
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 74 | ISSUE 5 SUMMER 2022

THE FUTURE IS UNWRITTEN: RECLAIMING THE TWENTY-SIXTH AMENDMENT

Yael Bromberg *

INTRODUCTION TO THE *RUTGERS UNIVERSITY LAW REVIEW*
2022 VOTING RIGHTS SYMPOSIUM ISSUE

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

In April 2022, *Rutgers University Law Review* hosted the first law symposium ever to be dedicated to the Twenty-Sixth Amendment, resulting in this first-of-a-kind legal collection. It took a fifty-year anniversary for the Twenty-Sixth Amendment to garner the attention of legal academia. For those familiar with the history of Rutgers School of Law, it is no surprise that the People's Electric Law School served as the home for the occasion,[2] bringing together the top voting rights litigators

* Yael Bromberg, Esq. practices democracy law on the local, state, and federal level as principal of Bromberg Law LLC and as special counsel and strategic advisor for The Andrew Goodman Foundation, a national organization dedicated to making youth voices and votes a powerful force in democracy. Bromberg lectures at Rutgers School of Law, where she teaches election law and the political process, and served as faculty advisor for the underlying *Rutgers University Law Review* 2022 Symposium: Voting Rights Reform: The 26th Amendment, Youth Power, Lawmaking, and the Potential for a Third Reconstruction. She worked with federal offices to architect the Youth Voting Rights Act, a sweeping, comprehensive measure introduced in Congress in July 2022 to uphold the promise of the Twenty-Sixth Amendment. This introductory article benefited from insightful comments on an early draft by Professor of Law Joshua Douglas and of course from the rich discussion generated by the underlying symposium. Thanks to *Rutgers University Law Review* editors John Byrnes, Sarah Calderone, and Lea Dyce for their leadership stewarding the underlying symposium, and to their team for excellent editing. Thank you to my family for the support that makes this work possible.

1. U.S. CONST. amend. XXVI, §§ 1–2.

2. *See* PAUL TRACTENBERG, A CENTENNIAL HISTORY OF RUTGERS LAW SCHOOL IN NEWARK: OPENING A THOUSAND DOORS 53–66 (2010). Between 1968 and 1977, Rutgers Law embraced the term People's Electric Law School based on its pioneering role in legal clinical academia, which transformed the traditional legal academia to one that situated students

in the nation with the original youth organizers and legislative aides who advanced ratification in 1971, contemporary youth organizers and advocates, legal scholars and law school clinicians, undergraduate educators and their students, and university administrators committed to youth civic and political participation.[3] The *Rutgers University Law Review* symposium urged participants to consider where the next fifty years will lead us as we approach the centennial of the Twenty-Sixth Amendment. The multiple contributors to the symposium and this resulting issue uniformly recognized the current limitations of federal Twenty-Sixth Amendment litigation and sought to build public consensus to advance the right.

alongside their clients, engaging them in public interest lawyering in federal and state courts. The school's embrace of a renewed public interest mission was evident through its pioneering commitment to a diverse student and faculty body, including the enrollment of large numbers of African-American students, many with backgrounds in civil rights activity, such as former President and CEO of The Leadership Conference on Civil and Human Rights Wade Henderson, and the enrollment and recruitment of a large number of women, such as then second-career young mother, now Senator Elizabeth Warren, and a young female professor named Ruth Bader Ginsburg whose students encouraged her to lead a legal campaign for gender equality. *See id.*

3. *2022 Voting Rights Symposium*, RUTGERS UNIV. L. REV., https://rutgerslawreview.com/symposium-2022/ (last visited Oct. 26, 2022). Beyond those whose work is published within this issue, the April symposium benefited from notable remarks by: Leah Aden, Deputy Director of Litigation at NAACP Legal Defense & Education Fund; Jason Berman, longtime Chief of Staff to Senator Birch Bayh, Founder and Chairman of the important Senate Judiciary Subcommittee on Constitutional Amendments; Laura Brill, Esq., Founder and Director of The Civics Center; Professor Reverend Cornell Brooks, Esq. of the Harvard Kennedy and Divinity Schools and Director of The William Monroe Trotter Collaborative for Social Justice; Law Professor Jenny Diamond Cheng of Vanderbilt Law School; Aderson B. Francois, Professor of Law and Director of the Institute for Public Representation Civil Rights Clinic of Georgetown University Law Center; Charles Imohiosen, Esq., President and CEO of The Andrew Goodman Foundation; Patricia Keefer, who led the state and federal organizing effort for Twenty-Sixth Amendment ratification as a then-youth organizer, currently Director of the International Affairs Department with the American Federation of Teachers; Law Professor Charisa Kiyo Smith of CUNY School of Law; and Professor Elizabeth Matto, Director of the Center for Youth Political Participation at the Eagleton Institute of Politics. Critical contributions were offered by formidable youth leaders within The Andrew Goodman Foundation network, including Evan Marlbrough, founder of the Georgia Youth Poll Worker Initiative and currently a fellow with ACLU-Georgia, and journalists Tamia Fowlkes and Shreya Bandyopadhyay of the University of Wisconsin-Madison. Keynote addresses were delivered by U.S. Election Assistance Commissioner Ben Hovland and N.J. Secretary of State Tahesha Way, incoming President of the National Association of Secretaries of State. *See id.*

The Twenty-Sixth Amendment has laid largely dormant since the decade following its ratification on July 1, 1971.[4] The seventies brimmed with Twenty-Sixth Amendment jurisprudence applying the strictest standard of review, strict scrutiny, which is what the Supreme Court once applied to other voting restrictions. During that era, state and federal courts across the country, including a summary affirmance by the United States Supreme Court in 1979, upheld application of strict scrutiny to invalidate youth voter infringements, such as efforts to deny the right to vote from a campus address.[5]

4. As described by Jason Berman, longtime chief of staff to Indiana Senator Birch Bayh, who was chairman of the important Senate Judiciary Subcommittee on Constitutional Amendments:

> The speed by which the Twenty-Sixth Amendment was ratified may have contributed to its subsequent neglect. In retrospect, a culmination of events at the turn of the 1970s – Vietnam, campus unrest, the Draft, extension of the Voting Rights Act, and publication of the Pentagon Papers – may have led the Twenty-Sixth Amendment to be viewed as a product of the moment. Unfortunately, constitutional scholars and historians immediately turned their attention to the Equal Rights Act and the abolition of the electoral college.

Telephone Interview with Jason Berman, Chief of Staff, U.S. Senator Birch Bayh (Aug. 8, 2022); *see also* JENNIFER FROST, "LET US VOTE!": YOUTH VOTING RIGHTS AND THE 26TH AMENDMENT 301–08 (2022).

5. *See, e.g.*, Symm v. United States, 439 U.S. 1105, 1105 (1979), *aff'g,* United States v. Texas, 445 F. Supp. 1245, 1247–48, 1254–55, 1261 (S.D. Tex. 1978) (reviewing Title III of the Voting Rights Act Amendments of 1970 in evaluating whether a Twenty-Sixth Amendment violation exists, including whether a precondition to voting "bear[s] a reasonable relationship to any compelling State interest," and reviewing related "[l]itigation . . . necessary to enforce the promises of Title III of the Voting Rights Act Amendment of 1970, and the 26th Amendment" in finding unconstitutional a residency questionnaire that was part of a more pervasive pattern of conduct to limit student voter registration from college campuses addresses, and that treats young registrants differently than other voters); Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1367–68 (1st Cir. 1975) (determining that, even under a rigorous standard of review, the holding of a special contest during winter break is not unconstitutional under the Twenty-Sixth Amendment based on the particular underlying facts where the election board made a good faith attempt to reschedule the special contest and the novel issue was raised at the last minute, but looking askance at local elections held over students' break, cautioning "we would be disturbed if . . . a town continued to insist on elections during vacations or recess, secure in the conviction that returning to town and absentee voting would be considered insignificant burdens"); Newburger v. Peterson, 344 F. Supp. 559, 561–63 (D.N.H. 1972) (applying strict scrutiny to strike down, pursuant to the Fourteenth Amendment, a state law that disqualified voters, primarily students, with the firm intent to leave their towns at a fixed time in the future, based on the fundamental right to vote and the right to travel); Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 244–45 (N.J. 1972) (invalidating, under the Twenty-Sixth Amendment, county policy of refusing voter registration to students who live on campus); Colo. Project-Common Cause v. Anderson, 495 P.2d 220, 221, 223 (Colo. 1972)

The Twenty-Sixth Amendment provides that "[t]he 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."[6] The text tracks the language set forth by the Fifteenth and Nineteenth Amendments which prescribe a constitutional right to ballot access free of discrimination "on account of race, color, or previous condition of servitude" and "on account of sex."[7] These were not its only influences; the legislative history of the Twenty-Sixth Amendment demonstrates that it was heavily influenced by the Fourteenth Amendment and the Voting Rights Act of 1965 along with the Voting Rights Act Amendments of 1970.[8]

Longstanding West Virginia U.S. Representative Jennings Randolph, later elected to the U.S. Senate, regularly introduced it to Congress for three decades since 1942.[9] Senator Randolph viewed this

(applying heightened scrutiny to invalidate, pursuant to the Twenty-Sixth Amendment and the state constitution, age-based restrictions on the right to circulate and sign referenda petitions); Bright v. Baesler, 336 F. Supp. 527, 533 (E.D. Ky. 1971) (invalidating, pursuant to strict scrutiny under the Fourteenth Amendment, domicile requirements that are more stringently applied to students than to other voter registration applicants); Ownby v. Dies, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (invalidating, under the Twenty-Sixth and Fourteenth Amendments, a state statute providing different criteria for determining voting residency for voters ages eighteen to twenty-one than for voters over the age of twenty-one); Jolicoeur v. Mihaly, 488 P.2d 1, 2 (Cal. 1971) (applying heightened scrutiny to invalidate, pursuant to the Twenty-Sixth Amendment, a state policy that allowed only unmarried minors to register to vote from their parents' addresses rather than their college addresses); Wilkins v. Bentley, 189 N.W.2d 423, 426–27, 434 (Mich. 1971) (applying strict scrutiny to invalidate a state residency requirement pursuant to the Fourteenth Amendment as applied to students, finding that "students must be treated the same as all other registrants. No special questions, forms, identification, etc., may be required of students").

6. U.S. CONST. amend. XXVI, § 1.

7. U.S. CONST. amends. XV, § 1, XIX.

8. *See* Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. LAW 1105, 1123–34 (2019) (describing the legislative history of the Twenty-Sixth Amendment and the Fourteenth Amendment principles that underscore its thirty-year history, including Title III of the Voting Rights Act Amendments of 1970); *see also* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1172 (2012) ("The Twenty-Sixth Amendment is thus properly understood as the outcome of a legal and political battle over the VRA, and it should be interpreted in light of the constitutional meanings that battle generated.").

9. S.J. Res. 166, 77th Cong. (1942) (proposing the original language of the Twenty-Sixth Amendment, applied to both state and federal elections); H.R.J. Res. 354, 77th Cong. (1942) (introducing the first joint resolution in Congress); *see also Hearings on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78 Relating to Lowering the Voting Age to 18 Before the Subcomm. on Const. Amends. Of the S. Comm. on the Judiciary*, 90th Cong. 61 (1968) (statement of Jennings Randolph, U.S. Senator, West Virginia) ("[M]y interest in this subject has not abated. I had then, as I have now, the utmost confidence in the ability of our young citizens to think clearly, to weigh the issues, and to make judicious decisions on matters closely affecting their futures.").

expansion of the franchise as a means of protecting United States democracy. As he explained during the 1968 congressional hearings when a tipping point on the issue was drawing near:

> Our youth are the promise, the hope, the dream of Americans. This we all recognize as we emphasize education, family, health, and vocational preparation . . . with the thought that by their own endeavors they must become full participants in our society . . . . They are, I think, the active defenders of what we call the American system. I am not speaking of the establishment; I am speaking of the system under which our country was born, continues to grow, and I think will prosper in the future as in the past.[10]

This conceptualization of youth political participation to protect and bolster the health of the nation was repeated by President Richard Nixon during the ceremonial certification of the Twenty-Sixth Amendment.[11]

Yet the route to constitutionalization was far from direct.[12] After decades of endeavoring to introduce the measure via constitutional amendment, widely respected Senate Majority Leader Michael Mansfield of Montana undertook a novel statutory approach by introducing a 1970 amendment to the Voting Rights Act of 1965.[13] An expedited Supreme Court decision upheld the statutory expansion as applied to federal elections pursuant to the Fourteenth Amendment (which remains good law) but denied its application to state elections.[14] As such, the potential of a bifurcated election administration system was on the horizon as the

10. *Hearings on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78 Relating to Lowering the Voting Age to 18 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 90th Cong. 62 (1968) (statement of Jennings Randolph, U.S. Senator, West Virginia); *see also Hearings on S.J. Res. 7, S.J. Res. 19, S.J. Res. 32, S.J. Res. 34, S.J. Res. 38, S.J. Res. 73, S.J. Res. 87, S.J. Res. 102, S.J. Res. 105, S.J. Res. 141, S.J. Res. 147 Relating to Proposed Constitutional Amendments Lowering the Voting Age to 18 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 91st Cong. 3–14 (1970) (statement of Jennings Randolph, U.S. Senator, West Virginia).

11. Richard Nixon, U.S. President, Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution (July 5, 1971), https://www.presidency.ucsb.edu/documents/remarks-ceremony-marking-the-certification-the-26th-amendment-the-constitution. *See infra* text accompanying note 131.

12. For a comprehensive legislative history of the Twenty-Sixth Amendment, see generally WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA (1992) (offering the first full history of the voting age in the United States from 1607 to 1991, with emphasis on the 1969-1971 period); Jenny Diamond Cheng, How Eighteen-Year-Olds Got the Vote 17–18 (Aug. 4, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818730.

13. Cheng, *supra* note 12, at 6, 9.

14. *See* Oregon v. Mitchell, 400 U.S. 112, 126 (1970).

1972 presidential election loomed—meaning that eighteen- to twenty-one-year-olds were poised to only be able to vote in federal elections, but not state elections. A tipping point was finally reaching on the issue, and the creative statutory route forced a political necessity for what had become a widely accepted moral issue.[15]

Thanks to efforts both inside and outside the halls of Congress, the Twenty-Sixth Amendment's final introduction in 1971 rounded the requisite thirty-eight states for ratification in less than 100 days—making it the fastest amendment to be ratified in U.S. history, with nearly uniform cross-partisan support.[16] Yet, despite the Twenty-Sixth Amendment's nearly unanimous ratification and the prominent role of youth leadership throughout the Second Reconstruction (1954-1967),[17] which catapulted its constitutionalization, youth voting rights are not widely perceived today within a systemic framework of a constitutionalized protected class (youth) and classification (age) with regard to ballot access.[18]

A reclamation of this constitutional right began in the aftermath of the notorious *Crawford v. Marion County Election Board* Supreme Court decision upholding Indiana's voter identification law, the first challenge of its kind,[19] and the presidential election of Barack Obama months later when first-time voters set new records.[20] Following these two 2008

15. *See* Bromberg, *supra* note 8, at 1125–26 (The Mansfield Amendment was approved by a rollcall of sixty-four to seventeen, and the resulting statute passed the Senate 64 to 12 and the House 237 to 132. "The opposing position did not take issue with the merit of expanding the franchise; indeed, the twenty-one-year age requirement was largely viewed as an anachronism. However, the opposition argued that the path to youth enfranchisement required a constitutional amendment, not statute."); *see also* FROST, *supra* note 4, at 234–35 (describing how the 1970 hearings quadrupled the number of speakers and statements from youth organizations, in particular member organizations of the Youth Franchise Coalition, including state-based campaigns from Oregon, Ohio, and New York; the Ripon Society, the Youth Franchise Coalition's one Republican organization; the NAACP; and the Student National Education Association).

16. Manisha Claire, *How Young Activists Got 18-Year-Olds the Right to Vote in Record Time*, SMITHSONIAN MAG. (Nov. 11, 2020), https://www.smithsonianmag.com/history/how-young-activists-got-18-year-olds-right-vote-record-time-180976261/; Jennifer Frost, *The GOP Once Supported Youth Voting and Encouraged Participation*, WASH. POST (Dec. 5, 2022), https://www.washingtonpost.com/made-by-history/2022/12/05/young-voters-republicans/.

17. *See infra* text accompanying notes 121–22.

18. *See, e.g.*, Walgren v. Howes, 482 F.2d 95, 102 (1st Cir. 1973) (noting, in a Twenty-Sixth Amendment case, that "the voting amendments would seem to have made the specially protected groups, at least for voting-related purposes, akin to a 'suspect class'").

19. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008).

20. *2008 Set the Record for First-Time Voters*, CTR. FOR INFO. & RSCH. ON CIVIC LEARNING & ENGAGEMENT (May 27, 2011), https://archive.civicyouth.org/2008-set-the-

events, strict voter identification laws proliferated, with consequence to youth voters.

The gutting of the Voting Rights Act in 2013 in *Shelby County, Alabama v. Holder* just made matters worse.[21] States previously subject to pre-clearance were now free to introduce voter suppression laws, and they moved quickly. Within twenty-four hours of the ruling, Texas announced implementation of a strict photo ID law, which among other restrictions, removed student IDs from the list of acceptable forms of voter ID.[22] Similarly, while a flexible photo ID mandate had been introduced in North Carolina prior to *Shelby County* that had allowed for college ID to serve as an acceptable form of voter ID, within weeks of *Shelby County*, the original twelve-page bill ballooned to forty-nine pages and expanded to include a range of restrictions such as: cuts to the early voting period; elimination of same day registration; elimination of a robust pre-registration program in high schools, civics programs, and public agencies; and roll-backs on the availability of college and out-of-state government-issued IDs, except under very limited circumstances.[23]

These expanded restrictions in the post-2008 era were occasionally met with new Twenty-Sixth Amendment claims; however, youth voting rights were not central to these challenges due to the necessary attention drawn to the parallel racial discrimination claims.[24] As the Fourth Circuit Court of Appeals concisely summarized, North Carolina's omnibus law targeted African Americans with "almost surgical precision."[25] Notably, the courts struggled to identify the appropriate

record-for-first-time-voters/; *see also Election Results 2008*, N.Y. TIMES (Nov. 5, 2008), https://www.nytimes.com/elections/2008/results/president/national-exit-polls.html.

21. *See* Shelby Cnty., Ala. V. Holder, 570 U.S. 529, 556–57 (2013).

22. *See* TEX. ELEC. CODE ANN. § 63.0101 (West 2021); *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

23. *Compare* Act of Apr. 8, 2013, 2013 N.C. Sess. Laws 3 (first edition), *with* Act of Apr. 8, 2013, 2013 N.C. Sess. Laws 1–3, 28–33, 37–39 (seventh edition). *See The Effects of Shelby County v. Holder*, *supra* note 22.

24. *See, e.g.*, N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016) (focusing analysis on the Fourteenth Amendment and Section 2 of the Voting Rights Act claims, and avoiding the lower court's Twenty-Sixth Amendment analysis); One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 925–27 (W.D. Wis. 2016) (acknowledging the lack of clarity on what standard of review to apply and reserving only nine paragraphs of the 119-page decision to a summary analysis of the Twenty-Sixth Amendment claim); Lee v. Va. State Bd. of Elections, 843 F.3d 592, 598–607 (4th Cir. 2016) (noting that it is "far from clear" what standard to apply to Twenty-Sixth Amendment claims, focusing analysis on claims brought under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments).

25. *McCrory*, 831 F.3d at 214.

standard of review to apply to Twenty-Sixth Amendment claims that reappeared in this new era.[26]

A 2018 Florida federal court advanced the Twenty-Sixth Amendment jurisprudence in the modern era when it preliminarily enjoined the Secretary of State's categorical ban of on-campus polling sites during the early voting period.[27] In so doing, Judge Walker recognized the youth voters as constituting a protected class.[28] Judge Walker could have arguably started and ended his analysis at the prima facie nature of the categorical ban.[29] However, he went further to include a rich analysis of the unique value that on-campus polling locations offer the class, including during the early voting period, and recognized a wider systemic framework for youth voting rights.[30]

The first sentence of Judge Walker's decision begins with a description of the large number of public colleges and universities in the state of Florida.[31] The opening paragraphs go on to describe how more than 1.1 million young men and women are enrolled in its state institutions; the class's outsized proportion of the voting base on the local level; and the popularity of early voting among college students.[32] Later on, the decision sets out how the class's access to the ballot is uniquely impacted, taking into consideration longer travel time to voting sites compared to other voters, disproportionate lack of access to cars, and how "[y]ounger voters casting their ballots on Election Day disproportionately face information costs—'Where is my polling location? What valid ID do I need to bring? . . . How do I get there?'"[33] Judge Walker goes on to describe the class's over-reliance on provisional ballots and the

26. *See, e.g.*, *id.* at 222–23 (expressing doubt that Fifteenth Amendment principles regarding intentional discrimination are applicable to the Twenty-Sixth Amendment but doing so anyway based on the plaintiffs' theories of the case); *Lee*, 843 F.3d at 607 (same). In my prior legal scholarship, I propose a standard of review to apply to Twenty-Sixth Amendment claims in keeping with the development of the modern right to vote jurisprudence: a consolidated approach similar to that offered by the Fourteenth Amendment to root out prima facie, intentional, and disparate impact discrimination. *See* Bromberg, *supra* note 8, at 1150–64 (reviewing Twenty-Sixth Amendment case law in the modern era and proposing a standard of review).

27. League of Women Voters of Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1220–21, 1225 (N.D. Fla. 2018). The author served as co-counsel on behalf of The Andrew Goodman Foundation in subsequent phases of the litigation.

28. *Id.* at 1217.

29. *Id.* at 1216–17.

30. *Id.* at 1209–10.

31. *Id.* at 1209.

32. *Id.*

33. *Id.* at 1217–19.

disproportionate rejection of those ballots, and how the "[m]ail-in ballot statistics are even starker."[34]

Despite this significant advance to the Twenty-Sixth Amendment jurisprudence in the modern era, as Professor Joshua Douglas describes in his essay in this symposium volume, "several cases surrounding the pandemic election of 2020 . . . essentially suggest[] that the Amendment simply enfranchised those eighteen years old and older, but otherwise does not offer substantive protection."[35] These challenges, arising from the Fifth and Seventh Circuit Courts of Appeals, sought to expand access to no-excuse absentee voting to younger voters in the midst of COVID, as the laws at issue restricted access to no-excuse vote-by-mail to only those over the age of sixty-five.[36]

In *Texas Democratic Party v. Abbott* ("*TDP II*"), the Fifth Circuit Court of Appeals was fixated by the lack of absentee voting in 1971 when the Twenty-Sixth Amendment was ratified and noted that young Texans were never granted access to no-excuse voting.[37] The panel observed that there could be no denial or abridgment of the right to vote because "[i]n-person voting was the rule [in 1971], absentee voting the exception."[38] The panel explained that the Twenty-Sixth Amendment must be understood as "a prohibition against adopting rules based on age that deny or abridge the rights voters already have."[39] The Fifth Circuit held that "an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced."[40] The panel summarized, "conferring a benefit on another class of voters does

34. *Id*. at 1219.

35. Joshua A. Douglas, *State Constitutions and Youth Voting Rights*, 74 RUTGERS U. L. REV. 1729, 1733 (2022); *see* Tex. Democratic Party v. Abbott (*TDP I*), 961 F.3d 389, 408–09 (5th Cir. 2020) (staying the District Court's injunction which was based on application of strict scrutiny, and suggesting that the Amendment's "most immediate purpose was to lower the voting age from twenty-one to eighteen," therefore applying rational basis review), *application to vacate stay denied*, 140 S. Ct. 2015, 2015 (2020) (J. Sotomayor noting "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment"), *injunction vacated*, Tex. Democratic Party v. Abbott (*TDP II*), 978 F.3d 168, 184 (5th Cir. 2020) (remanding and holding that "the Twenty-Sixth Amendment confers an individual right to be free from the denial or abridgment of the right to vote on account of age" and concluding that it is unnecessary to assess the applicable level of scrutiny because the challenge presents no denial or abridgment of the right).

36. *See TDP II*, 978 F.3d at 174; Tully v. Okeson, 977 F.3d 608, 612 (7th Cir. 2020).

37. *TDP II*, 978 F.3d at 188, 192.

38. *Id*. at 188.

39. *Id*. at 189.

40. *Id*. at 190–91.

not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote."[41]

Professor Douglas recaps in his symposium essay, *State Constitutions and Youth Voting Rights*, that "[i]n rejecting the challenges, these courts failed to recognize the true scope of the Twenty-Sixth Amendment: to enfranchise voters aged eighteen to twenty *and* to ensure equal voting access regardless of age."[42] Similarly, U.S. Elections Assistance Commissioner Ben Hovland and Counsel to Federal Election Commissioner Phillip A. Olaya presciently write in their symposium article, *Shaping Future Impact of the Twenty-Sixth Amendment*, that the Fifth Circuit's conclusion is an example of how "litigation opened the door to other potential age-discriminatory voting policies."[43]

Indeed, the Fifth Circuit's proposal is a radical contortion with implications beyond the youth vote. It sets aside the basic constitutional precepts that voting is a fundamental right, and that all persons are equal under law. It explicitly allows one group to receive a voting benefit denied to others, without the need for a state to even assert a compelling state interest, much less prove it with evidence. And it asserts that the right to vote does not encompass the right to vote by mail. The Seventh Circuit's recent decision accomplishes much of the same.

Despite the gravity of these decisions, a few silver linings emerge that may cabin these otherwise erroneous rulings. First, such decisions were determined in emergent circumstances due to the crisis of the pandemic with the general election just weeks away and when election administration was already ongoing. It is well established that the courts are less likely to disrupt the status quo the closer an election approaches;[44] the Fifth and Seventh Circuit decisions were respectively

41. *Id.* at 194.

42. Douglas, *supra* note 35, at 1735. In his symposium essay, Professor Douglas combines two areas of his expertise: the value of state constitutions and judiciaries as a vehicle for addressing rights where the federal courts fall short, and the value of the youth vote. *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (an exposition on the strength of state constitutionalism and the right to vote, analyzing judicial methods and offering a mode of state constitutional analysis for the right to vote); Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63 (2017) (legal and policy arguments to support lowering the voting age to sixteen).

43. Ben Hovland & Phillip A. Olaya, *Shaping Future Impact of the Twenty-Sixth Amendment: How Lessons from the 2020 Election and Voting During the COVID-19 Pandemic Are Instructive for Engaging the Next Generation of Americans*, 74 RUTGERS U. L. REV. 1697, 1709 (2022).

44. *See, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). The Purcell principle is a doctrine that courts should not change election laws "[a]s an election draws closer" when the "risk will increase" that court orders in emergency election-related litigation, "especially

filed on September 10 and October 6, 2020.[45] Relatedly, they arose from preliminary injunction briefing rather than from a more fulsome merits-based briefing.[46] In retrospect, would the panels have ruled differently had they known that a majority of voters (sixty-nine percent) would "cast their ballot . . . by mail and/or before Election Day" in 2020—a drastic increase from 2016 when a minority of voters (forty percent) did so?[47] Third, both panels contemplated the burden on the voters insofar as their ability to meet the qualifying excuses to vote-by-mail such as disability.[48] In this way, the panels were also preoccupied to some degree by the practical burdens as applied in practice. These burdens might have been proven up through less emergent briefing circumstances and perhaps even discovery, notwithstanding the blatant *prima facie* discrimination at play.

Fourth, the panels recognized that a roll back of a right already affixed is a recognizable abridgement of the right to vote on account of age, as protected by the Twenty-Sixth Amendment.[49] Despite their extreme holdings, they reject the premise advanced by the state-defendants that the only purpose of the Twenty-Sixth Amendment was to lower the voting age.[50] And lastly, the panels signaled some acknowledgment (albeit in dicta) of the applicability of heightened scrutiny to the Twenty-Sixth Amendment claim.[51]

When the Fifth Circuit's first panel decision ("*TDP I*") was published,[52] another Twenty-Sixth Amendment challenge was winding its way in the United States District Court for the Southern District of

conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Specifically, the Supreme Court found that the lower court "was required to weigh [this risk specific to election cases], in addition to the harms attendant upon the [traditional] issuance or nonissuance of an injunction." *Id.* at 4.

45. *TDP II*, 978 F.3d at 168; Tully v. Okeson, 977 F.3d 608, 608 (7th Cir. 2020).

46. *TDP II*, 978 F.3d at 174; *Tully*, 977 F.3d 608, 611.

47. Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html.

48. *TDP II*, 978 F.3d at 192–93; *Tully*, 977 F.3d at 616–17.

49. *TDP II*, 978 F.3d at 193; *Tully*, 977 F.3d at 613–14.

50. *See TDP II*, 978 F.3d at 176; *Tully*, 977 F.3d at 614.

51. *See TDP II*, 978 F.3d at 184, 193; *Tully*, 977 F.3d at 614.

52. The first Fifth Circuit panel decision was published on June 4, 2020, granting the stay of the preliminary injunction. *See TDP I*, 961 F.3d 389, 389, 397 (5th Cir. 2020). The second panel decision was published on September 10, 2020, and vacated the injunction and remanded the case to the district court for further proceedings consistent with the opinion on interlocutory appeal. *See TDP II*, 978 F.3d at 194.

Texas.[53] There, a voting schedule offered students from a historically Black university fewer early voting opportunities compared to the county's white residents.[54] Represented by the Legal Defense and Education Fund, the lawsuit challenged the lack of an on-campus polling site during the first week of early voting, and the fewer overall hours of early on-campus voting for the 2018 general election.[55] The case arose within a context of decades-long lawsuits concerning student voting rights in Waller County, home to historically significant Prairie View A&M University,[56] a Black college and university established during the Reconstruction period after the Civil War.[57]

Following a two-week bench trial, Judge Eskridge acknowledged the new law established by the Fifth Circuit and found:

> Parallel considerations . . . necessarily lead to the same conclusion. Provision for in-person early voting is relatively common today . . . . *It simply can't be said . . . that the right to vote in 1971 included a right to vote early. In-person voting on election day was instead the general rule*, with other methods of voting in advance being an exception of varying availability and implementation.[58]

Dismissing the intentional youth discrimination challenge, Judge Eskridge held that the plaintiffs' claims regarding "the particular times and locations they would have preferred . . . is insufficient to establish denial of the right to vote under the Twenty-Sixth Amendment per the reasoning of *Texas Democratic Party II*."[59] The *TDP* case remains on appeal again before the Fifth Circuit as of the publication of this writing.

This new preoccupation with what election administration tools were present in 1971 at the time of the Twenty-Sixth Amendment's ratification—such as the prevalence of vote-by-mail, as examined by the Fifth and Seventh Circuits, or the prevalence of on-campus early voting sites, as examined by the United States District Court for the Southern

53. *See* Allen v. Waller Cnty., Tex., 472 F. Supp. 3d. 351, 366 (S.D. Tex. 2020) (denying summary judgment on July 15, 2020); Johnson v. Waller Cnty., 593 F. Supp. 3d 540, 547 (S.D. Tex. 2022) (following bench trial, denying Plaintiffs' claims and finding lack of discriminatory intent or effect on account of race and/or age with respect to early voting locations and times).

54. *Johnson*, 593 F. Supp. 3d at 546.

55. *Id.*

56. *Id.* at 547, 552, 560–62, 601.

57. *College History*, PRAIRIE VIEW A&M UNIV., https://www.pvamu.edu/about_pvamu/college-history/ (last visited Oct. 26, 2022).

58. *Johnson*, 593 F. Supp. 3d at 616 (emphasis added).

59. *Id.*

District of Texas—to consider the strength of a Twenty-Sixth Amendment challenge further illustrates just how far we have yet to go to fulfill the promise of the Twenty-Sixth Amendment.

In another recent pandemic-related lawsuit, a challenge was brought against a new Alaska policy to automatically distribute vote-by-mail ballots to voters age sixty-five and older.[60] In oral argument before the Ninth Circuit Court of Appeals, Attorney Jason Harrow explained that, had the restriction revolved around any other protected classification—such as the automatic distribution of ballots to only Black or Caucasian voters, or automatic distribution to only women or men—unconstitutionality pursuant to the Fifteenth or Nineteenth Amendments would be presumed as obvious.[61] Notably, the state-defendants therein acknowledged this premise, observing that "strict scrutiny would apply if the State were to mail absentee ballot applications to only voters of a certain race, because race is a suspect classification."[62]

This new line of inquiry seemingly serves only to ratchet down youth voting rights, at least as it relates to unequal treatment of access to a benefit, as opposed to a roll-back of the status quo. What is good for the goose is good for the gander. While vote-by-mail or early voting may not have been prevailing electoral mechanisms in 1971, neither was strict voter identification. Moreover, the legislative history of the Twenty-Sixth Amendment specifies its purpose to overcome the "special burdens" imposed on young voters such as "traveling to one centralized location" to vote.[63] These pandemic cases do not grapple with this legislative history. The new line of inquiry is also incongruous with the rights afforded by other amendments. One could not reasonably advocate against a race-based voting rights challenge by looking to the election administration mechanisms in place in the late 1800s when the Fourteenth and Fifteenth Amendments were ratified. One hopes that such advocacy would be laughed out of court today.

Notwithstanding the fundamental principles established upon ratification of the Twenty-Sixth Amendment that embraced the cross-partisan recognition that youth enfranchisement is critical for democracy and that investing in our youth is as American as apple pie,[64] the

60. Disability L. Ctr. of Alaska v. Meyer, 484 F. Supp. 3d 693, 698 (D. Alaska 2020).

61. *See* Disability L. Ctr. of Alaska v. Meyer, 857 Fed. App'x 284, 285 (9th Cir. 2021) (dismissing the appeal as moot after the 2020 election); Transcript of Oral Argument, Disability L. Ctr. of Alaska v. Meyer, 857 Fed. App'x 284 (9th Cir. 2021) (No. 20-35778).

62. Opposition to Motion for Preliminary Injunction at 7, Disability L. Ctr. of Alaska v. Meyer, 484 F. Supp. 3d 693 (D. Alaska 2020) (No. 20-cv-00173).

63. S. REP. NO. 92-26, at 14 (1971) (accompanying S.J. Res. 7, 92d Cong. (1971)).

64. *See* Claire, *supra* note 16; Frost, *supra* note 16.

bourgeoning Twenty-Sixth Amendment modern jurisprudence remains caught in the crosshairs of the "voting wars" playing out in the federal judiciary.[65]

The repercussions of this forgetting or outright abandonment of this constitutional right are evident at every step of the youth voter engagement process: pre-registration, voter registration and portability, in-person voting location and proofs, and mail voting.

As Laura Brill, Esq., Director of the Civics Center, explained during the symposium, pre-registration opportunities remain ripe, either through the enactment of new state law or by increased regulation and enforcement of existing law. Notably, pre-registration benefits all youth voters, regardless of college attrition, by engaging them in the voter registration process before they graduate high school. The Civics Center reports that thirty-five states allow youth to register at sixteen or seventeen years old, before they are eligible to vote.[66] However, the report also found significant under-utility of the law. For example, "[d]espite favorable laws and available educator resources, only 11% of 16- and 17-year-olds are preregistered to vote in California. In Los Angeles County, it's only 10%."[67] In North Carolina, the legislature cut a robust pre-registration program that brought county clerks into high schools to pre-register 150,000 young people in four years.[68]

65. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012) (explaining the 2000 election as a foreshadow of how the confluence of election administration difficulties and ideologically-motivated efforts to focus on the wrong issues to undermine the legitimacy of the election process creates the potential for a major crisis); Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629 (2018) (describing the 2016 election as a major escalation of the "voting wars" that broke out across the post-2000 election landscape; how election-related litigation has more than doubled in the post-2000 period amid ongoing efforts to delegitimize the electoral process); *Voting Rights Litigation Tracker*, BRENNAN CTR. FOR JUST. (Oct. 3, 2022), https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker (tracking ninety-six active lawsuits to date in twenty-six states and Washington, D.C.).

66. *See* THE CIVICS CENTER, FUTURE VOTERS AND GAPS IN OUR DEMOCRACY: EXECUTIVE SUMMARY 5, 10–14 (2021), https://issuu.com/thecivicscenter/docs/2021-03-23_executive_summary__james_s_cut (recommending automatic and online voter registration systems that are accessible to high school students, and improvement in transparency and data collection by requiring elections officials to maintain data and provide regular reports on the number of sixteen- and seventeen-year-olds who preregister or register to vote).

67. *Id.* at 5.

68. *See supra* note 23 and accompanying text; *see also* Expert Report Submitted by Peter Levine, Seth Avakian, and Kei Kawashima-Ginsberg on Behalf of the Duke Intervenor-Plaintiffs at 7 & n.4, League of Women Voters of N.C. v. State, 2014 WL 12770081 (M.D.N.C. May 19, 2014) (No. 13-CV-660) (estimating that more than 150,000

If youth voters do go on to college or university, they often experience misinformation, confusion, or intimidation about their right to vote from their campus address. Examples abound across the nation, including but not limited to: New Hampshire, a long-standing offender,[69] New York,[70]

young people aged sixteen and seventeen pre-registered to vote between 2010 and September 1, 2013, when the ban went into effect).

69. *See* Bromberg, *supra* note 8, at 1138–41 (alteration in original) (describing multiple legislative efforts in New Hampshire with regard to voter registration and the conflation of residency and domicile, and concluding that "[t]aken together, the trend evident in New Hampshire is one that seeks to impose obstacles to the ballot that disparately impact students by requiring that voters take extra steps such as obtaining a driver's license and a vehicle registration card to establish a right to vote, and sign long, confusing affidavits about domicile written in [legalese], at the risk of serious civil and criminal penalties and home visits by public officials."); *see also* League of Women Voters of N.H. v. Gardner, No. 226-2017-CV-00433, 2020 WL 4343486, at *16 (N.H. Super. Apr. 8, 2020) (emphasis added) ("The problem with SB 3 is not that it creates a system that encourages voters to be actively turned away from the polls or physically prevents individuals from registering by, for example, requiring specific types of documentation that are impossible for one group to obtain. *The burdens imposed by SB 3 are more subtle; the new process establishes enough hurdles, the forms contain enough complexity, and the penalties present enough risk that they tend to dissuade a specific type of voter from even engaging with the process.* In this regard, the State's constant refrain that nobody was prevented from voting rings hollow. *SB 3 does not stop someone at the polls from casting a ballot; it discourages them from showing up in the first place*."), *aff'd sub nom.* N.H. Democratic Party v. Sec'y of State, 262 A.3d 366, 382 (N.H. 2021) (upholding trial court's ruling unanimously, finding that SB3 requiring a lengthy affidavit "imposes unreasonable burdens on the right to vote"); *see also* Maya Kempf-Harris, *New Hampshire Supreme Court Unanimously Strikes Down SB 3, Again Certifying Students' Right to Vote In-State*, DARTMOUTH (July 16, 2021, 5:00 AM), https://www.thedartmouth.com/article/2021/07/new-hampshire-supreme-court-unanimously-strikes-down-sb-3-again-certifying-students-right-to-vote-in-state.

70. *See* Complaint at 6, Pitcher v. Dutchess Cnty. Bd. of Elections, No. 12CV8017 (S.D.N.Y. Oct. 31, 2012) (bringing federal class action under the First and Fourteenth Amendments, claiming wrongful rejection of voter registration applications for the 2012 general election because students from Bard College, Marist College and the Culinary Institute of America did not include on their applications dormitory names or room numbers in addition to the students' street and mailing addresses); Stipulation of Settlement and Consent Decree at 2–4, Pitcher v. Dutchess Cnty. Bd. of Elections, No. 12CV8017 (S.D.N.Y. May 13, 2013) (retaining jurisdiction and permanently enjoining and prohibiting rejection of voter registration applications by on-campus student residents solely on the basis that the form does not set forth the name of the dormitory and/or room number).

Texas,[71] Virginia,[72] South Carolina,[73] Connecticut,[74] and Michigan.[75] In addition, the college campuses where they are far more likely to vote are

71. *See* Complaint at ¶¶ 2–3, 30, Prairie View Chapter of the NAACP v. Kitzman, No. H-04-459 (S.D. Tex. Feb. 5, 2004) (bringing federal action on behalf of Prairie View A&M students claiming that the county criminal District Attorney Oliver S. Kitzman threatened students with felony prosecution for "illegal voting," a felony punishable by confinement of up to ten years and a fine of up to $10,000, if they choose to cast a ballot on Election Day in Waller County based on a legally unjustifiable interpretation of Texas domiciliary law, in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act, 42 U.S.C. 1971(b)); Settlement Agreement and Order at ¶¶ III.2, III.3, Prairie View Chapter of the NAACP v. Kitzman, No. H-04-459 (S.D. Tex. Feb. 25, 2004) (retaining jurisdiction and holding that "[c]ollege students shall be eligible to vote in Waller County elections on the same basis and by application of the same standards and procedures as non-students, without regard to whether such students have dormitory or student housing addresses, whether they resided in Waller County prior to attending school, and whether they plan to leave Waller County upon graduation," and barring the District Attorney from using any listed reasons solely or in combination as a basis for actual or threatened prosecution, indictment, or investigation based on non-residency for voting purposes in the county; further noting that "the parties have stipulated, District Attorney Kitzman's actions and statements, taken in the historical context, could reasonably be perceived as improperly threatening PVAMU students who were eligible to vote in Waller County with felony prosecution if they attempt to vote in Waller County.").

72. *See* Complaint at ¶¶ 4–6, New Va. Majority Educ. Fund v. Fairfax Cnty. Bd. of Elections, No. 19-cv-01379 (E.D. Va. Oct. 30, 2019) (federal lawsuit brought under the First and Fourteenth Amendments, claiming wrongful rejection of voter registration applications for the 2019 general election because students did not include on their applications dormitory names or room numbers in addition to the students' street and mailing addresses); Settlement Order, New Va. Majority Educ. Fund v. Fairfax Cnty. Bd. of Elections, No. 19-cv-01379 (E.D. Va. Nov. 1, 2019) (establishing a court-approved process for students to correct voter registration applications that were initially rejected for the 2019 general election); *see also* Patrick J. Troy, *No Place to Call Home: A Current Perspective on the Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL'Y 591, 605 n.77, 605–07 (2006) (describing a 2004 state challenge, Alami v. City of Williamsburg, No. CL010296-00 (Va. Cir. Ct. filed Mar. 2, 2004), on behalf of College of William & Mary students who were required to fill a questionnaire when registering to vote).

73. *See* Cindy Landrum, *Judge Tells County: Stop Sending Voter Registration Questionnaire to On-campus College Students*, GREENVILLE J. (Oct. 7, 2016), https://greenvillejournal.com/news/judge-orders-greenville-county-stop-sending-questionnaires-campus-college-students-try-register-vote/ (enjoining the distribution of an eleven question form to students seeking to register to vote from their campus address, impacting 7,000 campus residents in Greenville County, South Carolina).

74. *See* Molly Salafia, *Letter to the Editor*, MIDDLETOWN PATCH (Oct. 27, 2011, 3:02 PM), https://patch.com/connecticut/middletown-ct/letter-to-the-editor-wesleyan-students-registered-to-43506e8938 (Republican candidate for planning and zoning commission addressing 2011 Wesleyan student-voters that "students have also not been educated, from my understanding, to the fact that by changing their permanent address to Middletown, they are now subject to local car tax and possibly state income tax"); *see also* Findings and Conclusions for Complaint by Paulina Jones-Torregrosa, No. 2012-014 (May 23, 2012) (describing a series of communications by various local, county, and state officials and

often intentionally or unintentionally left off polling site lists—such as in Florida,[76] North Carolina,[77] New York,[78] and more. In some scenarios, these are intentional youth voter suppression efforts. In others, such as in Fulton County, Georgia, leading up to the 2022 general election—where 80,000 youth voters were poised to face a roll-back of their accessibility to on-campus polling locations—preservation of the status quo appeared to be an afterthought, at best.[79]

candidates regarding students' ability to register to vote from their campus address and cast a successful ballot on Election Day for the contentious 2011 local election; describing letter by county registrar office requesting that students visit the office in-person prior to Election Day to verify on-campus residency, and subsequent correspondence by Secretary of State, confirming that non-compliance with the county registrar's request will not affect students' eligibility to vote, but that students should prepare to be redirected should they appear at the wrong polling location on Election Day; but concluding that any purported misinformation or disinformation did not rise to a statutory violation pursuant to CONN. GEN. STAT. § 9-364 (2012) for influencing or attempting to influence any elector to "stay away from any election").

75. *See* Bromberg, *supra* note 8, 1141–42 (describing Michigan case study with regard to voter registration and the conflation of residency and domicile when then-Secretary of State advised students in March 2018 that they should not register from their campus address, because it would not be "fair," since it is not their true home).

76. *See supra* notes 27–34 and accompanying text.

77. *See* Ryan D'Ercole, *Fighting a New Wave of Voter Suppression: Securing College Students' Right to Vote Through the Twenty-Sixth Amendment's Enforcement Clause*, 78 WASH. & LEE L. REV. 1659, 1686–87 (2021) (describing the closure of on-campus early voting locations by North Carolina county boards of elections in 2014, including limiting on-campus voting sites at North Carolina State University, Duke University, East Carolina University, University of North Carolina at Charlotte, and Winston-Salem State University); *see also* Anderson v. The North Carolina State Bd. of Elections, No. 14CVS12648, 2014 WL 6771270, at *1 (N.C. Super. Oct. 13, 2014) (alteration in original) (concluding that the removal of an early voting polling site from Appalachian State University campus indicated "no other intent from [the] board's decision other than to discourage student voting").

78. *See* Verified Petition at 1, 3, Bard Coll. v. Dutchess Cnty. Bd. of Elections, 198 A.D.3d 1014 (N.Y. App. Div. 2021) (No. 52777/21) (agency challenge brought by students, Bard College, University President Leon Botstein, and faculty for failure to redesignate an on-campus polling location pursuant to 2020 settlement agreement in successful prior litigation); Decision and Order at 2–3, Bard Coll. v. Dutchess Cnty. Bd. of Elections, 198 A.D.3d 1014 (N.Y. App. Div. 2021) (No. 52777/21) (granting petition for 2021 on-campus polling location, consistent with prior 2020 settlement agreement). These litigation victories motivated a statewide change in law, mandating the designation of on-campus polling locations on qualifying colleges and universities across the State of New York. *See* Press Release, Bard College, New Legislation Will Bring Polling Places to New York College Campuses: Legislative Win Follows Years-Long Fight for Student Voting Rights (Apr. 9, 2022), https://www.bard.edu/news/new-legislation-will-bring-polling-places-to-new-york-college-campuses-2022-04-09. The author was co-counsel in these related matters on behalf of The Andrew Goodman Foundation and Bard College and its affiliates.

79. *See* Ben Brasch, *Following ACLU Complaint, Fulton to Host Voting on College Campuses*, ATLANTA J.-CONST. (Aug. 11, 2022), https://www.ajc.com/news/atlanta-

Campus gerrymanders contribute to further confusion about the appropriate polling location, although these gerrymanders are widely under-examined due to the failure to recognize the protected class status at issue.[80] Once they appear to vote, students are not uniformly allowed to vote using a student identification card, an identification method stripped from new voter ID laws.[81]

Statistics show that young voters disproportionately rely on provisional ballots due to issues related to their voter registration forms, polling place accessibility, and their mobility.[82] Those ballots are disproportionately rejected, although there is no standard notification system in place.[83] The same holds true for their vote-by-mail ballots. Vote-by-mail ballots cast by young voters are disproportionately rejected

news/following-aclu-complaint-fulton-to-host-voting-on-college-campuses/LZ2A5CSQBJF7BCKSJX37DEM6D4/.

80. *See* Bromberg, *supra* note 8, at 1115 (describing the gerrymandering of Prairie View A&M University in Texas and North Carolina A&T University, and noting that "the 26th Amendment has not yet been a basis for a gerrymander challenge."); *see also* D'Ercole, *supra* note 77, at 1680–82 (describing campus gerrymanders at Montclair State University in New Jersey and Louisiana State University, as well as municipal gerrymanders in Ann Arbor, Michigan, home to 48,090 University of Michigan students, and Berkeley, California, where University of California student residents are split among four different council districts).

81. *See, e.g.*, *supra* notes 22–23 and accompanying text; Bromberg, *supra* note 8, at 1143; D'Ercole, *supra* note 77, at 1682–86; Findings of Fact, Conclusions of Law, and Order at ¶¶ 669, 672–73, Mont. Democratic Party v. Jacobsen, No. 21-0451 (Mont. Dist. Ct. Sept. 30, 2022), https://www.narf.org/nill/documents/20220930wnv-v-jacobsen-order.pdf (following a nine-day bench trial, examining legislative intent, and determining that a new voter identification law that removes student identification cards from serving as a stand-alone form of identification, "violates the Equal Protection Clause by imposing heightened and unequal burdens on Montana's youngest voters"). The author served as an expert witness in prior phases of the Montana litigation related to the grant of preliminary injunction.

82. *See* League of Women Voters of Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1220–21, 1219 (N.D. Fla. 2018) (alteration in original) (citations omitted) (relying on expert report by Professor Dan Smith, and finding that "[y]ounger voters are more likely to have their provisional ballots rejected because they have showed up at the wrong precinct, a not uncommon miscalculation for people who move at least once a year from dorm-to-dorm, dorm-to-apartment, house-to-dorm, apartment-to-apartment, Greek-house-to-house, among others. In Florida, voters aged 18 to 21 had provisional ballots rejected 'at a rate more than *four times higher* than the rejection rate for provisional ballots cast by voters between the ages of 45 to 64.'"); *see also* Gunther Peck et al., *Provisional Rights and Provisional Ballots in a Swing State: Understanding How and Why North Carolina College Students Lose Their Right to Vote, 2008-Present*, 74 RUTGERS U. L. REV. 1799, 1813 & n.72 (2022).

83. *See Detzner*, 314 F. Supp. 3d at 1219.

compared to all other age cohorts.[84] These trends stand in juxtaposition to common-sense reforms that would help cure ballot obstruction such as portability and Same Day Registration, administrative solutions described in further detail in the symposium article submitted by U.S. Elections Assistance Commissioner Ben Hovland and Counsel to Federal Election Commissioner Phillip A. Olaya.[85]

Given that the Twenty-Sixth Amendment jurisprudence has laid nascent for the better part of forty years, forging a path forward to reinvigorate our popular understanding and recognition of the constitutional right will require laying a foundation with public education infused by research and data analysis and targeted advocacy that builds collective experience and confidence.

For example, in their symposium article, *Shaping Future Impact of the Twenty-Sixth Amendment*, Hovland and Olaya look to "reforms where [they are] possible and by thoroughly collecting data to show the demonstrable impact of such efforts."[86] Their symposium article examines how lessons from the 2020 election and the pandemic may be particularly effective in addressing the challenges faced by youth voters and explores the need for modernization of administration solutions.[87] The article also describes how young Americans stepped up in response to the shortage of poll workers across the country in the midst of the pandemic and acknowledges state programs that successfully encourage high school and college poll workers.[88]

Professor Douglas proposes in his symposium essay that relief can be realized in state constitutions and state judiciaries.[89] Douglas argues that an embrace of the guarantee found in state constitutions that provides an affirmative grant of voting rights to those above a requisite age—as opposed to the Twenty-Sixth Amendment's "shall not" prescription—may find greater acceptance in state judiciaries, which may offer greater protections of constitutional rights compared to federal forums, and normalize and advance common understanding of young voters' disparate treatment.[90] A recent Montana youth voting rights state

84. *Id.* (alteration in original) (relying on expert report by Professor Dan Smith, and finding that "[m]ail-in ballot statistics are even starker. Vote-by-mail is convenient, but 'a voter 18 to 21 years old is roughly *eight-times more likely* to have her vote by mail ballot rejected than an absentee voter over 65 years old'"); *see also* Anna Baringer et al., *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, 19 ELECTION L.J.: RULES, POL., & POL'Y 289, 298 (2020).

85. Hovland & Olaya, *supra* note 43, at 1716–18.

86. *Id.* at 1727.

87. *Id.* at 1702, 1710–22.

88. *Id.* at 1723–26.

89. Douglas, *supra* note 35, at 1731–32.

90. *Id.* at 1739.

decision provides a good example of Douglas's proposal. Following a bench trial, the trial judge found unconstitutional three recent voting laws restricting the availability of student identification, elimination of Election Day Registration, and barring the distribution of absentee ballots to seventeen-year-olds although they would turn eighteen by or on Election Day.[91]

Similarly, esteemed voting rights litigators Perry Grossman and Adriel I. Cepeda Derieux of the ACLU and its New York affiliate, the NYCLU, reflect herein on their recent experiences in the New York state judiciary and legislature to demonstrate the "small, but significant incremental ways" that affirmative voting rights litigation under state constitutional law "have improved the landscape for reform in the courts, the legislature, and among the public."[92] Their symposium article, *Reform Begins at Home: Integrating Voting Rights Litigation and Advocacy in Progressive States*, advances the notion that "[v]oters benefit when litigation and organizing erodes the status quo bias of all stakeholders—including legislators, the press, and the public as well as courts—to open greater access to the ballot."[93] Notably, they examine the importance of centering and elevating young leaders who are "most negatively affected by antiquated voting practices that might keep them from the franchise and least invested in the status quo."[94]

Within this symposium collection, Duke University Professor Gunther Peck publishes an article co-authored with six undergraduate students, *Provisional Rights and Provisional Ballots in a Swing State: Understanding How and Why North Carolina College Students Lose Their Right to Vote, 2008-Present*, examining how and why provisional voting affects the voting rights of North Carolina college students statewide and in Durham County.[95] In his applied learning course, Professor Peck advances a pedagogical model that encourages his students to analyze the impact of laws and regulations among their peers. The resulting article offers data-driven analysis and case studies of individual student voters, with startling results: seventy-three percent of young voters had their provisional ballots rejected statewide in 2020, with seventy-eight percent rejected in Durham County, up from forty-two percent in 2008.[96] On the campus of North Carolina Central University,

91. *See supra* note 81 and accompanying text.

92. Perry Grossman & Adriel I. Cepeda Derieux, *Reform Begins at Home: Integrating Voting Rights Litigation and Advocacy in Progressive States*, 74 RUTGERS U. L. REV. 1773, 1782 (2022).

93. *Id.* at 1788.

94. *Id.*

95. Peck et al., *supra* note 82, at 1799–1802.

96. *Id.* at 1832.

a historically black university in Durham County, nearly all provisional ballots cast by students in 2020—ninety-five percent in total—were rejected, indicating that "provisional ballots are not fulfilling their intended purpose of providing a failsafe for voters whose eligibility is uncertain."[97] Moreover, "a youth voter was more than *fourteen* times more likely to cast a provisional ballot than a voter older than sixty-five" and that "[a] young Black person voting in Durham County was more than *twenty-five* times more likely than an older white person in Durham County to cast a provisional ballot over the previous four elections."[98] The article concludes that "[p]rovisional balloting, designed to protect election security and the voting rights of transient citizens, increasingly has become a method for administering illegitimate ballots, depriving young people of their power to be heard."[99]

Still hopeful of the federal bench, former Louisiana youth organizer with The Andrew Goodman Foundation and now Washington, D.C.-based legal counsel with The Campaign Legal Center, Valencia Richardson, Esq. writes in her symposium article, *Leveraging Civil Rights Statutes to Empower the Youth Vote*, how an innovative path for the enforcement of student voting rights may be found within Section 11 of the Voting Rights Act, which prohibits the denial of eligible citizens to register to vote, and within the National Voter Registration Act by reconsidering the efficacy and breadth of covered agencies.[100]

A unique article by Professors Jonathan Becker and Erin Cannan offers a fresh perspective by innovative, high-level college administrators at Bard College. Their symposium article, *Institution as Citizen: Colleges and Universities as Actors in Defense of Student Voting Rights*, examines the role of institutions of higher education as civic actors necessary in realizing the democratic potential of the Twenty-Sixth Amendment.[101] Becker and Cannan survey the legislative history of the Amendment and recent legal scholarship over the last fifteen years and conclude that the role of college leadership is rarely mentioned, pronouncing: "This absence speaks loudly."[102] Drawing on their decades of experience protecting the voting rights of Bard students through education, election administration, college institutionalization of voter protection, multiple

97. *Id.* at 1801–02, 1827, 1832.
98. *Id.* at 1809–10.
99. *Id.* at 1825.
100. Valencia Richardson, *Leveraging Civil Rights Statutes to Empower the Youth Vote*, 74 RUTGERS U. L. REV. 1839, 1854–66 (2022).
101. Jonathan Becker & Erin Cannan, *Institution as Citizen: Colleges and Universities as Actors in Defense of Student Voting Rights*, 74 RUTGERS U. L. REV. 1869, 1875–76 (2022).
102. *Id.* at 1885.

successful legal challenges in state and federal courts, and successful statewide legislation, Becker and Cannan caution that it is

> critical that leaders [of higher education] at least partially take up the fight on its merits, because if they do not do so when rights of their own students are under assault, the legitimacy of the link between higher education and citizenship will be called into question, and the role of higher education in society will decline.[103]

An article by developmental psychologists Laura Wray-Lake and Benjamin Oosterhoff, *Using Developmental Science to Inform Voting Age Policy*, perhaps unconventional for a traditional law symposium publication, offers an insightful examination of the role of developmental science and evidence of adolescents' capacities to vote. The analysis includes research on youth voting trends in local domestic jurisdictions and in foreign countries which have lowered the voting age to sixteen.[104] The developmental scientists advance an evidence-based youth rights argument to lower the voting age.[105]

Clinical law professor Cara Suvall expands on these principles of hot and cold cognition in her novel symposium piece, *Out Before the Starting Line: Youth Voting and Felony Disenfranchisement*.[106] Professor Suvall examines the over-representation of youth and young adults in connection with the criminal justice system, and explains how this period of youth "comes with a heightened likelihood of being legally disenfranchised and . . . is the period in which youth are least likely to be able to get voting rights that were lost restored and most likely to find misinformation around voting eligibility to be an insurmountable barrier."[107] An expert in juvenile criminalization, Suvall explains the legal, administrative, and financial barriers to rights restoration in addition to the related costs of voter misinformation and confusion for those eligible for restoration and for those whose voting rights remain intact despite their relatively minor experiences with the criminal justice

103. *Id*. at 1876, 1908.
104. Laura Wray-Lake & Benjamin Oosterhoff, *Using Developmental Science to Inform Voting Age Policy*, 74 RUTGERS U. L. REV. 1911, 1920, 1926–29 (2022).
105. *Id*. at 1914.
106. Cara Suvall, *Out Before the Starting Line: Youth Voting and Felony Disenfranchisement*, 74 RUTGERS U. L. REV. 1933, 1936 (2022).
107. *Id*. at 1945.

system.[108] Suvall urges youth voting rights advocates to remember to address the policies surrounding youth criminalization in their efforts.[109]

In sum, what emerges from the various oral and written symposium contributions is a recognition that cognizable relief pursuant to the Twenty-Sixth Amendment may still be found from the federal bench, but that we must set our sights within and beyond those hallowed halls so that the right can eventually be fully realized and understood. Youth voting rights advocates must consider seeking relief in state courts where state-based constitutional claims may be better received. Additionally, state and federal legislative bodies may offer some salve. The data-driven federal Youth Voting Rights Act, S. 4500/H.R. 8341, recently introduced in Congress by Senator Elizabeth Warren and Representative Nikema Williams, offers a comprehensive approach to the myriad of ways that young voters are uniquely impacted, and seeks to fulfill the promise of the Twenty-Sixth Amendment.[110] Similar state and local templates may be extrapolated from this framework and expanded upon. Moreover, levers are available beyond the legislatures and judiciaries, particularly as the nation is in the midst of a constitutional crisis.[111] Relief must ultimately be crafted, studied, sought and delivered by We The People. In keeping with the underlying values of the Twenty-Sixth Amendment, young people must be centered and empowered in this process and equipped with multi-generational and cross-institutional support. The future simply has too much at stake as the nation and the world increasingly tilt towards authoritarianism.

Lastly, the symposium took on an audacious task of exploring how these themes relate to the potential of a Third Reconstruction. A few leading democracy practitioners have already declared this as a period of rebirth and resistance.[112] Time will tell if this era of U.S. history will

108. *Id.* at 1945–55.

109. *Id.* at 1934–35.

110. *See* Press Release, Elizabeth Warren, U.S. Senator, Senator Warren, Rep. Williams to Introduce Bill to Expand Youth Access to Voting (July 11, 2022), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-rep-williams-to-introduce-bill-to-expand-youth-access-to-voting; Youth Voting Rights Act, S. 4500, 117th Cong. (2022); Youth Voting Rights Act, H.R. 8341, 117th Cong. (2022).

111. *See generally* MARK C. ALEXANDER ET AL., BEYOND IMAGINATION?: THE JANUARY 6 INSURRECTION (2021) (authored by fourteen deans of American law schools who examine how the Insurrection represents a turning point in America's history, in the hopes of moving the nation forward towards healing and a recommitment to the rule of law and the Constitution).

112. *See, e.g.*, Jackie Salzinger, *A Third Reconstruction: Cornell William Brooks Calls for a New Protest Movement*, POLITIC (Apr. 5, 2015), https://thepolitic.org/article/a-third-reconstruction-cornell-william-brooks-calls-for-a-new-protest-movement (describing Yale

ultimately hold up as one of rebuilding and reunification. Professor C. Vann Woodward, the eminent southern historian, coined the term "Second Reconstruction"—the period following World War II marked by the 1954 Supreme Court case *Brown v. Board of Education*—when the nation began to correct civil and human rights abuses that lingered since the nation's First Reconstruction (1865-1877), the period of constitutional rebuilding in the wake of the civil war.[113] In 1955, Woodward prefaced:

> What the perspective of years will lend to the meaning of change we cannot know. We can, however, recognize and define the area and extent of change . . . . [I]f the earlier eras of revolutionary change can be compared with waterfalls in the stream bed of Southern history, then we are perhaps justified in speaking of the most recent era as one of rapids—and fairly precipitous rapids at that.[114]

The Second Reconstruction ultimately continued for more than a decade; Woodward attributed its end in 1966.[115] Those "fairly precipitous rapids" that he first recognized in the immediate aftermath of *Brown*[116] continued to build force, ultimately forming a new waterfall of democracy. Race relations that had been "attacked and even . . . avoided or neglected" during the First Reconstruction, including political, economic, and civil rights, were finally addressed a century later through the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Housing Rights Act of 1969.[117] A bevy of constitutional amendments accompanied—the Twenty-Fourth Amendment in 1964 to invalidate poll taxes;[118] the Twenty-Fifth Amendment in 1967 to constitutionalize a process for presidential removal and succession, proposed in the aftermath of President John F. Kennedy's assassination

Law School address by NAACP President Cornell William Brooks titled "Civil Rights in America, from Selma to Ferguson: Captives or Creators of History"); Deborah D. Douglas, *Q&A: You Know We're at War, Right?*, BOS. GLOBE (Jan. 5. 2022, 2:19 PM), https://www.bostonglobe.com/2022/01/05/opinion/qa-you-know-were-war-right/; WILLIAM J. BARBER II & JONATHAN WILSON-HARTGROVE, THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR 121 (2016); Peniel E. Joseph, *The Perils and Promise of America's Third Reconstruction*, TIME (Sept. 15, 2022, 6:00 AM), https://time.com/6211887/america-third-reconstruction/.

113. S*ee* C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 91, 107, 240 (3d ed. 2008).

114. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 10 (2001).

115. WOODWARD, *supra* note 113, at 174–78; WOODWARD, *supra* note 114, at 209–10.

116. WOODWARD, *supra* note 114.

117. *Id.* at 9.

118. U.S. CONST. amend. XXIV.

and first invoked following the Watergate scandal;[119] and of course, the Twenty-Sixth Amendment in 1971 to continue the arc of political inclusion and bring eleven million new voters into the democratic process.[120]

Woodward reflected that two distinctive features of the Second Reconstruction were absent from the First Reconstruction: "(1) the predominance of the Negro, and (2) the predominance of youth . . . . *They sprang to the vanguard, furnished the martyrs, produced the heroes*."[121] To be sure, young people have always written the Story of America, and they continue to do so today.[122]

As we close out the fifty-year anniversary of the Twenty-Sixth Amendment, and embark on the next fifty years towards its centennial, like Reconstructions prior, the nation faces countless constitutional crises met by extreme violence by a political base afraid of losing majority control. To name a few: the integrity of the Supreme Court amidst an emerging activist conservative majority;[123] the proliferation of the Big Lie fraudulently claiming that the 2020 election was stolen and related attacks on election administrators;[124] and a violent attempted coup on the U.S. Capitol during a joint session of Congress to certify the results of the presidential election, leading to presidential impeachment.[125] Amid this political and physical violence, new constitutional proposals are on the table: election modernization based on learned trends of the 2020

119. U.S. CONST. amend. XXV; *25th Amendment*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/constitution/amendmentxxv (last visited Oct. 26, 2022).

120. U.S. CONST. amend. XXVI; Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution, *supra* note 11. In my prior work, I describe the Twenty-Sixth Amendment as "an integral part and natural extension of the Second Reconstruction." Bromberg, *supra* note 8, at 1120.

121. WOODWARD, *supra* note 113, at 169–70 (emphasis added).

122. Yael Bromberg, *The Youth Voting Rights Act Would Transform Access for Young Voters*, TEEN VOGUE (July 27, 2022), https://www.teenvogue.com/story/youth-voting-rights-act-what-is.

123. Ben Olinsky & Grace Oyenubi, *The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, CTR. FOR AM. PROGRESS (June 13, 2022), https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/.

124. Lauren Miller & Wendy R. Weiser, *January 6 Hearings and the Big Lie's Ongoing Damage to Democracy*, BRENNAN CTR. FOR JUST. (June 13, 2022), https://www.brennancenter.org/our-work/analysis-opinion/january-6-hearings-and-big-lies-ongoing-damage-democracy.

125. Juana Summers, *Congress Certifies Biden Victory; Trump Pledges 'Orderly Transition' on Jan. 20*, NPR (Jan. 7, 2021, 3:41 AM), https://www.npr.org/2021/01/07/954234902/congress-certifies-biden-victory-after-pro-trump-rioters-storm-the-capitol.

pandemic election;[126] elimination of the electoral college;[127] ratification of a Twenty-Eighth Amendment to remove the stranglehold of money from our political system;[128] and ratification of the long-lingering Equal Rights Amendment.[129] A comprehensive, sweeping proposal to fulfill the promise of the Twenty-Sixth Amendment has also been introduced, the Youth Voting Rights Act.[130]

The ultimate question of our time, then, is whether the nation will rise to the occasion and emerge as a more perfect union, and at what cost. Just as they did during the Second Reconstruction, young democracy practitioners are leading the way. Their participation will help to forge a new waterfall for democracy, particularly if the institutions of justice and lawmaking do not turn their backs on the cross-partisan tenet that the Twenty-Sixth Amendment's purpose is to protect and bolster our republic. For it is youth who offer "some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country throughout history, we find, goes through ebbs and flows of idealism."[131]

126. Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2022); For The People Act of 2021, H.R 1, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

127. H.R.J. Res. 14, 117th Cong. (2021).

128. H.R.J. Res. 48, 117th Cong. (2022); H.R.J. Res. 1, 117th Cong. (2021); S.J. Res. 25, 117th Cong. (2021).

129. S.J. Res. 28, 117th Cong. (2021).

130. *See* Press Release, Elizabeth Warren, *supra* note 110; Bromberg, *supra* note 122.

131. Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution, *supra* note 11.