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The Twenty-First Century Poll Tax

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Introduction

In 2008, Randi Lynn Williams of Dothan, Alabama, lost her right to vote when she was convicted of fraudulent use of a credit card.[1] Although she served her sentence of probation and a few months in prison, she is still currently unable to vote.[2] Although many states have abolished or liberalized their laws disenfranchising convicted felons in recent years,[3] in Alabama and many other states, individuals convicted of a felony cannot regain their voting rights until they pay off the financial obligations resulting from their conviction.[4] These financial obligatiwons can include outstanding court fines, legal fees, and victim restitution.[5] These laws have left otherwise eligible voters, including Ms. Williams, unable to participate in the democratic process because they owe a monetary debt to the state.[6]

Although disenfranchising voters over outstanding legal financial obligations ("LFOs") is widely criticized, no court has yet been persuaded to strike down these laws. The practice continues to disenfranchise people based on wealth, and disproportionately affects the voting rights of people of color due to inherent racial disparities in socioeconomic status and the

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1. Connor Sheets, *Too Poor to Vote: How Alabama's 'New Poll Tax' Bars Thousands of People From Voting*, THE GUARDIAN (Oct. 4, 2017), https://www.theguardian.com/us-news/2017/oct/04/alabama-voting-poll-tax.

2. *Id.*

3. Samantha J. Gross, *Florida Voters Approve Amendment 4 on Restoring Felons' Voting Rights*, MIAMI HERALD (Nov. 6, 2018), https://www.miamiherald.com/news/politics-government/election/article220678880.html.

4. ALLYSON FREDERICKSEN & LINNEA LASSITER, ALL. FOR A JUST SOC'Y, DISENFRANCHISED BY DEBT: MILLIONS IMPOVERISHED BY PRISON, BLOCKED FROM VOTING 5 (2016).

5. Erika L. Wood & Neema Trivedi, *The Modern Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. 30, 36–38 (2007).

6. Sheets, *supra* note 1.

American criminal justice system. LFO disenfranchisement calls to mind the poll taxes of the late nineteenth and early twentieth centuries, which were prohibited in federal elections by the Twenty-Fourth Amendment, and in state elections by the landmark Supreme Court case *Harper v. Virginia State Board of Elections*.[7] Although the concept of felon disenfranchisement itself has been affirmatively upheld by the U.S. Supreme Court,[8] this Article argues that disenfranchisement for outstanding LFOs is more akin to the poll tax jurisprudence than to the felon-voting cases. This Article aims to add to a growing body of literature criticizing these practices by providing an extensive examination of the constitutional doctrines and legislative history of both the practice of LFO disenfranchisement as well as the possibly implicated constitutional provisions. This Article ultimately argues that LFO disenfranchisement schemes violate both the Twenty-Fourth Amendment and the Equal Protection Clause of the U.S. Constitution, and rendering a necessary change in the way courts should view this issue.

Part I discusses the history and background of the poll tax and the long struggle that resulted in its abolishment under both a constitutional amendment and landmark Supreme Court case. Part II describes the history and legal doctrines surrounding felon disenfranchisement in the United States. Part III discusses LFO disenfranchisement and its current treatment by courts. Finally, Part IV analyzes LFO disenfranchisement in light of the relevant case law, history, and constitutional text, and concludes that courts have incorrectly analyzed these restrictions as they violate both the Twenty-Fourth Amendment and the Equal Protection Clause.

I. The Poll Tax and the Long Struggle to Enfranchise the Poor

The prohibition against poll taxes is part of the written constitution of the United States as well as the larger constitutional canon. The view that the poll tax is antithetical to American democracy, however, was far from self-evident and resulted from a transformative change in the American constitutional fabric during the New Deal Era and Civil Rights Movement. Part I.A. addresses the early history and use of the poll tax in America. Part I.B. addresses the legislative history and jurisprudence surrounding the Twenty-Fourth Amendment. Part I.C. discusses the post-Amendment treatment of the poll tax and the Supreme Court's monumental decision in *Harper v. Virginia State Board of Elections*,[9] which finally, and determinatively, prohibited the poll tax in America.

7. 383 U.S. 663 (1966).
8. *See infra* Part II.B.
9. 383 U.S. 663 (1966).

A. From a Bridge to a Barrier[10]

A poll tax, also called a head tax, is a direct tax levied on all adults[11] which in the United States has been strongly connected to voting rights.[12] In the popular imagination, the poll tax is notoriously connected with suppressing black voters in the Jim Crow South, and while this is true in some ways, the history of the tax and its connection with the vote is not as simple as that.

Ironically, the poll tax requirement for casting a ballot in the United States was originally employed as a means of expanding, rather than limiting, the franchise. Following the American Revolution, many states allowed only property owners to vote; the idea being that owning property showed an investment in the welfare of the community beyond simply living in it.[13] As a more liberal measure, some states, including Pennsylvania, Georgia, and South Carolina,[14] opted to impose a small tax to substitute for these property qualifications.[15] The tax requirement, although still a means of keeping certain individuals from voting, originally served to expand voting rights from only white male property owners to those white men who could afford to pay the tax.[16] As the national economy changed and attitudes about voting gradually liberalized at the state level, with nearly all states eventually granting universal white male suffrage, these taxes were all but eliminated as a prerequisite for voting by the mid-nineteenth century.[17]

However, after the end of the Civil War and the ratification of the Fifteenth Amendment in 1870, the poll tax requirement experienced a dramatic resurgence in the South.[18] Following the collapse of

10. *See* Fagan Dickinson, *The Poll Tax and Voter Registration*, 35 TEX. L. REV. 1031, 1038 (1957) ("Ironically, the poll tax, which was originally adopted to extend suffrage, is now sometimes supported as a means of limiting the voting privilege to the 'better class of people.'").

11. For an extensive history of the use of these taxes in the Ancient World, England, and colonial-era America, see generally, David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINN. L. REV. 375, 378–82 (2011).

12. BRIAN L. FIFE, REFORMING THE ELECTORAL PROCESS IN AMERICA: TOWARD MORE DEMOCRACY IN THE 21ST CENTURY 19 (Praeger, 2010).

13. Atiba R. Ellis, *The Cost of the Vote*, 86 DENV. L. REV. 1023, 1036 (2009); Schultz & Clark, *supra* note 11, at 382.

14. In many Southern states, white men were "increasingly accumulating wealth, even though it was not in terms of real property, and demanding the vote." Ellis, *supra* note 13, at 1039.

15. FIFE, *supra* note 12, at 19; J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 63 (Yale Univ. Press, 1974); Schultz & Clark, *supra* note 11, at 382.

16. *See* Ellis, *supra* note 13, at 1037.

17. Schultz & Clark, *supra* note 11, at 385 ("By the time of Andrew Jackson's Presidential inauguration in 1829, only two states continued to require a freeholder status for voting."); *see also, id.* at 386 (noting that the poll tax's "adoption was a democratic reform, and its rejection the same").

18. This post-Reconstruction tax requirement is particularly ironic as some states, such as Alabama, first entered the Union in the antebellum period without any tax or property qualifications whatsoever. Schultz & Clark, *supra* note 11, at 385.

Reconstruction, where the voting protections for newly freed black citizens were vigorously enforced by the federal government, state governments used their newfound control to actively stop these newly enfranchised voters from casting ballots, and made various efforts to effectively re-subjugate these individuals to their enslaved status.[19] After periods marked by state-sanctioned violence and intimidation, the southern state governments sought to disenfranchise black voters by more traditional legal means, beginning in the 1870s and culminating in the state constitutional conventions of the 1890s and 1900s.[20] One part of this myriad of efforts was a renewed push for a poll tax payment as a precondition for voting. These efforts were initially successfully opposed by poorer white people, who feared the requirement would also force them to surrender their ability to vote.[21] Despite this resistance, every State in the former Confederacy had enacted a poll tax statute by 1904.[22]

The renewed poll tax was only one means of suppressing the black vote in the South, along with other restrictions like literacy tests and grandfather clauses, and electoral practices such as the white primary.[23] Southern states also continued to use extralegal means, such as violence, lynching, threats, and intimidation, to keep the black population from voting.[24] Although it is impossible to estimate just how many individuals were disenfranchised specifically as a result of the poll tax, due to the confluence of these other similar restrictions,[25] there is a consensus among scholars that the poll tax certainly kept at least some otherwise eligible voters from casting their ballots.[26]

Although the explicit purpose of the poll tax requirement was to disenfranchise the black vote, it is important to address the class politics that

19. For a detailed explanation of ways that state governments rolled back the progress of Reconstruction and subjugated black citizens, *see* J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, *in* MINORITY VOTE DILUTION 27, 27–43 (Chandler Davidson ed., 1984).

20. *See* Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class,* 52 AM. UNIV. L. REV. 23, 30-34 (2002).

21. ELEANOR BONTECOU, THE POLL TAX 10 (1942).

22. KOUSSER, *supra* note 15, at 63.

23. *See* Schultz & Clark, *supra* note 11, at 386; *see generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (Oxford University Press, 3d rev. ed. 1974).

24. R. GRANN LLOYD, WHITE SUPREMACY IN THE UNITED STATES 6 (1952); *see* Chandler Davidson, *The Voting Rights Act: A Brief History*, CONTROVERSIES IN MINORITY VOTING 7, 10 (Bernard Goffman & Chandler Davidson eds., 1992); *see generally,* WOODWARD, *supra* note 23.

25. V.O. KEY JR., SOUTHERN POLITICS 599 (1949) ("The assignment of a weight to one of these influences—the poll tax—is somewhat like trying to decide what proportion of the score of a football team can be attributed to the efforts of any one player."); *see also,* John Lackey, *The Poll Tax: Its Impact on Racial Suffrage*, 54 KY. L.J. 423, 427 (1965) ("Apparently, the Mississippi Department of Revenue is quite willing for [a black person] to pay his poll tax; there were other effective ways to keep him from voting.").

26. *See* KEY, *supra* note 25, at 599.

motivated the requirement as well. After the end of Reconstruction and the withdrawal of federal troops, the Democratic Party, which at that time was made up of many former Confederate leaders and wealthy white landowners, once again dominated southern legislatures.[27] The Democratic elite sought to once again unite white southerners in the face of what they viewed as tyranny and illegitimate rule by northern Republican carpetbaggers.[28] Many of the policies advanced by these legislatures to expand the South's industrial and financial standing and modernize the southern economy, however, ran counter to the economic interests of poor white farmers.[29] These poor farmers eventually split from the Democratic Party to join the People's Party (the Populists), an insurgent political movement motivated by increasing anxiety among the nation's farmers over the declining position of small, independently owned farms and the rise of wage labor.[30] Interestingly, the Populists (and, ironically, even the Democrats of this era)[31] often relied on black voters for assistance at the polls,[32] despite many leaders of the movement exhibiting openly xenophobic and racist views.[33] While outwardly in favor of disenfranchising black voters, many of these poorer whites fought Democratic disenfranchisement efforts due to fears that they too would lose their political power and voting rights, and would thus forfeit their economic interests.[34]

27. *See* Nate Cohn, *Demise of the Southern Democrat Is Now Nearly Complete*, N.Y. TIMES (Dec. 4, 2014), https://www.nytimes.com/2014/12/05/upshot/demise-of-the-southern-democrat-is-now-nearly-compete.html; Blain Roberts & Ethan J. Kytle, *When the South Was the Most Progressive Region in America*, THE ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/politics/archive/2018/01/when-the-south-was-the-most-progressive-region-in-america/550442/.

28. KOUSSER, *supra* note 15, at 26 ("Everywhere the ruling oligarchy stressed the threat of [black] domination and of a return to Reconstruction and the consequent necessity of solid support for the 'white man's party.'"); *see also, id.* at 11–17.

29. BONTECOU, *supra* note 21, at 11 ("The new leaders of the [Democratic] party, however, proved to be interested primarily in the industrial and financial expansion of the South."); KOUSSER, *supra* note 15, at 17 ("As upper-class Redeemers cut back government expenditures, absconded with a good deal of the budgeted public money, prevented mountain whites from electing their own local officials, and instituted policies strikingly favorable to big Northern-owned businesses, many whites began to doubt the virtues of Redemption.").

30. KOUSSER, *supra* note 15, at 33-34; Joseph Gerteis & Alyssa Goolsby, *Nationalism in America: The Case of the Populist Movement*, 34 THEORY AND SOCIETY 197, 205–06 (2005). *See generally,* JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY (1931).

31. Wechsler, *supra* note 20, at 28 (noting the "striking contradiction" of the Democrats "being the sworn party of white supremacy, while simultaneously courting the black vote").

32. *See* KOUSSER, *supra* note 15, at 35–37; Lackey, *supra* note 25, at 424.

33. Gerteis & Goolsby, *supra* note 30, at 205 ("[D]espite the largely sincere attempt to build a political coalition of black and white members, most Southern white Populists remained avowed racists.").

34. *Id.*

After the national People's Party supported the populist Democratic Senator William Jennings Bryan's presidential campaign in 1896,[35] the People's Party lost nearly all of its electoral clout, and the Democrats once again dominated southern legislatures.[36] To keep their grip on power, and despite large protests from poorer and formerly Populist-led counties, many of the remaining states approved new poll taxes in rapid succession.[37] While the state constitutional conventions of this era were explicit about their intention to disenfranchise black voters[38] without disenfranchising any white voters, many of these conventions' debate records show a willingness to purge formerly Populist white voters as well.[39] Both black voters and lower-class white voters, who had seen their political power and franchise rights expanded during the years of Populist challenge to the one-party South, became a prime target for disenfranchisement once the People's Party all but collapsed.[40] In the fifteen-year period between 1889 and 1904, the former Confederate states, now firmly dominated by the Democrats, wrote a number of statutes and constitutional provisions designed to keep these voters from the polls, and one of the chief means of doing so was the new poll tax requirement for voting.[41]

Indeed, even while the poll tax requirement was specifically aimed at black voters, and generally at all low-income voters, it had the effect of disproportionately affecting black voters.[42] As Senator Paul Douglas of Illinois later explained, the poll-tax requirement "was intended to reduce the number of low-income citizens who could vote. It disenfranchised poor whites as well as poor [black people]. But since the [black people] were on the average much poorer than the whites, it disenfranchised more [black

35. Although Bryan championed the economic interests of the poorer whites most associated with populism, throughout his life he held racist views toward African Americans. *See* HICKS, *supra* note 30, at 354–79 (describing the contentious internal debates within the Populist movement regarding support of Bryan's campaign); *see also,* Willard H. Smith, *William Jennings Bryan and Racism*, 54 J. NEGRO HISTORY 127, 136 (1969) ("[Bryan's] attitude toward [black/white] race relations, however, was much less generous and was quite inconsistent with his emphasis on democracy, equality, and rule by the people.").

36. Lackey, *supra* note 25, at 424.

37. *See* Franklin B. Williams Jr., *The Poll Tax as a Suffrage Requirement in the South, 1870-1901*, 18 J. SOUTHERN HISTORY 469, 471 (1952).

38. *See, e.g.*, ARI BERMAN, GIVE US THE BALLOT 17 (2015) (noting one delegate discussing the poll tax provision as a means of both raising education funding and disenfranchising black voters, who he described as "a vicious and useless class").

39. KOUSSER, *supra* note 15, at 250–57. In Alabama's convention, for example, there is direct testimony that the cumulative tax provision was meant to disenfranchise many poor whites who would vote against the economic interests of the wealthy Southern Democratic elite. *See id* at 169; *see also,* Dickinson, *supra* note 10, at 1036.

40. Wechsler, *supra* note 20, at 29.

41. *See* KOUSSER, *supra* note 15, at 169–81.

42. *See* Lackey, *supra* note 25, at 427.

people] than whites."[43] As a means of racially targeted disenfranchisement, the poll tax was incredibly effective. As an illustrative example: in Louisiana, there were 130,000 black voters registered in 1896 before the poll tax requirement was enacted, but only 1,340 remained in 1904.[44]

Poll taxes in the post-Reconstruction south[45] usually ranged from $1.00 to $2.00 per year, which was excessive for both poor black and white sharecroppers, given that sharecroppers were not typically paid in cash.[46] Because the tax was such a relatively small amount, it had the feature of being "no appreciable hindrance to voting for the well-to-do when its payment [was] a prerequisite to voting" but created "a serious burden for those of low economic status."[47] In 1901, one South Carolina congressman noted that many potential black voters did not bother to register to vote "because they would rather save the dollar which would be required as poll tax."[48] Additionally, some states made little or no effort to collect the poll tax while still requiring payment as a precondition to vote, or specified specific windows in which to pay the tax that did not coincide with elections.[49] In many states, the taxes accrued over time when they were unpaid, so the individual would have to pay back taxes for every year they were unable to pay before they could exercise the right to vote.[50] The effectiveness of the tax can be summarized by a statement by a woman in the Georgia backcountry when asked about the tax: "A dollar ain't much if you've got it."[51]

B. The Twenty-Fourth Amendment: Ghosts of the New Deal

The Twenty-Fourth Amendment to the Constitution, which ultimately banned the use of the poll tax as a means to disqualify voters in federal

43. Lackey, *supra* note 25, at 427.

44. Kelly Philips Erb, *For Election Day, A History of the Poll Tax in America*, FORBES (Nov. 5, 2018, 8:30 PM), https://www.forbes.com/sites/kellyphillipserb/2018/11/05/just-before-the-elections-a-history-of-the-poll-tax-in-america/#508c6f164e44.

45. For an examination of the variations in the poll tax requirements of the individual states, see FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 39–40 (Univ. of Alabama Press, 1958).

46. FIFE, *supra* note 12, at 19; KOUSSER, *supra* note 15, at 65.

47. BONTECOU, *supra* note 21, at 2.

48. KOUSSER, *supra* note 15, at 63.

49. *See, e.g.*, Dickinson, *supra* note 10, at 1032 (noting that Texas's poll-tax provision required voters to present a receipt showing that their tax was paid between October 1st and January 31st). Receipt requirements also denied the franchise, as receipts could be lost in between payment of the tax and the election. Schultz & Clark, *supra* note 11, at 389.

50. KOUSSER, *supra* note 15, at 65; *see also,* C. VAN WOODWARD, A HISTORY OF THE SOUTH: 9 ORIGINS OF THE NEW SOUTH 1877-1913, 336 (1954); Ellis, *supra* note 13, at 1042.

51. BONTECOU, *supra* note 21, at 16; Sarah Wilkerson-Freeman, *The Second Battle for Woman Suffrage: Alabama White Women, the Poll Tax, and V. O. Key's Master Narrative of Southern Politics*, 68 J. SOUTHERN HISTORY 333, 347 (2002).

elections, is often referred to as a "forgotten amendment."[52] Although it is widely assumed that the amendment was passed as a result of the Civil Rights Movement of the 1960s, the amendment actually traces its origins thirty years earlier, to the New Deal era. Part I.B.1 discusses the New Deal origins of the effort to abolish the poll tax that culminated in the Twenty-Fourth Amendment, Part I.B.2 discusses the amendment's legislative history, and Part I.B.3 discusses the Supreme Court's interpretation of the amendment as exemplified by *Harman v. Forsennius*.[53]

i. New Deal Efforts to Abolish the Poll Tax

In the 1930s, early organizing campaigns sought federal involvement in abolishing the poll tax, and President Franklin Delano Roosevelt ("FDR") initially gave his full-throated support for the abolition, publicly framing the abolishment of the tax as an issue of class rather than race.[54] In this era of expanding protections for workers' rights and economic security, many bills died or were watered down in committees chaired by conservative Democrats from poll tax states.[55] At the time, however, the South had the largest proportion of self-identifying "liberals," here meaning supporters of progressive economic programs,[56] than any other region in the country,[57] and the Great Depression had greatly increased the number of white people affected by the tax requirement.[58] The New Dealers hardly cared that these economic liberals, much like the Populists before them, included vehement racists. In order to get these programs through Congress, FDR needed the support of poorer southern whites who were disproportionately disenfranchised by poll taxes but who had perhaps the greatest economic stake in the programs' passage.[59] Because of this widespread

52. *See* Brendan F. Friedman, Note, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment,* 42 HOFSTRA L. REV. 343, 346 (2013); *see also,* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 N.W. U. L. REV. 63, 69 (2009) ("The Twenty-Fourth Amendment lies deep in the shadows."); Schultz & Clark, *supra* note 11, at 375 (describing the Amendment as one of the "'great silences' of the Constitution" and noting its "ironic superfluousness").

53. 380 U.S. 528 (1965).

54. MANFRED BERG, "THE TICKET TO FREEDOM": THE NAACP AND THE STRUGGLE FOR BLACK POLITICAL INTEGRATION 105 (2005); Ackerman & Nou, *supra* note 52, at 71.

55. *See generally* Louis Menard, *How the Deal Went Down*, THE NEW YORKER (Feb. 24, 2013), https://www.newyorker.com/magazine/2013/03/04/how-the-deal-went-down.

56. As noted above, many poorer whites in the South were economically liberal but socially and racially conservative. Paul Krugman referred to these voters in a recent *New York Times* op-ed as "racist populists." Paul Krugman, *The Empty Quarters of U.S. Politics*, N.Y. TIMES (Feb. 4, 2019), https://www.nytimes.com/2019/02/04/opinion/ralph-northam-howard-schultz.html?rref=collection%2Fbyline%2Fpaul-krugman.

57. Ackerman & Nou, *supra* note 52, at 71.

58. OGDEN, *supra* note 45, at 182–85.

59. Ackerman & Nou, *supra* note 52, at 71; Friedman, *supra* note 52, at 346.

disenfranchisement, there was a widely held belief that southern congressional delegations did not reflect the true economic policy preferences of the region.[60]

The New Deal era brought legal challenges to the poll tax as well. In 1937, a white man sued over Georgia's poll tax statute, claiming that it violated the Equal Protection Clause as well as the Nineteenth Amendment, as Georgia did not collect the tax from women. In *Breedlove v. Suttles*, the Supreme Court unanimously upheld the constitutionality of the scheme, finding it to be a legitimate nondiscriminatory method for raising revenue.[61] Ignoring the racist and classist motivations of the poll tax requirement, the Court instead viewed the tax as a neutral form of taxation which had long been used in the United States and other countries, equating it to the antebellum practice.[62] The Court noted that:

> [T]he payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex.[63]

The *Breedlove* decision, along with conservative Southern Democrats in Congress opposing FDR's court packing plan, sparked a concerted effort to prohibit the poll tax by constitutional amendment.[64] Although unsuccessful, debate surrounding the poll tax took up a great deal of political oxygen during the New Deal period, with many more liberal Democrats framing the issue of repeal as a class issue, as opposed to a race-based civil rights issue.[65]

60. *See* BONTECOU, *supra* note 21, at 4 ("[T]he will of the majority of citizens has at times been thwarted by . . . men who have been chosen by a restricted electorate among whom there is a very small proportion of the workers in field or factory."). Roosevelt explicitly blamed the poll tax for many of his political problems and the inability to pass certain New Deal programs. *See* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 57 (Columbia Univ. Press, 1976) (citing Letter from Franklin D. Roosevelt, President of the United States, to Aubrey Williams (Mar. 28, 1938), President's Personal File 200, Franklin Delano Roosevelt Library) ("I think the South agrees with you and me. One difficulty is that three quarters of the whites in the South cannot vote–poll tax etc.").

61. Breedlove v. Suttles, 302 U.S. 277 (1937).

62. *Breedlove*, 302 U.S. at 281; *see also,* Schultz & Clark, *supra* note 11, at 393.

63. *Breedlove*, 302 U.S. at 281.

64. FIFE, *supra* note 12, at 19.

65. Friedman, *supra* note 52, at 346.

FDR initially used the full weight of the bully pulpit to decry the poll tax requirement, labeling the more conservative southern leaders of the Democratic Party as representatives of "Polltaxia," and openly challenging these members with more liberal candidates in Democratic primaries.[66] As the Democratic Party was large and ideologically diverse at that time, with the South essentially being a one-party region, Roosevelt hoped that challenging the "Polltaxia" contingent would change the party's congressional delegation to a more liberal and ideologically coherent caucus which would reliably back his New Deal initiatives.[67] At the same time, Roosevelt secretly encouraged campaigns to repeal the poll tax at the state level.[68]

The conservatives, however, mostly held onto their seats in the primaries of 1938, and forced the president to retreat on his call for an abolition of the poll tax.[69] While Eleanor Roosevelt vigorously and vocally supported a full statutory ban on the practice even after this defeat,[70] the President, stung by his rebukes in the southern primaries, remained much more cautious on the issue throughout the remainder of his presidency.[71] Regardless, FDR's early embrace of the issue paved the way for future legislators to frame the repeal of the poll tax in terms of wealth discrimination. This made the abolition of the tax a major priority of liberals and progressives in the following decades.[72]

ii. The Long Road to the Twenty-Fourth Amendment

At the end of the New Deal era, anti-poll tax efforts achieved moderate success in fits and starts. During the Second World War, for example, Congress passed the Soldier Vote Act of 1942, which forbade states from levying a poll tax for absentee ballots in federal elections.[73] The pressure to abolish the tax increased further when the Supreme Court struck down

66. *Id.*

67. Ackerman & Nou, *supra* note 52, at 71 ("Roosevelt's aim was nothing less than the transformation of the Democrats into an ideologically coherent liberal party that could sustain progressive politics on a national basis.").

68. *Id.*

69. Ackerman & Nou, *supra* note 52, at 71.

70. ELEANOR ROOSEVELT, THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT 191 (1992) ("I also remember wanting to get all-out support for . . . the removal of the poll tax, but though Franklin was in favor . . . [it] never became 'must' legislation."). Eleanor Roosevelt remained a vocal advocate against the poll tax both as First Lady and after she left the White House. THE ELEANOR ROOSEVELT ENCYCLOPEDIA 92 (Maurine H. Beasley et al., eds., 2001) (discussing Roosevelt's collaborative efforts with Pauli Murray to organize the National Committee to Abolish the Poll Tax); *id.* at 94 (discussing her efforts to pressure the Truman administration on the issue).

71. Ackerman & Nou, *supra* note 52, at 77–78.

72. *Id.* at 71; *see also,* BONTECOU, *supra* note 21, at 4.

73. Soldier Vote Act, ch. 561, § 2, 56 Stat. 753, 753 (1942).

the "white primary"[74] and the Republican Party placed opposition to the tax requirement in its 1944 platform.[75] It was not until 1946, however, that the effort to establish what eventually became the Twenty-Fourth Amendment took hold.

Beginning in 1946, Senator Spessard Holland, a Florida Democrat, attempted to pass an Article V constitutional amendment to abolish the poll tax.[76] His first proposal passed the House but died by filibuster in the Senate.[77] He would repeat this quixotic effort over the next twelve years, repeatedly reintroducing the amendment in each new Congress.[78] Five years before the amendment's eventual passage, it seemed that these efforts would continue to be fruitless in perpetuity, both due to southern filibuster and the lack of interest on the part of three-fourths of the states.[79]

Interestingly, despite the Twenty-Fourth Amendment being his signature achievement, Holland was a lifelong segregationist.[80] Holland continually agitated for the amendment because he viewed the issue through the New Deal-era lens of class, rather than race, as he repeatedly stressed throughout the decades of debates on the issue.[81] Although the poll tax was certainly a large piece of the Jim Crow recipe for disenfranchising black voters, other means, such as literacy tests, were likely far more essential ingredients for black disenfranchisement.[82] In fact, by the time the amendment came before the states, all but five states had eliminated the practice entirely, largely due to the slow, piecemeal efforts of the New Deal-era reformers.[83]

Holland's efforts were rewarded, however, in the early days of the Kennedy administration.[84] With national public opinion slowly turning against Jim Crow in 1962, Holland's amendment was attractive to a number

74. Smith v. Allwright, 321 U.S. 649 (1944); *see also,* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2014) (describing *Smith v. Allwright* as "[t]he Court's most important white primary decision").

75. Ackerman & Nou, *supra* note 52, at 78.

76. *Id.*

77. *Id.*

78. *Id.* at 78–79.

79. Dickinson, *supra* note 10, at 1038.

80. *See* Associated Press, *Spessard L. Holland Dies at 79; Former Senator From Florida*, N.Y. TIMES (Nov. 7, 1971), https://www.nytimes.com/1971/11/07/archives/spessard-l-holland-dies-at-79-former-senator-from-florida.html.

81. 108 CONG. REC. 2851, 4154 (statement of Senator Holland) ("[T]he proposal does not come under the ordinary classification of the ordinary civil rights legislation. It applies to majorities, to minorities, and to every person of every color.").

82. Ackerman & Nou, *supra* note 52, at 79.

83. *Id.*

84. When John F. Kennedy was elected in 1960, fewer than 30 percent of all 1.4 million Southern blacks were eligible to cast a ballot. *See* MARK R. LEVY & MICHAEL S. KRAMER, THE ETHNIC FACTOR 50–53 (Simon and Schuster, 1972).

of constituencies. Some southerners in Congress felt that they could abolish the poll tax without changing the political reality of the region, and that coming out in favor of the amendment would give them cover to oppose more sweeping civil rights reforms.[85] Desperate to contain the political fallout from the Freedom Rides,[86] President Kennedy was anxious for an easy civil rights win that would not damage his reputation among white southerners, who might provide the difference in his 1964 reelection effort.[87] Although the amendment faced strong opposition from some prominent liberals and civil rights groups because of fears of setting a precedent requiring all civil rights issues to be passed by constitutional amendment, the Twenty-Fourth Amendment ultimately passed Congress by incredible margins,[88] almost thirty years after FDR's initial campaign against "Polltaxia."

After passage in Congress, the amendment was quickly ratified by the states over the next sixteen months, propelled by the rising national interest in the civil rights movement.[89] Remarkably, the struggle to abolish the tax over the decades "had suddenly become a relatively uncontroversial—if painfully inadequate—response to the country's racial and economic problems."[90] The text of the amendment, now enshrined in the written constitution, provides that:

> [T]he 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

85. *See* Ackerman & Nou, *supra* note 52, at 85–86 ("One of the strong factors in the poll tax amendment against which you seem to have a bad aversion but which has allowed many Senators to cast a Constitutional vote on a relatively non-important matter which gave them an out on vastly more important matters like the literacy bill." (quoting Letter from Spessard L. Holland to E. H. Crowson (May 12, 1962))).

86. *See generally* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (Oxford Univ. Press, 2007).

87. The Amendment was opposed by a number of more liberal senators in both parties, as well as civil rights groups such as the NAACP, as they thought that a constitutional amendment would force a precedent that future civil rights laws could only be passed through constitutional amendment, which would allow thirteen states to veto them. *See After the Poll Tax*, CHI. DAILY TRIB., Mar. 31, 1962, at 12; Anthony Lewis, *Senate Approves Ban on Poll Tax in Federal Votes*, N.Y. TIMES (Mar. 28, 1962), at A1.

88. The vote tally for final passage was 77 to 16 in the Senate, and 294 to 86 in the House. 108 CONG. REC. 2851, 17,670 (1962); *The Twenty-Fourth Amendment*, 1962 CONG. Q. ALMANAC 404. Although the final passage was by overwhelming margins, moving the amendment through Congress was by no means easy. For a complete and well-written history of the difficult legislative and procedural maneuvers involved in passing the Twenty-Fourth Amendment, see Ackerman & Nou, *supra* note 52, at 85–86.

89. Ackerman & Nou, *supra* note 52, at 87.

90. Ackerman & Nou, *supra* note 52, at 87.

> 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.[91]

Furthermore, "[t]he Congress shall have power to enforce this article by appropriate legislation."[92]

iii. The Supreme Court Weighs In

At the time of the amendment's ratification, only five states still had a poll-tax qualification on the books.[93] As the amendment concerned only federal elections, four states retained their tax requirement for state elections, thereby attempting to set up two separate sets of voting qualifications.[94] Indeed, Joe Patterson, the Mississippi Attorney General at the time of the amendment's ratification, stated that "[s]ome machinery will have to be set up to reckon with two sets of voters—one for state elections and one for national elections," and Alabama's Attorney General, Richmond Flowers, lamented the "terrifically confusing" situation caused by the amendment's passage.[95]

The Virginia Legislature, anticipating the enactment of the amendment, had previously passed a law to ensure that its poll tax would be retained in state elections.[96] The law permitted residents to vote for federal candidates by filing certificates of residence, but required annual payments of $1.50 a person for voting in state elections.[97] In *Harman v. Forsennius*, the only case in history where the Supreme Court directly applied and interpreted the Twenty-Fourth Amendment, this practice was ultimately struck down.[98] In holding that this dual system was "repugnant to the Twenty-Fourth Amendment," the *Harman* Court framed its understanding of the poll tax in both racial and economic terms.[99]

The Court noted the "widespread national concern" with the poll tax in the lead up to the amendment's passage, and described the "general

91. U.S. CONST. amend. XXIV, § 1.

92. U.S. CONST. amend. XXIV, § 2.

93. These states were Alabama, Arkansas, Mississippi, Texas, and Virginia. Ben A. Franklin, *Impact of Poll Tax Has Waned in Last 40 Years*, N.Y. TIMES (Jan. 24, 1964), https://www.nytimes.com/1964/01/24/archives/impact-of-poll-tax-has-waned-in-last-40-years.html.

94. United Press Int'l, *24th Amendment, Banning Poll Tax, Has Been Ratified; Vote in South Dakota Senate Completes the Process of Adding to Constitution*, N.Y. TIMES (Jan. 24, 1964), https://www.nytimes.com/1964/01/24/archives/24th-amendment-banning-poll-tax-has-been-ratified-vote-in-south.html. Arkansas repealed its tax requirement for state elections by ballot initiative in 1964. ARK. SEC'Y OF STATE, HISTORICAL INITIATIVES & REFERENDA ELECTION RESULTS (1938-2018) at 10, https://www.sos.arkansas.gov/uploads/elections/Initiatives_and_Amendments_1938-2018_1.pdf (last visited Aug. 13, 2019).

95. *See* United Press Int'l, *supra* note 94.

96. *See id.*

97. *See id.*

98. 380 U.S. 528 (1965).

99. *Id.* at 533–34.

repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax," due to its nature of "exact[ing] a price for the privilege of exercising the franchise."[100] The majority opinion also observed that the poll tax was "a requirement adopted with an eye to the disenfranchisement of [black people] and applied in a discriminatory manner."[101]

Crucially, the Court began its analysis of the Virginia alternative to the poll tax by opining that the 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."[102] Comparing the new provision to the Fifteenth Amendment, the Court declared that the Twenty-Fourth "'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed."[103]

Thus, according to the Court, in order for the plaintiffs to demonstrate that the restriction was unconstitutional under the amendment, they needed to show that it "impose[d] a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax."[104] The Court noted that the Virginia scheme was a "cumbersome procedure" that imposed a "real obstacle" for those citizens who asserted their constitutional right to vote free of a poll tax requirement.[105] A State imposing a requirement upon voters who refused to pay the poll tax therefore abridged voting rights *because* of the refusal to pay the poll tax.[106]

The Court gave no credence to the argument that the new dual scheme provided administrative benefits to the state, concluding that in federal elections "the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed."[107] In sweeping terms, the Court declared that "[a]ny material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-Fourth Amendment and must fall under its ban."[108] The amendment, the Court proclaimed, "was . . . designed to absolve all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax."[109]

100. *Id.* at 539.
101. *Harman*, 380 U.S. at 540.
102. *Id.* at 540.
103. *Id.* at 540–41 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
104. *Id.* at 541.
105. *Id.* at 542.
106. *Harman*, 380 U.S. at 542. (emphasis added).
107. *Id.*
108. *Harman*, 380 U.S. at 542.
109. *Id.* at 544.

Despite the bold pronouncements of the *Harman* decision, the Twenty-Fourth Amendment was never successfully used again to challenge the constitutionality of a state statute.[110] The legislative follow-up to the amendment in the Voting Rights Act of 1965 and the seminal case of *Harper v. Virginia State Board of Elections*[111] helped ensure, however, that the prohibition of the poll tax requirement for the exercise of the franchise became a bedrock principle of the constitutional canon.

C. The Death of the Poll Tax: The Voting Rights Act and *Harper v. Virginia State Board of Elections*

Although the Twenty-Fourth Amendment prevents states from conditioning voting on payment of the poll tax in federal elections, the states initially remained free to use the tax as a barrier in their state elections. While only four states retained the poll tax in the early 1960s, the Civil Rights Movement continued to press the national conversation in favor of civil and voting rights, including the absolute abolition of the tax requirement at the state level.

That opportunity seemingly came with the Voting Rights Act of 1965. The monumental legislation passed through Congress in the wake of "Bloody Sunday" and Martin Luther King Jr.'s march from Selma to Montgomery, Alabama, which turned a spotlight on the disenfranchisement of black voters in the South.[112] The footage of King and other organizers like later Congressman John Lewis being brutally beaten on the Edmund Pettus Bridge stirred a nationwide call to action to protect the right to vote.[113]

Although scholarly[114] and popular media[115] have explored the Act's passage through Congress and the ways it has fundamentally affected voting rights and entered the national consensus, less attention has been given to the unique way in which the Act addressed the question of the poll tax in state elections.

Instead of including an outright statutory ban on the practice in the final text of the Act, Congress instead engaged in a novel kind of "legal ju-jitsu" by issuing a list of "findings" that declared that the poll tax denies or abridges the constitutional right to vote. Congress then directed the Attorney General to file a lawsuit urging the Supreme Court to strike down the remaining state

110. Schultz & Clark, *supra* note 11, at 376.

111. 383 U.S. 663 (1966).

112. BERMAN, *supra* note 38, at 4–6; DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 404 (1986).

113. GARROW, *supra* note 112, at 404.

114. *See, e.g.*, Ackerman & Nou, *supra* note 52, at 87–111. *See generally,* THE FUTURE OF THE VOTING RIGHTS ACT (David L. Epstein, et al. eds., 2006); Davidson, *supra* note 24.

115. *See, e.g.*, BERMAN, *supra* note 38, at 13–64; ALL THE WAY (HBO Films 2016); SELMA (Paramount Pictures 2014).

poll tax requirements.[116] The provision's authors hoped that this approach would encode the elimination of the poll tax as a "superprecedent" through interbranch collaboration between Congress and the courts.[117] Rather than using the cumbersome and politically costly process of an Article V amendment, the Voting Rights Act's sponsors hoped to collaborate with the judiciary to "crystalize commitments rooted in two generations of constitutional politics," as exemplified by the public mobilization and legislative actions accompanying the New Deal and the Civil Rights Movement.[118] As Attorney General Nicholas Katzenbach explained to President Lyndon Johnson, involving both Congress and the courts in the effort was the "safest, swiftest, and most efficient course to eliminate the poll tax."[119]

The Supreme Court ultimately took up the issue in the 1966 case *Harper v. Virginia State Board of Elections*,[120] holding that Virginia's state poll tax scheme violated the Equal Protection Clause. Writing for the six-justice majority, Justice William O. Douglas reversed the Court's decision in *Breedlove*. Interestingly, Douglas's majority opinion made no mention of the tax's purpose of disenfranchising black voters,[121] and instead framed the issue as the state discriminating on the basis of wealth.[122] The Court noted that although states have the right to regulate their own elections, these regulations must not "invidiously discriminate" and must be within the confines of the Equal Protection Clause.[123] Speaking in the Warren Court's trademark broad terms, the Court declared that states violate the Equal Protection Clause "whenever [they] make[] the affluence of the voter or payment of any fee an electoral standard."[124] Citing to the Court's earlier voting rights jurisprudence, Douglas noted that the "political franchise of voting" is a "fundamental political right, because [it is] preservative of all

116. Ackerman & Nou, *supra* note 52, at 101, 109.

117. *Id.* at 103–04.

118. *Id* at 109.

119. Memorandum from Att'y Gen'l Nicholas B. Katzenbach to Lyndon B. Johnson, President of the United States, *Reasons Why the Department of Justice Has Favored the Mansfield-Dirksen Approach to Elimination of the Poll Tax* (May 21, 1965); *see also,* Ackerman & Nou, *supra* note 52, at 101-02. The approach was not without its detractors—it was opposed by both liberals such as Ted Kennedy and Jacob Javits as well as segregationists like Strom Thurmond. *Id* at 101–04.

120. 383 U.S. 663 (1966).

121. *See id.* at 672 (Black, J., dissenting) ("It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law . . . is being used as a device or mechanism to deny [black] citizens of Virginia the right to vote on account of their color.").

122. *Id.* at 666 (majority opinion).

123. *Id.* at 666; *see also, id.* at 665 ("[T]he right of suffrage 'is subject to the imposition of state standards which are not discriminatory.'" (quoting Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959)).

124. 383 U.S. at 666.

rights."[125] As an illustration, the Court compared the poll tax requirement to a hypothetical tax on the right to speak, noting that while "no court would hesitate to strike it down as a blatant infringement of the freedom of speech," "the poll tax as enforced . . . is a tax on the equally important right to vote."[126]

Douglas's opinion contains many broad, sweeping declarations about the unacceptability of limiting exercise of the franchise by discriminating in favor of wealth. The opinion declared that wealth, like race, has no bearing on one's ability to be an informed voter,[127] and that "a citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."[128] Douglas called this "the clear and strong command of our Constitution's Equal Protection Clause."[129] He noted that "[t]he principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors, by analogy, bars a system which excludes those unable to pay a fee to vote or who fail to pay."[130]

Douglas also found fault with Virginia's argument that the poll tax was more akin to an administrative fee in other state functions, like licensing drivers, which is applied equally to all citizens. The Court stated that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications."[131] In comparing voting qualifications drawn on the basis of wealth to lines and practices drawn on the basis of race, Douglas opined that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."[132] The Court held that the degree of discrimination caused by the fee was irrelevant. The fee itself as a prerequisite for voting "r[an] afoul of the Equal Protection Clause."[133] The Equal Protection Clause, the Court noted, requires "the opportunity for equal participation by all voters in the election of state legislators."[134]

In overruling *Breedlove*, the Court noted that "the Equal Protection Clause is not shackled to the political theory of a particular era" and that, in determining what constitutes a discriminatory practice, the Court has "never been confined to historic notions of equality" because "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do*

125. *Harper*, 383 U.S. at 667 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
126. *Id.* at 665 n. 2 (quoting United States v. Texas, 252 F. Supp. 234, 254 (W.D. Tex. 1966)).
127. *Id.* at 668 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.").
128. *Id.* at 667.
129. *Id*.
130. *Harper,* 383 U.S. at 668.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 670 (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)).

change."[135] The Court then compared the attitude around the poll tax requirement to the Court's evolution on the concept of "separate but equal" between *Plessy v. Ferguson* and *Brown v. Board of Education*.[136] In reversing the lower court and declaring the poll tax requirement unconstitutional, Justice Douglas forcefully concluded: "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[137]

Harper is in keeping with many other Warren Court cases that found government distinctions based on wealth constitutionally deficient.[138] Although the Burger Court began to shift away from the bold pronouncements in *Harper*, holding that wealth is not a suspect class on par with race and applying the rational basis test to cases alleging wealth discrimination,[139] *Harper* remains a landmark case in the constitutional canon. Despite the ideological shift of the Court over time, it continues to cite *Harper*,[140] and it will still apply strict scrutiny to cases involving wealth discrimination when a fundamental right, such as voting, is implicated.[141]

Although Justice Douglas's opinion fails even to mention the Twenty-Fourth Amendment or the constitutional "findings" of the Voting Rights Act on the poll tax, Bruce Ackerman and Jennifer Nou posit that *Harper* deserves status as a superprecedent, similar to notable New Deal era cases such as *United States v. Darby Lumber Company*.[142] In these cases, the Court uses its power to uphold landmark statutes and cement the American people's popular sovereignty into the country's larger constitutional canon.[143] *Harper* stands for the notion that the American people, rather than simply the six

135. *Harper*, 383 U.S. at 669.

136. *Id.* at 669–70 (citing Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954); Plessy v. Ferguson, 163 U.S. 536 (1896)).

137. *Id.* at 670.

138. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating filing fees for divorce cases as applied to individuals unable to pay the fee); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that welfare beneficiaries possess a property right in their anticipated government benefits, and that such benefits cannot be terminated without a hearing); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide legal counsel to indigent criminal defendants); *see also,* MICHAEL DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW 42 (2d ed. 2015).

139. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 478 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); *see also,* Bertrall L. Ross II, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 341–43 (2016).

140. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 227 (2003); Bush v. Gore, 531 U.S. 98, 105 (2000).

141. DIMINO ET AL., *supra* note 138, at 43.

142. 312 U.S. 100 (1941).

143. Ackerman & Nou, *supra* note 52, at 136. For an extensive explanation of why these and other New Deal-era statutes and precedents should be given this special status as part of the "small c" constitutional fabric of the United States, see Luke Norris, *The Workers' Constitution*, 87 FORDHAM L. REV. 1459, 1500–14 (2019).

justices in the majority, had ultimately rejected qualifying the right to vote on the basis of wealth once and for all.

II. Civil Death: Felon Disenfranchisement in the United States

To understand the connection between the poll tax and disenfranchisement for the failure to pay legal financial obligations, it is essential to explore the practice of felon disenfranchisement in the United States. Part II.A. discusses the history of felon disenfranchisement in the United States. Part II.B. discusses the relevant Supreme Court jurisprudence surrounding the issue.

A. The Origins of Felon Disenfranchisement in the United States

Unlike nearly every other western democracy, the United States forces inordinate civil penalties on people convicted of felonies, as opposed to criminal punishment alone. These consequences often include fines, victim restitution, the loss of the right to serve on juries, and, crucially, the loss of the right to vote.[144] In the 2000 election, approximately 4.7 million otherwise eligible Americans were prohibited from voting because they were incarcerated due to a criminal conviction, were serving terms of probation or parole, had previous criminal convictions, or had unpaid fees or court costs that were imposed on them as a condition of their conviction.[145]

The disenfranchisement of felons has its roots in the Middle Ages concept of "civil death," where individuals convicted of certain crimes were banished from the community and lost all legal rights, including their right to own and inherit property.[146] This concept was brought to the United States by European colonists, although the colonists eventually abandoned stripping certain civil rights such as inheritance.[147] In the early United States, only certain crimes were subject to disenfranchisement laws, but by the mid-

144. *See* Lauren Handelsman, Note, *Giving the Barking Dog Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 75 FORDHAM L. REV. 1875, 1879 (2005); Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1318 (2003).

145. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 780, 797 (2002).

146. Harry David Saunders, *Civil Death – A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 988-992 (1970); *see also* Alec C. Ewald, "*Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060; Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913, 1913 (2015); Handelsman, *supra* note 144, at 1879.

147. Handelsman, *supra* note 144, at 1879.

nineteenth century several states prohibited felons who had committed serious crimes from casting a ballot.[148]

Although the practice had roots in the Early Republic, felon disenfranchisement, like the poll tax, was openly weaponized against newly enfranchised black voters during the late nineteenth and early twentieth centuries. In many post-Reconstruction constitutions, states expanded the limits of provisions revoking voting rights, by enumerating specific crimes they expected black people would be more likely to commit.[149] Between 1865 and 1900, eighteen states adopted laws restricting the voting rights of convicted criminals; thirty-eight states total had some type of felon voting restriction.[150] For example, Alabama's Constitutional Convention of 1901 included the notes supporting proposed felon disenfranchisement provisions of delegate John B. Knox, stating that, "The Convention's goal is to establish white supremacy in the State, within the limits imposed by the Federal Constitution,"[151] illustrating the "ardent and persistent embrace by Southern racists of the criminal justice system as a means of racial domination."[152] Today, states with higher numbers of black residents and a high proportion of non-white prison inmates are the states most likely to have strict criminal disenfranchisement laws.[153]

These restrictive laws cast a wide net, and in some extreme cases, citizens may lose their right to vote for convictions of minor offenses, such as misdemeanors and felonies that do not even carry a prison term.[154] First-time offenders may even be disenfranchised after entering guilty pleas for minor felonies, an action that takes place frequently despite actual innocence as the offender cannot risk a much harsher sentence if they lose at trial.[155]

148. Angela Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 563 (2003); Handelsman, *supra* note 144, at 1879.

149. *See* FREDERICKSEN & LASSITER, *supra* note 4, at 10; Wood & Trivedi, *supra* note 5, at 31.

150. Wood & Trivedi, *supra* note 5, at 32.

151. *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21 to Sept. 3* (1901) (statement of Delegate John B. Knox concerning convict disenfranchisement provisions).

152. Garrett Epps, *The 'Slave Power' Behind Florida's Felon Disenfranchisement*, THE ATLANTIC (Feb. 4, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-slave-power-behind-floridas-felon-disenfranchisement/552269/.

153. FREDERICKSEN & LASSITER, *supra* note 4, at 10; Behrens, et al., *supra* note 148, at 594, 596.

154. FREDERICKSEN & LASSITER, *supra* note 4.

155. *See generally* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice,* 154 U. PA. L. REV. 79 (2005); Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/; Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/; Benjamin Weiser, *Trial by Jury, a Hallowed*

Unsurprisingly, like many other practices in the criminal justice system,[156] felon disenfranchisement laws have a racially discriminatory effect even if the law is facially neutral. It is well established that people of color are disproportionately arrested and criminally convicted. Although the gap has closed slightly in recent years, according to a report from the Pew Research Center, black men are still more than five times as likely as white men to be incarcerated in the United States.[157]

If the goal of felon disenfranchisement was to prevent black people from voting, the laws have been incredibly effective, especially as mass incarceration greatly increased during the "tough on crime" era of the 1980s and 1990s.[158] The number of black prisoners rose 68 percent between 1980 and 1985, and then more than doubled by 1995.[159] Data from the U.S. Department of Justice shows that 8.3 percent of all black males, ages 25 to 29 in the United States, were in prison in 1996, as opposed to 2.6 percent of Hispanic males and just 0.8 percent of white males in the same age range.[160] While the rates of prison growth have slowed since the 1990s, the carceral state continues to have profound disproportional impact on the black and Latino communities. Indeed, "more African Americans are under correctional control today—in prisons or jail, on probation or parole—than

American Right, Is Vanishing, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html.

156. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 185–220 (rev. ed. 2012) (describing the disproportionate effects of mass incarceration on communities of color and specifically black men); JOHN F. PFAFF, LOCKED IN 45-50 (2017) (exploring possible causes of racial disparities in state prisons); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57 (2014) (describing the *Terry* stop-and-frisk doctrine as "a central site of inequality, discrimination, and abuse of power"); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 244 (2015) (describing "the salience of race to the American practice of capital punishment"); Praatika Prasad, Note, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3092–3109 (2018) (discussing racial bias in prosecutors' closing statements in criminal cases).

157. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RESEARCH CTR. (Apr. 30, 2019), https://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/ ("In 2016, there were 1,608 black prisoners for every 100,000 black adults—more than five times the imprisonment rate for whites (274 per 100,000) and nearly double the rate for Hispanics (856 per 100,000).").

158. *See generally* Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2013).

159. *Compare* BUREAU OF JUSTICE STATISTICS, STATE AND FEDERAL PRISONERS, 1925-85, 4 (1986) (noting 150,249 black prisoners in state and federal prisons in 1980), *with* CHRISTOPHER J. MUMOA & ALLEN J. BECK, PRISONERS IN 1996, BUREAU OF JUSTICE STATISTICS 9 (1997) (showing 220,700 black prisoners in state and federal prisons in 1985, and 541,900 black prisoners in that same category of facilities in 1995).

160. DARRELL K. GILLIARD & ALLEN J. BECK, PRISONERS IN 1997, BUREAU OF JUSTICE STATISTICS 11 (1998).

were enslaved in 1850," and, as a result, "more [black men] are disenfranchised today than in 1870, the year the Fifteenth Amendment was ratified."[161] One scholar has observed that criminal offenders, who are disproportionately black, constitute "for the first time since slavery, a voteless caste" in the United States.[162]

Unsurprisingly, felon disenfranchisement laws have had profound effects on the American political landscape, including the very fundamental methods of how our country's political maps are drafted. In the census conducted every decade, incarcerated individuals are typically counted as residents of the county where the prison is located.[163] This artificially overinflates the population of these counties, which are overwhelmingly rural, white, and conservative, and leaves the areas where these individuals are from, which are often urban, diverse, and Democratic leaning, vastly undercounted.[164] The disparity in the population data results in these white rural areas having more voting representation and political power in the legislative process at both the state and national level.[165]

Additionally, the practice of felon disenfranchisement is impactful enough to have likely made the difference in at least one presidential election. In 2000, for example, the Florida Secretary of State under Governor Jeb Bush, Katherine Harris, sent the state's county election supervisors a list of 58,000 voters to "purge" from the voting rolls due to a felony conviction.[166] Black Americans made up 11 percent of registered voters in Florida but 44 percent of voters on the list. After the election, as a part of a settlement in a lawsuit against Florida by the NAACP, a data firm estimated that 12,000 voters who were disenfranchised during the election were mistakenly placed on the list.[167] If 44 percent of these voters were African American, and 90 percent of African American voters voted for Al Gore, then at least 4,752 black Gore voters were mistakenly disenfranchised, almost nine times George W. Bush's margin of victory of 537 votes.[168]

161. ALEXANDER, *supra* note 156, at 175.

162. J. Whyatt Modesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & C.R. L. REV. 435, 436 (2001).

163. Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 325 (2018).

164. *Id.* at 328–29

165. *Id.*

166. Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, THE NATION (July 28, 2015), https://www.thenation.com/article/how-the-2000-election-in-florida-led-to-a-new-wave-of-voter-disenfranchisement/.

167. Berman, *supra* note 166.

168. *Id.*; *see also,* DIMINO ET AL., *supra* note 138, at 52.

B. Supreme Court Jurisprudence – *Richardson v. Ramirez* and *Hunter v. Underwood*

Despite the obvious discriminatory intent and impact of felon disenfranchisement laws, the Supreme Court has given its explicit blessing of these laws' constitutionality. In the 1974 case *Richardson v. Ramirez*,[169] then-Associate Justice William Rehnquist, writing for a six-justice majority, held that the Fourteenth Amendment grants an "affirmative sanction" to state laws that disenfranchise individuals with a criminal record.[170] Three plaintiffs challenged a California constitutional provision which completely denied voting rights to all individuals convicted of an "infamous crime," even if they had served their sentence.[171] The plaintiffs, all of whom had successfully completed their parole, claimed that this provision of the California Constitution and its enabling statute denied them equal protection under the Fourteenth Amendment.[172]

Justice Rehnquist's opinion denied the plaintiffs' equal protection claim and declined to apply strict scrutiny, as the Court had applied in other voting rights cases, based on the majority's understanding of the language in Section 2 of the Fourteenth Amendment.[173] Section 2, which allowed states to have their apportionment of representatives reduced if they denied the right to vote to qualified citizens, specifically exempted state efforts to disenfranchise individuals who "participat[e] in rebellion" or commit some "other crime."[174] Justice Rehnquist referred to the time of the amendment's drafting and ratification to note that the "other crimes" language was never altered, and that at the time of the amendment's ratification, "29 states had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[175] The Court also observed that after the Civil War, Congress readmitted the former Confederate States with acts that enabled a "fundamental condition"[176] of prohibiting states from depriving citizens of the right to vote "except as a punishment for such crimes as are now felonies at common law."[177] Justice Rehnquist opined that, "[T]he exclusion of felons from the vote has an affirmative sanction in [section] 2

169. 418 U.S. 24 (1974).
170. *Id.* at 54.
171. *Id.* at 26–27.
172. *Id.* at 27.
173. *See id.* at 42, 53–54.
174. U.S. CONST. amend. XIV, § 2.
175. *Richardson*, 418 U.S. at 48.
176. *Id.* at 52.
177. *Id.* at 51; *see also, id.* at 48–52.

of the Fourteenth Amendment, a sanction which was not present in the case of . . . other restrictions on the franchise."[178]

This "affirmative sanction" of felon disenfranchisement in the amendment's plain language, as well as the historical evidence, was of "controlling significance" to the Court in "distinguishing such laws from other state limitations on the franchise which have been held invalid under the Equal Protection Clause."[179]

Justice Thurgood Marshall, joined by Justice William Brennan, dissented, deriding the Court's "unsound historical analysis"[180] and stating that felon disenfranchisement was "not forever immunized from the evolving standards of equal protection scrutiny."[181]

Justice Marshall would have applied strict scrutiny to the California law since the right to vote is fundamental.[182] He noted that there was "no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen."[183] Although he did not touch on the racially discriminatory nature of felon disenfranchisement laws, Justice Marshall derided the laws as a state attempt to restrict access to the ballot to those who "support . . . the established order." In response to the state argument that disenfranchising felons prevents individuals from selfishly seeking to undermine the state's penal values at the ballot box, Justice Marshall dismissed this argument as merely a "temporal majority" disenfranchising individuals with different views.[184] Because the law is in need of constant revision in response to society's changing needs, Justice Marshall felt that the state effort to disenfranchise felons who might favor change to society's criminal laws "strikes at the very heart of the democratic process,"[185] and that felon disenfranchisement was a relic of "the fogs and fictions of feudal jurisprudence" which "infring[es] upon the spirit of our system of government."[186]

More than a decade later, the Court took on another case concerning felon disenfranchisement. Justice Rehnquist again delivered the opinion in *Hunter v. Underwood.*[187] The plaintiffs in *Hunter*, a black woman and a white man, challenged the constitutionality of the provision of the Alabama Constitution of 1901 that disenfranchised all persons convicted of "any

178. *Richardson*, 418 U.S. at 54–55.
179. *Id.* at 54.
180. *Id.* at 56 (Marshall, J. dissenting).
181. *Id.* at 76.
182. *Id.* at 77.
183. *Richardson*, 418 U.S. at 78.
184. *Id.* at 82–83.
185. *Id.* at 82.
186. *Id.* at 86 (quoting Byers v. Sun Savings Bank, 41 Okla. 728, 731 (1914)).
187. Hunter v. Underwood, 471 U.S. 222 (1985).

crime . . . involving moral turpitude."[188] While the provision was by its plain language "racially neutral," it had an undeniably discriminatory impact on black individuals.[189] The Court then followed the approach of *Arlington Heights v. Metropolitan Housing Redevelopment Corp.*[190] to determine whether the law rose to the level of violating the Equal Protection Clause: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory purpose or intent is required to show a violation of the Equal Protection Clause."[191] To violate the Equal Protection Clause, racial discrimination must have been a "substantial" or "motivating" factor behind a law's enactment, thus shifting the burden to the state to show that the law would have been enacted even without the discriminatory intent.[192]

Citing to the legislative history of the 1901 constitution as well as the historical record of the time,[193] the *Hunter* Court found that the section of the Alabama Constitution was enacted with the explicit intent of disenfranchising black voters and "certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation."[194] Although the state contended that the true purpose of the provision was to disenfranchise poor whites as well as black voters, the Court, without weighing the question of whether this discrimination against poor whites was a "permissible motive," found that this would not negate the racially discriminatory motive of the Alabama convention.[195] Furthermore, the Court stated, the intervening eighty years had not legitimated a provision enacted with explicit racially discriminatory intent.[196] Declining to say whether the language would be constitutionally valid if enacted today, the Court held that the provision violated the Equal Protection Clause.[197]

Justice Rehnquist concluded *Hunter* by attempting to reconcile the case with his *Richardson* opinion, stating that Section 2 of the Fourteenth Amendment certainly "was not designed to permit the purposeful racial discrimination attending the enactment and operation of [a provision] which

188. *Hunter*, 471 U.S. at 223–24 (quoting ALA. CONST. OF 1901 § 182).
189. *Id.* at 227.
190. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
191. *Id.* at 264–65 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).
192. *Hunter*, 471 U.S. at 228 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).
193. *Id.* at 228–31.
194. *Id.* at 231.
195. *Id.* at 232–33.
196. *Id.* at 233.
197. *Hunter*, 471 U.S. at 223.

otherwise violates section 1 of the Fourteenth Amendment" and holding that nothing in *Richardson* indicated anything to the contrary.[198]

The practical effect of *Richardson* and *Hunter* is that felon disenfranchisement laws are expressly permitted under the Fourteenth Amendment and, unlike other restrictions on voting rights, they are beyond the reach of strict scrutiny so long as they are not *expressly* enacted at least in part with a racially discriminatory purpose.[199]

Although it is nearly impossible to challenge a felon disenfranchisement law on equal protection grounds, attitudes toward these laws have changed significantly in both state legislatures and the public at large within the last decade. It has become increasingly apparent that many states now see these laws as "a heritage of the old slave-power mindset, [that] have no business marring politics in a twenty-first century democracy."[200]

Since the *Richardson* and *Hunter* decisions, many states have loosened their felon disenfranchisement laws. In Maine and Vermont, those convicted of a felony are still allowed to vote even while incarcerated.[201] It appears that the tide in some states have turned against felon disenfranchisement, often in newsworthy ways. For example, in three states where the legislative process has moved relatively slowly, governors have acted unilaterally to restore voting rights to certain classes of individuals with felony convictions.[202] Newly elected Governor Andy Beshear recently signed an executive order restoring voting rights to more than 140,000 formerly incarcerated individuals in Kentucky.[203] Similarly, in 2016, Virginia Governor Terry McAuliffe issued an executive order restoring the voting rights of all people with felonies who had completed their parole.[204] Lastly, New York Governor Andrew Cuomo issued an executive order in 2018 indicating his office would consider pardons to restore voting rights for

198. *Hunter*, 471 U.S. at 223.

199. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214, 1218–27 (11th Cir. 2005); Madison v. State, 163 P.3d 757 (Wash. 2007); Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000); *see also,* Sloan G. Speck, Note, *"Failure to Pay Any Poll Tax or Other Tax": The Constitutionality of Tax Felon Disenfranchisement*, 74 U. CHI. L. REV. 1549, 1556 (2007).

200. Epps, *supra* note 152.

201. DIMINO ET AL., *supra* note 138, at 51.

202. *See* NAT'L. CONF. STATE LEGIS, *Felon Voting Rights: Recent State Action*, (Oct. 14, 2019), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

203. Arian Campo-Flores, *Kentucky's New Governor Restores Voting Rights to Nonviolent Felons*, WALL ST. J. (Dec. 12, 2019, 4:03 PM), https://www.wsj.com/articles/kentuckys-new-governor-plans-to-restore-voting-rights-to-nonviolent-felons-11576152000.

204. Van R. Newkirk II, *How Letting Felons Vote Is Changing Virginia*, THE ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/.

individuals on parole, which could allow 35,000 formerly incarcerated people to get their voting rights back.[205]

Florida recently overturned its policy of total felon disenfranchisement via ballot initiative during the 2018 midterm elections, after decades of being the largest state to disenfranchise citizens with felony convictions.[206] Before the change in the law, 27 percent of all disenfranchised felons in the United States lived in Florida, and in 2016, more than 10 percent of all the state's eligible voting-age population was disenfranchised due to felony convictions.[207] Staggeringly, more than one-fifth of all black eligible voters in Florida were disenfranchised in 2016.[208] The result direct result of this ballot initiative could be monumental, as Florida frequently plays a key role in national politics and presidential elections.

While the successful Florida ballot initiative represents an incredible new opportunity for formerly incarcerated individuals to regain their voting rights, the Republican-controlled Florida legislature moved in early 2019 to mandate that these individuals must pay all of their outstanding legal financial obligations in order to qualify to have their voting rights restored.[209] This restriction, signed into law by Governor Ron DeSantis and recently upheld by the Florida Supreme Court, is estimated to halt or permanently obstruct the re-enfranchisement of many of the more than half-a-million people who will be affected by the LFO-repayment measure.[210] The next part addresses these types of LFO restrictions in detail, along with their unique constitutional and sociological implications.

205. Vivian Wang, *Cuomo Plans to Restore Voting Rights to Paroled Felons*, N.Y. TIMES (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/nyregion/felons-pardon-voting-rights-cuomo.html.

206. Gross, *supra* note 3.

207. Epps, *supra* note 152.

208. *Id.*

209. News Serv. of Fla., *Amendment 4 Bill: DeSantis Says He's Ready to Sign*, TAMPA BAY TIMES (May 8, 2019), https://www.tampabay.com/florida-politics/buzz/2019/05/08/amendment-4-bill-desantis-says-hes-ready-to-sign/; Wayne Washington, *Ex-Felon Bill, With Financial Constraints, Awaits Signature—or Veto*, GAINESVILLE SUN (May 7, 2019, 5:44 PM), https://www.gainesville.com/news/20190507/ex-felon-bill-with-financial-constraints-awaits-signature—or-veto; *see also,* Editorial, *Why Are Florida Republicans So Afraid of People Voting?*, N.Y. TIMES (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/opinion/sunday/florida-vote.html.

210. *See* Lawrence Mower, *Florida Supreme Court Issues Setback for Amendment 4 Supporters*, TAMPA BAY TIMES (Jan. 16, 2020), https://www.tampabay.com/florida-politics/buzz/2020/01/16/florida-supreme-court-issues-setback-for-amendment-4-supporters/; P.R. Lockhart, *A Controversial Florida Law Stops Some Former Felons From Voting. A Judge Just Blocked Part of It.*, VOX (Oct. 19, 2019, 2:53 PM), https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-lawsuits-fines-fees; *see also,* Jeffrey Schweers, *'New Beginning' for Florida Felons: Registrations Continue Amid Voting Rights Fight*, TALLAHASSEE DEMOCRAT (Nov. 21, 2019, 10:28 AM), https://www.tallahassee.com/story/news/local/state/2019/11/21/florida-felons-still-registering-amidst-amendment-4-legal-battle/4223319002/.

III. Disenfranchisement for Unpaid Legal Financial Obligations

While the number of states that permanently disenfranchise individuals with felony convictions has decreased in recent years, the practice of restricting the voting rights of ex-offenders who still owe legal financial obligations ("LFOs") remains shockingly prevalent. According to a 2019 survey by the Civil Rights Clinic at Georgetown Law School, 30 states have some form of these laws on their books.[211] Outstanding LFOs can include fees or fines attached to a criminal conviction, public citation, or expenses incurred during the course of legal proceedings or in the course of an individual's incarceration.[212] Sometimes these payments are related to the underlying charge, but other times they are merely a revenue source for the courts.[213] High interest rates and late fees can often compound debts.[214]

States can statutorily tie LFO obligations to disenfranchisement in two ways. The first type is categorized by a 2016 report as "direct" LFO disenfranchisement, where the disenfranchisement statute specifically requires repayment of these obligations for regaining the right to vote.[215] Of the thirty states that engage in LFO disenfranchisement, eight have laws that explicitly state a person's voting rights are revoked if LFOs are unpaid.[216] Others engage in "de facto" LFO disenfranchisement, where the state does not specifically require LFO repayment as a condition of re-enfranchisement, but effectively does so by mandating completion of probation or parole, and subsequently requires LFO repayment as a condition of that completion.[217]

Paying off these debts can be extremely difficult for people recently released from prison for various socioeconomic reasons. Individuals are often caught in a cycle of debt where, even if the amount owed is minimal, people may struggle to pay. Many jurisdictions also charge interest when the debt goes unpaid, causing the debt to accumulate. Simultaneously, as

211. GEORGETOWN LAW CIVIL RIGHTS CLINIC, CAN'T PAY, CAN'T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 21 (2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf ; *see also,* Karin Martin & Anne Stuhldreher, *These People Have Been Barred From Voting Today Because They're In Debt*, WASH. POST (Nov. 8, 2016, 3:00 AM), https://www.washingtonpost.com/posteverything/wp/2016/11/08/they-served-their-time-but-many-ex-offenders-cant-vote-if-they-still-owe-fines/.

212. FREDERICKSEN & LASSITER, *supra* note 4, at 5.

213. *Id.* at 11.

214. *Id.*

215. *Id.* at 7.

216. While most of the states with direct disenfranchisement for unpaid LFOs are in the former Confederacy, Connecticut, Washington State, and Arizona also have these statutes on their books. *See* CONN. GEN. STAT. § 9-46a(a) (2019); WASH. REV. CODE § 29A.08.520 (2019); ARIZ. REV. STAT. ANN. § 13-912 (20129); ARIZ. REV. STAT. ANN. § 13-905; *see also,* GEORGETOWN LAW CIVIL RIGHTS CLINIC, *supra* note 211, at 21.

217. GEORGETOWN LAW CIVIL RIGHTS CLINIC, *supra* note 211, at 25; FREDERICKSEN & LASSITER, *supra* note 4, at 7.

these debts only increase, many incarcerated people are not able to work for pay, and those that can are paid at alarmingly low rates, sometimes less than fifty cents an hour.[218] Criminal records can make it difficult for people to find jobs, and without a source of income, the released individual will struggle to pay bills and put food on the table. Choosing between essentials such as food and shelter or court-ordered debts is not a difficult choice to make.[219] As interest accrues, the cycle of debt continues. Some states also have provisions where unpaid LFOs carry prison time.[220] Even in states where courts are required to inquire into a person's ability to pay before assessing a LFO, many effectively ignore this obligation.

Although critics and Democratic politicians have widely noted the similarities between the poll tax and LFO voting requirements,[221] especially in the wake of the 2019 Florida imposition,[222] courts have all but unanimously rejected arguments that the practice is unconstitutional under both the Equal Protection Clause and the Twenty-Fourth Amendment. The Fourth,[223] Sixth,[224] Ninth,[225] and Eleventh[226] circuits, for example, all have

218. Ruben J. Garcia, *U.S. Prisoners' Strike is a Reminder How Common Inmate Labor Is,* CBS News (Sept. 3, 2018, 5:51AM) ("Inmates have claimed in lawsuits that they earned as little as 12 cents an hour—or nothing as all, as is legal in some states."); Daniel Moritz-Rabson, *'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold To Government*, NEWSWEEK (Aug. 28, 2018, 5:12 PM), https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729.

219. Nareissa Smith, *No Money, No Vote: How Imposed Fines, Fees and Costs Keep Black People From Voting*, ATLANTA BLACK STAR (Nov. 30, 2017), https://atlantablackstar.com/2017/11/30/no-money-no-vote-imposed-fines-fees-cost-keep-black-people-voting/.

220. FREDERICKSEN & LASSITER, *supra* note 4, at 10.

221. *See, e.g.*, Cory Booker (@CoryBooker), TWITTER (Apr. 24, 2019, 4:37 PM), https://twitter.com/CoryBooker/status/1121196374840754176 ("This is a poll tax."); Hillary Clinton (@HillaryClinton), TWITTER (May 7, 2019, 11:52 AM), https://twitter.com/HillaryClinton/status/1125835719488999425 ("No one should have their right to vote taken away because of fines. The Florida GOP's measure requiring people to pay court-ordered fees before regaining access to the ballot is a modern-day poll tax unworthy of our democracy."); Alexandria Ocasio-Cortez (@AOC), TWITTER (March 19, 2019, 11:56 AM), https://twitter.com/AOC/status/1108083568918564865 ("A poll tax by any other name . . .").

222. Dartunorro Clark, *Florida on Verge of Blocking Some Ex-Felons from Voting. Critics Call It a Poll Tax.*, NBC NEWS (May 3, 2019, 2:58 PM), https://www.nbcnews.com/politics/politics-news/florida-verge-blocking-some-ex-felons-voting-critics-call-it-n1001916.

223. Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000) (finding that Virginia's $10 fee to begin the process of civil rights restoration did not violate the Twenty-Fourth Amendment).

224. Johnson v. Bredesen, 624 F.3d 742, 746-51 (6th Cir. 2010) (holding that Tennessee's law requiring the payment of victim restitution and outstanding child support as a precondition to restoration of voting rights did not violate either the Equal Protection Clause or the Twenty-Fourth Amendment).

225. Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010).

226. Hand v. Scott, 888 F.3d 1206, 1209–10 (11th Cir. 2018) (holding that Florida's policy of reinstating felons' voting rights based solely on the discretion of an Executive Clemency Board did not violate the Equal Protection Clause).

explicitly held that states are able to enact barriers to reinstating the franchise for ex-felons, including requiring full payment of LFO obligations.

Indeed, nearly every court considering the question has dismissed equal protection and Twenty-Fourth Amendment claims regarding LFO requirements[227] because *Richardson* provides a carve-out from *Harper*, whereby felons no longer have a fundamental right to vote.[228] Rather, these cases deal with the *restoration* of a fundamental right, rather than a *denial* of a fundamental right.[229] Accordingly, instead of applying a form of heightened scrutiny, they apply the deferential rational basis test to find that these laws are rationally related to a legitimate state interest.[230] These courts have held that the states have a rational basis "for restoring voting rights to only those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders."[231] Even though these requirements might seriously affect the ability of certain felons to vote "based on . . . differing income statuses,"[232] the fact that they are felons, and therefore within the purview of *Richardson* and its progeny, takes the LFO requirements outside of the scope of *Harper*'s prohibition of conditioning the vote based on wealth.

IV. Eliminating the Twenty-First Century Poll Tax

The Court has never explicitly reconciled its decisions regarding felon disenfranchisement in *Richardson* and *Hunter* with *Harper's* much broader decision decrying the *per se* unconstitutionality of conditioning voting on payment of a fee. Although lower courts have held that LFO disenfranchisement is governed under the *Richardson* line of cases, these courts err in not giving *Harper* and the Twenty-Fourth Amendment greater weight in deciding the constitutionality of this practice.

Despite cases upending voting rights in recent years, the Court has "retained a sound intuition" that *Harper* and the prohibition on the poll tax "has deep roots in our current constitutional order, and that it would be a grievous mistake to cut our mooring lines to this particular triumph of the civil rights era."[233] As David Schultz and Sarah Clark argue, this should

227. Schultz & Clark, *supra* note 11, at 377.

228. *See, e.g.*, *Johnson*, 624 F.3d at 746; Madison v. State, 163 P.3d 757, 766-69 (Wash. 2007). For a more nuanced understanding of the subtle differences in the facts and holdings of these particular cases, see Ann Cammett, *Shadow Citizens*: *Felony Disenfranchisement and the Criminalization of Debt,* 117 PENN. ST. L. REV. 349, 387–96 (2012).

229. Cammett, *supra* note 228, at 388.

230. *See, e.g.*, *Madison*, 163 P.3d at 772; *Harvey*, 605 F.3d at 1079.

231. *Harvey*, 605 F.3d at 1079.

232. *Madison*, 163 P.3d at 769.

233. Ackerman & Nou, *supra* note 52, at 134; *see also,* Modesire, *supra* note 162, at 438 (noting that the hard won victories of the Civil Rights Movement "became the springboard for the

be extended to our collective understanding of the Twenty-Fourth Amendment as "a rejection of [the] linkage between wealth and voting, and a severing of the assumption that property or income is a prerequisite to having a political voice."[234]

Although *Harper* did not explicitly rely on the Twenty-Fourth Amendment in its opinion, both *Harper* and the text of the amendment, when taken together, provide a "superprecedent" in our constitutional canon against abridging voter qualifications based on wealth, which deserves far greater deference by courts than it has been given to date.[235] Popular understanding is that *Harper*'s failure to mention the Twenty-Fourth Amendment and its expansive read of the Fourteenth severely limited the Twenty Fourth's legal effect. However, this misunderstands the history of the *Harper* decision. As Bruce Ackerman and Jennifer Nou explain, *Harper* should be read in conjunction with the Twenty-Fourth Amendment as enshrining the struggles of the New Deal and Civil Rights-eras to end wealth discrimination in the nation's constitutional fabric.[236]

The practice of LFO disenfranchisement amounts to a poll tax within the contemplation of both the text of the constitution and monumental Supreme Court precedent that provides the capstone to the struggles of the New Deal and the Civil Rights Movement. Like the postbellum poll taxes in the South, disenfranchising individuals who owe financial obligations to the state discriminates on the basis of race and the basis of wealth. Like the poll tax, it has a disproportionate effect on people of color and those who would vote against the calcified economic interests in state legislatures. Disenfranchising otherwise qualified voters due to financial obligations "may today be strictly localized," but "its results are felt by the nation as a whole."[237] This "differential in voting requirements affects both the economic and political life of the nation."[238]

Courts have incorrectly framed the issue of LFO disenfranchisement by failing to take into account the "superprecedent" of the poll-tax prohibition. Although a state may deny felons the right to vote for any period of time, it does not follow that once a state enacts processes whereby an individual may regain his franchise rights, those processes may be

final legal assault in the Jim Crow laws which had deprived African Americans the vote since Reconstruction").

234. Schultz & Clark, *supra* note 11, at 377.

235. *See* Speck, *supra* note 199, at 1566 ("Douglas Mentions the Twenty-fourth Amendment nowhere in his opinion, but the Amendment and *Harper* fit together tightly.").

236. *See generally* Ackerman & Nou, *supra* note 52, at 134–35.

237. BONTECOU, *supra* note 21, at 4.

238. *Id.*

conducted in arbitrary and discriminatory ways that fail to comport with the other provisions of the Constitution.[239]

This Article argues that the practice should be deemed both an impermissible poll tax under the Twenty-Fourth Amendment as well as a violation of the Equal Protection Clause, *Richardson* notwithstanding. Part IV.A. describes how courts should view LFO disenfranchisement through the lens of the Twenty-Fourth Amendment as the framers envisioned it, and Part IV.B. then describes how courts should properly conduct an Equal Protection Clause analysis of LFO disenfranchisement provisions.

A. The Twenty-Fourth Amendment – A Constitutional Sleeping Giant

Although in the last decades lawyers have made efforts to employ the Twenty-Fourth Amendment in litigation about a number of voting rights issues, including voter identification laws, these efforts have been sporadic and unpersuasive to courts.[240] To this day, the only restriction struck down under the Twenty-Fourth Amendment was the Virginia proof-of-residency requirement in *Harman*.[241] Although courts and the public at large view the Twenty-Fourth Amendment as a footnote or a forgotten piece of history aimed at one specific practice, this fundamentally ignores the history of the movement to abolish the poll tax, as well as the intentions of the amendment's framers. Evidence in both the language of the amendment as well as its legislative history suggests that it was meant to be a dynamic and adaptable part of the constitution.

The language of the amendment suggests it should be broadly construed. Critically, the amendment prohibits the right of citizens to vote in federal elections from being "denied or abridged" on account "of failure to pay any poll tax or any other tax."[242] As the legislative history, Supreme Court decision in *Harman*, and academic commentators have noted, the "any other tax" provision should be construed broadly to include other devices meant to prevent voting based on wealth discrimination, and finally disposing of the notion that wealth and property should be connected to one's ability to participate in democratic self-government.[243]

239. Judge Karen Nelson Moore's scathing and well-researched dissent in *Johnson*, in particular, provides a compelling analysis of why LFO disenfranchisement violates both the Equal Protection Clause and the Twenty-Fourth Amendment. Johnson v. Bredesen, 624 F.3d 742, 756, 760 (6th Cir. 2010) (Moore, J., dissenting). Much of the analysis, *infra*, is structured around and supplements her forceful arguments.

240. Schultz & Clark, *supra* note 11, at 376.

241. *Id.* at 404.

242. U.S. CONST. amend. XXIV, §1.

243. *See* Schultz & Clark, *supra* note 11, at 416; Speck, *supra* note 199, at 1556 ("[The Amendment] creates a broad, absolute prohibition on voter qualifications that in any way implicate economic means. The Supreme Court's response to states' attempts to circumvent the poll tax ban illustrates a broad reading of the Twenty-fourth amendment."); *see also,* Schultz & Clark, *supra*

The popular legal canon suggests that the Twenty-Fourth Amendment remains as a vestigial organ of the constitution that no longer has a function in the post-*Harper* jurisprudence.[244] This, however, misreads both the intentions of the framers of the amendment and Supreme Court jurisprudence on the topic of the poll tax.

Much of the legislative and executive history of the amendment suggests that both the amendment's framers and President Johnson anticipated that the amendment would be construed broadly to apply beyond the traditional poll-tax requirement.[245] These floor statements by the amendment's supporters wholeheartedly decry not just the poll tax as it was being practiced at the time, but the practice of "pay[ing] for the right to vote."[246] Congressman Dante Fascell, a Democrat from Florida, perhaps summarized this sentiment best: "[T]he payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not be allowed a scintilla of this in our free society."[247] President Johnson also remarked upon the amendment's passage that it stood for the proposition that "there can be no one too poor to vote."[248] It is curious, then, why courts and practitioners have been so hesitant to use the Twenty-Fourth Amendment to challenge "equivalent or milder substitutes" to the poll tax, when these

note 11, at 419 (suggesting that 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").

244. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459, 1481–82 (2001) ("[T]he net effect of the Twenty-fourth Amendment was, at most, to abolish the poll tax in federal elections, in a few states, two years before it would have been abolished across the board anyway."); Speck, *supra* note 199, at 1566 ("*Harper* thus appears to essentially obviate any practical need for the Twenty-fourth Amendment.").

245. Friedman, *supra* note 52, at 364.

246. 108 CONG. REC. 17, 662 (1962) (statement of Rep. Joelson); *see also, id.* at 4154 (statement of Sen. Holland); *id.* at 4585 (statement of Sen. Yarborough) (noting that the amendment would prohibit his state's practice of "unjustly discriminat[ing] against people of limited means"); *id.* at 17,657 (statement of Rep. Fascell) (stating that the struggle to abolish the poll tax was a struggle to ensure "that no American must pay for the privilege of exercising his constitutional privilege—the right to vote"); *id.* at 17,660 (statement of Rep. Baldwin) ("I hope [the amendment] will be passed by an overwhelming vote. No person should have to pay for the privilege of voting."); *id.* at 17,665 (statement of Rep. Addabbo) ("I believe it is our responsibility to at least give to all those qualified to vote the right to do so without having to pay for that right and to continue to work for the moral rights of all."); *id.* (statement of Rep. Dingell) (noting that the text of the amendment "prohibits other taxes being used as a device to evade the legislative purpose of the amendment").

247. 108 CONG. REC. 17,657 (1962) (statement of Rep. Fascell).

248. Nan Robertson, *24th Amendment Becomes Official – Johnson Hails Anti-Poll Tax Document at Ceremonies*, N.Y. TIMES (Feb. 5, 1964), https://timesmachine.nytimes.com/timesmachine/1964/02/05/97168103.html.

practices are precisely what its congressional sponsors, the president, and even the Supreme Court indicated the amendment prohibits.[249]

Although courts and practitioners have been slow to use the Twenty-Fourth Amendment as intended by its framers, academics and commentators have begun to recognize the amendment for its potential as a sleeping giant of great constitutional significance.[250] Accordingly, courts should not hesitate to apply *Harman* and the amendment's legislative history to strike down poll taxes, substitutes for the poll tax, and—critically— "any other tax" that denies or abridges voting rights.[251]

Once distilled, the principles at issue in both *Harman* and the legislative history of the Twenty-Fourth Amendment evidence that LFO disenfranchisement is plainly within the meaning of the amendment's text as drafted by its framers. If the test for the "any other tax" provision is the same as, or similar to, the test deployed in *Harman*, a plaintiff would need to demonstrate that a restriction imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying "a tax." The two questions that must be answered in a Twenty-Fourth Amendment inquiry, therefore, are: (1) whether LFO disenfranchisement schemes either "abridge" or "deny" the right to vote, and (2) whether LFOs constitute a "tax" within the meaning of the Amendment.

As to the first question, courts weighing the issue have decided that LFO restrictions for convicted felons do not abridge or deny the right to vote because, by the language of *Richardson* and *Hunter*, felons do not have a fundamental right to vote in the first place. These courts fail to note, however, that this principle is distinguishable by reading the "affirmative sanction" of Section 2 of the Fourteenth Amendment in conjunction with the Twenty-Fourth. Because the Twenty-Fourth was enacted nearly one hundred years after the Fourteenth, the language of the Fourteenth—which affirms the ability of states to deny voting rights to felons—should be subject to the later-enacted constitutional text, including that a state may not deny or abridge these rights in a way that constitutes "a poll tax or any other tax."

249. Harman v. Forsenius, 380 U.S. 528, 542 (1965).

250. *See, e.g.*, Ackerman & Nou, *supra* note 52, at 136 ("[C]ourts are duty bound to take [the constitutional principles behind *Harper* and the Twenty-Fourth Amendment] with high seriousness as they struggle to interpret the constitutional meaning of democracy in the twenty-first century."); *id.* at 145 ("[W]e believe that it is past time for the Supreme Court to admit Twenty-Four into the constitutional canon."); Schultz & Clark, *supra* note 11, at 420 ("[T]he broader purpose of the Twenty-fourth Amendment is to break the linkage between wealth and democracy in the United States."); Wood & Trivedi, *supra* note 5, at 43–45; Speck, *supra* note 199, at 1567–68.

251. Harman considered only restrictions that "imposed a material requirement solely upon those who refuse to surrender their constitutional right to vote without paying a poll tax." 380 U.S. at 541. The Court, however, has never interpreted the other clause of the amendment, which states that the vote may not be denied or abridged by reason of failure to pay "any other tax." U.S. CONST. amend. XXIV, §1.

By the plain language of *Richardson* and *Hunter*, a state may deny felons the right to vote *as a category* so long as it does not enact these disenfranchisement statutes in an *explicitly* discriminatory manner. But states that re-extend the franchise to felons on the condition that they have paid LFOs have *re-conferred* a fundamental right to these individuals.[252] It follows that when states regrant the right to vote only to *some* formerly incarcerated people, those individuals who have not paid their LFOs *could* vote but for their failure to pay these obligations. The right to vote for people who have not paid the LFOs, therefore, is "abridged" by that failure to pay.

The second question is whether these fines constitute a "tax" within the meaning of the amendment. To understand what the amendment means by "other tax," courts should first be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[253] A "tax" is defined as "a compulsory contribution to state revenue, levied by the government on workers' income and business profits, or added to the cost of some goods, services, and transactions."

While LFOs may be better classified as "fees" or "debts" rather than a "tax" in the literal sense, *Harman* makes clear that the amendment prohibits not just the practice of the direct poll tax, but also the practice of setting a price for voting.[254] The similarities between LFO disenfranchisement and the classic "poll tax" at issue in the *Harman* decision show that LFO disenfranchisement amounts to a "tax on voting" within the meaning of the Twenty-Fourth Amendment.

Given that the Supreme Court may now be more open to arguments about the legislative history of the statutes and constitutional provisions they interpret,[255] it is useful to conduct an analysis of the amendment's legislative history for what exactly constitutes a "tax" within the meaning of the amendment. This history suggests that LFO payments fall within the meaning of the amendment's text. For example, the committee report from

252. *See* DIMINO ET AL., *supra* note 138, at 43; Cammett, *supra* note 228, at 388.

253. District of Columbia v. Heller, 554 U.S. 570 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 1931) (alteration in original); *see also,* Johnson v. Bredesen, 624 F.3d 742, 768 (2010) (Moore, J., dissenting).

254. *Harman*, 380 U.S. at 541.

255. Josh Gerstein, *Supreme Court Justice Antonin Scalia Dead at 79*, POLITICO (Feb. 13, 2016, 5:14 PM), https://www.politico.com/story/2016/02/breaking-news-supreme-court-justice-antonin-scalia-dead-at-the-age-of-79-219246. Justice Scalia had a career-long distrust of legislative history, *see generally* James J. Brudney & Corey Dislear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008), whereas his successor, Justice Gorsuch, makes use of it; *see* Max Alderman & Duncan Pickard, Symposium, *Justice Scalia's Heir Apparent?*, 69 STAN. L. REV. ONLINE 185 (discussing how then-Judge Gorsuch turned to '"traditional tools of statutory interpretation in an effort to discern Congress's meaning,' including legislative history—a striking departure from Justice Scalia's textualism").

the House of Representatives noted that the amendment would extend far beyond the quintessential poll tax and "would . . . prevent both the United States and any State from setting up any substitute in lieu of a poll tax."[256] This included "preventing the nullification of the amendment's effect by a resort to subterfuge."[257] This language and intent suggest that states could not avoid implicating the amendment by repackaging the poll tax by another means outside the technical definition of a "poll tax" or "other tax."

Additionally, debates surrounding the amendment in both houses suggest that its sponsors believed that the "other tax" language would encompass all payments to the government generally, even if not technically within the definition of a "tax." For example, Representative Gonzalez indicated that "there should not be any price tag or any other kind of tag on the right to vote."[258] Representative Fascell understood the amendment to make clear that "the payment of money whether directly or indirectly, whether in a small amount or in a large amount should never be permitted to reign as a criterion of democracy."[259] Representative Joelson noted that the amendment sought to target "areas in which American citizens are required to pay for the right to vote."[260] Representative Halpern noted his hope that the amendment would "outlaw[] th[e] undemocratic, feudal practice of placing a price tag on the right to vote."[261] Finally, Senator Javits spoke of the amendment's elimination of any "encumbrance" bearing the "character" of the poll tax.[262]

Furthermore, by the Supreme Court's interpretation of the amendment's text in *Harman*, the amendment's purpose was to prohibit "sophisticated as well as simple minded" attempts to deny the vote to the poor and the indigent. It is apparent that the amendment's drafters and the *Harman* Court meant the amendment to be not a vestigial piece of constitutional language aimed at a practice that had been diminished in all but four states, but to extend to reach all denials or abridgments of the right to vote by reason of failure to pay a monetary obligation, whether technically structured as a tax, fee, or debt. Because the payment of LFOs "exact[s] a price for the privilege of exercising the franchise,"[263] it certainly bears the "character" of a tax on voting.[264] LFOs are a "forced monetary contribution paid to the government

256. H.R. Rep. No. 87 – 1821 (1962), *reprinted in* 1962 U.S.C.C.A.N. 4033 (1962).
257. 1962 U.S.C.C.A.N. at 4037.
258. *Abolition of Poll Tax in Federal Elections: Hearing on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670, & S.J. Res. 29 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong., 2d Sess. 15 (1962).
259. 108 CONG. REC. 17657 (1962).
260. *Id.* at 17662.
261. *Id.* at 17661
262. *Id.* at 4155.
263. Harman v. Forsenius, 380 U.S. 528, 539 (1965).
264. 108 Cong. Rec. at 4155.

for the benefit of the government or the general public," which "abridge" the right to vote, and thus plainly fall within the type of state action prohibited by the Twenty-Fourth Amendment.

B. Equal Protection: Irrational Laws and Uncompelling State Interests

Even if courts fail to see that LFO disenfranchisement is a poll tax prohibited by the Twenty-Fourth Amendment, they should still find the practice to violate the Equal Protection Clause.[265] While Ackerman and Nou extensively criticize Douglas's opinion for failing to acknowledge the debt it owed to the Twenty-Fourth Amendment and the Voting Rights Act, they believe that *Harper* should be read as the "third and final stage of a larger process through which the American people successfully repudiated wealth discrimination at the ballot box."[266] Indeed, "we should place *Harper* in its higher lawmaking context, and reinterpret it as codifying a larger effort by the American people, during the 1960s, to create a more egalitarian democracy. *Harper* is not the product of an activist Court, but of an activist people."[267] Because *Harper* crystallized the popular sovereignty of the American people—expressed through both a constitutional amendment and a "super statute"[268] —courts need to "take this point with high seriousness as they struggle to interpret the constitutional meaning of democracy in the twenty-first century."[269]

Furthermore, some scholars stress that Justice Rehnquist's historical and originalist arguments may have been off base in *Richardson*. For example, Professor Gabriel Chin posits that the Fifteenth Amendment's enforcement provision on racial disenfranchisement is inconsistent with Section 2 of the Fourteenth Amendment, and that the Fifteenth Amendment should be understood as repealing, or at least modifying, the language of Section 2.[270] It is equally probable that Justice Rehnquist failed to take into consideration the clause's relationship with the Twenty-Fourth Amendment. If each successive amendment can be understood as taking into consideration the earlier written constitution, Section 2 should be read with the understanding that the states may sanction disenfranchisement for "other

265. *See* Cammett, *supra* note 228, at 396–402.

266. Ackerman and Nou posit that although it was a mistake and an unfortunate oversight that Justice Douglas failed to acknowledge the Twenty-Fourth Amendment or Section 10 in his opinion, they note that the language in the opinion largely repackages the same ideas in Section 10. Ackerman & Nou, *supra* note 52, at 110.

267. *Id.* at 133.

268. *See generally,* William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

269. Ackerman & Nou, *supra* note 52, at 136.

270. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).

crimes" but must avoid doing so in a way that constitutes a "poll tax or other tax" that "denies or abridges" voting rights.

The affirmative sanction of the Fourteenth Amendment, however, means that states are essentially free to engage in felon disenfranchisement outside the watchful eye of the Court's strict scrutiny. Despite the overwhelming sociological and statistical evidence of the racially disparate impact that the practice of felon disenfranchisement and the criminal justice system as a whole have on both people of color and the poor, the plain text of the Fourteenth Amendment and *Richardson*'s reading of it essentially cordon off felon disenfranchisement from equal protection challenges in all but the rare explicitly discriminatory cases. *Richardson* essentially guarantees the constitutionality of state felon disenfranchisement laws. Thus, any wholesale repeal of this practice will have to come through an Article V constitutional amendment, the Supreme Court revisiting *Richardson*, or through popular pressure on state legislatures to change their voter qualification laws or criminal codes.

Furthermore, despite *Harper*'s sweeping language regarding wealth discrimination, the Court's subsequent case law has made it abundantly clear that wealth is not a suspect class.[271] These cases, in addition to both *Richardson* and *Hunter*'s findings that felons lack a fundamental right to vote, means that LFO disenfranchisement provisions are analyzed under rational basis review rather than strict or intermediate scrutiny.[272]

For a law to pass rational basis scrutiny, it must be rationally related to a legitimate government interest.[273] Although courts have recognized legitimate state interests in regard to LFOs, such as ensuring compliance with court orders and requiring felons to complete terms of their sentence, the practice of restoring the franchise only to those with the means to pay is insufficiently related to these interests to survive a rational basis analysis. Indeed, "preconditioning suffrage on a payment that a person is *unable* to make is [not] in any rational way related to the government's interest in promoting that payment."[274]

Regarding the first state interest, Supreme Court precedent suggests that restrictions that fail to take into account those who are unable but willing to pay are disfavored,[275] especially when done with an ancillary connection to

271. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 2, 29 (1973).

272. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 564–68 (5th ed. 2015).

273. *Id.*

274. Johnson v. Bredesen, 624 F.3d 742, 756 (2010) (Moore, J., dissenting) (emphasis added).

275. *See* Bearden v. Georgia, 461 U.S. 660, 662 (1983) (holding that the state acted unconstitutionally when it revoked an individual's probation because he was unable to pay fines and restitution payments, without a determination that he had made a bona fide effort to pay); Zablocki v. Redhail, 434 U.S. 374, 389 (1978) (finding that a statute prohibiting individuals who

the purported interest[276] and when a more direct means of asserting the interest is available.[277] Revoking a legal right or privilege from a person who is unable to make restitution payments "through no fault of his own . . . will not make restitution suddenly forthcoming."[278] States are effectively forcing someone who is unable to pay to choose between food on the table and a vote at the ballot box. Tying repayment to voting rights is unlikely to compel these individuals to pay their LFOs any more quickly than if the franchise was not so conditioned. These restrictions "embod[y] nothing more than an attempt to exercise unbridled power over a clearly powerless group, which is not a legitimate state interest."[279]

A second commonly asserted state interest in upholding LFO disenfranchisement, that elections need to be protected from felons who continue to break the law via their noncompliance with court-mandated payments, is "nothing 'more than a naked assertion that [a felon's] poverty by itself' is a sufficient reason to disqualify the felon from regaining the right to participate in the exercise of democracy."[280] Although a state may take certain things, like "[r]esidence requirements, age, and previous criminal record"[281] into consideration when deciding qualifications for its voters, once a state allows those with a previous criminal record to restore their right to vote by completion of a financial payment, it "makes the affluence of the voter or payment of [a] fee an electoral standard," which is explicitly prohibited by *Harper*.[282] By opening the door to *some* former felons, who have the means to pay their LFOs, the state "ceases to rely on the felon's participation in criminal activity as its basis for withholding the right to vote" and deems them just as worthy of the franchise as others, but for their ability to pay their financial obligations.[283] Some courts feel that *Harper* is not applicable to LFO disenfranchisement, as the *Harper* Court applied strict scrutiny, rather than rational basis review, due to the fundamental nature of the voting right at issue. The Supreme Court's analogous rational basis cases, however, lend further support to the notion that *Harper* provides a *per se* constitutional ban on conditioning the franchise on payment of a fee.[284]

had failed to pay child support payments from getting married violated Equal Protection as applied to individuals who were unable to make the payments).

276. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 449-50 (1985).

277. *See Zablocki*, 434 U.S. at 389–90.

278. *Bearden*, 461 U.S. at 670.

279. Johnson v. Bredesen, 624 F.3d 742, 758 (2010) (Moore, J., dissenting) (emphasis added).

280. *Id*. (quoting *Bearden*, 461 U.S. at 671).

281. Richardson v. Ramirez, 418 U.S. 24, 53 (1974).

282. Harper v. Va. Bd. Of Elections, 383 U.S. 663, 666 (1966); *see also Johnson*, 624 U.S. at 758-59.

283. *Johnson*, 624 U.S. at 759.

284. *See supra* notes 272, 275–83.

A third commonly asserted state interest is ensuring that felons complete the terms of their sentence. The Supreme Court has ruled, however, that states may not put into place "unreasoned distinctions"[285] in pursuing this interest once they have established the means for doing so. Additionally, according to *Griffin v. Illinois*,[286] states may not "discriminate[] against some convicted [felons] on account of their poverty."[287] In *Williams v. Illinois*,[288] for example, the Court ostensibly used rational basis review in ruling that states cannot extend an individual's prison term based on their inability to pay a fine.[289] So too with LFO disenfranchisement; the state is extending a felon's period of disenfranchisement solely because of the involuntary nonpayment of financial obligations. It is plainly "not rational to achieve" a legitimate or substantial state interest "in a manner that discriminates against particular felons on the basis of their wealth."[290]

Lastly, *San Antonio Independent School District v. Rodriguez*[291] is commonly cited by courts in holding that these LFO requirements pass constitutional muster, as the Supreme Court explicitly held that wealth is not a suspect class. The Court, however, stated that *Williams* is controlling when individuals, because of their indigency, "are completely unable to pay for some desired benefit" and "as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit."[292] The Court has limited *Griffin* to cases in which the government has "a legal or a practical monopoly" over the benefit sought.[293] Individuals who are disenfranchised due to an inability to pay their LFOs clearly fall within this category.

Rational basis, although a deferential standard, should be applied "with bite" in cases where individual rights are at stake.[294] Although courts are hesitant to strike down these LFO repayment laws due to the ability of the legislative process to curtail any perceived wrongs, as Justice Marshall noted in his *Richardson* dissent, those with felony convictions are a politically unpopular group, meaning if the courts do not step in to protect their rights under the constitution, "it is unlikely that anyone else will carry the banner for them."[295] Once states open the door for felons to regain their franchise

285. M.L.B. v. S.L.J., 519 U.S. 102, 111 (1996).
286. 351 U.S. 12 (1956).
287. *Id.* at 18 (plurality opinion).
288. 399 U.S. 235 (1970).
289. *Id.*
290. Johnson v. Bredesen, 624 F.3d 742, 761 (2010).
291. 411 U.S. 1 (1972).
292. *Id.* at 20.
293. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 460 (1988).
294. *See* CHEMERINSKY, *supra* note 272, at 706.
295. Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting).

rights, they must do so in ways that do not discriminate on the basis of wealth. To do otherwise is not consistent with *Harper* or the court's larger equal protection jurisprudence.

Conclusion

The Framers, with all their many faults, fundamentally changed the world with their vision of a constitutional republic where "the electors are to be the great body of the people of the United States," "[n]ot the rich, more than the poor; not the learned more than the ignorant."[296] Alexis de Tocqueville once lauded the spirit of the American republic as a society characterized by a "general equality of condition" across the country.[297] The Twenty-Fourth Amendment and the Supreme Court's landmark decision in *Harper v. Virginia Board of Elections* cemented the American people's attempt to enshrine that principle into a superprecedent in our constitutional fabric.

When a person is released from prison, common wisdom suggests that they have paid their debt to society. The current practice of disenfranchisement over unpaid legal financial obligations, however, means that individuals are often locked in a cycle of debt where they perpetually pay for their crimes by exchanging their right to participate in our democracy. The post-bellum roots of this practice, like the poll tax before it, suggest that LFO disenfranchisement, and felon disenfranchisement more broadly, are an attempt to further race and wealth discrimination at the ballot box and centralize white supremacy in American society. This system of disenfranchisement silences the political voices of vulnerable people, and has the potential to drastically affect the upcoming elections in 2020 and beyond. It is crucial then that courts, legislatures, and the American people work to realize the inherent principle of equality in American society that DeToqueville so admired, and which the New Deal and Civil Rights eras helped to cement in our national consciousness. We must not hesitate to call the practice of LFO disenfranchisement what it is—an unconstitutional twenty-first century poll tax.

296. THE FEDERALIST no. 57 (James Madison). The irony of the man who wrote this eloquent statement being a slaver and an architect of the three-fifths compromise is not lost on the author of this Article. *See* Noah Feldman, *James Madison's Lessons in Racism*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/opinion/sunday/james-madison-racism.html.

297. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3 (1835).

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