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The Young and the Restless: How the Twenty-Sixth Amendment Could Play a Role in the Current Debate Over Voting Laws

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Abstract

The Twenty-Sixth Amendment is commonly understood as lowering the voting age to eighteen. However, a close look at the Amendment's language and history indicates that the Twenty-Sixth Amendment does more than just grant a right. Properly read, the Twenty-Sixth Amendment acts as an antidiscrimination law similar to the Fourteenth, Fifteenth, and Nineteenth Amendments. Accordingly, the Twenty-Sixth Amendment possesses the power not just to invalidate legislation that explicitly contravenes its purpose, but also to neutralize facially neutral legislation that was enacted with a discriminatory intent. Using Fourteenth and Fifteenth Amendment jurisprudence as a guide, this Comment proposes a framework for structuring Twenty-Sixth Amendment claims against facially neutral legislation. It argues that where claimants can show that a law was enacted for the purpose of impeding the youth vote, the Twenty-Sixth Amendment should trigger strict judicial scrutiny. It uses North Carolina's new voting legislation, the Voter Information Verification Act, to illustrate how a group of students may demonstrate that this facially neutral legislation was enacted for the purpose of frustrating young and student voters.

THE YOUNG AND THE RESTLESS: HOW THE TWENTY-SIXTH AMENDMENT COULD PLAY A ROLE IN THE CURRENT DEBATE OVER VOTING LAWS

NANCY TURNER*

The Twenty-Sixth Amendment is commonly understood as lowering the voting age to eighteen. However, a close look at the Amendment's language and history indicates that the Twenty-Sixth Amendment does more than just grant a right. Properly read, the Twenty-Sixth Amendment acts as an anti-discrimination law similar to the Fourteenth, Fifteenth, and Nineteenth Amendments. Accordingly, the Twenty-Sixth Amendment possesses the power not just to invalidate legislation that explicitly contravenes its purpose, but also to neutralize facially neutral legislation that was enacted with a discriminatory intent. Using Fourteenth and Fifteenth Amendment jurisprudence as a guide, this Comment proposes a framework for structuring Twenty-Sixth Amendment claims against facially neutral legislation. It argues that where claimants can show that a law was enacted for the purpose of impeding the youth vote, the Twenty-Sixth Amendment should trigger strict judicial scrutiny. It uses North Carolina's new voting legislation, the Voter Information Verification Act, to illustrate how a group of students may demonstrate that this facially neutral legislation was enacted for the purpose of frustrating young and student voters.

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TABLE OF CONTENTS

INTRODUCTION

As House Bill 589, or the Voter Information Verification Act (VIVA), worked its way through the North Carolina Legislature, a group of students gathered outside the office of the North Carolina Speaker of the House to protest the bill.[1] "Why do you support a bill making it more difficult for North Carolinians to vote?" one of the students exclaimed.[2] By the end of the night, six students had been arrested.[3]

VIVA, which ends pre-registration for sixteen- and seventeen-year-olds, eliminates same-day registration, forbids out-of-precinct voting,[4] prohibits the use of student IDs as voter identification, and restricts the use of out-of-state licenses for the same,[5] has been described as "the most sweeping anti-voter law in at least decades."[6] This is

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1. Saki Knafo, *North Carolina Voter ID Law Targets Student Voters, Too*, HUFFINGTON POST (July 25, 2013), http://www.huffingtonpost.com/2013/07/25/north-carolina-voter-id_n_3654826.html.

2. *Id.*

3. *See id.* (reporting that over 900 people have been arrested while protesting the legislation and several other items since the bill has been proposed).

4. In its ruling on October 1, 2014, the Fourth Circuit issued a preliminary injunction blocking the provisions of the Voter Information Verification Act (VIVA) that ended same-day registration and out-of-precinct voting. League of Women Voters v. North Carolina, 769 F.3d 224, 248–49 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). Several days later, the Supreme Court stayed the injunction, but gave no reasoning as to its decision. North Carolina v. League of Women Voters, 135 S. Ct. 6 (2014).

5. On June 22, 2015, Governor McCrory signed into law several modifications to VIVA's voter identification provisions. *See* Rick Hasen, Big News: Changes Made to North Carolina Voter ID Law, ELECTION LAW BLOG (June 18, 2015, 1:13 PM), http://electionlawblog.org/?p=73591. Under the new modifications, voters lacking the proper photo identification may cast a provisional ballot if they provide their birthdate, last four digits of their Social Security number, and execute an affidavit affirming that at least one of seven enumerated "reasonable impediments" has prevented them from obtaining proper identification. *See* 2015 N.C. Sess. Laws 103 (listing these "reasonable impediments" as lack of transportation, illness or disability, lack of documents needed to obtain photo identification, work schedule, family responsibilities, lost or stolen photo identification, or photo identification applied for, but not yet received). While the trial proceeded as scheduled in July 2015, Judge Thomas Schroeder set aside arguments on the identification provisions until a later date. Samantha Lachman, *North Carolina Just Relaxed Its Voter ID Law, But Will Voters Get the Memo?* HUFFINGTON POST (July 21, 2015), http://www.huffingtonpost.com/entry/north-carolina-voter-id-law_55ad57b2e4b0caf721b3935f.

6. *See* Knafo, *supra* note 1 (quoting Richard Hasen, a law professor at the University of California, Irvine and the author of THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION). While VIVA has been regaled as the Nation's most restrictive voting law, several other states have also enacted restrictive voting legislation in recent years. *See, e.g.*, WIS. STAT. § 5.02 (6m) (2014) (requiring voters to present either a Wisconsin driver's license, military ID, U.S. passport, tribal ID, naturalization certificate, or a student ID if it bears signature, issuance date,

especially troublesome for young voters, as their relative inexperience with voting procedures leaves them particularly susceptible to changes in electoral law.[7] Recognizing that North Carolina is home to at least one hundred twenty-five colleges[8] and hundreds of thousands of postsecondary students,[9] some view North Carolina's new voting scheme as an attempt to keep student voices out of the government[10]—voices that are constitutionally protected.[11] Seven students have joined a lawsuit challenging the legislation, arguing that VIVA's provisions violate their Twenty-Sixth Amendment rights.[12]

The Twenty-Sixth Amendment prohibits the federal government or any state government from enacting a law that would prevent or frustrate the ability of those aged eighteen and over to vote.[13] Despite the fervor surrounding the enactment of the Twenty-Sixth Amendment in 1971,[14] it has received very little attention.[15] Perhaps

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expiration date, and proof of enrollment).

7. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 52–54 (2014) (finding that voters between nineteen- and twenty-three-years-old and voters who had been registered for less than a year were more affected by Kansas's and Tennessee's change in voter identification laws than voters between forty-four and fifty-three years old).

8. *Colleges in North Carolina*, CAPPEX, http://www.cappex.com/colleges/states/North-Carolina (last visited Aug. 9, 2015).

9. Amended Complaint at 9, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-CV-00660). Texas similarly forbids the use of student IDs for voting, despite having a postsecondary student population of over one million. Max J. Rosenthal, *Texans Allowed to Show Gun Permits But Not Student IDs at Voting Booth*, HUFFINGTON POST (Nov. 15, 2011), http://www.huffingtonpost.com/2011/11/15/texans-gun-permits-student-ids-voting_n_1095530.html.

10. *See* Tyler Kingkade & Saki Knafo, *North Carolina Voter ID Law Targets College Students*, HUFFINGTON POST (July 31, 2013), http://www.huffingtonpost.com/2013/07/30/north-carolina-voter-id-students_n_3676413.html (referencing Diana Kasdan, senior counsel at New York University School of Law's Brennan Center of Justice, who remarked that the legislation is "clearly targeting student voters").

11. Symm v. United States, 439 U.S. 1105, 1105 (1979) (mem.) (holding that students have the right to vote in the community where they attend school).

12. Amended Complaint at 2–3, N.C. State Conf. of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-CV-00660).

13. *See* U.S. CONST. amend. XXVI ("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.").

14. The Twenty-Sixth Amendment followed a period of intense youth activism and a failed attempt to extend the Voting Rights Act to lower the age of eligibility to vote in federal and state elections to eighteen. *See* 117 CONG. REC. 7532, 7543 (1971) (statement of Rep. Matsunaga) (recognizing that student unrest and violence in the years surrounding the Twenty-Sixth Amendment reflects concern for "the important issues of our time").

15. *See* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J.

this is because the Twenty-Sixth Amendment is generally viewed as a "narrowly tailored response to the rise of youth activism in the 1960s."[16] However, such a dismissive view discounts the plain language and history of the Amendment, both of which suggest that the Twenty-Sixth Amendment deserves a much more significant place in our constitutional jurisprudence.[17] Furthermore, the protections provided by the Twenty-Sixth Amendment are especially salient today, as at least twenty-two states have passed legislation curtailing voting rights since 2010.[18] Several of these laws face legal challenges.[19] By understanding the strength of Twenty-Sixth Amendment protections, a new voice emerges in the controversy surrounding this new wave of stricter voting laws.

This Comment will argue that where facially neutral voting legislation works to discriminate against young or student voters, courts should employ a strict scrutiny standard to review claims brought under the Twenty-Sixth Amendment. It then proposes that, in line with Fourteenth and Fifteenth Amendment jurisprudence, those bringing a Twenty-Sixth Amendment claim should use

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1168, 1170–71 (2012) (pointing out that there has only been one Supreme Court case addressing the Twenty-Sixth Amendment and only a handful of lower court cases).

16. *Id.*

17. *See id.* at 1171–72 (recognizing that the Twenty-Sixth Amendment was not written as a simple age limit for disenfranchisement). *But see* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD L. REV. 1457, 1488–89 (2001) (arguing that the Twenty-Sixth Amendment was largely a cost-saving mechanism and, therefore, should not be read broadly).

18. Jerry H. Goldfeder & Myrna Pérez, *Voting Restrictions: From Statehouses to Courts*, N.Y. L.J. (Oct. 24, 2014), http://www.newyorklawjournal.com/id=1202674404316/Voting-Restrictions-From-Statehouses-to-Courts. For example, in 2014, Tennessee restricted the types of identification that may be presented at the polls to Tennessee driver's licenses, U.S. passports, photo IDs issued by the Tennessee Department of Safety and Homeland Security, photo IDs issued by the federal or Tennessee state government, U.S. Military photo ID, or Tennessee handgun carry permits. TENN. CODE ANN. § 2-7-112(c) (2014); *Elections, Voter Identification Requirements*, TENN. DEP'T OF STATE, https://www.tn.gov/sos/election/photoID.htm (last visited Aug. 9, 2015). Expressly excluded are college student IDs, photo IDs issued by city or county governments, and any photo ID issued by another state. *Id.*

19. *See* Jaime Fuller, *How Has Voting Changed Since* Shelby County v. Holder?, WASH. POST (July 7, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder (stating that new voting laws have restricted the right to vote in twenty-two states, and such laws are facing legal action in Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin). Opponents of these stricter voting laws argue that the "only effect will be limiting the right to vote—mostly among low-income and minority voters who may not own government identification or have enough flexibility with their employment" to comply with the new rules. *Id.*

disproportionate effects, historical background, administrative history, departures from normal procedure, and any other relevant information to evidence a discriminatory purpose. This Comment then uses North Carolina's new voting legislation to illustrate how challengers of facially neutral laws should use such direct and circumstantial evidence to demonstrate that the legislation was enacted with a discriminatory purpose. Part I provides background information about the enactment of the Twenty-Sixth Amendment and how it has been interpreted, as well as the history behind the passage of VIVA and its controversy. Part II.A. argues that the Twenty-Sixth Amendment should be read as an anti-discrimination amendment, thus triggering strict scrutiny when legislation or actions were enacted with a discriminatory purpose. Part II.B. proposes a framework for evaluating claims brought under the Twenty-Sixth Amendment, using plain language and historical similarities between the Twenty-Sixth and Fifteenth Amendments to support the proposal. Part II.C. argues that VIVA's background, legislative history, and plain language evidence an intent to discourage student voters in violation of the Twenty-Sixth Amendment. Part III recommends that, where a challenged legislation is facially neutral, a court should evaluate a Twenty-Sixth Amendment claim as it would a Fifteenth Amendment claim, and, therefore, apply strict scrutiny upon finding that Twenty-Sixth Amendment rights have been burdened. Part IV concludes by finding that under such a standard, VIVA violates the Twenty-Sixth Amendment.

I. THE RISE OF THE RESTLESS

A. The History of the Twenty-Sixth Amendment

In the 1960s, the United States exploded with youth and student activism, demanding civil rights, an end to the war in Vietnam, and most importantly, the right to vote. Armed with the argument "old enough to fight, old enough to vote," activists demanded that the right to vote be extended to eighteen-year-olds.[20] By 1970, the overwhelming power and influence of these young advocates compelled legislators to amend the Voting Rights Act[21] in order to

20. *See Records of Rights Vote: "Old Enough to Fight, Old Enough to Vote,"* NAT'L ARCHIVES (Nov. 13, 2013), http://blogs.archives.gov/prologue/?p=12964 (recognizing that the slogan "old enough to fight, old enough to vote" was first heard during World War II, but picked up speed during the Vietnam War).

21. The Voting Rights Act is a piece of federal legislation, originally passed in 1965, which sought to strengthen the Fifteenth Amendment's prohibition on the denial and abridgement of the right to vote based on race. *See History of Federal Voting*

enfranchise those at least eighteen years of age.[22] Just months later, however, the Supreme Court invalidated this legislation in part, reasoning that it was beyond the scope of Congress to enfranchise eighteen-year-olds in state and local elections.[23] Determined to incorporate youthful ideals into the electoral process, Congress went to work on a constitutional amendment that would accomplish what Title III of the Voting Rights Act could not.[24] The result was the Twenty-Sixth Amendment.

Of utmost concern to some legislators debating the Twenty-Sixth Amendment was the impact enfranchisement would have on college towns, where eighteen- to twenty-one-year-olds constitute a significant portion of the population.[25] Not surprisingly, in the years following the enactment of the Amendment, many Twenty-Sixth Amendment claims were brought by college students alleging age discrimination in voting practices.[26]

In 1979, the Supreme Court weighed in on the Twenty-Sixth Amendment, holding that college students have the right to vote in the

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Rights Laws, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Aug. 9, 2015).

22. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318 (1970); *see also* S. REP. NO. 92-26 (1971) *reprinted in* 1971 U.S.C.C.A.N. 931, 936 ("The anachronistic voting-age limitation tends to alienate them from systematic political processes and to drive them into a search for an alternative, sometimes violent, means to express their frustrations over the gap between the nation's ideals and actions."); *Records of Rights Vote: "Old Enough to Fight, Old Enough to Vote,"* NAT'L ARCHIVES (Nov. 13, 2013), http://blogs.archives.gov/prologue/?p=12964 (observing that the Twenty-Sixth Amendment was ratified faster than any other constitutional amendment).

23. *See* Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970) (finding that while Congress may lower the minimum voting age for national elections, its attempt to do the same for state and local elections impinges on the powers reserved to the states in the Constitution).

24. Proponents of the Twenty-Sixth Amendment saw college-aged youth as an increasingly important sector of society and sought to capture their ideals in the electoral process. *See* 117 Cong. Rec. 7532, 7533–64 (1971) (reporting that capturing youthful idealism was a primary goal of Congress).

25. *See id.* at 7538 (statement of Rep. Michel) ("For goodness sakes, we could have these transients actually controlling the elections, voting city councils and mayors in or out of office in a town in which they have a dominant voice."). Take, for example, the city of Boulder, Colorado, home of the University of Colorado. Nearly one-third of the city's population is between eighteen and twenty-four years old, "highlighting the effect of the university on city demographics." BOULDER ECON. COUNCIL, MARKET PROFILE (Apr. 2015), http://boulderеconomiccouncil.org/bec_publications/market-profile-april-2015. The city's median age is 27.7 years old—almost ten years younger than the national median. *Id.*

26. *See, e.g.*, Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 234–35 (N.J. 1972) (challenging a state law that imposed extra questions on college students seeking to register to vote in their college community).

communities where they attend college.[27] In so holding, the Court affirmed several lower courts' invalidation of state and local laws imposing residency requirements and presumptions on college students.[28] However, courts have by no means held that students have an absolute right to vote. The Supreme Court has upheld various durational residency requirements and registration deadlines,[29] and has concluded that states have a legitimate interest in making sure voters are "bona fide" residents of the state.[30] Moreover, in 2008, the Supreme Court found that voter identification requirements were constitutional,[31] reasoning that state interests in detecting and deterring voter fraud were sufficiently weighty to justify the even-handed limitations placed on voters by requiring photo identification for in-person voting.[32] While all of these rulings may affect the ability

27. *See* Symm v. United States, 439 U.S. 1105, 1105 (1979) (mem.) (concluding that a requirement that college dormitory residents establish that they intend to remain in the community after graduation before they could be registered to vote violated the Twenty-Sixth Amendment).

28. *See, e.g.*, Jolicoeur v. Mihaly, 488 P.2d 1, 11–12 (Cal. 1971) (en banc) (holding that state practice of requiring unmarried students to register at their parent's home was unconstitutional).

29. *See* Burns v. Fortson, 410 U.S. 686, 686–87 (1973) (per curiam) (concluding that Georgia's fifty-day registration deadline is constitutional, although noting that such a long deadline touches the outer limits of constitutionality). *But see* Dunn v. Blumstein, 405 U.S. 330, 347–50, 360 (1972) (finding Tennessee's one-year durational residency requirement unconstitutional, but acknowledging that a state could demonstrate a compelling need to require thirty days of residency prior to voting).

30. *See Dunn*, 405 U.S. at 347–48 (asserting that a thirty-day registration deadline is sufficient to further the state's goal of ensuring all voters are actually state residents, and lengthy durational residency requirements are not necessary in accomplishing this goal); Carrington v. Rash, 380 U.S. 89, 95–96 (1965) (making it clear that while states may take efforts to ensure that voters are bona fide residents of the state, states may not use class or status to create presumptions of non-residency). In *Carrington*, the Court also asserted that "fencing out" a sector of the population because of the way they vote or the effect they will have on elections was unconstitutional. *Id.* at 93–94.

31. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194, 202–03 (2008) (upholding Indiana's identification requirements, despite a complete lack of evidence that in-person voter fraud has ever occurred in Indiana). *But see* Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *55 (Pa. Commw. Ct. Jan. 17, 2014) (finding that Pennsylvania's identification requirements "disproportionately burden[] low-income and homeless voters, who are less likely to have a compliant ID" and would face difficulty obtaining compliant identification).

32. While *Crawford* established that states have a legitimate interest in protecting the integrity of the electoral process and endorsed photo identification as one method for achieving this goal, the Court did not put forth a per se rule authorizing all voter identification laws. *See Crawford*, 553 U.S. at 202 (confining its opinion to Indiana's voter law); *see also* Matt Apuzzo, *Students Joining Battle to Upend Laws on Voter ID*, N.Y. TIMES (July 5, 2014), http://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-

of students to vote, the cases in no way detract from the premise that students may not be subjected to different voting requirements than the rest of the population. Moreover, all of these cases were brought under the Fourteenth Amendment's Equal Protection Clause, and presented no Twenty-Sixth Amendment claims.[33]

While most courts agree that legislation that explicitly subjects college students to more stringent registration requirements based on their status as students violates their Twenty-Sixth Amendment rights,[34] it is less clear how to determine when facially neutral legislation may violate the Twenty-Sixth Amendment. The U.S. Court of Appeals for the First Circuit confronted such a situation in *Walgren v. Howes*,[35] where students challenged an action that set a local election date during a time when most students would be on winter holiday.[36] The court, recognizing the lack of Twenty-Sixth Amendment case law, suggested that the proper analytical approach would be similar to the method used in evaluating Fifteenth and Nineteenth Amendment claims.[37] The court reasoned that the Fifteenth and Nineteenth Amendments, which enfranchised African Americans and women respectively,[38] mirror the Twenty-Sixth Amendment in language and purpose, yet have much more case law to guide courts in evaluation.[39]

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discriminate-based-on-age.html?_r=2 (observing that the details of other voter identification laws and how such laws are implemented may be subject to judicial scrutiny).

33. *See* Fish, *supra* note 15, at 1231 ("There is no strong anti-age-classification norm in current Fourteenth Amendment jurisprudence, and distinctions based on age are only subject to rational basis review.").

34. *See, e.g.*, Jolicoeur v. Mihaly, 488 P.2d 1, 11–12 (Cal. 1971) (en banc) (holding that the presumption that college students are domiciliaries of their parents' residence violates the Twenty-Sixth Amendment). *But see* Levy v. Scranton, 780 F. Supp. 897, 901 (N.D.N.Y. 1991) (finding that while the subjective intent of some of the legislators in passing voting restrictions impermissibly targeted students, this "does not lead to the inevitable conclusion that this subjective intent was a motivating factor on the part of the entire legislature to enact this bill").

35. 482 F.2d 95 (1st Cir. 1973).

36. *Id.* at 97.

37. *See id.* at 100–01 (recognizing that the Fifteenth and Nineteenth Amendments served as models for the Twenty-Sixth Amendment).

38. The Fifteenth Amendment declares that neither the federal government nor any state government may pass a law that infringes upon the right to vote based on race. U.S. CONST. amend. XV. Similarly, the Nineteenth Amendment prohibits any law that inhibited the right to vote based on sex. U.S. CONST. amend. XIX.

39. *Howes*, 482 F.2d at 101. The court noted that the Fifteenth Amendment, in particular, has a considerable amount of guiding case law. *Id.*

While case law on the Twenty-Sixth Amendment is limited, the cases on point demonstrate that courts, including the Supreme Court, show little hesitation in thwarting explicit attempts to hamper student voting. Although these holdings in no way create an absolute right to vote, such holdings do suggest a continuing commitment to protecting the youth vote. In analogizing the Twenty-Sixth Amendment to the Fifteenth and Nineteenth Amendments, the First Circuit suggested that the Twenty-Sixth Amendment was indeed an anti-discrimination statute, and its reasoning also illustrated that the Amendment could create a claim against a facially neutral statute.

B. Using the Fifteenth Amendment to Understand the Twenty-Sixth Amendment

The Fifteenth Amendment invalidates legislation that denies or abridges the right to vote because of race or sex, and mandates strict scrutiny where legislation, although neutral on its face, was enacted with a discriminatory intent.[40] Additionally, the Fifteenth Amendment has a broad scope; its protections extend beyond voting and its "paradigmatic protected classes."[41] The Fifteenth Amendment in particular has been read to invalidate even "simpleminded modes of discrimination" that may leave the "abstract right to vote" intact.[42] This language first appeared in *Lane v. Wilson*,[43] a Fifteenth Amendment case that involved a statute, which, while neutral on its face, had the practical effect of enfranchising all white voters while requiring all would-be African-American voters to register within a twelve-day period or risk losing their right to the franchise forever.[44] By invalidating a race-neutral statute because it

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40. *See* Shaw v. Reno, 509 U.S. 630, 644 (1993) (requiring strict scrutiny wherever race is the overriding force in the redistricting process); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (explaining that the Fifteenth Amendment "has repeatedly been construed . . . to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice"), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

41. Fish, *supra* note 15, at 1175; *see* United Jewish Orgs. of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 522 (2d Cir. 1975) (holding that white voters have standing to challenge a redistricting plan under the claim that it violates their Fifteenth Amendment rights), *aff'd sub nom.* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977). The Nineteenth Amendment has a similarly broad scope. *See* Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (recognizing that the Nineteenth Amendment has sex equality implications for constitutional questions other than voting).

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

43. *Id.*

44. *Id.* at 268–71. The challenged statute required anyone who hadn't registered to vote in 1914 to register to vote within a twelve-day period if they were to vote in 1916. *Id.* While the legislation made no explicit mention of race, most

produced unequal access to the polls,[45] the Supreme Court illustrated that the Fifteenth Amendment had the power to invalidate legislation that is neither explicitly discriminatory nor a complete bar to the exercise of the franchise, if the legislation had the practical effect of discouraging or disenfranchising African-American voters.[46] In *Howes*, the First Circuit concluded that a similar strength could be associated with Twenty-Sixth Amendment claims.[47]

However, simply stating that the Fifteenth Amendment invalidates legislation that handicaps the ability to vote based on race oversimplifies the analysis needed to determine when a Fifteenth Amendment violation occurs. In 1980, the Supreme Court decided *City of Mobile v. Bolden*,[48] clarifying that where the challenged

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African Americans had not been allowed to register in 1914, and thus, by default, fell into the group that only had a twelve-day registration period in 1916. *Id.*

45. *See id.* at 276–77 (reasoning that a twelve-day registration period was too "cabined and confined" of a time limit to allow someone to assert their constitutional rights).

46. Lower courts have used this standard to overturn various types of voting-related legislation. *See, e.g.*, United States v. Bibb Cnty. Democratic Exec. Comm., 222 F. Supp. 493, 494–95, 498–99 (M.D. Ga. 1962) (finding that polling stations separated by race violate the Fifteenth Amendment because, even though the right to vote remained intact, distinctions based on race adversely affect public interest and discourage participation); United States v. Alabama, 192 F. Supp. 677, 678–79 (M.D. Ala. 1961) (holding that Alabama's voting laws violated the Fifteenth Amendment because mechanisms such as writing tests and time-consuming qualification forms preyed upon the disparities between white and black citizens and discouraged black citizens from voting), *aff'd*, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

47. *See* Walgren v. Howes, 482 F.2d 95, 101 (1st Cir. 1973) ("The Fifteenth Amendment nullifies sophisticated as well as simpleminded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." (quoting *Lane*, 307 U.S. at 275)). The Supreme Court of California also endorsed this perspective, quoting the same excerpt from *Lane v. Wilson* and using it to reason that requiring unmarried voters to register at their parents' place of residence acted as an impermissible barrier to the right to vote on account of age. Jolicouer v. Mihaly, 488 P.2d 1, 4, 12 (Cal. 1971) (en banc). While the legislation in *Jolicouer* was not facially neutral, the case is relevant insofar as it demonstrates that more than one court has approved the use of Fifteenth Amendment jurisprudence to evaluate a Twenty-Sixth Amendment claim. *See id.* at 3 (noting that registrars refused to register unmarried minors pursuant to the California Attorney General's statement that the residence of an unmarried minor will normally be his parents' home, regardless of where the minors are presently living). However, the First Circuit did not ultimately conduct a thorough analysis under this standard. *See* Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1368 (1st Cir. 1975) (concluding that the county officials made a good faith effort to find a mutually acceptable election date and, therefore, the election date was not intended to discriminate against students).

48. 446 U.S. 55 (1980) (plurality opinion) *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in*

legislation is racially neutral, plaintiffs must show that the legislation was enacted with a discriminatory purpose.[49] In *Bolden*, African-American citizens of Mobile, Alabama alleged that the city's at-large method of electing its commissioners violated the Fifteenth Amendment,[50] citing as evidence the lack of any African-American individuals on the City Commission, despite the city's significant black population.[51] The election scheme was racially neutral.[52] The Supreme Court upheld the city's election scheme, concluding that where the challenged legislation is racially neutral, disproportionate effects alone are insufficient to establish a claim of unconstitutionality.[53] Although the Supreme Court contended that disproportionate impact is not dispositive, it reasoned that the impact of legislation—whether it affects one race more heavily than another—may be used to infer a discriminatory purpose.[54] In so ruling, the Supreme Court equated the facially neutral Fifteenth Amendment analysis with Fourteenth Amendment analysis.[55]

Thornburg v. Gingles, 478 U.S. 30 (1986).

49. *Id.* at 62. In its reasoning, the Court borrowed from Fourteenth Amendment jurisprudence, which similarly requires discriminatory intent to show an equal protection violation. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66, 269 (1977) (holding that, without more, authorities' refusal to change zoning from single-family to multi-family is not enough to show an equal protection violation, even though the decision disproportionately affects minorities); *see also* Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1287–88 (M.D. Ala. 2013) (finding that although amendments to the Voting Rights Act have lessened the burden of proof for plaintiffs, the Fifteenth Amendment still requires a discriminatory purpose), *vacated and remanded*, 135 S. Ct. 1257 (2015).

50. *Bolden*, 446 U.S. at 58.

51. *Id.* at 58, 64–65.

52. *Id.* at 59–60, 62.

53. *Id.* at 73–76 (reasoning that a lack of black representatives in city council did not tend to show that the plaintiffs' right to vote had been purposefully denied or abridged on account of race); *see also* Wright v. Rockefeller, 376 U.S. 52, 56, 58 (1964) (upholding a congressional reapportionment statute where plaintiffs failed to demonstrate that the legislature was motivated by racial considerations).

54. *Bolden*, 446 U.S. at 70 (quoting Washington v. Davis, 426 U.S. 229 (1976)); *see also* Velasquez v. City of Abilene, 725 F.2d 1017, 1022 (5th Cir. 1984) (finding that "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the . . . Fifteenth Amendment[] to occur"). The First Circuit did not discuss this aspect of Fifteenth Amendment analysis when it evaluated the validity of the election date in *Howes*. *See* Walgren v. Howes, 482 F.2d 95, 101 (1st Cir. 1973) (failing to mention that where facially neutral legislation is at issue, plaintiffs must demonstrate the action had discriminatory intent).

55. *See* Rogers v. Lodge, 458 U.S. 613, 618 (1982) (recognizing that the demonstration of intention is necessary under both Fourteenth and Fifteenth Amendment claims); *see also* Davis v. Schnell, 81 F. Supp. 872, 876, 880 (S.D. Ala.

Village of Arlington Heights v. Metropolitan Housing Development Corp.,[56] which involved a Fourteenth Amendment challenge to a city's zoning laws, provides a thorough review of some of the relevant factors courts consider when determining whether a facially neutral action is constitutionally permissible.[57] In *Arlington Heights*, the Court explained that plaintiffs may evidence an action's discriminatory effects, its historical background, the sequence of events that led to the action, the presence or absence of departures from normal procedures or substantive criteria, and the action's legislative or administrative history to demonstrate that the action or legislation had a discriminatory purpose.[58] Moreover, where an action or legislation is "unexplainable on grounds other than race," courts will often find a discriminatory intent.[59]

Following the First Circuit's reasoning in *Howes*, a Twenty-Sixth Amendment claim brought in opposition to a facially neutral action or piece of legislation would be evaluated under the same framework as a Fourteenth Amendment claim against a facially neutral action.[60] Accordingly, where challengers of a voting law can use that law's legislative history, practical effects, and surrounding events to evidence that the law was enacted to discriminate against young or student voters, the law should receive strict scrutiny.

1949) *aff'd*, 336 U.S. 933 (1949) (using the same framework to evaluate Fifteenth and Fourteenth Amendment claims).

56. 429 U.S. 252, 254 (1977).

57. *Id.* at 267–68.

58. *Id.*; Taylor v. Haywood Cnty., 544 F. Supp. 1122, 1133 (E.D. Tenn. 1982) (recognizing that, although plaintiffs must show a discriminatory intent in order to prevail on a Fifteenth Amendment claim, an invidious discriminatory purpose may often be inferred from the totality of relevant facts); *see also* McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987) (recognizing that contemporaneous historical evidence has "probative value" in determining whether an action had discriminatory intent); Schnell v. Davis, 336 U.S. 933 (mem.) (finding the sequence of events that led to the legislation relevant in demonstrating a discriminatory intent); Veasey v. Perry, 71 F. Supp. 3d 627, 699–700 (S.D. Tex. 2014) (reasoning that demographic shifts may be relevant in determining whether there was discriminatory intent).

59. *Arlington Heights*, 429 U.S. at 266; *see* Shaw v. Reno, 509 U.S. 630, 644 (1993) (ruling that that redistricting legislation was so bizarre that it was unexplainable on grounds other than race); Guinn v. United States, 238 U.S. 347, 363–64 (1915) (concluding that a grandfather clause that had the practical effect of enfranchising only white voters had no discernible purpose other than to disenfranchise black voters).

60. Walgren v. Howes, 482 F.2d 95, 101 (1st Cir. 1973).

C. *The Relevance of the Twenty-Sixth Amendment Today*

On June 25, 2013 the Supreme Court released its decision in *Shelby County v. Holder*,[61] which invalidated Section 4 of the Voting Rights Act (VRA),[62] reasoning that the type of racial discrimination that had motivated and sustained Section 4 no longer existed.[63] Section 4 provided the enforcement mechanism for Section 5 of the VRA, which requires states with a history of discrimination to obtain approval from the federal government before making changes to their election laws.[64] This included North Carolina.[65] The day after the Court's decision in *Shelby County*, North Carolina began pursuing drastic voting reform.[66] Several weeks later, the North Carolina Senate produced a fifty-seven page piece of legislation called the Voter Information Verification Act.[67] The Act imposes strict voter identification requirements, diminishes early voting opportunities, ends same-day registration, prohibits out-of-precinct voting, and eliminates pre-registration for high school students.[68] Proponents of VIVA provide that the Act ensures administrative efficiency and prevents voter fraud, while opponents argue the legislation was enacted to suppress young and minority voting.[69]

North Carolina's new draconian set of voting laws surprised many, as the state's previous voting laws were so successful in increasing voter participation. In 1991, North Carolina had one of the lowest voter participation rates in the country, ranking forty-seventh out of

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61. 133 S. Ct. 2612, 2612 (2013).

62. *Id.* at 2631; *see also* Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all&_r=1& (reporting that Section 4 of the Voting Rights Act required states and political subdivisions with a history of discrimination to obtain federal preclearance before enacting new voting laws).

63. *Shelby Cnty.*, 133 S. Ct. at 2631 (asserting that Congress is responsible for ensuring that "the legislation it passes to remedy [racial discrimination in voting] . . . speaks to current conditions").

64. Fuller, *supra* note 19.

65. *Id.*

66. League of Women Voters v. North Carolina, 769 F.3d 224, 242 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735 (2015).

67. N.C. Gen. Stat. §§ 163-166.13 (2013).

68. *See* N.C. GEN. STAT. § 163-166.13 (voter identification requirements); *id.* § 163-82.23 (elimination of teenage preregistration); *id.* § 163-82.6(c) (elimination of same-day registration); *id.* § 163-227.2 (reduction of early voting); Apuzzo, *supra* note 32 (reporting that students also cite other government efforts, distinct from VIVA, as evidence that officials wish to impede student voting).

69. Apuzzo, *supra* note 32.

the fifty states.[70] In response to this dismal statistic, the legislature enacted measures to increase voter participation over the next decade.[71] They worked; by 2012, North Carolina boasted one of the highest rates of voter participation.[72] Furthermore, cases of voter fraud remained very low.[73] Despite these promising results, the North Carolina Legislature, led by Republicans,[74] sought a drastic overhaul of the state's voting laws following the Supreme Court's decision in *Shelby County*.[75] While the bill predated the *Shelby County* decision, the original version of the bill merely sought to require some form of photo identification for in-person voting.[76] The bill was set aside for months and only saw rapid action after the Supreme Court invalidated Section 4 of the Voting Rights Act.[77] In fact, the day after the decision came down in *Shelby County*, Senator Thomas Apodaca, Republican Chairman of the Rules Committee, publicly stated, "So now we can go with the full bill."[78] It was at that time that stricter ID requirements emerged: student IDs were prohibited and stringent restrictions were placed on out-of-state licenses.[79] Additionally, the bill

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70. Amended Complaint at 9, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13 CV 00660).

71. *Id.*

72. *Id.*; *see also* Press Release, Democracy N.C., Republicans, African Americans, Women and Senior Post the Highest Voter Turnout Rate in North Carolina 1 (Dec. 19, 2012), http://democracy-nc.org/downloads/NCVoterTurnout2012PR.pdf (reporting that in the 2012 presidential elections 68.3 percent of registered voters in North Carolina cast ballots).

73. *See Widespread Voter Fraud Not an Issue in NC, Data Shows*, WNCN (July 29, 2013), http://thevotingnews.com/widespread-voter-fraud-not-an-issue-in-north-carolina-data-shows-wncn (stating that in the 2012 elections voter fraud allegations accounted for only 0.00174 percent of ballots cast).

74. *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 335 (M.D.N.C. 2014) (stating that the House Committee on Elections is chaired by a Republican).

75. *See id.* at 335–36 (noting that VIVA went from being a relatively short document that clarified voter identification requirements to a fifty-seven page piece of legislation).

76. *See* Amended Complaint at 10, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13 CV 00660) (arguing that the original bill contained no restrictions on student IDs or out-of-state licenses); *see also McCrory*, 997 F. Supp. 2d at 335 (reporting that the original bill consisted almost exclusively of an implementation of a comparatively non-restrictive voter identification program).

77. Amended Complaint at 11, *McCrory*, 997 F. Supp. 2d 322 (No. 1:13 CV 00660); *see also* League of Women Voters v. North Carolina, 769 F.3d 224, 242–43 (4th Cir. 2014) (suggesting that the reason the Legislature took no action until after the *Shelby County* decision is because proponents of the amended bill knew it would not pass federal preclearance), *cert. denied*, 135 S. Ct. 1735 (2015).

78. *McCrory*, 997 F. Supp. 2d at 336.

79. *Id.*; *see* N.C. GEN. STAT. § 163-166.13 (stating that out-of-state licenses are accepted only if the holder had registered to vote in North Carolina within

eliminated preregistration for high school students, cut back early voting days, ended same-day registration, prohibited out-of-precinct voting, and terminated the discretion of county boards of election to keep polls open an extra hour on Election Day.[80]

Lawyers for seven college students joined the NAACP, the American Civil Liberties Union, and the Department of Justice in seeking injunctive relief from VIVA in the District Court for the Middle District of North Carolina.[81] The complaint argued that VIVA impermissibly infringes on the rights of young voters under the Twenty-Sixth Amendment and sought a preliminary injunction pending a full trial.[82]

After a four-day trial, the Honorable Thomas Schroeder of the Middle District of North Carolina denied the plaintiffs' request for injunctive relief.[83] In his 125-page decision, Judge Schroeder found that, although the complaint stated plausible claims and should be permitted to proceed to litigation, the plaintiffs did not demonstrate that they are likely to suffer irreparable harm, which is a prerequisite for preliminary injunctive relief.[84] His opinion does not contain a

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ninety days of the election).

80. *McCrory*, 997 F. Supp. 2d at 336.

81. Amended Complaint at 2, *McCrory*, 997 F. Supp. 2d 322 (No. 1:13 CV 00660); Hunter Schwarz, *Justice Department Sues North Carolina Over Voter ID Law*, WASH. POST (July 7, 2014) http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/07/justice-department-sues-north-carolina-over-voter-id-law. Similar voting laws are being challenged in several other states, most notably Wisconsin and Texas; *see also* Jeffery Toobin, *Freedom Summer, 2015*, NEW YORKER (Oct. 28, 2014), http://www.newyorker.com/news/daily-comment/freedom-summer-2015 (reporting that, on emergency appeal, the Supreme Court struck down Wisconsin voter identification law while upholding the Texas voter identification law, but reasoning that this had more to do with the laws' implementation than their substance). *See generally* Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (finding Texas's new voting regime unconstitutional); Frank v. Walker, 17 F. Supp. 3d 837, 862–63 (E.D. Wis. 2014) (concluding that the burden a photo identification law places on the population outweighs the state's interest in preventing voter impersonation), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *reh'g denied*, 773 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

82. Amended Complaint at 2–3, *McCrory*, 997 F. Supp. 2d 322 (No. 1:13 CV 00660).

83. *McCrory*, 997 F. Supp. 2d at 334.

84. *Id.*; *see* Richard Fausset, *Judge Backs New Limits on North Carolina Voting*, N.Y. TIMES (Aug. 8, 2014), http://www.nytimes.com/2014/08/09/us/judge-in-north-carolina-upholds-2013-voting-law.html?ref=politics&_r=0 (noting that Judge Schroeder acknowledged that, given North Carolina's history of discrimination in voting practices, residents have reason to be wary of changes in voting law). *But see* Ari Berman, *Hundreds of Voters are Disenfranchised by North Carolina's New Voting Restrictions*, NATION (Sept. 10, 2014), http://www.thenation.com/blog/181566/hundreds-voters-disenfranchised-north-carolinas-new-voting-restrictions# (referencing a review by Democracy N.C. that reported 454 voters could not successfully cast their ballots in North Carolina's primary due to the new law, including at least one student).

thorough analysis of the students' claims, however, because the plaintiffs brought the claim as ten individuals rather than as a class.[85] Judge Schroeder reasoned that if the plaintiffs wished to continue the litigation as individuals, they must show that they themselves are likely to suffer irreparable harm before trial.[86] The plaintiffs appealed to the Fourth Circuit, which heard the case on September 25, 2014.[87]

On October 1, 2014, in a 2–1 ruling, the Fourth Circuit reversed the district court's denial of a preliminary injunction as to VIVA's elimination of same-day voter registration and the prohibition on counting out-of-precinct ballots.[88] However, the Fourth Circuit affirmed the district court's denial of a preliminary injunction regarding the elimination of teenage preregistration, the shortening of the early voting period, and the restrictions on voter identification, reasoning that, although the plaintiffs may ultimately succeed at the full trial, they have not shown they will suffer irreparable harm in these respects before the trial in 2015.[89] North Carolina filed an emergency petition to the Supreme Court,[90] and on October 8, 2014, the Supreme Court stayed the Fourth Circuit's preliminary injunction on same-day registration and out-of-precinct voting.[91] The majority did not offer any reasoning.[92] Despite the plaintiffs' inability to secure a preliminary injunction, observers predict that the plaintiffs will likely have a strong case at the full trial,[93] as VIVA is considered to be one of the toughest voting restrictions in decades.[94]

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85. *See McCrory*, 997 F. Supp. 2d at 365 (noting that all the Twenty-Sixth Amendment cases cited to the court had been brought as class actions).

86. *Id.*

87. *Appeals Court Sets Quick Date on State's Voting Law*, WITN (Sept. 9, 2014), http://www.witn.com/home/headlines/Appeals-Court-Sets-Quick-Date-On-States-Voting-Law-274517581.html.

88. League of Women Voters v. North Carolina, 769 F.3d 224, 248–49 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

89. *Id.*

90. Rick Hasen, *Breaking: North Carolina Files Emergency #SCOTUS Petition in Same-Day Voting, Precinct Voting Case: Analysis*, ELECTION LAW BLOG (Oct. 2, 2014, 1:47 PM), http://electionlawblog.org/?p=66256.

91. North Carolina v. League of Women Voters, 135 S. Ct. 6 (2014).

92. Lyle Denniston, *Court Allows North Carolina Voting Limits*, SCOTUSBLOG (Oct. 8, 2014, 7:14 PM), http://www.scotusblog.com/2014/10/court-allows-north-carolina-voting-limits.

93. *Id.*

94. *Id. Compare* 2013 N.C. Sess. Laws 381, *with* FLA. STAT. ANN. § 101.043 (West 2014) (requiring photo identification for in-person voting, but allowing several forms of identification, such as debit or credit cards, retirement center identifications, neighborhood association identification, or public assistance identification), *and*

At a minimum, North Carolina's new voting legislation demonstrates that its proponents are simply apathetic to the youth vote. However, the extent of the new law's prohibitions and restrictions, coupled with the law's legislative history, may suggest that it was enacted specifically to make student voting more difficult. Such a discriminatory purpose would violate the Twenty-Sixth Amendment.

II. THE RELEVANCE OF THE RESTLESS: HOW THE TWENTY-SIXTH AMENDMENT COULD PLAY AN IMPORTANT ROLE IN VOTING LAWS TODAY

A. The Twenty-Sixth Amendment Should be Read as an Anti-Discrimination Amendment, Giving it the Power to Trigger Strict Scrutiny in Response to Facially Neutral Laws that Deliberately Frustrate Student Voting

Nearly every court confronted with a Twenty-Sixth Amendment claim commented that there exists sparse guidance on how to evaluate and analyze such claims.[95] While case law clearly demonstrates that laws containing facial discrimination are unconstitutional,[96] no court has resolved the power of the Twenty-Sixth Amendment to neutralize facially neutral action that impedes youth voter participation. Unlike race and gender, age is generally not afforded strict scrutiny.[97] However, at least one court has reasoned that the history and text of the Twenty-Sixth Amendment indicates that the Amendment should be evaluated under some form of heightened scrutiny.[98]

ALA. CODE § 17-9-30 (2014) (requiring photo identification but permitting employee identification cards, tribal identification cards, or student identification from a public or private university or technical college), *and* CONN. GEN. STAT. ANN. § 9-261 (2014) (stating only that voters must be able to show a preprinted form of identification displaying elector's name and either his address, signature, or photo).

95. *See, e.g.*, Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1367 (1st Cir. 1975) (acknowledging that few cases have been decided under the Twenty-Sixth Amendment, creating analysis problems for the court).

96. *See generally* Symm v. United States, 439 U.S. 1106, 1106 (1979) (mem.) (holding that legislation that distinguishes students from the rest of the population with respect to voting procedure violates the Twenty-Sixth Amendment).

97. *See, e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 307 (1976) (rejecting a claim that Massachusetts's mandatory retirement age for police officers violated their right to equal protection). *See generally* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 215 (recognizing and discussing the widely-held conclusion that classifications based on age do not offend equal protection guarantees).

98. *See Bd. of Selectmen*, 519 F.2d at 1367 (finding it "difficult to believe" that the Twenty-Sixth Amendment provided no special protections for young voters).

1. The plain language of the Twenty-Sixth Amendment indicates that it should be read as an anti-discrimination amendment capable of triggering strict scrutiny

The plain language of the Twenty-Sixth Amendment does not simply convey a right; it prohibits age-based discrimination or differential treatment throughout the entire voting process. The Amendment does not simply say "the voting age shall be set at eighteen"; rather, section one of the Amendment reads, "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 any State on account of age."[99] Such strong anti-discriminatory language is not unfamiliar; it is similarly used in the Fifteenth and Nineteenth Amendments,[100] which prohibit any racial or sexual discrimination that affect the right to vote.[101] These amendments are understood to not only have the power to invalidate explicitly discriminatory legislation, but also the power to nullify facially neutral legislation enacted with a discriminatory intent.[102] The nearly identical language of the Twenty-Sixth Amendment and the Fifteenth and Nineteenth Amendments suggests they should be interpreted harmoniously and that claims brought under the amendments should be evaluated similarly.

For the Twenty-Sixth Amendment, this confirms that the Amendment should be understood as expansive in both its scope and power, as both the Fifteenth and Nineteenth Amendments have been interpreted to prohibit any type of racial or sexual discrimination at any stage or level of the electoral process, explicit or implicit.[103] The

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99. U.S. CONST. amend. XXVI § 1; *see* Michel Martin, *Is Age the New Frontier of Voting Rights?*, NPR (July 8, 2014, 12:54 PM), http://www.npr.org/2014/07/08/329804364/is-age-the-new-frontier-of-voting-rights (promoting the idea that the Twenty-Sixth Amendment was written as an anti-discrimination law).

100. *See* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

101. *See* 117 CONG. REC. 7532, 7533 (1971) (statement of Rep. Celler) ("This provision is modeled after similar provisions in the [Fifteenth A]mendment, which outlawed racial discrimination at the polls, and the [Nineteenth A]mendment, which enfranchised women.").

102. *See generally* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (affirming that the Fifteenth Amendment can invalidate facially neutral legislation if challengers can show the legislation was created for a discriminatory purpose).

103. *See* Robert J. Deichert, Rice v. Cayetano*: The Fifteenth Amendment at a Crossroads*, 32 CONN. L. REV. 1075, 1080 (2000) (asserting that the plain language and the judicial interpretations of the Fifteenth Amendment strongly demonstrate that the Amendment acts as a bar to racial discrimination during any type of election); *see*

Fifteenth Amendment in particular demands strict scrutiny where claimants can evidence a law was enacted with a discriminatory purpose.[104] By choosing to model the Twenty-Sixth Amendment after these amendments, its framers made clear that they were doing more than just lowering the voting age to eighteen; they were forbidding any legislation that frustrates voting ability based on age.

The strength of the Twenty-Sixth Amendment's plain language becomes particularly evident when compared to other constitutional provisions concerning age. The anti-discriminatory tone present in the Twenty-Sixth Amendment is noticeably absent from the other age-related constitutional provisions.[105] For example, Article II of the Constitution establishes the minimum age requirement for the presidency, and reads, in part, "neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years."[106] This language, although also distinguishing the ability to participate in the political process based on age, is markedly different than that of the Twenty-Sixth Amendment.[107] Article II does not

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also Fish, *supra* note 15, at 1174. Some courts have even interpreted the Fifteenth and Nineteenth Amendments to extend beyond their traditional understanding of protecting the right of African Americans and women to vote. Fish, *supra* note 15, at 1175–76. *See generally* Rice v. Cayetano, 528 U.S. 495, 517 (2000) (limiting voters to persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated the Fifteenth Amendment because it used ancestry as a proxy for race); Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (recognizing that the Nineteenth Amendment has sex-equality implications for constitutional questions other than voting). Similarly, some applications of the Twenty-Sixth Amendment illustrate that it has a reach beyond its traditional understanding. *See* Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085, 1088 (1977) (holding that the protections of the Twenty-Sixth Amendment apply to tribal secretarial elections).

104. Shaw v. Reno, 509 U.S. 630, 653 (1993) (concluding that race-based redistricting demands strict scrutiny). Strict scrutiny requires a state or local government to show that the law is narrowly tailored to serve a compelling government interest. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (clarifying that the strict scrutiny standard ensures that the government is pursuing an important goal and that the methods used to pursue that goal are so closely fit to the accomplishment of the goal that there is little to no chance of ulterior motives).

105. *See* U.S. CONST. art. I, § 2, cl. 2 (setting minimum age requirement for the House); *id.* art. I, § 3, cl. 3 (establishing the minimum age requirement for the Senate); *id.* art. II, § 1, cl. 5 (setting the minimum age requirement for the presidency); Fish, *supra* note 15, at 1171 (recognizing that the Twenty-Sixth Amendment was not written as a mere age limit disenfranchisement, such as the Constitutional age requirements for the presidency).

106. U.S. CONST. art. II, § 1, cl. 5

107. *Compare* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who

endeavor to protect the right of those over thirty-five to run for president. It does not read that "the right of United States citizens, who are thirty-five years of age or older, to run for president, shall not be denied or abridged." Rather, Article II merely sets a baseline age that one must attain to participate in the franchise, similar to if the Twenty-Sixth Amendment simply read, "the voting age shall be eighteen." The fact that not all constitutional provisions concerning age contain anti-discriminatory language further supports the idea that the drafters of the Twenty-Sixth Amendment anticipated that it would convey special protections to young voters.

2. The historical context and legislative history suggest the Twenty-Sixth Amendment is an anti-discrimination amendment

The historical context of the Twenty-Sixth Amendment supports the assertion that the Amendment should trigger strict scrutiny. The 1960s were a time of unparalleled youth activism in American history. College attendance rates were spiking,[108] and the eighteen- to twenty-one age bracket was increasingly seen as an informed and contributing sector of society.[109] The legislature's objective in drafting the Twenty-Sixth Amendment was not to simply allow eighteen-year-olds to vote; it sought to encourage the youth vote.[110] The legislature manifested this intent not only through the Amendment's anti-discriminatory tone, but also through its sweeping language.

The Twenty-Sixth Amendment was in large part a reaction to the Supreme Court's invalidation of Article III of the VRA, which enfranchised eighteen- to twenty-year-olds. However, the language in the Twenty-Sixth Amendment does not simply mirror the language

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shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."), *with* U.S. CONST. amend. XXVI § 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 any State on account of age.").

108. *See* Jolicouer v. Mihaly, 488 P.2d 2, 6 (Cal. 1971) ("Today more than half the [eighteen]- to [twenty-one]-year-olds are receiving some type of higher education." (quoting S. REP. NO. 92-26 (1971), *reprinted in* 1971 U.S.C.C.A.N. 931, 935)).

109. *See, e.g.*, 117 CONG. REC. 7532, 7533 (statement of Rep. Celler) ("Some of our youth have disappointed us, but the preponderant majority are as sound of mind as they are strong in body.").

110. *See* Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 237 (N.J. 1972) ("The legislative history preceding the adoption of the amendment clearly evidences the purpose not only of extending the voting right to younger voters but also of encouraging their participation by the elimination of all unnecessary burdens and barriers."); *Jolicouer*, 488 P.2d at 5 (recognizing that "channeling youthful idealism" was a primary goal of Congress).

used in Article III.[111] While Article III only prohibited the "denial" of the right to vote on account of age, the Twenty-Sixth Amendment contains a much more sweeping prohibition, forbidding not just the denial of the right to vote on account of age, but also the *abridgment* of the right to vote on account of age.[112] The inclusion of the word "abridged" in the Twenty-Sixth Amendment is significant, as forbidding the abridgement of the right to vote expounds a much more expansive prohibition than merely disallowing the denial of the right to vote. "Abridge" means to "diminish, curtail, deprive, or reduce,"[113] a range of actions and effects much broader than those covered under "denial." It reflects a conscious choice by its framers to prohibit more than just outright barriers to the right to vote; it reveals an intent to create a comprehensive ban on any legislation that frustrates the ability of those over eighteen to vote.[114]

Moreover, in discussing the reach of the Twenty-Sixth Amendment, legislators made it clear that the "right to vote" as written in the Amendment encompasses more than the ability of one to cast a ballot;[115] it covers any action incidental to the successful casting and counting of one's ballot.[116] Furthermore, the "right to vote" was

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111. *See* Fish, *supra* note 15, at 1173 (explaining that Article III only protected young would-be voters who were "denied the right to vote" but the Twenty-Sixth Amendment prevents the right of young people to vote from being denied or abridged).

112. *Id. Compare* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318 ("Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or in any political subdivision in any primary or election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."), *with* U.S. CONST. amend. XXVI § 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 any State on account of age.").

113. *Jolicouer*, 488 P.2d at 4.

114. *See* 117 CONG. REC. 7532, 7534 (statement of Rep. Poff) ("Finally the Congress erred in confining the impact of its statute to the denial of the right to vote, when, in fact, if the House intended to be thorough, it should have also proscribed the abridgement of that right."); S. REP. NO. 92-26, at 14 (1971) (finding that forcing young voters to undertake special burdens such as obtaining absentee ballots or traveling to a centralized location would dissuade them from voting); Fish, *supra* note 15, at 1181 (suggesting that many policies could "abridge" the right to vote, such as locating polling stations away from colleges, requiring registrants to have a driver's license, or splitting a college campus between two legislative districts).

115. 117 CONG. REC. 7532, 7535 (statement of Rep. Poff) ("The 'right to vote' is a constitutional phrase of art whose scope embraces the entire process by which the people make their political choices.").

116. *See* Symm v. United States, 439 U.S. 1105 (1979) (mem.) (invalidating a Texas statute that required students to pledge an intention to stay in the community

imagined to extend beyond voting in general and primary elections.[117] The Twenty-Sixth Amendment anticipates that anyone eighteen years or older will not be prevented from participating in any electoral process of any political subdivision.[118] Such an expansive interpretation of the franchise further confirms that the Amendment's authors intended to root out age-based barriers to voting at any level of the electoral process.

3. Age should be considered a suspect class with respect to voting

Given the history of political powerlessness and discrimination against youths with respect to voting, age should be viewed as a suspect class in matters related to voting. In order to be considered a suspect class, a group must generally meet four criteria: (1) "the group in question has suffered a history of discrimination"; (2) group members "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) "the group is a minority or is politically powerless"; and (4) "the characteristics distinguishing the group have little relation to legitimate policy objectives or to . . . 'the ability of group members to contribute to society.'"[119]

Young and student voters alike have endured a history of discrimination and political powerlessness with respect to voting. Before the enactment of the Twenty-Sixth Amendment, only three states allowed eighteen-year-olds to vote in state and local elections.[120] Even after the passage of the Amendment, states and their political subsidiaries continued to pass legislation that some courts recognized as an effort to stifle the youth vote.[121] In fact, discrimination against

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after graduation before students were able to register to vote).

117. 117 CONG. REC. 7532, 7540 (statement of Rep. Wiggins).

118. *See id.* (finding that "the act of voting" includes "the full range of rights to participate in the election process").

119. *See* Press Release, U.S. Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

120. As of March 1971, only Alaska, Georgia, and Kentucky allowed eighteen-year-olds to vote. 117 CONG. REC. 7532, 7533. Massachusetts, Minnesota, and Montana allowed those at least nineteen years old to vote, while Hawaii, Maine, and Nebraska required that voters be at least twenty years old. *Id.* All other states required voters to be at least twenty-one years old to vote. *See id.* (stating that only nine states allowed those under twenty-one to vote).

121. *See, e.g.*, Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 245 (N.J. 1972) (finding that the county's requirement that unmarried students register to vote in their parents' place of residence was improper discrimination and a denial of the right to vote based on age).

student voters persists to this day, as some legislators continue to resent the influence young and student voters have in elections.[122]

To argue that young voters have an "immutable characteristic" would be difficult and counterintuitive; age, by its very nature, is not immutable.[123] However, proponents of the Twenty-Sixth Amendment clearly believed that young and student voters had a "distinguishable characteristic" significant enough to warrant its own constitutional protection. By enacting the Twenty-Sixth Amendment, legislators sought to channel and protect "youthful idealism" in the electoral process, a characteristic arguably possessed only by young voters. Even if they are able to vote years later, when their status as a student or young voter no longer frustrates their ability to vote, the "youthful idealism" Congress once hoped to capture may be gone.[124]

Furthermore, the mere existence of the Twenty-Sixth Amendment suggests that, once over the age of eighteen, an individual's age cannot be used as a proxy for inexperience or unawareness. However, some commentators and legislators continue to lambast youth for their inexperience[125] and suggest that their age impedes their ability to be informed voters. In fact, some openly suggest increasing the voting age

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122. *See* Sarah Fearon-Maradey, Note, *Disenfranchising America's Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U.N.H. L. REV. 289, 299–302 (2012) (quoting two New Hampshire legislators who accuse students of diluting the vote in college towns and voting with ignorance and inexperience); Bertrand M. Gutierrez, *Chairman: Eliminate WSSU Early-Voting Site*, WINSTON-SALEM JOURNAL, (Aug. 18, 2013), http://www.journalnow.com/news/elections/local/article_3da9300a-07a2-11e3-b6b3-001a4bcf6878.html [hereinafter Guiterrez, *WSSU Early-Voting Site*] (explaining that the Chairman of the Forsyth County Board of Elections proposed to shut down a college early voting site because he heard professors were offering extra credit to students who voted).

123. *See* Craig v. Boren, 429 U.S. 190, 212 & n.2 (1976) (Stevens, J., concurring) (distinguishing an "immutable characteristic" as one that is determined "solely by the accident of birth"); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360–61 (1978) (suggesting that an "immutable characteristic" is a trait that its possessors are powerless to escape, such as race, age, or illegitimacy).

124. S. REP. NO. 92-26 (1971), *reprinted in* 1971 U.S.C.C.A.N. 941 ("[P]articipation of the young in local and State elections is particularly appropriate and necessary[] and their point of view especially valuable in devising responsible programs.").

125. *See* Fearon-Maradey, *supra* note 122, at 302 (quoting New Hampshire representative Gary Sorg, who claimed students vote with ignorance); Tyler Kingkade, *Things Conservative Pundits Say About Young Voters*, HUFFINGTON POST (Nov. 3, 2014), http://www.huffingtonpost.com/2014/11/03/conservative-pundits-young-voters_n_6094286.html (detailing statements made toward young voters in recent years including Jonah Goldberg's assertion that young voters are "too frickin' stupid to vote" and Ann Coulter's belief that the Twenty-Sixth Amendment should be repealed and replaced with a prohibition on voting until the age of forty).

or endorse policies making it more difficult for young voters to cast their ballots. In maintaining this view, these commentators and legislators suggest that age is inherently related to an individual's ability to bring experience, knowledge, and responsibility to the voting process. The Twenty-Sixth Amendment, with its corresponding testimony and case law, contests the validity of such an arbitrary distinction.[126]

By recognizing that young voters have a history of political powerlessness and discrimination and that they possess certain characteristics not assignable to other classes of voters, an argument for treating age as a suspect class with respect to voting emerges. Recognizing age as a suspect class in matters related to voting further supports the contention that claims brought under the Twenty-Sixth Amendment should receive strict scrutiny.

Taken together, the text, construction, and history of the Twenty-Sixth Amendment support its interpretation as an anti-discrimination amendment, which prohibits a broad range of actions that may discriminate against young or student voters. Furthermore, its textual and historical similarities to the Fifteenth and Nineteenth Amendments support the proposition that legislation that impinges on Twenty-Sixth Amendment rights ought to be subject to strict scrutiny.

B. Developing a Framework for Evaluating Twenty-Sixth Amendment Claims: Borrowing from Fifteenth Amendment Jurisprudence

Symm v. United States[127] established that university and college students have a right to vote in the state and local elections where they attend school and that subjecting them to more stringent registration requirements based on their status as students violates their Twenty-Sixth Amendment rights.[128] It is, therefore, clear that the Twenty-Sixth Amendment prohibits legislation or action that makes explicit age-based distinctions with respect to voting.[129] However, no court has

126. *See, e.g.*, 117 CONG. REC. 7532, 7558 (1971) (statement of Rep. Adams) ("There can be little question that [eighteen]-year-olds today are better informed and more openly committed to a compassionate and just future for our country than at any previous time.").

127. 439 U.S. 1105 (1979) (mem.).

128. *See generally id.* (discussing the different methods states had used to impose restrictions on student voting, such as presumptions of non-residence and demanding questionnaires); *see also* Sloane v. Smith, 351 F. Supp. 1299, 1304–05 (M.D. Pa. 1972) (holding that requiring a higher standard of proof for students seeking to establish domicile violated the Twenty-Sixth Amendment).

129. Although some argue that discrimination based on student status does not equate to discrimination based on age because students may be of any age, courts regularly allow Twenty-Sixth Amendment claims based on impediments to student voting, reasoning that a majority of students are between eighteen and twenty years old.

thoroughly evaluated when facially neutral legislation may violate the Twenty-Sixth Amendment.[130] Given the similarities between the construction of the Fifteenth and Twenty-Sixth Amendments, Fifteenth Amendment jurisprudence should serve as a guide in bringing Twenty-Sixth Amendment claims against facially neutral legislation.

By combining several Supreme Court and lower court decisions, a framework for evaluating facially neutral legislation under the Fifteenth Amendment materializes. Where legislation or an official state action is facially neutral, a plaintiff alleging a violation of the Fifteenth Amendment must be able to show discriminatory purpose, not simply a disproportionate impact.[131] However, a plaintiff may evince a discriminatory purpose by illustrating that the challenged legislation disproportionately affects a certain race.[132] Moreover, a discriminatory purpose may be inferred from the totality of the relevant facts, both direct and circumstantial.[133] In this respect, a plaintiff may use historical background or a specific series of events leading up to the decision,[134] the legislative or administrative history

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See, e.g., Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1368 (1st Cir. 1975) (allowing a class suit on behalf of the entire college community to be brought under the Twenty-Sixth Amendment); United States v. Texas, 445 F. Supp. 1245, 1247–49, 1261 (S.D. Tex. 1978) (concluding that the Twenty-Sixth Amendment protects the right of students to vote in their college communities). *But see* Bright v. Baesler, 336 F. Supp. 527, 531–32 (E.D. Ky. 1971) (reasoning that student voting rights voting cases are distinguishable from minority voting rights cases, and student voting rights cases should be brought under the Fourteenth, rather than the Twenty-Sixth Amendment).

130. *See Walgren*, 519 F.2d at 1367 (upholding facially neutral legislation challenged under the Twenty-Sixth Amendment because county officials made a good faith effort to work with the students to find an acceptable alternative).

131. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion); *see also* Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1287–88 (M.D. Ala. 2013) (ruling that although Section 2 of the Voting Rights Act lessens the burden of proof for plaintiffs, the Fifteenth Amendment still requires a discriminatory purpose).

132. *See Bolden*, 446 U.S. at 70 (stating that disproportionate impact may be used as a starting point); *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) (determining that evidence that the impact of an official action bears more heavily on one race than another is a good starting point for plaintiffs attempting to show an invidious discriminatory purpose).

133. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

134. *See* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 221–25, 231–32 (1964) (using a series of decisions by the Virginia General Assembly, such as closing public schools, opening racially segregated private schools, and using public funds to maintain those private schools, as evidence of an invidious discriminatory intent); Schnell v. Davis, 336 U.S. 933 (1949) (mem.) (noting the fact that the original section of the state constitution detailing voting qualifications had stood for fifty years, and the new amendment came on the heels of a Supreme Court decision that affirmed that voters

behind the action,[135] any departure from normal procedures or substantive criteria,[136] or any other information a court may find relevant. A plaintiff may also demonstrate that the challenged legislation or purpose has no practical purpose except to disenfranchise a certain sector of the population.[137] A plaintiff need not show that the challenged action was motivated solely or primarily by racial considerations;[138] the plaintiff need only show that race was one of the motivating factors in the action or legislation.[139] If a plaintiff can demonstrate that the challenged legislation, although neutral on its face, was enacted with some racially discriminatory intent, it will be subject to strict scrutiny.[140] Under such scrutiny, a law enacted for a racially discriminatory purpose will be invalidated unless it is narrowly tailored to achieve a compelling government interest.[141]

Such a framework can be easily applied to Twenty-Sixth Amendment cases. Thus, where legislation is neutral on its face, a plaintiff alleging a violation of the Twenty-Sixth Amendment must demonstrate that the legislation was enacted with a discriminatory intent—to discourage or frustrate voting among students or young voters. The plaintiff may show a disproportionate impact and use the totality of relevant facts surrounding the legislation to evidence a discriminatory intent. Where

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of all races must be given equal opportunity to vote in state primaries).

135. *Arlington Heights*, 429 U.S. at 268 (asserting that "[t]he legislative and administrative history of the decision may be highly relevant, especially" if there are statements by those involved with the legislation); *see* Davis v. Schnell, 81 F. Supp. 872, 876, 880 (S.D. Ala. 1949) *aff'd*, 336 U.S. 933 (1949) (finding relevant the published testimony of a distinguished Alabama lawyer who had stated that the proposed amendment to the state constitution had the purpose of giving registrars arbitrary power to exclude African Americans from voting).

136. *Arlington Heights*, 429 U.S. at 267.

137. *See id.* at 266; *see also* Shaw v. Reno, 509 U.S. 630, 644 (1993) (ruling that the redistricting legislation at issue was so bizarre that it was "unexplainable on grounds other than race"); Guinn v. United States, 238 U.S. 347, 359 (1915) (concluding that a grandfather clause that had the practical effect of enfranchising only white voters had no discernible purpose other than to disenfranchise black voters).

138. *Arlington Heights*, 429 U.S. at 255–56.

139. *See* Velasquez v. City of Abilene, 725 F.2d 1017, 1022 (5th Cir. 1984) (observing that "[r]acial discrimination need only be one purpose . . . of an official act in order for a violation of the . . . Fifteenth Amendment[] to occur"). *But see* Levy v. Scranton, 780 F. Supp. 897, 901 (N.D.N.Y 1991) (finding that while the subjective intent of some of the legislators impermissibly targeted student voters, this did not automatically mean the subjective intent was a motivating factor on the part of the entire legislature).

140. *See* Miller v. Johnson, 515 U.S. 900, 903–04 (1995) (explaining the legislature's action will be subjected to strict scrutiny where race is the overriding factor).

141. *Id.* at 904.

legislation has been shown to burden a plaintiff's Twenty-Sixth Amendment right, courts ought to apply strict scrutiny.

C. Taken Together, VIVA's Strict ID Requirements, Elimination of Same-Day Voting, Prohibition on Out-of-Precinct Voting, and Termination of Sixteen and Seventeen-Year-Old Registration, Violate the Twenty-Sixth Amendment

Because VIVA is a facially neutral piece of legislation,[142] in order to prevail on their Twenty-Sixth Amendment claim, the students must demonstrate that the challenged provisions of VIVA were motivated by a discriminatory purpose.[143] Although this may seem a daunting task, students may use the totality of the relevant facts, including, if it is true, that the law bears more heavily on young voters, to evidence a discriminatory purpose.[144] Inferring a discriminatory purpose will necessarily require a sensitive inquiry into the facts surrounding the legislation, both circumstantial and direct.[145] Additionally, the students may include relevant background or legislative history.[146]

1. Demonstrating that VIVA will disproportionately affect student and young voters

Currently, students may have difficulty demonstrating discriminatory intent through a disproportionate impact, as VIVA's most damning element for students, its strict identification provision, has yet to take effect.[147] However, there is much to suggest that strict voter identification requirements will likely have a disproportionate effect on student voters. Foremost, students have a recognized difficulty in obtaining identification that complies with such strict standards.[148] In

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142. *See generally* 2013 N.C. Sess. Laws 381 (making no reference to age or status as a college student).

143. *Cf.* Mobile v. Bolden, 446 U.S. 55, 58 (1980) (plurality opinion) (finding that, in order to violate the Fifteenth Amendment, facially neutral legislation must be shown to have been enacted with a discriminatory purpose).

144. *Cf. id.* at 70 ("[T]he impact of the official action—whether it bears more heavily on one race than another—may" be used as evidence of an intentional discriminatory purpose); Taylor v. Haywood Cnty., 544 F. Supp. 1122, 1133 (W.D. Tenn. 1982) ("Necessarily, however, an invidious discriminatory purpose may often be inferred from the totality of relevant facts.").

145. *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (allowing challengers to present circumstantial evidence of a discriminatory purpose, such as a departure from normal legislative procedure).

146. *Cf. id.* at 267 (announcing that those claiming a Fourteenth Amendment violation may use relevant legislative history or background surrounding the legislation or action to show a discriminatory purpose).

147. *See* N.C. GEN. STAT. § 163-166.13 (effective Jan. 1, 2016) (clarifying that the identification requirements will not be enforced until 2016).

148. *See* Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at

fact, this difficulty has led some states to allow students to use their university or college-issued IDs as a form of identification for voting purposes.[149] Under VIVA, students cannot use their student ID as identification for voting purposes. Even under VIVA's new "relaxed" identification provision, which should allow voters without an acceptable form of photo identification to cast a ballot if they can identify a "reasonable impediment," it is unclear whether students will be able to vote without a state or federally-issued ID.

VIVA's restrictions on the use of out-of-state licenses may also disproportionately affect students. Despite the fact that many students come to North Carolina from out-of-state to attend school,[150] VIVA only allows voters to use out-of-state licenses as photo identification if they have registered to vote in North Carolina within ninety days of the election.[151] However, VIVA also mandates that registration books close twenty-five days prior to the election.[152] This leaves would-be voters carrying out-of-state licenses only a fixed sixty-five day period to register to vote. This resembles the voting handicap the Supreme Court found violative of the Fifteenth Amendment in *Lane v. Wilson*.[153] Similar to VIVA, the legislation at issue in that case was facially neutral; however, it had the practical effect of allowing black citizens only twelve days to register to vote.[154] Despite its neutrality, the Supreme Court still found the statute unconstitutional because the statute's practical effect operated against the very class the Fifteenth Amendment sought to protect.[155] It will

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*5 (Pa. Commw. Ct. Jan. 17, 2014) (recognizing that the Pennsylvania Legislature allows student IDs as a form of identification for voting purposes due to the difficulties students would otherwise have in obtaining complaint identification); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 52–54 (2014) (reporting that changes in voter identification laws in Kansas and Tennessee disproportionately affect those in the eighteen to twenty-three age range).

149. *Applewhite*, 2014 WL 184988, at *5.

150. Amended Complaint at 9–10, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13 CV 00660).

151. N.C. GEN STAT. § 163-166.13.

152. *Id.*

153. *Cf.* 307 U.S. 268, 271 (1939) (involving an Oklahoma statute that automatically qualified voters that had voted in the 1914 general election, but required all other voters to register within a twelve-day period or risk losing their right to the franchise permanently).

154. *See id.* at 269–72 (explaining that the 1914 general election had been based on a "grandfather clause" that exempted many white voters from the required literacy test and the 1916 statute then grandfathered those citizens' voting qualifications).

155. *See id.* at 269–77.

likely be difficult for students, with inflexible class schedules and questionable access to transportation, to comply with VIVA's requirement that they register to vote during a specific sixty-five day period.[156]

The prohibition on out-of-precinct and same-day voting may have a disproportionate effect on students as well. With the elimination of out-of-precinct voting, voters are required to vote within their proper precinct, which is determined by the address where the voter has lived thirty or more days prior to the election.[157] For new college students, this is likely their parents' residence, unless the students officially changed their place of residence shortly after their move. This is comparable to the practice of presuming college students are domiciliaries of their parents' residence, a practice that courts have nearly uniformly condemned.[158] Furthermore, students often change residences throughout their college career,[159] a quality that courts have found relevant in determining whether the elimination of certain voting procedures disproportionately affects particular classes of voters.[160]

Despite the fact that the identification provision, which will arguably affect student voters the most, will likely not yet be in effect when this case goes to full trial, students challenging this legislation should still be able to use Fourteenth and Fifteenth Amendment case law to make a colorable argument that these provisions will disproportionately affect them as a class. However, given the recent

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156. The students contesting VIVA may have a difficult time making their case because, by the time the trial takes place, the provision of VIVA outlining the identification requirements will still not have gone into effect. *See* N.C. GEN STAT. § 163-166.13. However, the students should still be able to draw a strong comparison to the fixed registration periods that were found to operate unfairly against black citizens in *Lane v. Wilson.*

157. *Voting in North Carolina*, N.C. STATE BD. OF ELECTIONS, http://www.ncsbe.gov/ncsbe/Voting (last visited Aug. 9, 2015).

158. *See, e.g.*, Jolicoeur v. Mihaly, 488 P.2d 1, 11–12 (Cal. 1971) (holding that the presumption that students are domiciliaries of their parents' residence violates the Twenty-Sixth Amendment).

159. *See* Harmeet Kauer, *College Students Challenge North Carolina Voting Law*, USA TODAY (July 16, 2014, 12:01 PM), http://college.usatoday.com/2014/07/16/college-students-challenge-north-carolina-voting-law-2 (interviewing an Appalachian State University senior who states that she has moved four times during her college experience).

160. *See id.* (reasoning that measures such as out-of-precinct voting and same-day registration can complicate the voting process for students who move to different counties to attend college); *cf.* League of Women Voters v. North Carolina, 769 F.3d 224, 233 (4th Cir. 2014) (issuing a preliminary injunction against the prohibition on out-of-precinct voting, based in part on the finding that 17.1 percent of African Americans moved within the state between 2006 and 2010, compared with only 10.9 percent of whites), *cert. denied*, 135 S. Ct. 1735 (2015).

relaxation of the identification provision, although unclear in its application to students, the students will have to overcome the argument that the relaxation represents an effort by the legislature to come to a mutually acceptable arrangement.[161]

2. Evidencing a discriminatory intent from the relevant background of the legislation

The students will have an easier time demonstrating discriminatory intent from the relevant background and legislative history of the legislation. First and foremost, the students should point out that the impact of the Twenty-Sixth Amendment on communities and states with large student populations has been a concern ever since the Amendment's drafting.[162] In fact, prejudices against student voters are just as strong today as they were during the Amendment's enactment.[163] For example, in 2012, New Hampshire representative Gary Sorg remarked that "average taxpayers in college towns . . . are having their votes diluted" by student voters who vote with "ignorance and inexperience."[164] The New Hampshire House Speaker similarly blamed college students for impeding the ability of college towns to govern themselves.[165] In 2011, Maine's Secretary of State, Charles Summers, sent threatening emails to university students, encouraging them to reregister outside their college towns.[166] Since VIVA's enactment, there has been at least one recognized official act of discrimination against student voters: the closure of the early voting site at Appalachian State University.[167] The students should argue that, similar to southern states with a history of racial discrimination, states that have traditionally been home to large student populations and which have demonstrated

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161. Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1368 (1st Cir. 1975) (concluding that the county officials made a good faith effort to find a mutually acceptable election date and, therefore, the election date was not intended to discriminate against students).

162. *See* 117 CONG. REC. 7532, 7538 (statement of Rep. Michel) ("My principal concern with this particular measure is one that has to do with permitting [eighteen]-year-olds to vote, for instance, in local and municipal elections in college towns.").

163. *See* Fearon-Maradey, *supra* note 122, at 301–02 (quoting representatives who explicitly seek to curb college student voting because they believe student voters dilute the votes of other community residents).

164. *Id.* at 302.

165. *Id.* at 301.

166. *See id.* at 299 (noting that it is not believed that Summers sent such an email to any other class of voters).

167. Anderson v. N.C. State Bd. of Elections, No. 387P14, 2014 WL 6771270, at *2 (N.C. Sup. Ct. Oct. 13, 2014) (finding no other purpose behind the decision to move the voting site off-campus other than an attempt to discourage student voters).

instances of hostility toward student voters should be subject to closer scrutiny for Twenty-Sixth Amendment purposes.[168]

VIVA's legislative history and the sequence of events leading up to VIVA's enactment evidence a discriminatory intent.[169] VIVA's strict provisions came on the heels of a controversial Supreme Court decision, a quality that courts have previously found indicative of discriminatory intent when applied to the Fourteenth and Fifteenth Amendments.[170] In fact, the original legislation, which merely sought to require some form of photo identification for in-person voting, was set aside for three months[171] and saw rapid action only after the Supreme Court issued the *Shelby County* decision.[172] What began as a relatively short document transformed into a fifty-seven page behemoth that among other things, denied the use of student IDs, placed strict requirements on the use of out-of-state licenses, ended same-day registration, prohibited out-of-precinct voting, and eliminated teenage preregistration.[173] The opportunistic timing of this draconian legislation suggests that its drafters did not believe such legislation would have passed the scrutiny of the Department of

168. *Cf.* Lane v. Wilson, 307 U.S. 268, 268–71 (1939) (recognizing Oklahoma's history of racial discrimination and citing it as a reason to infer discriminatory intent); Taylor v. Haywood Cnty., 544 F. Supp. 1122, 1130, 1133 (E.D. Tenn. 1982) (finding a history of racial discrimination relevant in an alleged Fifteenth Amendment violation).

169. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (establishing that the sequence of events leading up to legislation may often be relevant in determining whether there was discriminatory intent).

170. *See* Schnell v. Davis, 336 U.S. 933 (1949) (mem.) (recognizing that the new amendment, which mandated prospective voters be able to understand and explain any section of the United States Constitution, came on the heels of a Supreme Court decision affirming that voters of all races must be given equal opportunity to vote in state primaries); *see also* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 221 (1964) (observing that shortly after *Brown v. Board of Education*, which found school segregation unconstitutional, Prince Edward County's school board began to shut down all public schools, effectively forcing students to go to racially segregated private schools); Sloane v. Smith, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972) (tracing the origin of a county's change in voting procedure to the VRA, which enfranchised eighteen-year-olds). Relatedly, in *Arlington Heights*, the Supreme Court reasoned that it would be suspicious if a tract of property had been zoned as multi-family, but was suddenly re-zoned as single-family when officials learned of a plan to erect multi-family housing. 429 U.S. at 267.

171. League of Women Voters v. North Carolina, 769 F.3d 224, 231, 242 (4th Cir. 2014) (noting that after *Shelby County*, North Carolina "rushed" to pass VIVA "literally the next day"), *cert. denied*, 135 S. Ct. 1735 (2015).

172. *See id.* at 242–43 (reasoning that at this time the North Carolina Senate believed they would have to submit the legislation to the United States Department of Justice for clearance, but the Senate also knew that the Supreme Court was considering a challenge to the enforceability of section 5 of the Voting Rights Act).

173. *See generally* 2013 N.C. Sess. Laws 381.

Justice, likely because the drafters recognized that aspects of the legislation would have been considered discriminatory.[174]

The political climate in North Carolina surrounding the enactment of VIVA suggests discriminatory intent.[175] North Carolina is home to hundreds of thousands of college and university students,[176] and the size and influence of this class of voters is relevant in determining the motivations behind official action or legislation.[177] Student voters played an enormous role in the 2008 and 2012 presidential elections; commentators believe these voters were responsible for transforming North Carolina into a blue state for the first time in over a generation in 2008.[178] Although Republican presidential candidate Mitt Romney took the state in 2012, he won by only a narrow margin,[179] and two-thirds of voters under thirty-years-old still voted for President Barack Obama.[180] Commentators assert that student voters were responsible for keeping the election close.[181] The fact that Republican legislators passed such austere legislation following a period of such intense student influence suggests they were trying to "fenc[e] out" students based on the way they vote.[182]

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174. *Cf.* Davis v. Schnell, 81 F. Supp. 872, 876, 880 (S.D. Ala. 1949) *aff'd*, 336 U.S. 933 (1949) (concluding that a review of the circumstances and history surrounding the enactment of the amendment illustrate that its purpose was to frustrate the ability of African-American would-be voters to cast their ballots).

175. *Cf.* Veasey v. Perry, 71 F. Supp. 3d 627, 637–38 (S.D. Tex. 2014) (finding relevant testimony that, at the time Texas was enacting its voting law, the state was undergoing a demographic shift that suggested Republicans would face a declining voter base).

176. Amended Complaint at 7, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13 CV 00660); *see also About Our System*, U. OF N.C., http://www.northcarolina.edu/?q=content/about-our-system (last visited Aug. 9, 2015) (highlighting the more than 220,000 students enrolled at sixteen state system campuses).

177. *See* Sloane v. Smith, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972) ("The fact that Pennsylvania State University, with a student population of 27,200, is located within Centre County, with a total population, including the students, of 99,450 cannot be overlooked.").

178. Apuzzo, *supra* note 32 (reporting that, in 2008, students voted "overwhelmingly" for Barack Obama, while he lost every other age group).

179. Stephanie Strom, *Election 2012: North Carolina*, N.Y. TIMES (Nov. 6, 2014), http://elections.nytimes.com/2012/results/states/north-carolina (illustrating that, in North Carolina, Romney received 50.6 percent of the votes, while Obama received 48.4 percent of the votes).

180. Kingkade & Knafo, *supra* note 10.

181. Apuzzo, *supra* note 32 (noting that student voter turnout was fifty-seven percent, among the highest turnout rates in the country).

182. *See generally* Carrington v. Rash, 380 U.S. 89, 93–95 (1965) (holding that legislators may not fence out a sector of the population based on the way that group of individuals generally votes).

Legislator statements surrounding VIVA's enactment also indicate a discriminatory purpose.[183] Just one day after the Supreme Court handed down its decision in *Shelby County*, which allowed North Carolina to pass electoral legislation without federal preclearance, one senator remarked, "So, now we can go with the full bill."[184] Such a statement illustrates that legislators already had an alternate version of the bill that responded not to changing electoral conditions, but rather to a Supreme Court decision.[185] During the committee meeting concerning the legislation, Jamie Phillips, counsel for the NAACP, spoke before the North Carolina Senate Rules Committee: "The fewer young people and minorities who vote, the better it seems in your minds. We get it. No one is being fooled."[186] Phillips's confrontation with the Rules Committee echoes a situation the Supreme Court found relevant in *Schnell v. Davis*,[187] where members of the legal community suggested that the purpose of a proposed state amendment was discriminatory.[188] Furthermore, during VIVA's debate, opponents openly characterized the measure as disproportionately affecting African Americans, young voters, and the elderly.[189]

The elimination of teenage preregistration[190] and the mandated high school voter registration drive[191] further demonstrate that

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183. *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (stating that aspects of the legislative history, especially statements by members of decision-making bodies, may be highly relevant in determining the existence of discriminatory intent).

184. N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322, 336 (M.D.N.C. 2014).

185. *But see* United States v. O'Brien, 391 U.S. 367, 383–84 (1968) (reasoning that the statements of only a few legislators may be irrelevant because what motivates one legislator to make a speech about a statute is not necessarily what motivates others to enact it).

186. *McCrory*, 997 F. Supp. 2d at 337.

187. 336 U.S. 933 (1949) (mem.).

188. Davis v. Schnell, 81 F. Supp. 872, 876, 880 (S.D. Ala. 1949) *aff'd*, 336 U.S. 933 (1949) (affirming the Alabama District Court's decision, which suggested that published statements from the legal community alleging that the purpose of the Boswell Amendment was to disenfranchise African Americans contributed to the claim that the Legislature had a general understanding that this would be the effect of the amendment).

189. *McCrory*, 997 F. Supp. 2d at 337; *see also* Marcia Mercer, Can We Still Vote?, AARP (Aug. 20, 2012), http://www.aarp.org/politics-society/government-elections/info-01-2012/voter-id-laws-impact-older-americans.html (explaining that one in five senior citizens lacks a current government-issued photo ID, and many senior citizens lack the proper documentation to be issued a new ID).

190. N.C. GEN. STAT. § 163-82.23 (2014) (eliminating the word "preregister" from the former provision); *see also* Anne Blythe, *Elimination of NC Voter Preregistration Program Creates Confusion for DMV and Elections Officials*, CHARLOTTE OBSERVER (Jul. 2, 2014), http://www.charlotteobserver.com/2014/07/02/5020938/elimination-of-nc-voter-

VIVA's proponents sought to discourage young voters from participating in the electoral process. While sixteen- and seventeen-year-olds have no constitutionally protected right to vote,[192] the legislature's decision to end this program, which has seemingly no relation to the issue of voter fraud,[193] bolsters the argument that the legislature was trying to discourage political participation of young voters by making it less convenient for young voters to register.

VIVA's prohibition on the use of university- and college-issued student IDs for voting[194] further demonstrates a discriminatory intent. Student IDs are the one form of photo identification every young voter is likely to possess. In September 2014, the Government Accountability Office released a study stating that, of the twenty states that require photo identification for in-person voting, twelve states accept student IDs for photo identification.[195] The willingness of other states to accept student IDs as voter identification suggests that the prohibition of student IDs is not significantly related to the prevention of voter fraud and is merely being used to impede student voting.[196] In allowing student IDs to be used as voter identification, the Pennsylvania legislature recognized that students would otherwise face difficulties obtaining a compliant form of identification.[197] Strengthening this notion is the fact that North Carolina is willing to make considerations for other groups; it allows service members to use their military IDs and permits individuals over seventy-years-old to use an expired license.[198] This situation can be analogized to the

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preregistration.html#.VDbcY_l4rwg (acknowledging that, since the preregistration was enacted in 2010, over 50,000 sixteen- and seventeen-year-olds have preregistered every year).

191. 2013 N.C. Sess. Laws 1538.

192. *See* U.S. CONST. amend. XXVI (enfranchising only those eighteen years and over).

193. *Cf.* Shaw v. Reno, 509 U.S. 630, 657–58 (1993) (noting that the North Carolina General Assembly adopted a reapportionment scheme "so irrational on its face that it can be understood only as an effort to segregate voters" based on their race); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (reasoning that departures from substantive criteria related to the goals of the legislation may be taken into consideration).

194. N.C. GEN STAT. § 163-166.13.

195. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 18 (Sept. 2014).

196. *Cf.* Burns v. Fortson, 410 U.S. 686, 688–89 (1973) (Marshall, J., dissenting) (per curiam) (arguing that, because many states can close their registration books only thirty days before the election, Georgia's need to close its registration books fifty days before the election seemed less compelling).

197. Applewhite v. Commonwealth, No. 330 MD. 2012, 2014 WL 184988, at *3 (Pa. Commw. Ct. Jan. 17, 2014).

198. N.C. GEN STAT. § 163-166.13.

situation confronted in *United States v. Bibb County Democratic Executive Committee*,[199] where polling stations separated by race were found to violate the Fifteenth Amendment because, even though the right to vote remained intact, distinctions based on race discouraged participation.[200] By allowing some groups, but not others, to use special identification for voting purposes, VIVA draws distinctions based on group membership that may discourage participation.

Furthermore, the combination of the prohibition on student IDs and the restriction on out-of-state licenses effectively require students to pledge to stay in the community after graduation, a tactic the Supreme Court found violative of the Twenty-Sixth Amendment in *Symm v. United States*.[201] By preventing students from using their university-issued identification for voting purposes, the state confines most students to a driver's license as a source of identification. As previously mentioned, however, an individual may only use an out-of-state driver's license as identification for in-person voting if they have registered to vote within ninety days of the election. Therefore, in order to vote in the community where they attend school, an out-of-state student attending a college or university in North Carolina generally must obtain a North Carolina driver's license. In *Symm*, the Court agreed with the lower court's finding that laws requiring students to manifest an intent to stay in the community where they attend school in order to register to vote violated the Twenty-Sixth Amendment.[202] Students in North Carolina can analogize VIVA's provisions to this holding, arguing that VIVA's provisions effectively require students to pledge to stay in the community where they attend school in order to vote there.

The closing of college polling stations during VIVA's enactment further indicates that officials sought to suppress the voices of young voters.[203] Since VIVA's enactment in 2013, county boards of election

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199. 222 F. Supp. 493, 499 (M.D. Ga. 1962).

200. *See id. at* 494–95, 499 (illustrating that requiring citizens to vote only at specific polling stations based on racial distinctions impaired the overall ability of Bibb County citizens of all races to vote because African Americans could show up to vote and be turned away based on the color of their skin).

201. 439 U.S. 1105 (1979) (mem.).

202. *Id.*; *see also* Sloane v. Smith, 351 F. Supp. 1299, 1304–05 (M.D. Pa. 1972) (concluding that because a policy that operated to require college students to show a Pennsylvania driver's license in order to register to vote was adopted out of fear of student influence in elections, it violated the Twenty-Sixth Amendment).

203. *See* Perkins v. Matthews, 400 U.S. 379, 387–88 (1971) (announcing that the location of polling places has an obvious potential for denying or abridging the right to vote); *see also* S. REP. NO. 92-26, at 14 (1971) (stating that forcing young voters to

have shut down early voting sites on several college campuses across the state.[204] Local election officials argue that some of these closures were mandated by pre-existing law that required all polling locations have curbside voting for disabled voters.[205] Chairman of the Forsyth County Board of Elections closed the early-voting station at the historically black Winston-Salem State University upon discovering that professors were offering their students credit if they voted.[206] Similarly, the Watauga County Board of Elections eliminated the polling station historically located on Appalachian State University's campus, citing voter confusion as their justification.[207] The Board relocated the polling station to a county building located off a busy road with no sidewalks,[208] over a mile from campus.[209] There is no public transportation.[210] Students filed a lawsuit in Wake County Superior Court challenging the closure. The judge agreed that the primary intent of the board's decision was to discourage young voters.[211] Closing college polling stations and relocating the stations in relatively inaccessible areas may provide evidence that elected officials are unresponsive to the needs of students or are trying to

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undertake burdens such as traveling to a centralized location would dissuade them from voting, in contravention of the VRA and equal protection under the law afforded to young voters by the Fourteenth Amendment); Fish, *supra* note 15, at 1181 (suggesting that the closing of college polling stations could be seen as a policy that "abridge[s]" the right to vote based on age).

204. Evan Walker-Willis, *Blocking the Youth Vote in the South*, INST. FOR S. STUDIES (Oct. 29, 2014, 10:54 AM), http://www.southernstudies.org/2014/10/blocking-the-youth-vote-in-the-south.html (reporting that North Carolina State University, Duke University, Winston-Salem State University, East Carolina University, Appalachian State University, and University of North Carolina at Charlotte all experienced poll closures).

205. *Id.*

206. Gutierrez, *WSSU Early-Voting Site*, *supra* note 122 (stating that the Chairman thought such voting was illegal and led to "irregularities").

207. Bertrand M. Gutierrez, *Access to Boone Voting Site Raised as Major Concern*, WINSTON-SALEM JOURNAL, (Aug. 18, 2014, 12:00 AM), http://www.journalnow.com/news/state_region/article_9a0bc822-07a6-11e3-ab6f-001a4bcf6878.html [hereinafter Gutierrez, *Access to Boone Voting Site*].

208. *Id.*

209. Walking Directions from Plemmons Student Union to the Watauga Cnty. Agric. Conference Ctr., Google Maps, https://www.google.com/maps (follow "Get Directions" hyperlink; then search "A" for "Plemmons Student Union" and search "B" for "Watauga County Agricultural Conference Center"; then follow "Get Directions" hyperlink).

210. Gutierrez, *Access to Boone Voting Site*, *supra* note 207. One ASU student commented that she believed the new location would discourage many would-be student voters. *See id.* (stating that the student knew a lot of people who said they had no way of getting to the new polling station and did not want to walk along the road).

211. Anderson v. N.C. State Bd. of Elections, No. 14-CVS-12648, 2014 WL 6771270, at *1 (N.C. Sup. Ct. Oct. 13, 2014) (denying summary judgment for county board of elections).

dissuade students from voting, situations courts often find relevant in Fourteenth and Fifteenth Amendment inquiries.[212]

Borrowing from Fourteenth and Fifteenth Amendment jurisprudence, students challenging facially neutral legislation under the Twenty-Sixth Amendment must show the legislation was enacted with a discriminatory intent and may demonstrate the discriminatory intent using all relevant information surrounding the law's enactment. In pursuit of this goal, the students in North Carolina may evidence the probable disproportionate effects of VIVA's fixed registration periods for out-of-state licenses and the prohibition of the use of student IDs. The students can also reference VIVA's accelerated journey through the legislature as well as legislator statements surrounding its enactment to evidence a discriminatory purpose. Similarly, the closure of college campus voting stations and the termination of teenage preregistration indicate that legislators and officials intended to curb the youth vote. Where young or student voters can use facts such as these to demonstrate that legislation was created with discriminatory intent, the Twenty-Sixth Amendment should trigger strict scrutiny.

D. VIVA Would Fail Strict Scrutiny

In order to survive strict scrutiny, a state must show it has a compelling interest in regulating the material and the legislation is narrowly tailored to achieve the compelling interest.[213] Under such a formulation, the burden is on the state to show that its interest is not only compelling, but cannot be served by less restrictive means.[214] North Carolina, like many states that have enacted stricter voting regulations, asserts that the purpose of its new voting legislation is to combat voter fraud. The Supreme Court has recognized and defended curbing voter fraud as a compelling state interest.[215] Those

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212. *Cf.* Rogers v. Lodge, 458 U.S. 613, 613, 625–26 (1982) (finding the unresponsiveness and insensitivity of local officials to the needs of black communities relevant to the discriminatory intent inquiry). While a finding that local officials have been "unresponsive" to the needs of a particular class generally involves an inquiry into past abuses, the Supreme Court has noted that contemporaneous acts of discrimination have more probative value. *See id.* at 613; *see also* McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987).

213. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (reasoning that strict scrutiny requires an important governmental goal and that the methods used to reach such goal be a close fit).

214. *See id.* (concluding that the fit must be so close that there is little to no doubt the legislation is serving no other purpose).

215. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191, 196 (2008)

seeking to challenge VIVA or similar legislation on Twenty-Sixth Amendment grounds would have a difficult, if not impossible, time arguing that combating voter fraud is not a compelling state interest. This would likely be true even in states such as North Carolina where instances of voter fraud are low.[216] However, many voter identification laws, including VIVA, have measures that are so excessive in comparison to the relatively low risk of in-person voter fraud[217] that it suggests reducing voter fraud is not the legislation's only purpose. Legislation that has restrictions so out of proportion with the state interest cannot be said to be "narrowly tailored."

Proponents of VIVA and similar legislation could defend the prohibition on student IDs by arguing that, unlike other forms of accepted identification, student IDs are not government-issued. Supporters of VIVA could assert that the law's willingness to accept expired licenses and military licenses but not student IDs is not based in student discrimination, but is rather based on an effort to ensure that everyone who votes has a government issued form of identification. Even proponents of Texas's voting laws, which allow gun owners to use their concealed carry permits as identification for in-person voting, but do not allow students to use their student IDs,[218] could maintain that because a government-issued ID is required to obtain a concealed carry permit,[219] such permit demonstrates that the carrier possesses a proper government-issued ID. However, it is unclear how disallowing student IDs, which often bear a photo of the student, the student's name, an expiration date, and the name of an educational institution within the state, has any relation to combating

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(finding that there is "no question" of the "legitimacy" and "propriety" of a state's interest in using a variety of methods to prevent voter fraud).

216. *See Widespread Voter Fraud Not an Issue in NC, Data Shows*, *supra* note 73 (stating that, in the 2012 elections, voter fraud allegations accounted for only 0.00174 percent of ballots cast).

217. *See* Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUSTICE 6 (2007), http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf (finding that the type of voter fraud targeted by photo identification laws is more rare than death by lightning strike). Judge Posner recently rejected voter fraud justifications for the strict voter identification laws in Wisconsin, citing the low incidence of voter fraud in Wisconsin. *See* Frank v. Walker, 773 F.3d 783, 788, 791, 795 (7th Cir. 2014) (Posner, J., dissenting) (alleging that the Wisconsin legislature had created a solution to resolve a non-existent voter fraud problem by quipping, "If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?").

218. Rosenthal, *supra* note 9.

219. TEX. DEP'T OF PUB. SAFETY REGULATORY SERVS. DIV., Concealed Handgun Licensing, https://www.txdps.state.tx.us/internetforms/Forms/CHL-6.pdf (last visited Aug. 9, 2015).

in-person voter fraud.[220] Moreover, as previously mentioned, given the fact that many other states allow student IDs to be used as identification for in-person voting, it is less convincing that these forms of identification pose a serious threat of being used to perpetuate voter fraud.[221] Supporters of VIVA have not shown that eliminating an entire class of identification is the least restrictive way to lessen the threat of in-person voter fraud.

VIVA's proponents have similarly failed to show that the provision eliminating North Carolina's preregistration for sixteen- and seventeen-year-olds is narrowly tailored to serve the state's compelling interest of combating voter fraud.[222] As previously mentioned, individuals under eighteen-years-old do not have a constitutional right to vote. However, it is unclear how doing away with a program that simply added teenagers' names to the voter rolls once they turn eighteen is related to the state's asserted goal of reducing in-person voter fraud. In fact, some suggest that the new legislation complicates the process of registering eighteen-year-old voters. Complicating the process could arguably lead to an increase in improper names being added to the voter lists—quite the opposite of the state's asserted interest and clearly not narrowly tailored.

In demonstrating the need for the restrictions on out-of-state licenses, supporters of VIVA could argue that states have an interest in ensuring that voters are "bona fide residents" of the state and that requiring all would-be voters to bear an in-state license is an effective method in achieving this end. However, the state has not shown this is the least restrictive method for demonstrating a voter is a bona-fide resident, especially when considering the unique

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220. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (reasoning that departures from substantive criteria related to the goals of the legislation may be taken into consideration). *But see* Reply in Support of Defendants' Motion to Dismiss at 13, Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (Nos. 2:13-CV-193, 2:13-CV-263, 2:13-CV-291) (arguing that, unlike the other forms of identification accepted by Texas's voter identification law, student IDs do not demonstrate that the holder is a resident of Texas).

221. Because so many other states accept student IDs and out-of-state licenses as identification for in-person voting, it is less clear that this restriction is rationally related to the state goal of reducing voter fraud. *Cf.* Burns v. Fortson, 410 U.S. 686, 688–89 (1973) (Marshall, J., dissenting) (per curiam) (arguing that because many states can close their registration books only thirty days before the election, Georgia's need to close its registration books fifty days before the election seemed less compelling).

222. *Cf.* Veasey v. Perry, 71 F. Supp. 3d 627, 702 (S.D. Tex. 2014) (noting that the defendants did not demonstrate that the discriminatory features of Texas's voting law were necessary to prevent fraud).

position of students; the Supreme Court has held that officials cannot require students to pledge an intent to stay in the community where they attend school in order to register to vote.[223]

Despite the relatively low threat of in-person voter fraud, arguing that reducing voter fraud is not a compelling state interest may be a losing argument. Although the burden is still on the state to show that preventing voter fraud is a compelling state interest, it is likely an assertion that most courts will accept. In contrast, states that have enacted restrictive voting legislation may have a more difficult time illustrating such laws are narrowly tailored to achieve this goal.

III. RECOMMENDATION

The Twenty-Sixth Amendment should trigger strict scrutiny when facially neutral legislation is enacted with the purpose of frustrating young or student voting. Courts reviewing Twenty-Sixth Amendment claims should treat student and young voters as a suspect class with respect to voting, given the history of purposeful exclusion of young individuals from the franchise until the 1970s and given the continued suspicion of young voters.[224] A court should evaluate a Twenty-Sixth Amendment claim against facially-neutral legislation as it would for Fourteenth and Fifteenth Amendment claims, by requiring the presence of a discriminatory purpose[225] and allowing plaintiffs to demonstrate such discriminatory purpose from the totality of relevant facts, including disproportionate impact.[226] Courts should pay special attention where, as is the case in North Carolina, a state seeks to restrict the use of student IDs and out-of-state licenses for voting purposes, as these two forms of identification are so heavily relied upon by students.[227] In particular, courts should recognize that a prohibition on student IDs is not narrowly tailored to the prevention of fraud and likely indicates that such legislation was enacted under an ulterior motive. This is especially salient where the legislation makes exceptions for other types of identification, such as military IDs and handgun licenses.

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223. Symm v. United States, 439 U.S. 1105 (1979) (mem.).

224. *See supra* Part II.A.3. (providing a history of youth voter issues).

225. *See supra* Part II.B. (discussing the background and history of discriminatory purpose).

226. *See supra* Part II.B. (outlining the connection between demonstrating discriminatory purpose with scrutiny of laws involving racial impacts and VIVA's use of age).

227. *See supra* note 148 and accompanying text (discussing the inherent difficulty for a student to obtain proper identification and providing the example of the Pennsylvania legislature allowing student identification due to this hardship).

The group of students alleging that VIVA violates the Twenty-Sixth Amendment ought to bring the claim as a class action rather than as individual plaintiffs, as all other cases brought under the Twenty-Sixth Amendment have done.[228] As it is unlikely that any of the students will have been denied the right to vote when this case goes to trial, it will be difficult to successfully assert an individual interest. The students can argue VIVA's legislative history, statements from legislators and the legal community concerning the legislation, VIVA's elimination of teenage preregistration and student IDs, and the closing of some college polling stations indicate that one of the purposes in enacting VIVA was to curb the influence of young voters in North Carolina.[229] Moreover, the students can argue that although the strict identification requirements have yet to take effect, such requirements could have a disproportionate impact on young and student voters.[230] The students should concede that preventing voter fraud is a legitimate state interest, but note that VIVA's measures are so out of proportion with the actual threat of voter fraud that the legislation is not narrowly tailored to the state's goal of combating voter fraud.

When considering the case, the court should endorse a broad reading of the Twenty-Sixth Amendment. Such a reading will not only be consistent with the Amendment's history and plain text, but it will also demonstrate a continued commitment to the purpose of the Twenty-Sixth Amendment, which was to encourage political participation of youth.

CONCLUSION

Contrary to popular belief, the Twenty-Sixth Amendment was not a narrowly tailored response to the increasing youth activism and opposition to the Vietnam War in the 1960s. The statements made by legislators debating the Amendment, the Amendment's textual similarities to other anti-discrimination amendments, and judicial interpretation in the years following its enactment all suggest that the Twenty-Sixth Amendment was written as an anti-discrimination amendment similar to the Fourteenth and Fifteenth Amendments.

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228. *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 365 (M.D.N.C. 2014) (noting that all the Twenty-Sixth Amendment cases cited to the court had been brought as class actions).

229. *See supra* Part II.C.2. (discussing the relevant legislative history of VIVA to demonstrate the discriminatory intent required to assert a constitutional claim).

230. *See supra* Part II.C.1. (demonstrating disproportionate impact by arguing that students have historically had trouble obtaining the types of identification required under the North Carolina voter law).

As an anti-discrimination amendment, it has the power to not only invalidate legislation that explicitly distinguishes young and student voters from other classes of voters, but also to nullify facially neutral legislation that was enacted with the purpose of frustrating the ability of young voters to participate in the franchise.

Similar to the Fourteenth and Fifteenth Amendments, the Twenty-Sixth Amendment should trigger strict scrutiny when challengers can show that facially neutral legislation or official action was undertaken with discriminatory intent. Those claiming a Twenty-Sixth Amendment violation can demonstrate a discriminatory purpose through the totality of the circumstances surrounding the legislation or action, including possible disproportionate effects, relevant background and legislative history, statements of officials, and other events surrounding the enactment of the legislation. Challengers do not need to show that the frustration of the youth vote was the primary purpose of the legislation or action, but they should show that it was a motivating factor behind the legislation or action. If those claiming a Twenty-Sixth Amendment violation can illustrate a discriminatory purpose through the totality of the circumstances, the court should apply strict scrutiny and invalidate the legislation or action unless the state can show it serves a compelling state interest and is narrowly tailored toward that interest.

North Carolina's Voter Information Verification Act (VIVA) was enacted with a discriminatory purpose. By placing fixed registration periods for out-of-state licenses and prohibiting the use of student IDs, VIVA places extra burdens on a group that is likely to have inflexible schedules, lack experience with voting procedures, and has a history of political powerlessness. By eliminating teenage preregistration, VIVA discarded a straightforward program that merely added teenagers to the voter rolls the moment they turned eighteen. Eradication of the programs appears to bear no relation to the issue of in-person voter fraud and demonstrates a lack of concern for the ability of new voters to register to vote. The relocation of several college polling stations surrounding VIVA's enactment further evidences an attempt to impede student voting. Additionally, the legislation's temporal proximity to the *Shelby County* decision, coupled with the strong influence of young voters in recent years, suggest that VIVA's restrictive provisions were intended to fence-out young and student voters.

Despite the low rate of in-person voter fraud, courts have generally recognized the prevention of voter fraud as a compelling interest. North Carolina would likely be successful in this assertion. However, VIVA's provisions are so out of proportion with the relatively low risk

of voter fraud that the legislation should fail strict scrutiny because it is not "narrowly tailored" to the prevention of voter fraud.

Young and student voters seeking to challenge similar voting laws in other states can use the North Carolina example as a guide in structuring their own arguments. While North Carolina's laws are particularly restrictive, the new voting laws enacted in many states may be susceptible to a Twenty-Sixth Amendment challenge.