September 15, 2008

What Is an Unconstitutional "Other Tax" on Voting? Construing the Twenty-Fourth Amendment

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Construing the Twenty-Fourth Amendment

Allison R. Hayward*

The poll tax . . . has served in a two-edged capacity to curtail exercise of the suffrage – as an obstacle to voting and . . . because of the automatic forgiveness, actually as a payment to the citizen to stay away from the ballot box . . .

Jennings Perry, Democracy Begins at Home: The Tennessee Poll Tax Fight 97 (1944)

Introduction

One of life’s eternal verities is that an increase in the price for an ordinary good or service will reduce demand for it. Certainly the belief that voting was sensitive to price increases animated the institution of a poll tax as a prerequisite for voting.

Poll taxes are per capita taxes, that is, each individual taxpayer pays the same flat tax. Poll taxes need not necessarily be charged as a prerequisite to voting, but that became their most notorious use through the 20\textsuperscript{th} century. Some states made the poll tax due months before election day, or prevented payment by a third party. Poll taxes used as a voting prerequisite were in practice an ineffective means of raising revenue, and appeared to be less about revenue and more about the suppressive effects of a price increase on voting.

In pursuit of voting reform, the Twenty Fourth Amendment made unconstitutional poll taxes, or any other tax, payable as a prerequisite for voting in federal elections.\footnote{Amendment XXIV, section 1 reads: The rights 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.} Soon afterward, the Supreme Court in Harper v. Virginia Board of Elections\footnote{383 U.S. 663 (1966).} declared state poll taxes for these purposes also unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. No one any longer disputes the suspect policy wisdom or unfairness of taxing people to vote. But many critics of state election administration policies argue that the bar against poll taxes and “other taxes” extends to indirect financial burdens imposed on a voter to obtain some other prerequisite to vote. Yet it cannot be that any cost incurred by a voter – however attenuated to voting -- is an unconstitutional tax under the 24\textsuperscript{th} Amendment.

This Article will look closely at the origin and application of “poll tax or other tax” (meant here to include any form of tax, fee or charge imposed as a precondition to

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1 Amendment XXIV, section 1 reads: The rights 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.

voting), the history of anti-poll tax reform, the intended scope of such reforms, and suggest a way to decide what voting prerequisites could be unconstitutional “poll taxes.”

The analysis in this Article isolates the question of defining “poll tax or other tax” under the 24th Amendment from what constitutes a severe burden or a “reasonable” requirement in equal protection doctrine. That question is critical when reviewing voting laws, because severe burdens will trigger constitutional “strict scrutiny.” The 24th Amendment should be understood as a separate source of authority. It contains a flat prohibition on such taxes. Potentially, the 24th Amendment is a more stable and resilient source of protection. In any case, it deserves separate treatment.

This issue is of great salience presently as states explore additional election administration measures, for example voter identification requirements, that may involve individual voter expense. But the question of what constitutes an “other tax” reaches beyond the voter identification debate. Local revenue streams may become burdened by greater demands for election-day technology, expertise, and litigation. Meanwhile economic conditions could pinch government budgets. One should expect states and localities to seek additional ways of shifting the costs associated with elections onto others, even onto voters.

A principled rule that can identify permissible forms such cost shifting might take, and flag potentially unconstitutional “tax” burdens, would be a useful tool for policymakers, and the lawyers and judges who will inevitably be called upon to evaluate the scope of unconstitutional taxes or fees that present some kind of hurdle or prerequisite for voting.

In Section I, this Article reviews the history of using taxes as a voting prerequisite. In Section II, the Article examines the corruption that followed the institution of these taxes, as political powers used the requirement to limit and manipulate their constituencies. Section III reviews the effort to abolish tax prerequisites for voting, to define better what the anti-poll tax effort meant to accomplish. Finally, in Section IV, the Article develops a rule for determining when a tax or fee is unconstitutional under the 24th Amendment, and applies it to several contemporary situations.

I. Use of Poll Taxes as a Voting Qualification

People think of poll taxes almost automatically in the context of the franchise. That usage need not be the case. A state might charge a “poll tax” as a simple per capita tax, without imposing any precondition on the franchise. A state government could use a
capitation tax simply to raise revenue. Henry David Thoreau’s arrest for failure to pay his poll tax in 1846 formed the basis for his famous lecture “Civil Disobedience.”

Moreover, a number of qualifications for access to the franchise have been used by jurisdictions throughout history, both as a way to preserve the right to vote of proper voters, and to exclude from the body of electors voters whose participation was thought to be illegitimate. This Article will focus on the imposition of a tax, charge or fee on voting, but the reader should be mindful that taxes are but one way jurisdictions, for good reasons or bad, have imposed restrictions on who may vote.

Taxes as a voting qualification developed initially as an alternative to property qualifications. Urbanization, demographic changes and population growth put pressure on state constitutions to adapt to new realities. The debate in the New York Constitutional Convention of 1821 is illustrative. Its Committee on Elective Franchise proposed to abolish all existing property distinctions, and make the right to vote contingent only upon “virtue and morality.” Propertied interests marshaled their resources, and fought this proposal vigorously in the full Convention. Nevertheless, they were defeated, 100 to 19, and the Convention instead qualified the franchise on payment of a state or county tax, performance of military service, highway work, or three year’s residence.

The Convention was not so generous regarding suffrage for black voters. After much debate about the propriety of drawing race lines among the population, and the narrow failure of an amendment to provide full suffrage for black males, the New York convention included an undiluted property owning requirement for black voters, much

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New Hampshire localities may levy a “resident tax” that is essentially a poll tax. See N.H. R.S.A. § 72:1 - 72:5. The Delaware Constitution authorizes a local capitation tax, DEL CONST. ART. VIII § 5.


8 KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 5-6 (1918) (describing the dual purposes behind voting qualifications); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 316-20 (2000) (summarizing political dynamics in history of suffrage restrictions).

9 Forbush, supra note 6, Janice Christensen, The Constitutionality of National Anti-Poll Tax Bills, 33 MINN. L. REV. 217, 232 (1949). States began abandoning property requirements in the early 1800s; Connecticut in 1818, Massachusetts and New York in 1821, New Jersey in 1844. DUDLEY MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY 50-52 (1949); see also KEYSSAR, supra note 8 at 51 (chart showing falling proportion of states with property and tax requirements 1790-1855).

10 See KEYSSAR, supra note 8 at 34; EDWARD SAIT, AMERICAN PARTIES AND ELECTIONS 12-18 (1927).

11 PORTER, supra note 8 at 55. Notably, the ability to vote for convention delegates had been extended almost universally to adult males. Leo H. Hirsch, Jr., The Free Negro in New York, 16 J. OF NEGRO HISTORY 415, 418 (1931).

12 PORTER, supra note 8 at 60.
the same in scope to its existing law. Then, five years later, the voter rejected the residual tax paying qualification and other “civic duties” by popular referendum as applied to white voters, leaving the burden on black voting unchanged.

The controversy in New York over whether, or how, to liberalize the franchise for black voters foreshadowed the prevalent use of poll taxes to disenfranchise blacks (and poor whites) primarily in the post-Reconstruction South. Whereas poll taxes had broadened suffrage in the early 19th century in many places, by the late 19th century “the poll tax requirement served a directly contrary purpose, that of restricting the suffrage.”

After the Civil War, it was common for new southern state constitutions to include a flat per capita “poll” tax, and allocate that revenue to schools. It was not long afterward state laws also required taxpayers to prove payment of the poll tax before voting. Delaware enacted a poll tax prerequisite for voting in 1873, which was prominently, and unsuccessfully, challenged in state court in 1890. In 1889, Florida first required poll-tax payment as a prerequisite to voting, followed by Tennessee in 1890, Arkansas in 1893, South Carolina in 1895, Louisiana in 1898, North Carolina in 1900 Alabama and Virginia in 1901, and Texas in 1903. The poll tax was not limited to the South, but its longest-lived use as a precondition for voting was in Southern jurisdictions.

The laws in Maine and Massachusetts burdened voting less directly, but still provided an incentive to avoid voting. These states collected a per capita “poll” tax and permitted the

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13 PORTER, supra note 8 at 68; Hirsch, supra note 11 at 420.
14 PORTER, supra note 8 at 69; Hirsch, supra note 11 at 421.
15 Christensen, supra note 9 at 232.
16 See Friezleben v. Shallcross, 19 Atl. Rep. 576 (Del. 1890); The Delaware Poll Tax Case, N.Y. TIMES, Jan. 25, 1890 (noting real challenger to law was N.Y. Republican Senator Frank W. Higgins, counsel for state was Delaware Democratic Senator George Gray); Delaware Disenfranchisement, N.Y. TIMES, Jan. 27, 1890. Delaware also enforced a property ownership requirement. In one political campaign the Republicans planned to use a $100,000 campaign fund “to buy a tract of swamp land and parcel it out among the laboring men so as to qualify them as voters.” EARL SIGES, STATE AND FEDERAL CORRUPT PRACTICES LEGISLATION 22 (1928).
17 FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 2-3 (1958); Forbush, supra note 6 (Georgia had never repealed its tax requirement, but extended it to primary and general elections in 1908); Dickson, supra note 5 at 1032 (Texas). On the implementation of the Georgia poll tax during reconstruction, see Condition of Affairs in Georgia, H. MIS. DOC. 52, 40th Cong. 3d Sess (1869) at 41, 45.

In Texas, the 1875 Constitutional convention proposed a poll tax voting prerequisite, but it was defeated. The legislature put forth the same restriction again in 1902, and it was adopted in 1903. Dickson, supra note 5 at 1032. Virginia imposed a poll tax suffrage requirement from 1876-82, but the Readjuster Movement led to its repeal. OGDEN, supra at 3 and n.5; RALPH McDANIEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-02 at 6-9 (1928). It was restored in 1901.
18 Nevada imposed a poll tax as a voting prerequisite on voters under 60 years of age, but this law was later found unconstitutional under the state constitution, for reasons unrelated to any suffrage concerns. State v. Stone, 53 Pac. Rep. 497 (1898) (finding Nevada law unconstitutional because title issued with it was inadequate). Salem, Oregon imposed a “road poll tax” requirement on voters which was also found unconstitutional under the Oregon state constitution. Livesley v. Litchfield, 83 Pac. Rep. 142 (1905) (holding that legislature could not add qualification for voters beyond those in state constitution). The Oregon Constitution at this time limited the franchise to white male citizens and aliens of 21 or over residing in the state during the six months before the election. Noncitizens must have declared their intent to become a citizen. Id. at 143.
tax collector to compare his rolls with the lists of voters, to collect unpaid poll taxes from people claiming to be voters in the jurisdiction.  

The poll tax at this point was not simply an indirect way to achieve a result not permitted under the 15th amendment – suppression of the black vote -- but also a tool for the suppression of the Populist-tending votes of poor whites. Florida’s experience provides a vivid illustration of the poll tax’s success in this area: in 1936, Florida repealed its poll tax, but continued to limit participation in the Democratic primary to white voters. Participation in Florida primaries increased 46 percent with the lifting of the poll tax among white primary voters. The Southern states that repealed poll taxes before their abolition nationwide did so with the enthusiastic support of poor white (potential) voters.

The financial burden of a poll tax is difficult to appreciate from a present perspective. Poll tax rates ran between $1 and $2 per voter per year throughout this period, which adjusted to inflation would equate to $15/$20 to $30/40 in current dollars. That alone would impose a burden on the most destitute. But inflation adjustment alone fails to reflect the burden the tax imposed upon a broader cohort of rural voters in that era. These would have been small subsistence farmers who did not deal in cash for many things, and who might only earn a dollar for a day’s work to the extent they sought employment away from home. And, as the quote at the top of the Article notes, all one needed to do

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19 See Poll Tax Laws in New England States, 41 CONG. DIGEST 135 (May 1962). Vermont and New Hampshire towns required payment of the poll tax before voting in town elections. Id. In April 2008, the New Hampshire Town of Newmarket declared it would no longer collect its $10 “resident tax.” See www.newmarketnh.gov/content/view/14697/. A comprehensive chart detailing taxpaying requirements for suffrage from 1870 to 1921 is in KEYSSAR, supra note 8 at 268-69 (Table A.10).

20 See OGDEN, supra note 17 at 11-13; MYRDAL at 482-83; Christensen, supra note 9 at 229; Dickson, supra note 17 at 1036 (noting passage in 1903 of Texas poll tax intended to inhibit the populist movement and provide a registration system.), Joseph E. Kallenbach, Constitutional Aspects of Federal Anti-Poll Tax Legislation, 45 MICH. L. REV. 717, 726 n. 32 (1947).


22 KEYSSAR, supra note 8 at 228-29. A study of the Houston, Texas electorate’s changes after the abolition of the poll tax observed that “the most striking feature . . . was the exclusion of the Mexican Americans by the poll-tax system . . .” Dan Nimmo and Clifton McCleskey, Impact of the Poll Tax on Voter Participation: The Houston Metropolitan Area in 1966, 31 J. OF POL. 682, 688 (1969).

23 The margins are because the purchasing power in current dollars varied during the period the poll tax was enforced. For example, $1 in 1913 would equal $21.57 currently; in 1920, $10.68; in 1932 $15.59, and in 1940, $15.25. Moreover, taxpayers in arrears often had to pay their cumulative back taxes before being allowed to vote. For a voter who hadn’t paid in many years, the price of voting could be quite high. OGDEN, supra note 17 at 33; Forbush, supra note 6.

24 See GUNNAR MYRDAL, AN AMERICAN DILEMMA 482 (1944); Voting Rights Legislation, S. Rep. 89-162 (Part 3, April 21, 1965) (Additional Views of Senators Dodd, et al) at 33 (“For the many rural negroes who buy on credit and transact most of their business in a bartering fashion, the funds needed for poll tax payments are almost impossible to raise in their noncash economy); WYTHE HOLT, VIRGINIA’S CONSTITUTIONAL CONVENTION OF 1901-02 at 13-20 (1990) (relating Virginia poverty statistics).

Moreover, the poll tax did not raise much revenue, see Per Capita Revenue for Virginia Is High, WASH. POST, Feb. 14, 1931 at 12 (noting Virginia collected average $2.56 per capita in property tax, $2.90 in special taxes, but $.30 in poll taxes in 1928); Brief of the United States as Amicus Curiae, Harper v. Virginia State Board of Elections, No. 48, Sept 10, 1965 at 36 n. 33 (in 1964 poll tax revenue for education
to avoid taxation altogether was to refrain from voting, so the poll tax that went uncollected except as a voting prerequisite essentially paid people not to vote. A substantially wider swath of voters would find these savings worth the effort in restraining oneself from voting.\(^25\)

Receipts showing taxpayers’ payment of the Texas Poll Tax for 1925, produced for voting in 1926. Note the date (December of 1925) and sex and race specification on the receipt.

II. Playing Politics With the Poll Tax

Restrictions upon political activity seem to bring out the most creative political inventions. The poll tax contingency was no exception. Organized political interests found ways to manipulate poll tax prerequisites to serve their purposes.\(^26\) Poll taxes comprised ½ of 1 percent of total education revenues); J. Morgan Kousser, Progressivism – For Middle-Class Whites Only: North Carolina Education, 1880-1910, 46 J. OF SOUTHERN HISTORY 169, 175-79 (1980) (observing that North Carolina tax collectors declined to collect poll tax from black taxpayers, noting effect on education funding in black regions). Toward the end of the poll tax era in Texas, one finds reports of volunteer organizations setting up “poll tax drives” in January to assist voters by offering poll tax payment in community locations. See Jaycees Slate Poll Tax Sales Campaign, DENTON RECORD-CHRONICLE, Jan. 21, 1960.

\(^25\) See McDANIEL, supra note 17 at 50 ([The poll tax] was a considerable sum and in addition frequently represented all the taxes they would be called on to pay. . . . Altogether it was better, so many reasoned, to let well enough alone and not attempt to vote.)

\(^26\) The pernicious effects of the poll tax were evident early on – the Massachusetts Prohibition Party in 1878 resolved that the poll-tax “tends to corrupt the legislator, and all such odious restrictions should be abolished.” Pooling Their Issues, WASH. POST, Sept. 12, 1878 at 1. See also Little Rhody’s Wrongs,
didn’t simply suppress votes of people who lacked the money, foresight, or interest to pay
them. Poll taxes were a means by which governing powers limited the size of the voting
class by discouraging voting, and manipulated those who did vote. The suppression
effects were immense: In a study based upon the 1940 census and the 1942 election, 25
out of every 100 people voted in non-poll tax states, but only 3 out of 100 in poll tax
states. Suppression exaggerated the strength of local machine politicians, as it
permitted effective manipulation with smaller numbers of supporters.

In some jurisdictions money could be used to pay taxes for others, sometimes in return
for their votes. In most instances third party payment involved political activists
subsidizing voters, but two Massachusetts cases involved the improper use of surplus
public funds to pay individuals’ poll taxes. The Roosevelt Administration’s Farm
Services Administration came under attack for “vote buying” in 1942 for its policy
permitting farmers to include poll tax payments among those living expenses for
calculating federal FSA loans. So private and public money could both be used to pay
for votes.

Some jurisdictions, Virginia and Texas for example, enacted laws requiring that the poll
tax be paid personally by the individual voter. Arkansas and Alabama laws only
prohibited the payment of another’s tax for the purpose of influencing their vote, and
the burden of proving the intent behind the payment made these laws ineffective.

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28 See e.g. JENNINGS PERRY, DEMOCRACY BEGINS AT HOME: THE TENNESSEE POLL TAX FIGHT 128 (1944)
(“Crump did not have the power because his machine marshaled 60,000 to 70,000 voters at the polls but
because the people of Tennessee by and large had no vote whatever. And they had no vote because of the
poll tax barrier.”)
29 See e.g. Mark Wahlgren Summers, Barrel Politics in the Gilded Age, in MONEY AND POLITICS 55 (2002)
(describing party payment in Philadelphia). The Massachusetts tax contingency stated explicitly that the
tax could be paid by the voter, “or his master, parent or guardian.” GEORGE MCCRARY, A TREATISE ON
THE AMERICAN LAW OF ELECTIONS § 28 (1875) (citing Opinion of Judges, 18 Pick 575). Yet in practice
the Massachusetts poll taxes were apparently paid by candidates and parties. The Poll Tax, BOSTON DAILY
GLOBE, Nov. 12, 1878 at 2.
30 Allen v. Inhabitants of Marion, 93 Mass. 108; 1865 WL 3244 (Mass. 1865); Cooley v. Inhabitants of
Granville, 64 Mass. 56; 1852 WL 4605 (Mass. 1852). By this time the Massachusetts’s poll tax was no
longer a prerequisite to vote, but the cases suggest that public fund could also pay poll taxes for favored
voters.
31 Robert DeVore, FSA Faces Full-Dress Probe of Its Alleged Vote-Buying, WASH. POST, Feb. 7, 1942 at 9;
ROOSEVELT ASSAILS CRITICS OF FSA IN POLL TAX CONTROVERSY, WASH. POST, Feb. 14, 1942 at 11.
32 Tilton v. Herman, 64 S.E. Rep. 351 (Va. 1909) (interpreting Virginia requirement that voter “personally
pay” poll tax six months before election); Solon v. State, 114 S.W. Rep. 349 (Tex. 1907) (considering
whether Texas law prevented brother from loaning voter $1.75 to pay poll tax). Republicans, seeking to
improve numbers in the senate and “save a Southern state from Bourbon rule” raise money from Northern
Republicans to pay the poll taxes of black voters in Virginia. Washington: Senator Mahone Starts for
Virginia with a Barr’l, CHI. TRIB. Nov. 2, 1881 at 3. In 1892, the day before the election, the Democratic
Party in Tennessee reportedly purchased Republican-subsidized black voters’ poll tax receipts back from
them for another $.50, undoing Republican turnout efforts. WILL RUIN BOURBONS, CHI. DAILY TRIB, Nov. 4,
1892 at 8.
33 OGDEN, supra note 17 at 78, 83.
Even in the states with such clauses on the books, political interests simply ignored these restrictions. In Texas, political operatives would buy poll tax receipts, distributing them on election day. Texas “saloon interests” allegedly spent about $5,000 to pay the poll taxes for 500 Cooke county voters, who were dispatched to vote against a county prohibition proposition in 1905. When the measure failed by 40 votes, aggrieved supporters challenged the payments as voter fraud in violation of Texas law. It was the custom in one Texas town to buy receipts for 4,000 to 5,000 fictitious voters, hold the receipts until election day, then distribute them. These receipts included a description of the “taxpayers” age, sex, residence, race, birthplace, and occupation, so the shill voter needed to match the fictitious voter’s personal description.

Similarly, in Arkansas and Virginia, notwithstanding laws prohibiting poll taxes paid by another, political interests paid blocks of poll taxes. The Virginia Constitutional Convention in 1901-02 amended the state’s poll tax to require personal payment of the poll tax. But the Supreme Court of Appeals ruled in 1908 that the tax could be paid by a voter’s agent “or perhaps in other ways.” Poll tax payments became a regular line item in Virginia campaign financing. Noted one Virginia State Senator in 1962: “[The poll tax] is not a political matter, gentlemen. This is an economic matter. It costs me $5,000 every time my election comes up.”

Bootleggers in Chattanooga Tennessee purchased blocks of poll tax receipts before elections “as partial payment for the protection given their illicit enterprises by the city administration.” The reformist mayor of San Antonio, Texas was indicted (but not convicted) of paying the poll taxes for labor union members, in his campaign against a candidate favored by the established political machine of that city.

In jurisdictions that really required a voter to pay his poll tax personally, candidates and parties could provide the voter with the money to pay the tax. In particularly close elections, faithless voters could collect tax reimbursements from both sides, pocket one

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34 Whaley v. Thomason, 93 S.W. Rep. 212 (Tex. 1906); see also PETER ODEGARD, PRESSURE POLITICS 252-53 (1928) (describing mobilization of “wet vote” in Texas, including paying poll taxes for “Mexican” voters.)
35 Whaley, 93 S.W. Rep at 212.
36 OGDEN, supra note 17 at 91.
37 Id. at 92-95; see also CHESTER H. ROWELL, DIGEST OF CONTESTED ELECTION CASES 402-04 (1901) (summarizing Virginia election contest O’Farrall v. Paul 1882); Caven v. Clark, 78 F. Supp. 295 (W.D. Ark. 1948) (allegation that defendants illegally paid poll taxes for 2,502 out of a total of 9,820).
38 HOLT, supra note 24 at 243-45 (citing Tazewell v. Herman, 60 S.E. 767 (Va. 1908) and Tilton v. Herman, 64 S.E. 351 (Va. 1909)); see also MCDANIEL, supra note 17 at 54.
40 OGDEN, supra note 17, at 97. Another Tennessee example of third-party purchases of poll tax receipts involved the Patterson v. Carmack election contest from 1896, see Rowell, supra note 37 at 574-80.
41 See Maverick Faces Trial in Poll Tax Case Today, WASH. POST, Nov. 27, 1939 at 3; Jury Acquits Maverick of Vote Fraud, WASH. POST, Dec. 9, 1939 at 2.
payment, and produce the same receipt to both as proof of the “proper” use of their funds.\textsuperscript{42}

Individuals who paid the poll tax, but then did not vote, inadvertently provided another vehicle for voter fraud. The poll tax roll in Texas served as the roll of registered voters, that is, Texas did not require voter registration separately. A Texas campaign could persuade, (with money) poll watchers or election judges to leave at the close of voting, then cast fraudulent votes for “voters” who had paid their poll tax, but had not appeared to vote.\textsuperscript{43} Moreover, since voters over the age of 60 were exempt from payment, it also served the interests of politicians to refrain from purging the names of deceased voters, tracking these names, and using them for casting fraudulent ballots.\textsuperscript{44}

The official in charge of administering the poll tax found himself in possession of a valuable political resource. In Alabama, the local probate judge kept the poll tax records, and could pay taxes for favored voters, mark unpaid tax as paid, or thwart access to tax records by opponents seeking to mobilize their supporters.\textsuperscript{45} Officials could waive the tax, or back date a receipt for a “good” voter who failed to pay on time.\textsuperscript{46} Tax collectors reportedly refused or returned the poll taxes of certain voters, to prevent them from voting.\textsuperscript{47} Legal exemptions to the tax, such as for the disabled, could be selectively applied to excuse nonpayment for favored voters with coughs, broken fingers, or partial deafness.\textsuperscript{48} The state’s inequitable enforcement would argue against the poll tax as a legitimate suffrage qualification. As we shall see, when this very argument was set before the Supreme Court, the Justices declined to adopt that analysis.\textsuperscript{49}

III. Efforts to abolish poll taxes as a voting prerequisite

A. \textit{Breedlove} and the 1940s

In 1936, a white male voter who had not paid the Georgia poll tax filed suit, declaring that the Georgia $1 poll tax requirement for voting was unconstitutional under the 14\textsuperscript{th} and 19\textsuperscript{th} amendments.\textsuperscript{50} He argued that by excluding women and men over 60 from the tax, the state law violated the “rule of equality” and abridged his privilege to vote. The

\textsuperscript{42} \textit{OGDEN, supra} note 17 at 82.
\textsuperscript{43} \textit{ROBERT CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT} 181 (1990). This abuse could occur with any kind of registration system that induces registration of nonvoters, and is not exclusive to the poll tax/registration system.
\textsuperscript{44} \textit{ROBERT CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER} 722 (1983).
\textsuperscript{45} \textit{OGDEN, supra} note 17 at 79-80.
\textsuperscript{46} \textit{Id.} at 105-06
\textsuperscript{47} \textit{Cong. Rec.} Mar. 27, 1962 at 5090 (Statement of Sen. Javits, reporting that local Mississippi collectors refused poll tax payments from black taxpayers).
\textsuperscript{48} \textit{OGDEN, supra} note 17 at 108 (discussing practice in Madison County, Alabama).
\textsuperscript{49} \textit{Breedlove v. Suttles}, 302 U.S. 277 (1937), cited in \textit{Kallenbach, supra} note 20 at 729 (noting that exceptions make “evident that there is a certain element of spuriousness about a suffrage ‘qualification’ with so many loopholes in it.”)
litigation was aimed not at poll taxes as such, “but against poll taxes which carry a
deprivation of the elective franchise.” Poll taxes as a voting prerequisite appeared on
the way out at the state level, and no doubt the timing seemed propitious to litigate a
challenge.

The Supreme Court rejected his claims unanimously in *Breedlove v. Suttles*, concluding
that the exceptions for older men and women were reasonable. The Court also rejected
the challenge to the law as a burden on voting, because the tax was imposed on some
individuals who did not vote, and was not imposed on all voters. Justice Butler, writing
for the Court, observed that “payment as a prerequisite is not required for … voting.
[Georgia] does not limit the tax to electors; aliens are not there permitted to vote, but the
tax is laid upon them if within the defined class. It is not laid upon persons 60 or more
years old, whether electors or not.”

The *Breedlove* decision provoked national debate on poll taxes, and their suppression of
poor voters of all races. President Franklin Roosevelt publicly condemned poll taxes
during the 1938 elections, and analysts predicted that the growing movements in the eight
remaining poll-tax states to abolish the taxes would benefit Roosevelt in 1940. In the
wake of the 1938 elections, Congressman Lee Geyer of California introduced a bill
developed with the assistance of the Southern Conference on Human Welfare to abolish
the poll tax. He articulated the legal and policy theory that Congress was within its
authority to regulate those pernicious political activities (like vote-buying) arising from
the poll tax system by eliminating poll taxes as a voting prerequisite. Corrupt abuses
were the explicit hook that brought poll taxes within Congress’s power to regulate.
Witnesses before Congress attested to the corruption that accompanied the poll tax
system. Despite the fact that popular opinion had turned against poll taxes, these first
efforts failed.

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51 *Breedlove*, Appellant’s brief, 1937 WL 40794 (1937) at *4. According to this brief, Georgia’s poll tax is
the “most vicious” since it required payment of all accumulated back taxes as a condition of voting. *Id.*
As a result, Georgia law had restricted the vote to eight percent of the population. *Id.*
52 *Poll Tax ‘Voting’ Vanishing*, CHRISTIAN SCI. MON. Apr. 20, 1938 at 8 (noting trend in states to repeal
poll tax).
53 *Breedlove*, 302 U.S. at 280.
54 *Id.* at 282-83. Georgia repealed its poll tax in 1940, out of an interest in securing votes from poor white
voters. LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY; BLACK ENFRANCHISEMENT IN GEORGIA 50-
51 (2003).
55 Carroll Kilpatrick, *Disenfranchised South*, WASH. POST, Dec. 11, 1937 at 9; KEYSSAR, supra note 8 at
237.
56 OGDEN, supra note ___ at 245; *Move for Poll Tax Repeal is Backed by the President*, CHRISTIAN SCI.
MON. Sept. 10, 1938 at 3; *President Urges Repeal of Poll Taxes*, WASH. POST, Sept. 10, 1938 at 2; Sidney
Olson, *Move to Free Ballot of Poll Tax Gains Momentum in the South*, WASH. POST, Aug. 21, 1938 at B3.
57 Kallenbach, *supra* note 20 (citing 84 Cong. Rec. Appx. 4123-4125 (1939); OGDEN, *supra* note 17 at 244.
58 Kallenbach, *supra* note 20 at 720; Christensen, *supra* note 9 at 218, 235 (“There is abundant evidence
that corrupt practices do result when the poll tax requirement is imposed.”).
59 *Poll Tax Fosters Corruption, Virginian Tells Committee*, WASH. POST, Apr. 11, 1940 at 2 (testimony of
Republican delegate George A. Pruner).
60 Robert DeVore, *Cloture Defeat Spells Doom of Poll-Tax Foes*, WASH. POST, Nov 24, 1942 at 1. In a
1941 poll, 63 % of the voting public opposed poll taxes as a prerequisite for voting, with 25% approving of
Through the 1940s anti-poll tax members battled with Southern opponents over these reforms, in a debate centered on the scope of legitimate federal authority. Yet limited success came when Congress passed laws relaxing voting standards for members of the armed services in the Ramsey Act and the Serviceman’s Ballot Act. When Republicans took control of Congress in 1946, one might have expected more progress against poll taxes, since the Republican Platform of 1944 explicitly called for a constitutional amendment abolishing poll taxes in federal elections. But the sectarian and partisan battlelines in the Senate remained, and with legislative enthusiasm dissipated, no Congressional committee reported out an anti-poll tax measure after the 82nd Congress.

Poll tax opponents concluded that “direct national action to eliminate the poll tax requirement is possible only through adoption of a restrictive constitutional amendment.”

B. Passage of the 24th Amendment

Starting with the 81st Congress (in 1949), Senator Spessard L. Holland of Florida introduced an anti-poll tax constitutional amendment in each session. Each session, the subcommittee on constitutional amendments would hold hearings, report the amendment favorably to the Senate Judiciary Committee, at which point the effort would languish. In 1962, amendment allies finally bypassed the Senate Judiciary Committee by substituting the anti-poll tax language into another resolution on the floor.
Some civil rights groups opposed poll tax amendment because they believed it would set a precedent under which all subsequent civil rights measures would proceed via constitutional amendment. Civil rights reforms would thus become slow-tracked through Congress, and sputter during state ratification. Yet Kennedy Administration Assistant Attorney General Nicholas Katzenbach noted that Congress’s constitutional authority to eradicate poll taxes via statute was “not free from doubt” and would be tied up in litigation. Accordingly, the amendment process might yield a strong result, more quickly. Another argument in favor of a constitutional amendment not made by the Kennedy Administration, was that it would withstand second-guessing and erosion of legislative support in subsequent Congresses.

What did the Senators debating this Amendment think about its scope? As there was no contemporaneous Senate committee report for the legislation, we must sift through the


70 A forthcoming article contends that the constitutional amendment route was chosen to impede the progress of civil rights reform. Bruce Ackerman & Jennifer Nou, Canonizing the Civil Rights Revolution: The People and the Poll Tax, 103 Nw. U. L Rev. ___ (Jan. 2009) at 23-25, available at http://ssrn.com/abstract=1154242 (cited with permission of author Nou, email to author, Sept. 4, 2008). It is difficult to place one’s legal analysis within the context of the time. I am not convinced that the constitutional amendment route was taken for these reasons. It seems to me that at the time a strong and sincere legal argument could be made that a constitutional amendment would better withstand litigation, and would, by attracting some support from certain members, be the prudent political course.

More theoretically, Ackerman and Nou argue that the ultimate rejection of the Article 5 amendment process in favor of a statutory ban on poll taxes foreshadowed the abandonment of the Article 5 “straightjacket” generally in favor of “landmark statutes.” Id. at 63. Whether this is a good thing depends, I believe on whether one prefers that constitutional change should come explicitly through amendment, or through the interpretation of statutes, which necessarily requires an aggrieved party (and time) to litigate, and makes the Supreme Court the battlefield for social change.

71 Cong. Rec. Aug. 27, 1962 at 17,656 (reproducing testimony). During Congress’s consideration of the Voting Rights Act of 1965 and its poll tax provisions, the House Committee on the Judiciary prepared a report on voting rights court decisions that helps recreate the perspective on state discretion at the time. See Leading Court Decisions Pertinent to Proposed Voting Rights Act of 1965, House Judiciary Committee, 89th Cong. 1st Sess. March 25, 1965. At the time, the weight of cases supported the proposition that, unless a state’s voting limitations were imposed to prevent racial minorities from voting, states had great discretion under the Constitution to administer election laws. Id. see also Voting Rights Act of 1965, H.R. 89-439 at 18 (“so long as State laws or practices erecting voting qualifications do not run afoul of the 15th Amendment or other provisions of the Constitution, they stand undisturbed); Voting Rights Legislation, S. Rep. 89-162 April 21, 1965 at 18 (summarizing constitutional standard and scope of Congressional power as applicable only to racially discriminatory state voter qualifications); but see id. at 34 (separate statement by committee majority contending that Congress has power under 14th, 15th and Guarantee Clause to prohibit poll taxes, because wealth has nothing to do with qualification to be an elector).

The important point is only that at the time the argument limiting Congress’s authority was supported by precedent, had force, and should not be deemed pretextual. Sincere supporters of abolishing the poll tax, observing this, would prefer to solidify their principal in a constitutional amendment, and wouldn’t believe that precedent doomed other anti-discrimination laws to the same fate. Recall that Katzenbach, in particular, had a strong record in favor of civil rights. See MICHAEL O’BRIEN, JOHN F. KENNEDY: A BIOGRAPHY 837 (2006) (detailing Katzenbach’s role in Alabama school integration).
Senate floor debates for what “other tax” the Senate thought the Amendment would prohibit. Opposing Senators led a “friendly filibuster” for 11 days, so one has a great deal of material available to pull some sense of what Senators thought the Amendment would do.

Senators supporting the Amendment expressed their positions in broad and sweeping rhetoric, but in context one must wonder how seriously to take the rhetoric. Senator Holland claimed to believe that “every citizen should, as a matter of right, be entitled to vote” yet at other points in the debate it is clear that the Amendment’s supporters did not intend to abolish other state laws limiting the franchise by age, capacity, felon status, or even through the imposition of a literacy test. “Every citizen” meant every citizen otherwise qualified to vote, and left the questions of permissible qualifications begging.

Opponents of the Amendment suggested in some remarks that the Amendment would reach more broadly into state voter qualifications. Senator John Sparkman, of Alabama, an opponent of the Amendment, contended that state laws with the effect of impeding voting could also be unconstitutional under the amendment. Sparkman raised the hypothetical case of a person who fails to pay his taxes, is jailed, and could not vote on election day. His suggestion that this indirect burden on voting would also be found unconstitutional was not adopted by other Senators. Senator McClellan, of Arkansas, another opponent, asked rhetorically whether requiring voter registration and requiring voters to pay $1 “and that dollar went to the cost of holding elections” would be “an offensive way to pay the cost of voting in elections.” No colleagues pursued this question, although the context suggests McClellan believed that a tax on registration would be barred by the Amendment. As these were observations made by the Amendment’s opponents, and might reflect their attempt to overstate the scope of the law and build opposition to it, they are entitled to less weight in interpretation.

Some Senators suggested that the Amendment would prevent state laws from blocking “paupers” from voting, but toward the end of debate others insisted it would have no

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72 Generally speaking, committee reports are the most reliable source of legislative intent, as they explicate policy goals as well as specific terms. See William Eskridge, et al., Legislation and Statutory Interpretation 302-03 (2000). Explanatory statements by sponsors or floor managers are also useful. Id at 303. “After committee reports and sponsor statements, the reliability of legislative history falls off markedly.” Id. at 304. In general, statements of legislative intent made with notice and a chance for others to respond or disagree provide better evidence of what legislators were thinking that isolated or last minute statements. See Einer Elhauge, Statutory Default Rules 126-27 (2008).


74 Cong. Rec. Mar. 20, 1962 at 4584, 4586. In his latter comments, Sen. Sparkman seems to concede that these indirect burdens on voting would not become unconstitutional under the 24th Amendment.


76 See supra note 72.
effect on these laws. Most significantly, although Senators repeatedly asserted that the Amendment would affect the laws of five states, no one replied that the provision barring “other taxes” could implicate taxes or fees that indirectly burden voting in still more states. The Senate finally voted out the Amendment by 77-16.

The House of Representatives then considered the Amendment. The House Committee Report explicitly noted that the amendment would reach attempts by states or the United States to employ a poll tax or other tax as a prerequisite to vote. Noted the Report; “The limitation . . . would also prevent both the United States and any State from setting up any substitute tax in lieu of a poll tax as a prerequisite for voting . . . . This prevents the nullification of the amendment’s effect by resort to subterfuge in the form of other types of taxes.”

Nor did the debates on the 24th Amendment in the House specify what charges would amount to an “other tax.” But when the debate became specific, Members seem to intend that the prohibition reach “substitutes” to poll taxes. Some Members used broad descriptions of the scope of the Amendment. Congressman Fascell of Florida, speaking in support, stated that “the payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not be allowed a scintilla of this.” Congressman Seymour Halpern of New York, also speaking in support, urged “any step taken in the direction of outlawing this undemocratic, feudal practice of placing a price tag on the right to vote.” Halpern noted that the Amendment “would prevent the imposition not only of a poll tax but of any other tax as a prerequisite to voting … and it is broad enough to prevent the defeat of its objectives by some ruse or manipulation of terms.”

80 Outlawing Payment of Poll or Other Taxes as Qualification for Voting in Federal Elections, H.R. Rep. 87-1821 (June 13, 1962) at 5. The minority, for its part, conceded that this law could only be enacted by constitutional amendment, but complained that the 45 non-poll-tax states were forcing their “views of government” in the remaining five poll tax states. Id. at 6.
82 Cong. Rec. Aug. 27, 1962 at 17661; see also id. at 17662 (Rep. Joelson decrying payment “for the right to vote.”); id. at 17666 (Rep. Bolan stating “There should not be any price tag or any kind of tax on the right to vote.”)
Yet, as in the Senate, these Members never contradicted claims made by the Amendment’s opponents that the poll tax amendment would only affect the laws of the five states imposing an explicit “poll tax” prerequisite for voting.84 There is no indication, beyond those rhetorical statements cited above, that Members thought the poll tax amendment would call into question the constitutionality of other incidental taxes, fees or expenses incurred individually by voters to vote. In those few places in the debate where Members became specific, “other taxes” meant taxes, fees or charges explicitly tied to voting in federal elections – different from the “poll tax” in name only.

The Amendment’s ratification, at first, proceeded rapidly and without controversy. Illinois ratified the Amendment first on November 14, 1962, just shy of three months after House passage.85 New Jersey ratified it in December with unanimous votes in both houses. In January 1963, 2 state legislatures, Oregon and Montana,86 quickly ratified the amendment, then 12 more states in February,87 and 13 in March 1963. In most of these early ratifying states the ratification legislation passed with very comfortable vote margins and little debate.88 After March the pace slackened considerably, with three ratifications in April, two in May and another two in June.89 Ratification ceased altogether from July 1963 to January 1964, as state legislatures closed their sessions for the year. In January 1964, Maine and South Dakota added the final two states necessary to adopt the amendment.

85 Illinois First State to OK Poll Tax Ban, CHI DEFENDER, Nov. 16, 1962 at 1. The Illinois House, called into special session, voted 150-12 in favor. Id. Interestingly, one skeptical member reportedly argued that he could not support the amendment because of the uncertain meaning of “other taxes.” Id. Many of the most detailed reports regarding state ratification come from the Chicago Defender, which was the leading national newspaper for the African American community.
86 Montana’s legislature approved the Amendment by a House vote of 56-37 and a Senate vote of 51-4. Poll Tax Proposal Up to Governor, BILLINGS GAZETTE, January 31, 1963. This article reported that the Governor might veto the ratification, and the House would lack the two-thirds necessary to override. Neither a Governor’s signature, nor any other requirement beyond passage by state legislatures, is necessary to ratify a constitutional amendment under Article V. See Hawke v. Smith, 253 U.S. 221 (1920).
87 West Virginia ratified the amendment on February 1, after a mere 10 minute debate in its Senate. Teacher Salary Hikes Proposed, BECKLEY POST-HERALD, Jan. 16, 1963 at 1. New York ratified it February 4; the state Assembly passed it unanimously with debate, and the Senate passed it 56-2. Anti-Poll Tax Proposal Gets Support, THE TIMES RECORD (Troy, N.Y.) Jan. 22, 1963 at 14, State OKs Amendment Outlawing Poll Taxation, THE PORT STANDARD, Feb. 6, 1963 at 6. California ratified it on February 7 with a 70-3 vote in the Assembly. Calif. Pens Okay to Ban On Poll Tax, CHI DAILY DEFENDER, Feb. 11, 1963. Indiana ratified the Amendment on February 19; its Senate unanimously and its House with one dissenting vote. GOP Acts on Redistricting, ANDERSON HERALD, Jan. 23, 1963 at 1,2; Pension Bill Loses, ANDERSON HERALD, March 2, 1963 at 1,2. The Indiana Governor also signed the joint resolution, even though as noted supra note 86, his signature was superfluous.
88 In Tennessee, which ratified the Amendment March 21, the State Senate voted 23-1 in favor. House Disregards Governor’s Plea, KINGPORT NEWS, March 21, 1963 at 3. Both Houses of the Rhode Island legislature approved the Amendment unanimously. Anti Poll Tax Act Ratified By State, NEWPORT DAILY NEWS, Feb. 15, 1963 at 4. In Alaska the margin was not so wide – the amendment was approved 27-8 in the House, with dissenters arguing that the Amendment incurred on state’s rights. Poll Tax Resolution Reactions, FAIRBANKS DAILY NEWS-MINER, Feb. 12, 1963 at 3.
89 Florida ratified the amendment April 18, with a Senate vote of 36-6 and a House vote of 104-3. Fla. Close to Backing Ban on Poll Tax, CHI DAILY DEFENDER, Apr. 16, 1963 at 6. Iowa followed on April 24 with a Senate vote of 48-0 and a House vote of 92-4. Iowa 32nd State to Okay Anti-Poll Tax Amendment, CHI DEFENDER, Apr. 27, 1963 at 3.
Some states rejected the Amendment outright. Mississippi quickly voted down the Amendment in December 1962. The Maine legislature initially rejected the 24th Amendment in 1963 fearing that the amendment would jeopardize Maine’s poll tax, which was not a voting prerequisite yet was required to obtain various state licenses. Maine reconsidered and provided the 37th ratification in January 1964. The Oklahoma House rejected the Amendment, with opponents arguing that interfered improperly with the internal business of other states.

In several others states, the Amendment stalled. In Arizona, the state House passed the ratification bill in March 1963, but it was held without action in the Senate’s Suffrage and Elections Committee. The Wyoming legislature failed to act on ratification, and did not abolish a school poll tax (not levied as a voting precondition) until 1968. Not surprisingly, a number of southern states took no action on the Amendment, including Alabama, Virginia, Arkansas, South Carolina, and Louisiana.

In January of 1964, South Dakota became the 38th state to ratify the 24th amendment, thus abrogating the poll tax requirements in federal elections in the five remaining states of Alabama, Arkansas, Mississippi, Texas and Virginia. Because the amendment reached only federal elections, and did not address other access issues like those presented by literacy tests, one analyst deemed it at the time “the most trivial amendment ever offered to the Constitution.” Yet certain incumbent politicians from the time might disagree. Powerful Chairman of the House Committee on Rules, Virginia Rep. Howard Smith,

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91 Ban on Poll Tax Lacking Two States, N.Y. TIMES, Jan. 5, 1964 at 65. Nevada, which easily ratified the 24th Amendment in March 1963, also continued to impose a poll tax without qualms over the amendment’s potential effect on that tax. Trying to Save the Poll Tax, RENO EVENING GAZETTE, May 16, 1963 at 34. That same argument, recall, successfully defeated the amendment when first brought before the Maine legislature.
92 Ban on Poll Taxes Ratified by Maine, N.Y. TIMES, Jan. 17, 1964 at 15. The House approved it 108-34, and the Senate passed it with a voice vote. Id.
93 Oklahoma’s Strange Feat, WASH. POST, May 10, 1963 at A18 (Editorial); Votes Sought to Override Teacher Veto, LAWTON CONSTITUTION, May 7, 1963 at 2. The Oklahoma House, as Committee of the Whole, had shouted down a “do pass” motion to ratify the Amendment in January, 1963, but then kept the matter alive by referring the provision to committee. House Shouts Down Proposed US Amendment Outlawing Poll Tax, ADA EVENING NEWS, Jan. 29, 1963 at 1.
94 Poll Tax Score: 1 Dead, 1 Alive, TUCSON DAILY CITIZEN, March 20, 1963 at 36. “Arguments against the bill were to the effect one state should not interfere with the internal affairs of another.” Id. Arizona ended its session in April, 1963, and did not act on it during the brief time in early 1964 before ratification was complete. See Jones Osborn, Poll Tax Gets Death Blow, YUMA DAILY SUN, Jan. 24, 1964 at 1. Arizona lawmakers could have had special concerns about the scope of “other tax” in the Amendment, because voting by non-taxed Native Americans had (and has) been controversial in Arizona. See Glenn A. Phelps, Representation Without Taxation: Citizenship and Suffrage in Indian Country, 9 AMERICAN INDIAN Q. 135 (1985). By comparison, New Mexico’s Senate passed the ratification bill on March 3, 1963, albeit with an 18-10 vote. Senate Passes 19 Pieces of Legislation, ALBUQUERQUE TRIBUNE, March 5, 1963 at A2.
95 House Joint Resolution 1, amending Section 5, Article 15 of the Wyoming Constitution, ratified by popular vote 1968.
97 The 24th Amendment, TIME, Jan 31, 1964.
whose district was reconfigured after court-ordered redistricting and now included more suburban Washington D.C. voters, as well as more poor and black voters no longer discouraged by the Commonwealth’s poll tax, suffered defeat in his 1966 Democratic primary to a more liberal challenger.99

Anti-poll tax reformers, with support from the White House, kept up the fight against poll taxes in state elections. The President’s Commission on Registration and Voting Participation in late 1963 had recommended that states abolish poll taxes and literacy tests as voting prerequisites altogether.100 In the words of the Commission’s Report: “No American should have to buy his right to vote in any election.”101

Congress echoed this view in Section 10 of the 1965 Voting Rights Act (VRA).102 Contemporaneous congressional reports consider at length the use of all manner of tests and devices, including complicated application forms, literacy tests, voucher requirements, moral character requirements, challenges, and procedural hurdles to limit black voting.103 These burdens are never analogized to poll taxes, or described as a kind of “other tax” burden contingent to voting. In fact, the VRA as introduced explicitly set poll taxes apart, in the original version by permitting state poll taxes as a voting prerequisite, but prohibiting states from requiring voter to pay past due taxes.104 The Senate added the poll tax ban in committee, but it was defeated on the Senate floor.105

The House version included a ban on a “poll tax or any other tax” used as a prerequisite to vote.106 The House Report on its bill does not define “other tax,” although in context, as before, Congress focused on effects in the four jurisdictions that still implemented overt “poll taxes.”107 It is only in the committee’s “Republican Views” where the


100 President’s Commission on Registration and Voting Participation, Report on Registration and Voting Participation, November, 1963, at 47; Marjorie Hunter, Federal Survey Bids States Ease Voting Barriers, N.Y. Times, Dec. 21, 1963 at 1. The recommendation against literacy tests was controversial and elicited dissents from Commission members; the poll tax recommendation did not. Report, supra, at 51-59. Report on Registration and Voting Participation, supra note 100 at 47. The history of voting rights legislation, from the 24th Amendment to the Voting Rights Act, is beyond the focus of this paper, but can be found in Ackerman and Nou, supra note 70 at 29-42.


102 Voting Rights Legislation, S. Rep. 89-162 (Part 3) April 21, 1954 at 4-5. Notably, Congress would suspend such tests and devices only in jurisdiction where less than 50% of the voting age population voted, finding that those other jurisdictions did not appear to apply the requirements differently by race. See Voting Rights Act of 1965, H.R. Rep. 89-439 (June 1, 1965) at 14.


104 See Senate Boos Poll Tax; Pushes Vote Rights Bill, CHICAGO DAILY DEFENDER, May 20, 1965 at 1.

105 Id. The House Judiciary subcommittee amended the House version to contain findings that poll taxes, because of their association with racial discrimination, violated the 14th and 15th amendments. Voting Rights Act of 1965, H.R. Rep 439 at 19-22.

106 Voting Rights Act of 1965, H.R. Rep. 439 at 20 (“46 states in the Union, subscribing to the principle that voting rights are not to be encumbered by any fiscal exaction, have set a national norm rejecting the
question of what constitutes an “other tax” is asked. Here, the scope only extends to include other taxes, namely requiring property tax payments before one could vote in certain special elections. The Conference version of the VRA dropped “other tax” and thus the final version of the VRA only refers to “poll taxes.”

The 24th Amendment was soon tested by one state’s attempt to retain a tax as a condition on voting. Virginia’s revisions to its federal voter requirements – which mandated a poll tax or, alternatively, an annual notarized or witnessed certificate of residence – came before the Supreme Court in 1965. Within two months of oral argument a unanimous court held that this law violated the 24th Amendment. The Court readily concluded that the onerous certification requirement, imposed exclusively on federal voters who would not pay the poll tax, “abridged” the right to vote unencumbered by a poll tax. Notably, the Court did not declare that the certification requirement was itself a “poll tax or other tax” abolished by the 24th Amendment. Perhaps the Commonwealth’s obvious imposition of the onerous requirement as an unwieldy “substitute” to paying the tax made the question an easy one. Nevertheless, the Court did not need to explain what “other tax” might reach.

C. Harper and the Fourteenth Amendment

In Section 10(b) of the Voting Rights Act of 1965, Congress instructed the Attorney General to institute a test case challenging poll taxes in nonfederal elections. Yet the Harper v. Virginia State Board of Elections case arose independently from this Congressional mandate. On March 17, 1964, four black Fairfax County, Virginia residents filed a challenge to Virginia’s poll tax prerequisite in federal court in forma pauperis. They declared that they were unable to pay the state poll tax, assessed at $1.50 per year, and argued the tax violated their rights under the equal protection and due

poll tax.”) The remaining poll tax states at this point: Alabama ($1.50 per annum), Mississippi ($2.00); Texas ($1.50) and Virginia ($1.50).

108 Id. at 53 (Republican Views of Hon. William McCulloch, et al.). The Republican committee members argued that the Republican VRA bill was superior to the Judiciary committee’s product, in part because the “any other tax” aspect of the Committee’s bill could not be justified by a record of discriminatory use. Id.

109 Voting Rights: Conference Report, H. R. Rep. 89-711, August 2, 1965 at 6. The Report offers no explanation for removing “other tax.” Id. at 13 (Statement of the Managers on the Part of the House). In its final form, section 10 simply stated Congress’s findings and urged a constitutional challenge to state poll taxes. The legislative maneuvering behind this evolution is vividly described in Ackerman and Nou, supra note 70 at 38-46. The Chicago Defender reported the compromise as a step forward, not a loss, for black voters. Senate “Boos” Poll Tax; Pushes Vote Rights Bill, CHI. DEFENDER, May 20, 1965 at 3, 14.


111 Id. at 540. The particular certification procedure was in the Court’s view unduly burdensome. Id. at 541-43. It did not help Virginia’s claim, noted the Court, that 46 states that did not use the poll tax had found adequate and less burdensome ways to ensure that voting was limited to residents. Id. at 543.

112 The Department of Justice filed other litigation following the Act’s directive, see United States v. Alabama, 252 F. Supp. 95 (1966).

process clauses of the 14th amendment. The three-judge panel of the district court, following the Supreme Court’s Breedlove precedent, rejected their challenge in November 1964.

Before the Supreme Court, on January 25, 1966, the Harper litigants made several arguments against the poll tax prerequisite. First, they contended the poll tax was not a bona fide tax because the state did not impose it to raise revenue, citing as evidence the great difference between the number of people eligible to pay and the number the state bothered to assess. They also cited Virginia precedents stating explicitly that the tax was not “intended primarily for the production of revenue.” They noted that the poll tax was due long before the election, and assessments were neither comprehensive nor evenly applied. Second, the poll tax also seemed particularly susceptible to fraud, and would be something a well-administered election system would do better without.

Third, the challengers contended that no tax on voting could withstand Constitutional scrutiny as a state qualification for voting, since there is no legitimate state interest in fixing a proper voter qualification served by a tax on voting. The fact some classes of voters were exempt from paying just reinforced the argument that the poll tax bore no relation to a legitimate qualification for voters. States could, they argued, enforce voting qualifications that did relate to a voter’s fitness, qualifications such as residence, registration, felon status, and age. They noted that state voting restrictions were just the kind of law subject to greater 14th amendment scrutiny, because “the ordinary

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114 Several Appellants had never paid a poll tax, and would owe three year’s back taxes, penalties and interest before being qualified to vote, or a total at the time of $5.01. Brief for Appellants at 5.
115 240 F. Supp 270. The district court observed that Breedlove had been followed by a number of subsequent decisions, including a 1951 Supreme Court affirmation in Butler v. Thompson, 341 U.S. 937.
116 Brief of the United States, supra note 113 at 11. According to this brief, Virginia’s population eligible to pay the poll tax was about 2,312,887 but only 1,769,067 were assessed. Id. at 11 n. 13. If all had paid in 1960 the Commonwealth would have collected $3,500,000 but in fact collected only $1,706,000, including delinquent payments for past years. Id. at 12 n.15. Under Virginia law, delinquencies could not be pursued until three years had passed – until the payment of the poll tax for voting made no difference. Id. at 13, see also Oral Argument of Allison W. Brown, Harper v. Virginia Board of Elections, in 62 Landmark Brief and Arguments of the Supreme Court 1028 (Kurland and Caspar, eds.)(1975) (citing Campbell v. Goode, 2 S.E. 2d 456 (Va. 1939).
117 Id. at 31; Brief of Appellants at 25-26. The Government also argued that taxpayers were not given a due date by which to pay, which was disputed strongly by the Appellees. Brief of the Appellees, Harper, at *3, available at 1965 WL 115351.
118 Id. at 34.
119 Id. at 14. Hence it would not be enough simply to offer an exception for indigent voters. Id. It was the inequities of the poll tax that the Government argued, were considered and rejected in Breedlove – so by adopting a broader and more categorical argument not raised in that case, the Court need not be concerned about overruling Breedlove. Id. at 15.
120 Brief of Appellants at 8, 26-27.
121 Id. at 16; see also Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959) (Douglas, J., affirming North Carolina’s literacy test). Defenders of poll tax prerequisites saw the tax as a way of administering these other state interests – for example Texas (as we saw before) did not have a means of registering voters apart from the poll tax.
political processes of the State cannot be relied upon as the exclusive means to correct unfairness or inequity . . .”

In the wake of the ratification of the 24th amendment, with the poll tax issue again before the Court, the Justices chose not to follow the 1937 Breedlove precedent and its deference to the dwindling ranks of state lawmakers imposing poll taxes in nonfederal elections. Much had changed doctrinally since Breedlove was written. Coming close on the heels of the Court’s Reynolds v. Sims, Carrington v. Rash, and Wesberry v. Sanders decisions, the Court now had precedents containing broad expressions of the power of “the right to vote” and additional constitutional doctrine to apply to voting cases.

Even so, the drafting history of Harper indicates that a majority of the Justices were at first unwilling to abandon the Breedlove line of reasoning, believing that the constitutional claim against a $1.50 poll tax voting prerequisite was insubstantial and should be dismissed. The Court’s majority originally voted to issue a summary affirmation without even hearing an argument, like one issued in similar circumstances in 1951.

The draft dissent from this decision circulated among the Justices was authored, not by Justice Douglas, who eventually authored the Harper majority opinion, but by Justice Goldberg. Goldberg’s draft made many points later argued by appellants and the United States in their briefs and in court, namely that the poll tax was not a bona fide revenue source, and was instead solely to restrict voting. Goldberg observed that “the principle aim of this limitation was the disenfranchisement of the Negro.” He rejected the state’s claim that the poll tax provided a means to ascertain identification and proof of residence, observing that 46 states attained these requirements by “nondiscriminatory means.” Furthermore, his draft assured his colleagues that holding the poll tax unconstitutional did not mean that government was obliged to “equalize all economic inequalities among citizens.” “Nor does it mean that the Government cannot impose burdens or exactions which by reason of economic circumstances fall more heavily upon

\[\text{id. at 21 (citing United States v. Carolene Products Co, 304 U.S. 144, 152-54 n. 4 (1938). Appellants brief states explicitly what must have been in the minds of both sides – that the Court’s equal protection doctrine has recently expanded in ways that favored this challenge. Brief of Appellants at 9 (“The Court has also recently given the Due Process and Equal Protection clauses of the Fourteenth Amendment a scope and significance surpassing that which it formerly had.”))}\]

\[\text{William M. Wiecek, History of the Supreme Court of the United States 1941-53 (Vol. XII), 634-43 (discussing doctrinal change in voting cases during Stone Court); see also United States v. Alabama, 252 F. Supp. 95, 105-06 (M.D. Ala. 1966) (Johnson, D.J., specially concurring) (tracking change in doctrine).}\]


\[\text{Butler, 341 U.S. at 937.}\]


\[\text{Id. at 324.}\]

\[\text{Id. at 324-25}\]

\[\text{Id. at 329 (citing Carrington).}\]
some than others."\(^{131}\) Nor should it cast doubt on the validity of other voting qualifications.\(^{132}\)

Justice Black, for one, was persuaded by Goldberg’s draft, and the Court reversed itself, scheduling argument in January 1966.\(^{133}\) After argument, six justices agreed that the poll tax was *unconstitutional*, voting in favor of the position, as Chief Justice Warren articulated it, that “this was a discrimination against the poor and Negros as a matter of fact.”\(^{134}\) Justice Black, Harlan and Stewart, who would affirm the tax, were now left in the dissenting minority.\(^{135}\) Justice Goldberg had resigned from the court that previous year, however, so Justice Douglas wrote the opinion.\(^{136}\) On March 24, just shy of two months after oral argument, Justice Douglas announced the Court’s decision in *Harper*, following the spirit (but not the letter) of the Goldberg argument made the previous year.\(^{137}\)

Significantly, the opinion that persuaded the Court to reconsider poll tax precedents (Goldberg’s) is *not* the opinion issued by the majority (Douglas’s) months later. Justice Douglas’s *Harper* opinion is briefer, more sweeping, and less tethered to the case’s facts and argument than the Goldberg draft.\(^{138}\) Goldberg’s opinion considered and rejected the various arguments in defense of the poll tax in state races, concluding that the tax did not further a “reasonable state interest.”\(^{139}\) The *Harper* opinion, by contrast, declared simply that a state violates the 14\(^{th}\) Amendment “whenever it makes the affluence of a voter or payment of any fee an electoral standard.”\(^{140}\) To the extent this departed from precedent, *Harper* states overtly that the Court will not be “confined to historic notions of equality” and that such notions “do change.”\(^{141}\) This may be “one of the most emphatic declarations of ‘living constitutionalism’ to be found in the pages of the United States Reports.”\(^{142}\)

The *Harper* decision was a departure. As Cass Sunstein has observed, by concluding that charging a fee for voting was unconstitutionally discriminatory and the “states must provide the vote free of charge” it opened the way for claims that other kinds of fee requirements could also be unconstitutional, perhaps in contexts reaching beyond

\(^{131}\) Id. at 330.

\(^{132}\) Id. at 330-31

\(^{133}\) Id. at 334. Ackerman and Nou note that Black’s memo, dated March 4, 1965, came during the Selma marches and but three days before “Bloody Sunday” on March 7, 1965. Ackerman and Nou, *supra* note 70 at 52-53.

\(^{134}\) Schwartz, *supra* note 125, at 334.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Compare Schwartz, *supra* note 125 at 322-33 (Goldberg draft) with *Harper*, 383 U.S. at 665-70.

\(^{139}\) Schwartz, *supra* note 125 at 330.

\(^{140}\) *Harper*, 383 U.S. at 666

\(^{141}\) Id. at 669. Goldberg, by contrast, took pains to distinguish *Breedlove*, and other contrary precedent. Schwartz, *supra* note 125 at 331-32.

\(^{142}\) Ackerman and Nou, *supra* note 70 at 56. As Ackerman and Nou note, Douglas ignored Congress’s findings in section 10 of the VRA that Congress wrote into the statute specifically to give the Court support for holding the poll tax unconstitutional. *Id.* at 57.
voting. Any fee disproportionately impacts poor people. The Harper Court, Sunstein also noted, stated explicitly that the equal protection interpretation should change over time, as notions of equality change, untying the Justices from concerns about following precedent. Sunstein contended that the Harper opinion, and others from that period, indicated that the Court was developing a theory of rights that would include positive economic rights, resembling Franklin Roosevelt’s “Second Bill of Rights.”

The election of Richard Nixon in 1968, and his appointment of Justices Burger, Blackmun, Powell and Rehnquist in 1968-72, Sunstein observed, brought an end to the Court’s extension of constitutional protection over this area.

IV. Modern Poll Tax-Like claims Against Other Election and Voting Laws

The remainder of this Article will focus specifically on the question of “other tax” that is critical to understanding the scope of the 24th Amendment. One should separate the 24th Amendment analysis from the Court’s equal protection jurisprudence. There is no reason to assume that results under the 24th Amendment should be identical to those under equal protection. The 24th Amendment’s terms do not allow for balancing, or for any consideration of the state’s interest -- “poll taxes” or “other taxes” as a voting prerequisite are categorically unconstitutional. Moreover, the Court’s interpretation of the Amendment extends this per se treatment to “substitutes” some states might try to impose as voting prerequisites. In an equal protection-type claim, however, the state

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144 Id.

145 Id.

146 Id. at 162. Roosevelt’s Proposed Second Bill of Rights included a series of positive rights, among them the right to a job, a “decent home,” medical care, “adequate protection from the economic fears of old age, sickness, accident, and unemployment” and a right to a “good education.” Id. at viv.

Curiously, Ackerman and Nou argue that Douglas’s Harper opinion eclipsed the 24th Amendment and Section 10 of the VRA so as to erase their place in a doctrine “ending wealth discrimination during the 1960s.” Ackerman and Nou, supra note 70 at 50. My reading is the opposite: Harper presents a wealth-rights principle not contained in Goldberg’s draft, the 24th Amendment’s text or history, or the VRA history.

147 Id. at 163.

148 Ackerman and Nou, by contrast, use the 24th Amendment and the VRA to argue that Harper deserves “canonical superprecedent” status. They conclude that as such, Harper’s reasoning should eclipse holdings such as in Buckley v. Valeo, and Crawford v. Marion County Election Board, to impose egalitarian constitutional standards when cases raise the issue of wealth discrimination. Ackerman and Nou, supra note 70 at 73-81.

149 Harman, 380 U.S. at 542. One might argue that other Constitutional Amendments (notably those in the Bill of Rights) are expressed categorically, but have been interpreted to allow balancing. But when looking at the 24th Amendment’s “peers” - those amendments added post-Civil War, it is harder to find examples of “balancing” of the Constitution’s command. These amendments are specific, narrow, and offer less opportunity for interpretation. One exception to this might be the Twenty-First Amendment’s statement preserving to the states the ability to restrict importation or possession of alcohol, which has been subject to some interpretation because of its apparent conflict with the Commerce Clause. Granholm v. Heald, 540 U.S. 460 (2005).

150 Harman, 380 U.S. at 540.
would be able to argue that it has a sufficient interest in imposing the tax or fee (or a substitute).\textsuperscript{151}

Accordingly, the analysis here will only be relevant to federal elections, since the 24\textsuperscript{th} Amendment by its terms only governs federal elections.\textsuperscript{152} Given that the 24\textsuperscript{th} Amendment applies only to federal elections, while the equal protection clause as interpreted in \textit{Harper} and cases following applies to state and federal laws,\textsuperscript{153} payments related to voting in federal elections potentially face stricter scrutiny. They face both equal protection scrutiny a la \textit{Harper} and its progeny, and the 24\textsuperscript{th} Amendment’s per se bar on taxes that deny or abridge a voter’s franchise.\textsuperscript{154}

\section*{A. A Poll Tax Rule}

What is a “poll tax or other tax . . .”? One initial hurdle to jump before addressing the principle question is whether one should distinguish between “tax” and “fee.” Shortly after ratification of the 24\textsuperscript{th} Amendment, in the VRA legislative history, we saw that some Members read “other tax” as applying only to “taxes.”\textsuperscript{155} These members opposed including “other tax” in the law, and as we see from the Conference Report, their argument won over the VRA conferees.\textsuperscript{156} Yet reading “tax” too literally would conflict with the larger goal of barring poll tax “substitutes” that was in the minds of the authors and supporters of the 24\textsuperscript{th} Amendment.\textsuperscript{157} Accordingly, in this Article any kind of payment as a prerequisite to voting is prohibited, whether that payment is called a fee, a tax, or something else. The name assigned the charge by the government cannot control the analysis, if the Amendment is to reach “subterfuge” as intended.

If it does not matter what the government calls the payment, one needs a rule to sort out constitutional fees or taxes from unconstitutional ones. The Article proposes that an unconstitutional tax under the 24\textsuperscript{th} Amendment requires a monetized payment from

\begin{footnotes}
\item[151] \textit{Harper}, 383 U.S. at 668-69 (finding that poll tax was irrelevant to proper voters’ qualifications). What degree of scrutiny, how burdensome a state law can be, and how tough a task the state would have when defending its tax or fee is a contentious topic. Compare Brief for Petitioners, Indiana Democratic Party v. Rokita, No. 07-25 (Nov. 5, 2007) at 25-30, with brief for the United States as Amicus Curiae Supporting Respondents, Crawford v. Marion County Election Bd., Nos. 07-21 and 07-25 (Dec. 2007) at 18-20.


\item[153] This would be the “equal protection component of the due process clause of the 5th Amendment”, see United States v. Armstrong, 517 U.S. 456 (1996).

\item[154] Admittedly there are many claims that raise equal protection issues that would not be governed by the 24\textsuperscript{th} Amendment. Under \textit{Harper}, state laws barring “paupers” from voting fail, and in fact in the wake of \textit{Harper} state statutes and constitutions were amended to remove this qualification on voting. \textit{KEYSSAR}, supra note 8 at 271. Property ownership requirements would also implicate the equal protection clause. \textit{Id.} at 272-73.

\item[155] \textit{See supra} note 108.

\item[156] \textit{See supra} note 109

\item[157] \textit{See supra} note 81-83.
\end{footnotes}
individual voters contingent to their casting a vote that need not be spent if the voter doesn’t vote.

Plainly, an unconstitutional tax or fee would be one upon which one’s capacity to vote rests. If non-payment of the tax or fee (or a state’s substitute for a tax or fee) has no effect on one’s ability to vote, the charge does not raise a 24th Amendment claim. Also, the tax or fee should require a monetized payment. Non-monetized burdens related to voting, such as getting out of bed and standing in line, would not fall within the meaning of a tax or fee under the 24th Amendment. 158 During consideration of the 24th Amendment, there was no indication that either its supporters or opponents thought the ban would extend to non-pecuniary “costs” or inconveniences. Because one of the undesirable traits of poll tax systems was the abuse of tax payments for corruption and vote-buying, the illegal tax or fee should involve a broad and relatively uniform obligation to spend money for access to voting that otherwise need not be spent. This form of tax provides a tempting opportunity for political machines, as it makes vote-buying easier.

Also, expenses one would incur irrespective of voting cannot be deemed a tax or fee as a prerequisite to voting simply because the voter paid them on election day or in the context of voting absentee. 159 Parking fees and postage stamps are not tax or fee prerequisites to vote, but are costs the voter or anybody else would incur to park or mail. 160 The voter can avoid parking fees by walking or taking the bus, and can deliver an otherwise mailed absentee ballot personally. 161 By sorting out those taxes or fees specially assigned to voting, the rule also captures those payments that are susceptible to corruption and abuse of the election process. That is not to say that other taxes or fees might not raise 14th Amendment concerns, as addressed in the Court’s equal protection jurisprudence, and the utility of the tax could be balanced against other interests. This Article is focused instead on when a tax or fee is categorically unconstitutional under the 24th Amendment.

The suggested rule also acknowledges another trait common to poll tax regimes – that the taxes were not collected independent of voting (even though technically they were owed

158 The plain reading of the Amendment supports this perspective, as does the scope of the debate in Congress. See supra notes 72-84; contra Kelly Brewer, Disenfranchise this: State Voter ID Laws And Their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims, 42 VAL. U. L. REV. 191, 196-97 (defining “poll tax” as any material requirement on the voting process in order to discourage voting or deflect the administrative costs of an election.”). The present analysis sees no place for intent or purpose in the application of the 24th Amendment, nor would it read the concept of “tax or fee” as broadly as Brewer. 159 See Harman, 380 U.S. at 541.
160 Cf. Bruce v. City of Colorado Springs, 971 P.2d 679 (Colo. App. 1998) (requiring a stamp on mail-in ballot constitutional). Nevertheless, it would seem better policy to distribute mail-in ballots postage paid, as the inconvenience of locating a stamp of the correct amount may be more of a burden then the cost of the stamp. Oregon’s vote-by-mail system does not provide paid postage, but does allow voters to drop off their ballots at designated offices. ORS 274.470(6).
161 See e.g. S.D Laws 12-19-9 (governing delivery of absentee ballot): VA Code 24.2-707 (procedures for casting absentee ballot by person or mail). If a government imposed vote by mail for all elections, with no alternative means to deliver a ballot, then the cost of the stamp is a price to vote and under the proposed rule in this Article, would be unconstitutional.
Poll tax regimes, as we observed before, essentially paid people not to vote, and reinforced that impulse over time as “back taxes” added up. One of the strongest human impulses, it seems, is the compulsion to avoid taxation when possible. The same insidious effect on voting is not an issue when the tax or fee is levied on some other act that accompanies voting (like parking), just because that activity is part of what one individual, but not another, does in the voting process. When the tax is linked to voting, and only collected in the administration of voting, the 24th Amendment bars its use.

The suggested rule does not consider the temporal proximity of the fee or tax to the election. The 24th Amendment says nothing about proximity, but flatly prohibits poll taxes or other taxes as a voting prerequisite. Moreover, timing cuts both ways. Fees or taxes levied at the election directly burden people on the day they vote; but as we saw in the history of poll taxation, when taxes are due far in advance of the election this remoteness helps suppress turnout by voters who inadequately plan ahead or lose their receipt in the interim, and it provides corrupt interests with a tool if they are willing to traffic in poll tax receipts.

The suggested rule also does not try to impose a Harper-type “scrutiny” standard. One reason for this is pragmatic: It is not evident that Harper’s broad articulation of an equal protection requirement based on wealth discrimination, and exacting scrutiny of any such laws, has much force today (especially in the election law context). Another reason is that any equal protection analysis imposes a balancing test. As the doctrine has evolved in the voting context since Harper, it includes a number of steps that provide ample opportunity for interpretation and judgment calls. Judges first evaluate whether a law places an “incidental” burden on voting or a “severe” one. “Severe” burdens receive

162 See supra note 25.
163 See supra notes 23, 51.
164 See supra note 32.
166 Crawford, 128 S. Ct. at 1616 (“[A] court 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 adversarial system demands.”)
168 “Ordinary and widespread burdens, such as those requiring ‘nominal effort’ of everyone, are not severe.” Crawford, 128 S. Ct. at 1624 (Scalia, J., concurring); see also Burdick v. Takushi, 504 U.S. 428 (1992); Gonzalez v. Arizona, 485 F.3d 1041, 1049 (9th Cir. 2007). Fair-minded individuals could easily disagree over whether a law placed an “ordinary” burden on people, or what kind of effort should be deemed “nominal.” Justice Souter, for example, found the Indiana voter-ID burden “far from trivial.” Crawford, 128 S. Ct. at 1635.
strict scrutiny; others are upheld of they are reasonable, non-discriminatory, and serve an important state interest.\(^{169}\) The 24\(^{th}\) Amendment need not accommodate these nuances.

It is this author’s belief that when considering the constitutionality of taxes and fees on voting, success of an equal protection claim depends largely on the proclivities of judges. The 24\(^{th}\) Amendment standard is harder to reason away, and therefore potentially more stable and powerful in the contexts where it applies.

Similarly the rule does not include the law’s intent, purpose, or invidiousness. Admittedly, in the context of the 24\(^{th}\) Amendment intent was a factor in determining that Virginia’s onerous residence certification rejected in Harman was a poll tax “substitute.” Bad intent was also a substantial part of the analysis in Harper. But, again, it is not clear how much power an opinion from that period has today. In any case, the 24\(^{th}\) Amendment sets forth a *per se* rule, and “intent” does not fit in the analysis.\(^{170}\)

Applying the proposed rule to some easy cases shows how it would work. Charging voters a “user’s fee” to vote, perhaps as a way of diminishing the fiscal lode of administering elections, is clearly unconstitutional.\(^{171}\) Locating a precinct polling place in a complex, where access is limited to fee-paying entrants who only seek entry to vote at the precinct, would set a payment as a prerequisite to voting, and would be unconstitutional. Suspending the entry fee for voters would cure the violation. Locating a precinct in a building that requires visitors to pay to park there is not unconstitutional. Voters could park elsewhere, or use other transportation to reach the location. If the building only charged *voters* to park, not other visitors, that policy would form the basis for a 24\(^{th}\) Amendment claim, as one could avoid the charge by not voting.\(^{172}\)

### B. Who Are You?

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\(^{169}\) Admittedly, this standard incorporates decisions from a variety of different election law contexts – in Harper the issue was whether a voter could vote at all, in Burdick the Court examined whether the voter could cast a write-in vote. Dan Tokaji argues that issues involving access to voting should be evaluated differently from issues involving administration of elections. 156 U. Pa. L., Rev. PENNUNBRA 379 (2008); see also Damian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. Rev. 1174, 1178. But the Court shows no indication of bifurcating its analysis this way, whatever the conceptual merits of Tokaji’s approach.


\(^{171}\) The United States argued in Harper that using a tax on voting would be unconstitutional even if the revenue from the tax were used to defray the costs of elections or of representative government. Brief of the United States as Amicus Curiae at 37.

\(^{172}\) Thurgood Marshall, at oral argument in Harper, stated: “Where a city can, without question, charge for riding on the municipal subway . . . I don’t think anyone would try to support a plan where you had to put in a dime in a turnstile when you went in to vote.” Oral Argument of Thurgood Marshall, in LANDMARK BRIEFS, *supra* note 116 at 1034.
Some litigants have argued that certain voter identification requirements amount to unconstitutional poll taxes.\textsuperscript{173} Under this Article’s proposed rule, requiring voters to produce government-issued photo identification, such as a driver’s license, passport, or identification card, cannot be unconstitutional when applied to voters who already possess such identification. The expense that voter incurred for identification was plainly irrespective of voting.

Among that fraction of voters lacking state-issued identification, just as plainly the state could provide identification for free, and raise no 24\textsuperscript{th} Amendment concerns. Typically, however, some fee is involved. Waiving fees to obtain state identification for voting could cure any violation among those voters who only seek the ID to vote (as well as provide the individual with a useful item to use in other contexts).\textsuperscript{174} Can government limit the fee waiver to poor voters? The 24\textsuperscript{th} Amendment says noting about ability to pay, and poll tax history indicates that voters who could afford the tax were nevertheless deterred. Accordingly, any fee charged any individual who seeks state identification as a mandated prerequisite to voting raises 24\textsuperscript{th} Amendment concerns.\textsuperscript{175} States would be well advised to award fee waivers leniently in such cases, or institute another way to permit voters who lack photo identification to vote.\textsuperscript{176}

Costs and inconveniences associated with obtaining yet other documents necessary to obtain state identification are too attenuated from voting, and under the proposed rule would fall outside the scope of what is a “tax or fee” under the 24\textsuperscript{th} Amendment.\textsuperscript{177} One must spend time and often pay duplication fees, to obtain documentation of one’s identity. But these fees are charged voters and nonvoters alike. Moreover, the photo identification requirement, and any collateral expenses do not burden voters who vote absentee, so these indirect expenses are avoidable, as with the parking fees or postage stamps in the hypothetical.\textsuperscript{178} One must live in a precinct to vote there, but the property taxes or other residential taxes accompanying residence are not unconstitutional under the 24\textsuperscript{th} Amendment either. These charges apply to all residents, not just voters. It is better

\textsuperscript{173} Brief of Amicus Curiae Congressman Keith Ellison, Crawford v. Marion County Bd. Of Elections, Nos. 07-21, 07-25 (Nov. 12, 2007) at 5-10.
\textsuperscript{174} See, e.g. In re Request for Advisory Opinion, 740 N.W.2d 444, 465 (Mich. 2007) (citing state law that waives $10 fee for identification in certain circumstances). Note that the $10 identification fee is less than the inflation adjusted present value of historic poll taxes. See supra note 23.
\textsuperscript{175} Counsel in Harper, by the way, argued that any tax, even one exempting those unable to pay, was unconstitutional (because “irrational” and a prior restraint on the expressive act of voting). See Oral Argument of Allison W. Brown, supra note 116 at 1031; Oral Argument of Thurgood Marshall, Jr., id. at 1034.
\textsuperscript{176} See In re Request, 740 N.W. at 465 (noting that state allowed voters without ID to vote after signing affidavit).
\textsuperscript{178} See e.g. Crawford, 128 S. Ct. at 1622 (describing Indiana law); but see 128 S. Ct. at 1630 n.4 (Souter, J., dissenting) (citing evidence that absentee voting is unreliable).
policy for governments to provide essential items, like birth certificates, without charge. But it is not a constitutional violation if the government charges a fee.

The rule suggested in this Article does not assess the state’s interest, the motives behind the qualification, or the necessity (or lack thereof) for the qualification as a barrier to voter fraud. Many of the arguments against voter identification laws contain just these elements. Some of these points are quite powerful – why should a state require that the form of identification contain an expiration date, if all the document needs to do is establish the holder’s identity? But, as argued before, these kinds of factors have no place in a 24th Amendment analysis. How they factor into an equal protection analysis, as observed, is a moving target. Recent cases show greater deference to state lawmakers, at least when a facial challenge is raised against a state law, and one would expect a similar result whether a state or federal election was at issue.

C. When Crime Doesn’t Pay

Virtually all American jurisdictions deny felons the vote. The breadth of these state laws vary, but almost all states prohibit incarcerated felons from voting, and a majority bar felons from voting during probation or parole. Barriers to felon voting have been an aspect of state laws from earliest times, and as we have seen, preserving states’ restrictions on felon voting had been of concern during the congressional poll tax debate.

Accordingly, if an individual is convicted of a tax felony, that individual loses the right to vote in almost all jurisdictions. One might observe that tax felons are denied the vote because of a failure to pay a tax or fee. That result sounds incongruent with the 24th Amendment’s command that the “right of citizens . . . to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”

Is a state law barring tax felons from voting a violation of the 24th Amendment? The rule articulated above would find no 24th Amendment violation. It classifies as unconstitutional only those taxes or fees paid for access to voting that would not otherwise be payable. Taxes or fees owed irrespective of voting are thus not unconstitutional. Just as ticketing the driver who fails to pay for parking on election

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180 See supra notes 165-69.
181 Crawford, 128 S. Ct. at 1621-22.
183 Id. Maine and Vermont permit incarcerated felons to vote. Kentucky and Virginia prohibit felons from voting in perpetuity.
184 Hayden v. Pataki, 449 F. 3d at 316-22 (recounting history of felon disenfranchisement, lack of indicia that VRA intended to affect these laws).
186 Speck, supra note 185, arrives at a similar conclusion, but by interpreting the 24th amendment narrowly in accord with the era of its ratification. Id. at 1575 (interpreting the 24th Amendment through a
day is not a fee abridging the right to vote, penalizing a taxpayer for failing to pay taxes owed independently from voting cannot be a 24th Amendment violation. The denial of the vote is based on the felon’s conviction for breaking the tax law, not for failing to pay a tax contingent to voting.\textsuperscript{187}

This result is in accord with the conditions that prompted the Amendment. Unlike poll taxes historically, the government intends to collect the taxes whether or not the taxpayer votes.\textsuperscript{188} The taxpayer cannot avoid taxes simply by avoiding voting. Moreover, under state law the felon has no right to vote once convicted of the felony, so there is nothing to “deny or abridge.” That the underlying felony involved a tax crime, rather than an assault or fraud, is immaterial.

Convicted felons often owe money, such as accumulated awards, costs or fees, as part of their sentence. If a felon completes his confinement, but still owes payment to the state or others, may the state continue to bar him from voting? One might argue that requiring the felon to pay these obligations violates the 24th Amendment.\textsuperscript{189}

Under the rule articulated here, if discharging the terms of the sentence includes some payments, as an obligation irrespective of whether the felon also votes, then there is no 24th Amendment violation. Thus, the state may demand that a felon pay an existing restitution award before restoring his or her civil rights (including voting rights).

One could imagine a situation where the felon is obliged to pay a state fee explicitly for restoration of his voting rights. Then the felon has a stronger argument under the 24th Amendment. Additionally, if the state only attempts to collect outstanding obligations from felons who seek to vote, but not other felons, the state would appear to be more interested in suppressing the vote than in collecting the revenue, as we saw was historically the case with the poll tax.\textsuperscript{190} The state’s selective application of its collection practices would make payment a voting prerequisite, not a financial obligation irrespective of voting.

\textbf{Conclusion}

Although the Twenty-Fourth Amendment has taken a subsidiary place to the equal protection clause in the voting rights arena, a separate and distinct doctrine for the Amendment should grow over time. This Article, reasoning from history and experience, proposes a rule for applying the Amendment to other kinds of financial burdens on voting. For a tax or fee to be invalid under the 24th Amendment, it must require a

\textsuperscript{187} Thurgood Marshall’s\textit{Harper} argument included this same point. \textit{See} Oral Argument of Thurgood Marshall, supra note 116 at 1041-42.

\textsuperscript{188} \textit{See supra} note 25.

\textsuperscript{189} \textit{See} Coronado v. Napolitano, No. 07-1089, D. Az (May 30, 2007) (Complaint) (arguing that payment of restitution and fines before restoration of voting rights is unconstitutional poll tax).

\textsuperscript{190} \textit{See supra} note 25. The state’s collection practices could transform an otherwise constitutional charge into a 24th Amendment violation.
payment directly tied to voting. That is, a tax or fee owed irrespective of voting is not an unconstitutional poll tax under the 24th Amendment.

Since the 24th Amendment bans outright the use of poll taxes or other taxes as a prerequisite to voting, the proposed rule provides no means for “balancing” the state’s interest against the voter’s interest. The 24th Amendment, unlike the Court’s construction of the equal protection or due process clauses of the 14th Amendment, is not interested in the government’s interests, purposes, motives or biases. Any fee, even if not a “burden,” even if rational, even if waived for indigence, is unconstitutional if payment is made a contingency for voting.

This Article believes that this interpretation reflects best the text and intent behind the Amendment. It also reflects best the anticipated effect of the Amendment at the time it was adopted, which did not reach indirect costs to voting, or cases where tax crimes or criminal sentencing caused the voter to lose the right to vote. The proposed rule would continue to thwart the corruptive effects inherent in the poll tax regimes, but not impede state and local governments from collecting other revenues.

Until the present, perhaps it has been fair to call the 24th Amendment the Constitution’s “most insignificant.” But as judges reconsider the equal protection component of voting rights law, and increase the deference accorded state lawmakers, it could become far less trivial. Activists and litigators might do well to define the contours of the 24th Amendment protection against poll taxes before such time as it makes a difference in a charged political context.

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