U.C.L.A. Law Review

Voter Identification and the Forgotten Civil Rights Amendment: Why the Court Should Revive the Twenty-Fourth Amendment

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ABSTRACT

Since Reconstruction, states have passed laws to limit the power of those traditionally not permitted to vote (i.e. not white men). These barriers on the right to vote include, inter alia, the payment of poll taxes, which were often required months in advance of an election. In 1964, prior to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, three-quarters of the States ratified the Twenty-Fourth Amendment, forbidding the denial or abridgement of the right to vote based on a person's failure to pay a poll tax in federal elections. Since its ratification, the Supreme Court has only once decided a Twenty-Fourth Amendment issue—the 1965 decision in *Harman v. Forssenius*. In *Harman*, the Court held both that the failure to pay a poll tax in federal elections and the requirement that a voter choose between paying a poll tax and some other material requirement imposed on voting violated the Twenty-Fourth Amendment. The following year, in *Harper v. Virginia Board of Elections*, the Court applied the Equal Protection Clause of the Fourteenth Amendment to a state poll tax rather than the Twenty-Fourth Amendment, despite some indication that the Twenty-Fourth Amendment could be incorporated against the states via the Seventeenth Amendment and Article I, § 2 of the United States Constitution. Although *Harper* did not overrule *Harman* or otherwise deem the Twenty-Fourth Amendment unconstitutional, the Court has never again applied the Twenty-Fourth Amendment. This Comment argues that the Court should resurrect the Twenty-Fourth Amendment and apply it to Voter Identification laws—the modern poll tax equivalent—to protect the unraveling of democracy and ensure the "one person, one vote" standard.

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INTRODUCTION

The Twenty-Fourth Amendment states:

> Section 1: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> Section 2: The Congress shall have power to enforce this article by appropriate legislation.[1]

The Twenty-Fourth Amendment to the U.S. Constitution is perhaps the most underused civil rights law.[2] The U.S. Supreme Court could have interpreted the Twenty-Fourth Amendment with the same broad substantive protections as the Fourteenth Amendment, or enabled Congress to expand its powers to protect civil rights much like the application of the Thirteenth, Fourteenth, and Fifteenth Amendments.[3] Instead, since the Amendment's ratification in 1964, the U.S. Supreme Court has only decided a single poll tax case under the Twenty-Fourth Amendment,[4] in the 1965 case of *Harman v. Forssenius*.[5] Although *Harman* has never been overruled,

1. U.S. CONST. amend. XXIV, §§ 1–2.
2. The Twenty-Fourth Amendment prevents the abridgement of suffrage due to wealth. As described *infra*, in the only U.S. Supreme Court case to interpret the Amendment, *Harman v. Forssenius*, 380 U.S. 528 (1965), the Court noted that both the payment of a poll tax and forcing a voter to choose between paying a poll tax or some other material requirement are violative of the Twenty-Fourth Amendment. *Id.* at 542. Applying this holding to other voting rights cases could have had significant ripple effects that changed the way we vote today. Courts, for example, could have found that Election Day could only take place on a national holiday, found that voting booths must be walking distance from a registered voter's address, or required all states to allow mail-in voting for all voters. The Court's reluctance to revisit this amendment has led to a broken promise of suffrage not based on one's wealth—a far stretch from the civil rights law that could have been.
3. Section 2 of the Twenty-Fourth Amendment, much like Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth and Fifteenth Amendments, bestows on Congress the power to pass legislation to enforce the Twenty-Fourth Amendment. *See* U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2; U.S. CONST. amend. XXIV, § 2.
4. *See* Gonzalez v. Arizona, 677 F.3d 383, 408 (9th Cir. 2012) ("Our conclusion is consistent with *Harman*, the only Supreme Court case considering the Twenty-[F]ourth Amendment's ban on poll taxes.").
5. 380 U.S. 528.

since the Court's decision in *Harper v. Virginia State Board of Elections*[6] just one year later, the Court has exclusively decided poll tax cases under the Equal Protection Clause of the Fourteenth Amendment,[7] despite the Twenty-Fourth Amendment's explicit prohibition on poll taxes in federal elections.[8] This Comment endeavors to revive the Twenty-Fourth Amendment by illustrating how the Twenty-Fourth Amendment could apply to cases involving voter identification (Voter ID) requirements for elections. Part I addresses the history of the Twenty-Fourth Amendment, Part II explains the *Harman* Twenty-Fourth Amendment test, and Part III explores *Harper v. Virginia State Board of Elections* and the Court's continued preference for the Equal Protection Clause of the Fourteenth Amendment over the Twenty-Fourth Amendment. Part IV examines the history of Voter ID laws and the solution presented by the Twenty-Fourth Amendment. Finally, Part V analyzes how the Court could have applied the Twenty-Fourth Amendment in the Supreme Court's most recent Voter ID case, *Crawford v. Marion County Election Board.*[9]

6. 383 U.S. 663 (1966).
7. *See id.* at 664 n.1, 664–66 (finding Virginia's $1.50 poll tax unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); *see also* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185–89 (2008) (holding that an Indiana Voter ID law was constitutional under the Equal Protection Clause of the Fourteenth Amendment).
8. Although the Fourteenth Amendment is critical to our current civil and voting jurisprudence, its application in the voting rights context is not as absolute as purely applying the Twenty-Fourth Amendment. Under Equal Protection Clause analysis, the Court determines the validity of a particular law by applying strict scrutiny for race and fundamental rights cases, intermediate scrutiny for cases that, *inter alia*, involve gender, and rational basis review for everything else. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307 (2013) (any racial classification must meet strict scrutiny); Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 875 (1985) (a statute is permissible if its categorization bears a rational relation to a legitimate state purpose). Although voting is a fundamental right, courts may look at voters' disparate treatment based on wealth as a categorization based on wealth and decline to apply strict scrutiny. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (applying a hybrid test weighing the burden on the voters against the relevant and legitimate state interests). Because the Fourteenth Amendment test amounts to a balancing test, courts may justify a poll tax or a poll tax–like expense based on the government's interest in establishing the statute. *See id.* The Twenty-Fourth Amendment flatly bans federal poll taxes and therefore no justification is sufficient to permit a poll tax. U.S. CONST. amend. XXIV, §§ 1–2.
9. 553 U.S. 181.

I. THE HISTORY BEHIND THE RATIFICATION OF THE TWENTY-FOURTH AMENDMENT

A. Constitutional Voting Protections

When the States ratified the U.S. Constitution in 1789, it included no enumerated protections for voters; the Constitution only guaranteed a Republican form of government[10] and the right of people to choose their member of the U.S. House of Representatives.[11] Under the Constitution, the power to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives" rests with the States.[12] This power, however, is not absolute and is instead subject to Congressional oversight.[13] Meaning, in the absence of legislation dictating the terms of federal elections,[14] States hold the power to regulate the terms of their elections.[15] In essence, the States' election power "is matched by state control over the election process for state offices."[16] The State's great authority, however, "does not extinguish the State's responsibility to observe the limits" of such authority as set forth by the U.S. Constitution.[17] Therefore, Congress has the power to impose the terms of federal elections through legislation, but absent such action,

10. This is the so called "Guarantee Clause." *See* U.S. CONST. art. IV, § 4. Despite the promise of the Guarantee Clause, the Supreme Court has refused to issue remedies in suits brought under the Guarantee Clause, as they raise a nonjusticiable political question. *See* Baker v. Carr, 369 U.S. 186, 228–29 (1962); Luther v. Borden, 48 U.S. 1, 2 (1849).
11. *See* U.S. CONST. art. I, § 2.
12. U.S. CONST. art. I, § 4.
13. *See id.*
14. Congress could, for example, draw congressional representative districts pursuant to their Article I, Section 4 power, *id.*, but Congress has largely declined to take such action. Vieth v. Jubelirer, 541 U.S. 267, 276–77 (2004) ("Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting."). Although Congress has passed legislation dictating federal election days, it has not set forth election day hours, or ballot format, although these prescriptions are likely permissible pursuant to Article I, Section 4, the Fourteenth Amendment, U.S. CONST. amend. XIV, and the Fifteenth Amendment, U.S. CONST. amend. XV. *See* 2 U.S.C. §§ 1, 7 (2018); 3 U.S.C. § 1. As a result, early voting, poll hours, and ballots vary from state to state. *Sample Ballot Lookup*, BALLOTPEDIA, https://ballotpedia.org/Sample_Ballot_Lookup [https://perma.cc/P78K-FL2S] (last visited Feb. 17, 2020) (providing a lookup of ballots by ZIP code); *State Poll Opening and Closing Times (2020)*, BALLOTPEDIA, https://ballotpedia.org/State_Poll_Opening_and_Closing_Times_(2020) [https://perma.cc/UV3R-M8R7] (last visited Feb. 17, 2020); *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, NAT'L CONF. ST. LEGISLATURES (Apr. 14, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx [https://perma.cc/SJB9-AK8R].
15. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 233 (1986) (Stevens, J., dissenting).
16. *Id.* at 217 (majority opinion).
17. *Id.*

the states may dictate the terms of federal elections within the confines of the Constitution.

As a result, prior to the Voter Protection Amendments,[18] there was a patchwork of voting rules across the United States.[19] By 1920, the Constitution recognized the right of citizens[20] over the age of 21[21] to vote and found that the right to vote could not be abridged due to gender, race, or the condition of previous servitude.[22] Although these amendments began the important process of enumerating the rights of voters and unraveling the patchwork of state voter laws, those in power—namely white property-owning men—worked to obfuscate the power of these Amendments through poll taxes, literacy tests, registration requirements, and the like.

B. Reconstruction and the Poll Tax

With the passage of the Reconstruction Amendments[23] and the Civil Rights Acts of 1866,[24] 1870,[25] and 1875,[26] recently-freed Black[27] men began

18. For the purposes of this Comment, the Voter Protection Amendments include the Fourteenth Amendment (which preserved voting rights through the Amendment's Equal Protection Clause, U.S. CONST. amend. XIV), the Fifteenth Amendment (which prevented the denial of suffrage based on race or previous servitude, U.S. CONST. amend. XV), the Seventeenth Amendment (which permitted the direct election of Senators, U.S. CONST. amend. XVII), the Nineteenth Amendment (which granted women the right to vote, U.S. CONST. amend. XIX), the Twenty-Fourth Amendment (which eliminated the poll tax in federal elections, U.S. CONST. amend. XXIV), and the Twenty-Sixth Amendment (which granted citizens eighteen years of age and older the right to vote, U.S. CONST. amend. XXVI).
19. *See* Robert C. Kennedy, *On This Day*, N.Y. TIMES (Mar. 12, 2001), https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0312.html [https://perma.cc/HQ2E-SH8Z]; Hunter Schwarz, *Where Women Could Vote in 1919*, WASH. POST (Jan. 16, 2015, 10:22 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2015/01/16/where-women-could-vote-in-1919/?utm_term=.69cbc34f56a8 [https://perma.cc/LV44-LSR8]; *Did You Know: Women and African Americans Could Vote in NJ Before the 15th and 19th Amendments?*, NAT'L PARK SERV. (July 3, 2018), https://www.nps.gov/articles/voting-rights-in-nj-before-the-15th-and-19th.htm [https://perma.cc/3UNP-H89W].
20. A citizen's right to vote is not absolute. For instance, courts have abridged the voting rights of felons under authority found in Section 2 of the Fourteenth Amendment. *See* Richardson v. Ramirez, 418 U.S. 24 (1974); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 261 (2004).
21. The voting age was later amended to eighteen in 1971. *See* U.S. CONST. amend. XXVI, § 1.
22. *See* U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XXIX.
23. This is a common term for the Thirteenth, Fourteenth, and Fifteenth Amendments. *See* Senate Historical Office, *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/

voting in elections and running for elected office.[28] Despite the Fourteenth and Fifteenth Amendments' promise of suffrage for male citizens, many states and localities instituted literacy tests, poll taxes, and "grandfather clause" laws to effectively circumscribe voting based on race, wealth, and conditions of prior servitude.[29]

By the beginning of the twentieth century, the poll tax was effectively a prerequisite for voting in southern states[30] as a way to deter Black and, as a

generic/CivilWarAmendments.htm [https://perma.cc/6C6F-DXHG] (last visited Apr. 22, 2020).

24. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
25. Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (also known as the Enforcement Act of 1870).
26. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
27. I have chosen to capitalize the word "Black" and "Latinx" following the scholarship of Kimberlé W. Crenshaw and Cheryl I. Harris. I share their view that Black, Latinx, Asian, and other similar minorities constitute a specific cultural group and therefore capitalization is required to denotate the existence of a proper noun. The use of capitalization in reference to racial group has a particular political history. "Although 'white' and 'Black' have been defined oppositionally, they are not functional opposites. 'White' has incorporated Black subordination; 'Black' is not based on domination." Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1707, 1710 n.3 (1993); *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1332 n.2 (1988).
28. David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 387 (2011).
29. *Voting Rights Act: Major Dates in History*, ACLU, https://www.aclu.org/voting-rights-act-major-dates-history [https://perma.cc/5R32-2PR2] (last visited Feb. 17, 2020); *see* Guinn v. United States, 238 U.S. 347 (1915) (invalidating a "grandfather clause" that exempted from the literacy test anyone, or the lineal descendants of anyone, who could have voted on January 1, 1866, a date prior to the ratification of the Fifteenth Amendment, when Black Americans were not constitutionally permitted to vote); *see also* Terry v. Adams, 345 U.S. 461, 469–70 (1953) (finding that the Jaybird Party primaries did "precisely that which the Fifteenth Amendment forbids—strip [Black Americans] of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens"); Butler v. Thompson, 341 U.S. 937 (1951) (mem.) (upholding a Virginia poll tax under the Equal Protection Clause of the Fourteenth Amendment; while no longer good law due the Court's decisions in *Harper* and *Crawford*, *Butler* illustrates how Virginia used a poll tax to disenfranchise Black voters), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Lane v. Wilson, 307 U.S. 268 (1939) (invalidating an Oklahoma law enacted in response to the Court's decision in *Guinn*, which automatically gave those who voted in the general election in 1914 the right to vote, despite the Court's finding in *Guinn* that the voting statute in 1914 was unconstitutional under the Fifteenth Amendment).
30. By 1902, Georgia, Virginia, Florida, Mississippi, Tennessee, Arkansas, South Carolina, Louisiana, North Carolina, Alabama, Texas, Maryland, and Delaware all required some or all voters to pay a poll tax prior to voting. *See* Frank B. Williams, Jr., *The Poll Tax as a Suffrage Requirement in the South, 1870–1901*, 18 J.S. HIST. 469, 471 (1952).

potential fringe benefit, poor white voters.[31] By the 1940s, poll taxes varied from one to three dollars and frequently needed to be paid six months in advance.[32] States such as Alabama and Georgia charged a cumulative poll tax, meaning a potential voter would be required to pay poll taxes for each year after the statute was passed in which the voter was eligible to vote and could not prove he paid the tax.[33]

Poll taxes frequently included exemptions. For example, in Alabama, "all individuals over the age of twenty-one and under forty-five, except for those who were permanently disabled, blind or deaf, and those who had served in the military"[34] were required to pay the poll tax. Similarly, Virginia required everyone over twenty-one "except for Civil War veterans and their wives or widows, and individuals in the military pensioned by the state"[35] to pay a poll tax. These exemptions, however, were not evenly enforced and often favored whites over Blacks, who were often poorer due to their history of enslavement and the systematic discrimination that prevented Black Americans from building wealth.[36]

Despite evidence[37] that poll taxes were enacted to reduce the number of eligible Black voters, many legislators claimed these requirements were facially neutral and necessary to raise money for schools, or that voters should help financially support their government.[38] Notwithstanding these claims, poll taxes had a significant impact on Black voters. In Louisiana, for

31. *Id.* ("The paramount reason usually accepted for the use of the poll tax was the desire to eliminate the [Black] voters from politics. To this may be added the alleged intention of disfranchising poor whites.").
32. *See Notes and Legislation—Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 645–46 (1940).
33. *See* Kelly Phillips Erb, *For Election Day, A History of the Poll Tax in America*, FORBES (Nov. 5, 2018, 8:30 PM), https://www.forbes.com/sites/kellyphillipserb/2018/11/05/just-before-the-elections-a-history-of-the-poll-tax-in-america/#39fac2fb4e44 [https://perma.cc/65XP-55U7].
34. Schultz & Clark, *supra* note 28, at 389.
35. *Id.*
36. *See* Brian Thompson, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, FORBES (Feb. 18, 2018, 12:15 PM), https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/#7d84bb5d7a48 [https://perma.cc/ 2L38-ETMW].
37. *The Tuscaloosa News* of Alabama stated: "This newspaper believes in white supremacy, and it believes that the poll tax is one of the essentials for the preservation of white supremacy." Erb, *supra* note 33. *The Memphis Public Ledger* said the "'insignificant' poll tax was a manifestation of the desire to keep the 'ignorant [Blacks]' from voting." Williams, *supra* note 30, at 477 n.32.
38. *Id.* at 477 (the best nondiscriminatory reasons for the poll tax's inclusion in the suffrage article "seem to be that it was considered a means of raising much-needed money for the schools and that it satisfied the conservative belief that good citizens paid taxes.").

example, more than 130,000 Black men were registered to vote in 1896; however, by 1904 there were only 1342 registered Black voters.[39]

C. President Franklin Roosevelt's Anti–Poll Tax Campaign

Beginning in 1938, President Franklin Roosevelt began an anti–poll tax campaign to help build a liberal Democratic base in the South and bolster his New Deal reforms. Roosevelt's 1937 plan to pack the Supreme Court[40] failed, in part due to conservative Southern Democrats who joined the Republicans in defeating the proposed judicial reform.[41] In 1938, Roosevelt challenged the conservative wing of his party by supporting liberal primary challengers.[42] Roosevelt hoped to transform the Southern Democratic party into a body that would support New Deal reforms and denounced the Southern Democratic old guard as "Polltaxia."[43] In an effort to elect proreform candidates with the support of poor white voters who were disenfranchised by the poll tax, Roosevelt took up the poll tax cause and described the Southern economic system as "feudal."[44]

The Southern Conference for Human Welfare (SCHW), the National Association for the Advancement of Colored People (NAACP), and the National Committee to Abolish the Poll Tax (NCAPT) worked with labor unions to push Congress to repeal the poll tax.[45] In 1939, California Representative Lee Geyer introduced legislation in Congress to repeal the poll tax.[46] That legislation failed.[47] Starting in 1939, however, different members of Congress introduced legislation or constitutional amendments to eliminate the poll tax every year until 1962,[48] when Senator Spessard Holland[49] of Florida introduced the Twenty-Fourth Amendment.[50]

39. Erb, *supra* note 33.
40. Franklin D. Roosevelt, The President Presents a Plan for the Reorganization of the Judicial Branch of the Government (Feb. 5, 1937), *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 51, 63 (1941).
41. *Id.*
42. Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 71 (2009).
43. *Id.* at 71–72.
44. *Id.*; Schultz & Clark, *supra* note 28, at 401.
45. Schultz & Clark, *supra* note 28, at 401.
46. *Id.*
47. *Id.*
48. Harman v. Forssenius, 380 U.S. 528, 538 (1965).
49. Interestingly, Senator Holland was a lifelong segregationist who voted against the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Ackerman & Nou, *supra* note 42, at 69. Ackerman and Nou suggest that Holland introduced the Twenty-Fourth Amendment as a

Prior to the passage of the Twenty-Fourth Amendment, the Court declined to find the poll violated the Equal Protection Clause of the Fourteenth Amendment. In *Breedlove v. Suttles*,[51] Nolan Breedlove, a white, likely poor, man challenged a Georgia statute requiring male voters aged twenty-one to sixty to pay a one-dollar poll tax. The petitioner argued that requiring some but not all voters to pay the tax violated both the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the Constitution.[52] The Court disagreed, finding that the Equal Protection Clause "does not require absolute equality,"[53] and the exceptions for women, minors, the elderly, and the blind were reasonable.[54] The Court also rejected the Privileges and Immunities Clause argument on the ground that under the Constitution, voting rights come from the states. The Court found that the poll tax was a "reasonable regulation long enforced in many states."[55]

Despite *Breedlove's* outcome, World War II[56] offered increased support for overturning the poll tax, especially as some soldiers who were fighting in the war were disenfranchised at home when they could not afford to pay the poll tax.[57] To some, it seemed antithetical that men drafted into military service to protect American democracy would be denied the right to vote.[58]

stalling mechanism. *Id.* at 69. They argue that Holland anticipated that the proposed Amendment would not be ratified by the requisite three-quarters of the states and would fail to satisfy Article V's requirements, thus stalling the poll tax argument. *Id.* Holland's tactic failed, however, and the Twenty-Fourth Amendment was ratified on January 23, 1964. *Id.*; *Historical Highlights: The Twenty-Fourth Amendment*, U.S. HOUSE OF REPRESENTATIVES: HIST. ART & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/37045 [https://perma.cc/ D9T4-DYH3] (last visited Apr. 22, 2020). This history further illustrates the paradox of the poll tax.

50. Ackerman & Nou, *supra* note 42, at 69–70.
51. 302 U.S. 277 (1937).
52. *Id.* at 280.
53. *Id.* at 281.
54. *Id.* at 281–82. The Georgia statue at issue in *Breedlove* required every sighted male resident between the ages of 21 and 60 to pay a poll tax, and thus carved out exceptions for minors, the elderly, the blind, and women. *Id.* at 279.
55. *Id.* at 283.
56. *See* Molly Guptill Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 335, 351–52 (2016) (explaining how, to many, World War II was seen as a fight to preserve democracy, and that Nazi Germany sought to take over Europe and curtail the rights of many conquered citizens).
57. Schultz & Clark, *supra* note 28, at 402.
58. Senator Claude Pepper of Florida described the paradox as effectively telling a soldier, "'We are sorry; you are a qualified solider without paying [the poll tax], but not a qualified citizen without paying a sum of money.' Yet we are preaching . . . the liberation of the oppressed peoples of the world, and the emancipation of the subjected peoples everywhere."

Notwithstanding fierce opposition, the Soldier Voting Act of 1942 became law on September 16, 1942.[59] The Soldier Voting Act permitted men and women serving the nation during wartime to cast absentee ballots, waived some registration requirements, and eliminated the poll tax in federal elections for those serving in the military in a time of war.[60] The Soldier Voting Act was the first federal law to limit poll taxes and was the first expansion of Black American voting rights since Reconstruction.[61] This Illustrates that World War II moved the issue of abolishing the poll tax forward in a way not possible absent the conditions of war, including, inter alia, the constraints of poll taxes preventing soldiers from voting.

D. Progress Toward Ratification of the Twenty-Fourth Amendment

In an effort to prevent Congressional legislation abolishing the poll tax[62] from 1946 until 1962, Senator Holland regularly introduced a constitutional amendment to eliminate the poll tax.[63] Through a clever parliamentary move, Senator Holland managed to tack what would become the Twenty-Fourth Amendment onto Senator Estes Kefauver's proposed constitutional amendment dealing with the continuation of government in the event of a nuclear attack.[64] This maneuver moved the Twenty-Fourth Amendment to the House floor in 1960.[65] The debates in both chambers of Congress framed the Amendment as a good government measure rather than as a racial issue.[66] Supporters of the Amendment argued the end of the

Manning, *supra* note 56, at 351–52 (alterations in original) (quoting statement of Sen. Pepper).

59. *Id.* at 353.

60. *Id.* The Soldier Voting Act exempted persons "in military service in time of war" from paying poll taxes or other taxes "as a condition of voting in any election for President, Vice President, electors for President or Vice President, or for Senator or Member of the House of Representatives." 50 U.S.C. § 302 (1942) (repealed 1955).

61. Manning, *supra* note 56, at 353.

62. Holland sought to prevent Congressional legislation on the poll tax, which he believed could pass by seeking a constitutional amendment. Although this process appears antithetical to his goal, he opined that a constitutional amendment abolishing the poll tax would never pass Article V ratification muster; furthermore, seeking amendment over Congressional legislation would force its advocates to put their efforts behind what he believed was a losing battle. His goal was to put the amendment to a vote and allow it to fail, which he believed would put the effort to bed once and for all. His strategy proved unsuccessful. *See* Ackerman & Nou, *supra* note 42, at 78; *supra* note 49.

63. Ackerman & Nou, *supra* note 42, at 78.

64. *Id.* at 80–81.

65. *Id.* at 81.

66. Schultz & Clark, *supra* note 28, at 402.

poll tax would increase poor white voter participation and prevent a political alliance between the poor white voters and the Black voters.[67] Even those opposed to the Amendment tried to downplay the racial impact of eliminating the poll tax. One opponent, Senator Richard Russell, claimed, "[t]he States which require a poll tax today apply this levy equally to all voters and to all prospective voters without regard to race, creed, or color."[68]

During the January 1962 State of the Union Address, President John F. Kennedy told Congress that, "[t]he right to vote . . . should no longer be denied through such arbitrary devices on a local level . . . such as literacy tests and poll taxes."[69] In August of the same year, Congress approved the Twenty-Fourth Amendment,[70] and on January 23, 1964, South Dakota became the thirty-eighth State to ratify the Amendment, establishing the Amendment as constitutional law.[71] The following month, during a celebration of the Amendment's ratification, President Lyndon B. Johnson noted:

> Today, the people of this land have abolished the poll tax as a condition to voting. By this act they have reaffirmed the simple but unbreakable theme of this Republic. Nothing is so valuable as liberty, and nothing is so necessary to liberty as the freedom to vote without bans or barriers. . . . There can now be no one too poor to vote. There is no longer a tax on his rights.[72]

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67. Senator Holland spoke in support of the Amendment:

> It was shown in my own State [of Florida], when we repealed the poll tax in 1937—and I had a modest part in doing that, as [a] member of the State senate at the time—that at the next election, in 1940, at which time the colored people were not voting in my State, there was an immense increase in participation in voting by the white people. This resulted from the fact that many people, because of penury or because of carelessness or because of a dislike of what they saw happening in some counties as a result of the poll tax, had not participated in the elections. These people came in to participate.

Id. at 402 (quoting the congressional record). Senator Douglas saw the elimination of the poll tax as a device "to split the 'poor whites apart from the [Black voters] so that a political alliance between them would be impossible.'" *Id.* at 403 (quoting the congressional record).

68. *Id.* at 403 (alteration in original) (quoting the congressional record).

69. John F. Kennedy, President of the U.S., State of the Union Address (Jan. 11, 1962) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/january-11-1962-state-union-address [https://perma.cc/4MMW-9KYJ]). Kennedy continued: "As we approach the 100th anniversary . . . of the Emancipation Proclamation, let the acts of every branch of the Government—and every citizen—portray that 'righteousness does exalt a nation.'" *Id.*

70. Ackerman & Nou, *supra* note 42, at 86.

71. *Historical Highlights: The Twenty-Fourth Amendment*, *supra* note 49.

72. Lyndon B. Johnson, President of the U.S., Remarks Upon Witnessing the Certification of the 24th Amendment to the Constitution (Feb. 4, 1964) (transcript available at

While the Twenty-Fourth Amendment had a significant ripple effect on protections for poor white voters,[73] Black voters who were brave enough to cast a ballot still encountered literacy tests, grandfather clauses, or violent retribution.[74] Nevertheless, the Twenty-Fourth Amendment was the first in a line of important civil rights reforms in the 1960s, predating the Civil Rights Act of 1964[75] and the Voting Rights Act of 1965.[76] Beyond its enormous racial and civil rights implications, the Amendment importantly added protections for voting based on wealth (or lack thereof) to the Constitution, where none existed before.

II. THE *HARMAN* TEST FOR THE TWENTY-FOURTH AMENDMENT

A. The Court's Voting Rights Evolution

Since its ratification in 1964, the Supreme Court has only evaluated a single case under the Twenty-Fourth Amendment:[77] *Harman v. Forssenius*.[78] In *Harman*, the Court held that the Twenty-Fourth Amendment does not merely prohibit laws that deny voters the right to vote due to their failure to pay the poll tax, but that the Amendment also prohibits laws that abridges voters' rights to vote due to the burden imposed by a milder substitute to the poll tax.[79] The decision in *Harman* was part of the Warren Court's broader focus on civil rights and its examination of the constitutional right to vote. Sixteen years after the Court declared malapportionment a nonjusticiable political question in *Colegrove v. Green*,[80] the Warren Court changed course in *Baker v. Carr*,[81] and engaged in a more expansive reading of the Equal Protection Clause of the Fourteenth Amendment. In *Baker*,[82] the Court

https://www.presidency.ucsb.edu/documents/remarks-upon-witnessing-the-certification-the-24th-amendment-the-constitution [https://perma.cc/M5ZY-FVYM]).

73. *See* Ackerman & Nou, *supra* note 42, at 131.
74. *See id.* at 73.
75. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000(a)).
76. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).
77. *See* Gonzalez v. Arizona, 677 F.3d 383, 408 (9th Cir. 2012).
78. 380 U.S. 528 (1965).
79. *Id.* at 540.
80. Colegrove v. Green, 328 U.S. 549, 554 (1946) (plurality opinion) (holding that malapportionment was a nonjusticiable political question under Article I, Section 4 and the Equal Protection Clause of the Fourteenth Amendment).
81. 369 U.S. 186 (1962).
82. In *Baker*, Tennessee did not reapportion state house and state senate seats between 1901 and 1961 despite substantial growth, changes, and population movement

affirmed its holding in *Colegrove*[83] that Guarantee Clause[84] claims were nonjusticiable political questions.[85] Nevertheless, the *Baker* Court also held that Equal Protection Clause claims under the Fourteenth Amendment were justiciable because they did not fall into one of the Court-defined categories of political questions.[86] Significantly, *Baker* permitted the Court to apply constitutional voting protections to elections and deliver on the promise of the Fourteenth and Fifteenth Amendments.

In 1963, the Court built on the progress of *Baker*, and declared in *Gray v. Sanders* that the Fourteenth Amendment promised "one person, one vote."[87] Five months after the ratification of the Twenty-Fourth Amendment in 1964, the Court used the principles of *Baker* and *Gray* to declare unconstitutional

throughout the state. The Plaintiffs alleged that because of the population changes and the failure of the legislature to reapportion itself since 1901, plaintiffs and others similarity situated were denied the equal protection of the laws accorded to them by the Fourteenth Amendment. *Id.* at 189–95.

83. Justice Frankfurter's dissent in *Baker* explains that *Colegrove* and its progeny found that "[c]laims resting on this specific guarantee of the Constitution have been held nonjusticiable [because these claims] challenged state distribution of powers between the legislative and judicial branches." *Id.* at 289–90 (Frankfurter, J., dissenting).

84. U.S. CONST. art. IV, § 4.

85. *Baker*, 369 U.S. at 209–10. The *Baker* Court held that the complaint at issue "neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause." *Id.* at 209. Thus, the court did not disturb its finding in *Colegrove*, and implicitly affirmed its decision. Instead, the Court found the "District Court misinterpreted Colegrove v. Green and other decisions of this Court on which it relied," *id.*, because the "Appellants' claim that . . . being denied equal protection is justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" *Id.* at 209–10 (quoting Snowden v. Hughes, 321 U.S. 1, 11 (1944)).

86. Justice Brennan's majority opinion enumerated six characteristics of a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

87. Gray v. Sanders, 372 U.S. 368, 381 (1963). Justice Douglas's majority opinion stated:

> [A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographic unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 379.

malapportionment of state legislatures in *Reynolds v. Simms*.[88] The Court opined that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[89] The Warren Court's brief history of voting rights reform informed the Court's decision in *Harman*,[90] and subsequently framed the issue in a later seminal case, *Harper v. Virginia State Board of Elections*.[91]

B. *Harman v. Forssenius*

In anticipation of the ratification of the Twenty-Fourth Amendment,[92] Virginia passed two statutes slightly altering the state's poll tax regime.[93] These statutes amending the Virginia poll tax statutes were at issue in *Harman*.[94] The statutes did not change any requirements to vote in state elections, which still included a $1.50 poll tax. Instead, Virginia eliminated the poll tax as an absolute prerequisite to registration and voting in federal elections. The statutes permitted Virginia voters to choose between the

88. Reynolds v. Simms, 377 U.S. 533 (1964). Chief Justice Warren's majority opinion stated: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. . . . [Thus] the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* at 562.
89. *Id.* at 555.
90. 380 U.S. 528, 537–40 (1965).
91. 383 U.S. 663 (1966).
92. The Twenty-Fourth Amendment states:

> Section 1: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
> Section 2: The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXIV.

93. Prior to the passage of the Twenty-Fourth Amendment, Virginia required a $1.50 annual poll tax for voters to be eligible to vote in any federal or state election. In anticipation of the Twenty-Fourth Amendment, Virginia passed two statutes which: (1) permitted Virginia voters to vote without payment of the $1.50 poll tax in federal elections if voters filed the appropriate certificate of residence; (2) continued all other Virginia voting requirements including the $1.50 state poll tax; and (3) permitted federal and state voters to prove they met the Virginia Constitution's residency requirement. *Harman*, 380 U.S. at 530–32. Although *Harman* concerned the requirement to either pay the $1.50 poll tax or file a certificate of residency, the underlying $1.50 poll tax required in state elections was also at issue in *Harper*, discussed in Part III, *infra*.
94. *Harman*, 380 U.S. 528.

payment of a $1.50 poll tax and filing a certificate of residence every election year in order to vote in federal elections.[95] The statutes provided that the certificate of residence must be filed no later than six months prior to the election and no earlier than October 1st of the year immediately preceding the election.[96] The certificate of residence required the voter to state her current address, that she had been a resident of Virginia since the date she registered to vote, and that she did not intend to move from her city or county of residence before the next election.[97] In addition, the statutes required the certificate of residence to be notarized or witnessed.[98]

The Supreme Court found this statute unconstitutional and "repugnant to the Twenty-[F]ourth Amendment."[99] In evaluating the Virginia statute under the Twenty-Fourth Amendment, the Court looked to the purpose behind the enactment of the Amendment. The Court noted: "One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise."[100] Another objection included the requirement to pay the poll tax well before election day, often before candidates announced themselves or before campaigns gained traction.[101] As a result, many were disenfranchised because they failed to timely pay the poll tax.[102]

Given the long held tradition that "a [s]tate may not impose a penalty upon those who exercise a right guaranteed by the Constitution,"[103] the Court determined that the "Twenty-[F]ourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason."[104] Put another way, the Court held that the Twenty-Fourth Amendment does not merely prohibit laws that deny voters the right to vote due to their failure to pay the poll tax. The Twenty-Fourth Amendment also prohibits laws that abridges voters' rights to vote due to the burden imposed by a milder substitute to the poll tax. Thus:

> For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may

95. *Id.* at 530–32.
96. *Id.* at 532.
97. *Id.*
98. *Id.*
99. *Id.* at 533.
100. *Id.* at 539.
101. *Id.* at 539–40.
102. *Id.*
103. *Id.* at 540 (citing Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583 (1926)).
104. *Id.*

> be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-[F]ourth Amendment and must fall under its ban.[105]

The Court found that the Virginia statute violated the Twenty-Fourth Amendment because those who did not wish to pay the poll tax in federal elections were required to file a certificate of residence prior to voting in the election.[106] The Court held that the certificate of residence was a material requirement on voting because it required voters to present a witnessed or notarized certificate of residence each year before voting, at least six months prior to the election.[107] This amounted to voters having to choose between paying a poll tax and a material requirement that impeded their ability to vote. Under the *Harman* test, the Court declared that the Twenty-Fourth Amendment prohibits not only the payment of a poll tax to be eligible to vote, but also laws that force a voter to choose between paying a poll tax and complying with a material requirement to voting.[108] This decision had the potential to expand voter protection and prevent infamous attempts to prevent poor and minority voter turnout.

Since Reconstruction, poll taxes have prevented poor and nonwhite voters from exercising their right to vote.[109] Just short of the hundred-year anniversary of the close of the Civil War, the states ratified the Twenty-Fourth Amendment, abolishing poll taxes in federal elections.[110] The following year the Court announced that the Twenty-Fourth Amendment did more than prohibit the payment of poll taxes in federal elections, it also prevented a state

105. *Id.* at 542.
106. *Id.* at 541.
107. *Id.* at 542.
108. *Id.*
109. *See* Peter Beinart, *Should the Poor Be Allowed to Vote?*, ATLANTIC (Oct. 22, 2014), https://www.theatlantic.com/politics/archive/2014/10/the-new-poll-tax/381791 [https://perma.cc/H4F5-PX46]; *see also* Gregory P. Downs & Kate Masur, *How to Remember Reconstruction*, N.Y. TIMES (Nov. 16, 2018), https://www.nytimes.com/2018/11/16/opinion/reconstruction-american-civil-war.html [https://perma.cc/P6G3-2L7M].
110. *See 24th Amendment, Banning Poll Tax, Has Been Ratified; Vote in South Dakota Senate Completes the Process of Adding to Constitution*, N.Y. TIMES, Jan. 24, 1964, at 1, https://www.nytimes.com/1964/01/24/archives/24th-amendment-banning-poll-tax-has-been-ratified-vote-in-south.html [https://perma.cc/8A47-UPHK]; *cf.* Ted Widmer, *Did the American Civil War Ever End?*, N.Y. TIMES (June 4, 2015, 12:41 PM), https://opinionator.blogs.nytimes.com/2015/06/04/did-the-american-civil-war-ever-end [https://perma.cc/9NND-K8BT].

from forcing a voter to choose between paying a poll tax or submitting to another material requirement on voting.

This progress was short-lived. The very next year, in *Harper v. Virginia. State Board. of Elections*, the Court decided a poll tax case under the Fourteenth Amendment, leaving the Twenty-Fourth Amendment all but forgotten.[111]

III. HOW *HARPER V. VIRGINIA STATE BOARD OF ELECTIONS* ROLLED BACK THE HARMAN TEST

A. The Court's Evolution on *Harper v. Virginia State Board of Elections* and Justice Goldberg's Secret Dissent

Since *Harman*, the Supreme Court has never decided another case under the Twenty-Fourth Amendment; this is largely due to the Court's ruling in *Harper v. Virginia State Board of Elections*[112] the following year. In *Harper*, the Court used the Equal Protection Clause of the Fourteenth Amendment to find unconstitutional a statute which required the payment of a $1.50 poll tax in order to vote in Virginia state elections.[113] Despite the recent passage of the Twenty-Fourth Amendment in 1964 and the Voting Rights Act of 1965,[114] the Court never mentioned these newly minted laws and instead overruled its decision in *Breedlove v. Suttles*, which upheld a

111. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
112. *Id.*
113. *Id.* at 666.
114. The Voting Rights Act (VRA) of 1965 sought to break the grip of state disenfranchisement through Jim Crow laws by, inter alia, eliminating restrictions to vote by outlawing literacy tests and poll taxes and requiring the Justice Department to monitor the worst actors as determined in the Section 4 preclearance criteria through Section 5 of the VRA. *History of Federal Voting Rights Laws*, U.S. DEP'T JUST., https://www.justice.gov/crt/history-federal-voting-rights-laws [https://perma.cc/FZE7-6DNU] (last updated July 28, 2017). Despite the Twenty-Fourth Amendment's passage the year before, Section 10 of the VRA effectively barred the poll tax in all elections: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 10303(f)(2) of this title, as provided in subsection (b)." 52 U.S.C. § 10301(a) (2018).

Georgia poll tax, and rather than apply the *Harman* test,[115] it applied the Fourteenth Amendment.[116]

The Court's failure to mention the Twenty-Fourth Amendment or Section 10 of the Voting Rights Act, however, was a historical accident with negative ripple effects that persist today. When *Harper* first came to the Supreme Court by appeal from a three judge district court panel[117] in February 1965,[118] the justices voted six to three to affirm the district court's decision to permit a state poll tax.[119] In response, Justice Arthur Goldberg circulated an unpublished dissent, which he later referred to as the most important example of a draft dissent changing the original decision of a case.[120]

In his dissent, Justice Goldberg chronicled the history of the Court's recent expansions of Fourteenth Amendment protections, illustrating how *Breedlove* should be overturned because the decision predated the Court's expansive reading of the Fourteenth Amendment.[121] He wrote that "*Breedlove* was decided long before our recent decisions applying the Equal Protection Clause of the Fourteenth Amendment in the voting area so as to make it clear that the effect of the Fourteenth Amendment is to nullify invidious discrimination in the polling booth."[122] Justice Goldberg also noted that the recent passage of the Twenty-Fourth Amendment was not meant to strip the Court of its power under the Fourteenth Amendment to eliminate discrimination at polling places. Rather, the Twenty-Fourth Amendment was "an affirmative effort to eliminate the poll tax in federal elections."[123]

Justice Goldberg found that the history of the ratification of the Twenty-Fourth Amendment illustrated an interest in eliminating the poll tax at both the state and federal levels. He reasoned that despite the Twenty-Fourth Amendment's application to only federal elections, Congress did not

115. The *Harman* test determined that both poll taxes and requiring a voter to choose between a poll tax and submitting to another material requirement on voting, there the certificate of residence, are unconstitutional under the Twenty-Fourth Amendment. Harman v. Forssenius, 380 U.S. 528, 542 (1965).
116. *Harper*, 383 U.S. at 670.
117. *Id.* at 665–66.
118. Note that when *Harper* first came to the Court it predated the Voting Rights Act of 1965, which President Johnson signed into law on August 6, 1965. *Voting Rights Act Media Kit*, LBJ PRESIDENTIAL LIBR. (June 25, 2013), http://www.lbjlibrary.org/press/voting-rights-act-media-kit [https://perma.cc/CLU2-ZJNJ].
119. Ackerman & Nou, *supra* note 42, at 112.
120. Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317, 318–19.
121. *See* Subpart II.A, *supra*.
122. Schwartz, *supra* note 120, at 332.
123. *Id.*

intend to permit state-level poll taxes; rather, the Amendment reflects a necessary compromise that put an end to some types of poll taxes.[124]

Justice Goldberg's unpublished dissent illustrates that the Twenty-Fourth Amendment and Fourteenth Amendment should be read as supplemental Amendments that can be used together to combat poll taxes, just as the Fourteenth and Fifteenth Amendments are read together in voting rights cases.[125] This message was lost, however, in Justice Douglas's final opinion in *Harper*.

Justice Goldberg (joined by Justices Douglas and Warren) circulated the unpublished opinion on March 4, 1965,[126] three days before Bloody Sunday in Selma, Alabama.[127] The day after Bloody Sunday, Justices Black, White, and Brennan changed their votes resulting in a six to three vote in favor of reversing the district court and finding the Virginia state poll tax unconstitutional.[128] By the start of oral argument on January 25, 1966,[129] however, Justice Goldberg left the Court and was replaced by Justice Fortas.[130]

Prior to oral argument, the Court permitted Solicitor General Thurgood Marshall to submit an amicus curiae brief on the government's behalf.[131] Although Marshall did not have access to Justice Goldberg's unpublished dissent, he made similar arguments regarding the Twenty-Fourth Amendment and the newly passed Voting Rights Acts of 1965.[132] Despite Justice Goldberg's

124. *Id.*
125. *Id.*
126. Ackerman & Nou, *supra* note 42, at 114.
127. On March 7, 1965, a day that is now known as "Bloody Sunday," a group of approximately 600 activists set out to march from Selma to the state capital in Montgomery to advance the voting rights cause. *Confrontations for Justice*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/eyewitness/html.php?section=2 [https://perma.cc/2RAT-DQE7] (last visited Apr. 22, 2020). The marchers were stopped as they were leaving Selma at the end of Edmund Pettus Bridge by 150 Alabama State troopers, sheriff's deputies, and possemen who ordered the demonstrators to disperse. *Id.* One minute and five seconds after the two-minute warning to disperse, troopers advanced with clubs, bull whips, and tear gas, and fifty-eight people were treated for injuries at the local hospital. *Id.*
128. Ackerman & Nou, *supra* note 42, at 114–15.
129. *Harper v. Virginia Board of Elections*, OYEZ, https://www.oyez.org/cases/1965/48 [https://perma.cc/6LKJ-ZYBQ] (last visited Apr. 22, 2020). Note that because *Harper* came to the Supreme Court on appeal from a three judge district court panel pursuant to 28 U.S.C. § 2101(a) rather than through a writ of certiorari, the Justices in conference first voted on whether to affirm the district court's decision and then held oral arguments, which accounts for the one year delay between Justice Goldberg's dissent and oral argument. *See Harper*, 383 U.S. at 665–66; Schwartz, *supra* note 120, at 322 n.1.
130. Schwartz, *supra* note 120, at 334–35.
131. Brief for the United States as Amicus Curiae, *Harper*, 383 U.S. 663 (No. 48), 1965 WL 130114.
132. *Id.* at 24–26.

unpublished dissent and Solicitor General Marshall's amicus brief, Justice Douglas did not mention either the Twenty-Fourth Amendment or Section 10 of the Voting Rights Act in his majority opinion in *Harper*.

Rather than follow the path forged by Justice Goldberg and Solicitor General Marshall with regard to the Twenty-Fourth Amendment, the new *Harper* Court ignored the new Amendment. Instead, the Court held that the Equal Protection Clause of the Fourteenth Amendment prevents "the States from fixing voter qualifications which invidiously discriminate."[133] The Court considered its prior decisions in *Carrington v. Rash*,[134] *Louisiana v. United States*,[135] and *Gray v. Sanders*,[136] and reasoned that because a State may not deny a person the right to vote due to armed service status or homesite status, "the same must be true of requirements of wealth or affluence or payment of a fee."[137] Further, "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications [was] to introduce a capricious or irrelevant factor."[138] As a result, the Court determined that a state violates the Equal Protection Clause of the Fourteenth Amendment "whenever it makes the affluence of the voter or payment of any fee an electoral standard"[139] and that "the right to vote is too precious, too fundamental to be . . . burdened" by the payment of fees.[140]

While *Harper* continued the Warren Court's important work of expanding the reading of the Fourteenth Amendment to protect the right to vote and overruled the outcome in *Breedlove*, the Court's failure to mention the Twenty-Fourth Amendment's applicability to poll tax cases effectively eradicated the Amendment one year after its birth.[141]

133. *Harper*, 383 U.S. at 666.
134. 380 U.S. 89 (1965). As explained by the *Harper* Court, *Carrington* held that a state can impose reasonable residence requirements for voting but it cannot deny the ballot to "bona fide residents" under the Equal Protection Clause "merely because [the resident] is a member of the armed services." *Harper*, 383 U.S. at 667.
135. 380 U.S. 145 (1965) (holding Louisiana's Constitution "interpretation test" as a precondition for voting violated the Fourteenth and Fifteenth Amendments, as well as 42 U.S.C. § 1971(a)).
136. 372 U.S. 368 (1963) (holding that homesite was not a permissible basis for distinguishing between qualified voters within the state once a class of voters had been chosen and their qualifications specified, and that the Fourteenth Amendment demands equality—or "one person, one vote," *id.* at 381).
137. *Harper*, 383 U.S. at 667.
138. *Id.* at 668.
139. *Id.* at 666.
140. *Id.* at 670.
141. It appears that *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), is the only other case to successfully apply the Twenty-Fourth Amendment. *Id.* at 408 (holding that Arizona's requirement that prospective voters provide documentary proof of citizenship was superseded

As a result, *Harper*'s expansive reading of the Fourteenth Amendment created two tracks for poll tax cases. On one track, a court could apply the Twenty-Fourth Amendment test which prohibits poll taxes in federal elections and also prohibits the choice between paying a poll tax and some kind of other material requirement to voting. This track imposes a standard that essentially prohibits laws that force a voter to choose between paying a tax and something else. On the other track, the Fourteenth Amendment prevents poll taxes insofar as the tax burdens the right to vote. The second track creates an opening to permit some kind of poll tax so long as paying it is not burdensome,[142] seemingly in violation of the Twenty-Fourth Amendment.

Multitrack systems are prevalent in other contexts. Petitioners in vote dilution cases, for example, frequently bring claims under the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act, which permits the court to find merit under any of several offered theories. This is not, however, how most poll tax cases play out. Although most poll tax claims are brought under both the Twenty-Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment, most courts disregard the Twenty-Fourth Amendment theory as if *Harper* overruled *Harman* and the Twenty-Fourth Amendment altogether.[143] As illustrated, the Court did nothing of the sort; instead, the Amendment has merely been in hibernation since *Harper*.

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by the National Voter Registration Act and finding that the identification requirement did not violate the Twenty-Fourth Amendment). Since *Harman*, the U.S. Supreme Court has never again applied the Twenty-Fourth Amendment.

142. Crawford v. Marion County Elections Board, 553 U.S. 181 (2008), exploited this opening to loosen the poll tax restriction decades later when the Court analyzed an Indiana Voter ID case as discussed *infra*.

143. *See*, *e.g.*, *id*. (holding that an Indiana voter ID law was constitutional under the Equal Protection Clause of the Fourteenth Amendment while never discussing the Twenty-Fourth Amendment); Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971) (holding that provisions of the Texas Constitution and a statute requiring that persons who wish to vote in any given year register each year during a registration period beginning on October 1 and ending on January 31 were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, while not applying the Twenty-Fourth Amendment test). *But see Gonzalez*, 677 F.3d at 408 (holding that Arizona's requirement that prospective voters provide documentary proof of citizenship was superseded by the National Voter Registration Act and finding that the identification requirement did not violate the Twenty-Fourth Amendment).

B. How the Twenty-Fourth and Fourteenth Amendments Should Interact

The Court should revive the Twenty-Fourth Amendment and at a minimum apply the *Harman* test in cases involving federal elections.[144] Application of the Twenty-Fourth Amendment, unlike the Fourteenth Amendment Equal Protection Clause analysis, does not require the court to determine whether the type of harm is unconstitutional based on the level of scrutiny applied.[145] Because the Equal Protection analysis requires the balancing of the harm against the government's interest or the statute's rational relationship to governing, applying the Fourteenth Amendment inherently leads to some kind of balancing.[146] In contrast, the Twenty-Fourth Amendment unequivocally states poll taxes are not permissible, leaving little room for courts to balance a poll tax against a government's interest and create antidemocratic carveouts.[147] Therefore, the Fourteenth Amendment analysis may seem advantageous in a case involving state elections because the Twenty-Fourth Amendment on its face applies to federal elections.

Just as with federal poll tax cases, applying the Fourteenth Amendment to a state poll tax case is not advantageous when the Court applies the Equal Protection Clause test from *Harper*, amended by *Crawford*.[148] When the Court balances the burden on the right to vote against the state's interest, the result is fewer protections for voters. Instead, the Court could apply the Twenty-Fourth Amendment by way of the Seventeenth Amendment and Article I, Section 2 of the Constitution to state elections, as described in Subpart III.C, so long as the voting requirement is imposed in elections for the most numerous branch of government (for example, most typically the State Assembly, or State House of Representatives).[149] This illustrates that the Fourteenth Amendment is not the only vehicle to prevent state level poll taxes.

144. *See supra* text accompanying note 115.
145. *See supra* note 8.
146. *Id.*
147. U.S. CONST. amend. XIV.
148. Crawford v. Marion Cty. Elections Bd., 553 U.S. 181 (2008).
149. U.S. CONST. amend. XVII.

C. The Twenty-Fourth Amendment is Incorporated Against the States Via the Seventeenth Amendment and the Qualifications Clause of the Constitution

The Seventeenth Amendment, which established the direct election of Senators, requires, inter alia, that each state's electors "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."[150] The Qualifications Clause of Article I, Section 2 of the Constitution similarly requires that the members of the House of Representatives be chosen by the people, and that the "Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[151] The fundamental purpose of these clauses are "satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives."[152]

In its opinion in *Harman*, the Court noted that the district court found the certificate of residence requirement was a distinct qualification to vote in federal elections, in violation of Article I, Section 2 and the Seventeenth Amendment.[153] The Supreme Court, however, did not find it necessary to address the issue of whether the Twenty-Fourth Amendment is incorporated against the states. The Virginia statute at issue in *Harman* only applied to federal elections, and did not require incorporation because it fit squarely within the scope of the Twenty-Fourth Amendment.[154] *Harman* and *Harper v. Virginia State Board of Elections* (addressing the state-level Virginia poll tax)[155] were effectively companion cases decided a year apart,

150. The Seventeenth Amendment further states:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. *The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.* When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Id. (emphasis added).

151. U.S. CONST. art. I, § 2.
152. Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986).
153. Harman v. Forssenius, 380 U.S. 528, 533 (1965).
154. *Id.* at 533–34.
155. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

concerning Virginia's poll tax statutes, which assessed a $1.50 tax in order to vote. In *Harman*, the statutes at issue required voters in federal elections to choose between paying a poll tax and filing a certificate of residence in federal elections.[156] The district court in *Harman* held that the certificate of resident imposed a "distinct qualification" or at least increased the "quantum of necessary proof of residence" on a federal voter and therefore violated the Seventeenth amendment and Article I, Section 2 of the Constitution.[157] In *Harper*, the relevant statute required all voters in state elections to pay a poll tax without the certificate of residence option.[158] Had the Virginia statues at issue in *Harman* and *Harper* been consolidated and brought before the Court as a single case, perhaps the Court would have affirmed the district court's incorporation analysis regarding the application of the Twenty-Fourth Amendment through the Seventeenth Amendment and the Qualification Clause of the Constitution, rather than exercising judicial restraint. In this fictious consolidated case the statewide poll tax issue would present a real controversy to apply Seventeenth Amendment and Article I, Section 2 incorporation, rather than a theoretical idea, and the Court would be more likely to engage with the district court's analysis.

Moreover, had the Court applied the district court's use of the Seventeenth Amendment and Article I, Section 2 of the Constitution to *Harman,* the Court would likely not have come to the same legal conclusion as it did in *Harper*. Furthermore, courts today could apply the Twenty-Fourth Amendment against the states via the Seventeenth Amendment and Article I, Section 2 based on precedent.

The Court addressed a similar issue in *Tashjian v. Republican Party of Connecticut*[159] when it held that a political party's rule, which permitted unaffiliated voters to vote in primary elections, did not violate Article I, Section 2 or the Seventeenth Amendment.[160] The Court found that, despite Article I, Section 2 and the Seventeenth Amendment, the voting requirements for the most numerous branch of the state legislature and the voting requirements for the federal members of Congress do not require "perfect symmetry."[161]

156. *Harman*, 380 U.S. at 529.
157. *Id.* at 533.
158. *Harper*, 383 U.S. at 664 n.1.
159. 479 U.S. 208 (1986).
160. *Id.* at 209.
161. *Id.* at 229.

In *Oregon v. Mitchell*,[162] the Court addressed when federal electors and electors for the largest legislative branch may be asymmetrical. In *Mitchell*, the Court held that a portion of the 1970 amendment to the Voting Rights Act—which reduced the state and federal voting age from twenty-one to eighteen years of age—was unconstitutional.[163] In arriving at this decision the Court noted that the "Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people[,] through constitutional amendments[,] have specifically narrowed the powers of the States."[164] In other words, Congress has the ability to pass legislation applying to the states based on Congress's power in the Constitution and its amendments.[165] For this reason, the Court in *Mitchell* upheld a statute outlawing New York's English literacy requirement as a prerequisite to voting, because the requirement discriminated based on race in violation of the Fourteenth Amendment.[166] Although the Court agreed Congress could set a federal voting age at eighteen years of age, the Court found Congress could not set the voting age in state elections because "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race."[167] This illustrates that federal electors and the electors of the largest legislative branch are typically symmetrical so long as Congress is authorized

162. 400 U.S. 112 (1970).
163. *Id.* Note this case predated the Twenty-Sixth Amendment, which granted the right to vote to eighteen-year-old citizens. U.S. CONST. amend. XXVI.
164. *Mitchell*, 400 U.S. at 125.
165. The Court in *Mitchell* explained:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War [Reconstruction] Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination . . . .

Id. at 128 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966))). The Twenty-Fourth Amendment contains a similar enabling clause to the Reconstruction Amendments, permitting Congress to pass legislation to enforce the Amendment. U.S. CONST. amend. XIV.
166. *Mitchell*, 400 U.S. at 129.
167. *Id.* at 130.

to set the specific voting qualification at the state level (i.e., to prevent discrimination or enforce a Constitutional Amendment).[168]

In contrast, State provisions are permissible so long as they do "not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature."[169] This illustrates that the state electorate could be more expansive than required under federal law, or put another way, that federal law sets a floor rather than a ceiling with regard to state voting laws. Therefore, state voter registration and voting laws can be more expansive than federal law while still requiring the basic protections of federal voting law. Under this test, it would be constitutional for California to pass a law permitting sixteen-year-old citizens to vote in all state assembly elections, California's largest legislative body (despite the Twenty-Sixth Amendment),[170] so long as these sixteen-year-olds could also vote in federal elections.[171] This is permissible because states may set a voting age younger than as required by the Twenty-Sixth Amendment.[172] Further, the law permitting sixteen-year-olds to vote would not disenfranchise federal voters eligible to vote for the most numerous state body. Under the *Tashjian* test, this law would not violate Article I, Section 2 or the Seventeenth Amendment despite the law being more expansive than federal law requires.

These amendments can be read in the inverse as well, as long as Congress is acting under its enforcement power as authorized by the

168. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding Congress's ability to set qualifications to prevent discrimination in voting based on Congress's enforcement power in the Fifteenth Amendment).
169. Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986).
170. The Twenty-Sixth Amendment provides: "The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. The Amendment, however, does not set a minimum age; rather, it states constitutional protections are triggered once an eligible voter reaches eighteen years of age. *Id.*
171. If, however, the proposed law only permitted sixteen-year-old voters to vote in all state elections *except* state assembly elections, sixteen-year-olds would not be required to also vote in federal elections pursuant to the Seventeenth Amendment and Article I, Section 2 of the Constitution.
172. For example, Kentucky amended its constitution in 1955 to allow people eighteen and older to vote, KY CONST. § 145, and Maryland amended its constitution in 1969 to lower the voting age to eighteen years of age, MD CONST. art. I, § 1. *See also* Kelsey Piper, *Young People Have a Stake in our Elections. Let them Vote.*, VOX (Sept. 20, 2019, 11:42 AM), https://www.vox.com/future-perfect/2019/9/10/20835327/voting-age-youth-rights-kids-vote [https://perma.cc/WT6M-EX2C] (noting that prior to the ratification of the Twenty-Sixth Amendment in 1971, several states lowered the voting age from twenty-one to eighteen, nineteen, or twenty).

Constitution or one of its amendments. For example, if, rather than lowering the suffrage age, California passed a poll tax law, the Twenty-Fourth Amendment would block the use of the poll tax in federal elections. In addition, because of the Twenty-Fourth Amendment's enforcement power, per the Seventeenth Amendment and Article I, Section 2, the poll tax could not apply in elections for the California State Assembly, the state's most numerous branch of government. In other words, this fictional California poll tax could not apply to federal voters pursuant to the Twenty-Fourth Amendment and could not apply to the State Assembly via the Seventh Amendment and Article I, Section 2 of the Constitution. Therefore, pursuant to *Tashjian*, the Twenty-Fourth Amendment would prevent poll taxes in all federal elections and the election of California Assembly members. This illustrates that Article I, Section 2 and the Seventeenth Amendment act similar to incorporation, applying the Twenty-Fourth Amendment to elections for state legislatures' most numerous branch of government.[173]

Furthermore, because an Equal Protection Clause analysis often requires applying the appropriate level of scrutiny—which in turn results in balancing the statute's categorization against the government's interest—applying the Twenty-Fourth Amendment to state poll taxes through incorporation would do away with this kind of balancing and plainly forbid any poll tax.[174]

IV. VOTER IDENTIFICATION LAWS

A. The 2000 Election: The Origin of Voter Identification Laws

Voter Identification (Voter ID) laws emanate from the poll tax laws of the post–Reconstruction Era and in many ways embody a modern poll tax.[175] In the wake of *Bush v. Gore*[176] and the Presidential election of 2000,[177]

173. Even if the Court did not incorporate the Twenty-Fourth Amendment to the states, enforcement of the Twenty-Fourth Amendment in federal Voter ID cases would amount to *de facto* incorporation. The cost of having two separate Voter ID systems for state and federal elections would be enormously expensive for local governments and would essentially result in two separate elections. Thus, if the court enforced the Twenty-Fourth Amendment in federal elections, state elections would essentially be forced to follow suit.

174. *See supra* note 8.

175. Charles Postel, *Why Voter ID Laws Are Like a Poll Tax*, POLITICO (Aug. 7, 2012, 12:26 AM), https://www.politico.com/story/2012/08/why-voter-id-laws-are-like-a-poll-tax-079416 [https://perma.cc/43JT-EQMX] (noting Voter ID is like a poll tax because (1) authors of Voter ID laws use fraud as a pretext; (2) Voter ID creates a small nuisance to some voters but great hardship to others; and (3) these laws can be enacted for a crude partisan advantage).

Congress passed the Help America Vote Act[178] (HAVA). HAVA was intended to improve the overall administration of elections and restore trust in America's election procedures.[179] To facilitate these goals, HAVA required states to enact voter-identification requirements for all newly-registered voters who registered to vote by mail.[180] These first-time voters were required to present identifying documentation—either photo identification or a document such as an utility bill, a government paycheck, or other government paperwork

176. On the night of the 2000 election, the results were too close to call. Presidential candidate Al Gore lead the popular vote, but in Florida, the popular vote was within a margin of 600 votes, putting Florida's decisive electoral votes at issue. Andrew Glass, *Bush Declared Electoral Victor Over Gore, Dec. 12, 2000*, POLITICO (Dec. 12, 2018, 12:06 AM), https://www.politico.com/story/2018/12/12/scotus-declares-bush-electoral-victor-dec-12-2000-1054202 [https://perma.cc/7SXR-6NYR]; *Presidential Election Results Between Al Gore and George Bush Too Close to Call*, HISTORY.COM (July 24, 2019), https://www.history.com/this-day-in-history/presidential-election-al-gore-george-bush-too-close-to-call [https://perma.cc/CU8P-H5XG]. As a result, the Florida Supreme Court ordered a selective manual recount and presidential candidate George W. Bush subsequently filed an emergency application to stay the Florida Court's order. Bush v. Gore, 531 U.S. 98, 100 (2000). The U.S. Supreme Court found that the Florida Supreme Court ordered the recount without a prescribed standard and that its failure to prescribe a standard denied equal protection. *Id.* at 103. As a result, the Court—in a 5–4 decision—ordered the Florida Supreme Court to stop the recount, *id.* at 110, which resulted in presidential candidate George W. Bush winning Florida and thus becoming the forty-third President of the United States. Gore won the popular vote but lost at the electoral college, making the 2000 election the third presidential election in which the candidate who won the Electoral College lost the popular vote. Tara Law, *These Presidents Won the Electoral College—But Not the Popular Vote*, TIME (May 15, 2019), https://time.com/5579161/presidents-elected-electoral-college [https:// perma.cc/XN2E-26KY].
177. This was the first modern election in which the elected president did not win the popular vote; prior to the 2000 election, the last occurrence was in the 1888 election. Benjamin Kentish, *Donald Trump Has Lost Popular Vote by Greater Margin Than Any US President*, INDEP. (Dec. 12, 2016), https://www.independent.co.uk/news/world/americas/us-elections/donald-trump-lost-popular-vote-hillary-clinton-us-election-president-history-a7470116.html [https://perma.cc/4WV3-T6ZY]. This uncommon occurrence coupled with the confusing and deceptive "butterfly" ballots in Florida illustrated that not all votes were counted and perhaps the 2000 election was a result of some kind of vote suppression. *See* Eric Weiss, *18 Years Since the Butterfly Ballot, Florida's Voting System Still Can't Get It Right*, ABC ACTION NEWS (Nov. 12, 2018, 3:38 AM), https://www.abcactionnews.com/news/political/18-years-since-the-butterfly-ballot-florida-s-voting-system-still-can-t-get-it-right-1 [https://perma.cc/2NJ9-ZXF4]; *Butterfly Ballot Cost Gore White House*, CNN (Mar. 11, 2001, 8:43 AM), http://www.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount/#1 [https://perma.cc/BC3Q-5R72].
178. Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2018).
179. Brendan F. Friedman, Note, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 HOFSTRA L. REV. 343, 350 (2013).
180. 52 U.S.C. § 21083(b) (requiring voters who have never voted in a state or federal election, or voters that have never voted in that jurisdiction, to show identification including with either a photo ID or identifying mail).

containing the voter's name and address.[181] Despite this requirement, many states have recently enacted stricter voter identification standards than mandated by HAVA.[182] As of February 2020, nineteen states require all voters to present photo ID[183] in order to cast their ballots.[184]

B. Voter Identification Laws Do Not Prevent Fraud, They Disenfranchise Voters

Proponents of Voter ID echo the pro–poll tax arguments of yore. They argue that Voter ID is required to prevent fraud and uphold democracy while imposing a minimal burden on voters.[185] Voter fraud, however, is very rare, partly due to hefty penalties for each act of voter fraud.[186] Voter fraud in connection with a federal election is punishable by up to five years in prison and a $10,000 fine, in addition to potential state penalties.[187]

Beyond the legal implications of voter fraud, our electoral system already keeps many voters from the polls. In fact, in 2016, only 61.4 percent of U.S. citizens cast ballots in the presidential election.[188] Voter turnout is stymied by a myriad of obstacles: election day falls on a Tuesday, a workday, many states require voters to register to vote at their current address up to a month in advance of the election,[189] many voters lack transportation to the

181. 52 U.S.C. § 20183(b)(3)(A).
182. One example is the Indiana Voter ID statute at issue in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
183. These states include Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, Wisconsin, Arkansas, Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, North Carolina, Rhode Island, South Carolina, South Dakota, and Texas. Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L. CONF. ST. LEGISLATURES (Jan. 17, 2019), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/A3EG-EAVJ].
184. Although federal law is often a floor rather than a ceiling as illustrated in Subpart IV.C *infra*, HAVA should be the ceiling for identification requirements and to do otherwise exceeds the confines of the Twenty-Fourth Amendment.
185. Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression [https://perma.cc/8D2G-4YEQ].
186. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 26 (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf [https://perma.cc/7TT9-4EAY].
187. 52 U.S.C. § 10307(c) (Supp. IV 2018).
188. Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RES. CTR. (May 12, 2017), https://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots [https://perma.cc/R6Z8-PQ23].
189. Rachel Epstein, *2020 Election Voter Registration Deadlines: A State-by-State Guide*, MARIE CLAIRE (Sept. 24, 2019), https://www.marieclaire.com/politics/a26251797/2020-election-

polls,[190] and vote by mail is not permitted in all states.[191] The Brennan Center for Justice found that voter fraud incidents occur at rates between 0.000009 percent and 0.0027 percent, depending on the state and election year.[192] This led the Brennan Center to conclude: "It is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls."[193] In reviewing the 2016 election results, the Washington Post found that of the 135 million votes cast in 2016, there were just four counts of voter fraud.[194] Despite evidence of the overwhelming infrequency of voter fraud, opponents of a diverse and expansive electorate hide behind the banner of preventing fraud in order to disenfranchise poor, young, and nonwhite voters.[195]

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voter-registration-deadlines [https://perma.cc/LZ7J-WN74]; *Register to Vote and Check or Change Registration*, USA.GOV, https://www.usa.gov/register-to-vote#item-213833 [https://perma.cc/LZ6Z-8NA6] (last updated Aug. 23, 2019).

190. CHARLES STEWARD III, MASS. INST. OF TECH., 2016 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS 33 (2017), https://www.legendsvote.org/wp-content/uploads/MIT-Charles-Stewart-Voter-Turnout-Study-2016.pdf [https://perma.cc/M2PK-NC8B].

191. *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, *supra* note 14.

192. LEVITT, *supra* note 186, at 13–15.

193. *Id.* at 4.

194. Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016, 6:54 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.3abf7af4bb3b [https://perma.cc/UJT9-AB7K].

195. In the wake of the Reconstruction Amendments Black men began voting and even winning public office. Eric Foner, *There Have Been 10 Black Senators Since Emancipation*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/ 14/opinion/sunday/hiram-revels-reconstruction-150.html [https://perma.cc/43SQ-XZM2] (noting that Hiram Revels, the first Black Senator, took office in 1870). In response to Black Americans' new ability to disrupt the status quo, many states enacted Jim Crow laws to purposefully prevent Black Americans from exercising their constitutional rights, including voting. Danielle McLean, *Black Voters Sue Mississippi Over Jim Crow–Era Laws That Benefit White Candidates*, THINKPROGRESS (May 31, 2019, 5:47 PM), https://archive.thinkprogress.org/black-voters-challenge-mississippi-racist-jim-crow-election-process-5f478bb009e6 [https://perma.cc/C4FH-7A4D] (articulating that in 1890 Mississippi white supremacists wrote and adopted a new constitution to ensure newly enfranchised Black Americans never took political control of the state); *see also supra* Subpart I.B. Mechanisms such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and court cases eliminated much of obvious disenfranchisement, however there are still those who fear people they consider different because of, inter alia, their race, gender, national origin, or politics, voting or taking office. Jennifer Rubin, *Republicans Are Anti-Voting and Anti-Democratic*, WASH. POST (Apr. 12, 2019, 6:00 AM), https://www.washingtonpost.com/opinions/2019/04/12/opposing-efforts-boost-voting-turnout-is-anti-democratic [https://perma.cc/UX7T-2ZDP]. Today, Voter ID laws and limited poll hours, early voting, or vote by mail play the role literacy tests, grandfather clauses, and poll taxes once played. *See id.*; Justin Sink, *Trump Rejects Voting-by-Mail Amid Virus, Citing Fraud Concerns,* BLOOMBERG (Apr. 3, 2020, 5:45 PM), https://www.bloomberg.com/news/articles/2020-04-03/trump-rejects-voting-by-mail-amid-virus-citing-fraud-concerns [https://perma.cc/24GA-LD69]; Joanna Walters, *Top*

C. Voter Identification Laws Constitute a Modern-Day Poll Tax in Violation of the Twenty-Fourth Amendment

Voter ID requirements impose a substantial financial and logistical burden on voters that is akin to the poll tax. Roughly 11 percent of eligible voters (approximately twenty-one million Americans) lack the government-issued identification required by many states as a prerequisite for voting.[196] Although many of these Voter ID laws provide "free" identification cards, the underlying cost of obtaining that "free" identification is often substantial. Further, more than ten million Americans live over ten miles away from an ID-issuing office that is open at least two days a week.[197]

Access issues are becoming even more prevalent as the decade progresses and more states enact Voter ID laws. In 2012, the Brennan Center conducted a study of ten states that had Voter ID laws in place and found that 450,000 Americans both lacked vehicle access and lived further than ten miles from an ID-issuing office open two or more days a week.[198] Today, seventeen states have enacted Voter ID laws requiring photo ID,[199] yet over ten million Americans live further than ten miles away from such offices.[200] This problem is particularly acute in rural states like Mississippi, Alabama, and Wisconsin, where more than 30 percent of voting age citizens live ten or more miles away from these offices.[201]

In addition to the pure difficulty and cost associated with obtaining a "free" identification, a voter must be available or take time off from work during the ID-issuing office's business hours.[202] A voter attempting to obtain a "free" ID may incur transportation costs, opportunity costs for lost time at work, and child care costs. Beyond the transportation costs, obtaining an ID requires

Trump Adviser: Republicans Have 'Always' Relied on Voter Suppression, GUARDIAN (Dec. 21, 2019, 12:56 PM), https://www.theguardian.com/us-news/2019/dec/21/trump-adviser-republicans-voter-suppression [https://perma.cc/4EAH-TYCW].

196. Suevon Lee & Sarah Smith, *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Mar. 19, 2016, 8:33 AM), https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws [https://perma.cc/3X8T-SXXJ].
197. KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 3 (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Challenge_of_Obtaining_Voter_ID.pdf [https://perma.cc/NQ23-TGZU].
198. *Id.* at 5.
199. These states include Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, Wisconsin, Arkansas, Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, South Dakota, and Texas. Underhill, *supra* note 183.
200. GASKINS & IYER, *supra* note 197, at 3.
201. *Id.*
202. *Id.* at 6.

applicants to obtain underlying documentation, such as a birth certificate or naturalization paperwork.[203] These documents are often costly. For example, an official copy of a birth certificate can cost between $15 and $30 depending on the state.[204] A passport can cost $110 to renew, or $135 to obtain new passport, and a replacement naturalization certificate costs $345.[205] While a small percentage of states permit voters to obtain free copies of their birth certificates if the document is obtained for the purpose of obtaining a Voter ID, the vast majority of states do not.[206] Furthermore, even in the states that offer free birth certificates, this does not aid a citizen born out of state or naturalized who seeks to obtain identification.[207] Between the costs of transportation to the ID-issuing locations and the costs associated with obtaining underlying documentation, Voter ID laws often require eligible voters to pay hefty fees in order to vote.

In 2012, and in response to the widespread proliferation of Voter ID laws, then–Attorney General Eric Holder equated the requirement that voters show a state-issued photo ID in order to cast ballots to the Jim Crow poll tax.[208] According to Attorney General Holder, "[m]any of those without IDs would have to travel great distances to get them and some would struggle to pay for the documents they might need to obtain them . . . . We call those poll taxes."[209]

The *Harman* Court in 1965 affirmed that the Twenty-Fourth Amendment prevented the imposition of a poll tax or similar material requirement in federal elections. Voter ID laws embody a requirement to pay in order to vote in federal elections. Much like the Jim Crow era poll tax, voters in Voter ID states must pay a fee to obtain the correct documentation to be eligible to vote. During Jim Crow, voters were often required to pay a tax six months in advance, retain a receipt, and present that receipt in order to vote. Under modern Voter ID laws, eligible voters must either purchase a state-issued ID or pay the underlying cost of obtaining an ID (e.g., transportation cost, opportunity cost, underlying

203. *Id.* at 14.
204. *Id.*
205. *Id.*
206. *Id.* at 15.
207. *Id.*; *Replace Your Vital Records*, USA.GOV, https://www.usa.gov/replace-vital-documents#item-36582 [https://perma.cc/W4P3-ZE4H] (last updated Jan. 2, 2020).
208. Amy Bingham, *Eric Holder Dubs Texas Voter ID Law a 'Poll Tax'*, ABC NEWS (July 10, 2012), https://abcnews.go.com/blogs/politics/2012/07/eric-holder-dubs-texas-voter-id-law-a-poll-taxes [https://perma.cc/P5X7-F8GD].
209. *Id.*

documentation cost, etc.) in advance of the election in order to present what could be considered proof of payment—the photo identification—at the polls on election day.

Voter ID is even more prevalent in the post–*Shelby County v. Holder*[210] era.[211] Prior to the end of the § 5 preclearance regime in *Shelby County*, the U.S. Department of Justice or a three judge panel at the U.S. district court of DC could block the proverbial worst actors—the cities, counties, and states that fell under the § 4 coverage formula (covered jurisdictions)—when they requested to disenfranchise voters with Voter ID laws through § 5's preclearance regime.[212] In *Shelby County*, the Supreme Court found that the § 4 coverage formula was unconstitutional.[213] Because § 5's preclearance requirement that covered jurisdictions request to change voting rules only applied to covered jurisdictions as enumerated in § 4, this decision disabled federal oversight of these so called worst actors.[214] This illustrates that in *Shelby County's* wake, states are left unchecked to pass discriminatory Voter ID laws which have already impacted elections.[215]

Researchers at the University of California, San Diego recently found that "strict voter identification laws do, in fact, substantially alter the makeup of who votes and ultimately do skew democracy in favor of whites and those on the political right."[216] This is in part because Voter ID laws disproportionately affect Latinx, Black, and mixed-race Americans.[217] Thus, Voter ID laws allow conservative state leaders to effectively mold their

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210. 570 U.S. 529 (2013) (finding the § 4 coverage formula of the Voting Rights Act unconstitutional, which effectively abolished the § 5 preclearance regime present in the Act).
211. *See* Issie Lapowsky, *A Dead-Simple Algorithm Reveals the True Toll of Voter ID Laws*, WIRED (Jan. 4, 2018, 7:00 AM), https://www.wired.com/story/voter-id-law-algorithm [https://perma.cc/Y875-XWR8].
212. Jenée Desmond-Harris, *Why is Section 4 of the Voting Rights Act Such a Big Part of the Fight for Voting Rights?*, VOX (Feb. 14, 2016, 6:25 PM), https://www.vox.com/2016/2/14/17619202/voting-rights-fight-explained-key-sections-rights-act [https://perma.cc/3R9M-GMZU].
213. *Shelby County*, 570 U.S. at 557.
214. Desmond-Harris, *supra* note 212.
215. Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 18, 2017), https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218 [https://perma.cc/S8PD-LYKY].
216. ZOLTAN HAJNAL ET AL., VOTER IDENTIFICATION LAWS AND THE SUPPRESSION OF MINORITY VOTES 4 (2017), http://pages.ucsd.edu/~zhajnal/page5/documents/voterIDhajnaletal.pdf [https://perma.cc/H2XW-LNVD].
217. *Id.* at 1.

electoral destinies, and that is exactly what has happened.[218] Since the election of President Barack Obama, a series of Republican-led state legislatures passed strict Voter ID laws, securing their political futures.[219] During a 2016 federal trial challenging Wisconsin's Voter ID law, a former Republican staffer testified that Republican senators were "giddy" and "politically frothing at the mouth"[220] about the idea that the state's 2011 Voter ID law might keep Democrats from voting, which would help Republicans win at the polls.[221] This behavior is reminiscent of the Jim Crow era poll tax, designed to keep Black and low-income voters from the polls and ultimately from having an impact in governing at the local, state, and national level. Voter ID is the modern poll tax dressed up as fraud prevention—disenfranchising voters rather than protecting democracy. In 2020, President Trump, confirmed this belief by commenting should he agree to plans to expand vote by mail, "you'd never have a Republican elected in this country again."[222]

Proponents of Voter ID laws indicate these laws are not violative of the Twenty-Fourth Amendment because many do not require eligible voters to obtain any ID at all. Instead as with the statute at issue in *Crawford***,**[223] those without proper ID or those who object to being photographed for religious reasons may vote provisionally, as is true with most Voter ID laws. In Indiana, for example, voters without identification can vote in one of two ways: by

218. *See* Danny Hakim & Michael Wines, *'They Really Don't Want Us to Vote': How Republicans Made it Harder*, N.Y. TIMES (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/us/politics/voting-suppression-elections.html [https://perma.cc/9ATA-VKVJ]; John Laloggia, *Conservative Republicans are Least Supportive of Making it Easy For Everyone to Vote*, PEW RES. CTR. (Oct. 31, 2018), https://www.pewresearch.org/fact-tank/2018/10/31/conservative-republicans-are-least-supportive-of-making-it-easy-for-everyone-to-vote [https://perma.cc/QJZ4-9PLZ] (noting conservative Republicans on average are the least likely to support reforms that make voting easier for all citizens).
219. Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino, or Elderly.*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html [https://perma.cc/VP5Y-4L7B].
220. *Id.*
221. *Id.*
222. Jennifer Rubin, *Want Proof That Republicans Want to Suppress Voters? Just Ask Trump.*, WASH. POST (Mar. 31, 2020, 9:58 AM), https://www.washingtonpost.com/opinions/2020/03/31/want-proof-that-republicans-want-suppress-voters-just-ask-trump [https://perma.cc/EPB5-FBUS].
223. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (plaintiffs asserting that an Indiana law requiring all in person voters, but not absentee votes, to present state issued identification in order to vote was violative of the Fourteenth Amendment).

presenting adequate ID within a few days of the election at the county seat, or by signing an affidavit indicating they are eligible to vote at the county seat.[224]

These provisions, however, are an inadequate workaround to prevent disenfranchisement. As with many ID-issuing offices, voters must find a way to travel to their county seat in order to cast a provisional ballot. In *Harman*, the Court found that "[a]ny material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-[F]ourth Amendment and must fall under its ban."[225] Because the provisional ballot requires voters to perform this task for every single election, this so-called workaround is more onerous than obtaining the identification in the first place, and imposes a material requirement on voters without identification. Therefore, Voter ID laws force voters to choose between paying to obtain government issued identification through the typical process, paying for transportation and the underlying documentation to vote with a "free" ID, or paying for transportation to confirm their provisional ballot through an affidavit or additional documentation. All of these actions amount to a poll tax. Furthermore, in every election, the process of confirming a provisional ballot imposes a material requirement on a federal voter who is unwilling to pay the poll tax, in this case to obtain the ID. Thus, the Court should revive the Twenty-Fourth Amendment and apply its doctrine in Voter ID cases and find these laws unconstitutional.

V. How the Court Could Have Applied the Twenty-Fourth Amendment and the Fourteenth Amendment in *Crawford v. Marion County*

A. The Supreme Court's Decision in *Crawford*

In *Crawford v. Marion County Elections Board*,[226] the Supreme Court's most recent and only pure Voter ID case, the Court chose not to invoke the Twenty-Fourth Amendment when confronted with a potential modern-day

224. *Id.* at 240 (Souter, J., dissenting).
225. Harman v. Forssenius, 380 U.S. 528, 542 (1965). The Court found refusal to pay the poll tax amounted to a voter's "refusal to waive the constitutional immunity" in Voter ID cases, *id.*, however, failure to obtain Voter ID imposes a material requirement on voters who refuse to obtain a government identification. *Id.*
226. 553 U.S. 181 (2008).

poll tax. Instead, the *Crawford* Court applied a greatly loosened version of the Equal Protection Clause test rather than the *Harper* test.[227]

Although the Court could perhaps reasonably decide to apply only the Fourteenth Amendment to state level Voter ID laws following in the footsteps of *Harper*, the Court's refusal to apply the Twenty-Fourth Amendment to Voter ID laws in federal elections or in elections for the most numerous branch of the state government is the most troublesome aspect of the decision.[228]

In *Crawford*, the Court reviewed a facial challenge[229] questioning the constitutionality of an Indiana statute that required citizens voting in person on election day or casting a ballot in person at the office of the Circuit court to present a photo ID issued by the government.[230] The statute, however, did not apply to absentee ballots submitted by mail and "contain[ed] an exception for persons living and voting in a state-licensed facility such as a nursing home."[231] Despite the *Harman* precedent, the Court did not apply the Twenty-Fourth Amendment.

Furthermore, rather than follow its holding in *Harper* that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard,"[232] the Court evaluated whether the state interest outweighed the burden on the right to vote.[233] In so doing, the Court weakened *Harper*'s absolutist language regarding the poll tax and determined "a State may . . . impose reasonable . . . restrictions on the availability of the ballot."[234] The Court declined to announce a "'litmus test' that would neatly separate valid from invalid restrictions"[235] and instead concluded it "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."[236] In other words, the

227. *Crawford*, 553 U.S. at 188–89.
228. For a discussion of the Seventeenth Amendment and Article I, Section 4, see *supra* Part III.
229. It is still an open question whether the Court would have applied their announced rule in *Crawford* differently had the challenge been as-applied rather than facial in nature. The Roberts Court has expressed a clear preference for deciding as-applied cases and on a number of occasions has rejected facial constitutional challenges while reserving the possibility that narrower as-applied claims might succeed. *See* Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 774 (2009).
230. *Crawford*, 553 U.S. at 185.
231. *Id.* at 185–86.
232. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).
233. *Crawford*, 553 U.S. at 190.
234. *Id.* at 189 (internal quotation marks omitted).
235. *Id.* at 190.
236. *Id.*

Court must evaluate whether the State's justification for the burden outweighed the burden on the right to vote.

In applying this test, the Court found three state interests burdening the right to vote: (1) the State's interest in preventing voter fraud; (2) the State's interest in modernizing election procedures; and (3) the State's interest in safeguarding voter confidence.[237] These delineated interests were found sufficient to uphold the Indiana Voter ID law. The Court also held that "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*."[238] This illustrates that rather than ruling in accordance with *stare decisis* the Court overturned the maxim that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax,"[239] and instead created a new poll tax Equal Protection Clause test that nebulously weighs the burden on the voters against the relevant and legitimate state interests.[240]

B. The Court Misapplied the Equal Protection Clause Test in *Crawford*

The Court misapplied the Equal Protection Clause test that it announced in *Crawford*. Despite the Court's articulation of the doctrine, the Court did not find that the State's justification for the burden outweighed the burden on the right to vote. Because the statute in question fails to adequately address voter fraud (as discussed in Part IV), absent additional evidence of protecting public confidence, the State failed to illustrate how protecting voter confidence justifies the burden on the right to vote, and thus misapplied the new Equal Protection Clause test.

As discussed in Part IV, voter fraud is exceedingly rare and highly unlikely. The *Crawford* record indicated no evidence of polling place impersonation fraud, and the state of Indiana conceded "that it was unaware of any incidents of attempted or successful impersonation fraud in Indiana; that no one in Indiana history has been indicted for impersonation fraud; and that no evidence of impersonation fraud was presented to the Indiana legislature during the debate over the photo ID law."[241] Furthermore, the

237. *Id.* at 191.
238. *Id.* at 189–90 (quoting Harper v. Va. State Bd. of Elections, 383 U.S. 663, 788 n.9 (1966)).
239. *Harper*, 383 U.S. at 666.
240. *Crawford*, 553 U.S. at 191.
241. Brief for Brennan Center for Justice et al. as Amici Curiae Supporting Petitioners at 11, *Crawford*, 553 U.S. 181 (No. 07-21).

statute only requires Voter ID for those voting in person[242] and does not require Voter ID for those voting absentee, which at the time of the decision were essentially available only to certain groups, such as the elderly and those living with disabilities.[243] But while the *Crawford* record indicated no evidence of fraud at polling places, the same record contained documentary evidence of some fraud in absentee voting, suggesting the statute was not an effective tool for fraud prevention.[244] Thus, this statute is both underinclusive and overinclusive in preventing voter fraud, meaning the statute does not pass strict scrutiny, and further does not justify any resultant burden on the right to vote.

The Court cited the passage of HAVA and the National Voter Registration Act of 1993 (NVRA)[245] as a mandate to modernize election procedures. The Court, however, did not note that both HAVA and the NVRA are subject to the Twenty-Fourth and Fourteenth Amendments. Therefore, any requirements in these statutes must also pass the poll tax and substantial burden tests.

Further, neither HAVA nor the NVRA require photo ID.[246] To the contrary, the NVRA was passed to enhance voting opportunities for Americans, which included the creation of a national voter registration form, permits voter registration at the Department of Motor Vehicles, and allows the Department of Justice to bring civil actions in federal court to enforce its requirements.[247] In addition, the NVRA takes no position on photo IDs and confines its procedures to voter registration.

Although HAVA requires newly-registered voters to show ID upon their first visit to the polling place, HAVA does not require photo ID. Instead, first-time voters can present either photo identification or identifying mail such as a utility bill, government pay check, or government paperwork

242. For example, the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. *Crawford*, 553 U.S. at 185–86.
243. *Id.* at 240. (Breyer, J., dissenting).
244. *Id.* at 225–26 (Souter, J., dissenting) ("The photo identification requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana . . . ; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot stuffing, ballot miscounting, voter intimidation, or any other type of corruption on the part of officials administering elections." (citation omitted)).
245. *Id.* at 191 (majority opinion).
246. *Id.* at 193.
247. *About the National Voter Registration Act*, U.S. DEP'T JUST. (May 21, 2019), https://www.justice.gov/crt/about-national-voter-registration-act [https://perma.cc/T2C2-KD9G].

with the voter's name and address on the document.[248] Thus, relying on HAVA and the NVRA is misplaced in justifying a burden on the right to vote because the statutes neither require photo ID nor show intent to require Voter ID. As a result, election modernizing procedures do not justify the burden on the right to vote.

The Court also contended that the state has an interest in protecting public confidence but does not indicate how this statute protects public confidence. Instead, the Court asserted that protecting public confidence is an interest closely related to preventing voter fraud.[249] Because the statute in question fails to adequately address voter fraud (as discussed in Part IV and Subpart V.B), absent additional evidence of protecting public confidence, the state failed to illustrate how protecting voter confidence justifies the burden on the right to vote.

In short, the three enumerated justifications for burdening the right to vote presented by the government in *Crawford*, fail to illustrate a justification worthy of burdening the right to vote. Indiana presented no evidence to illustrate a single actual incidence of in-person voter fraud, and furthermore, the statute is both underinclusive and overinclusive as a fraud prevention measure. Instead, Indiana relied on a false mandate from NVRA and HAVA in creating its own Voter ID law. And it is unclear how the Indiana statute safeguards voter confidence. As a result, the Court should have found the statute unconstitutional.

C. The Burden on the Right to Vote

The Court has long held that voting is a fundamental right.[250] The right to vote links a citizen to her laws and government, and "is protective of all fundamental rights and privileges."[251] As a result, the Court should tread lightly in burdening the right to vote, and a state may not lawfully burden the right to vote "merely by invoking abstract interests."[252] In *Crawford*, however, the Court found that the threats to the state interest outweigh the significant burden on the right to vote.[253] The Voter ID law at issue in *Crawford*, imposed a substantial burden on the right to vote unjustified by

248. 52 U.S.C. § 20183(b)(3)(A) (2018).
249. *Crawford*, 553 U.S. at 197.
250. *E.g.*, Burdick v. Takushi, 504 U.S. 428, 433 (1992).
251. Evans v. Cornman, 398 U.S. 419, 422 (1970).
252. *Crawford*, 553 U.S. at 209 (Souter J., dissenting).
253. *Id.* at 203–04 (majority opinion).

state's interest in preventing fraud or modernizing the election system, because the law accomplished neither goal.

According to the district court's findings, 43,000 Hoosiers lacked necessary identification to vote under the new Voter ID law.[254] Of those, many were likely to be "low on the economic ladder"[255] and thus suffer a greater burden under the Voter ID law. As shown in Subpart IV.C, Voter ID requirements, including the costs of both the underlying documentation and the necessary travel to obtain the ID, impose financial burdens on the right to vote. And this heavy burden on Indiana voters should not be outweighed by the State's stated justification.[256] This further illustrates that the *Crawford* Court should have found the burden imposed by the Indiana statute outweighed the State's justification in imposing the statute, and that the Court should have declared the statute unconstitutional.

D. The Court Should Have Applied the Twenty-Fourth Amendment in *Crawford*

With regard to the requirement to obtain photo identification in federal elections and in elections of the most numerous branch of the state legislature,[257] the Court should have applied the Twenty-Fourth Amendment. Perhaps, the Court correctly applied the Equal Protection Clause of the Fourteenth Amendment to all other state photo identification claims;[258] however, the Court incorrectly chose to not apply the Twenty-Fourth Amendment to federal voters.

The Indiana Voter ID statute required voters[259] to provide photo ID prior to all in person voting, except for those voters living and voting in a state-licensed nursing home.[260] Voters could obtain a "free" photo ID if they provided the costly underlying required documentation such as a birth certificate or naturalization paperwork.[261] These requirements perhaps

254. *Id.* at 187–88.
255. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).
256. The states justification of interest included: (1) the State's interest in preventing voter fraud; (2) the State's interest in modernizing election procedures; and (3) the State's interest in safeguarding voter confidence. *See Crawford*, 553 U.S. at 191.
257. See the discussion of the Seventeenth Amendment and Article I, Section 4 *supra* Part III.
258. As discussed *supra* Subparts III.A–B.
259. This statute included voters in federal elections and in elections for the most numerous branch of government. Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005.
260. *Crawford*, 553 U.S. at 185–86.
261. *Id.* at 186.

proved difficult; for example, some individuals who attempted to obtain the appropriate ID may have been uncertain regarding how to obtain the proper documents, and "some may [have found] the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport)."[262]

Furthermore, at the time of the decision, the appropriate state-issued photo IDs were only issued at the Bureau of Motor Vehicles (BMV)[263] which were more onerous to travel to than the polls.[264] If a voter was unable to present a photo ID because the voter forgot the ID, was an indigent voter, or had a religious objection to being photographed, that person could "cast a provisional ballot that [would] be counted only if she execute[d] an appropriate affidavit before the circuit court clerk within 10 days following the election."[265] Unlike "the trip to the BMV (which at least ha[d] a handful of license branches in the more populous counties [at the time]), a county has only one county seat."[266] Meaning some voters were forced to travel to the county circuit court every time they wished to cast a ballot; this amounted to an onerous and particularly burdensome experience for indigent or other struggling voters because "most counties in Indiana either lack[ed] public transportation or offer[ed] only limited coverage."[267]

This statute is analogous to the statute in *Harman*, illustrating the Court could have found the Indiana statute unconstitutional under the Twenty-Fourth Amendment. In *Harman*, the Virginia statute in question required voters in federal elections to pay a $1.50 annual poll tax at least six months prior to the election or present a notarized or witnessed certificate of residence between one year and six months prior to the election.[268] In *Harman*, the Court found that the Twenty-Fourth Amendment forbade the payment of poll taxes in federal elections and prevented requiring a voter to choose between a poll tax and a material requirement on voting.[269]

262. *Id.* at 239 (Breyer, J., dissenting).
263. *Id.* at 211–12 (Souter, J., dissenting).
264. *Id.* at 212–13 ("Marion County, for example, has over 900 active voting precincts . . . yet only 12 BMV license branches; in Lake County, there are 565 active voting precincts . . . to match up with only 8 BMV locations; and Allen County, with 309 active voting precincts . . . has only 3 BMV license branches." (citations omitted)).
265. *Id.* at 186.
266. *Id.* at 217 (Souter, J., dissenting).
267. *Id.*
268. Harman v. Forssenius, 380 U.S. 528, 530–32 (1965).
269. *Id.* at 540 ("Significantly, the Twenty-[F]ourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason.").

In *Crawford*, the Indiana statute required voters to obtain photo ID requiring voters to travel burdensome distances and pay significant costs for the underlying documentation required to obtain the ID. Much like the Virginia law at issue in *Harman*, Indiana voters had to obtain the documentation and photo IDs in advance of the election.[270] In summary, the statute in *Crawford* is similar to the poll tax option in *Harman*: an Indiana voter must pay a fee to obtain documentation and travel to obtain a required photo ID, obtain this identification from a government office at least two weeks[271] prior to the election, and present the results of their payment—the photo ID—on election day to be eligible to vote. This is the definition of a poll tax and the Court could have struck down this Voter ID–as–poll tax requirement in their decision in *Crawford*.

Not only is the ID requirement equivalent to a poll tax, the statute's provisional ballot procedure for voters without photo ID is also an unconstitutional material requirement imposed on federal voters.[272] In *Harman*, the Court found that a statutory alternative to paying a poll tax—a certificate of residence witnessed between one year and six months prior to the election—imposed a material requirement on federal voters who refused to pay the poll tax, and thus found this alternative unconstitutional. The statutory alternative in *Crawford* is far more onerous than the alternative in *Harman* because it requires voters to travel a greater distance to the county seat for every election in order to have their vote counted. In contrast, the alternative in *Harman* (a certificate of residence) could have been obtained and witnessed or notarized locally and the certificate allowed voters to vote

270. The Indiana BMV indicates it takes fourteen days to obtain a photo ID in the mail. Underlying documentation can take much longer; for example, a U.S. passport can take six to eight weeks and birth certificates range from two to four weeks, depending on the state. *See* Erik Jackson, *How to Replace (and Store) Crucial Documents*, REAL SIMPLE (July 22, 2018), https://www.realsimple.com/home-organizing/organizing/record-keeping/replace-store-important-documents [https://perma.cc/Q3KV-4ZV6]; *Processing Times*, U.S. DEP'T STATE—BUREAU CONSULAR AFF., https://travel.state.gov/content/travel/en/passports/requirements/processing-times.html [https://perma.cc/FM35-WB2D] (last visited Apr. 22, 2020); *Receiving Your Driver's License or ID Card Through the Mail*, BUREAU MOTOR VEHICLES, https://www.in.gov/bmv/2579.htm [https://perma.cc/8MJ3-GN5Y] (indicating it can take six to eight weeks to obtain a passport); *Where to Write for Vital Records*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/w2w/index.htm [https://perma.cc/7V6B-TG22] (last updated Jan. 25, 2019) (indicating it can take two to four weeks to obtain a copy of a birth certificate).

271. *Receiving Your Driver's License or ID Through the Mail*, *supra* note 270, at slide 1 (follow "start slideshow" hyperlink).

272. *Cf. Harman*, 380 U.S. at 542 (noting a poll tax is present when a voter must choose between voting and a material requirement on voting).

in elections for an entire year. Because the provisional ballot requirement in the Indiana statute imposes a material requirement on voters not wishing to pay to vote and surpasses the poll tax alternative in *Harman*, the provisional ballot is not a suitable alternative to the Voter ID requirement.

Had the Court applied the *Harman* analysis, it could have found that the payment associated with Voter IDs amounted to a poll tax, and that requiring a voter to choose between paying a poll tax—here obtaining the necessary ID—and performing a different material requirement, like making the onerous journey to county seat to give an affidavit affirming their identity, the Court likely would have found the statute amounted to an unconstitutional poll tax with regard to voting in federal elections and voting for the state's most numerous branch of government. Thus, the Court erred, at a minimum, in not applying the Twenty-Fourth Amendment to the Voter ID requirements in federal elections and in state elections of the most numerous branch of government.

CONCLUSION

Reviving the Twenty-Fourth Amendment would make great strides towards a more inclusive democracy and is sorely needed today. In April 2020, a district court in Georgia declined to apply the Twenty-Fourth Amendment to a state law requiring voters to pay postage for absentee ballots[273] amidst the COVID-19 pandemic.[274] Additionally in 2020, President Trump refused to expand vote by mail amidst the pandemic and the Supreme Court determined,

273. Black Voters Matter Fund v. Raffensperger, No. 1:20-CV-01489-AT, 2020 WL 2079240, at *1 (N.D. Ga. Apr. 30, 2020).

274. Based on what is known at the time of writing this comment, the COVID-19 virus spread to the United States in February of 2020. By March 11, 2020, the disease was described as a global pandemic. Due to the virus's rapid transmission, and the number of cases resulting in hospitalization or death, many cities, counties, and states issued stay at home orders. In addition, several states postponed elections. Bill Chappell, *1st Known U.S. COVID-19 Death Was Weeks Earlier Than Previously Thought*, NPR (Apr. 22, 2020, 10:04 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/22/840836618/1st-known-u-s-covid-19-death-was-on-feb-6-a-post-mortem-test-reveals [https://perma.cc/3AHL-K26D]; Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html [https://perma.cc/FJ6F-JQMB]; *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html [https:// perma.cc/DR6D-F95Z]; Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/U4VS-RVA5].

in a misguided decision, to not lengthen absentee voting for a Wisconsin primary scheduled to take place the during a public health crisis. These all too recent examples illustrate that voter suppression is still alive and well.[275]

Voter ID laws and other fee payment schemes are a modern-day poll tax and their proponents make arguments similar to the arguments made by reconstructionist gatekeepers: that Voter ID laws protect democracy, prevent fraud, and are of little burden to those who care to engage in the electoral process. History has proven these arguments false and that too often these laws are motivated by invidious racism or attempts to silence those with less power. Unlike Reconstruction, Courts now have a powerful civil rights tool to prevent disenfranchisement: the Twenty-Fourth Amendment. The Courts should draw on *Harman* to once again wield this Amendment to protect the right of citizens to vote despite their relative wealth or poverty.

Despite a climate of seemingly building suppression, there is some cause for cautious optimism. In 2018, Florida amended its constitution, ending the lifetime ban on voting for some prior felons who completed "all terms" of their sentence.[276] In July 2019, the Republican-led Florida legislature passed a law defining "all terms" of a felon's sentence as including the payment of all legal debts like fines, fees, and restitution.[277] In May 2020, a district court determined that this law conditions the right to vote on a person's ability to pay a fee and is therefore unconstitutional under the Twenty-Fourth Amendment.[278]

Even in light of this recent decision, the revival of the Twenty-Fourth Amendment is critical.

Furthermore, the Twenty-Fourth Amendment is essential in the post–*Shelby County* era,[279] especially as the likelihood of a presidential election amidst a pandemic increases. When the Court disabled the § 4 coverage formula, it gave the historically most discriminatory actors unfettered

275. Republican Nat'l Comm. v. Democratic Nat'l Comm., No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020); Rubin, *supra* note 222.
276. RJ Vogt, *Could Fee-Based Voting Restrictions Tilt the 2020 Election?*, LAW360 (Feb. 9, 2020, 8:02 PM), https://www.law360.com/access-to-justice/articles/1242065/could-fee-based-voting-restrictions-tilt-the-2020-election-?nl_pk=06f540bc-d456-4eeb-8286-2f7fa418da8b&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice [https://perma.cc/H8GS-AQBE].
277. *Id.*
278. Jones v. DeSantis, No. 4:19CV300-RH/MJF, 2020 WL 2618062, at *29 (N.D. Fla. May 24, 2020).
279. The Court in *Shelby County* found the § 4 coverage formula of the Voting Rights Act to be unconstitutional, which effectively abolished the § 5 preclearance regime present in the Voting Rights Act. Shelby County v. Holder, 570 U.S. 529 (2013).

access to both burden voters with Voter ID laws and disenfranchise their political foes. In *Shelby County's* wake, the Twenty-Fourth Amendment plays an even more important role in protecting democracy and ensuring the "one person, one vote"[280] standard.

As a result, the Court should resurrect the Twenty-Fourth Amendment to strike down Voter ID laws and other requirements that mandate the payment of a fee in exchange for the right to vote.

280. Gray v. Sanders, 372 U.S. 368, 381 (1963).