, but do not include students.[152]

Some states that accept student ID cards as identification create such stringent criteria that most student identification cards will not qualify. Wisconsin technically accepts student identification cards.[153] But to count as proof of identification when casting a ballot, the student ID must include the date it was issued, an expiration date no longer than two years after the issue date, and a signature.[154] Students must present this ID alongside a document corroborating their enrollment in the institution.[155] Add this to the fact that Wisconsin does not allow out-of-state IDs to count as proof of identification,[156] and it becomes particularly difficult for over 300,000 college students, tens of thousands of whom are from out of state, to exercise their right to vote.[157]

It is not hard to identify the partisan motivations for these voter ID laws. Those who benefit, whether gun owners or the elderly, are demographic groups that favor Republicans.[158] On

151. S.C. CODE ANN. § 7-13-710 (2021).

152. N.D. CENT. CODE § 16.1-01-04.1 (2021).

153. WIS. STAT. § 5.02(6m)(f) (2020).

154. *Id.* Student IDs at several universities within Wisconsin, such as the state's flagship UW-Madison, did not meet these criteria and as a result, the university needed to set up ID centers where students could obtain qualifying identification. *See* Nico Savidge, *Election Turnout Robust Despite Some Confusion over New Photo ID Requirement*, WIS. ST. J. (Apr. 5, 2016), https://perma.cc/RT6K-9MLB (describing the steps that the UW-Madison took in the lead up to the 2016 primary).

155. WIS. STAT. § 5.02(6m)(f) (2020). Additionally, this requirement that students present a corroborating document led to wait times of up to two hours at polling places near college campuses. *See* Ari Berman, *Wisconsin's Voter ID Law Caused Major Problems at the Polls Last Night*, NATION (Apr. 6, 2016), https://perma.cc/8B4G-PD5Z (describing a two-hour wait at the Marquette University polling place).

156. BROMBERG ET AL., *supra* note 40, at 16.

157. Muniz, *supra* note 24.

158. *See* Rich Morin, *The Demographics and Politics of Gun-Owning Households*, PEW RSCH. CTR. (July 15, 2014), https://perma.cc/3FWQ-Y9MT

the other hand, disadvantaged voters, such as college students, often favor Democrats.[159]

E. *Restrictions on Polling Places*

Like most of election law, the decisions of where to locate polling places, how long they remain open, whether to have early voting, and, if so, which sites can serve as early voting locations, is largely left up to the discretion of state and local officials. The major federal limitation on these decisions was the preclearance requirement of Section 5 of the Voting Rights Act, which provided for Department of Justice review of changes to election laws to ensure that new laws did not have a discriminatory effect on racial minority voters.[160] However, post-*Shelby County*, states have moved to restrict the availability of polling places in an attempt to limit the participation of minority and student voters.[161] As it relates to student voters, these restrictions come in two forms: (1) limiting early voting on college campuses and (2) locating polling places away from campus. Removing voting locations from college campuses is of particular concern since many students may not have cars and may live in towns which lack accessible public transportation.

1. Limiting Early Voting on College Campuses

In 2014, county boards of elections in North Carolina closed on-campus early voting throughout the state.[162] This included limiting on-campus voting sites at North Carolina State

("Republicans are twice as likely as Democrats to be members of a gun-owning household."); NIDA ASHEER & CALVIN JORDAN, PEW RSCH. CTR., IN CHANGING U.S. ELECTORATE, RACE AND EDUCATION REMAIN STARK DIVIDING LINES 32 (2020), https://perma.cc/G88M-EQNP (PDF) (noting that 56 percent of Republican voters are over the age of fifty).

159. *See supra* notes 50–51 and accompanying text.

160. *See supra* notes 14–17 and accompanying text.

161. *See Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. ON CIV. & HUM. RTS., https://perma.cc/V8F7-HNDH (finding that thirteen states had closed a combined total of 1,688 polling place between 2012 and 2018); Evan Walker-Wells, *Blocking the Youth Vote in the South*, FACING S. (Oct. 29, 2014), https://perma.cc/BQ76-LPDL (describing post-*Shelby County* attempts to limit student voting in Alabama, Florida, Mississippi, North Carolina, Texas, and Virginia).

162. Walker-Wells, *supra* note 161.

University, Duke University, East Carolina University, University of North Carolina at Charlotte, and Winston-Salem State University—one of the state's historically Black universities.[163] In the same election cycle, the Watauga County Board of Elections attempted to use a similar tactic by eliminating an early voting site at Appalachian State University campus in Boone, North Carolina. A state court struck down this plan, finding that "[a]ll the credible evidence indicates that the sole purpose of that plan was to eliminate an early voting site on campus so as to discourage student voting and, as such, it is unconstitutional."[164] In recent years, the state Republican party in North Carolina has encouraged state boards of elections to act in a partisan manner when making the decisions about early voting.[165]

In 2018, Florida's Secretary of State tried to unilaterally restrict early voting on college campuses by interpreting a state law to prohibit the use of college campuses as early voting sites.[166] Students challenged this policy, resulting in a preliminary injunction barring its enforcement because it violated the First, Fourteenth, and Twenty-Sixth Amendments.[167] However, in 2019, the GOP-controlled state legislature attempted an end-around of this order, amending the state's early voting laws to require that early voting locations have "sufficient non-permitted parking to accommodate the

163. *Id.*

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

165. *See* Colin Campbell, *'Party Line Changes' Urged to Limit Early Voting Hours*, NEWS & OBSERVER, Aug. 18, 2016, at A1 https://perma.cc/HQ33-BTCS (quoting the executive director of the North Carolina GOP, Dallas Woodhouse, as stating, "Republicans can and should make party line changes to early voting").

166. *See* League of Women Voters of Fla. v. Detzner, 314 F. Supp. 3d 1205, 1209 (N.D. Fla. 2018) (noting that the Secretary of State issued an opinion that none of the state's twelve public universities and twenty-eight state and community colleges could serve as early voting sites).

167. *Id.* at 1210, 1217 ("The [Secretary of State's] [o]pinion has the effect of creating a secondary class of voters who Defendant prohibits from even seeking early voting sites in dense, centralized locations where they work, study, and, in many cases, live. This effect alone is constitutionally untenable.").

anticipated amount of voters."[168] College campuses, which lack such parking, were the primary targets of this bill, which would make it harder for the nearly 1.1 million college students who attend college in Florida to vote.[169]

2. Locating Polling Places Away from Campus

In addition to losing their early voting sites in 2014, North Carolina State University, Duke University, Eastern Carolina University, and University of North Carolina, also lost on-campus polling places on election day.[170] This forced students to travel to a place off campus to vote. North Carolina State University, for example, offered a polling place in its student center in 2012.[171] In 2014, the nearest polling place was almost four miles away from campus.[172]

At Bard College in New York, 70 percent of the eligible voters in the voting district reside on campus.[173] Historically, the polling place for the district was located three miles away from campus on a route that lacks sidewalks and access via public transportation.[174] In 2009, Bard students began advocating for a polling place on campus. Beyond directly serving the vast majority of eligible voters in the district, it would also be on a public transportation route and be ADA compliant, unlike the available polling location at the time.[175] It was not until 2020 that the students reached a settlement with

168. 2019 Fla. Laws ch. 162 (codified as amended at FLA. STAT. § 101.657 (2020)).

169. *See Detzner*, 314 F. Supp. 3d at 1209 (noting that the nearly 830,000 students enrolled at Florida public institutions amount to more than the populations of North Dakota, South Dakota, Alaska, Vermont, Wyoming, and D.C.).

170. *See* Walker-Wells, *supra* note 161.

171. Staff Editorial, *We Should Be Able to Vote on Campus*, TECHNICIAN (Oct. 22, 2014), https://perma.cc/C9PJ-XJNG.

172. *Id.*

173. Bromberg, *supra* note 4, at 1145.

174. *The Andrew Goodman Foundation, Bard College President and Students File Voter Suppression Lawsuit Against the Dutchess County Board of Elections,* ANDREW GOODMAN FOUND. (Sept. 4, 2020), https://perma.cc/J4L7-FPAN.

175. *See Fight for a Polling Site on Bard's Campus*, BARD CCE, https://perma.cc/LCK2-GB43 (inventorying the history of Bard students advocating for their right to vote).

the Duchess County Board of Elections to open this new polling place.[176]

Compounding the issue of locating polling places away from campus, some locations split college campuses among voting districts, creating confusion among students about where they should vote. During the 2020 election, Rutgers University-New Brunswick in New Jersey was divided into five different polling locations, four of which were located at off-campus locations.[177] Similarly, the Ithaca Common Council in New York divided Cornell University's campus into three different election wards.[178] Most notably, while there was a polling location on campus, that location only served one student dorm.[179] The rest of Cornell's students were required to vote off campus at locations up to three miles away or inaccessible via public transportation.[180] This irrational location of polling locations makes it more difficult for students to identify where to vote on election day.

F. *Mail-In Ballots*

A relatively new concern, particularly given that the 2020 election occurred against the backdrop of the COVID-19 pandemic, is that many mail-in ballot laws disadvantaged students as compared to other groups. Voting by mail is a relatively new development in election administration. Yet it is one of the primary ways that students vote, particularly those unregistered in their college towns either by choice or due to state-imposed burdens.[181] Only five states conduct all-mail

176. *See* Order at 1–2, Andrew Goodman Found. v. Dutchess Cnty. Bd. of Elections, No. 52737/20 (Sup. Ct. N.Y. Oct. 30, 2020), https://perma.cc/297X-Y6JG (PDF) (finalizing the agreement between the parties).

177. *See Find Your Polling Location*, RUTGERS CTR. FOR YOUTH POL. PARTICIPATION, https://perma.cc/S4EA-DBCG (indicating that the majority of residence halls and campus apartments are in voting districts with poll locations off campus).

178. Spain, *supra* note 115.

179. *Id.*

180. *Id.*

181. *See* Sarah Andes et al., *Young People and Vote by Mail: Lessons for 2020*, CTR. FOR INFO. & RSCH. ON CIV. LEARNING & ENGAGEMENT (May 6, 2020), https://perma.cc/4LLH-MSL7 (noting that nearly 20 percent of young people

elections, where localities send all voters a ballot and conduct the election almost entirely by mail.[182] In the other forty-five states and the District of Columbia, mail-in voting is a substitute to in-person voting.[183] Each state has different laws and processes regarding who can request a mail-in ballot.[184] Mail-in voting restrictions can make it more difficult for students to vote in two core ways: age restrictions on who can obtain a no-excuse absentee ballot[185] and strict requirements on how to prove identity over mail.[186]

Sixteen states require voters who wish to vote by mail to submit an excuse explaining why they are not able to vote in-person.[187] However, seven of these states allow voters *above* a certain age to request an absentee ballot without an excuse.[188] In Texas, for example, any voter sixty-five or older may request a mail-in ballot without submitting a qualifying excuse.[189] These laws discriminate by age on their face, and, as a result, disadvantage any voter under the age of sixty-five when attempting to exercise their right to vote.[190] This is particularly

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voted by mail in the 2016 presidential election; however, voting by mail was highest among youth voters either in college or with some college experience).

182. *See id.* (noting that Colorado, Hawaii, Oregon, Utah, and Washington conduct "all-mail elections").

183. *Id.*

184. *Id.*

185. *See, e.g.*, TEX. ELEC. CODE ANN. § 82.003 (West 2021) (providing that any voter who is 65 years of age or older on election day is automatically qualified to vote by mail).

186. *See, e.g.*, ALA. CODE § 17-9-30(b) (2021) (requiring that the application for a mail in ballot contain a copy of the voter's photo ID); MISS. CODE ANN. § 23-15-715(b) (2021) (requiring that the application for a mail-in ballot be signed before a notary or other officer "having authority to administer an oath").

187. *See* HARROW ET AL., *supra* note 44, at 1 n.1 (inventorying states which require an excuse to request a mail-in ballot).

188. *See id.* (noting that Kentucky, Indiana, Louisiana, Mississippi, South Carolina, Tennessee, and Texas all have laws allowing voters above a certain age to request a mail-in ballot without an excuse).

189. TEX. ELEC. CODE § 82.003 (2021).

190. *See* HARROW ET AL., *supra* note 44, at 12 ("The court explained that the [Texas] law creates two classes of persons based on age, but 'the right of people below the age of sixty-five to vote is uniquely threatened and burdened solely based on their age'" (quoting Tex. Dem. Party v. Abbott, 461 F. Supp. 3d 406, 446 (W.D. Tex. 2020))).

true for students, who rely on access to absentee ballots in large numbers.[191]

Prior to the 2020 election, five states required voters to submit proof of identification when submitting their request for a mail-in ballot.[192] Alabama and Wisconsin specifically required that a copy of a photo ID be submitted along with a request for a mail-in ballot.[193] In the aftermath of the election, legislators in at least eleven states introduced bills that would enact a voter ID requirement for mail-in ballots.[194] For the reasons discussed in Part I.D., voter ID requirements disparately impact college students. Expanding restrictive photo ID requirements to mail-in voting, especially in states that do not accept student IDs as valid proof of identification,[195] will likely further burden students' ability to exercise their right to vote.

II. THE TWENTY-SIXTH AMENDMENT IN THE COURTS

A. *Early Years and Current Debates*

While discrimination against college students attempting to exercise their right to vote is pervasive, the Twenty-Sixth Amendment remains an underused litigation tool. In the 1970s, immediately after ratification, courts saw a flurry of Twenty-Sixth Amendment claims.[196] These initial cases struck

191. *See id.* at 12 (noting that in states which had an age discrimination statute only 6.6 percent of voters between the age of eighteen to twenty-four voted by mail, compared to a national average of 22.5 percent).

192. *See Voting Outside the Polling Place; Absentee, All-Mail, and Other Voting at Home Options*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 24, 2020), https://perma.cc/JHA7-CBUL (explaining the additional steps that voters in Alabama, Louisiana, Mississippi, South Dakota, and Wisconsin must take to prove their identity when requesting a mail-in ballot).

193. *See* ALA. CODE § 17-9-30(b) (2021) (requiring voters to submit valid voter ID when requesting a mail-in ballot); WIS. STAT. § 6.87(1) (2021) (same); MISS. CODE ANN. § 23-15-715(b) (2021) (requiring voters have their request for an absentee ballot notarized); S.D. CODIFIED LAWS § 12-19-2 (2021) (requiring voters to either submit a valid voter ID with their application or get their absentee ballot request notarized).

194. *See State Voting Bills Tracker 2021*, *supra* note 27 (inventorying bills in Alabama, Arizona, Connecticut, Georgia, Maryland, Minnesota, Missouri, Montana, New Hampshire, and Washington).

195. *See supra* notes 142–145 and accompanying text.

196. *See* Bromberg, *supra* note 4, at 1135 n.126 (collecting cases).

down practices subjecting students to more stringent registration requirements and secured students the right to register where they attended school.[197] The Supreme Court issued its only Twenty-Sixth Amendment ruling in *Symm v. United States*[198] in 1979.[199]

Initially heard as *United States v. Texas*,[200] *Symm* arose from an action brought by the United States Attorney General against the Waller County, Texas registrar for his use of a residency questionnaire.[201] This questionnaire directly asked if the applicant was a college student and, if so, inquired about the student's home address, property ownership, employment, social ties to churches and local organizations, and required them to affirm that they intended to reside in Waller County indefinitely.[202] The registrar implemented this form to restrict the registration of students at Prairie View A&M University, an HBCU in a majority-white county.[203] A three-judge district court panel concluded that the use of the residency questionnaire violated the Fourteenth and Twenty-Sixth Amendments and granted the students' request for an injunction.[204] On a direct appeal to the Supreme Court, the Court, offering no reasoning of its own, summarily affirmed the district court panel's conclusion.[205] While this was undoubtedly a victory for students and points to the potential viability of Twenty-Sixth Amendment claims, the lack of guidance from the Supreme Court leaves more questions than answers.[206]

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197. *See* cases cited *supra* note 70 (striking down residency questionnaire and additional registration requirements post-ratification).

198. 439 U.S. 1105 (1979).

199. Symm v. United States, 439 U.S. 1105, 1105 (1979), *aff'g sub nom*, United States v. Texas, 445 F. Supp. 1245 (S.D. Tex. 1978).

200. 445 F. Supp. 1245 (S.D. Tex. 1978).

201. *Id.* at 1248.

202. *See id.* at 1262 (providing the questionnaire).

203. *See id.* at 1252 (discussing Symm's testimony admitting that he does not consider students as residents "as a general rule" and that, of the 545 students who were subjected to this additional questionnaire, only thirty-five were then registered as voters).

204. *Id.* at 1261.

205. *Symm*, 439 U.S. at 1105.

206. *See* Bromberg, *supra* note 4, at 1150–51 (noting that since 2008 there has been a small resurgence in Twenty-Sixth Amendment claims, but that "this litigation has done little to advance the promise of the Twenty-Sixth

The correct test to analyze Twenty-Sixth Amendment claims is debated among scholars,[207] and no framework has been consistently applied by the lower courts.[208] This debate largely centers around whether courts should apply the *Arlington Heights* framework, which requires proof of intentional discrimination,[209] or the *Anderson-Burdick* balancing test, which evaluates whether a law results in an undue burden on the right to vote.[210] This next section examines the leading cases

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Amendment due to the dearth of guidance available on how to handle such claims"). The precedential weight of rulings summarily affirming a three-judge district court panel is vague, with the Court instructing that "'[a] summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.'" Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 426 (2019) (quoting Anderson v. Celebrezze, 460 U.S. 780, 785 n.5 (1983)).

207. *Compare* Cheng, *Voting Rights for Millennials*, *supra* note 13, at 656 (arguing that the proper framework to assess Twenty-Sixth Amendment Claims is the test for intentional discrimination developed by the Court in *Arlington Heights*), *with* Bromberg, *supra* note 4, at 1158 (advocating that plaintiffs should be able to bring Twenty-Sixth Amendment claims by satisfying either *Arlington Heights* or *Anderson-Burdick*, or through "direct evidence of *prima facie* intentional discrimination").

208. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 549 (4th Cir. 2016) (expressing hesitancy, but applying *Arlington Heights*); Luft v. Evers, 963 F.3d 665, 673 (7th Cir. 2020) (combining the plaintiffs' partisan fencing claims together with their Fifteenth and Twenty-Sixth Amendment claims and applying *Anderson-Burdick* balancing); Tex. Dem. Party v. Abbott, No. 20-50407, 2020 U.S. App. LEXIS 28799, at *54–55 (5th Cir. Sept. 10 2020) (refusing to identify the proper test, but rejecting the lower court's application of strict scrutiny to a law that on its face created an age classification for voting by mail).

209. To determine whether an unlawful discriminatory purpose was a motivating factor, the court should consider factors including: (1) the historical background of the action; (2) the specific sequence of events leading up to the challenged decision; (3) any departures from normal procedures; (4) the legislative history as well as contemporaneous statements by lawmakers; and (5) the impact of the official action. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (establishing what has become known as the *Arlington Heights* framework for assessing discriminatory purpose).

210. *Anderson-Burdick* balancing requires that a court

> weigh "the character and magnitude of the asserted injury to the rights . . . 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."

in the three circuit courts that have recently ruled on Twenty-Sixth Amendment claims.

B. *Recent Approaches by the Fourth, Fifth, and Seventh Circuits*

Lee v. Virginia State Board of Elections[211] contains the Fourth Circuit's most thorough discussion of a Twenty-Sixth Amendment claim. In 2013, the Republican-controlled Virginia state legislature enacted a strict voter identification law.[212] This law required voters to present a photo ID when voting and only allowed voters three days after the election to cure a provisionally cast ballot by presenting the appropriate ID.[213] Under the law, photo IDs issued by public and private colleges and universities qualified as appropriate identification; however, the plaintiffs, the Democratic Party of Virginia, brought numerous claims of statutory and constitutional violations, including a Twenty-Sixth Amendment claim alleging that the General Assembly intended for the new strict ID requirement to suppress the ability of young voters to exercise their right to vote.[214] The plaintiffs advocated that the court apply the *Arlington Heights* intentional discrimination framework.[215] The district court adopted the plaintiffs'

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

211. 843 F.3d 592 (4th Cir. 2016).

212. Cheng, *Voting Rights for Millennials*, *supra* note 13, at 662. Democrats, who gained control of the upper chamber of the state legislature in 2019, thus obtaining complete control of the state legislative and executive branches, significantly relaxed Virginia's ID requirement in the lead up to the 2020 election. *See* 2020 Va. Acts 1064 (codified as amended at VA. CODE ANN. § 24.2-643 (2021)) (expanding the appropriate forms of voter identification and allowing for a voter without proper identification to fulfill the requirement by signing an affidavit).

213. *Lee*, 843 F.3d at 594.

214. Cheng, *Voting Rights for Millennials*, *supra* note 13, at 662–63; *see Lee*, 843 F.3d at 594 (noting that plaintiffs also alleged that the General Assembly was racially motivated and brought additional challenges under Section 2 of the Voting Rights Act and the First, Fourteenth, and Fifteenth Amendments).

215. *See* Opening Brief of Appellants at 62, Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (No. 16-1605) ("[T]he Twenty-Sixth Amendment, which uses language that is parallel to that in the Fifteenth Amendment, was designed to ensure 'that citizens who are 18 years of age or

Arlington Heights test, however, it found that the plaintiffs' evidence failed to demonstrate that the General Assembly acted with the intent to suppress young voters.[216]

On appeal, the Fourth Circuit discussed whether *Arlington Heights* was the appropriate framework. The court noted that, while the language in the Fifteenth and Twenty-Sixth Amendments is similar, "it is far from clear that the Twenty-Sixth Amendment should be read to create a cause of action that imports principles from Fifteenth-Amendment jurisprudence."[217] Nevertheless, like the district court, the Fourth Circuit ultimately concluded that the plaintiffs' Twenty-Sixth Amendment claim failed because the plaintiffs were unable to demonstrate that Virginia enacted the voter identification law with the intent to discriminate against voters on the basis of age.[218]

In 2011, in *One Wisconsin Institute, Inc. v. Thomsen*,[219] plaintiffs brought a challenge against Wisconsin's numerous attempts to restrict voting.[220] Among the challenged laws was a requirement that students present additional proof of enrollment when using their student ID to vote and that the student ID be "unexpired."[221] The district court, applying *Arlington Heights*, did not find age-based discrimination in

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older shall not be discriminated against on account of age' in the voting context.").

216. *See* Lee v. Va. State Bd. of Elections, 188 F. Supp. 3d 577, 609–10 (E.D. Va. 2016) ("[T]his case has failed to reveal by a preponderance of the evidence that the Virginia General Assembly, a legislative body composed of 140 Delegates and Senators, enacted the Virginia photo identification requirement with the intent to suppress minority and young voters.").

217. *Id.*

218. *See id.* at 607 ("[T]he plaintiffs point to no evidence in the record that supports their age-discrimination claim other than . . . [that] young people are less likely to possess photo identifications and that a Virginia legislator made a passing comment that President Obama had been focusing on obtaining the support of young voters.").

219. 198 F. Supp. 3d 896 (W.D. Wis. 2016), *aff'd in part, rev'd in part sub nom.* Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

220. *See id.* at 906 (challenging Wisconsin's voter ID requirement, restriction on absentee and early voting, and increase of the durational residency requirement, among other provisions); *see also supra* notes 18–20 and accompanying text.

221. WIS. STAT. § 5.02(6m)(f) (2020); *see supra* notes 153–157 and accompanying text.

violation of the Twenty-Sixth Amendment.[222] It did, however, strike down the requirement that the student ID be unexpired, finding that the restriction violated the equal protection clause of the Fourteenth Amendment.[223]

The Seventh Circuit heard the appeal of *One Wisconsin Institute* in *Luft v. Evers*.[224] The Seventh Circuit rejected the lower court's ruling that the requirement that a student ID be unexpired failed rational basis review.[225] Instead, using the *Anderson-Burdick* balancing, the court struck down the requirement that students must show proof of enrollment in addition to their unexpired student ID.[226] The court noted that "[n]o other category of acceptable identification—including for drivers, military members, passport holders, or veterans— depends on ongoing affiliation of any sort."[227] While this was certainly a victory for students, the court's decision was very narrow, only striking down the law on the fact that "the state has not tried to justify" the requirement in any way.[228]

Lastly, in 2020, in *Texas Democratic Party v. Abbott*,[229] the plaintiffs challenged Texas's mail-in voting law, which permitted no-excuse mail voting for persons sixty-five and older, but required younger voters to prove that they were either sick, disabled, or anticipated being away from the county on election day.[230] The plaintiffs argued that, because an age requirement was built into the statute, the statue was facially

222. *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 925–27.

223. *See id.* at 962 ("[The Statute] adequately addresses [the State's fraud] concern by requiring a voter to present proof of enrollment with the student ID. Adding the requirement that a voter's college or university ID be unexpired does not provide any additional protection.").

224. 963 F.3d 665 (7th Cir. 2020).

225. *See id.* at 677 (noting that the "rational-basis standard is not demanding" and that "[d]rawing a line between current and expired documents serves a legitimate governmental purpose" (internal quotes omitted)).

226. *Id.* For its analysis of other more generalized voting requirements, the court combined the partisan fencing and Fifteenth and Twenty-Sixth Amendment claims and analyzed them under the *Anderson-Burdick* standard. *See id.* at 673.

227. *Id.* at 677.

228. *Id.*

229. 461 F. Supp. 3d 406 (W.D. Tex. 2020).

230. TEX. ELEC. CODE § 82.001 (2021).

unconstitutional and as a result strict scrutiny applied.[231] The district court agreed and granted a preliminary injunction after finding that the law would have failed even rational basis review.[232]

On appeal, a divided Fifth Circuit reversed.[233] It found that "conferring a privilege" to one set of voters based on their age while denying that privilege to younger voters was not the same as abridging younger voters' rights.[234] As a result, the court ruled that the Twenty-Sixth Amendment was not violated and strict scrutiny did not apply.[235] Notably, Judge Stewart dissented from this reasoning.[236] Basing his interpretation of the Twenty-Sixth Amendment on the Court's jurisprudence in racial discrimination cases as well as the amendment's legislative history, Stewart argued that a statute abridges the right to vote if it "fails to treat members of the electorate equally."[237] Stewart concluded that the Texas law facially treated voters differently based on age and, as a result, violated the Twenty-Sixth Amendment.[238] He also asserted that the law would fail regardless of the level of judicial review the court applied.[239]

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231. *See* Plaintiffs Reply in Support of its Motion for Preliminary Injunction at 5, Tex. Dem. Party v. Abbott, 461 F. Supp. 3d 406 (W.D. Tex. 2020) ("[TEX. ELEC. CODE § 82.001] is *prima facie* discriminatory towards younger votes as the law on its face creates two classes of voters. In doing so, it abridges and otherwise severely burdens the right to vote for voters under the age of 65.").

232. *Abbott*, 461 F. Supp. 3d at 418–20.

233. *See* Tex. Dem. Party v. Abbott, 978 F.3d 168, 174 (5th Cir. 2020) (vacating the lower court's injunction)

234. *Id.* at 192.

235. *See id.* (stating that since the Twenty-Sixth Amendment was not violated, age-based distinctions under the Fourteenth Amendment should be analyzed under rational basis and voting rights claims under *Anderson-Burdick* balancing).

236. *Id.* at 195–99 (Stewart, J., dissenting).

237. *Id.* at 196.

238. *See id.* at 199 ("By giving younger voters fewer options, especially in the context of a dangerous pandemic where in-person voting is risky to public health and safety, their voting rights are abridged in relation to older voters who do not face this burden.").

239. *See id.* at 200 (stating that Texas had not presented any evidence that the age distinction was rational).

While students have had some success vindicating their rights under the Twenty-Sixth Amendment through the courts,[240] these circuit court rulings demonstrate the uncertain nature of Twenty-Sixth Amendment claims. As a result, Congress should enact legislative remedies to better secure college students' right to vote.

III. LEGISLATIVE REMEDIES TO PROTECT STUDENT VOTERS

Section 2 of the Twenty-Sixth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation."[241] It allows Congress the authority to enact legislation to protect the rights encompassed by the amendment, namely age discrimination in voting.[242] It is similar to other constitutional amendments, such as the Fourteenth, Fifteenth, and Nineteenth Amendments, that also grant Congress the power to enact legislation to enforce each amendment's guarantees.[243] This Part discusses three potential legislative actions that would help address some of the biggest challenges facing student voters: (1) automatic voter registration at colleges and universities; (2) polling place requirements at colleges and universities; and (3) a statutory cause of action using a disparate impact framework to make it easier to bring Twenty-Sixth Amendment claims.

A. *Automatic Voter Registration Through Colleges and Universities*

As discussed above, the manipulation of voter registration requirements is one of the most common barriers erected to

240. The majority of these victories for students occurred immediately post-ratification. *See* cases cited *supra* note 70 (citing cases where state and district courts struck down residency questionnaires and additional registration requirements post-ratification).

241. U.S. CONST. amend. XXVI, § 2.

242. *See* Fish, *supra* note 33, at 1195–1203 (explaining that the history and text of the Twenty-Sixth Amendment provide that its enforcement clause be construed broadly).

243. *See id.* at 1203 (noting that while the Nineteenth Amendment's enforcement clause has not been challenged, Congress' power under the Fifteenth Amendment has been construed broadly).

prevent college students from voting.[244] In the last two Congresses, Democrats prioritized voting rights by introducing a comprehensive democracy reform bill known as "The For the People Act" as the first bill (H.R. 1).[245] Most of the provisions in the Act are not directly targeted at student voters, but the Act would help remove some of the barriers that they, and other vulnerable groups, often face when attempting to exercise their right to vote.[246]

One provision of H.R. 1 that specifically addresses barriers facing college students is the creation of an automatic voter registration system and a requirement for colleges and universities to assist their students in obtaining registration.[247] Under the Act, higher education institutions would be required to assist in automatically registering all eligible individuals enrolled in at least one course to vote.[248] This mandate would apply to both public and private institutions.[249] It would require that the college or university inform every student that, unless they decline to register to vote or are found ineligible, they will be registered or have their voting information updated.[250] As federal legislation with the ability to override any contrary state or local law, this automatic registration provision would solidify college students' right to register to vote where they attend school and prevent states from subjecting students to additional registration requirements or spreading misinformation to prevent them from registering.

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244. *See supra* Part I.B.

245. *See generally* H.R. 1, 116th Cong. (2019); H.R. 1, 117th Cong. (2021).

246. "The For the People Act" would relax voter identification laws, H.R. 1, 117th Cong. § 1903 (2021), require the use of independent commissions for redistricting, *id.* § 2411, and allow all registered voters to vote by mail. *See id.* § 1621.

247. *See generally* H.R. 1, 117th Cong. § 1013 (2021).

248. *Id.* § 1013(e)(3)(A).

249. *Id.* § 1013(e)(3)(B).

250. *Id.* § 1013(b)(1). The Act would also require that each institution designate a "Campus Vote Coordinator" who is responsible for disseminating voting information to students at least twice a year. *See id.* § 1901(b) (requiring the campus coordinator to include information on location of polling places and available transportation to polling places, a referral to websites that provide the voter registration information for all states, and any other information the coordinator considers appropriate).

H.R. 1 has passed the House, but its prospect of overcoming a filibuster in the Senate is perilous.[251] If the Senate is unable to pass H.R. 1 as a comprehensive voting reform package, Congress should consider enacting this automatic registration provision as a standalone measure.

B. *Polling Places on College Campuses*

State and local governments manipulate the time and locations of polling places to discourage student voters, and this practice has seen a dramatic uptick in the aftermath of *Shelby County*.[252] H.R. 1 contains several polling time and location requirements that may help address this issue.[253] If passed, it would mandate that early voting is available at least fifteen days before an election, that each polling place be open for at least ten hours each day, and that polling locations are, to the greatest extent possible, located within walking distance of a stop on a public transportation route.[254] These requirements would help reduce poll place manipulation, but they would not directly prohibit state or local officials from intentionally removing polling places from college campuses so long as the location was still accessible via public transportation.

Congress should take the extra step and require polling places at most colleges and universities.[255] Five states already require or highly encourage polling locations at colleges and universities.[256] On average there is one polling place per 1,700

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251. *See* Glenn Thrush, *More Democrats Join the Effort to Kill the Filibuster as a Way of Saving Biden's Agenda*, N.Y. TIMES (Mar. 5, 2021), https://perma.cc/L92X-GWL9 (noting the growing chorus of Democrats who support reforming the filibuster to pass legislation that they view as crucial such as H.R. 1).

252. *See supra* notes 160–161 and accompanying text.

253. H.R. 1, 117th Cong. § 1611 (2021).

254. *Id.*

255. Senator Joe Manchin proposed a nearly identical solution in his recent counter-proposal to H.R. 1, the Freedom to Vote Act. *See* S. 2747, 117th Cong. § 1201(a)(2) (2021) ("In the case of a jurisdiction that includes an institution of higher education . . . an appropriate number (not less than one) of polling places . . . will be located on the campus of the institution of higher education.").

256. *See Polling Places*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 20. 2020), https://perma.cc/2P6U-24RD (noting that California, Colorado, Maryland,

voting-aged members of the population.[257] The general voting population at most colleges and universities, particularly once faculty and staff are considered, likely surpasses this threshold. Congress should pass additional legislation which requires that colleges and universities have the opportunity to serve as poll locations if they have an on-campus student population of at least 1,500 students or if the student population is greater than 60 percent of the average size of a precinct in the county. This would protect student voters at large institutions as well as small colleges like Bard that, despite their relatively small size, make up a significant portion of the voting population in a locality.[258] While not necessarily requiring poll locations at all college campuses, this statute would ensure that college students have the appropriate access to convenient voting that their population and density demand.

C. *Statutory Cause of Action Using Disparate Impact Framework*

Congress should create a statutory cause of action for age-based voting discrimination claims. States and localities employ a wide array of tactics to manipulate voting laws in a way that abridges students' right to vote.[259] As a review of circuit-court cases reveals, claims brought directly under the Twenty-Sixth Amendment are not sufficient to protect students from age-based discrimination in voting.[260] As a result, Congress should enact a statute similar to Section 2 of the Voting Rights Act, which protects voters from discrimination on the basis of race,[261] to provide a statutory cause of action for age-based voter

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Minnesota, and Wyoming "require or encourage" poll locations on college campuses even in mostly mail elections).

257. *See EAC Election Day Survey: Polling Places 2004 General Election*, ELECTION ASSIST. COMM'N (Sept. 19, 2005, 1:08 PM), https://perma.cc/5K8G-AUNU (PDF) (recording the number of poll locations by state).

258. *See supra* notes 167–176 and accompanying text.

259. *See supra* Part I.

260. *See supra* Part I.B.

261. *See* 52 U.S.C. § 10301 ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." (emphasis added)).

discrimination claims. However, unlike Section 2—which was recently neutered by the Court in *Brnovich v. Democratic National Committee*[262]—this new statutory cause of action for age-based voter discrimination claims should expressly adopt the general burden shifting framework used for disparate impact claims.[263]

The common burden shifting test for disparate impact claims under federal civil rights laws involves a three-part framework: (1) the plaintiff must establish that the defendant's practice causes a disparate impact;[264] (2) if this is shown, then the defendant has the opportunity to demonstrate why the practice is necessary;[265] and (3) if the defendant makes this showing, then the plaintiff has the opportunity to offer an alternate practice that addresses the necessity but results in less of a disparity.[266] In the voting context, such a standard would assist voters in bringing claims because proving intentional discrimination is often difficult or impossible due to

262. 141 S. Ct. 2321 (2021). The Court found that Section 2, as it is currently written, should not be applied using a disparate-impact framework. *Id.* at 2340–41. Instead, the Court interpreted the "totality of the circumstances" and "equally open" language in Section 2 to require courts to consider "any circumstance that has a logical bearing" on voting. *Id.* at 2338. Notably, unlike in disparate-impact claims, the Court does not require the state to prove that its practice in-fact supports a strong state interest. *Id.* at 2340.

263. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1597–1600 (2019) (explaining that burden shifting frameworks are generally used for disparate impact claims in every other area of law that recognizes such claims except for voting). In response to the Court's decision in *Brnovich v. Democratic National Committee*, Congress is currently considering updating Section 2 of the Voting Rights Act (VRA) to follow the disparate impact framework for discrimination claims more closely. *See* H.R. 4, 117th Cong. (2021) (introducing a new test to bring claims under Section 2 of the VRA). Instead of creating a standalone statute for age discrimination claims, an alternate solution would be for Congress, in its updated version of Section 2, to include language that also prohibits voting practices, standards, or procedures that result in a denial or abridgment of the right to vote on the basis on age.

264. Because every law would likely have some disparate impact, plaintiffs would likely have to prove a statistically significant disparate impact in order for their claim to succeed. Stephanopoulos, *supra* note 263, at 1613.

265. Defendants must show that the requirement in fact accomplishes their stated goals and that there are "no obvious alternative[s] that would be equivalently effective." Stephanopoulos, *supra* note 263, at 1639.

266. Stephanopoulos, *supra* note 263, at 1597.

the fact that legislators have a confluence of motives for enacting legislation and are savvy enough to avoid making overt discriminatory comments, even if they are privately motivated by animus.[267] Additionally, the second prong requires the state to demonstrate why the voting practice is necessary. Properly performed, this would require the state to provide real evidence behind what are usually generalized election security, "fraud," or budgetary concerns.[268] Lastly, the defendants would be able to provide practices that address those concerns, if legitimate, through less restrictive means.

Consider Texas' voter identification law, which restricts the forms of appropriate identification to a driver's license, military identification, citizenship certificate, passport, and handgun license.[269] For the first prong, students challenging this restrictive voter identification law would show, using empirical evidence, that they are less likely to have these required forms of identification, and as a result, their ability to exercise the right to vote is disparately impacted by the law.[270] Second, the State would have the opportunity to argue that the photo ID requirement is necessary, likely by asserting that it promotes election integrity, reduces fraud, or "bolster[s] voter confidence" in the election.[271] Assuming that the state could support this claim,[272] in the third and final step, students could then present

267. Chief Justice Roberts brought up this point specifically in oral arguments for *Brnovich v. Democratic National Committee*. *See* Oral Argument Transcript at 14–15, 45–46, 101–02, Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321 (2021) (No. 19-1257), https://perma.cc/A23V-LL2H (PDF) ("Let's say that you have 49 legislators who speak and give good reasons for adopting [a law] . . . . 49 of the legislatures don't say anything . . . and two legislators have a clear racial motivation. . . . Was race a motivating factor in that case so that the legislation would be suspect?").

268. *See* Stephanopoulos, *supra* note 263, at 1639 ("Any interest named by the jurisdiction must be substantial in order to be recognized.").

269. TEX. ELEC. CODE § 63.0101 (2021).

270. Example of potential evidence includes the fact that student voters are statistically less likely to have driver's licenses or other appropriate forms of identification. *See* BROMBERG ET AL., *supra* note 40, at 18 (pointing to research that "over 14 percent of North Carolina's young voters may not have a state-issued ID or driver's license").

271. *See* Stephanopoulos, *supra* note 263, at 1638–39 (describing justifications usually provided by states when instituting voter ID laws).

272. *See id.* at 1639 n.414 ("The evidence is mostly undisputed that voter-impersonation fraud is extremely rare. Even courts upholding photo ID requirements have conceded this point." (citing Greater Birmingham

evidence that the state's purported reasons are a pretext for discrimination, or that other more narrowly tailored rules would adequately satisfy the state's purported election security concerns. In this scenario, students could demonstrate that the state's security interest is satisfied by either allowing student IDs to count as proper identification or requiring voters without IDs to sign affidavits attesting to their residency in the precinct. As seen through this example, by requiring defendants to substantiate why a voting regulation that disparately impacts students is necessary and by providing plaintiffs the opportunity to offer an alternate practice, the burden shifting framework would give students a clearer legal avenue to bring their claim and force courts to more thoroughly evaluate the impact of voting laws that make it harder for students to vote.

IV. APPLYING *CITY OF BOERNE* TO ASSESS THE CONSTITUTIONALITY OF LEGISLATIVE REMEDIES

The Twenty-Sixth Amendment is one of seven amendments[273] that contains an enforcement clause, providing that "Congress shall have power to enforce this article by appropriate legislation."[274] Such clauses grant Congress substantial authority to pass legislation to secure the rights enshrined by these Amendments, at times even allowing Congress to pass prophylactic legislation.[275]

Congressional action based on its enforcement power is not without limitation.[276] In *City of Boerne v. Flores*, the Court

Ministries v. Merrill, 284 F. Supp. 3d 1253, 1273 (N.D. Ala. 2018); Lee v. Va. State Bd. of Election, 188 F. Supp. 3d 577, 608–09 (E.D. Va. 2016); N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 441 (M.D.N.C. 2016))). *But see* Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2340 (2021) ("One strong and entirely legitimate state interest is the prevention of fraud.").

273. *See generally* U.S. CONST. amend. XIII § 2; *id.* amend. XIV § 5; *id.* amend. XV § 2; *id.* amend. XIX § 2; *id*. amend. XXIII § 2; *id*. amend. XXIV § 2.

274. U.S. CONST. amend. XXVI § 2.

275. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) (noting that the Fourteenth Amendment's enforcement power allows Congress to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct").

276. *See* Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 39 (2012) (finding that the Family Medical Leave Act's abrogation of states' sovereign immunity

maintained that enforcement power requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[277] The congruence and proportionality test established by *City of Boerne* has faced criticism,[278] and some scholars have questioned whether it is the correct framework to apply to legislative remedies based on the Twenty-Sixth Amendment.[279] Regardless, the Court has consistently applied the test since its promulgation, and because it is the most demanding standard that enforcement power legislation will face, it is the standard this Note will use to judge the constitutionality of legislative remedies under the Twenty-Sixth Amendment.[280]

A. *The Congruence and Proportionality Framework*

At issue in *City of Boerne* was Congress's ability to enact the Religious Freedom Restoration Act of 1993 (RFRA).[281] Congress enacted RFRA in response to the Court's decision in *Employment Division v. Smith*,[282] where the Court concluded that the Free Exercise Clause did not require that states demonstrate a compelling interest when enacting generally

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for failure to provide self-care leave was not sufficiently justified by a pattern of state constitutional violations).

277. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

278. *See generally* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

279. *See* Fish, *supra* note 33, at 1224–29 (arguing that *Boerne* should not apply to the Twenty-Sixth Amendment because the more deferential standard articulated in *Katzenbach v. Morgan* was currently being applied to similarly worded enforcement clauses when the Twenty-Sixth Amendment was drafted and ratified).

280. See Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before* Katzenbach v. Morgan, 113 NW. U. L. REV. 47, 104–08 (2018), for analysis of the political factors that make it unlikely for the Court to use a more differential enforcement power standard in the near future.

281. *City of Boerne,* 521 U.S. at 511.

282. 494 U.S. 872 (1990).

applicable laws that burdened religious activities.[283] In RFRA, Congress attempted to reinstate the compelling interest requirement, explicitly circumventing the Court's conclusion in *Smith*.[284] Relying heavily on separation of powers arguments, *City of Boerne* struck down such a use of legislative power, finding that that "power to enforce" does not grant Congress the authority to "determine what constitutes a constitutional violation."[285] To ascertain whether Congress was acting to remedy or prevent unconstitutional action as opposed to substantively changing the scope of constitutional protections, the Court compared the congruence and proportionality of the remedial measures to the harm they were intended to prevent.[286]

Congruence and proportionality is often described as a "means-end test."[287] It requires that the Court weigh the nature and extent of the unconstitutional conduct at issue against the scope and forcefulness of Congress's response.[288] When establishing the nature and extent of the unconstitutional conduct, the Court generally looks at the legislative record established by Congress to show the existence and extent of a constitutional wrong.[289] The Court may also assess whether or

283. *See id.* at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself . . . contradicts both constitutional tradition and common sense.") (internal quotations omitted).

284. *See* 42 U.S.C. § 2000(b) ("The purposes of this Act are—(1) to restore the compelling interest test as set forth in [pre-*Smith* cases] and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

285. *City of Boerne*, 521 U.S. at 519. *See* Allen v. Cooper, 140 S. Ct. 994, 1004 (2020) ("Congress cannot use its power to enforce . . . to alter what that Amendment bars.").

286. *See City of Boerne*, 521 U.S. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

287. *Allen*, 140 S. Ct. at 1004.

288. *See id.* ("On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. . . . [O]n the other hand, courts are to examine the scope of the response Congress chose to address that injury.").

289. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (finding that RFRA's legislative record lacked modern examples of laws enacted due to

not its own jurisprudence has previously identified a constitutional wrong or applied heightened scrutiny when examining such action.[290] The Court then examines the scope and forcefulness of the remedy instituted by Congress, measuring whether or not the action is closely tied to the harm identified.[291]

Under the congruence and proportionality framework, the Court upheld portions of the Family and Medical Leave Act (FMLA),[292] Americans with Disabilities Act (ADA),[293] and the Religious Land Use and Institutionalized Persons Act (RLUIPA),[294] Congress's replacement to RFRA. However, the Court has also struck down portions of the FMLA[295] and ADA,[296]

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religious bigotry that would warrant requiring that the substantial burden test be applied to claims of religious discrimination).

290. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.").

291. *See Allen*, 140 S. Ct. at 1004 (describing the "critical question" as "how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations" and noting that "hard problems often require forceful responses").

292. 29 U.S.C. §§ 2601–2654; *see Hibbs*, 538 U.S. at 739–40 (upholding the FLMA's family-care provision which requires private and state employers provide twelve weeks of unpaid leave to care for sick family members).

293. 42 U.S.C. §§ 12101–12213; *see* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (upholding the ADA's requirement that state courts provide reasonable modifications to allow individuals with disabilities access to judicial services).

294. 42 U.S.C. §§ 2000cc–2000cc-5; *see* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (upholding the institutionalized-persons provision of RLUIPA which requires that, if the government imposes a substantial burden on an inmate's exercise of religion, that it provides a compelling interest and does so by the least restrictive means).

295. *See* Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 43–44 (2012) (striking down the FLMA's self-care provision which would have required state employers to grant unpaid leave for self-medical care).

296. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (striking down the ADA's requirement that employers make reasonable accommodations to qualified disabled employees unless they can demonstrate that such accommodations would impose an undue hardship on their business).

as well as the Patent Remedy Act[297] and Copyright Remedy Clarification Act,[298] for not being sufficiently proportional and congruent to the documented harm. The fault lines of these cases illustrate what is necessary for remedial legislation to pass the congruence and proportionality test.

First, the congressional record must provide evidence of a pattern of violations that the action intends to redress.[299] This pattern must detail instances of the specific harm to be addressed as well as its prevalence.[300] In *Nevada Department of Human Resources v. Hibbs*,[301] the Court upheld the FMLA's family-care provision, finding that the congressional record— which included extensive testimony and surveys of employer practices— demonstrated that employers routinely refused to provide substantial paternity leave, thus furthering a system of gender-based discrimination.[302] Conversely, in *Coleman v. Court of Appeals of Maryland*,[303] the Court struck down the FMLA's self-care leave provision because, while Congress's legislative record on discrimination for family-care leave was extensive, it offered no evidence specifically demonstrating that employers were likewise discriminatory in

297. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 630 (1999) (striking down the Patent Remedy Act's abrogation of states' sovereign immunity which would have allowed states to be sued for monetary damages in patent infringement cases).

298. *See* Allen v. Cooper, 140 S. Ct. 994, 1007 (2020) (striking down the Copyright Remedy Clarification Act's abrogation of states' sovereign immunity which would have allowed states to be sued for monetary damages in copyright infringement cases).

299. *See Coleman*, 566 U.S. at 37 (noting that Congress must establish "evidence of a pattern of state constitutional violations" and craft a remedy to "address or prevent *those* violations" (emphasis added)).

300. *See Allen*, 140 S. Ct. at 1006 (concluding that only a handful of copyright violations by states did not indicate a prevalence of unconstitutional conduct warranting congressional abrogation of state sovereign immunity).

301. 538 U.S. 721 (2003).

302. *See id.* at 730–31 (highlighting that the congressional record included data from the Bureau of Labor Statistics indicating that only 18 percent of male employees had access to paternity leave and testimony revealing that even where paternity leave existed, men faced discriminatory treatment by employers in granting their request to use such leave).

303. 566 U.S. 30 (2012).

how they awarded sick leave.[304] In *Allen v. Cooper*,[305] the Court struck down the Copyright Remedy Clarification Act's abrogation of states' sovereign immunity from monetary damages for copyright infringement because the congressional record identified only a dozen possible examples of infringement (only two of which were intentional and thus would have raised a constitutional issue).[306]

Second, it is easier for Congress to establish a history of unconstitutional conduct for behavior that is generally subject to heightened scrutiny by the Court.[307] In *Board of Trustees of the University of Atlanta v. Garrett*,[308] the Court noted that disability-based protections generally invoke rational basis review.[309] Therefore, in order for Congress to establish a history of unconstitutional conduct, it must show not only that the discrimination based on disability was widespread, but also that such discrimination was irrational.[310] On the other hand, the *Hibbs* Court indicated that because gender-based classifications are inherently subject to heightened scrutiny, Congress merely needed to identify that such discrimination existed and was not

304. *See id.* at 37 ("But what the family-care provisions have to support them, the self-care provision lacks, namely, evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations.").

305. 140 S. Ct. 994 (2020).

306. *See id.* at 1006 ("Of the 12 infringements listed in the report, only two appear intentional, as they must be to raise a constitutional issue.").

307. *Compare* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (explaining that the congressional record failed to identify any irrational state discrimination against the disabled), *and* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (identifying that state discrimination on the basis of age may occur so long as it is rationally related to a legitimate state interest), *with* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 728 (2003) (identifying that gender-based discrimination is subject to heightened scrutiny, making it easier for Congress to establish a pattern of unconstitutional discrimination).

308. 531 U.S. 356 (2001).

309. *See id.* at 367 (indicating that equal protection challenges to action that discriminates based on disability is subject to rational basis review).

310. *See id.* at 368 ("The legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

supported by an important government objective—an easier burden for Congress to meet.[311]

Third, the Court has identified certain actions as severe responses which require substantial justification by Congress. For example, prophylactic legislation, which aims to restrict facially constitutional conduct in order to prevent constitutional violations, must be justified by evidence in the congressional record linking the prophylactic response to the unconstitutional conduct.[312] Additionally, any attempt to abrogate states' sovereign immunity must include both a non-ambiguous statement from Congress as well as substantial justification for doing so.[313] Lastly, while not applying *City of Boerne*, the Court in *Shelby County v. Holder* identified that remedial measures such as requiring preclearance of voting laws "impose[] substantial federalism costs."[314]

B. Applying City of Boerne to Student Voting Reforms

All three student-focused voting rights reforms proposed in this Note—(1) automatic voter registration through colleges and universities; (2) polling locations at colleges and universities; and (3) a statutory cause of action with disparate impact burden shifting mechanism—pass muster under the congruence and proportionality framework articulated in *City of Boerne*.[315] Each proposal will be considered in turn.

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311. *See Hibbs*, 538 U.S. at 736 (explaining that because gender classifications must "'serve important governmental objectives' and be 'substantially related to the achievement of those objectives'" it was easier for Congress to show that the state conduct at issue was unconstitutional).

312. *See Kimel*, 528 U.S. at 89 (explaining that Congress did not identify a pattern of unconstitutional age discrimination which would support prophylactic legislation).

313. *See* Allen v. Cooper, 140 S. Ct. 994, 1001 (2020) ("Not even the most crystalline abrogation can take effect unless it is 'a valid exercise of constitutional authority'" (quoting *Kimel*, 528 U.S. at 78)).

314. Shelby County v. Holder, 570 U.S. 529, 540 (2013).

315. Additionally, automatic voter registration and polling place requirements could likely be supported under the Elections Clause of the Constitution. *See* U.S. CONST. Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing [sic] Senators.").

1. Automatic Voter Registration Through Colleges and Universities

Automatic voter registration through colleges and universities would require that higher education institutions assist students, who enroll in at least one course and qualify to vote, to register with their local registrar. As discussed in Part I.B above, attempts to inhibit students from registering to vote are historically pervasive and take many forms. Attempts to deny students the right to vote in their college towns either through flat out restricting their ability to register or subjecting them to additional questionnaires were struck down consistently in the decade after ratification of the Twenty-Sixth Amendment.[316] While the standard of judicial scrutiny afforded to such claims remains unclear, these practices have been consistently deemed unconstitutional, including by the Supreme Court.[317] And yet, the practice persists with county registrars requiring students registering to vote to fill out additional questionnaires as recently as 2016[318] and state legislatures imposing new, additional burdens in an effort to limit students' ability to register.[319] The nature of the harm is that it interferes with one of the most important rights individuals have: the right to vote.

By contrast, the scope and forcefulness of requiring colleges and universities to assist in registering voters is relatively minimal. The scope of the remedy is targeted—only requiring that colleges and universities assist registering students who already qualify and do not opt out. The remedy is not particularly forceful considering that Congress already has the authority to promulgate laws which regulate the time, place, and manner of federal elections through the Elections Clause.[320] In fact, Congress has already done so in the past through the

316. *See* Symm v. United States, 439 U.S. 1105, 1105 (1979) (summarily affirming the three-judge panel which found that the use of an additional questionnaire targeted at college students violated the Twenty-Sixth Amendment); *see also* cases cited *supra* note 70 (striking down residency questionnaires and additional registration requirements targeted at students).

317. *Symm*, 439 U.S. at 1105.

318. *See supra* notes 71–74 and accompanying text.

319. *See supra* notes 82–89 and accompanying text.

320. U.S. CONST. art. I, § 4, cl. 1.

National Voter Registration Act of 1993 (NVRA), which required state departments of motor vehicles to provide applications for voter registration.[321] Further, colleges and universities already collect the information needed to register individuals to vote such as place of residence and citizenship information. Requiring these institutions to take the additional step to inform students that they will be registered unless they opt out is neither unduly broad in scope nor forceful. As a result, the automatic voter registration of college students through their college or university is likely to pass the congruence and proportionality test for remedial legislation.

2. Polling Places on College Campuses

A requirement that colleges and universities with populations above a certain threshold serve as poll locations would cut down on the harmful practice of localities intentionally removing poll locations from college campuses. Removing polling locations from college campuses is a more recent development, but like other closures or removals of polling places, it has seen a sharp increase post-*Shelby County*.[322] Many courts have not yet weighed in on the topic, but several courts have found such action unconstitutional.[323] While removing a polling place may not be a complete denial of the right to vote, it can subject students to a more burdensome voting process and have "the effect of creating a secondary class of voters."[324]

Conversely, a rule requiring that colleges and universities with a population above a certain threshold serve as a polling location is a targeted and relatively unforceful solution. Like the voter registration requirement, congressional action in this area

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321. *See* 52 U.S.C. § 20504 (codifying the NVRA's voter registration application requirement).

322. *See supra* Part I.E.

323. *See* League of Women Voters of Fla. v. Detzner, 314 F. Supp. 3d 1205, 1209 (N.D. Fla. 2018) (striking down the Florida Secretary of State's decision to prohibit college campuses from serving as early voting locations); Anderson v. N.C. State Bd. of Elections, No. 14-CVS-012648, 2014 WL 6771270, at *1 (N.C. Super. Ct. Oct. 13, 2014) (overturning a North Carolina county's attempt to remove an early voting site from Appalachian State University).

324. *Detzner*, 314 F. Supp. 3d at 1217.

is likely supported by the Elections Clause.[325] Furthermore, buildings on college campuses generally serve as polling locations and resemble other common polling locations such as K-12 schools, fire stations, churches, and senior living facilities.[326] By limiting the requirement to colleges and universities that already meet the population average warranted for a polling location, the requirement is unlikely to overly burden local officials when determining what locations to choose as polling places. As a result, the polling place requirement for colleges and universities is likely congruent and proportional.

3. Statutory Cause of Action with a Burden Shifting Mechanism

Finally, Congress can, and should, create a statutory cause of action that would allow an individual to challenge a law that disparately impacts the individual's ability to vote based on their age. As discussed in Part I above, the tactics that states use to attempt to limit students' ability to vote are vast. They range from voter ID laws to gerrymandering to the manipulation of polling places.[327] They have also been historically pervasive, beginning prior to the enactment of the Twenty-Sixth Amendment and continuing to today.[328] As long as parties perceive that they can gain a partisan advantage from limiting student voting, such tactics will persist.[329] As a result, a statutory cause of action that clarifies how these claims should be brought is warranted due to the persistent nature of age-based discrimination in voting and the substantial harm of disenfranchisement. Such a flexible mechanism is important since the methods used by lawmakers to inhibit student voting are likely to change over time.

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325. U.S. CONST. art. I, § 4, cl. 1.

326. *See Polling Places*, *supra* note 256 (describing locations generally used as polling places).

327. *See supra* Part I.

328. *See supra* notes 39–45 and accompanying text.

329. *See* Wines, *supra* note 12 (discussing the partisan motivations of officials in Florida, New Hampshire, North Carolina, Tennessee, Texas, and Wisconsin when enacting laws which abridge students' ability to vote).

The scope of the law would be considerable. It would prohibit all age-based discrimination in voting, not just those laws targeted at students. It would clarify the legal standard for doing so and create a lesser burden than presently exists under some circuits' current Twenty-Sixth Amendment jurisprudence, which requires proof of intentional discrimination.[330] Other groups likely to bring claims under an anti-age discrimination statute, such as members of the military, the elderly, and the incarcerated, have their own history of disenfranchisement which supports such a remedial measure.[331] Additionally, burden shifting frameworks are widely used remedial measures and are employed for disparate impact claims in many different areas of the law including racial, age, or disability discrimination in employment and racial discrimination in lending and housing.[332] Most notably, when the promises of the Fifteenth Amendment were not being fully realized through the courts, Congress updated Section 2 of the Voting Rights Act to end the scourge of race-based discrimination in voting by allowing individuals to prove that a practice, regardless of intent, results in denial or abridgment of the right to vote.[333] The current situation of age-based voter discrimination targeted at college students is no different. States have been persistent in their attempts to limit ballot access for college students[334] and sufficient redress has not been afforded through the courts.[335] As a result, a statutory cause of action that would provide victims of age-based discrimination in voting the ability to bring

330. *See supra* notes 211–218 and accompanying text.

331. *See* Fish, *supra* note 33, at 1218–20, 1222–24 (discussing how the Twenty-Sixth Amendment can be used to protect the voting rights of military personnel and the elderly); BROMBERG ET AL., *supra* note 40, at 9 (providing examples of how members of the military as well as individuals convicted of felonies are two other groups of young people who have their rights burdened by existing laws).

332. *See* Stephanopoulos, *supra* note 263, 1597–1600 (inventorying the different statutes using disparate impact burden shifting frameworks).

333. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 443–45 (2015) (describing the legislative history behind the 1982 amendment to the Voting Rights Act that added in the new results-based language to Section 2).

334. *See supra* Part I.

335. *See supra* Part II.

their claim by proving disparate impact is congruent and proportional.

CONCLUSION

When it came to advocating for an end to the Vietnam war and advocating for the civil rights of women, racial minorities, and members of the LGBTQ+ community, student protesters in the 1960s were on the right side of history. They were our nation's conscience. Through consistent student activism they forced the government not only to address those pressing national issues, but they also earned the right to vote in the process.[336] However, that right to vote, afforded to young people in the Twenty-Sixth Amendment, has consistently been infringed. For both partisan and non-partisan reasons,[337] states and localities attempt to make it harder for students to vote: subjecting them to more rigorous voter registration requirements;[338] gerrymandering their campuses;[339] enacting voter identification laws that refuse to accept the validity of a student ID;[340] manipulating the availability of polling locations;[341] and passing mail-in voting requirements which expressly discriminate based on age.[342] While providing remedies in some situations, litigation under the Twenty-Sixth Amendment alone has not been sufficient to address these infringements.[343] As a result, Congress has the duty, and the ability under the Twenty-Sixth Amendment's enforcement clause, [344] to enact laws that protect students' ability to vote.

Like college students in the 1960s, students today are acting as our nation's conscience, pressuring lawmakers to address issues ranging from racial injustice to gun violence to

336. *See supra* notes 2–8 and accompanying text.

337. *See supra* notes 46–51 and accompanying text.

338. *See supra* Part I.B.

339. *See supra* Part I.D.

340. *See supra* Part I.D.

341. *See supra* Part I.E

342. *See supra* Part I.F.

343. *See supra* Part II.

344. See Fish, *supra* note 33, at 1195–1203 (explaining the enforcement power of the Twenty-Sixth Amendment).

climate change.[345] As students advocate for these changes, Congress must secure the most effective means of student engagement with the political process: their ability to vote. Congress must pass laws requiring colleges and universities to assist in voter registration,[346] mandate that college campuses with populations above a certain threshold serve as polling places,[347] and provide a statutory cause of action for age-based disparate impact claims for students to challenge burdensome voting laws.[348] Fighting a new era of voter suppression requires nothing less.

345. *See supra* notes 9–12 and accompanying text.
346. *See supra* Part III.A.
347. *See supra* Part III.B.
348. *See supra* Part III.C.