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Katharine Silbaugh

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DEVELOPMENTAL JUSTICE AND THE VOTING AGE

*Katharine Silbaugh**

ABSTRACT

Several municipalities have lowered the voting age to 16, with similar bills pending in state legislatures and one considered by Congress. Meanwhile, advocates for youth are trying to raise the ages of majority across an array of areas of law, including ages for diverting criminal conduct into the juvenile justice system (18 to 21); buying tobacco (18 to 21); driving (16 to 18); and obtaining support from the foster care system (18 to 21). Child welfare advocates are fighting the harms of Adultification, meaning the projection of adult capacities, responsibilities, and consequences onto minors. In legal and social history, seeing 16- and 17-year-olds as possessing adult capacities has connected with holding them responsible for adult decision-making, particularly in the criminal justice system, but also in disciplinary mechanisms at school. This effect is dramatically worse for children of color. These two movements are in tension; child welfare advocates are fighting Adultification while democracy advocates are fighting for younger entry into the adult political sphere. But the age of majority is not a technicality. It is a thick fabric of public and private laws formed for the protection of children and adolescents, an interwoven safety net, whose efficacy depends on the strength of the weave. Indeed, the age of majority plays a protective role in our 18-year-old voting age; the 16-year-old franchise exposes youth to constitutionally protected campaigning, inviting commercial and political interests to target teenagers with “political speech.” Currently, public law shields teenagers from this contact for fear they will be exploited, and private law enables

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parents to constrict campaign interactions with teenagers. Countless similar underappreciated harms of Adultification can carelessly deprive children of educational, housing, employment, and civic futures. The minor extant intrusions on the age of majority, such as the driving age, pale in comparison to the civic meaning of lowering the age of the franchise. When the voting age dropped from 21 to 18, states lowered their legal age of majority from 21 to 18 in response, influencing policies such as aging out of foster care and entitlement to child support beyond 18. As a core marker of citizenship, voting has had a powerful anchoring effect on ideas about civic maturity. Lowering the benchmark for civic maturity threatens to anchor a lower age for civic protection, as occurred when the 26th Amendment passed. This Article contends that 16- to 18-year-olds are entitled to their childhoods, as Greta Thunberg contends, with our protection and support, not to the burdens of adult hopes, adult expectations, adult uses, and adult consequences. It makes a claim for developmental justice grounded in participatory democracy. Lowering the voting age works at cross-purposes to the essential task of protecting youth from premature engagement with the criminal justice system, and with the long-term disenfranchisement that can come with that entanglement. With Adultification risking criminalization and criminalization risking disenfranchisement, current thinking about youth voting exposes disparities in public ambition for the future political participation of youth arising from the disparities in their childhood experiences.

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“This is all wrong. I shouldn’t be up here. I should be back in school on the other side of the ocean. Yet you all come to us young people for hope? How dare you. You have stolen my dreams and my childhood with your empty words.”

- 16-year-old Greta Thunberg, 2019 UN Climate Action Summit, September 2019¹

INTRODUCTION: DEVELOPMENT, POSITIVE RIGHTS, AND TEEN VOTING

On March 7, 2019, Representative Ayanna Pressley went to the floor of Congress to introduce legislation to lower the voting age nationally from 18 to 16, saying, “[f]rom gun violence, to immigration reform, to climate change, to the future of work — our young people are organizing, mobilizing and calling us to action. They are at the forefront of social and legislative movements and have earned inclusion in our democracy.”² Speaker of the House Nancy Pelosi, the most powerful legislator in the United States, favors lowering the voting age to 16, and she supported a local ballot initiative in the 2016 election in San Francisco that would have given 16-year-olds the right to vote in local elections.³ In 2019, 125 members of Congress supported such a move at the federal level. With the help of the advocacy organization Vote16usa.org,⁴ a movement has begun to lower the voting age to 16, with bills pending in a number of state

1. *Greta Thunberg: You Are Failing Us. How Dare You*, CNN (Sept. 23, 2019), <https://www.cnn.com/videos/health/2019/09/23/greta-thunberg-powerful-unga-climate-change-speech-sot-vpx.cnn> [https://perma.cc/3X7N-FVXM].

2. Press Release, Representative Ayanna Pressley, Rep. Pressley’s Floor Remarks on Lowering the Voting Age (Mar. 7, 2019), <https://pressley.house.gov/media/press-releases/rep-pressleys-floor-remarks-lowering-voting-age> [https://perma.cc/3SAX-SPYL].

3. John Bowden, *Pelosi Says She Backs Lowering Voting Age to 16*, HILL (Mar. 14, 2019), <https://thehill.com/homenews/house/434115-pelosi-says-she-backs-lowering-voting-age-to-16> [https://perma.cc/RCK9-JHMY].

4. See generally VOTE16 USA, <http://vote16usa.org/> [https://perma.cc/WSN3-H3BC] (last visited Jan. 10, 2020).

legislatures aimed at aspects of that goal.⁵ Recently, these ideas have motivated successful efforts to lower the voting age to 16 in several cities and towns, and the introduction of the Bill in the current Congress to do so for federal elections.⁶ The movement is premised, in part, on the notion that neuroscience and our improved knowledge of development indicate that for voting, 16-year-olds have sufficient cognitive development.⁷ This Article will examine the movement to lower the voting age through the lens of developmental equality, contending that neuroscience and youth activism are not the only metrics for understanding the laws protecting youth.

State conceptions of 16-year-olds have another consequence. Nationwide, over 800,000 juveniles were arrested in 2017.⁸ While the number of juvenile arrests has declined from over 2 million as

5. *State Legislatures Consider Vote16*, VOTE16 USA, <https://vote16usa.org/state-legislatures-consider-vote16/> [<https://perma.cc/QCV3-PHJ6>] (last visited Jan. 10, 2020).

6. In two Maryland towns, Takoma Park and Hyattsville, for example, 16-year-olds now enjoy the right to vote in municipal elections. See Lindsay A. Powers, *Takoma Park Grants 16-year-olds Right to Vote*, WASH. POST (May 14, 2013), https://www.washingtonpost.com/local/takoma-park-grants-16-year-olds-right-to-vote/2013/05/14/b27c52c4-bccd-11e2-89c9-3be8095fe767_story.html [<https://perma.cc/Z8HX-9MM7>]; Kara Voght, *There's a Growing Movement to Let 16-year-olds Vote. It Would Change Everything*, MOTHER JONES (Apr. 3, 2018), <https://www.motherjones.com/politics/2018/04/theres-a-growing-movement-to-let-16-year-olds-vote-it-would-change-everything> [<https://perma.cc/5EBY-HSYZ>]. Berkeley, California is close to completing the same reform, and the entire state of California may soon become the first in the nation to lower its voting age. See *Measure Y1 Passes to Lower Voting Age for School Board Elections*, VOTE16 USA, <https://vote16usa.org/project/berkeley-ca> [<https://perma.cc/PK82-FVRC>] (last visited Jan. 10, 2020); see also Tyler Okeke & Luis Sanchez, *California Is Taking Steps to Lower The Voting Age — Here's Why*, TEEN VOGUE (Aug. 28, 2019), <https://www.teenvogue.com/story/california-bill-lower-voting-age-17-passes-assembly> [<https://perma.cc/48WN-WHJG>]. See generally Yamiche Alcindor, *Campaign to Lower Voting Age to 16 in Local Races Ignites a Debate*, N.Y. TIMES, (Dec. 9, 2015), <https://www.nytimes.com/2015/12/10/us/politics/campaign-to-lower-voting-age-to-16-in-local-races-ignites-a-debate.html> [<https://perma.cc/B674-L6MB>]; Nik DeCosta-Klipa, *Ayanna Pressley is Introducing Legislation to Lower the Federal Voting Age*, BOSTON.COM (Mar. 6, 2019), <https://www.boston.com/news/politics/2019/03/06/ayanna-pressley-voting-age-16> [<https://perma.cc/H8PL-LM9X>].

7. See, e.g., Vivian Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK L. REV. 1447, 1513 (2012).

8. Office of Juvenile Justice & Delinquency Prevention, *Estimated Number of Juvenile Arrests, 2017*, U.S. DEP'T JUST., <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2017> [<https://perma.cc/6J4S-WZK5>] (last visited Jan. 12, 2020); see also Office of Juvenile Justice & Delinquency Prevention, *Arrest Trends by Offense, Age, and Gender*, U.S. DEP'T JUST., https://www.ojjdp.gov/ojstatbb/crime/ucr_trend.asp?table_in=1 [<https://perma.cc/FEC2-3KY9>] (last visited Jan. 12, 2020).

recently as 2007, the racial disparity in juvenile justice involvement is *increasing*.⁹ The District of Columbia, where Pressley gave her speech, continues to have among the highest rates of youth in the physical custody of the juvenile justice system.¹⁰ The involvement of those youth in the juvenile justice system dramatically increases the odds that they will develop an adult criminal record,¹¹ which will undermine their futures as voters, and in seeking employment, housing, and education.¹² Just next door in Virginia, 22% of the African American population continues to be disenfranchised due to past felony convictions.¹³ Approximately 6.1 million Americans cannot vote because of felony disenfranchisement,¹⁴ and approximately 12 million Americans between the ages of 16 and 18 cannot vote due to age.¹⁵

This Article contends that 16- to 18-year-olds are entitled to their childhoods, as Greta Thunberg contends, with our protection and support, not to the burdens of adult hopes, adult expectations, and adult consequences. They are not to be used. When we see 16-year-olds, we should see their capacity, but we should focus on their need for protection and developmental support. In legal and social history, the overall impact of seeing 16- and 17-year-olds as possessing adult capacities connects with a tendency to hold them responsible for adult decision-making, particularly in the criminal justice system, but also in

9. *Id.*; Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, SENTENCING PROJECT (Apr. 1, 2016) [<https://perma.cc/B674-L6MB>].

10. *State-By-State Data*, SENTENCING PROJECT, <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/> [<https://perma.cc/VK2B-SXHY>] (last visited Jan. 11, 2020).

11. *FACT SHEET: Reducing Recidivism for Justice-Involved Youth*, U.S. DEP'T EDUC. (Dec. 2, 2012), <https://www.ed.gov/news/press-releases/fact-sheet-reducing-recidivism-justice-involved-youth> [<https://perma.cc/WQJ8-P9XM>]; *see also Reducing Juvenile Recidivism*, COUNCIL ST. GOVS. JUST. CTR., <https://csgjusticecenter.org/youth/reducing-juvenile-recidivism/> [<https://perma.cc/68CV-7G7L>].

12. *See* Sarah Berson, *Beyond the Sentence — Understanding Collateral Consequences*, U.S. DEP'T JUST., OFF. JUST. PROGRAMS, <https://nij.ojp.gov/topics/articles/beyond-sentence-understanding-collateral-consequences> [<https://perma.cc/6Z8H-C4YS>].

13. *State-By-State Data*, *supra* note 10.

14. Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/4TYV-7AT4>].

15. *Child Population by Age Group in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/101-child-population-by-age-group> [<https://perma.cc/3NL5-KU8V>] (last visited Jan. 11, 2020).

disciplinary mechanisms at school.¹⁶ That tendency is dramatically worse for children of color.¹⁷ Advocates for youth are trying to *raise* the age for diverting criminal conduct into the juvenile justice system from 18 to 21, a movement aimed at extending civic protection to childhood and reversing the serious harms of Adultification.¹⁸ To be a minor is to have a protective status, conceptually rich and legally significant.

These movements are in tension; child welfare advocates are fighting Adultification while democracy advocates are fighting for a lower age to enter the adult political sphere. That tension cannot be minimized with assurances about the genuinely good intentions of the Vote16 movement. This Article juxtaposes the movement to lower the voting age to 16 based in part on neuroscience with the contrasting grooming of many 16-year-olds via the juvenile justice system to lose the franchise for long portions of their lives. Through that juxtaposition, this Article considers a claim for developmental justice for children and youth grounded in participatory democracy. Lowering the voting age works at cross-purposes to the essential task of protecting youth from premature engagement with the criminal justice system, and with the long-term disenfranchisement that comes with that entanglement. Adultification is shown to lead to lessening of social and civic support for teenagers,¹⁹ and this Article argues that

16. Phillip Goff et al., *The Essence of Innocence: The Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 501, 526–45 (2014). See generally REBECCA EPSTEIN ET AL., GEO. UNIV. LAW CTR., CTR. ON POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS CHILDHOOD (2017), <https://endadultificationbias.org/wp-content/uploads/2019/05/girlhood-interrupted.pdf> [<https://perma.cc/6NXR-Q8HQ>].

17. See generally JAMILIA BLAKE & REBECCA EPSTEIN, GEO. UNIV. LAW CTR., CTR. ON POVERTY & INEQUALITY, LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS 1–2 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/05/Listening-to-Black-Women-and-Girls.pdf> [<https://perma.cc/B9DW-XC63>]; EPSTEIN ET AL., *supra* note 16.

18. See John Kelley, *In Another Big Year for “Raise The Age” Laws, One State Now Considers All Teens as Juveniles*, CHRON. SOC. CHANGE (June 25, 2018), <https://chronicleofsocialchange.org/youth-services-insider/juvenile-justice-raise-the-age-vermont-missouri-state-legislation/31430> [<https://perma.cc/9FFM-Z3J3>]; Teresa Wiltz, *How ‘Raise The Age’ Laws Might Reduce Recidivism*, PEW CHARITABLE TRS. (May 31, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/31/how-raise-the-age-laws-might-reduce-recidivism> [<https://perma.cc/3JC2-E6K9>]; see also Aidan Ryan, *Crime Bill Would Redefine Juveniles as Up to Age 21*, BOS. GLOBE (July 9, 2019), <https://www.bostonglobe.com/metro/2019/07/09/crime-bill-would-redefine-juveniles-age/maHshbBT6QaaX9ooVDVidN/story.html> [<https://perma.cc/KR8S-TZUX>].

19. See generally Blake & Epstein, *supra* note 17; Goff et al., *supra* note 16.

the political significance of voting carries with it a particularly potent threat of worsening those processes.

In their urgent drive to improve political engagement, democracy activists should pause to consider the value of the age of majority. The age of majority is neither arbitrary nor technical. The age of majority is a system, a thick fabric of public and private laws formed for the protection of children and adolescents. Dismissing the significance of the age of majority belies the function and importance of that legal system. It is too clever to deploy imperfections and irregularities in that fabric to argue that the age of majority lacks content. As long as its protections are meaningful, every intrusion requires substantial consideration not simply of the capacity of children, which is the focus of Vote16's campaign, but of the protective function of legal childhood. The public and private body of law surrounding minors forms an interwoven safety net, whose efficacy depends on the strength of the weave. The impact of minor intrusions on the notion of adulthood, such as driving at age 16, pale in comparison to the civic significance of lowering the age of the franchise.

This web of public and private law defining legal childhood often protects in ways we fail to notice. As just one example, the age of majority is playing a protective function in the case of the current voting age. Political speech, including campaign speech, enjoys the greatest protection in our constitutional and democratic system. With the franchise comes exposure to campaign speech. Vote16 invites the targeting of teenagers by corporate and political interests with "political speech" from which we have typically attempted to protect them.²⁰ Tobacco companies, the military, credit card companies, and all manner of commercial interests are currently regulated in their ability to communicate with minors, in part because minors are deemed too vulnerable to exploitation.²¹ But all of these entities have urgent political interests that inform political campaigns, and enjoy protected rights to communicate with voters. I have seen nothing in the Vote16 movement that contends with this legal conflict.

20. For example, military recruiters may not speak to children until the turn 18 without parental permission; cigarette companies may not market to teens; teenagers may be blocked by parents from gun advocacy websites; credit card companies may not induce teens to borrow. *See infra* Section IV.

21. *See, e.g.*, FED. TRADE COMM'N, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf [<https://perma.cc/JHC7-A7GV>].

Restriction on targeting youth is but one example of the sometimes invisible protective function of legal childhood, a protective function that is remarkably absent from the Vote16 discourse. Vote16 advocates will eventually be forced to address this particular issue as campaigners conflict with state regulation on communicating with minors and as parents exercise their right to limit campaign contact with their 16-year-old children. When they do, will it open up for them broader questions about the general harms of Adulthoodification, and the risks that their movement will lower the anchor for countless other protections associated with legal minority?

In *Reimagining Equality: A New Deal for Children of Color*,²² Nancy Dowd makes a case for a new legal concept: developmental equality. The claim is this: African American boys, and all children, are entitled to conditions that will allow for adequate development. Dowd explains that “[d]evelopmental equality identifies the structural components of inequality created and sustained by the state that generate hierarchies among children.”²³ She marshals neuroscience and new understandings of trauma and adverse childhood experiences to focus our attention on the developmental injustices suffered by African American children due to three factors in particular — poverty, poor treatment in school, and excessive involvement with the juvenile justice system, each of which engages state action. Dowd powerfully melds conceptions about development from neuroscience with social structures: “[a] strong surrounding environment provides the basis for the best development of brain architecture: because the brain is developing at a fast rate, the rate of development and the nature of development depend on experiences, and on interactions and relationships with others.”²⁴ Often, discussion of cognitive development and maturity in law is relatively detached from the context and experiences that shape development, so they miss the normative social, economic, and educational circumstances that problematize narratives about “typical” development. Dowd’s focus on environment and resources liberates the language of neuroscience from the risks that it will draw us inward toward examining psychological states as though they are endogenous rather than a product of resources and state action that are highly relevant to any discussion of equality or justice.

22. NANCY E. DOWD, *REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR* (2018).

23. *Id.* at 3.

24. *Id.* at 104–05.

Dowd recognizes that she is making a case for positive rights, though claims for positive rights have been difficult in our federal system, even for children.²⁵ Dowd asks us to revisit fundamental ideas about rights more broadly, but she also grounds the claim for positive rights to development more narrowly in childhood exceptionalism.²⁶ Social inequality during childhood impacts development and life course, even as developmentally disadvantaged groups show resilience in generating coping mechanisms in response to trauma, poverty, violence, and inequality.²⁷ Dowd contends that the unequal developmental opportunities children experience result from state action, and the developmental equality model provides a focus on those state actions. Once policy-created childhood hierarchies influence children's development, adult equality becomes more difficult to achieve. Dowd argues that "[u]ndermining development generates potentially lifelong subordinating consequences that are difficult or impossible to overcome."²⁸ Who we are emerges in part from the conditions we experienced during development, long before we have the capacities to steer ourselves through the decision-making of the hypothesized adult in a liberal democracy. Dowd claims a positive right to development within our constitutional system, and mines aspects of constitutional law to call forth these positive rights to developmental equality. This Article presses the case for developmental justice in the context of the franchise. It argues that conceptions of youth and the franchise expose vast disparities in public ambition for the future political participation of youth and children arising out of vast disparities in developmental experiences.

Lowering the voting age based on an idealized version of development risks *Adultification*: the projection of adult responsibilities associated with adult rights, at a time when children need our continued, formal support, from government, community, neighborhood, and family. The fight for justice in the provision of that support, and against dramatically unequal childhoods, requires

25. Even in the context of children, the Supreme Court has refused to recognize any positive rights to state support or protection under the federal Constitution. *See, e.g.,* DeShaney v. Winnebago Cty. Dep't. of Soc. Serv., 489 U.S. 189 (1989) (no constitutional right to protection from child abuse); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (no constitutional right to a public education). Children do enjoy positive rights to education under all state constitutions. *See generally infra* Section III.

26. *See* DOWD, *supra* note 22, at 80, 130.

27. *Id.* at 32–41, 61–65.

28. *Id.* at 3–4.

viewing 16- and 17-year-olds as children for purposes of our public obligation to them. Without diminishing the power and presence many youths of this age possess, it is a mistake to carve out this single aspect of their capacity from the more important context, which is the fight for truly enabling and protecting development provided on an equal basis. Speaking of teenagers as actualized near-adults, when the state is assaulting their cognitive, social, emotional, and civic development by processing so many of them through the juvenile justice system and school disciplinary processes, threatens to lead us away from focusing on their needs, and our own civic obligation to meet those needs.

The Parkland students, who energized a national conversation about reform of gun laws, serve as the normative basis for the movement to lower the voting age, the central example of contemporary student political voice.²⁹ At the same time, they may exemplify the relatively privileged ideas of child development that trouble Dowd, despite the conscious inclusion efforts made by the Parkland leaders.³⁰ If development is a dynamic process rather than a decontextualized one, and if cognitive development is shaped in part by disparate state action rather than universalized, then we need to acknowledge a *politics* to development as we speak about the franchise.

When considering voting rights, the image of the Parkland students must expand in light of excessive and discriminatory involvement of African American teenagers with the juvenile justice system. Because so many states, formally or functionally, permanently disenfranchise citizens with a felony record, excessive teen involvement in the juvenile justice system begs consideration of the

29. See, e.g., Voght, *supra* note 6; see also Susan Jones, *Democrats Point to Student Gun-Control Activists As a Reason to Lower Voting Age to 16*, CNS NEWS (Mar. 6, 2019, 7:57 AM), <https://www.cnsnews.com/news/article/susan-jones/democrats-point-student-gun-control-activists-reason-lower-voting-age-16> [https://perma.cc/7C93-4NXT].

30. See DOWD, *supra* note 22, at 65. Marjory Stoneman Douglas High School, the site of the Parkland, Florida school shooting, is a majority white school but is more diverse than the typical American high school. The recognizable leaders of the movement spawned by the shooting appear to be predominantly white, with the exception of Emma Gonzales. See Sarah Ruiz-Grossman, *Black Parkland Students Want Peers to ‘Share the Mic’*, HUFFINGTON POST (Apr. 5, 2018), https://www.huffingtonpost.ca/entry/black-students-marjory-stoneman-march-for-our-lives-gun-violence-movement_n_5ac5548ce4b056a8f59810f9 [https://perma.cc/F62K-NK9U]; *School Directory Information for Marjory Stoneman Douglas High School*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&ID=120018002721 [https://perma.cc/MG57-EE7W] (last visited Jan. 21, 2020).

impact on political participation. While new legal reform efforts focus on enhancing the political voice of predominantly white teenagers by enfranchising them, African American youth are targeted by the juvenile justice system, which places them at far greater likelihood of funneling into the adult criminal justice system.³¹ That, in turn, leads to their long-term disenfranchisement. Therefore, many Black teenagers are now in the process of becoming permanently disenfranchised, just as more advantaged teenagers are being offered the franchise at age 16, as the world takes note of their political voice. This is particularly distressing because a powerful argument for positive rights to equal development could be that developmental justice is a necessary foundation to meaningful citizenship — citizenship best exemplified by the vote — just as eighteenth-century leaders argued of education. Before we think about enfranchising teenagers, we must think about protecting all teenagers from long-term disenfranchisement; otherwise, we risk exacerbating developmental and political inequality. A central commitment of protecting teenagers includes a steadfast defense of legal childhood as against the harmful encroachments of Adulthood at school, in the juvenile justice system, in the commercial system, and even in the political arena.

Part I of this Article explores the voting age debate, focusing on the modes of argument made in support of the 26th Amendment to lower the voting age from 21 to 18, and their correlates in today's movement to lower the voting age from 18 to 16. Part I considers the movement to lower the voting age in light of the protective goals of the developmental justice lens. Part II of this Article considers the protective function disenfranchisement plays for 16- to 18-year-olds, as families and governments often shield those teens from political speech by commercial or other organized interests. Part III explores the intellectual history of a case for public education rooted in popular sovereignty and extends that reasoning to a positive right of developmental justice. A political theory of negative rights depends in part on the democratic ideal of a government built and run by the people. This popular sovereignty, in turn, depends upon an able citizenry. The argument for state interest in preparing adults to self-govern fueled a movement toward public schooling in the eighteenth century, realized more fully for white children in the nineteenth century. Noah Webster wrote in 1787:

31. See DOWD, *supra* note 22, at 48.

In despotic governments, the people should have little or no education, except what tends to inspire them with a servile fear. Information is fatal to despotism The constitutions are republican and the laws of education are monarchical. The former extend civil rights to every honest industrious man; the latter deprive a large proportion of the citizens of a most valuable privilege. In our American republics where governments are in the hands of the people, knowledge should be universally diffused by means of public schools. Of such consequence is it to society that the people who make laws should be well informed that I conceive no Legislature can be justified in neglecting proper establishments for this purpose.³²

By the time we are old enough to function as citizens, developmental injustice has changed who we become based in part on the way race frames childhood. In this regard, we have failed the founders' "republican" conception of readiness before children reach the voting age. Part IV sets out the case that voting is itself a positive right, enabling of negative rights in much the way public education enables voting.

Part V considers Dowd's case for developmental equality through the lens of the franchise, and grounds developmental justice in positive rights. Discussion of lowering the voting age must contend with the disparate paths toward and away from citizenship for developmentally advantaged teens and those experiencing developmental injustice. The decontextualized neuroscience on which the voting argument rests obscures the state action which fuels developmental inequality. The Article concludes that lowering the benchmark for civic maturity threatens to anchor a lower age for civic protection, as it did when the 26th Amendment passed. That price is too high for too many youths in need of a more protective lens on teen years.

I. THE VOTING AGE DEBATE

In part to improve lifelong political participation and to recognize the stake youth have in political choices,³³ in recent years a handful of countries, including Austria, Brazil, Argentina, Croatia, Malta, and

32. NOAH WEBSTER, *On the Education of Youth in America*, in A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE 3 (1783), <http://americainclass.org/sources/makingrevolution/independence/text3/websteramericidentity.pdf> [<https://perma.cc/EE3R-WD4Z>].

33. See *Should 16-Year-Olds Be Given the Vote?*, DEBATING EUR. (June 9, 2019), <https://www.debatingeurope.eu/2019/07/18/16-year-olds-given-vote/#.XW7AoChKiUk> [<https://perma.cc/DBH9-TQ9Y>].

Scotland have lowered the voting age to 16.³⁴ In the United States, several local jurisdictions have lowered the voting age for municipal elections, including Takoma Park, Maryland, and Berkeley, California.³⁵ Representative Ayanna Pressley (D-MA) introduced legislation in Congress this term to lower the voting age to 16, and Nancy Pelosi has embraced the concept in principle.³⁶ At this moment in time, 16- to 18-year-olds are perceived to be more likely to vote for Democrats than Republicans, and therefore the Democrats may have a self-interest in pursuing a lower voting age.³⁷ Yet, in recent years the conservative movement has been actively engaged in promoting conservatism to high school students through its conservative youth organization, Turning Point USA,³⁸ and many arguments for lowering the voting age bear no relationship to political party. This Part considers those less-partisan arguments to understand what ideas about age and citizenship fuel voting age policy. What is the political economy of this movement, its rhetoric, and underlying theory?

Evaluation of the rhetoric surrounding the voting age suggests that it has not been possible to contain the meaning of the voting age to its

34. See *id.*; *Argentina Voting Age Lowered From 18 to 16*, BBC NEWS (Nov. 1, 2012), <https://www.bbc.com/news/world-latin-america-20164573> [<https://perma.cc/9N39-Q6KE>]; Sharon Omondi, *Legal Voting Age By Country*, WORLDATLAS (Sept. 7, 2017), <https://www.worldatlas.com/articles/legal-voting-age-by-country.html> [<https://perma.cc/YX3H-PFEL>]; Johannes Pleschberger, *What Does Voting at 16 Change? The Case of Austria*, EURONEWS (Nov. 9, 2018), <https://www.euronews.com/2018/09/11/what-does-voting-at-16-change-the-case-of-austria> [<https://perma.cc/8WTS-DZYU>].

35. See Joshua Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052–61 (2017); Benjamin Oosterhoff, *Should 16 and 17-Year-Olds Be Able to Vote?*, PSYCHOL. TODAY (Oct. 14, 2018), <https://www.psychologytoday.com/ca/blog/civically-engaged/201810/should-16-and-17-year-olds-be-able-to-vote> [<https://perma.cc/FZW6-ZLKF>].

36. See Bowden, *supra* note 3; DeCosta-Klipa, *supra* note 6.

37. See Emily Badger & Claire Cain Miller, *How the Trump Era Is Molding the Next Generation of Voters*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/upshot/trump-era-molding-young-voters.html> [<https://perma.cc/5D5T-PJEE>]; Valerie Richardson, *States Race Ahead of 2020 Democrats in Push to Scrap Electoral College, Lower Voting Age*, WASH. TIMES (Mar. 27, 2019), <https://www.washingtontimes.com/news/2019/mar/27/2020-democrats-proposed-electoral-college-voting-a/> [<https://perma.cc/VK38-WLBS>].

38. See Andrew Marantz, *The Parkland Provocateur Kyle Kashuv Prepares to Graduate*, NEW YORKER (June 3, 2019), <https://www.newyorker.com/magazine/2019/06/03/the-parkland-provocateur-kyle-kashuv-prepares-to-graduate> [<https://perma.cc/W8Y7-5NFG>]; Alexandra Yoon-Hendricks, *A Place Where Conservative Teenagers Feel Free to be Themselves*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/us/politics/turning-point-young-conservatives.html> [<https://perma.cc/3H25-G4HU>].

own lane. Instead, as one of the primary markers of citizenship, the voting age has a powerful anchoring effect on ideas about civic maturity, regardless of intentions. Indeed, advocates for *raising* the age of juvenile court jurisdiction cite directly to the other legal benchmarks of adulthood, starting with voting:

You have to be 18 to vote in a general election or join the military without your parents' consent — and you've got to be 21 before you can belly up to the bar.

But in some states, if you're under 18 and you break the law, you'll be treated as an adult, no matter how slight the crime — even if it's just jumping a subway turnstile or shoplifting.

Sixteen-year-olds in New York and North Carolina are still funneled through adult criminal courts and housed in adult prisons and jails. In Georgia, Michigan, Missouri, Texas and Wisconsin, 17-year-olds are automatically prosecuted as adults.

Raising the age can have a huge impact on the lives of young people. Teens funneled into adult prisons do not have access to rehabilitative services that the juvenile justice system provides. And adult prisons can be extremely dangerous for teens.

Prosecuting minors as adults used to be more common. But the practice has declined amid increasing awareness that young people, with brains that are still developing, may not fully understand the consequences of their actions, as well as evidence that teens are more likely to commit additional crimes if they are prosecuted as adults.³⁹

Advocates of a 16-year-old voting age need to take seriously the possibility of unintended consequences for 16-year-olds beyond the vote itself. At the time the voting age dropped from 21 to 18, most states still called 21 the age of majority.⁴⁰ Once the voting age moved down to 18, states lowered their legal age of majority to 18 in response,⁴¹ which influences policies such as aging out of foster care at 18,⁴² and entitlement to child support beyond 18.⁴³ This Part seeks

39. Wiltz, *supra* note 18.

40. See *The 26th Amendment*, HISTORY, <https://www.history.com/topics/united-states-constitution/the-26th-amendment> [<https://perma.cc/MJD9-2YDJ>] (last visited Jan. 13, 2020).

41. See *Termination of Child Support Age of Majority*, NAT'L CONF. ST. LEGISLATURES (May 6, 2015), <http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx> [<https://perma.cc/G6D5-DED3>].

42. See *Time for Reform: Aging out and on Their Own*, ANNIE E. CASEY FOUND. (May 28, 2007), <https://www.aecf.org/resources/time-for-reform-aging-out-and-on-their-own/> [<https://perma.cc/S4S2-AMGS>].

to surface the dynamic between voting age arguments and conceptions of the need to protect youth.

The following Section considers the *kinds* of arguments that appear in the debate, looking for theories of childhood, democracy, citizenship, and development that are deployed in the discussions, in order to anchor developmental equality in political history and discourse.

A. The Civic Elevation of the Age 18

It is not difficult to identify the cause of the 18-year-old voting age, especially since cause does not need full coherence. There was a single over-arching mode of argument that was *persuasive* in lowering the voting age to 18, and that mode of argument compared the age of military service to the age of voting. In 1942, President Franklin Roosevelt led a successful effort to lower the age for conscription into the armed services to 18, and a consensus quickly developed that voting should accompany involuntary service.⁴⁴ The effort to lower the voting age began as soon as the conscription age changed, with serious proposals to pass a constitutional amendment lowering the voting age as early as 1944.⁴⁵ The Vietnam War propelled that consensus into action.⁴⁶ In 1971, the 26th Amendment to the Constitution was ratified, setting the voting age at 18, where it had previously been 21.⁴⁷ The causal explanation for the 18-year voting age, then, is the tethering of voting age to the age for military service: “old enough to fight, old enough to vote” was the rallying cry of the 26th Amendment movement.⁴⁸ Put differently, the cause for the 18-year-old voting age is that the age for military service was lowered to 18. The voting age did not advance in its own right but in relation to

43. See *Termination of Child Support Age of Majority*, *supra* note 41.

44. See Maggie Astor, *16-Year-Olds Want a Vote. Fifty Years Ago, So Did 18-Year-Olds*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/voting-age.html> [<https://perma.cc/XSY9-8GD6>]; Andrew Glass, *Congress Changes Draft Age, Nov. 11, 1942*, POLITICO (Nov. 11, 2014), <https://www.politico.com/story/2014/11/this-day-in-politics-congress-draft-november-11-1942-112752> [<https://perma.cc/LU7F-S559>].

45. See *The 26th Amendment*, *supra* note 40.

46. See Scott Warren, *This Is Why 16-Year-Olds Should Be Able to Vote*, N.Y. POST (Mar. 2, 2019, 9:17 AM), <https://nypost.com/2019/03/02/this-is-why-16-year-olds-should-be-able-to-vote> [<https://perma.cc/C29M-8EPQ>].

47. See U.S. CONST. amend. XXVI.

48. See Jenny Diamond Cheng, *How Eighteen-Year-Olds Got the Vote* 6, 10 (Aug. 4, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2818730> [<https://perma.cc/2MWP-NKSB>]; Astor, *supra* note 44.

civic obligations of adulthood. This particular disparity between voting and service ages in the line between childhood and adulthood became untenable. This was not, in effect, an argument about *development*. It was an argument about justice in two anchors of civic adulthood.

i. Benchmarking: Setting the Voting Age at the Age of Military Service

The law allocates various privileges of childhood and adulthood at different ages, generally falling between 16 and 21; the literature discussing civic maturity raises questions of consistency from one specific domain to the next, with age decisions grounded as often in pragmatics as in political theory.⁴⁹ Yet the argument for a relationship between military service and the franchise is particularly compelling; it seems true that if you are old enough to die for your country, you are old enough to participate in its democratic processes.⁵⁰ *Benchmarking* is a powerful force in arguments about the transition to adulthood, no place more clearly than the military as a benchmark for voting. I am seeking to illustrate that voting by the association to other incidents of adulthood does not in itself prove the case for voting, though benchmarking of a new 16-year-old voting age may enhance the legal maturity of the age 16 more broadly.

Given that younger military conscription came before younger voting, their equation begs a question: What makes a person old enough to die for their country? Surprisingly, it was in part the *immaturity* of 18-year-olds, not their maturity, that fueled their conscription. The age for military conscription was lowered to 18 from 21 at a time when the country needed more soldiers, particularly those who were not yet married with dependents.⁵¹ There was value in expanding the overall pool of men to fight by adding 18–20-year-olds, yet the benefit of the younger draft was in part that 18-year-olds

49. See Charles C. W. Cooke, *The Age of Majority Is a Mess*, NAT'L REV. (Feb. 28, 2018, 10:20 AM), <https://www.nationalreview.com/corner/voting-age-lowered-16-no-consistency/> [<https://perma.cc/BDE3-MPQ2>]; Jeff Jacoby, *Lower the Voting Age? Let's Raise It Instead*, BOS. GLOBE (Mar. 15, 2019, 5:07 PM), <https://www.bostonglobe.com/opinion/2019/03/15/lower-voting-age-let-raise-instead/wOapyrwQTEVgjT7btjasuK/story.html> [<https://perma.cc/48WN-5FHU>]; Holly N. S. White, *Why We're Letting Americans Vote, Marry, and Drink Far Too Young*, WASH. POST (May 29, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/05/29/why-were-letting-americans-vote-marry-drink-far-too-young/> [<https://perma.cc/49CE-377V>].

50. See Astor, *supra* note 44.

51. See Cheng, *supra* note 48, at 15.

had *less* civic maturity than those older men, who were already supporting dependents.⁵² No military casualty is welcome, but the death of a soldier with young children or a wife was thought to be the worst kind, impacting financial dependents and cutting into the family.⁵³ In 1942, Congress granted draft deferment to married men,⁵⁴ with Senator Joshua Lee of Oklahoma saying “[w]e want the unmarried men taken first.”⁵⁵ In this sense, the military was looking not just for more people but for *younger* people, who had not yet matured into married life or parenthood. The age of 18 represented to the military some sweet spot *between* childhood and adulthood. Some may believe that the decision was driven by a conception of mature adulthood presaging today’s neuroscience, but there is evidence that it was driven by a peculiar military decision to exploit the unattached immaturity of the 18-year-old.

Despite the intuitive nexus between service and voting, the current voting age movement hopes to separate the two for analysis. Its claim might be that a 16-year-old is ready to vote, but not yet ready to serve in the military. Indeed, I doubt very much that advocates of 16-year-old voting would want any analogies made to military service that would suggest the introduction of a lower draft or enlistment age. Those advocates would likely see a conscripted or enlisted 16-year-old as a child-soldier, because in the military context, a 16-year-old looks to most people like a child.

Once the decision to draft 18-year-olds was embedded in civic understanding, the case for voting age parity was intuitively compelling, but still worthy of analysis. A general notion of highest civic duty (military service) and highest civic right (the franchise) as a benchmarked pair might be grounded in different theories, in addition to benchmarking as its own argument. One theory is that 18-

52. *Id.*

53. See Dominique McIndoe, *June 26, 1942: Married Men to Get Draft Deferment — For Now*, SETON HALL U.: WORLD WAR 2.0, <https://blogs.shu.edu/ww2-0/1942/06/26/married-men-to-get-draft-deferment-for-now/> [<https://perma.cc/SYX7-VYE8>] (last visited Jan. 20, 2020) (student project of creating historical news articles using information that would have been available at the time but written in contemporary style); Kara Dixon Vuic, *Women May Soon Have to Register for the Draft, It’s Long Overdue*, WASH. POST (Mar. 4, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/03/04/women-may-soon-have-register-draft-its-long-overdue/> [<https://perma.cc/GZ6V-PS67>].

54. See C. P. Trussell, *Deferring of Married Men in Draft Is Written into Allowances Bill*, N.Y. TIMES (June 13, 1942), <https://timesmachine.nytimes.com/timesmachine/1942/06/13/issue.html> [<https://perma.cc/82D7-9HX4>].

55. See McIndoe, *supra* note 53.

year-olds have *earned* the right of political participation through their acts of military service. A second is that the possibility of forced service demonstrates the *stake* that 18-year-olds have in the outcome of political debates. Benchmarking in and of itself, earned franchise, and a stake in politics all re-appear in debates over the current effort to lower the voting age to 16.

ii. Earning the Vote Through Service in the Military

The argument for *earned* franchise at 18 has rhetorical force so strong that it seems to require little unpacking. Yet women, too, received the franchise at 18, though they have not been subject to the military draft,⁵⁶ and the vast majority of 18 to 21-year-olds never “earned” their right to vote by actually serving in the military.⁵⁷ In an earned franchise argument, the *age* itself must be the important focal point: “old enough to fight, old enough to vote.”⁵⁸ If so, the notion that the franchise is earned with service is not the truth of the case; the case rests on a theory about the age 18, an age that has itself been burnished and elevated in many aspects by the fact that it is useful to the military. In this way, 18 as a status has earned the right to vote. Conceptions of the age 18 developed over the twentieth century are not necessarily well supported by twenty-first-century neuroscience, which is showing that the cognitive capacity continues to develop into a person’s mid-twenties.⁵⁹ This new information is unlikely to change the political equation of military service with the franchise, if 18-year-olds vote because their exposure to military service is a form of earning the franchise.

56. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

57. See Mona Chalabi, *What Percentage of Americans Have Served in the Military?*, FIVETHIRTYEIGHT (Mar. 19, 2015, 6:19 AM), <https://fivethirtyeight.com/features/what-percentage-of-americans-have-served-in-the-military/> [<https://perma.cc/4MF6-E6CG>] (about 7.3% of Americans have served).

58. See generally Joseph P. Williams, *‘Old Enough to Fight, Old Enough to Vote’: The 26th Amendment’s Mixed Legacy* (July 1, 2016), U.S. NEWS & WORLD REP., <https://www.usnews.com/news/articles/2016-07-01/old-enough-to-fight-old-enough-to-vote-the-26th-amendments-mixed-legacy> [<https://perma.cc/C7HQ-KY5N>] (the movement for lowering the voting age from 21 to 18 centered on the idea that if a person is old enough to be sent to war, he should be old enough to vote for the Commander-in-Chief who sends him to war).

59. See Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013); Sarah B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 1, 3 (2009).

iii. Stakeholding: Enfranchising Citizens Who Have a Stake in Political Issues

The second argument for benchmarking the voting age against the age of military service is that the *possibility* of conscription at 18, and the risk of death, places an intense spotlight on the stake an 18-year-old has in choosing political leaders. One choice may increase the chance of foolish war, another the chance of righteous war, a third choice might lead to a lower conflict path to achieving national goals. This is also intuitively persuasive. Yet if you turn 18 in January, you might be drafted before you ever cast your first vote in a national election, the level of government at which questions of war are decided. To influence the likelihood of your own death at war, it might make sense to extend the franchise to 14 or 15, when the roots of future conflict still allow for diplomatic approaches. Perhaps this states the argument too literally — it is not that voting at 18 increases or decreases your own risk of sacrificing your life for your country. Rather, voting at 18 becomes a proxy for 18-year-olds as a group, today and in the future, who may be subject to the military draft. The 18-year-old age group has a substantial stake in electoral outcomes, and should therefore participate in elections. Given the vast developmental inequality beginning at birth for children born into poverty and experiencing unequal schooling, we might think that 5-year-olds also have substantial stake in government policy sufficient to justify their participation in elections.⁶⁰ Yet the death risk associated with the draft gives unique force to the arguments about a “stake” in the choice of representatives in government.

The next Section explores these three modes of argument underlying the military-voting link that supports the age 18 franchise in the age 16 context: *benchmarking* to an age respected for independent reasons, *earned* participation in the political process, and *stakeholder* arguments (enfranchisement because of “skin in the game”). It considers the use of each in the current debates over a 16-year-old voting age, and the risks. Finally, this Section describes an additional set of arguments appearing in the new debate that relate to developmental neuroscience rather than to benchmarking, and that link the science of development to the potential improvement of democracy through increasing rates of participation in elections.

60. See DOWD, *supra* note 22, at 11–27 (exploring the ways that state-sponsored poverty and schooling influence development for very young children).

B. Translation of the Age 18 Arguments to the Age 16

The arguments for lowering the voting age to 18 were successful and had intuitive and substantive force. An examination of today's movement to lower the voting age to 16 shows parallels to those winning arguments for the 26th Amendment, with military service the most striking difference from those arguments.

i. Benchmarking

Given the history, perhaps it is unsurprising that arguments both for and against a 16-year-old voting age are overwhelmingly embedded in comparison to other “ages of adulthood.” In newspapers and other short-form media, in particular, discussion of lowering the voting age centers around a litany of activities tied to various ages, depending on the writer's position. Children can drive when they turn 16 and cannot drink until they turn 21, and until they turn 18, for example, children may not be held to their contracts, buy cigarettes or a lottery ticket, marry without parental permission, get a ten year passport, or work full-time during the school year.⁶¹ Accordingly, this argument goes, individuals should not be able to vote until they turn 18. The argument from consistency and benchmarking is marshaled by proponents of lowering the voting age as well. After all, 16-year-olds can be subject to adult prosecution, pay taxes on wages, drive cars, engage in sexual conduct, and may

61. See, e.g., Morris Chafetz, *Adulthood at 18 — Not 16, Not 21*, BALTIMORE SUN (July 22, 1996), <https://www.baltimoresun.com/news/bs-xpm-1996-07-22-1996204061-story.html> [https://perma.cc/6UYC-TNBT]; Margaret Drye, *Welcome to Adulthood, Sort Of*, VALLEY NEWS (May 13, 2017), <https://www.vnews.com/the-age-of-adulthood-9808673> [https://perma.cc/A5GJ-7DKE]; Mark Oppenheimer, *Opinion, Marry at 16, Get Drafted at 18, Drink at 21 . . . Who Counts as an Adult?*, L.A. TIMES (Mar. 13 2017), <https://www.latimes.com/opinion/op-ed/la-oe-oppenheimer-age-majority-20170313-story.html> [https://perma.cc/3HPL-XLJS]; Jan Murphy, *Old Enough to Marry? Or Buy Cigarettes? Age Matters in Bills Before PA. Lawmakers*, PA POST (June 17, 2019), <https://papost.org/2019/06/17/old-enough-to-marry-or-buy-cigarettes-age-matters-in-bills-before-pa-lawmakers/> [https://perma.cc/2RHA-79FZ]; Katherine Viti, *New Smoking Law Misunderstands Adult Responsibility*, CAVALIER DAILY (Feb. 27, 2019), <https://www.cavalierdaily.com/article/2019/02/viti-new-smoking-law-misunderstands-adult-responsibility> [https://perma.cc/EQA4-DNPN]; Froma Harrop, *Age Discrimination for the Young*, REAL CLEAR POLITICS (Feb. 9, 2010), https://www.realclearpolitics.com/articles/2010/02/09/age_discrimination_for_the_young_100223.html [https://perma.cc/PA54-7NST]; *Talk of the Nation: When Does Responsibility Begin? 16, 18, 21?*, NAT'L PUB. RADIO (Oct. 7, 2009), <https://www.npr.org/templates/story/story.php?storyId=113579236> [https://perma.cc/M9RU-8XT5].

even donate blood.⁶² These responsibilities suggest a flexible process of arriving at adulthood, with a number of indications that 16-year-olds have been judged by society to possess significant capabilities and responsibilities to the state that may align with exercising the franchise. Yet the age of majority remains 18 in almost all states, with children's entitlement to parental and state protection ending when they reach that age.⁶³ The vast majority of less visible regulations and private law treat 18 as the end of legal childhood protections, or disabilities, which are often the same thing.

These arguments for voting from comparison to other incidents of adulthood may sound in benchmarking logic, but they may also collapse in that logic, because we are not perfectly consistent across our age-based benchmarks for adulthood. In addition, we cannot even organize our age-based gateways by developmental milestones, with each gateway determined by the particular cognitive maturity needed for the task in question relative to the average developmental age. To the contrary, the ages set for various gateways seem to serve the needs of the system rather than reflect the maturity of the child. Sixteen-year-olds are particularly ill-prepared to begin driving because they still have poor impulse control, even as they may possess the maturity of an adult in more deliberative contexts.⁶⁴ Yet they drive at 16, through a combination of poor public transportation alternatives, poor suburban design that generates car dependency, rural car dependency, and significant legal subsidy to automobile usage over other forms of transportation.⁶⁵ Sixteen-year-olds crash and die at significantly higher rates than their 18-year-old counterparts.⁶⁶ In some places, they may drive a car at 16,⁶⁷ but

62. See e.g., *Information for Student Donors*, AM. RED CROSS, <https://www.redcrossblood.org/donate-blood/how-to-donate/info-for-student-donors.html> [<https://perma.cc/2BSF-2ZBH>] (some states allow 16-year-olds to donate blood with parental consent).

63. See *Termination of Child Support Age of Majority*, *supra* note 41.

64. See Vivian Hamilton, *Liberty Without Capacity: Why States Should Ban Adolescent Driving*, 48 GA. L. REV. 1019, 1062 (2014).

65. See generally George H. Shill, *Should the Law Subsidize Driving?*, 95 N.Y.U. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345366 [<https://perma.cc/VZ8T-ERCV>] (discussing the ways that society and the law subsidize driving to a dangerous degree).

66. See Hamilton, *supra* note 64, at 1063.

67. See generally *Teen and Novice Drivers*, GOVERNORS HIGHWAY SAFETY ASS'N, <https://www.ghsa.org/state-laws/issues/Teen-and-Novice-Drivers> [<https://perma.cc/ZZE3-RKN6>] (last visited Jan. 13, 2020).

cannot choose to bypass a bicycle helmet until they are 18,⁶⁸ though a helmet decision is less impulsive than braking distance. There is simply no *benefit* to allowing the 16-year-old to go without a helmet, while there is a societal benefit to the 16-year-old driving a car, whatever the risks. This age evaluation is not about maturity; it is pragmatic.

Yet voting is not the bureaucratic and pragmatic incident of the maturation process and pragmatic needs that driving is, but rather the most significant metric of citizenship against which other gateways will be measured. If benchmarking has intuitive appeal that has and will translate into policy, we need to be forward-looking about what could be benchmarked to a lower voting age in future debates. For example, a 16-year-old voting age risks beating back an active effort to *raise* the driving age to 18, one endorsed by the Insurance Institute for Highway Safety.⁶⁹ If benchmarking has force in the debate over 16-year-old voting, that debate should focus on the potential harm 16-year-old voting could inflict on other areas of law, given the weight and authority of the franchise. Rather than examining what we currently ask of 16-year-olds and grant to 16-year-olds, we need to consider what else we might come to ask of them in a world with 16-year-old voting.

ii. Stakeholder Arguments

Some argue that because 16-year-olds are still supported by their parents and are usually not in the workforce, they do not have “skin in the game.”⁷⁰ The same argument can support a voting age of 16,

68. See *Bicycle Helmet Laws*, HELMETS.ORG, <https://helmets.org/mandator.htm> [<https://perma.cc/AX2S-QSMK>] (last visited Jan. 13, 2020).

69. See *States Urged to Raise the Driving Age*, CBS NEWS (Sep. 10, 2008), <https://www.cbsnews.com/news/states-urged-to-raise-the-driving-age/> [<https://perma.cc/D5KY-BFWQ>].

70. See generally Alyson Johnston, *Lowering Voting Age to 16 is a Bad Idea*, PAMPLIN MEDIA GROUP (Apr. 3, 2019), <https://pamplinmedia.com/wsp/138-schools/424280-329522-lowering-voting-age-to-16-is-a-bad-idea> [<https://perma.cc/L9NZ-7DZX>] (arguing that teenagers should not have the ability to vote because they do not have the same obligations as working adults); Jen Kuznicki, *Don't Lower the Voting Age. Raise It*, CONSERVATIVE REV. (Mar. 13, 2019), <https://www.conservativereview.com/news/dont-lower-voting-age-raise/> [<https://perma.cc/TFL7-D392>] (arguing that 16-year-olds are not mature enough to vote); John Laidler, *Should the Voting Age Be Lowered for Town Elections?*, BOS. GLOBE (Mar. 22, 2019), <https://www.bostonglobe.com/metro/lobelocal/2019/03/22/should-lower-voting-age/YudoB9JpBXgzPIAiZp52kK/story.htm> [<https://perma.cc/8MSZ-HQ9T>] (discussing how young people desire the ability to vote but face opposition from state representatives).

though, because 16-year-olds are often in the workforce part-time, and pay taxes on their earnings to the government in which they have no voting voice. While military service is the literal “skin in the game,” we should remember that public education is one of the most substantial uses of government resources, and children certainly have a stake in its quality, character, and level of funding.

The stakeholder question does not rest solely on the rights of children to shape their destiny, but on the impact that electoral accountability has on political agendas. Politicians campaign vigorously on addressing the costs of higher education,⁷¹ an issue of great interest to 18-year-old voters. However, elementary school funding is not the center of anyone’s campaign, unless the campaign is focused on the worthy cause of raising teacher pay,⁷² a focus which results from a constituency of adult voters more than from a desire to direct funds to children.⁷³ Regardless of whether children have the

71. See, e.g., *College and Workforce Training*, CORY BOOKER <https://corybooker.com/issues/college-and-workforce-training/> [<https://perma.cc/P3F7-XNUU>] (last visited Aug. 9, 2019); *College for All and Cancel All Student Debt*, BERNIE SANDERS <https://berniesanders.com/issues/college-for-all/> [<https://perma.cc/VY9K-8H3W>] (last visited Aug. 9, 2019); *I’m Calling for Something Truly Transformational: Universal Free Public College and Cancellation of Student Loan Debt*, MEDIUM (Apr. 22, 2019), <https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f> [<https://perma.cc/GS44-NEXR>].

72. See, e.g., Sydney Ember, *Julián Castro Unveils Education Plan With Focus on Universal Pre-K*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/julian-castro-education-2020.html> [<https://perma.cc/UV4L-QAE4>] (discussing Julián Castro’s presidential campaign promise to impart a federal tax credit that would increase teacher pay); Nik DeCosta-Klipa, *Elizabeth Warren Pledges to Appoint Former Public School Teacher as Education Secretary*, BOSTON.COM (May 13, 2019), <https://www.boston.com/news/politics/2019/05/13/elizabeth-warren-education-secretary> [<https://perma.cc/DQ9B-KKNB>] (discussing Elizabeth Warren’s presidential campaign promise to appoint a former public school teacher as education secretary); *Raising Teacher Pay*, KAMALA HARRIS FOR PEOPLE, <https://kamalaharris.org/issue/raising-teacher-pay/> [<https://perma.cc/H7FM-2AWR>] (last visited Aug. 9, 2019) (discussing Kamala Harris’s presidential campaign promise to make federal investment to close the teacher pay gap); Emma Kinery, *Klobuchar Unveils Plan to Steer More Money to K-12 Education*, BLOOMBERG (July 5, 2019, 3:34 P.M.), <https://www.bloomberg.com/news/articles/2019-07-05/klobuchar-unveils-plan-to-steer-more-money-to-k-12-education> [<https://perma.cc/9ZHP-U72H>] (discussing Amy Klobuchar’s presidential campaign promise to increase federal funding for K-12 education and require states to increase teacher pay).

73. Chris Baylor, *Teachers’ Unions May Not Raise Pay — But They Do Bolster the Democratic Party*, WASH. POST (May 18, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/18/teachers-unions-may-not-raise-pay-but-they-do-bolster-the-democratic-party/> [<https://perma.cc/GQU2-WMLE>]; Michelle Hackman, *Democratic Candidates Step*

mental capacity to make an electoral decision, they are stakeholders from the start, and their lack of franchise may shape the government resources allocated to them.⁷⁴ Within ten years, the federal government will spend half its resources on adults over age 65.⁷⁵ At present, the federal government spends only one-quarter of the amount on children that it does on adults over 65.⁷⁶ Whether this is justified on the merits, it certainly coincides with the voter/nonvoter divide and supports the role that “stakeholder” arguments could play in lowering the voting age. Some have argued that as long as children cannot vote, if we expect their parents’ votes to protect their interests, we should be granting parents an extra vote for each child they have, to be a proxy vote cast on the child’s behalf as their legal representative.⁷⁷ Finally, the stakeholder argument against 16-year-olds neglects to consider the problems of the future. Arguably, adult voters are particularly bad at considering either the climate crisis or the national debt, for example — both having long time horizons of greatest significance to children, and highly discounted by older voters.⁷⁸

iii. Earning the Vote

While 16-year-olds, and younger children, have a substantial stake in the choice of elected representatives, their service to their country is relatively weak. While some 16-year-olds do work and pay taxes to

Up Courtship of Teachers, WALL ST. J. (May 19, 2019), <https://www.wsj.com/articles/democratic-candidates-step-up-courtship-of-teachers-11559142000> [<https://perma.cc/KQY3-G2FM>].

74. See generally DOWD, *supra* note 22, at 9–50 (discussing all of the ways policy negatively shapes children from a very young age).

75. See Howard Gleckman, *The Federal Government Will Spend Half Its Budget on Older Adults in Ten Years*, FORBES (Feb. 1, 2019, 9:33 A.M.), <https://www.forbes.com/sites/howardgleckman/2019/02/01/the-federal-government-will-spend-half-its-budget-on-older-adults-in-ten-years/#959065856b6f> [<https://perma.cc/TT3C-JP9V>].

76. See Michael Collins, *Report: The Federal Government Is Spending Less Money on Children and More on the Elderly*, USA TODAY (June 7, 2018, 10:35 A.M.), <https://www.usatoday.com/story/news/politics/2018/06/07/report-federal-government-spends-more-elderly-than-kids/677011002/> [<https://perma.cc/2ULW-E7RZ>].

77. Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1496, 1507 (1997).

78. Joel Stein, *Why Older People Shouldn’t Vote*, TIME (Aug. 18, 2019), <https://time.com/4457131/why-older-people-shouldnt-vote-and-other-ideas-unpopular-with-my-parents/> [<https://perma.cc/JRG9-7F6J>].

the government on their wages,⁷⁹ many do not,⁸⁰ and even those who do work are sometimes prevented by law from working full-time during the school year.⁸¹ Relative to earning the franchise through military service to the nation, 16-year-olds have not earned the vote through service, other than the payment of a relatively small amount in taxes.

Yet there is a second way that 18-year-olds “earned” their franchise: through political engagement. Youth activism during the Vietnam War was intense, and the political system saw the exercise of that generation’s collective political voice in protests, legislative testimony, publications, as well as protest music, art, and literature.⁸² While the military age was lowered during World War II, the visibility of a collective youth constituency did not emerge until the political turbulence of the 1960s, which saw “children” between 18 and 21 participate in direct action civil rights protests, freedom summer, the 1968 Democratic convention protests in Chicago, and anti-war protests across the country.⁸³ The development of a meaningful collective political voice of a generation not-yet-21 can be characterized as part of the “earning” process, in the sense of demonstrating readiness for civic engagement.

This argument — that readiness to vote is demonstrated by meaningful political mobilization — plays a significant role in the movement to lower the voting age to 16. Most recent literature about the voting age highlights the Parkland, Florida students, who survived a mass shooting at their high school and quickly mobilized a youth political movement in favor of gun control legislation.⁸⁴ Parkland

79. *Filing Requirements*, INTERNAL REVENUE SERV. (Sep. 20, 2019), <https://www.irs.gov/faqs/filing-requirements-status-dependents/filing-requirements> [<https://perma.cc/799L-DVGP>] (if children make more than a standard deduction, their wages are taxable); Kelly Phillips Erb, *What Kids And Their Parents Should Know About Summer Jobs And Taxes*, FORBES (July 5, 2018, 1:53 PM), <https://www.forbes.com/sites/kellyphillipserb/2018/07/05/what-kids-and-their-parents-should-know-about-summer-jobs-and-taxes/#1ec047bf1ce4> [<https://perma.cc/T9NU-U7V5>].

80. See Teri Morisi, *Teen Trends*, U.S. DEP’T LAB. BLOG (Mar. 9, 2017), <https://blog.dol.gov/2017/03/09/teens-trends> [<https://perma.cc/67RL-VZUK>] (approximately one-third of teenagers have paying jobs).

81. See generally U.S. DEP’T LAB., SELECTED STATE CHILD LABOR STANDARDS AFFECTING MINORS UNDER 18 IN NON-FARM EMPLOYMENT AS OF JANUARY 1, 2019 (2019), <https://www.dol.gov/whd/state/nonfarm.htm> [<https://perma.cc/VR4B-4F7F>].

82. Cheng, *supra* note 48, at 6–7; Hamilton, *supra* note 7, at 1462.

83. See Maggie Astor, *7 Times in History When Students Turned to Activism*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/us/student-protest-movements.html> [<https://perma.cc/T3V4-XEC3>]; Astor, *supra* note 44.

84. See, e.g., Voght, *supra* note 6.

galvanized youth to organize the 2018 March for Our Lives in D.C. and over 800 locations across the country, one of the largest protests in U.S. history.⁸⁵ March for Our Lives, Never Again MSD (Marjory Stoneman Douglas High School, the site of the shooting), and the online and in-person activism of the Parkland students have fueled claims for the franchise for those ready and able to exercise their political voice so effectively.⁸⁶ The Parkland students might serve as the emblem of what political agency looks like among teenagers when adequate community resources have supported their childhood development. A global youth climate strike in September of 2019 demonstrated the ability of youth to work internationally on future-directed activism.⁸⁷ The Black Lives Matter (BLM) movement engages young adults in political action as well, through direct action protests as well as political lobbying,⁸⁸ though it is less frequently cited when marshaling arguments for the youth franchise,⁸⁹ as its events are often portrayed in the media as spontaneous and stochastic rather than strategic examples of an earned political voice.⁹⁰ These

85. *March for Our Lives Highlights: Students Protesting Guns Say 'Enough Is Enough'*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/march-for-our-lives.html> [<https://perma.cc/KXU2-6XGV>]; Michael D. Shear, *Students Lead Huge Rallies for Gun Control Across the U.S.*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/politics/students-lead-huge-rallies-for-gun-control-across-the-us.html> [<https://perma.cc/B945-MCTF>]; Emily Witt, *From Parkland to Sunrise: A Year of Extraordinary Youth Activism*, NEW YORKER (Feb. 13, 2019), <https://www.newyorker.com/news/news-desk/from-parkland-to-sunrise-a-year-of-extraordinary-youth-activism> [<https://perma.cc/W4CR-3RMK>].

86. Voght, *supra* note 6.

87. Brian Resnick & Danielle Scuggs, *Photos: What the Youth Climate Strike Looks like Around the World*, VOX (Sept. 20, 2019, 2:57 PM), <https://www.vox.com/energy-and-environment/2019/9/20/20875523/youth-climate-strike-fridays-future-photos-global> [<https://perma.cc/N5YZ-UAQT>].

88. See Melinda D. Anderson, *From Civil Rights to Black Lives Matter: How Student Activism Spreads to High-School Campuses*, ATLANTIC (Oct. 8, 2019), <https://www.theatlantic.com/education/archive/2015/11/student-activism-history-injustice/417129/> [<https://perma.cc/FGS6-5QMY>].

89. See Dahleen Glanton, *As Country Listens to Florida Teens, Black Lives Matter Youths Feel Ignored*, CHI. TRIB. (Oct. 8, 2019), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-florida-teens-black-lives-matter-dahleen-glanton-20180223-story.html> [<https://perma.cc/SFW6-WQMF>]; Emily Witt, *Calling B.S. in Parkland, Florida*, NEW YORKER (Oct. 8, 2019), <https://www.newyorker.com/news/news-desk/three-days-in-parkland-florida> [<https://perma.cc/FAZ9-5NRW>].

90. See P.R. Lockhart, *Parkland is Sparking a Difficult Conversation about Race, Trauma, and Public Support*, VOX (Oct. 8, 2019), <https://www.vox.com/identities/2018/2/24/17044904/parkland-shooting-race-trauma-movement-for-black-lives-gun-violence> [<https://perma.cc/8HZ2-HJ5H>]; Adia Robinson, *After 5 Years, Black Lives Matter Inspires New Protest Movements*, ABC

media portrayals underestimate the organization and efficacy within the BLM movement,⁹¹ just as media portrayals failed to grasp the strategic sophistication of the civil rights direct action protests of the 1960s.⁹² The icons of the movement to lower the voting age seem to be drawn most often from Parkland and not BLM, a problem that reflects a concern this Article raises about the relationship between the 16 voting age movement, developmental injustice, and the under-aged grooming of African American youth to lose the franchise through involvement with the juvenile justice system.

C. Newcomer Arguments for Lowering the Voting Age to 16

As the previous discussion suggests, some of the arguments for lowering the voting age to 16 have correlates in the successful effort to lower the voting age to 18 fifty years ago. But there are new modes of argument, not seen in the 26th Amendment debate, that are prominent in today's movement, and they feature developmental neuroscience. The relationship between Dowd's work in support of developmental equality and the movement to lower the voting age is underscored by these more recent modes of argument fueling this political movement. These arguments are grounded first in cognitive development neuroscience, and second in the role of development in creating a voting habit.

i. Cognitive Development

Arguments from developmental neuroscience have begun appearing throughout the legal system, whether deployed to mitigate negative consequences of immature behavior, including the impulsive

NEWS (Oct. 8, 2019), <https://abcnews.go.com/Politics/years-black-lives-matter-inspires-protest-movements/story?id=56702439> [<https://perma.cc/7LLG-CHQ5>].

91. See Russell Rickford, *Black Lives Matter: Toward a Modern Practice of Mass Struggle*, NEW LAB. FORUM (Oct. 8, 2019), <https://newlaborforum.cuny.edu/2015/12/28/black-lives-matter-practice-of-mass-struggle/> [<https://perma.cc/L5KM-4CAE>]; Lockhart, *supra* note 90.

92. See Elahe Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protesters*, WASH. POST (Oct. 11, 2019), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters/> [<https://perma.cc/H9ZK-KERU>]; Barbara Reynolds, *I Was a Civil Rights Activist in the 1960s. But It's Hard for Me to Get Behind Black Lives Matter*, WASH. POST (Oct. 11, 2019), <https://www.washingtonpost.com/posteverything/wp/2015/08/24/i-was-a-civil-rights-activist-in-the-1960s-but-its-hard-for-me-to-get-behind-black-lives-matter/> [<https://perma.cc/7TPC-2ZEU>].

commission of crimes,⁹³ or instead to justify the developmental capacity for adult decision-making in the reproductive context.⁹⁴ Though age-based legal capacities remain overwhelmingly determined by “common knowledge” of maturity and practical need for bright lines tied to particular activities, courts and legislatures are increasingly referencing developmental neuroscience when making decisions about the appropriate legal standard to apply to a minor or young adult.⁹⁵ Given the move toward debating maturity in the language of developmental neuroscience, it is not surprising that developmental neuroscience emerges in the more serious legal and political science literature addressing the voting age.⁹⁶

Neuroscience supports the concept of domain-specific competence, meaning the developmental capacity to act like an adult in certain domains, depending on what portions of the cognitive apparatus are needed for a given task, relative to the typical maturation rate of those particular cognitive functions.⁹⁷ Vivian Hamilton argues that the level of specificity about maturation rates of particular capacities has improved to the point that it may be relied on to make decisions about regulating the passage to adulthood by domain. In particular, teenagers are ready to make considered judgments at an earlier age than they are prepared to make pressured decisions. Teenagers are mature in “cold” reasoning but less so in “hot” reasoning:

Converging research from several disciplines within the developmental sciences has established a reliable connection between age range and the attainment of certain cognitive competencies. Research in developmental psychology and cognitive and social neuroscience explains not only that adolescents make notoriously bad decisions under certain conditions, but also why it is they do so. This research explains that by mid-adolescence, when making unpressured, considered decisions — like those required to

93. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010); Dowd, *supra* note 22, at 127.

94. See *Hodgson v. Minnesota*, 497 U.S. 417, 428 (1990); *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 491 (1983); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976); Dowd, *supra* note 22, at 127.

95. See *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68; *Ashcroft*, 462 U.S. at 491; *Bellotti*, 443 U.S. at 648; *Danforth*, 428 U.S. at 74; Dowd, *supra* note 22, at 127.

96. See, e.g., Hamilton *supra* note 7, at 1504.

97. See Arthur Elster, *Lowering the Voting Age to Sixteen: The Case for Enhancing Youth Civic Engagement*, 29 CHILD. LEGAL RTS. J. 64, 65–66 (2009).

privately cast a ballot in an election that has unfolded over time — their cognitive competencies are mature.⁹⁸

“Domain-specific competence” suggests voting at age 15 or 16 would be appropriate because adolescents possess “adultlike cognitive processing capacities.”⁹⁹ They have the adult capacity to gather information, retain it, retrieve it, and to reason.¹⁰⁰ These skills are relevant to voting; they are deliberate skills.¹⁰¹ Adolescents are less developed when it comes to impulse control and rash judgments, which are influenced by different parts of their cognitive development. That slower rate of development for impulse control can be used to explain why a 21-year-old drinking age lowers accident rates.¹⁰² Hamilton’s careful work makes the case persuasively that neuroscience supports the ability of 16-year-olds to vote, and questions of cognitive maturity should not exclude 16- and 17-year-olds from the franchise. Hamilton pairs this cognitive evidence with a general presumption of universal suffrage, exceptions to which require careful justification, and finds that maturity cannot be that careful justification for postponing the vote until age 18.¹⁰³

Note that the body of work on cognitive development and the adolescent franchise is decontextualized from other policy questions, including the benchmarking to other adult gateways, political conceptions of earning citizenship, and becoming a stakeholder. Moreover, current research does not explore the variability in developmental neuroscience, depending on life circumstances, that is the touchstone of Dowd’s work, nor does it notice the decontextualized subject in neuroscience discussion.¹⁰⁴ Given a cognitive development framework relatively detached from the context in which children develop, the literature connecting neuroscience to voting age cannot reflect on the normative social, economic, and educational circumstances that could problematize a narrative about “typical” development. Instead, the body of work promoting neuroscience as a reason to lower the voting age demonstrates the significant gap that Dowd’s book fills, one that credits neuroscience but places it in a web of external context and state action. Viewing the new literature connecting voting to

98. Hamilton, *supra* note 7, at 1448–49.

99. *Id.* at 1510.

100. *See id.* at 1510–11.

101. *See* Douglas, *supra* note 35, at 1059.

102. *See generally* Hamilton, *supra* note 64, at 1079.

103. *See* Hamilton, *supra* note 7, at 1513.

104. *See* DOWD, *supra* note 22, at 60–65.

development through Dowd's lens, we can see that "cognitive readiness" to participate in the franchise, readiness to speak in the very political system that determines so much about cognitive readiness, is a complicated criterion to deploy in an ultimately political question about readiness to exercise political power. Considering development in the context of childhood experiences, we can see a different politics to the use of cognitive maturity in a discussion of political participation. The question is one of political power, not what an idealized and supported teen brain can achieve.

ii. Development's Relationship to Voter Participation Rates

Lowering the voting age may have long term net positive consequences for voter turnout by developing in youth the habit of voting.¹⁰⁵ Precisely because 18-year-olds are making a series of other developmental transitions toward adulthood, including graduating from high school and often leaving home, they lack the attention to this one particular aspect of adulthood in the mix of other transitions.¹⁰⁶ Based on this theory, introducing a habit of voting at 16, when fewer aspects of their lives are in flux, will lead to a higher rate of participation in elections.¹⁰⁷ There is some evidence from Austria that 16-year-olds granted the franchise do, in fact, exercise it at higher rates than those granted the franchise at age 18,¹⁰⁸ bolstering the case for those who want to see 16-year-olds vote *in order* to improve their lifelong odds of voting regularly. Lowering the voting age, then, may do something to improve the relatively low voter turnout across the United States, and advocates for lowering the voting age are motivated in part by this pragmatic impact.¹⁰⁹

It is this portion of the movement to lower the voting age that strikes most closely to the core of the dramatic injustice done by the developmental inequality described in Dowd's work. The effort to cultivate in teenagers a lifelong habit of voting by extending the franchise at just the right developmental moment — the moment

105. See Claudio Lopez-Guerra, *Enfranchising Minors and the Mentally Impaired*, 38 SOC. THEORY & PRAC. 115, 120 (2012).

106. See Yosef Bhatti & Kasper M. Hansen, *Leaving the Nest and the Social Act of Voting: Turnout Among First-Time Voters*, 22 J. ELECTIONS, PUB. OPINION & PARTIES 380, 396 (2012); Douglas, *supra* note 35, at 1057.

107. See Douglas, *supra* note 35, at 1057.

108. See Eva Zegglovits & Julian Aichholzer, *Are People More Inclined to Vote at 16 than at 18? Evidence for the First-Time Voting Boost Among 16–25-Year-Olds in Austria*, 24 J. ELECTIONS, PUB. OPINION & PARTIES 351, 358 (2014).

109. See Elster, *supra* note 97, at 67.

when they are becoming activated but are not distracted by the full burdens of adulthood — represents a high-order nurturing of the development of political agency. By dramatic contrast, the state action within the juvenile justice system and school discipline systems significantly increase the odds of criminal justice involvement once African American youth reach adulthood.¹¹⁰ African American teenagers experience felony arrests at dramatically higher rates than their white, Asian, or Hispanic peers. According to the City of New York’s 2016 Disparity Report:

In 2014, the rates for Black males and females were 30.2 and 20.8 times higher than their White peers, while the rates for Hispanic males and females were 8.5 and 6.5 times higher than their White peers Asian females had the lowest rate of felony arrests for individuals under age 16 at 0.1 arrests per 1,000 individuals, while Black males had the highest rate at 10 arrests per 1,000 individuals under age 16.¹¹¹

This criminal justice involvement risks their long-term disenfranchisement — the enduring denial of electoral political agency.¹¹² African American children are being primed for that permanent disenfranchisement before they ever reach the voting age. Viewed through the lens of the franchise, it appears that we are doing everything possible to limit the possibility and potential that developing youth of color will become sustained citizen participants in the political process. Reference to developmental neuroscience should not be deployed in the service of lowering the voting age if the developmental neuroscience is to be decontextualized from the developmental inequality wrought by unequal childhoods, especially when that inequality puts some children on track to lose the vote before they would ever be eligible for it. If lowering the voting age to 16 plays any role, no matter how inadvertent, in the further Adulthoodification of children most likely to fall under the jurisdiction of the criminal justice system, that harm cannot be justified by a theory of overall enhanced democratic participation, unevenly distributed.

110. See DOWD, *supra* note 22, at 47–49.

111. See N.Y.C. YOUNG MEN’S INITIATIVE, CTR. FOR INNOVATION THROUGH DATA INTELLIGENCE, *DISPARITY REPORT* 57 (2016), https://www1.nyc.gov/assets/yimi/downloads/pdf/Disparity_Report.pdf [<https://perma.cc/9MX4-TDRB>].

112. See generally Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 10, 2019 8:29 PM), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> [<https://perma.cc/4NX5-GTB3>].

II. THE RIGHT TO PROTECTION FROM CAMPAIGNING

The campaign for a 16-year-old voting age fails to capture the relationship between the disabilities that follow from the legal status of minors, and protection of minors. The current debate over lowering the voting age to 16 is woefully lacking in family law analysis that conceptualizes many of the limits on childhood agency as serving protective functions worth the imposition on the maturing youth. The campaign to lower the voting age offers meaningful discussion of whether youth will simply vote their parents' preferences, or are adequately represented already through their parents' votes,¹¹³ or have adequate civics knowledge to participate properly.¹¹⁴ But there is no discussion of parents as gatekeepers to information, either in a malevolent sense ("I would rather you not learn about Donald Trump"), or in a protective sense ("I can cut off your access to 8chan and prevent candidates from preying on your naiveté"). Yet disabling youth from voting also protects youth from being the target of campaigning. Substantial regulation already constrains the way entities may communicate with minors, in an effort to prevent their deception and exploitation,¹¹⁵ just as contract law protects them from similar concerns.

Parents have substantial rights to protect 16-year-olds and to make decisions about who may interact with a 16-year-old based on a personalized adult understanding of that particular child's needs. A system that allows 16-year-olds to vote would either suffer because the young voter cannot legally access information her parent chooses to block, or it would eventually reduce the ability of parents to limit contact between outside adults and their children.¹¹⁶ For example, under federal law, a parent has the right to block military recruiters from communicating with her child through the mail, on the phone, or in person, if the parent believes that the child is too immature to

113. See Samantha Godwin, *Children's Oppression, Rights, and Liberation*, 4 NW. INTERDISC. L. REV. 247, 298 (2011). See generally Rutherford, *supra* note 77

114. Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 67 (2017).

115. FED. TRADE COMM'N, *supra* note 21.

116. See Ariana Mclymore, *Apple Reinstates OurPact Parental Control App Removed Over Privacy Concerns*, REUTERS (July 11, 2019) <https://www.reuters.com/article/us-apple-ourpact/apple-reinstates-ourpact-parental-control-app-removed-over-privacy-concerns-idUSKCN1U62ZP> [<https://perma.cc/MC9A-QDPN>]; Jack Nicas, *Apple Cracks Down on Apps that Fight iPhone Addiction*, N.Y. TIMES, (Apr. 27, 2019) <https://www.nvtimes.com/2019/04/27/technology/apple-screen-time-trackers.html> [<https://perma.cc/FW9P-HJ7R>].

evaluate the prospect of enlisting in the military upon turning 18.¹¹⁷ Both consequences of youth voting — contraction of parental rights and expansion of candidate access to voters — would present serious challenges to the current state of the law. Advocates for 16-year-old voting may intend to mount a case that it is time to remove parental authority over 16-year-olds, but they have not said so. A move to allow 16-year-old voting may lead to that reform without reflection on the protective function that parental authority can serve. Information and exercise of the franchise are highly entwined; tobacco companies have a First Amendment right to target voters with political speech. Yet Vote16 activism has been entirely devoid of discussion of this problem with youth voting.

While a thorough treatment of these family law issues is beyond the scope of this Article, the issues expose the movement's relatively isolated view of 16-year-olds as political agents, a view that can also fail to connect to questions of juvenile justice and disenfranchisement that a developmental equality framework makes visible. Advocates for Vote16 focus on issues around voting, while child welfare advocates focus on the capacities and needs of teenagers more broadly, and the network of protection associated with those needs. Until there is serious discussion of whether a 16-year-old right to the franchise will curtail a parent's ability to close down access to that 16-year-old, whether by a cannabis advocate or a white nationalist organization, the voting age proposal lacks a serious footing in the law of the child or the law of political speech. Empowering 16-year-olds to make adult decisions sounds in good parenting, but subjecting 16-year-olds to adulthood, with its military service, its criminal justice system, and its constriction on parental protection, requires more thought, and claims from cognitive development need to include the political and legal context of childhood.

Developmental justice requires developmental equality: a fair distribution of developmental supports and the fair removal of developmental assaults that are disproportionately allocated based on race. Developmental justice also requires making room for positive rights, as Dowd argues. Further support for a positive right to

117. See Damien Cave, *Growing Problems for Military Recruits: Parents*, N.Y. TIMES (June 3, 2005), <https://www.nytimes.com/2005/06/03/nvregion/growing-problem-for-military-recruiters-parents.html> [<https://perma.cc/J5NQ-2LQQ>]; Lynn Neary, *Parents, Teens, and Military Recruiting*, NAT'L PUB. RADIO (July 5, 2005), <https://www.npr.org/templates/transcript/transcript.php?storyId=4730222> [<https://perma.cc/76U3-ALDU>].

developmental justice can be found in two enabling rights: the state law right to public education, and the right to vote.

III. SEEING A POSITIVE RIGHT TO DEVELOPMENT IN THE RIGHT TO PUBLIC EDUCATION: PREPARATION FOR CITIZENSHIP

A claim for developmental justice could find support in the history of public education. Carl Kaestle's *Pillars of the Republic: Common Schools and American Society, 1780–1860*, published in 1983, remains the clearest account of the historical development of government-supported schooling, and explains the core relationship between a positive right to education and successful democracy:

The nation's Founding Fathers knew from classical political theory that the most stable governments combined elements of monarchy, aristocracy, and democracy. But Americans had expelled monarchy, and revolutionary leaders stood firm against the creation of a formal American aristocracy. How, then, were they to escape the degeneration into anarchy that they believed was the inevitable fate of pure democracies? They pinned their hopes on a republic Here again, though, classical theory and much contemporary opinion warned them that republican government would not work in a country as large as America Education could play an important role in reconciling freedom and order. A sound education would prepare men to vote intelligently and prepare women to train their sons properly To foster the intelligence required of republican citizens, some of America's most eloquent political leaders looked to education — not just through the informal colonial modes of instruction but through schools organized and financed by the states.¹¹⁸

Moreover, in 1787, Thomas Jefferson wrote to James Madison, “[a]bove all things I hope the education of the common people will be attended to, convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty.”¹¹⁹ Liberty is the goal, self-governance the structure, and individuals ready to vote are the mechanism. The Founders believed that the system of negative rights that would protect liberty required the preparation of the future voter through a system of state-financed schools — the positive right on which negative rights to liberty would rely. Education, though provided by the states and localities rather

118. CARL KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860* 4–5 (1983).

119. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 5 *THE WRITINGS OF THOMAS JEFFERSON* 480 (Paul Leicester Ford ed., 1892).

than the federal government, would enable both state and federal citizenship, which is essential to a functioning democracy.¹²⁰ Jefferson introduced a bill in Virginia as early as 1779 to provide free public education at the state level, and its preamble explicitly connects education to the democratic experiment of popular self-governance:

[W]hence it becomes expedient for promoting the publick (sic) happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens, and that they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance; but the indigence of the greater number disabling them from so educating, at their own expence (sic), those of their children whom nature hath fitly formed and disposed to become useful instruments for the public, it is better that such should be sought for and educated at the common expence (sic) of all, than that the happiness of all should be confided to the weak or wicked.¹²¹

Reconceived as developmental rights, Jefferson displays concern over the development of (white) future voters, and made no provision for the education and development of the people he enslaved. He treats the white citizen as normative, as developmental neuroscience ordinarily does today.¹²² Yet he expounded on a necessary link between becoming a voting citizen and the public provision of preparation for that role, even as he set whites and Blacks on radically different courses.

How do we transport the eighteenth-century conception of the needs of democracy grounded in liberty into the present? Arguably, Kaestle is describing a regime of positive rights, in the sense that the framers of the republic believed that participatory democracy depended on the preparation of minors to become effective voting citizens (and at that time, the conception was limited to white men). Almost 200 years later, the U.S. Supreme Court would hold that there is no federally guaranteed right to education,¹²³ but recent litigation in a Rhode Island federal court seeks to raise the question again,

120. KAESTLE, *supra* note 117, at 5.

121. Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, 18 June 1779 *in* 2 THE PAPERS OF THOMAS JEFFERSON 526–535 (Julian P. Boyd ed., Princeton Univ. Press 1950).

122. DOWD, *supra* note 22, at 60–65.

123. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

given the tight nexus between self-governance and public schooling.¹²⁴ In 1973, when the Supreme Court declined to characterize a federal right to public education in *San Antonio Independent School District v. Rodriguez*, every single state constitution already guaranteed a positive right to education.¹²⁵ Federalism manages the issue of the democracy-enabling positive right of education, and the absolute necessity of schooling in our federal system is recognized as a state function and guarantee.¹²⁶ A right to education is already knit into the system of popular sovereignty, so the failure of the U.S. Constitution to guarantee it hardly undermines its centrality to democratic theory — voting citizens will receive some state preparation before achieving the franchise.

This historical link between the negative rights of our constitutional design and a positive right to education bolsters the argument for developmental justice and equality. The Constitution relies on liberties that need to be protected by citizen-voters. Those citizen-voters themselves need to be prepared to become citizen-voters to preserve the constitutional system. State-funded education, on this original conception, is justified by the need to prepare citizens to self-govern. Like voting itself, education becomes a structural precondition of negative rights, even though, like voting, it is itself a positive right, recognized under the state constitutions of all fifty states.¹²⁷ It is a small leap from a positive right to education to a positive right to developmental justice and developmental equality for that same democracy-saving purpose. As we break down preparedness to participate in the democracy into developmental neuroscience, we simply modernize the preconditions for a

124. See Brief for Plaintiffs, *A.C. v. Raimondo*, No. 1:18-cv-645 (D.R.I. filed Nov. 28, 2018); Alia Wong, *The Students Suing for a Constitutional Right to Education*, ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/> [<https://perma.cc/K5V3-DHZ7>].

125. See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35; Emily Parker, *50-State Review: Constitutional Obligations for Public Education (2016)*, EDUC. COMMISSION STS. (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/BW2U-LP4H>].

126. Parker, *supra* note 125.

127. *Id.* While education is not a constitutional right at the federal level, *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35, it is considered by many to be a fundamental right to a functioning democracy, one that need not be guaranteed by the federal government or Constitution in part because it is guaranteed as a positive right in every state constitution, and therefore to every American.

functioning democracy committed to negative liberties. There are positive rights foundational to negative rights.

In effect, Dowd suggests that by the time we are old enough to function as citizens, developmental injustice has changed who we become based in large part on race, especially for boys.¹²⁸ Dowd emphasizes the violation of equality values and the existing state action that creates the structures of developmental inequality to arrive at a positive right to developmental justice.¹²⁹ Even in a government system entirely devoted to negative rights, an argument for a substructure of positive rights that enable the broader negative rights can include both developmental justice and voting itself and find grounding in early thinking about state-financed schooling. In considering the idea of enabling rights within our system, the next Part explores voting as a positive right, and its relationship to development as expressed through voting age and through juvenile justice links to disenfranchisement. Development and political theory of citizenship are intertwined, just as development and the disparate experiences and environments of children are intertwined.

IV. VOTING IS A POSITIVE RIGHT

Dowd mounts an argument that developmental justice, even if it is a positive right, can be achieved by reclaiming parts of constitutional history often found in dissenting Supreme Court opinions.¹³⁰ An additional method of mounting her case can be advanced by grounding her argument in two positive rights that enable a functioning democracy. The first is the right to education discussed in Part III, which appears in all 50 state constitutions. This Part discusses the second, which is the right to vote. Taken together, these rights set a framework for minimum requirements to operate the popular democracy, and the reasoning for each could form the basis for the addition of Dowd's developmental justice to the group of positive enabling rights.

Joseph Fishkin argues that in our system of negative rights, the right to vote established and improved in the Constitution is best characterized as a positive right:

Voters need help to vote. I do not mean that only a few voters or certain groups of voters need help. State action is required if any of us are to vote at all. The state must set up polling places, train

128. DOWD, *supra* note 22, at 9–11, 34–35.

129. *Id.* at 42, 76, 90–94.

130. *Id.* at 115–35.

workers, buy machines, print ballots. The entire enterprise of voting requires positive action by the state. This is because voting is, inescapably, a positive right.¹³¹

Voting is an enabling right. We cannot enjoy negative liberties without a process substructure, and that substructure, enfranchisement, is itself *a positive right*. A state may not withdraw the right to vote on a claim that it is equally discriminating against all citizens.¹³² The states must take action to create a voting structure that enables the franchise. Similarly, Dowd's lens can be used to argue that *development* is a process right. This Article posits that voting may be a promising analogy to Dowd's positive right to equal development: development is also enabling, and without it, teenagers suffer "lifelong subordinating consequences that are difficult or impossible to overcome."¹³³ Both childhood development and the right to vote are the preconditions to a robust political system grounded in negative rights. Voting and a right to equal development can have common participatory democratic roots that can support Dowd's right to development. The debate over lowering the voting age is grounded in part in ideas about both development and the relationship between development and citizenship rights.

V. THE *DEVELOPMENTAL EQUALITY* LENS ON QUESTIONS OF VOTING AGE

Dowd's structural lens and the political lens can be used to shine a bright light on the state of positive rights to development, their relevance to the republican system of negative rights, and the movement to lower the voting age based on the science of cognitive development. We find one strong argument for developmental justice in the foundational theory supporting public education — the state needs to prepare citizens for self-governance to retain a functioning democracy through voting. We also find an analogy for developmental justice in the right to vote: arguably, both function as foundational positive rights enabling a system of negative right.

131. Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 33 (2011).

132. See, e.g., Kristen Green, *Prince Edward County's Long Shadow of Segregation*, ATLANTIC (Aug. 1, 2015), <https://www.theatlantic.com/national/archive/2015/08/segregation-prince-edward-county/400256/> [https://perma.cc/2M38-PW39] (Prince Edward County withdrew public education from all children rather than offer it without racial segregation).

133. DOWD, *supra* note 22, at 3–4.

Dowd's work shows that the juvenile justice system is one of the government structures interfering with equal development for African American children. The system disproportionately targets them, and experiences with the juvenile justice system dramatically increase the odds that a child will eventually be entangled in the adult criminal justice system if they are not already entangled in the adult system as minors. That adult entanglement, with its roots in state action toward minors, leads to the permanent disenfranchisement of those in its grip. In effect, we are disenfranchising African American youth before they ever reach the age of 18 because of disproportionate juvenile justice system involvement, rather than preparing them for a life of citizenship with proper developmental support.

It is dizzying to attempt to untangle the political system that uses law enforcement against African American youth, resulting in developmental inequalities and eventual disenfranchisement, from the failure of a positive right those children should have enjoyed to citizenship-creation through developmental equality, a right that would prepare them to vote. On the one hand, this Article argues that a positive right to developmental justice might be pressed as a precondition to a functioning democracy, as Jefferson believed publicly financed education was such a precondition because children and youth must be readied to vote. That positive right to developmental justice might be secured through their exercise of the franchise. Yet the system of developmental injustice strips many of them of the franchise before they reach adulthood, stripping them of the very rationale for the developmental justice of which they were deprived.

Debating extension of the franchise to 16-year-olds, where their *prototype* is advantaged in development — whether imagined in neuroscience studies or media accounts of Parkland activists — highlights the distance between advantaged and disadvantaged children. One may be offered the right to vote based on a narrative of effectively nurtured cognitive development; the other develops a criminal justice record before reaching the age of adulthood that is likely to lead to long-term disenfranchisement.

Disenfranchisement is where the rubber meets the road for Dowd's theory — where a potential political theory justifying positive rights in order to prepare children to become citizens is derailed by a practical disqualification from citizenship before reaching the age of majority for African American children. This is the Escher staircase of positive rights to development, granted in order to create citizens who govern the state allocation of resources that then impair

development of too many African American youth and set them up for long-term disenfranchisement. This Article seeks to translate Dowd's theory of developmental inequality into a question of politics with the conundrum of popular sovereignty at its center.

CONCLUSION

I am impressed by the maturity and efficacy of youth political activism, and believe we are living in a remarkable and hopeful era of resurgent youth engagement. Broadly speaking, I believe youth have the maturity and the stake to participate in elections. But elevating the teen political voice by giving it the formal power of the franchise poses a risk to the protective commitment we make toward teenagers, a commitment already riddled with holes. Even in disenfranchisement, there is protection from entirely unfiltered political and commercial speech. Child welfare advocates fight to remind courts, educators, and police that 16- and 17-year-olds are children. I am ambivalent about lowering the voting age to 16 in a world where we are not protecting the franchise for people whose involvement with the criminal justice system begins as minors and strips them of the franchise. The contrast is too dizzying. Voting activists seek *both* a youth franchise and the end to felony disenfranchisement. Yet I listen to the de-contextualized deployment of neuroscience and fear that felony disenfranchisement will take a back seat to the broader power base seeking a 16-year-old franchise. Moreover, the enfranchisement of 16-year-olds, where many disadvantaged 16-year-olds are being primed to lose their franchise, bumps up against the political force implicit in Dowd's argument for developmental equality. In Dowd's words, "[a]s youth develop, they are creating an identity that is either reinforced and supported, or not."¹³⁴ The cultivation and reinforcement of participatory identity for some, but not others, undermines the structure of rights as we understand them. Through the developmental lens, the Escher staircase that is the expansion of youth voting rights and its long-term contraction comes to seem as unstable as an Escher drawing itself.

134. DOWD, *supra* note 22, at 67.