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# Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment

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**Title:** Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment

**Abstract:** The adoption of the Twenty-Fourth Amendment banning poll taxes in federal elections was intended to protect franchise rights and increase voter turnout. However, since its adoption it has yet to be successfully invoked to invalidate any practice, including poll taxes and most recently voter photo IDs. This article seeks to resurrect the Twenty-Fourth Amendment and to make the case for a broader interpretation of it. Specifically, the Article seeks to disconnect the poll tax from a narrow reading of its legacy during the Jim Crow era when its primary purpose was to disenfranchise African-Americans. Instead, the poll tax should be understood in terms of its broader historical purpose, to limit voting to propertied freeholders in order to ensure that only those who had sufficient wealth or income had a voice in elections. The broader purpose of the Twenty-Fourth Amendment thus should be read as a rejection of this linkage between wealth and voting, and a severing of the assumption that property or income is a prerequisite to having a political voice.

## **Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment**

David Schultz<sup>1</sup>  
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The Twenty-Fourth Amendment banning poll taxes in federal elections may well be one of the “great silences of the Constitution.” Originally the “great silences” comment was first articulated by Justice Robert Jackson in *Hood v. DuMond*<sup>3</sup> in reference to the Commerce Clause and it spoke to the way the Court interpreted this clause to prevent certain types of state parochial or protectionist legislation from interfering with the creation of a national marketplace. The great silence was the negative Commerce clause and its use by the Court to prohibit certain activities, even if not spelled out explicitly in the text of the Constitution.

But with the Twenty-Fourth Amendment, its silence lies elsewhere, such as in its ironic superfluosity. By that, after ratification of Twenty-Fourth Amendment, the Supreme Court used it in *Harman v. Forssenius*<sup>4</sup> to strike down a poll tax for a federal

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<sup>3</sup> 336 U.S. 525, 535 (1949).

<sup>4</sup> 380 U.S. 528 (1965).

election. Then the Court voided a poll tax for state elections in *Harper v. Virginia Board of Elections*,<sup>5</sup> but it did so not by employing the Twenty-Fourth Amendment, but instead by using the Equal Protection clause. Moreover, since its adoption and the decision in *Harman*, no election practice has ever been invalidated by the Twenty-Fourth Amendment. Thus the great silence of the Amendment may reside in the fact that effectively it has had no impact or applicability, outside of one opinion, voiding a tax that only existed in five states. The Amendment thus standing majestically yet silent in the Constitution as a provision that has since its singular use failed to prohibit anything, even though efforts to employ it to invalidate practices such as voter photo identifications<sup>6</sup> and felon disenfranchisement laws,<sup>7</sup> among other practices, have been tried. The Twenty-Fourth Amendment thus appears to have been almost DOA and it remains in that condition—still dead—much like Francisco Franco was pronounced in several famous *Saturday Night Live* comedy sketches in the 1970s.

Its silence is indeed a curiosity, raising a series of questions. For example, why has the amendment had practically no impact? Was it an amendment with a singular

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<sup>5</sup> 383 U.S. 663 (1966).

<sup>6</sup> *See*: Crawford v. Marion County Board of Elections, 553 U.S. 181, 128 S.Ct. 1610 (2008). Although plaintiffs did not raise the poll tax question before the Supreme Court they did so at the district court level.

<sup>7</sup> *See*: Bynum v. Connecticut Commission on Forfeited Rights, 410 F. 2d.173 (1969) (*ruling* that a five dollar fee for ex-felons to pay a fee of five dollars before they could petition for restoration of their voting rights violated the Fourteenth Amendment. The

purpose whose duty was performed and now is no longer needed? What was the Amendment specifically adopted to prohibit and has it been read so narrowly that its application can only be felt in the context of efforts to disenfranchise African-American voters in the south? Or is it read in reference to the payment of a fee at the voting booth? Why has it not been read more broadly as seeking to address as unconstitutional costs imposed on voting or wealth being prohibited as a factor affecting voting? This is what the Court stated in *Harper* when it declared that: “Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”<sup>8</sup>

This article seeks to unsilence and resurrect the Twenty-Fourth Amendment and to make the case for a broader interpretation of it that takes off from where *Harman* and *Harper* end. Specifically, the Article seeks to disconnect the poll tax from a narrow reading of its legacy during the Jim Crow era when its primary purpose was to disenfranchise African-Americans. Instead, the poll tax should be understood in terms of its broader historical purpose, to prohibit the practice of restricting voting to propertied freeholders in order to ensure that only those who had sufficient wealth or income had a voice in elections. The broader purpose of the Twenty-Fourth Amendment thus should be read as a rejection of this linkage between wealth and voting, and a severing of the assumption that property or income is a perquisite to having a political voice. Given this broader, meaning, the Twenty-Fourth Amendment should be interpreted to prohibit voter

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petitioner did not raise and Twenty-Fourth Amendment challenge and the Court did not address this issue.).

<sup>8</sup> 383 U.S. at 666.

photo identification laws, durational voter registration laws, felon disenfranchisement practices, and other practices that deny voting and voting related activities due to wealth-based burdens.

Part one of the article traces the history of poll taxes from England to colonial and early America and up to the Civil War. This section then turns to an analysis of their readoption as part of Post-Civil War efforts to disenfranchise freed slaves. Part two of the article then seeks to develop the historical understanding of poll taxes by the Supreme Court and Congress. It turns to the Supreme Court's treatment of the poll tax in four cases, two where they were upheld, and then eventually the two decisions invalidating them. The purpose of this discussion is to clarify the context and understanding the Court gave to the poll tax. A review of congressional debates on poll taxes and efforts to ban them seeks to do the same thing. Overall, the argument here will be that the Court and Congress understood the Twenty-Fourth Amendment to be a broad rejection of the linkage between wealth and voting. Part three then examines both scholarly and case law treatment of the Twenty-Fourth Amendment. The third section examines as examples two types of issues regarding how the courts have failed to employ the Twenty-Fourth Amendment to invalidate devices that look like forms of poll taxes. The purpose of this section is simply to demonstrate contemporary interpretations of the Amendment. The final section then seeks to recover a broader meaning and understanding of the Twenty-Fourth Amendment, arguing that it ought to be read as a broad prohibition on the use of wealth, either directly or indirectly, as a prerequisite to engaging in voting and perhaps other types of political activities. Overall, the thesis of this article is that the Poll Tax

Amendment needs to be recovered from its silence and given a broader application to rejecting the historic connection between voting and wealth.

## **I. The History of Poll Taxes**

There are at least four distinct histories surrounding the use of poll taxes. The first is the use of poll taxes in the Ancient world and in Medieval England. The second is in colonial America. The third is the use of poll taxes in Antebellum America, especially in the time period between immediately after the Revolutionary War and up to the election of President Andrew Jackson in 1828. The fourth history implicates the employment of poll taxes in the South after Reconstruction ended in 1877 during the Jim Crow era. A brief review of these different histories surrounding the imposition of poll taxes is important for this article. The reason is that each of these histories, or genealogies as French philosopher Michel Foucault would call it, are important to explicate that each one carries with it a unique set of meanings that carry important political and power relations.<sup>9</sup> Depending on which genealogy one draws upon, the poll tax takes on a different meaning and purpose. As part of an effort here to recover a broader meaning of what the poll tax symbolized, and therefore what the Twenty-Fourth Amendment should mean, requires some attention to the different genealogies that it represents.

### **A. Poll Taxes in the Ancient World and Medieval England**

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<sup>9</sup> M. Foucault, *Nietzsche, Genealogy, and History*, in PAUL RABINOW, ED., *FOUCAULT READER*, 76, 83 (1984).

A poll tax in the United States has come to be understood as some fee paid by an individual as a prerequisite to being allowed to vote. More specifically, as will be noted below, the meaning is even more specific—it often refers to a tool used by several Southern States after Reconstruction that was meant to disenfranchise the newly freed slaves and later other African-Americans from voting.<sup>10</sup> But that is not the only meaning associated with poll taxes.

Poll taxes trace their history back to ancient Persia, Palestine, and the Roman Empire and Republic.<sup>11</sup> These poll taxes were individual or per capita taxes that each taxpayer was obligated to pay. Generally the tax was a flat rate—every individual was required to pay the same fee—but in Ancient Rome there were several classes or levels of fees, with different political rights associated with the type and amount of fee paid.<sup>12</sup> The primary purpose of the poll tax was to generate revenue.

During the Medieval era, several countries imposed poll taxes. They served as an alternative to taxes on goods or land that were often commonly imposed. In France a graduated poll tax was imposed in the late seventeenth century, creating 22 classes or levels of poll tax. In some cases there were exemptions for clergy from the tax or *taille*. This tax was detested by many and it went by the wayside with the French Revolution of

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<sup>10</sup> C. V. WOODWARD, *THE STRANGE CAREER OF JIM CROW*, 84, 85 (1974).

<sup>11</sup> *Poll Taxes in Ancient and Modern History*, CONGRESSIONAL DIGEST 260, (1942).

<sup>12</sup> *Id.*



1789.<sup>13</sup> England also began to impose a poll tax as early as 1377.<sup>14</sup> The purpose of the poll tax was again to provide an alternative to taxing property by placing the burden on individuals.<sup>15</sup> These taxes were imposed by the King on individual taxpayers, again creating classes of those citizens who were obligated to pay. The tax was collected in a complicated fashion that involved the local sheriff and courts and the ordering of special writs in some circumstances.<sup>16</sup> Despite the fact that the poor were exempt from paying it, and given the political privileges or political power that those who could afford it possessed, the poll tax symbolized the political rights one could exercise.

But the legacy from Medieval England regarding poll taxes moves beyond the capitation fee imposed in these three years. One needs to consider the political rights that individuals had. These were rights associated with property ownership. Beginning in 1430, the right to vote for members of Parliament was limited to those who owned “land worth 40 shillings a year in rental value or income.”<sup>17</sup> The purpose of the property qualification was tied into the concept of freeholder status. There was an assumption that only those individuals who had a sufficient stake in the community should be allowed to

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<sup>13</sup> *Id.*

<sup>14</sup> C.C. FENWICK, THE POLL TAXES OF 1377, 1379, AND 1381, xiii, xiv (1998).

<sup>15</sup> *Id.* at xiii.

<sup>16</sup> Fenwick at xvii.

<sup>17</sup> C. WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760-1860, 5 (1968).

vote. Montesquieu wrote in *The Spirit of Laws* that: “All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.”<sup>18</sup> Similarly, Sir William Blackstone, author of the famous *Commentaries on the Laws of England*, penned:

The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share of the elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates. . . But, since that can hardly be expected of persons of indigent fortunes, or such as are under immediate dominion of others, all popular states have been obligated to establish certain qualifications.<sup>19</sup>

Both Montesquieu and Blackstone drew linkages between property qualifications and voting. Blackstone’s remarks are especially revelatory here because his *Commentaries* cite numerous references to the concept of freeholder and the property qualifications that must be met in order to be an elector.<sup>20</sup> The rationale behind the property qualification was ostensibly to assure that the poor could not be bought or sell their votes to the

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<sup>18</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, 155 (1975).

<sup>19</sup> W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, vol. 1, 165 (1979).

<sup>20</sup> See e.g.: Blackstone at 166-171.

wealthy. The stated purpose seems to be to assure liberty and perhaps fair and free elections. But digging deeper, property qualification represented several values. First, they guaranteed that only those who had a financial stake in the government voted. This was perhaps an effort to weed out the poor whom it was presumed did not have a stake in the status quo and therefore would not be respectful of the government. Second, the qualification represented a class bias, conditioning political franchise upon property ownership in society. Third, there seemed to be a deeper assumption that a certain level of property ownership assured that one had sufficient intelligence when voting. For whatever reason exactly, property qualifications stratified English society, limiting franchise to a privileged few. Those who had this privilege were considered freeholders.

## **B. Colonial America**

The British concept of freeholder and property ownership as a prerequisite to voting carried over into colonial America. Property qualifications were common in colonial America, with seven of the original 13 colonies imposing some type of freeholder qualification upon citizens in order to vote.<sup>21</sup> New Hampshire required a freehold of 50 pounds and New York 40 pounds.<sup>22</sup> All of the colonies had either a real estate ownership requirement or a property or income alternative as a test for voting.<sup>23</sup>

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<sup>21</sup> Williamson at 12.

<sup>22</sup> *Id.* at 12-13.

<sup>23</sup> K.H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES, 12-13 (1971).

Estimates were that in Virginia, and presumably the rest of the colonies, property qualifications limited white male franchise to about 50% of that population.<sup>24</sup>

Many of the attitudes towards voting and property that were displayed in England carried over into the colonies. Henry Ireton, a Seventeenth century English general, argued against allowing anyone to vote, emphasizing the importance of property ownership. “He that is here today, and gone tomorrow. . .I do not see that he hath such a permanent interest.”<sup>25</sup> His views were reflected in the American colonies among many conservative Puritans. Thus, among a religious base of the population, equal franchise was rejected in favor of encouraging some property ownership to ensure a stake in a community. This is not a surprise. Among Calvinists and some of the Protestant religious orders that eventually populated America was a belief that material success was a sign of personal salvation.<sup>26</sup> Assuring only those who were “saved” or were blessed by God should vote was critical to the maintenance of the religious community they wished to foster. Thus, those who were wealthy or owned property were most fit to vote and rule because this material success demonstrated their religious worthiness to lead politically.

But more importantly, Blackstone’s *Commentaries*, which were tremendously influential in colonial America, reinforced linking property, freeholder status, and voting.

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<sup>24</sup> Williamson at 29-30.

<sup>25</sup> *Id.* at 64.

<sup>26</sup> M. WEBER, *THE PURITAN ETHIC AND THE SPIRIT OF CAPITALISM* (1976) (*describing* the linkage between Calvinism, Puritanism, and capitalism); R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT*, 5 (1989) (*noting* the Calvinistic roots of American politics).

Finally and obviously, because the colonies were part of the British Empire, it should come as no surprise that the law and attitudes of England influenced the formation of both in America.

### **C. Antebellum America**

Franchise continued to be conditioned upon property qualifications after America declared independence from England, but there was also a movement away from this property qualification and towards the creation of a poll tax. In 1776, when the Commonwealth of Pennsylvania adopted its first constitution it abolished the property requirement and substituted a poll tax requirement. The Commonwealth declared that one could not vote unless he (and voting was limited to males) had paid his taxes.<sup>27</sup> Georgia did the same in 1789. North and South Carolina allowed for the payment of poll taxes as alternatives to the property qualification, and New Hampshire in 1784 imposed a poll tax of approximately \$1.50.<sup>28</sup>

What is critical to understand about the payment of poll taxes during the early years of the American republic after independence and then during the early part of the nineteenth century, is the dual legacy that the poll taxes represented. On the one hand, the payment of some type of fee in order to vote continued the freeholder logic that carried over from the British and colonial eras. Specifically, many states viewed property

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<sup>27</sup> *Poll Taxes in Ancient and Modern History* at 261.

<sup>28</sup> *Id.*

ownership or the poll tax as an either/or proposition. By that, ownership of property assessed at a certain value (or generating a certain income) or the payment of a poll tax became options for taxpayers or potential voters in many states after independence.<sup>29</sup> The poll tax was still an effort to prevent “undesirables,” such as the poor or foreigners, from voting.<sup>30</sup> Implicit in the poll tax remained the conviction that wealth assured independence, a sign of worthiness or perhaps blessedness, and a definite stake in the political community. The poll tax thus carried over from England the property ownership assumptions about wealth and class privilege. This bias was noted by Charles Beard in his *An Economic Interpretation of the Constitution*.<sup>31</sup> Similarly, James Madison, writing in the *Federalist*, noted that: [T]he most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.”<sup>32</sup> John Jay once remarked that: “The people who own the country ought to govern it.”<sup>33</sup> Property and then poll tax requirements continued to assure that wealth would maintain political hegemony after independence.

But while at the same time poll taxes were a continuation of the freeholder concept, they did also represent a democratization of American society. Following the

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<sup>29</sup> Williamson at 181; Porter at 22-23.

<sup>30</sup> Porter at 91.

<sup>31</sup> C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1941).

<sup>32</sup> A. HAMILTON, J. JAY, J. MADISON, *THE FEDERALIST*, no. 10, 56 (1937).

Revolutionary War, several states began the process of reforming their voting laws.<sup>34</sup> This occurred for at least two reasons. First, it is difficult not to grant voting rights to individuals who fought a war for independence, especially when the banner of the revolution (as written in the Declaration of Independence) emphasized that all men are created equal. The revolutionary war era definitely represented an era of democracy, especially compared to the colonial period. Second, historian Bernard Bailyn once argued that the real American Revolution was an ideological one.<sup>35</sup> It was a revolution in an understanding and meaning surrounding political concepts such as representation, sovereignty, and constitutionalism, with the United States developing a distinct understanding of these terms, especially in comparison to England.<sup>36</sup> One could argue that same revolution in meaning was occurring with franchise and voting. The freeholder concept which had established a set of assumptions about who could vote was weakened and transformed by the American Revolution. While initially the freeholder idea was not abolished (removal of all property qualifications as a prerequisite to voting), providing alternatives such as the payment of poll taxes represented a more egalitarian application of this principle. One did not have to actually own property in terms of real estate in order to establish a stake in a community, payment of a poll tax also assured that.

But another force jettisoning the traditional real property requirement for voting was the changes in the economy brought about by the emerging industrial revolution in

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<sup>33</sup> F. MONAGHAN, JOHN JAY, 323 (1935).

<sup>34</sup> Porter at 1.

<sup>35</sup> B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, 161 (1977).

the United States. Morton J. Horwitz argued that during the early part of the nineteenth century American law underwent a significant change as a result of industrialization and changes in the economy.<sup>37</sup> These changes reflected a shift away from traditional notions of political and economic power that resided in land and real estate to a new form that was located in the emerging industrial world. Horwitz's story about changes in the law concentrate on topics such as property law and eminent domain, but his analysis on how the economy drives changes in the law is also applicable here. Specifically, the emergence of new forms of wealth beyond traditional property holdings meant that the concept of freeholder had to change. Defining one as having a stake in a society meant less in a world becoming more urban and where wealth might be demonstrated by factory ownership, banking, or finance. These new forms of wealth were reasonable substitutes for the older forms of wealth. Thus, the movement to abandon traditional forms of wealth as a requisite to voting and a sign of freeholder status had to give way to new conceptions of the same. The substitution of the poll tax for property ownership achieved that goal. In many ways, the poll tax was a democratic reform.<sup>38</sup>

But something more was going on here. If freeholder status was simply being transformed, one would have seen merely the substitution of property ownership with the poll tax. But states were not merely substituting one for the other, in many cases there was an abandonment of the poll tax altogether. In 1791 Vermont adopted universal white

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<sup>36</sup> *Id.* at 160-161.

<sup>37</sup> M.J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* (1977).

<sup>38</sup> Williamson at 266.



male suffrage (subject to some age, citizenship, and residency requirements), with New Hampshire quickly following suit soon afterwards.<sup>39</sup> Once the nineteenth century began, the trend towards universal white male suffrage accelerated.<sup>40</sup> This was despite the fact that class and property-based qualifications on voting persisted in 19<sup>th</sup> century Europe.<sup>41</sup> Maryland abolished all property and tax requirements in 1809.<sup>42</sup> Alabama entered the union without any tax or property qualifications,<sup>43</sup> and many of the original 13 states also removed their requirements. By the time of the election of Andrew Jackson as president in 1828 only two states required a freeholder status for voting.<sup>44</sup>

What was occurring with first the rejection of property qualifications and then eventually the poll tax was the abandonment of the freeholder concept in lieu of the democratization of American society. Perhaps it represented what Alexis DeTocqueville in his *Democracy in America* described as the spirit of democracy emerging in a society characterized by a general equality of conditions across the country.<sup>45</sup> Or maybe it was the Americanization of what voting should constitute, or maybe it was a product of a

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<sup>39</sup> Porter at 23.

<sup>40</sup> *Poll Taxes in Ancient and Modern History* at 261.

<sup>41</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, 319 (2000).

<sup>42</sup> Porter at 39-40.

<sup>43</sup> *Id.*

<sup>44</sup> Williamson at 223.

<sup>45</sup> A. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, vol. 1, lxvii (1961).

changing economy. Whatever the reason, one can make an argument that first the institution of the poll tax and then its rejection in Antebellum American were part of a broader movement away from considering wealth in any form as an appropriate requisite to voting. If the poll tax was rejection of older forms of governance that linked property to participation, the abandonment of the poll tax was a further severing of a linkage between wealth and franchise. The poll tax then had a dual legacy in this third period of history. Its adoption was a democratic reform and its rejection the same. It represented, by the time of the Civil War, a rejection of class privilege and freeholder status when it came to political engagement.

#### **D. The Jim Crow Poll Tax**

Had it not been for the Civil War, Reconstruction, and the first civil rights era, the poll tax as an institution probably would have faded from American politics. While the period leading up to the Civil War was marked by an expansion of franchise, Alexander Keyssar notes another one characterized by efforts to deny the right to vote.<sup>46</sup> After the Civil War many states in the South used Jim Crow laws, poll taxes, literacy tests, grandfather laws, and other not so subtle means such as lynchings and cross burnings to prevent newly freed slaves from voting.<sup>47</sup> This was an era that could be described as the

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<sup>46</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, xvi-xvii (2000).

<sup>47</sup> *See generally, e.g.,* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974) (*discussing the various techniques used to intimidate African-Americans away from voting*).

first great disenfranchisement in American history.<sup>48</sup> It is within the context of this period that poll taxes take on their fourth meaning.

Following the Civil War, Republicans in Congress launched a series of proposals and reforms both to punish the South and to bring them back into the United States. These proposals were directed at freeing the African-Americans from slavery and giving them full civil rights protections, including the right to vote. Legislation such as the 1866 Civil Rights Bill, the 1870 Civil Rights Bill, the 1875 Civil Rights Bill, and then the Thirteenth, Fourteenth, and the Fifteenth Amendments all sought to secure this aim by abolishing slavery, providing for equal protection under the law, banning employment discrimination and discrimination in public accommodations, and by granting political rights such as voting. All of these proposals were part of Reconstruction.

Yet Reconstruction did not occur without Southern resistance. Blacks were viewed by many southern Whites as scapegoats and as impediments to social unity.<sup>49</sup> As the newly freed slaves (male) were granted political rights and voted and ran for office southern whites perceived their political grip on power was waning. The first step in fighting Reconstruction and this loss of power was to disenfranchise Blacks.<sup>50</sup> Disenfranchising Blacks could not be directly undertaken by the southern states so long

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<sup>48</sup> See: D. Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WILLIAM MITCHELL L. REV. 484 (2008) (discussing the first and second waves of disenfranchisement in America). See also: J. M. KOUSSER, *COLORBLIND JUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999) for a similar argument.

<sup>49</sup> Woodward at 83.

<sup>50</sup> Woodward at 83.

as federal troops occupied the South and enforced Reconstruction. Alternative strategies would need to be adopted. The rise of the Ku Klux Klan and lynchings to intimidate Blacks from voting was one step in the process.<sup>51</sup>

But two other factors hastened the disenfranchisement in the South. First there was the disputed presidential election of 1876 that eventually led to the end of Reconstruction. Specifically, in the Hayes (Republican) Tilden (Democrat) election there was a prolonged dispute in Florida over which candidate had won the State's electoral votes. Eventually the Democrats were willing to concede the state to Hayes, but only on the condition that the federal troops be withdrawn from the south. That deal was affected, Hayes given Florida's electoral votes and the presidency, and in 1877 the troops were withdrawn. Thus this event ended Reconstruction and direct federal supervision of the states of the old Confederacy.<sup>52</sup> The other factor supporting disenfranchisement was a Supreme Court increasingly unsupportive or perhaps even hostile of congressional civil rights legislation, and also unwilling to challenge state efforts to segregate the races or renew their discrimination against Blacks. It is way beyond this article to recount in detail the history of decisions the Supreme Court issued that limited congressional authority or sustained state discriminatory practices, but holdings in the *Civil Rights*

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<sup>51</sup> R.G. LLOYD, *WHITE SUPREMACY IN THE UNITED STATES*, 8 (1952); Porter at 196.

<sup>52</sup> *See generally*: ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1867* (1988).

*Cases*<sup>53</sup> and later *Plessy v. Ferguson*<sup>54</sup> evidence these practices clearly. This period in the South after Reconstruction is the Jim Crow era.

Numerous techniques were employed to disenfranchise Blacks. Outright lynchings to prevent Blacks from voting were one tool to accomplish this.<sup>55</sup> Efforts were undertaken to amend state constitutions to dampen voting and enfranchisement.<sup>56</sup> Porter also notes other techniques such as ballot box stuffing, stealing of ballots, sudden arrest of voters before elections, and the closing of polling places on Election Day.<sup>57</sup> States adopted literacy tests and “grandfather” clauses as additional tools to restrict Black voting.<sup>58</sup> But for the purposes of this article, poll taxes were one of the important tools used to depress voting.

Lloyd contends that there was a difference between the adoptions of poll taxes in the South during Jim Crow as compared to those after the Revolutionary War. The post-Civil War poll tax was “re-established deliberately with the expressed purpose of restricting the electorate by disenfranchising the Negroes and poor whites.”<sup>59</sup> Ogden and

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<sup>53</sup> Civil Rights Cases, 109 U.S. 3 (1883) (*ruling* that the Civil Rights Act of 1875 was unconstitutional).

<sup>54</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*upholding* racial segregation on trains).

<sup>55</sup> Lloyd at 8.

<sup>56</sup> Porter at 200.

<sup>57</sup> Porter at 196.

<sup>58</sup> Lloyd at 11; Porter at 215. *See also*: F.D.OGDEN, THE POLL TAX IN THE SOUTH, 14-15 (1958) and DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW, 222-223 (2004).

<sup>59</sup> Lloyd at 2.

Stephenson similarly develop two histories to the poll tax, with those adopted after the Revolutionary War to encourage voting while those passed after the Civil War to deny suffrage.<sup>60</sup> Ten southern states enacted poll taxes<sup>61</sup> beginning with Tennessee in 1870,<sup>62</sup> then in Georgia in 1877 (which required all taxes be paid prior to voting), and then Mississippi which placed the poll tax in its constitution.<sup>63</sup> Other states adopted poll taxes such as Arkansas in 1892, South Carolina in 1895, and Virginia in 1901.<sup>64</sup> Texas went even further with its poll tax, requiring it as a prerequisite for registration and for voting in both primaries and general elections.<sup>65</sup> Even once the tax was paid, voters had to produce the receipt as proof. This too served as a tool of disenfranchisement as many did not retain or bring proof of payment when voting.<sup>66</sup> The actual amount of the tax varied. In Virginia it was \$1.50, as it was also in Alabama and Texas. In Mississippi it was \$2.00.<sup>67</sup> To place this fee in context, Virginia's \$1.50 poll tax in 1901 would be approximately \$44 in 2010.

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<sup>60</sup> Ogden at 2.

<sup>61</sup> Lloyd at 14.

<sup>62</sup> Porter at 203.

<sup>63</sup> Porter at 208.

<sup>64</sup> *Poll Taxes in Ancient and Modern History* at 262.

<sup>65</sup> *Id.*

<sup>66</sup> Ogden at 52-53.

<sup>67</sup> Ogden at 33.

Who was required to pay the poll tax? Alabama for example required it of all individuals over 21 and under the age of 45, except for those permanently disabled, those blind or deaf, and those who had served in the military.<sup>68</sup> Virginia required it of everyone over 21 except for Civil War veterans, wives, or widows, and individuals in the military pensioned by the state from military service.<sup>69</sup> Other states with poll taxes had parallel provisions for applicability and exemptions. What is important to remember here is that on the face the poll tax was not singularly directed at African-Americans or solely directed towards their disenfranchisement, even if that was its primary intent. The poll tax applied to all regardless of race. This broad application of the poll tax begs the question: Who did the tax really affect and hurt?

Ogden's *The Poll Tax in the South* offers perhaps the best analysis and answer to this question. He contends that southern legislators were aware of the fact that many poor whites would also be affected by it. Ogden quotes Governor Oates of Alabama as stating: "There are some white men who have no more right and no more business to vote than a negro and not as much as some of them" (sic).<sup>70</sup> While many legislators in the south worried that the poll tax would incorrectly disenfranchise poor whites, others approved of this measure.<sup>71</sup> Overall, there is prima facie evidence based upon the

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<sup>68</sup> Ogden at 39.

<sup>69</sup> *Id.* at 40.

<sup>70</sup> Ogden at 21.

<sup>71</sup> Ogden at 25-26.

legislative debates that the poll taxes were adopted at least with the knowledge that poor whites would be disenfranchised. Ogden argues this was not incidental, but done intentionally.<sup>72</sup> Lloyd reaches a similar conclusion.<sup>73</sup>

A statistical analysis further confirms the broader impact of the poll tax beyond merely disenfranchising African-Americans. While it is impossible to pinpoint and specifically to state that the poll tax discouraged a specific person from voting, the tax can be statistically correlated with a series of variables to determine its general impact.

According to Ogden he found that the:

[P]oll tax payment is influenced by urbanism, density of population, and the number of negroes or other unassimilated groups in the population, and the economic conditions in the area. This analysis suggests that the urban voter, the Negro voter, and the economically depressed voter are especially injured by a tax requirement (sic).<sup>74</sup>

There was both a race and class impact associated with the poll tax.<sup>75</sup> It disenfranchised both African-Americans and poor whites.<sup>76</sup> Lloyd's claim was that the poll tax resulted

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<sup>72</sup> Ogden at 24-25.

<sup>73</sup> Lloyd at 9-12.

<sup>74</sup> Ogden at 173.

<sup>75</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1547, 1481-82 (2001).

<sup>76</sup> *Id.* at 175.



in an overall drop of 35% between 1889 and 1908 in voting in the ten southern states that had adopted it.<sup>77</sup>

What conclusions can one draw from the re-adoption of the poll tax in the South after the Civil War? Lloyd sums it up well in stating that: “The poll tax was deliberately resurrected and re-established in the South in the 1890's and early 1900's, after half a century of free manhood suffrage, with the expressed purpose of restricting the electorate in the various states and disfranchising the Negroes and poor whites following the period known as ‘Negro domination.’”<sup>78</sup> It would not be a stretch to argue that the purpose of the poll tax, especially given both its racial and class impact, was an effort to resurrect the concept of freeholder status in the South. The use of poll taxes, along with literacy tests and grandfathers’ clauses, cumulatively sought to shrink the electorate by disenfranchising Blacks and poor whites. It rejected universal manhood suffrage with the hope that shrinkage of the electorate would maintain Southern Democratic Party authority.<sup>79</sup> The poll tax thus was as much about wealth and class as it was about race, with the broader purpose being to depress turnout.

#### **E. Summary**

The poll tax has had a varied history in the United States. It has been viewed both as a tool to limit franchise and also to promote it. However, the legacy of the tax is often

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<sup>77</sup> Lloyd at 9.

<sup>78</sup> Lloyd at 13.

<sup>79</sup> Lloyd at 14.

understood in terms of its adoption after the Civil War in the South. This understanding of the poll tax is often depicted in racial terms, describing its primary intent as seeking to disenfranchise African-Americans. There is strong evidence that there was a class component to the tax too, affecting intentionally and de facto poor whites. Thus the poll tax adopted at this time was clearly different from the one adopted after the Revolutionary War. While the post Revolutionary War poll tax could both be described as promoting and then eventually dismantling the concept of freeholder status, the post Civil War one seemed instead to resurrect that idea. Understanding the poll tax as being inextricably tied in with both race and class is critical to appreciating its broader significance in American society, and eventually the meaning of the Twenty-Fourth Amendment.

## **II. Interpreting the Poll Tax**

Given its checkered history that ranged from a simple head tax in England, a tool to ensure only freeholders could vote, a democratic reform in post-Revolutionary War America, and then a device to disenfranchise after the Civil War, how was the poll tax understood or depicted in the twentieth century when efforts to abolish it were undertaken? There are two ways to answer this question.

First, on four occasions the United States Supreme Court had the opportunity to review the constitutionality of poll taxes. Given what appeared to be the clear intent to use these taxes to disenfranchise African-Americans and poor whites, one might think that the Court would have easily found that they were unconstitutional either under the

Fourteenth or Fifteen Amendments. However, initially, the Court did not find them unconstitutional but instead upheld them. Yet when the Court did invalidate them it did so not so much because of the racially discriminatory intent or purpose but because of the economic impact upon the poor. Similarly, the congressional debates leading up to the passage of the Twenty-Fourth Amendment reveal that efforts to abolish the poll tax were framed more in terms of the issue of class (impact on the poor) than on race.

#### **A. The Supreme Court and the Poll tax**

##### **1. *Breedlove v. Suttles***

Prior to adoption of the Twenty-Fourth Amendment to the Constitution the Supreme Court upheld poll taxes on two occasions. The first was in *Breedlove v. Suttles*.<sup>80</sup> In *Breedlove*, petitioners challenged a statute requiring all citizens between the ages of 21 and 60 to pay a dollar poll tax prior to voting.<sup>81</sup> This statute did not apply to the blind or to women who were not registering to vote.<sup>82</sup> The appellant contended that the statute was repugnant both to the 14<sup>th</sup> Amendment Equal Protection and Privileges and Immunities Clauses.<sup>83</sup> The Supreme Court did not agree.

The Court first stated that the Equal Protection clause did not require absolute equality.<sup>84</sup> It supported its claim first by drawing a parallel to men who have reached the age of 60 and who were no longer required to perform jury duty, do road work, or

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<sup>80</sup> *Breedlove v. Suttles*, 302 U.S. 277 (1937).

<sup>81</sup> *Breedlove* at 279.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 280.

provide service to the militia.<sup>85</sup> It made sense for them to be exempt from these tasks. Therefore, the court reasoned, the lack of requirement to pay a poll tax was justified as analogous to the above.<sup>86</sup> As far as exempting women, the court stated that in view of burdens necessarily borne by them for the preservation of the race, the state reasonably may exempt them from poll taxes.<sup>87</sup> Additionally, Georgia law at the time stated that men were the head of the household and that their wives were subject to them, so requiring women to pay a poll tax would be increasing the man's burden.<sup>88</sup> The Court reasoned that the poll tax was not a violation of equal protection.<sup>89</sup> Additionally it rejected the 14<sup>th</sup> Amendment claim that the poll tax was a violation of the Privileges and Immunities Clause because the right to vote that they were alleging was a privilege that petitioners were being denied was not granted at the federal level but at the state level.<sup>90</sup> Therefore there was no federal claim. The petitioners' claims were denied and Georgia's poll tax statute was upheld.<sup>91</sup>

The Court stated that the levy of a poll tax had long been a familiar form of taxation, historically used in other countries and here as colonies then as states.<sup>92</sup> Most states limited poll taxes so that they were not grievous or oppressive. For example in

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<sup>84</sup> Id. at 281.

<sup>85</sup> Id. at 282.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id. at 283.

<sup>91</sup> Id. at 284.

<sup>92</sup> Id. at 281.

Georgia the tax had to be less than a dollar a year.<sup>93</sup> The Court stated that these taxes were laid upon the citizens of the state without regard to occupation or property to raise money for the support of government or some other specific end.<sup>94</sup> The Court, in defense of its holding on the equal protection claim, declared that “while possible to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay.”<sup>95</sup> The Justices seems to reason that because this specific statute did not include those men who are older than 60, women who do not wish to vote, and the blind, that enough accommodation has been made for the poor for this tax to pass constitutional muster. Finally the Court stated that the payment of poll taxes as a prerequisite to voting was a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia.<sup>96</sup> Thus it was a reasonable levy placed upon citizens if they choose to vote.

## **2. *Butler v. Thompson***

The Supreme Court also upheld the poll tax in *Butler v. Thompson*.<sup>97</sup> In this case, the petitioner brought a suit alleging that the Virginia poll tax disenfranchised African-Americans in violation of the 14th Amendment Equal Protection Clause.<sup>98</sup> The Court held that in practice the law was applied equally to the citizens of Virginia regardless of

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<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id. at 283-284.

<sup>97</sup> 341 U.S. 937 (1951).

<sup>98</sup> *Butler v. Thompson*, 97 F. Supp. 17, 18 (1951)

the evil motives of its draftsmen, therefore it did not violate the 14th Amendment.<sup>99</sup> According to the Court, a law that is fair on its face and fairly administered does not violate the federal constitution.<sup>100</sup> A state statute that institutes a reasonable poll tax on its citizens does not violate the privileges and immunities that are guaranteed to the citizens of the United States in the Constitution under the 14th Amendment.<sup>101</sup> Moreover no evidence had been produced to show that the requirement was applied unequally.<sup>102</sup> The evidence shown did not show discrimination, therefore there was no constitutional claim.<sup>103</sup>

The Court ruled that this poll tax was a legitimate tax no matter what the intentions of the drafters were, because it applied equally to all citizens of voting age.<sup>104</sup> The court also ruled that this poll tax did not in fact deprive any citizens of their rights.<sup>105</sup>

It is admitted that some of the most vocal and violent members of that Convention (where the poll tax became part of Virginia law) expressed a desire and purpose to eliminate Blacks as voters in Virginia. Yet even the most violent of these also expressed an intention to bring about this result by means that were valid under the Federal Constitution or Federal laws. And the expressions of these few can hardly be taken as necessarily voicing the dominant spirit of that Convention. For other voices were raised in the Convention to advance ideas couched in quite a different key.<sup>106</sup>

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<sup>99</sup> *Id.* at 20.

<sup>100</sup> *Id.* at 22.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 20.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 21.

The Court viewed this law as one that is fair on its face, and fairly administered to raise revenue, and therefore had no constitutional problem with it.<sup>107</sup> Because the right to vote comes from the states, it was the states place and prerogative to institute a poll tax if they choose to do so.<sup>108</sup>

### 3. *Harman v. Forssenius*

After the Twenty-Fourth Amendment was ratified, the first case that the Supreme Court heard regarding a poll tax was *Harman v. Forssenius*<sup>109</sup> where petitioners alleged that the Virginia poll tax was unconstitutional.<sup>110</sup> After ratification of the Twenty-Fourth Amendment, Virginia changed the law requiring payment of the poll tax to include the option to provide a certificate of residence.<sup>111</sup>

The requirement for those who wish to participate in federal elections without paying the poll tax is that they file in each election year, within a stated interval ending six months before the election, a notarized or witnessed certificate attesting that they have been continuous residents of the State since the date of registration (which might have been many years before under Virginia's system of permanent registration) and that they do not presently intend to leave the city or county in which they reside prior to the forthcoming election.<sup>112</sup>

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<sup>107</sup> *Id.* at 22.

<sup>108</sup> *Id.*

<sup>109</sup> *Harman v. Forssenius*, 380 U.S. 528 (1965).

<sup>110</sup> *Harman* at 533.

<sup>111</sup> *Id.* at 534. Va.Code Ann. s 24-17.2 (1964 Supp.)

<sup>112</sup> *Id.* at 380 U.S. at 541.

Chief Justice Warren stated that the requirement of Virginia citizens to pay a poll tax prior to voting was a clear violation of the Twenty-Fourth Amendment.<sup>113</sup> Initially the state argued that the federal courts should abstain from hearing this case because of the conflict between state and federal law.<sup>114</sup> The Court ruled that because of the immediacy and importance of this issue, the District Court did not err by not abstaining.<sup>115</sup> With that decided, the main issue was whether the state of Virginia can constitutionally require a federal voter to either pay a poll tax as required for state elections or file a certificate of residency.<sup>116</sup>

In declaring the poll tax a violation of the Twenty-Fourth Amendment<sup>117</sup> the Court characterized its and Congress's understanding of the device both in economic and racial terms. Chief Justice Warren in his majority opinion penned: "One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise."<sup>118</sup> "Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax," thereby serving as the motivation behind the Twenty-Fourth Amendment.<sup>119</sup> The tax, despite its small price, penalized both those who did not pay the tax presently and in the future.<sup>120</sup> What was the impact of that tax? For Warren:

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<sup>113</sup> *Id.* at 533-534.

<sup>114</sup> *Id.* at 536-537.

<sup>115</sup> *Id.* at 537.

<sup>116</sup> *Id.* at 538.

<sup>117</sup> *Id.* at 533-34.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 534.

<sup>120</sup> *Id.*



While it is true that the amount of poll tax now required to be paid in the several States is small and imposes only a slight economical obstacle for any citizen who desires to qualify in order to vote, nevertheless, it is significant that the voting in poll tax States is relatively low as compared to the overall population which would be eligible.<sup>121</sup>

The poll tax definitely disenfranchised the poor. But the Court also noted a racial animus with the tax, declaring: “In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner.”<sup>122</sup> Thus, the poll tax also disenfranchised African-Americans, but the primary focus of the Court’s attention here was less the issue of race than class.

The Court ruled that by changing the law allowing federal voters to *either* pay a poll tax *or* provide a certificate of residence, the state of Virginia was still indirectly denying the franchise.<sup>123</sup> The Twenty-Fourth amendment prohibited the requirement of a payment of a poll tax as a prerequisite to voting, and the Virginia law tried to provide a milder substitute.<sup>124</sup> The Court ignored this substitute option. According to the Court: [T]he Twenty-fourth Amendment does not merely insure that the franchise shall not be ‘denied’ by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be ‘denied or abridged’ for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth ‘nullifies sophisticated as well as simple-minded modes’ of impairing. It hits onerous procedural requirements which effectively handicap exercise of the franchise—by those claiming the constitutional immunity.<sup>125</sup>

Notice the language that Warren employed in this passage. He notes the Amendment’s choice of words to include “denied or abridged,” clearly a language

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<sup>121</sup> *Id.*

<sup>122</sup> 380 U.S. at 540, fn. 19.

<sup>123</sup> *Id.* at 541.

<sup>124</sup> *Id.* at 542.

broadly than simply saying that the poll tax must be the direct cause of the denial of franchise rights. Warren then backs up that reading by declaring that the purpose of the Amendment was to address both the obvious and more subtle ways such a tax could be used to disenfranchise. Overall, Warren's opinion interpreted the Twenty-Fourth Amendment broadly to address almost any effort to leverage the payment of a price in order to vote. For these reasons, the court held the Virginia law was unconstitutional as a violation of the Twenty-Fourth Amendment.<sup>126</sup>

#### 4. *Harper v Virginia Board of Elections*

The second case the United States Supreme Court heard where the poll tax amendment was debated was *Harper v Virginia Board of Elections*.<sup>127</sup> In this case, Virginia residents sued the election board alleging that based on the Twenty-Fourth Amendment, the tax issued to them at the polls in a state election was unconstitutional.<sup>128</sup> The Court stated that the right of suffrage is subject to the imposition of state standards which are not discriminatory.<sup>129</sup> The Court ruled that wealth, race, creed or color have no bearing on a person's ability to participate intelligently in the electoral process.<sup>130</sup> Additionally, it determined that wealth has no relation to voter qualifications.<sup>131</sup> To

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<sup>125</sup> 380 U.S. at 540-541.

<sup>126</sup> Id. at 544.

<sup>127</sup> **Error! Main Document Only.** 383 U.S. 663 (1966).

<sup>128</sup> *Harper* at 665.

<sup>129</sup> *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51 (1959).

<sup>130</sup> *Harper*, 383 U.S. at 668.

<sup>131</sup> Id.

introduce wealth or a payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.<sup>132</sup>

That said, the Court found that a state violates the Equal Protection Clause of the 14th Amendment whenever it makes the affluence of the voter or payment of a fee an electoral standard.<sup>133</sup> Finally, the court ruled that paying a tax had no relation to one's ability to vote.<sup>134</sup> "A citizen, a qualified voter, is no more nor no less so because he lived in the city or on the farm...We say the same whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all, pay the fee or fails to pay it."<sup>135</sup> Therefore, this poll tax was found unconstitutional based on the 14th Amendment Equal Protection Clause and not the Twenty-Fourth Amendment prohibiting the consideration of wealth as a qualification for voting.<sup>136</sup>

The Court made it clear that the franchise cannot be denied to someone based on their lack of ability to pay a tax. In essence, due to a lack of wealth. Even the \$1.50 poll tax was viewed as a barrier to disenfranchise otherwise qualified voters that could not afford to pay that poll tax.

## **5. Summary**

Prior to the adoption of the Twenty-Fourth Amendment, petitioners tried to have poll taxes eliminated based in the 14th Amendment Equal Protection Clause. In

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<sup>132</sup> Id.

<sup>133</sup> Id. at 666.

<sup>134</sup> Id. at 670.

<sup>135</sup> Id. at 667.

*Breedlove* and *Butler* the courts ruled that as long as the poll tax was applied equally to everyone there were no constitutional violation. The courts viewed these taxes as a reasonable way for states to generate revenue. This was not viewed as an issue of disenfranchising anyone.

But in *Harman* and *Harper*, the Court viewed the poll tax primarily in terms of a device that served as a disenfranchisement of the poor. Both cases made clear that wealth had no bearing on the ability of a citizen to qualify to vote. Additionally, it is also curious that the Court focused more on the issue of wealth than race when rendering its decisions in *Harman and Harper*. This was the quintessential opportunity for the Court to argue that Twenty-Fourth Amendment was aimed at discriminating against Blacks. It chose not to take this route, instead framing the issue of reading the Twenty-Fourth Amendment in one case as broadly banning practices that exact a price on voting, with a similar reading offered for the Equal Protection Clause. In part the reason for the Court's framing of the issue may have been a consequence of how litigants argued the cases, and in part a consequence of congressional debates on the Amendment. But in either case, a review of how Congress understood the poll tax and the Twenty-Fourth Amendment provides additional clarification regarding what its purpose might have been and how it should be read.

## **B. Congress and the Twenty-Fourth Amendment**

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<sup>136</sup> Id.

In addition to the Supreme Court ruling on the constitutionality of the poll tax four times, Congress also weighed in on the issue. Beginning in 1930s and until its passage in 1962, there were repeated efforts in Congress to abolish the poll tax. While numerous scholars and criticisms have been directed at efforts to ascertain legislative intent based upon a gloss of Congressional debates, they nonetheless do offer some insights into what the Twenty-Fourth Amendment was about and what problem it was seeking to address.

Congressional efforts to ban the poll tax culminated in 1962 when both the House and the Senate voted for the Twenty-Fourth Amendment and sent it off to the states for ratification. But adoption of the poll tax amendment was not a sudden act; it came after nearly three decades of legislative efforts in Congress. The debates during this thirty year period were framed along both the racial and class-based (income) impact that the tax had. The framing of this debate, especially with the emphasis being placed upon the class issues, was part of a deliberate strategy by opponents to win over southerners and not alienate those who feared Black franchise. Among the groups advocating this strategy was the NAACP.<sup>137</sup>

The NAACP was established in 1909 with a principle mission and legal strategy to overturn *Plessy v. Ferguson*. But a secondary goal was to secure voting rights for Blacks by attacking the Jim Crow laws—such as the grandfather law, literacy tests and poll taxes—that stood as barriers to franchise. Yet a direct assault on the poll tax as a racially discriminatory device would alienate many whites and generate little support in

the south. A more indirect tactic was needed, and that was to emphasize the impact that the poll tax had on the poor.

By the 1930s and 1940s it was clear that the poll tax disenfranchised individuals beyond the Black community. As Lloyd and Ogden pointed out,<sup>138</sup> the poll tax also affected the poor, disenfranchising many whites in the south. With the arrival of the depression, the tax, although nominal, made it even more difficult for poor whites to pay.<sup>139</sup> With the coming of the Roosevelt administration, many unions saw the tax as an impediment to organize and mobilize.<sup>140</sup> Thus, the NAACP found ready allies in other groups if it emphasized the economic impact that the poll tax had, as opposed to making race and Black franchise the primary issue.

President Roosevelt took up the banner against the poll tax in 1938, describing it as “feudal.”<sup>141</sup> Others described the tax as “Un-American.”<sup>142</sup> Some viewed the poll tax as an impediment to political reform against corrupt local governments.<sup>143</sup> A 1942 Gallup poll found that 63 percent of those surveyed supported repeal of the poll tax.<sup>144</sup> In 1938 the Southern Conference for Human Welfare (SCHW) was established. This group represented civil rights workers and Blacks and it sought to organize the repeal of the poll

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<sup>137</sup> S.F. LAWSON, VOTING RIGHTS IN THE SOUTH, 1944-1969, 58-9 (1976).

<sup>138</sup> Lloyd at 9; Ogden 172-175.

<sup>139</sup> Lawson at 55-6.

<sup>140</sup> *Id.*

<sup>141</sup> Lawson at 57.

<sup>142</sup> Lawson at 58.

<sup>143</sup> *Id.*

<sup>144</sup> Lawson at 58.

tax.<sup>145</sup> It, along with the NAACP and National Committee to Abolish the Poll Tax (NCAPT) worked with labor unions to make a push in Congress to repeal the poll tax.<sup>146</sup>

The first efforts in Congress to repeal the poll tax took place in 1939 when California Representative Lee Geyer sought to make it illegal to pay someone's tax in exchange for their vote.<sup>147</sup> The legislation went nowhere. In 1941 Florida Senator Claude Pepper introduced legislation to abolish the poll tax but the Supreme Court's *Breedlove* decision upholding it, along with World War II, initially slowed progress on the bill.<sup>148</sup> But the war eventually provided new support to repeal the poll tax, especially as it impacted soldiers fighting in it but who could not afford to pay. The Soldier Vote Act was meant to address this problem by abolishing the poll tax for those in the military. However, foes of Black franchise, sensing that the Act was an incremental first step against the poll tax, bitterly fought it.<sup>149</sup> Thus, until its final passage in 1962, the poll tax discussion in Congress was primarily framed around class issues, but many understood that race and Black civil rights lurked just under the surface of the debates.

During the 1962 debates on the Twenty-Fourth Amendment, Congressional debates and arguments by supporters of the repeal of the poll tax emphasized by the class and racial aspects of the device. Florida Senator Spessard Holland, a key supporter of the

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<sup>145</sup> *Id.* at 59.

<sup>146</sup> Lawson at 59-60.

<sup>147</sup> Lawson at 61.

<sup>148</sup> Lawson at 63-4.

<sup>149</sup> Lawson at 67-72.

Amendment, emphasized the impact in voting that occurred in his state when they repealed the poll tax.<sup>150</sup>

It was shown in my own State, when we repealed the poll tax in 1937—and I had a modest part in doing that, as of member of the State senate at the time—that at the next election in 1940, at which time the colored people were not voting in my state, there was an immense increase in voting by white people. This resulted from the fact that many people, because of penury or because of carelessness or because of a dislike of what they saw happening in some counties as a result of the poll tax, had not participated in the elections. These people came in to participate.<sup>151</sup>

Holland thus framed his arguments in favor of repeal of the tax more in terms of good government or democracy than he did on racial terms.

There are persons who think we are more interested only in white voters, and there are persons who think we are interested in only Negro voters. So far as I am concerned, I think a citizen is entitled to vote for his President, his Vice-President, his Senators, and his Representatives, regardless of what may be the laws of the State with reference to local elections. I think that the results accomplished in our State, where in 1960, 1,540,000-plus voted, indicate rather conclusively the beneficial nature of what Florida has done.<sup>152</sup>

Illinois Senator Paul Douglas saw the poll tax and property qualifications, along with literacy tests, as devices to split the “poor whites apart from the Negroes so that a political alliance between them would be impossible.”<sup>153</sup> Even opponents of the Amendment, such as Senator Russell, tried to downplay the racial aspect of the tax,

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<sup>150</sup> Cong. Rec. (March 27, 1962).

<sup>151</sup> Cong. Rec. 4154 (1962).

<sup>152</sup> Cong. Rec. (March 27, 1962).

<sup>153</sup> Cong. Rec. (March 27, 1962).



contending that: “The States which require a poll tax today apply the levy equally to all voters and to all prospective voters without regard to race, creed, or color.”<sup>154</sup>

Overall, the important point that this brief narrative on the congressional history leading up to the passage of the Twenty-Fourth Amendment should indicate that the poll tax debate was not singularly placed within a context of race but also with one that emphasized and criticized the linkage between wealth and voting.<sup>155</sup> The debate indicated that poor whites and those in the military were impacted by the poll taxes, and that these fees stood as an impediment to democracy, good government, and political reform.

### C. Summary

Both the congressional debates leading up to the passage of the Twenty-Fourth Amendment in the 1960s and the two Supreme Court decisions in *Harman v. Forssenius* and then in *Harper v. Virginia Board of Elections* were circumscribed by discussions of race and class. While the major impetus from groups such as the NAACP was to attack the poll tax as a racially discriminatory tool that suppressed Black civil rights, the debate was framed even broader by them and other groups in order to elicit a broader coalitional support to pass repeal of this practice. Thus for tactical reasons litigants in *Harman* and *Harper* placed greater focus on the class than racial aspects of the poll tax, thereby in part explaining why the Court penned the decisions the way it did.

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<sup>154</sup> Cong. Rec. 4154 (1962).

<sup>155</sup> Nathaniel Persily, *Candidates v. Parties: The Constitutional Restraints on Primary*

But the importance of noting the racial and class-based arguments surrounding the poll tax is significant. If the congressional debates and Supreme Court decisions can provide any insight into the meaning of the Twenty-Fourth Amendment, they suggest that one cannot read the text without contemplating its broader purpose. In part, one can argue that the Amendment should be read as part of a broader effort to break the linkage between wealth and voting. It is a continuation of the assault on the freeholder status that carried over from England to the United States and which was being dismantled in the post Revolutionary War and Antebellum eras, only to be sidetracked by the Civil War and the Jim Crow period. One legitimate reading then of the Twenty-Fourth Amendment thus is that it sought to cut the connection between property, wealth, and voting. It is this connection which serves as a tax on franchise that the Amendment sought to break.

### **III. Applying the Twenty-Fourth Amendment**

Except for the *Harman* decision, the Twenty-Fourth Amendment has never been successfully employed to challenge any practice in the United States. Instead, a review of several issues where the Twenty-Fourth Amendment could have been alleged reveals a host of lost opportunities and narrow readings that have practically rendered the Amendment dormant.

#### **A. The Poll Tax and the Payment of Taxes**

The constitutionality of a classification restricting the right to vote in a local election was at issue in *Hill v. Stone*.<sup>156</sup> Residents of Fort Worth, Texas challenged state and local laws limiting the ability to vote in local city board elections to those who have made real, mixed or personal property available.<sup>157</sup> In essence the statute called for payment via property in order to vote.<sup>158</sup> Petitioners alleged that this statute disenfranchised non-rendering voters in violation of the 14th Amendment Equal Protection Clause.<sup>159</sup>

The Supreme Court reviewed previous case law including *Harper* to determine the constitutionality of this statute.<sup>160</sup> For example, the Court had ruled in *Kramer v Union Free School District No. 15*<sup>161</sup> that in an election of general interest restrictions on the franchise other than residence, age and citizenship must promote a compelling state interest in order to survive a constitutional attack. Additionally, in *Cipriano v City of Houma*<sup>162</sup> and *City of Phoenix v. Kolodziejcki*<sup>163</sup> it ruled that the franchise could not be limited to those who pay property taxes or those who pay real property taxes for a bond election respectively. The Court held here however that the requirement of what amounts to be a payment for the franchise unconstitutionally disenfranchises those otherwise

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<sup>156</sup> *Hill, Attorney General of Texas v. Stone et al.*, 421 U.S. 289, (1975).

<sup>157</sup> *Id.* at 290.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 293.

<sup>160</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

<sup>161</sup> *Kramer v Union Free School District No. 15*, 395 U.S. 621 (1969).

<sup>162</sup> *Cipriano v City of Houma*, 395 U.S. 701 (1969)

<sup>163</sup> *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970).

qualified to vote and does not constitute a compelling state interest.<sup>164</sup> Therefore, the Texas statute was unconstitutional. However, the court reached its decision under the 14th Amendment Equal Protection Clause and not the Twenty-Fourth Amendment.

## **B. Poll Tax and Voter identification Laws**

### **1. *Crawford v Marion County Election Board***

In *Crawford v Marion County Election Board*, Crawford challenged an Indiana statute requiring voters to have state issued identification in order to vote.<sup>165</sup> Crawford alleged that this was a burden in violation of the 14th Amendment Equal Protection Clause.<sup>166</sup> The Court stated that the government interests of election modernization and the interest in preventing voter fraud outweighed the individuals' right to vote.<sup>167</sup> The integrity and reliability of the voting process was a sufficiently strong government interest to allow the franchise to be restricted.<sup>168</sup>

In *Crawford*, the petitioner did not argue that this was a violation of the Twenty-Fourth poll tax amendment which provides that the franchise cannot be limited based on wealth. In part they did not do this because this was a facial as opposed to an applied challenge. As a consequence, in *Crawford*, the petitioners failed to provide the number of people affected by this legislation and the actual cost associated with obtaining a state

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<sup>164</sup> Hill, 421 U.S. at 295.

<sup>165</sup> *Crawford v. Marion County Election Board et. al.*, 128 S. Ct. 1610, 1613 (2008).

<sup>166</sup> *Id.* at 1614.

<sup>167</sup> *Id.* at 1624.

<sup>168</sup> *Id.*

issued identification card.<sup>169</sup> Justice Stevens, writing for the majority, raised the possibility that admissible evidence about the burdens of the voter identification law might provide evidence on the burden that some might face and therefore raise a constitutional objection.<sup>170</sup> However, his comments did not suggest how the Court would rule and it did not indicate that a Twenty-Fourth Amendment claim was possible.

## 2. **Michigan and *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA***

In Michigan at issue was the state and federal constitutionality of 2005 PA 71, a state law that would require either presentation of a photo ID when voting or the signing of an affidavit stating one does not have the required identification.<sup>171</sup> The Court, in an advisory opinion, found the law to be constitutional under the balancing test found in *Burdick v. Takushi*.<sup>172</sup> Again the court declined to find this to be a poll tax.

In 1996 the state adopted a voter photo identification law.<sup>173</sup> Before that law took effect the Michigan Attorney General issued an advisory opinion concluding that the requirement was unconstitutional because it did not advance a compelling state interest, lacking evidence of substantial voter fraud in the state.<sup>174</sup> As a result of the events such

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<sup>169</sup> *Id.* at 1622.

<sup>170</sup> 128 S.Ct at 1623, fn. 20.

<sup>171</sup> 2007 WL 2410868 at 1.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1.

<sup>174</sup> *Id.*

as those surrounding the 2000 presidential election,<sup>175</sup> the state reenacted the voter ID law in the form of 2005 PA 71. Upon request from the Michigan House of Representatives which is permitted to ask for an advisory opinion, the State Supreme Court invited briefs to determine the facial constitutionality of 2005 PA 71.<sup>176</sup>

As in the Indiana case, the Michigan Supreme Court began its analysis by declaring that the right to vote is fundamental, but not absolute.<sup>177</sup> The Court noted that in the State's Constitution, the Legislature was given the authority to "*enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.*"<sup>178</sup> The Court indicated that the purpose of this constitutional language was to grant the state the power to prevent fraudulent voting.<sup>179</sup> The Court also referenced how under federal jurisprudence states were given the authority to regulate their own elections,<sup>180</sup> in order to prevent fraud and protect the right of a lawful voter to exercise their franchise.<sup>181</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 2.

<sup>177</sup> *Id.* at 4.

<sup>178</sup> *Id.* at 4 (*quoting* Mich. Con. art. 2, sec. 4) (italics in the Court opinion).

<sup>179</sup> In re Request for Advisory Opinion at 4.

<sup>180</sup> *Id.* at 4 (*citing* inter alia, *Burdick v. Takushi*).

<sup>181</sup> *Id.* at 4.

Thus, while the Michigan Supreme Court indicated that fundamental rights generally must be examined under strict scrutiny,<sup>182</sup> when it came to the area of election law the United States Supreme Court has rejected that analysis, preferring instead the more “flexible standard” as articulated in *Burdick*.<sup>183</sup> According to the Court, the threshold question then is to determine if

the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state.<sup>184</sup>

The Court quickly disposes of the burden question. It notes that it is slight and that of 2005 PA 71 “the statute merely requires the presentation of photo identification that the voter already possesses.”<sup>185</sup> The Court stated that the Attorney General did not claim that the photo ID requirement burdens voters who already have an ID, but merely that it might do so for those lacking the ID at present.<sup>186</sup> The Court quickly disposes of this objection by stating that the alternative to the photo ID is the signing of an affidavit which itself is not burdensome.<sup>187</sup> Alternatively, one could also request an absentee ballot to avoid this

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<sup>182</sup> *Id.* at 5.

<sup>183</sup> *Id.* at 5-6.

<sup>184</sup> *Id.* at 6.

<sup>185</sup> *Id.* at 6.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 6-7.

requirement.<sup>188</sup> Hence, for these reasons, the more flexible standard under *Burdick* is used to analyze the ID requirement.

The Court thus weighs the State's constitutional interest in preventing fraud against what it perceives is the slight burden of the voter ID requirement. It finds that the Article 2, section 4 state constitutional requirement to preserve the purity of the elections and to guard against abuses are compelling interests.<sup>189</sup> In addition, the Court notes that the state is not required to provide empirical evidence of voter fraud and that instead it may take prophylactic action to prevent it.<sup>190</sup> However, even if some proof is demanded, the Court says that in-person fraud is covert and hard to detect, and therefore it could not see how such proof could be undertaken.<sup>191</sup> Thus, under the *Burdick* flexible standard, the Michigan Supreme Court upheld 2005 PA 71 against federal constitutional challenges,<sup>192</sup> and eventually that it was not a violation of the state constitution either.<sup>193</sup> Finally, the Court, as was the case in Indiana in *Crawford*,<sup>194</sup> rejects the claim that the photo ID is an unconstitutional poll tax, finding that no fee is required to vote and because of the affidavit bypass.<sup>195</sup>

### 3. Georgia and *Common Cause/Georgia v. Billups*

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 7.

<sup>190</sup> *Id.* at 7.

<sup>191</sup> *Id.* at 7, fn. 64.

<sup>192</sup> *Id.* at 8.

<sup>193</sup> *Id.* at 8-10.

<sup>194</sup> 472 F.3d at 952.

<sup>195</sup> In re Request for Advisory Opinion at 12.



In 2005, the Georgia Legislature adopted and the governor signed House Bill 244, or Act 53 ("HB 244"),<sup>196</sup> requiring all registered voters in Georgia who vote in person at the polls to present a government-issued photo ID to election officials before being allowed to vote.<sup>197</sup> Subsequently, in 2006 the States adopted the 2006 Photo ID Act which repealed the 2005 Amendment and replaced it with near identical language.<sup>198</sup> The one difference between the 2005 Amendment and the 2006 Act was that the latter also amended state law to require the Board of Elections in each county to issue a Georgia photo voter identification card without charge to voters upon presentation of certain identifying documents. This changed previous law<sup>199</sup> which required individuals to complete an affidavit of indigency if they could not afford the ID.<sup>200</sup> For individuals who did not have a state driver's license, the 2006 Act also listed numerous other acceptable identifying documents to obtain the government ID or vote, including passports and military or tribal IDs.<sup>201</sup> Finally, the Act also mandated that each county have a place open Monday through Friday for a minimum of eight hours each day for the purpose of issuing the IDs.<sup>202</sup>

Common Cause Georgia, NAACP, and several individuals challenged the 2006 Act as a violation of the First and Fourteenth Amendments rights to vote and as a poll

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<sup>196</sup> HB 244 amended O.C.G.A. § 21-2-417, which did not require the production of a government-issued ID but instead allowed it among several other forms of proof of identification to be used when voting in person. 2007 WL 2601438 at \*6.

<sup>197</sup> 2007 WL 2601438 at \*7.

<sup>198</sup> *Id.*

<sup>199</sup> O.C.G.A. § 40-5-103.

<sup>200</sup> 2007 WL 2601438 at \*7-8.

<sup>201</sup> 2007 WL 2601438 at \*8.

tax.<sup>203</sup> They also alleged various state constitutional claims and sought a preliminary injunction to halt enforcement of the law.<sup>204</sup> Following a rather complicated history of litigation in both state and federal courts where the plaintiffs filed several complaints and amended motions for temporary and permanent injunctions,<sup>205</sup> a federal district court upheld the 2006 Act and rejected demands to enjoin its enforcement.<sup>206</sup>

In reviewing the case the district court began its substantive legal analysis on the constitutionality of the 2006 Act by affirming that voting is a fundamental right.<sup>207</sup> It then finds that the right to vote is not absolute, but that the state cannot unduly burden that right.<sup>208</sup> The question for the court then is what test to use to determine a burden, and after recounting several possibilities, it settles on the *Burdick* flexible standard approach.<sup>209</sup> In applying this standard the court thus had to weigh the government interests against the magnitude of their impact on the First Amendment rights of the plaintiffs. Interestingly, in arriving at this standard, the court implicitly rejected claims that the restriction of the Act's ID requirement was severe, therefore making the more

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<sup>202</sup> 2007 WL 2601438 at \*9-11.

<sup>203</sup> 2007 WL 2601438 at \*1.

<sup>204</sup> *Id.*

<sup>205</sup> 2007 WL 2601438 at \*3-4.

<sup>206</sup> 2007 WL 2601438 at \*50.

<sup>207</sup> 2007 WL 2601438 at \*42.

<sup>208</sup> *Id.*

<sup>209</sup> 2007 WL 2601438 at \*43-4 ("The Court finds that the appropriate standard of review for evaluating the 2006 Photo ID Act is the *Burdick* sliding scale standard. . . Under that standard, the Court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 433-34.").

flexible weighing approach the appropriate standard for review.<sup>210</sup>

In terms of the state interests being offered, the court notes that the “State and the State Defendants assert that the 2006 Photo ID Act's Photo ID requirement is designed to curb voting fraud.”<sup>211</sup> In looking to ascertain the instances of voter fraud in Georgia the court’s finding of fact acknowledge statements by the Secretary of State that in the previous ten years the “office received no reports of voter impersonation involving a scenario in which a voter appeared at the polls and voted as another person, and the actual person later appeared at the polls and attempted to vote as himself.”<sup>212</sup> The Secretary of State also declared that the “Photo ID requirement for in-person voting was unnecessary, created a significant obstacle to voting for many voters,”<sup>213</sup> and that absentee voting was the source of many of the problems.<sup>214</sup> Despite these acknowledgments by the Secretary, the court dismissed them and the need for the State to provide evidence of voting fraud. Instead, the court noted that since it was not applying strict scrutiny the State did not have to offer this empirical support and, moreover, “the legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them.”<sup>215</sup>

In terms of weighing this state interest against the injury to the plaintiffs’ right to

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<sup>210</sup> See: 2007 WL 2601438 at \*43 for a discussion of where the court begins the analysis of the two tier approach to voting regulations but then simply adopts the flexible standard without explaining why the burden is not severe.

<sup>211</sup> 2007 WL 2601438 at \*47.

<sup>212</sup> 2007 WL 2601438 at \*21.

<sup>213</sup> 2007 WL 2601438 at \*23.

<sup>214</sup> *Id.* at \*21.

<sup>215</sup> *Id.* at \*48 (*quoting Rokita*, 458 F.Supp.2d at 829).

vote, the court notes that the burden to the latter is not severe. It notes that the ID is free,<sup>216</sup> that each county has an office that is easily accessible to secure the ID,<sup>217</sup> and that none of the plaintiffs granted standing had difficulty securing the ID.<sup>218</sup> It also pointed out that a public education program to inform voters about the ID requirements was aimed at mitigating the burdens.<sup>219</sup> Thus, the court refused to grant the injunction and it also refused to invalidate the ID requirements under the Twenty-Fourth Amendment.

#### **4. Arizona and *Gonzalez v. Arizona***

*Gonzalez v. Arizona*<sup>220</sup> is a third case where the Twenty-Fourth Amendment was invoked to challenge voter photo ID requirements. Again the claim was rejected and the ID requirement was permitted. At issue here was a photo ID enacted as Proposition 200 via a ballot initiative in 2004.<sup>221</sup> Proposition 200 required “persons wishing to register to vote for the first time in Arizona to present proof of citizenship, and to require all Arizona voters to present identification when they vote in person at the polls.”<sup>222</sup> A coalition of groups challenged it, claiming it to be a poll tax, that it violated the First and Fourteenth Amendment Equal Protection clause and the right to vote, and that it also violated the Voting Rights Act, among other provisions.<sup>223</sup> Plaintiffs sought to enjoin

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<sup>216</sup> 2007 WL 2601438 at \*44.

<sup>217</sup> *Id.*

<sup>218</sup> 2007 WL 2601438 at \*43-6.

<sup>219</sup> 2007 WL 2601438 at \*46.

<sup>220</sup> 485 F.3d 1041 (9<sup>th</sup> Cir. 2007).

<sup>221</sup> 485 F.3d at 1046.

<sup>222</sup> *Id.*

<sup>223</sup> 485 F.3d at 1046.

enforcement of Proposition 200 prior to the 2006 election and were initially rejected by a federal district court<sup>224</sup> which rejected the parallels between the photo ID and a poll tax.<sup>225</sup> The court also indicated that the factual record necessary to show a burden on voting rights had not been developed. The Ninth Circuit reversed and granted the injunction,<sup>226</sup> but the United States Supreme Court vacated the stay and remanded the case back to the Court of Appeals.<sup>227</sup> In its reasoning the Supreme Court noted that while the right to vote was important so was addressing voter fraud, but that the Ninth Circuit had failed to give reasons for why it reversed the lower court.<sup>228</sup> On remand, the Ninth Circuit upheld Proposition 200.

In upholding the photo ID law the Court of Appeals quickly rejected the poll tax argument by distinguishing it from the fee paid in Virginia in *Harman v. Forssenius*.<sup>229</sup> In *Harman* the right to vote was abridged because failure to pay the poll tax disenfranchised.<sup>230</sup> Here, voters need only show proof of citizenship and the plaintiffs have not shown how this constitutes a form of poll tax.<sup>231</sup> Next, the court, drawing upon *Burdick*,<sup>232</sup> indicated that the plaintiffs had failed to demonstrate why strict scrutiny needed to be used in this case because they had failed to show how the ID required

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<sup>224</sup> *Gonzalez v. Arizona*, Slip Copy, 2006 WL 3627297 (D.Ariz.).

<sup>225</sup> 2006 WL 3627297 at \*4-5.

<sup>226</sup> 485 F.3d at 1046.

<sup>227</sup> *Purcell v. Gonzalez*, 127 S.Ct. 5 (2006).

<sup>228</sup> 127 S.Ct. at \*7-8.

<sup>229</sup> 380 U.S. 528 (1965).

<sup>230</sup> 485 F.3d at 1049.

<sup>231</sup> *Id.* at 1049.

<sup>232</sup> 485 F.3d at 1049.

imposed a severe burden upon the right to vote.<sup>233</sup> Thus, examining Proposition 200 under the more flexible *Burdick* standard the Court found that four affidavits of individuals claiming to be burdened by the photo ID law were insufficient or inappropriate to show the hardship claimed.<sup>234</sup> In effect, plaintiffs had thus far been unable to provide a record to show the alleged harms, and therefore the Ninth Circuit upheld the decision of the district court to deny the injunction.<sup>235</sup>

## 5. *Weinschenk v. Missouri*

One court in *Weinschenk v. Missouri*<sup>236</sup> did invalidate a voter photo ID law, but it did not do so on the basis of the Twenty-Fourth Amendment, despite noting the significant costs that some individuals would bear as they attempted to vote. At issue was SB 1014, a Missouri photo ID requirement that was adopted in 2006.<sup>237</sup> SB 1014 amended State law, mandating that as a condition of voting that “Missourians present as identification a document issued by the state or federal governments that contains the person's name as listed in the voter registration records, the person's photograph, and an expiration date showing that the ID is not expired.”<sup>238</sup> According to the Missouri Supreme Court, the change in the law effectively meant that for most residents only a state-issued driver’s or non-driver’s license or United States passport would be

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<sup>233</sup> *Id.* at 1049-50.

<sup>234</sup> 485 F.3d at 1050-51.

<sup>235</sup> 485 F.3d at 1052.

<sup>236</sup> 203 S.W.3d 201 (Mo. S. Ct. 2006).

<sup>237</sup> 203 S.W.3d at 205.

<sup>238</sup> *Id.* (citing 115.427.1, RS Mo Supp.2006).

considered an acceptable ID.<sup>239</sup> SB 1014 was challenged as a poll tax, under First and Fourteenth Amendment claims, and as a violation of various provisions of the Missouri Constitution.<sup>240</sup> The Missouri Supreme Court sustained the challenges.

Two points are critical to the decision in *Weinschenk* that distinguish it from the other cases sustaining the voter ID laws. First, the court stated that: “This case stands in stark contrast to the Georgia and Indiana cases, for their decisions were largely based on those courts’ findings that the parties had simply presented theoretical arguments and had failed to offer specific evidence of voters who were required to bear these costs in order to exercise their right to vote.”<sup>241</sup> Plaintiffs provided here the empirical evidence to show the actual burden that the ID would cause. They documented the real costs in terms what it would take to obtain proper identification to vote. Specifically, the court found that in some cases that plaintiff’s had to pay \$12 or \$11 for the driver’s or non-driver’s license, and that birth certificates would cost up to \$20.<sup>242</sup> Documenting real costs proved a real burden, and having shown the latter, the court was convinced that the severe burdens test as mandated in *Burdick* had been met.<sup>243</sup> Second, the court also emphasized that notwithstanding *Burdick*, the photo ID requirement was also going to be examined under the Missouri State Constitution which appeared to offer more protection for the right to vote than found under the federal Constitution.<sup>244</sup> The combination of empirical

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<sup>239</sup> 203 S.W.3d at 205-6.

<sup>240</sup> 203 S.W.3d at 204.

<sup>241</sup> 203 S.W.3d at 214.

<sup>242</sup> *Id.*

<sup>243</sup> 203 S.W.3d at 216.

<sup>244</sup> 203 S.W.3d at 212-214.

documentation and appeal to state constitutional law led the Court to reach conclusions under both federal and Missouri law contrary to the decisions in Indiana, Georgia, Michigan, and Arizona.

In its analysis of SB 1014, the Missouri Court highlighted several burdens that the law imposed upon its citizens. First, it found that:

[B]etween 3 and 4 percent of Missouri citizens lack the requisite photo ID and would, thus, need to obtain a driver's or non-driver's license or a passport in order to vote. Specifically, the trial court noted that the Secretary of State's analysis in August 2006 estimated that approximately 240,000 registered voters may not have the required photo ID and that the Department of Revenue's estimate of the same was approximately 169,215 individuals. Each of these forms of ID, however, normally costs money to obtain. This presents a practical problem for Missourians who will be discouraged from attempting to vote because of concern that they must pay a fee to do so.<sup>245</sup>

In calculating these number of those who lacked current IDs, the Court was able to rely upon statistics that did not seem in dispute, unlike in Indiana where the record was unclear to how many individuals would be burdened by the new ID requirement. Second, as noted above, the court was able to attach real dollars costs to securing identification in terms of fees for driver's and non-driver's licenses and birth certificates.<sup>246</sup> Third, the court was additionally willing to consider non-monetary costs, such as time and ability to navigate bureaucracies in order to vote,<sup>247</sup> especially if individuals are elderly or handicapped.<sup>248</sup> The court was concerned by the burden the law would have upon those

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<sup>245</sup> 203 S.W.3d at 206.

<sup>246</sup> *Id.*

<sup>247</sup> 203 S.W. 3d at 215.

<sup>248</sup> *Id.*



born out of state seeking to obtain the required birth certificate necessary to obtain the approved ID.<sup>249</sup>

Overall, the Missouri Supreme Court was able to show several instances where the obtaining of a driver's or non-driver's license cost time, effort, and money. These costs are real.

Nevertheless, under the new law these eligible registered voters will not be able to cast a regular ballot (or after 2008 any ballot at all) unless they undertake to obtain one of the requisite photo IDs. This will constitute a dramatic increase in provisional ballots over the previous law, as only 8,000 provisional ballots were cast statewide in the 2004 general election. As conceded by Appellants, denial of the right to vote to these Missourians is more than a *de minimis* burden on their suffrage.<sup>250</sup>

Thus, on the one side of the equation the court was able to document the real costs and burdens to Missourian voters associated with the new ID requirement. These costs, for the court, were sufficient for it to find that the photo ID requirement was in fact an unconstitutional poll tax.<sup>251</sup>

Next, in using strict scrutiny the court mandated that the State show a narrowly-tailored compelling interest to support SB 1014.<sup>252</sup> The court conceded that combating fraud is compelling,<sup>253</sup> but the State failed to make that demonstration. First, the State could not show that recent elections had serious problems with fraud.<sup>254</sup> Second, the

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<sup>249</sup> 203 S.W. 3d at 211.

<sup>250</sup> 203 S.W. 3d at 213.

<sup>251</sup> 203 S.W. 3d at 214-5.

<sup>252</sup> 203 S.W. 3d at 215-6.

<sup>253</sup> 203 S.W. 3d at 217.

<sup>254</sup> 203 S.W. 3d at 210 (*stating* that “the record contains two letters written in 2004 by then-Secretary of State Matt Blunt on the subject of voter fraud. He described Missouri's

fraud that did exist was not associated with voter impersonation but with absentee voting.<sup>255</sup> Instead, according to the court:

To the contrary, Appellants concede that the only type of voter fraud that the Photo-ID Requirement prevents is in-person voter impersonation fraud at the polling place. It does not address absentee voting fraud or fraud in registration. While the Photo-ID Requirement may provide some additional protection against voter impersonation fraud, the evidence below demonstrates that the Photo-ID Requirement is not "necessary" to accomplish this goal. At the trial court "No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri."<sup>256</sup>

Thus, while the interest in addressing fraud is compelling, the lack of evidence for the type of fraud to be remedied by the ID requirement meant it was neither narrowly-tailored nor compelling enough to survive strict scrutiny. Hence, SB 1014 was found to be unconstitutional under state constitutional clauses.<sup>257</sup>

### C. Summary

A review of Twenty-Fourth amendment jurisprudence demonstrates its brevity. Post *Harman* either the courts have failed to invoke this Amendment or plaintiffs have failed to argue it when confronted with a variety of voting practices that at least on the face appear to implicate costs or burdens that be interpreted as a "poll tax or other tax." These decisions reveal that the courts have read the Twenty-Fourth amendment, contrary

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statewide elections in 2002 and 2004 to then-Governor Bob Holden as 'two of the cleanest and problem free elections in recent history.' To the *St. Louis Post-Dispatch*, Blunt characterized the same elections as 'fraud-free.'").

<sup>255</sup> 203 S.W. 3d at 218.

<sup>256</sup> 203 S.W. 3d at 217.

to the dicta of Justice Warren in *Harman*, not broadly and not in ways to address the more subtle ways to deny franchise rights. They have chosen instead to read the amendment quite narrowly, applying only to poll taxes strictly understood as a tax directly imposed upon a voter, serving as a prerequisite to voting. Such a reading has turned the Twenty-Fourth into a great constitutional silence. Is this an accurate reading of the Amendment? This is the subject of the next section.

#### **IV. Recovering the Twenty-Fourth Amendment**

##### **A. The Twenty-Fourth Amendment, Wealth, and Voting**

So what does the Twenty-Fourth amendment cover or prohibit? A review of its application indicates that thus far it has not been successfully employed to invalidate poll taxes defined broadly. The Amendment also has not been favorably fashioned to attack voter photo identification laws, and it even has not been a tool to attack the payment of delinquent taxes, as in the *Hill* case. The Amendment thus far seems confined to the dustbin of constitutional history in terms of the protections it offers. The curiosity of this is to ask why. Why has the amendment not been successfully employed as a protection of voting rights, despite the long struggle for its passage? Perhaps the reasons for it reside in the very vagueness of the language of the Twenty-Fourth Amendment.

Return to the actual text of the amendment. Section one states: “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

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<sup>257</sup> 203 S.W. 3d at 221.

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.” The critical words in this amendment are the words “poll tax or other tax” and “denied or abridged.” What do these phrases mean?

As part one of this article sought to demonstrate, “poll tax” as a concept or practice has multiple meanings. Yet the most significant meanings associated with the term in American history refer either to a tax substituted in lieu of property qualifications to increase the electorate, or a tax used primarily to restrict either or both the poor and people of color from voting. If the purpose of the Amendment was to encourage voting, expand the franchise, or protect civil rights, then it is unlikely that the Twenty-Fourth should be read as banning devices meant to enlarge the electorate. This means that the Amendment should more likely be read as a prohibition on the use of devices meant to prevent the poor or people of color from voting. But there are some questions regarding how broad poll tax should be read. The twentieth century history of the efforts to eradicate the tax is laced with both concerns about its racial and class impacts. Some might argue that given when the tax was reinstituted in the south, the amendment should be read narrowly only to prevent the type of taxes that discriminate against people of color. If so, the tax has a narrow application and perhaps given change in the south, the success of the Voting Rights Act, and perhaps other reforms, the Amendment has outlived whatever purpose it was supposed to have.<sup>258</sup>

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<sup>258</sup> *See generally*: CHANDLER DAVIDSON AND BERNARD GOFFMAN, *THE QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (1994) (*examining the impact of the VRA on voter registration and turnout among African-Americans in the south*).

But the history of the Twenty-Fourth Amendment presented in this article suggests a broader reading of the Amendment. It is a reading that emphasizes the role of passage of the Amendment as part of a historical struggle to break the original concept of freeholder status that linked political participation and voting to property qualifications. Debates in 1962 surrounding the congressional vote on this Amendment, even if for just tactical reasons, emphasized the impact that the poll tax had on the poor in addition to the way it depressed African-American votes in the south. One could read this history and the congressional debates as suggesting that the Twenty-Fourth Amendment should be read more expansively, seeking to break the linkage between voting and wealth. Thus, this reading might mean that one should not adopt a narrow application of the Amendment as only seeking to ban the use of poll taxes in terms of the payment of \$1.50 fees as was the case in *Harper*. Even *Harman* read the Amendment more expansively, voiding a law that allowed for an alternative to the poll tax.

To support this claim, first note also how the Amendment itself refers to “poll tax or other tax.” Hayward argues that while the debates on the adoption of the Voting Rights Amendment implicate that “other tax” only referred to taxes, supporters of the Twenty-Fourth Amendment discouraged these narrow readings. For Hayward: “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 24th Amendment.”<sup>259</sup> To read tax very narrowly would simply encourage the payment of fees by alternative means to accomplish the same goal of disenfranchisement. In effect, it would encourage

subterfuge. A narrow reading of “other tax” would be no different than reading literacy tests narrowly as the Court did in *Lassiter v. Northampton County Board of Elections*,<sup>260</sup> or even what a poll tax was in *Breedlove* and *Butler*. In all of these circumstances the Court engaged in a narrow reading of what a literacy test or poll tax was, and thereby ignoring the larger context of discrimination that was occurring. It was a narrow reading that invited circumvention. One purpose of the VRA, especially section 5 and its preclearance requirement recognized this circumvention. The same rule should govern a reading of the Twenty-Fourth Amendment.

Hayward thus argues that “tax” in the Twenty-Fourth Amendment should be read more expansively to include fees. Accepting her analysis, Hayward then contends:

This article proposes that an unconstitutional tax under the 24<sup>th</sup> Amendment would exhibit the following characteristics:

- (a) a monetized payment
- (b) from individual voters
- (c) prerequisite to their casting a vote, and
- (d) avoidable if the voter doesn't vote.<sup>261</sup>

Hayward’s analysis is a good starting point for an effort to define the parameters of the prohibitions that come under the Twenty-Fourth Amendment. Applying her analysis, she concludes that the Amendment would not necessarily ban voter photo identification laws, especially if the government provides the identification for free,<sup>262</sup> and it also would not ban felon disenfranchisement laws or other changes in the mechanics of voting (closing

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<sup>259</sup> Hayward at 118.

<sup>260</sup> **Error! Main Document Only.** 360 U.S. 45 (1959). In this case the Court upheld the use of literacy tests as a condition of voting, overlooking the use of this device as a tool to disenfranchise African-Americans in the south.

<sup>261</sup> Hayward at 118.

or changing a voting place).<sup>263</sup> She makes these arguments while cognizant of some of the costs that might be borne by voters. However, her arguments still offer a narrow reading of what the Twenty-Fourth Amendment should encompass.

Return to the district court opinion in the Indiana voter photo identification case *Indiana Democratic Party v. Rokita*.<sup>264</sup> In that case the district court judge ruled that the identification requirement did not amount to a poll tax.<sup>265</sup> The judge dismissed and distinguished incidental costs, such as the fees associated with securing a birth certificate in order to obtain valid voter identification, as a form of a poll tax.<sup>266</sup> At one point the judge, in reference to the fees associated with securing a drivers license, states: “The fee imposed on individuals to obtain a driver's license is a fee for the privilege of driving, not for identification, and if an individual no longer wishes to enjoy the privilege of a driver's license, he/she can obtain an identification card for free.”<sup>267</sup> Judge Barker in this case effectively made a hairline distinction between the costs associated with voting—which might constituted a poll tax—and the costs associated with securing the information necessary to obtain a voter photo identification card. Clearly, using Hayward’s four requisites to determine if a fee is a tax, one can argue that the payment for a driver’s license may be an avoidable cost to voting. Yet such an argument ignores the reality that drivers’ licenses really serve that purpose for almost everyone in America. Even Judge

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<sup>262</sup> *Id.* at 120-21.

<sup>263</sup> Hayward at 121-22.

<sup>264</sup> **Error! Main Document Only.**458 F.Supp.2d 775 (D. Ind. 2006).

<sup>265</sup> *Id.* at 827-29.

<sup>266</sup> 458 F.Supp. 2d at 827.

<sup>267</sup> *Id.* at 827, fn. 80.

Posner, writing in the Seventh Circuit opinion upholding the identification requirement, recognized this.<sup>268</sup> Moreover, even if one does not consider the fees associated with obtaining a license, costs incurred to obtain birth certificates, naturalization papers, and similar documents to prove identities are not avoidable costs for many who wish to secure even the free voter photo identification. The Missouri court in *Weinschenk* recognized this. Moreover, to contend that these fees are distinct from real direct poll taxes is also no different than the denial of voting based on the claim that one could not present a receipt as proof that one paid the poll tax. The receipt requirement was indirect but it still served its purpose to deny many individuals the right to vote. Similarly, ignoring the background costs in order to vote takes a very narrow, formal, and inelastic approach to what constitutes a “poll tax or other tax.”

So how should the phrase “poll tax or other tax” be read? If one is unwilling to assume a broad reading of what constitutes a poll tax, then the “other tax” needs an expansive reading along the lines suggested in this article. It should address not just a tax in a narrow sense but the inequities of wealth and its impact on voting and franchise in America. It should, as noted above, seek to break the link between wealth and franchise in America. Thus, reformulating Hayward’s test, a poll tax or other tax should be read to include any monetized cost which directly or indirectly imposes an additional cost on voters in their casting of a vote such that it would discourage individuals from voting. This broadened test addresses the problem of subterfuge that Hayward was concerned

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<sup>268</sup> Crawford v. Marion County Board of Elections, 472 F.3d 949, 951 (7<sup>th</sup> Cir. 2007) (“it is exceedingly difficult to maneuver in today’s America without a photo ID (try flying, or



with when arguing for an expansive reading of what poll tax or other tax meant. Simply to allow the costs of voting to be sublimated or displaced elsewhere in terms of transaction costs not directly related to the actual casting of a ballot invites fraud and efforts to shift the poll tax to another expense that de facto serves the same purpose.<sup>269</sup> This test also reflects a broader movement in American politics, as noted in the first part of this article, to break the linkage between wealth, property, and voting in American society.

The argument of this article then is that the broader purpose of the Twenty-Fourth Amendment is to break the linkage between wealth and democracy in the United States. There is clear evidence that wealth or social economic status as sociologists and political scientists prefer to call it, dramatically impacts voting and political participation in the United States.<sup>270</sup> But despite this fact, wealth has not done well before the Court. In *Harper* wealth or income, although individualized, was recognized as a violation of the Equal Protection clause. In *Bullock v. Carter*<sup>271</sup> and *Lubin v. Panish*<sup>272</sup> the Court struck

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even entering a tall building such as the courthouse in which we sit, without one.”).

<sup>269</sup> As an analogy, the Supreme Court recognized in the White Primary cases, barring Blacks from membership in the Texas Democratic Party and then eventually in the Jaybird clubs was no different than banning African-Americans from voting in the general elections. Both served the same purposes.

<sup>270</sup> **Error! Main Document Only.** See generally: W.E. MILLER AND J.M. SHANKS, THE NEW AMERICAN VOTER (1996); S. VERBA AND N. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972); S. VERBA AND G.R. ORREN, EQUALITY IN AMERICA: THE VIEW FROM THE TOP (1985); S. VERBA, K.L. SCHLOZMAN, AND H.E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICA (1995); S. VERBA AND N. NIE, POLITICAL PARTICIPATION IN AMERICA (1976); L. JACOBS AND T. SKOCPOL, INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN (2007).

<sup>271</sup> 405 U.S. 134 (1972).

down the imposition of candidate filing fees as a prerequisite for running for office. Yet in *San Antonio v. Rodriguez*,<sup>273</sup> the Court refused to recognize wealth as a suspect classification when it came to education funding. Some have argued that the Supreme Court's refusal to overturn *Buckley v. Valeo*'s effective ban on expenditure limits amount to a "wealth primary" that permits campaigns to favor those who spend the most money.<sup>274</sup> Overall, despite a couple of cases addressing individualized fees to vote or file for office, the Court and the Constitution appears unwilling or unable to bracket off the economic marketplace from the impact it has on the political marketplace.

In addition to seeking to interpret "poll tax or other tax" there is also the use of the words "denied or abridged" in the Twenty-Fourth Amendment. Courts have read the Twenty-Fourth too narrowly when it comes to these words too. In *Bush v. Gore* the Court stated that: "[T]he right to vote applies to more than the initial allocation of franchise."<sup>275</sup> Warren more or less said the same in *Harman* when he argued that the Amendment was meant to address "sophisticated as well as simple-minded modes' of impairing" voting rights.<sup>276</sup> One should not read the Twenty-Fourth Amendment as simply seeking to nullify direct fees or costs levied on voting. Indirect costs, such as those associated with securing documents to secure voter identification, administrative process fees, and unique costs borne to participate in activities beyond general elections

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<sup>272</sup> 415 U.S. 709 (1974).

<sup>273</sup> 411 U.S. 1 (1973).

<sup>274</sup> JAMIE B. RASKIN AND JOHN BONIFAZ, *THE WEALTH PRIMARY—CAMPAIGN FUNDRAISING AND THE CONSTITUTION* (1994).

<sup>275</sup> 531 U.S. 98, 104.

<sup>276</sup> 380 U.S. at 540.

might all constitute other taxes that deny or *abridge* the right to vote.<sup>277</sup> Not to offer the Twenty-Fourth Amendment this broader reading thus ignores a Supreme Court jurisprudence that views the right to vote as something beyond the actual casting of a ballot. It ignores the class impact that the poll tax has had, and it ignores the language of the Amendment that recognized the possibility and practice of using some more subtle methods to engage in subterfuge and adopt other practices that effectively would accomplish the same purpose of instituting a tax. If the argument of this article is accepted, the Twenty-Fourth Amendment should be read broadly as a prophylactic against the use of wealth and income as a barrier when it comes to restricting voting rights.

There is one possible objection to this new expanded view of the Twenty-Fourth Amendment. Some might claim that efforts here interpret “other tax” so broad that the Amendment could be applied to ban any costs imposed on voters when seeking to exercise their franchise rights. There are several responses to this complaint. First, the test advocated here states that an unconstitutional poll tax should be interpreted as any monetized cost which directly or indirectly imposes an additional cost on voters in their casting of a vote such that it would discourage individuals from voting. This test embodies the economic concept of marginal costs. In economics the concept marginal

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<sup>277</sup> See also: Sloan G. Speck, *Failure to Pay Any Poll Tax or Other Tax: The Constitutionality of the Tax Felon Disenfranchisement*, 74 U. CHI. L. REV. 1549, 1574 (2007) (making a similar argument for a broad reading of the Twenty-Fourth Amendment that applies to indirect efforts to deny franchise).

costs helps to explain among other things investment decisions.<sup>278</sup> Specifically, firms will invest in new equipment or in the hiring of someone if the marginal gains from the investment outweigh the costs. The concept of marginal costs has also been adopted by political scientists when seeking to explain voting behavior. Steven Rosenstone asserts: “People participate in politics when they get valuable benefits that are worth the costs of taking part.”<sup>279</sup> Voting is a cost-benefit decision, the more costs imposed, the less likely someone is to vote.<sup>280</sup> Legal analysis, especially a law and economics approach, similarly incorporates economic thinking into its analysis. This means that one could adopt the economic concept of marginality as political scientists apply it to voting and read the Twenty-Fourth Amendment as an effort to address costs on voters that lead to them not to vote. This is what the test advocated here does. Conceptualizing the Twenty-Fourth as addressing marginal costs that discourage voting begins to place some outer boundaries on what a poll tax prohibits. It obviously bans the direct tax on franchise, no one debates that. But the marginality test forces the courts to engage in some type of balancing or weighing, assessing how specific practices, such as photo ID laws, special fees, and perhaps even other costs such as taking time off from work (especially for the poor) might impose burdens that discourage some from voting. Some costs might affect unique populations differently. What might not be seen as a cost to dissuade voting

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<sup>278</sup> DAVID L. WEIMER AND AIDAN R. YOUNG, POLICY ANALYSIS: CONCEPTS AND PRACTICES, 63-66 (2005).

<sup>279</sup> **ERROR! MAIN DOCUMENT ONLY.** STEVEN J. ROSENSTONE AND JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA, 10 (2003).

<sup>280</sup> **Error! Main Document Only.** RAYMOND E. WOLFINGER AND STEVEN J. ROSENSTONE, WHO VOTES?, 61 (1980).

among the affluent—such as taking time off from work—could be an indirect cost that keeps the poor away from the polls. The Supreme Court in *Burdick v. Takushi*,<sup>281</sup> in seeking to determine whether specific voting regulations are permissible under the Fourteenth Amendment, weighs state interests and burdens on voting rights.<sup>282</sup> This test thus already employs a weighing that recognizes how some practices may impose severe burdens upon some voters. What is then being advocated here is a similar test, adapted to the Twenty-Fourth Amendment, that gives meaning to its language, and recognizes how the Constitution is supposed to weigh certain costs imposed on voting in order to break the linkage between wealth and voting.

What are the implications of it when it comes to application? It can be seen in several areas.

## **B. Applying the Twenty-Fourth Amendment**

### **1. Felon Disenfranchisement Laws**

In *Richardson v. Ramirez*,<sup>283</sup> the Supreme Court upheld the constitutionality of felon disenfranchisement laws against challenges that they violated the Equal Protection Clause. Since that decision, efforts have been undertaken to challenge them, including

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<sup>281</sup> 504 U.S. 428 (1992).

<sup>282</sup> 504 U.S. at 433.

**Error! Main Document Only.** See also: David Schultz, *Lies, Damn Lies, and Voter IDs: The Fraud of Voter Fraud*, 1 Harv. L. & Pol. Rev On-Line. 1 (2008) (<http://hlpronline.com/2008/03/lies-damn-lies-and-voter-ids-the-fraud-of-voter-fraud/> and *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WILLIAM MITCHELL L. REV. 484 (2008) (reviewing in part, the *Burdick* test and the factors that affect voting behavior and decisions).

under the Twenty-Fourth Amendment. For example, in *Bynum v. Connecticut Commission on Forfeited Rights*, the court evaluated a Connecticut statute that required ex-felons to pay a fee of five dollars before they could petition the Commission for restoration of their voting rights.<sup>284</sup> Bynum alleged that this violated his 14th Amendment rights, and that this discriminates against the poor.<sup>285</sup> The court here determined that this claim was not without merit and noted that under *Harper*, wealth, like race, creed or color is not germane to one's ability to participate in the electoral process.<sup>286</sup> That said, the court remanded to determine just how poor Bynum was.<sup>287</sup> In doing that the court indicated that the fee was a possible violation of the 14th Amendment. Yet the petitioner did not allege that this practice violated his Twenty-Fourth Amendment rights.<sup>288</sup>

In *Coronado v. Napolitano*<sup>289</sup> at issue was a state law that prevented the restoration of voting rights to felons until such time that they paid all of their legal financial obligations, such as any fines and restitution that they owed.<sup>290</sup> The challenge here was under the Equal Protection clause, asserting that the requirement disproportionately impacted indigent individuals. At the trial level the Twenty-Fourth Amendment was again not alleged. The court rejected the plaintiff's Equal Protection

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<sup>283</sup> **Error! Main Document Only.**Richardson v. Ramirez, 418 U.S. 24 (1974).

<sup>284</sup> Bynum v. Connecticut Commission on Forfeited Rights, 410 F. 2d.173 (1969).

<sup>285</sup> Id. at 175.

<sup>286</sup> Id. at 176., Harper 383 U.S. at 668.

<sup>287</sup> Bynum, 410 U.S. at 177.

<sup>288</sup> Id.

<sup>289</sup> **Error! Main Document Only.**2008 WL 4838707 (D.Ariz.)

<sup>290</sup> Ariz. Rev. Stat. Ann. § 13-912(A)(2).

argument. First the court stated that the plaintiffs did not plead that they were indigent.<sup>291</sup> Second, had they made such a plea the court asserted that wealth is not a suspect classification under the Constitution.<sup>292</sup> Third, the requirement to pay fines affects all felons and does not single the plaintiff out.<sup>293</sup> Finally, the court found that the requirement to pay all fines prior to restoration of voting rights was “rationally related to the state's interest in ‘punishing and deterring criminal activity.’”<sup>294</sup>

Similarly in *Johnson v. Bredesen*<sup>295</sup> a Tennessee law that conditioned the restoration of voting rights to felons to the payment of legal obligations, including child support.<sup>296</sup> In this case, the plaintiff raised both an Equal Protect and Twenty-Fourth Amendment claim.<sup>297</sup> The court rejected these arguments. When it came to the Twenty-Fourth Amendment argument, the court took a narrow reading of what the amendment prohibited. First it noted that: “Neither the Supreme Court nor any Circuit Court of Appeals has, based on this Court's research, ever applied the Twenty-Fourth Amendment in any context that did not involve an explicit and unambiguous poll tax.”<sup>298</sup> Second, the court defined “poll tax” narrowly both in terms of its meaning and how it was applied in Tennessee.

“Poll tax” is defined as “a fixed tax levied on each person within a jurisdiction.[”] Black's Law Dictionary 1498 (8th ed.2004). “Poll taxes are

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<sup>291</sup> **Error! Main Document Only.**2008 WL 4838707 at \*3.

<sup>292</sup> *Id.*

<sup>293</sup> **Error! Main Document Only.**2008 WL 4838707 at \*3.

<sup>294</sup> *Id.*

<sup>295</sup> **Error! Main Document Only.**579 F.Supp.2d 1044 (D.Tenn.,2008).

<sup>296</sup> **Error! Main Document Only.**Tenn.Code Ann. § 40-29-202.

<sup>297</sup> 579 F.Supp.2d at 1048.

<sup>298</sup> *Id.* at 1056.

laid upon persons ... to raise money for the support of government or some more specific end.” Although a state may not make “the affluence of the voter or payment of any fee an electoral standard,” states do have “the power to fix qualifications.” States may permissibly fix as a qualification for voting the requirement that a persons [sic] not have been convicted of a felony. It follows that, having decided to re-enfranchise ex-felons, Arizona may permissibly fix as a qualification the requirement that those individuals complete the terms of their sentences. The Arizona laws do not make ability to pay “an electoral standard,” but limit re-enfranchisement to those who have completed their sentences-including the payment of any fine or restitution imposed. On that basis, the court rejected the plaintiffs’ Twenty-Fourth Amendment challenge.

This Court finds the reasoning employed by the District of Arizona and the Southern District of Florida to be persuasive. Plaintiffs here, having been convicted of committing a felony, no longer have a fundamental right to vote, so the statutory limitations on the restoration of that right do not impinge a right already granted, but instead define the conditions upon which restoration of that right will be premised. It is not unreasonable or impermissible for a state to require a convicted felon to complete his entire sentence, including the payment of restitution, prior to having his voting rights restored. Further, although payment of child support is not part of the Plaintiffs’ sentences, the obligation is a legal one that arises from a court order. Imposing a requirement that convicted felons comply with such outstanding court orders cannot reasonably be construed as a “tax” on voting. The policy decisions that led to the passage of the challenged statutory provisions do not raise any of the concerns that resulted in the prohibition of poll taxes in the first place.<sup>299</sup>

The court’s reasoning in the Tennessee case fell back upon a definition of poll tax that seemed to ignore its entire history in the United States, both after the Revolutionary War, during the Jim Crow era, and as debated by the Supreme Court and in Congress, as noted earlier in this article. It saw a poll tax as simply as a per capita revenue generator, ignoring the racial and class-based issues surrounding such a fee. Moreover, as with the

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<sup>299</sup> *Id.* at 1058 (citations omitted).



Arizona decision, the payment of legal obligations was not read as a “poll or *other tax*” but instead as a rationally-related condition tied to punishment for offenses.

In amicus briefs for these two cases on appeal to the Ninth and Sixth Circuits respectively, the American Civil Liberties Union seeks to argue the Twenty-Fourth Amendment claims more broadly along the lines asserted in this article.<sup>300</sup> If one accepts the arguments of this article, then all of these fees imposed on felons to restore their voting rights should constitute a form of a poll tax. They should be read more broadly as a “poll tax or *other tax*” and as an abridgment, consistent with the history of what the broader purposes of the Twenty-Fourth sought to prohibit. This amendment may offer a stronger and more viable alternative to the Equal Protection analysis which seems locked into the logic of both *Richardson* and a narrow conception of wealth that is not seen as a suspect classification.

## 2. Voter Photo Identification Laws

As described earlier in this article, the courts have generally dismissed claims that voter photo identification laws are a form of a poll tax. In the district court *Rokita* case the Court drew a tight analytical distinction between the costs associated with voting and

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<sup>300</sup> **Error! Main Document Only.**Johnson v. Bredesen, Brief of Amicus-Curiae Brennan Center for Justice at NYU School of Law In Support of Plaintiffs-appellants and Reversal (brief on file with the author and available at [http://www.brennancenter.org/content/resource/johnson\\_v\\_bredesen/](http://www.brennancenter.org/content/resource/johnson_v_bredesen/) (cite last visited on September 26, 2009)); Coronado v. Napolitano, Brief of Amicus-Curiae Brennan Center for Justice at NYU School of Law In Support of Plaintiffs and Reversal (brief on file with the author and available at [http://www.brennancenter.org/content/resource/coronado\\_v\\_napolitano/](http://www.brennancenter.org/content/resource/coronado_v_napolitano/) (cite last visited

the costs associated with getting the materials necessary to secure voter identification. In part the court seemed dismissive of the poll tax argument because the case was an applied challenge that failed to provide evidence of the real costs and individuals who would be burdened by the law. However, in Missouri the *Weinschenk* Court indentified both the costs and individuals burdened by the state law and therefore invalidated it under the state constitution. The analysis in this case could very well be applied to the photo identification cases argued under the Twenty-Fourth Amendment. The utility of using this amendment to argue voter identification cases are potentially many. First, it would potentially enable plaintiffs to argue for a strict scrutiny analysis of the photo identification, allowing them to bypass the two tier analysis and severe burdens test established in *Burdick* and applied in *Crawford* to examine these requirements. Second, a broader reading of what constitutes a poll tax or other fees would permit the costs described in *Weinschenk* to be adjudicated. Costs associated with securing the documentation necessary to obtain voter identifications, such as birth certificates, most certainly should be considered forms of “other taxes” or abridgements that the amendment was meant to prohibit. But one might be able to make other arguments that certain transactional costs, such as efforts to impose special travel to apply for these identifications, might in some circumstances rise to levels of “other taxes” or abridgements. For example, these costs might be similar to the requirement that one had to provide a receipt or documentation that the poll tax was actually paid. The payment of the poll tax, as well as demanding proof of it, equally served to disenfranchise and were

violations of the Twenty-Fourth Amendment. Similar costs like these should be banned under the reading of the amendment proposed here.

### **3. Early Voting Procedures**

The Twenty-Fourth Amendment may serve as an important tool to invalidate early voting procedures and requirements. Conversely, the amendment may in some circumstances demand early voting as a matter of right. In *Willie Ray v. State of Texas*,<sup>301</sup> petitioners alleged that Title 7 of the Texas Election Code which establishes rules for early voting violated their rights under the 14th Amendment. Title 7 stated that in the need for an early voter to have someone sign their voter application, a person commits an offense when, in the same election, the person signs an early voting ballot application as a witness for more than one applicant.<sup>302</sup> Petitioners contended that this disenfranchised elderly and disabled voters.<sup>303</sup> The court stated that the states interest in preventing voter fraud was paramount and sufficient to justify the infringement on a person's right to vote, even though the poor, elderly and disabled would be disproportionately disenfranchised.<sup>304</sup> Petitioners made no argument under the Twenty-Fourth Amendment and argued that this practice was unconstitutional under the Equal Protection Clause.

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<sup>301</sup> Ray v. State of Texas, 2008 U.S. Dist. LEXIS 59852, 2-3 (2008)

<sup>302</sup> Id. at 5.

<sup>303</sup> Id. at 6.

<sup>304</sup> Id. at 13.

Under 14th Amendment jurisprudence the analysis to determine if a voting practice is unconstitutional is to find if the law severely restricts the rights of the individual and if so, that law must be narrowly drawn to advance a state interest.<sup>305</sup> Because this case was argued under the 14th Amendment and prevention of voter fraud was viewed as a compelling enough state interest to justify a reasonable, non-discriminatory restriction on a person's 14th Amendment rights the law was upheld.<sup>306</sup>

However, under a Twenty-Fourth Amendment analysis suggested here, early voting procedures may well be unconstitutional. In many ways, election day voting discriminates against the poor. While some states require employers to give their workers time off to vote, often the time off is without pay or the time given is insufficient to allow someone, especially with public transportation, to leave work, vote, and return. As a result, many individuals may choose not to vote because of these costs. As a result of the costs and inconveniences associated with in-person election-day voting, many states have eased the process for early voting. In 2008, for example, almost 30% of the electorate voted before election-day across 34 states (for a total of 38 million voters).<sup>307</sup> Yet in general, absentee voting is considered a privilege and not a right, subject to strict requirements regarding the signing, witnessing, and processing of ballots.<sup>308</sup> These requirements often negate any advantages that absentee voting may give to the poor.

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<sup>305</sup> Norman v Reed, 502 U.S. 279, 289 (1992).

<sup>306</sup> Burdick v Takushi, 504 U.S. 428, 434 (1992).

<sup>307</sup> The Pew Center on the States, Electionline.org Briefing: Election 2008 in Review 7 (Dec. 2008).

<sup>308</sup> **Error! Main Document Only.**In the Matter of the Contest of General Election Held on November 4, 2008, for the Purpose of Electing a United States Senator from the State

One possible reading of the Twenty-Fourth Amendment would be to argue that absentee voting or early voting requirements that impose monetary costs or special burdens on voters should be seen as a form of a poll or other tax. Even more broadly, one might argue that this Amendment might be used to challenge the concept that absentee or early voting is a privilege and not a right. Instead, the Twenty-Fourth Amendment may require early voting for federal elections because of the costs incurred with in-person election-day voting. It might also invalidate requirements, such as in Texas, regarding limits on witnesses for those who opt to vote before election-day.

#### **4. Duration Residency Requirements**

Many states impose a durational residency requirement in order to vote in a state or federal election. More specifically, in order to vote one has to be a resident of a particular ward or precinct for a certain number of days (often 30) before an election. While such a law may find its rational basis in efforts to eliminate fraud, they also ignore the impact that they have upon the poor. Specifically, the less affluent and the poor are often more likely to move due to the inability to pay rent, evictions, loss of employment,

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of Minnesota, 767 N.W.2d 453, 462 (Minn.2009) (*stating* in reference to disputes arising out of the 2008 Minnesota Senate race between Al Franken and Norm Coleman: “We conclude that our existing case law requires strict compliance by voters with the requirements for absentee voting. Thus, we reject Coleman's argument that only substantial compliance by voters is required. Having rejected this argument, we also conclude that the trial court's February 13 order requiring strict compliance with the statutory requirements for absentee voting was not a deviation from our well-established precedent.”).

and economic instability in their family lives.<sup>309</sup> Additionally, the less affluent are usually less likely to be able to afford time from work to register early. As mentioned earlier, time off from work on election day is difficult enough for the poor. Requiring people to take additional time to register, and therefore more time from work adds to the burden on the less affluent for franchise. Residency requirements that impose advanced registration to vote may disproportionately disenfranchise these individuals.

Six states in the United States either permit day of election voter registration or do not require, as in the case of North Dakota, registration at all. Under a Twenty-Fourth Amendment analysis argued here, advanced registration requirements may be unconstitutional in that they disenfranchise voters as a result of costs they are incurring in order to vote. Granted that the costs are not requiring a specific monetized fee to be paid to the government, but nonetheless their financial situation which affects their residency is played out and exploited by advanced voter registration requirements. Banning these requirements, and in fact, extending the analysis to laws which require a residence in order to vote (and which burden the homeless) should be considered violations of the Twenty-Fourth Amendment. The reason for this is that these requirements may necessitate an expenditure of money as a prerequisite to voting in ways that could amount to a poll or other tax.

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<sup>309</sup> See e.g.: A. LARSON AND D. MEHAN, HOMELESS AND HIGHLY MOBILE STUDENTS: A DESCRIPTION OF THE STATUS OF HOMELESS STUDENTS FROM THREE SCHOOL DISTRICTS IN MINNESOTA, 7-8 (2009). Located on line at <http://www.cehd.umn.edu/SSW/cascw/attributes/PDF/minnlink/ReportNo7.pdf> (last viewed on September 17, 2009) (*noting* that increased frequency that the poor and homeless have to move, change residences, and therefore transfer their children to

## 5. Party Caucuses

Finally, one last political practice that could be targeted by the Twenty-Fourth Amendment is party caucuses. Political parties have many options to select from when choosing their nominees, including primaries, conventions, and caucuses. The Supreme Court has granted parties broad First Amendment rights to govern their internal affairs and select their nominees, subject to some limits on discriminatory practices.<sup>310</sup> Unlike primaries which generally take place all day or which give voters an option to vote absentee, caucuses do not permit either. They are usually evening or half day affairs that require in-person attendance. Among those who cannot often make it to events are the ill, those serving in the military, and those unable to afford the time and costs associated with attending. The same arguments apply here as to durational residency requirements. When people are required to get off work, get a baby-sitter or some other financial burden, this is an infringement on the franchise. With no option for absentee voting, these individuals are essentially excluded from participation in caucuses.

The exclusion of the poor from caucuses, with state sanction as a result of no requirement or option for absentee voting, violates the Twenty-Fourth Amendment. Less affluent voters often because of their financial situation are excluded from participation in selecting party nominees. The Twenty-Fourth Amendment might well either require

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different schools.

<sup>310</sup> See e.g.: *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

some alternative voting to permit participation in caucuses, or perhaps even forbid them as a discriminatory practice altogether.

## **Conclusion**

The Twenty-Fourth Amendment has been a constitutional silence almost since its adoption. While ratified with great promise to break the direct and indirect linkage between voting and racial and wealth-based qualifications, the Amendment has sat quietly in the Constitution, unused to fulfill the purpose. However, the aim of this Article has been to recover the original meaning of the Twenty-Fourth Amendment and to suggest that it is time for lawyers and courts to appreciate its broad purpose and scope. The ban on poll taxes was not meant to be a narrow and wooden abrogation of direct fees paid at the time one voted in a general election. Instead, the amendment should be read as a more expansive prophylactic to prevent the disenfranchisement of individuals across an array of activities that encompass more than the initial allocation of the right to vote.