"Stamping" Out The Postage Poll Tax

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In the 1966 case of Harper v. Virginia Board of Elections*, the Supreme Court abolished the last vestiges of the Jim Crow-Era poll tax in one fell swoop under the Equal Protection Clause. The opinion emphasized that paying a tax or fee is irrelevant to one's qualifications for voting and invidiously discriminates against the poor. Litigants have since invoked* Harper *to challenge poll tax-like policies, called constructive poll taxes. The doctrine surrounding constructive poll taxes, however, remains underdeveloped. This Note seeks to clearly establish what constitutes a constructive poll tax. This Note also responds to the 2021 case* of Black Voters Matter Fund v. Secretary of State for Georgia*, where the Eleventh Circuit held that requiring voters to pay for postage on mail ballots is not a constructive poll tax. Considering* Harper*'s philosophical underpinnings, the limited constructive poll tax case law and policy principles, this Note argues that a constructive poll tax exists whenever states require voters to pay a tax or fee unrelated to elections or buy an item or service to cast a ballot. Applying this definition to postage on mail ballots, this Note concludes that postage requirements constitute constructive poll taxes in violation of the Equal Protection Clause. Finally, this Note advocates for strategic litigation and state-level legislation to abolish postage requirements for mail ballots and encourage a sea change in constructive poll tax doctrine.*

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INTRODUCTION

In October 2014, a week before the 2014 general election, I was excited to be a first-time voter. With my mail ballot in hand, affixed with one Forever Stamp,[1] I mailed my ballot to the Rhode Island Board of Elections. On Election Day, however, I was surprised to find my ballot back in my mailbox with a large red circle in the upper-right corner reading "Insufficient Postage." Unknown to me, the oversized envelope had required $1.61 in postage. My ballot was not counted.

The proportion of votes cast by mail has steadily increased over the last two decades.[2] In the 2020 presidential election, held during the coronavirus pandemic, over 65 million voters cast their ballots via mail, accounting for over 40% of all voters in that election and shattering previous mail voting records.[3] With this unprecedented shift, election administrators struggled to ensure every mail ballot was counted. Their difficulties included matching ballots to registration signatures, mail ballots arriving after Election Day, and difficulties curing rejected mail ballots.[4] The thirty-three states that do not pre-stamp their mail ballots continued to disenfranchise voters who failed to affix adequate postage on their ballots.[5]

Despite the substantial number of voters who rely on mail voting, after reaching out via email to every state Board of Elections or Secretary of State office, no office that responded[6]

1. A Forever Stamp is a stamp issued by the U.S. Postal Service that remains usable for first-class postage even if postage rates increase. Sandra Grauschopf, *Forever Stamps: What They Are and How They Work*, BALANCE EVERYDAY (updated Feb. 16, 2021), https://www.thebalanceeveryday.com/forever-stamps-what-they-are-and-how-they-work-892774 [https://perma.cc/T5BV-LEWC].

2. *Voting by Mail and Absentee Voting*, MIT ELECTION DATA AND SCI. LAB, https://electionlab.mit.edu/research/voting-mail-and-absentee-voting [https://perma.cc/4HQS-KKQD].

3. Michael McDonald, *2020 General Election Early Voting Statistics*, U.S. ELECTIONS PROJECT (Nov. 23, 2020), https://electproject.github.io/Early-Vote-2020G/index.html [https://perma.cc/4BDU-52UH].

4. Ryan Beckwith, *What Could Still Go Wrong With Mail-In Ballots and Election Day*, BLOOMBERG (Sept. 14, 2020), https://www.bloombergquint.com/politics/what-could-still-go-wrong-with-mail-in-ballots-and-election-day [https://perma.cc/NXG2-TEB5].

5. Many of the states that do not pre-stamp mail ballots are pivotal swing states such as Pennsylvania, Ohio, and Texas. *VOPP: Table 12: States With Postage-Paid Election Mail*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 14, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-12-states-with-postage-paid-election-mail.aspx [https://perma.cc/RM8S-PF7N] [hereinafter *VOPP: Table 12*].

6. Including states as diverse as Rhode Island, North Dakota, North Carolina, Alaska, Louisiana and others.

tracks the number of voters who fail to return mail ballots because of insufficient postage.[7] Conversations with elections officials, however, confirm that disenfranchisement due to insufficient postage on mail ballots is both a common problem and one that disproportionately impacts young and low-income voters.[8]

Mail voters should not be disenfranchised for failing to buy stamps and the Fourteenth Amendment may provide a Constitutional remedy. Fourteenth Amendment jurisprudence recognizes that because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[9] The Fourteenth and Twenty-Fourth Amendments further proscribe the imposition of poll taxes in state[10] and federal[11] elections, respectively. Voters may be able to draw on these Constitutional provisions in future lawsuits seeking to mandate that states pre-stamp ballots.

This Note argues that requiring mail voters to pay for their own postage as a requirement to cast their ballots constitutes a constructive[12] poll tax in violation of the Fourteenth Amendment's Equal Protection Clause. Paying for postage is a constructive poll tax because, while it is not literally a tax a voter pays before stepping into a voting booth, it requires voters to pay a sum to vote and thus functions as the same sort of logistical and economic barrier to voting.

Part I demonstrates how paying for postage is a substantial barrier to many mail voters. Part II briefly traces the history of poll taxes and constructive poll tax doctrine in the United States. Part III concerns the current state of constructive poll tax doctrine.

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7. Sam Ackerman, *State Secretary of State Mass Mail* [on file with the *Columbia Journal of Law & Social Problems*].

8. The author reached out via email to state-level election officials in all fifty states. Despite a low response rate, some comments confirmed that some voters' ballots were not counted as a result of missing postage.

9. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

10. *See generally* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

11. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.").

12. In law, the term "constructive" refers to that which is "legally imputed; existing by virtue of legal fiction though not existing in fact." *See Constructive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

In Part III.A, the Note demonstrates that the per se rule against poll taxes announced in *Harper v. Virginia Board of Elections* survives recent case law developments. Part III.B proposes that states impose an unconstitutional constructive poll tax whenever they require a voter to pay a tax or fee unrelated to elections or buy an item or service to cast a ballot. Part III.C critiques two recent circuit court cases that fail to apply the proposed definition. Part IV.A applies the proposed framework and argues that it is impermissible under the Fourteenth Amendment's poll tax doctrine to require voters to pay for postage on mail ballots. Part IV.B addresses counterarguments, including those raised in the recent Eleventh Circuit decision in *Black Voters Matter v. Secretary of State for Georgia*, as well as the district court opinion below (called *Black Voters Matter v. Raffensperger*), which held that requiring the payment of postage for mail ballots is not a poll tax.[13] Finally, Part V provides a litigation strategy that, in conjunction with targeted state legislative efforts, maps the most feasible route to requiring all states to pre-stamp mail ballots.

I. POSTAGE AS A MODERN BARRIER TO THE BALLOT

Requiring mail voters to pay for postage disproportionately impacts young and low-income voters. Although no Secretary of State or Board of Elections who responded to the author's outreach tracks data on the number of unreturned mail ballots due to insufficient postage, a few statistics demonstrate the disparate burden that providing one's own postage has on young and low-income voters.[14]

Young and low-income voters are less likely to interact with the postal service than the average voter, and, as a result, are less likely to have stamps on hand than the general population. A head of household under the age of 34 typically sends 60% less mail than a head of household over the age of 55.[15] The impact of age on propensity to use the mail is even more significant when accounting for income. A head of household under the age of 34 with a total income less than $34,000 is 2.7 times less likely to

13. 478 F. Supp. 3d 1278 (N.D. Ga. 2020).
14. Ackerman, *supra* note 7.
15. 2015 U.S. POSTAL SERV. HOUSEHOLD DIARY STUDY 21 tbl.3.5.

receive mail than a head of household over the age of 55 with a total income greater than $100,000.[16]

Younger voters are also less likely to own stamps. One 2018 study, for example, revealed that the young voters interviewed would "go through the process of applying for a mail-in absentee ballot, [would] fill out the ballot, and then [not] know where to get stamps."[17] Mail voting can further compound these information gaps, as postage for a ballot can cost upwards of $1.50, or roughly the equivalent of four Forever Stamps, depending on the weight of the ballot.[18] Many voters may mistakenly fail to affix the required amount of postage to their ballot in error, especially if they assume that a single Forever Stamp is sufficient. These information gaps were more salient than ever in the 2020 presidential election, in which over 40% of voters voted by mail.[19]

Beyond a lack of familiarity with the postal system, some voters who are unable to vote in-person might decide to not vote at all because of the costs of stamps. The indirect costs associated with voting already make casting a ballot a difficult task, especially for low-income voters.[20] In the 33 states that fail to pre-stamp mail ballots, voters directly bear the costs of supplying their own postage.[21] Outreach to state elections officials indicates that the typical ballot demands between fifty cents and $1.40 in postage, depending on weight.[22] That figure can grow, however, when voters are required to add additional components to their ballot

16. *Id.*

17. Greg Toppo, *Students Don't Vote . . . for Want of a Postage Stamp?*, INSIDE HIGHER ED (Sept. 28, 2018), https://www.insidehighered.com/quicktakes/2018/09/28/students-dont-vote%E2%80%A6-want-postage-stamp [https://perma.cc/YF5Q-3BAM].

18. The cost of the postage will ultimately depend upon the weight of the ballot. Because some ballots are naturally larger because there are many races with more candidates, those ballots tend to be heavier and thus more costly. Further, in states that require a digital copy of one's identification, that can further add to the weight and thus, the total cost of the mail ballot. In the jurisdictions where the author received a response, the minimum cost was one forever stamp or fifty-five cents.

19. *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, PEW RSCH CTR. (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/ [https://perma.cc/4NDL-CSSW].

20. *See, e.g.*, Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 180 (2010) ("[I]n the 2008 election, more than ten million voters had to wait longer than an hour to vote and hundreds of thousands had to wait longer than five hours[.]").

21. *See VOPP: Table 12, supra* note 5.

22. As part of the primary research for this Note, the author sent emails to every state's highest elections official to ascertain the cost of postage in each state and to better understand how many voters fail to return ballots due to failure to affix postage.

packet, including—in some states—proof of identification.[23] Some voters, moreover, do not live near a place that sells individual stamps and may have to pay $10 for an entire book of stamps.[24] A Postal Service survey found that 18% of Millennials, 25% of Generation Xers, and 26% of Baby Boomers think that Forever Stamps are "expensive."[25]

Although not entirely due to postage costs, the turnout rate for young and low-income voters is markedly lower than the turnout rate of old and affluent voters. In the 2020 election, it is estimated that families with under $10,000 in income had a voter turnout rate of 47.1%, substantially lower than the national average of 68.6% and almost half the 84.8% turnout rate for voters with family income exceeding $150,000.[26] The data also shows disparities when accounting for both age and income. Among voters ages 18–24 with family income in any bracket under $150,000, the voter turnout rate was also below the national average.[27] Conversely, among voters over the age of 75 in any income bracket over $14,999, the voter turnout rate was higher than the national average.[28] The extent to which mail costs exacerbate these disparities is not known. But even if one does not think a Forever Stamp is expensive, as far as the Fourteenth Amendments is concerned, *any* monetary payment that is *required* to vote is too costly—no matter the price.

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23. *How to Vote by Mail in Every State*, WALL ST. J. (Sept. 18, 2020), https://www.wsj.com/articles/how-to-vote-by-mail-in-every-state-11597840923 [https://perma.cc/U7U4-KLTD]. Proof of identification adds more costs as many individuals lack the implements necessary to actually photocopy an identification. Color copies tend to cost just as much or more than a Forever Stamp per page if an individual needs to use a public copying machine. *See e.g.*, *Color Copies*, STAPLES, https://www.staples.com/Color-Copies/product_1798666 [https://perma.cc/ESC7-4T46].

24. Julia Carr Smyth, *Cost, Hassle of Stamps Questioned as Mail-In Voting Surges*, WASH. POST (Jul. 18, 2020), https://www.washingtonpost.com/health/cost-hassle-of-stamps-questioned-as-mail-in-voting-surges/2020/07/18/6a006f5e-c958-11ea-a825-8722004e4150_story.html [https://perma.cc/DJ5G-QF24].

25. U.S. POSTAL SERV., OFFICE OF INSPECTOR GEN., RARC-WP-18-011, MILLENNIALS AND THE MAIL 14 (2018).

26. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOV. 2020 tbl.7 (2021).

27. *Id.* Other brackets include Under $10,000, $10,000 to $14,999, $15,000 to $19,999, $20,000 to $29,999, $30,000 to $39,999, $40,000 to $49,999, $50,000 to $74,999, $75,000 to $99,999, $100,000 to $149,999, $150,000 and over.

28. *Id.*

II. THE HISTORICAL DEVELOPMENT OF POLL TAX DOCTRINE

Because the Constitution provides states with wide latitude over election administration,[29] many states employed poll taxes to discriminate against Black and poor voters until the 1960s.[30] The civil rights movement of the 1960s and the Warren Court's broad expansion of individual rights[31] marked a watershed moment for abolishing the poll tax. Enactment of the Twenty-Fourth Amendment in 1962 and the expansion of Equal Protection Doctrine after *Harper v. Virginia Board of Elections* in 1966 led to the complete abolition of the poll tax in its Jim Crow incarnation.[32]

Legal developments of the civil rights movement also abolished "constructive poll taxes." The scope of what can be considered a constructive poll tax, however, has not been clearly spelled out. This Note argues that faithful application of *Harper*'s rationale leads to the conclusion that any requirements that voters pay a tax or fee unrelated to elections[33] or buy an item or service in order to cast a ballot constitute a constructive poll tax. Case law concerning constructive poll taxes and general burdens on the right to vote has become blurry in recent years.[34] Further confounding the doctrine, last year, the United States District Court for the Northern District of Georgia in *Black Voters Matter Fund v. Raffensperger*—the first case to substantively address

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29. *See* U.S. CONST. art. I § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"); U.S. Const. art. I § 2 (pegging eligibility for voting for the U.S. House of Representatives to the "[q]ualifications requisite for Electors of the most numerous Branch of the State Legislature."). *See also* Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 3 (2013) ("The Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The latter is the province of the States.") (citing to U.S. CONST., art. I, § 2, cl 1) (emphasis in original).

30. By the time the Twenty-Fourth Amendment was ratified in 1962, the states that still imposed poll taxes were all in the Jim Crow South: Texas, Virginia, Alabama, Mississippi, and Arkansas. *Historical Highlights: The 24th Amendment*, U.S. HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/37045 [https://perma.cc/9HTA-BU92].

31. *See generally*, Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055 (2002).

32. *See generally* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

33. Assuming that fees related to an election are "poll taxes" in the literal—not constructive—sense.

34. *See e.g.*, Crawford v. Marion County Election Board, 553 U.S. 181 (2008) (holding that an Indiana voter identification law did not violate the equal protection clause under a balancing test, but in dicta, implied that if the identification cards cost money, there would be a constructive poll tax issue).

whether a requirement to pay for postage on mail ballots constitutes a poll tax—erroneously determined that the alternative of in-person voting ensures that postage requirements are not constructive poll taxes.[35] The Eleventh Circuit affirmed in August 2021, adding that, irrespective of alternatives, postage requirements are not constructive poll taxes.[36]

A. A BRIEF HISTORY OF THE ABOLITION OF THE POLL TAX

The incarnation of the poll taxes that precipitated the enactment of the Twenty-Fourth Amendment occurred during the Jim Crow era as former Confederate states sought to disenfranchise Black and poor white voters.[37] States with poll taxes typically required each voter to make a $1.00 to $2.00 payment six to nine months before an election to be permitted to vote.[38] By all measures, this racial disenfranchisement plan worked. The poll tax facilitated a drastic decline in the Black voter participation rate—from 98% in 1885 to a mere 10% by 1905.[39] Only seven years following the enactment of a poll tax in Virginia, the Black voter *registration* rate had fallen to 15%, starkly contrasting with the 80% voter registration rate for white Virginians.[40] In Louisiana, the enactment of a poll tax contributed to a reduction in the number of registered Black voters from 130,000 in 1896 to 1340 in 1904.[41]

By the Civil Rights Era of the 1960s, there was considerable congressional opposition to poll taxes. In 1962, Congress began debating legislation for a constitutional amendment—the Twenty-Fourth—categorically banning poll taxes for federal elections.[42] Speaking before the Senate Judiciary Committee, Attorney General Nicholas Katzenbach testified that the poll tax was "an

35. Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1314 (N.D. Ga. 2020), *aff'd sub nom*. Black Voters Matter Fund v. Secretary of State for Ga., 11 F.4th 1227 (11th Cir. 2021).

36. Black Voters Matter Fund v. Secretary of State for Ga., 11 F.4th 1227 (11th Cir. 2021).

37. Atiba R. Ellis, *The Cost of the Vote*, 86 DENV. U. L. REV. 1023, 1041 (2009).

38. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, 63–64 (1974).

39. *Id.* at 1044.

40. *Id.* at 1042–43.

41. Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 431 (2020).

42. *See* 108 CONG. REC. 2852, 4097 (1962).

arbitrary condition which bears no reasonable relation to a citizen's fitness to vote."[43] In the House debates, Representative Dante Fascell of Florida spoke forcefully in support of the bill, arguing: "Mr. Speaker, the payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not be allowed a scintilla of this in our free society."[44] Upon the legislation's passage and ratification by the requisite thirty-eight states on February 4, 1964, President Johnson proclaimed that now, "there can be no one too poor to vote."[45] The legislative history of the Twenty-Fourth Amendment, which underscores the irrelevance of the poll tax to voter qualifications, left a mark on the 1966 case that gave the Twenty-Fourth Amendment's spirit true effect throughout the nation: *Harper v. Virginia Board of Elections*.[46]

B. *HARPER V. VIRGINIA BOARD OF ELECTIONS*: THE INTRODUCTION OF THE FOURTEENTH AMENDMENT TO POLL TAX DOCTRINE

The Twenty-Fourth Amendment provides that "the right of citizens of the United States to vote in any primary or other election *for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress*, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[47] The Twenty-Fourth Amendment does not provide for the abolition of poll taxes in *state-level* elections.[48]

In 1965, one year following the ratification of the Twenty-Fourth Amendment, Congress enacted the Voting Rights Act. In

43. *Id.* at 4367 (remarks of Attorney General Katzenbach).

44. 108 CONG. REC. 16957, 17657 (1962).

45. Nan Robertson, *24th Amendment Becomes Official; Johnson Hails Anti–Poll Tax Document at Ceremonies*, N.Y. TIMES (Feb. 5, 1964), https://www.nytimes.com/1964/02/05/archives/24th-amendment-becomes-official-johnson-hails-antipoll-tax-document.html [https://perma.cc/S6DH-GJ32].

46. *See generally* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 66, 112 (2009).

47. U.S. CONST. amend. XXIV, § 1 (emphasis added).

48. For an argument that the Twenty-Fourth Amendment is incorporated against the states via the Seventeenth Amendment, *see* Vanessa Wright, *Voter Identification and the Forgotten Civil Rights Amendment: Why the Court Should Revive the Twenty-Fourth Amendment*, 67 UCLA L. REV. 472, 495–99 (2020).

Section Ten, the Voting Rights Act addressed poll taxes.[49] Section Ten declared that:

> Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections.[50]

Building off of the Twenty-Fourth Amendment's legislative history, Section Ten also parallels *Harper*'s expansive view that one's ability to make a payment bears no relation to one's qualifications to vote.[51] Section Ten failed, however, to abolish state-level poll taxes. It merely authorized the Department of Justice to pursue judicial action "for declaratory judgement or injunctive relief against enforcement of any requirement of the payment of a poll tax as a precondition to voting."[52]

Further action was thus still necessary to eliminate the poll tax and remedy the "unreasonable financial hardship" brought on by the "requirement of . . . payment . . . as a precondition to voting."[53] One year later, the Supreme Court decided *Harper v. Virginia Board of Elections*, a case that Professors Bruce Ackerman and Jennifer Nou describe as "the final stage in the process of dynamic triangulation—beginning with [the] Twenty-Four[th Amendment] and continuing in [Section] Ten—through which the American people repudiated poll taxes."[54]

Harper considered the constitutionality of a Virginia state poll tax of $1.50.[55] Subject to the constraints of the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-

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49. Voting Rights Act § 10, 52 U.S.C. § 10306 (1965); U.S. CONST. amend. XXIV, § 1.
50. *Id.*
51. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("[T]o repeat, 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.").
52. *Id.*
53. *Id.*
54. Ackerman & Nou, *supra* note 46, at 112.
55. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966). $1.50 in 1966 is about $12.29 in 2021 dollars. *Calculate the Value of $1.50 in 1966*, DOLLARTIMES, www.dollartimes.com.

Sixth Amendments,[56] Article I of the Constitution grants states broad discretion in setting election rules, particularly pertaining to voter qualifications.[57] The *Harper* Court nonetheless reasoned that unlike literacy tests, which bear "some relation to standards designed to promote intelligent use of the ballot,"[58] poll taxes "have no relation" to permissible voter qualifications.[59] Rather, poll taxes merely demonstrate one's wealth or ability to pay the tax. The Court declared that a state violates the Equal Protection Clause whenever it "makes the affluence of the voter or payment of any fee an electoral standard."[60] Although Equal Protection Clause analysis is typically conducted using tiers of scrutiny—where there is a degree of balancing between an alleged harm and a state interest[61]—the *Harper* Court was categorical in its refusal to permit poll taxes of any kind, claiming that "to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant."[62] The *Harper* Court did not even *mention* the state's countervailing interests,[63] because no state

56. U.S. CONST. amend. XIV § 1 (providing for equal protection under the law); U.S. CONST. amend. XV § 1 (providing that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); U.S. CONST. amend. XVII (providing that voters for the U.S. Senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"); U.S. CONST. amend. XXIV § 1 (providing that the right to vote in federal elections "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"); U.S. CONST. amend. XXVI (providing that the "right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

57. Article I § 2 ties the election of members to the U.S. House of Representatives to qualifications required for voters eligible to vote for the lower house of state legislatures, which in turn is set by states subject to the aforementioned constraints. U.S. CONST. art. I § 2 cl. 1. Further, Article I § 4 grants states the right to set "the Times, Places and Manner of holding Elections" subject to Congressional preemption. U.S. CONST. art. I § 4 cl. 1.

58. *Harper*, 383 U.S. at 666. Just seven years before writing the *Harper* decision, Justice Douglas delivered the majority in *Lassiter v. Northampton County Board of Elections*, which upheld a North Carolina literacy test because "the ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot." 360 U.S. 45, 51 (1959). The question of the constitutionality of literacy tests was eventually mooted by the passage of the Voting Rights Act, which categorically abolished these tests. 52 U.S.C. § 10101(a)(2)(C).

59. *Harper*, 383 U.S. at 666.

60. *Id.*

61. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227–28 (2002).

62. *Harper*, 383 U.S. at 668.

63. Justice Black's dissent notes several of the interests the Court could have found sufficient to justify the poll tax including, "(1) the State's desire to collect its revenue, and

interest could justify imposing a voting restriction that, as a matter of law, is entirely unrelated to voting qualifications.

In addition to holding that poll taxes are unconstitutional because wealth bears no relation to voters' qualifications to access the ballot, the Court also rooted its reasoning in protecting the poor as a distinctive class of persons. The Court held that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those on the basis of race are traditionally disfavored."[64] Accordingly, *Harper* stands for the dual propositions that under the Equal Protection Clause, poll taxes are impermissible because their payment bears no pertinence to one's fitness to vote and because they are tantamount to state-sanctioned discrimination against people of lesser means. Courts have consistently reaffirmed *Harper*'s strict mandate.[65] With one exception,[66] the Supreme Court has never employed the Twenty-Fourth Amendment to strike down an alleged poll tax, and has instead relied on *Harper* instead.[67]

C. RECENT DOCTRINAL DEVELOPMENTS: *CRAWFORD* AND *BLACK VOTERS MATTER FUND V. SECRETARY OF STATE FOR GEORGIA*

Since *Harper*, the Supreme Court has spoken infrequently on poll taxes or constructive poll taxes. The last Supreme Court case to consider *Harper*'s poll tax analysis was *Crawford v. Marion County Election Board* in 2008. The *Crawford* plurality maintained that poll taxes per se violate the Equal Protection

(2) its belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote." *Id.* at 674 (Black, J., dissenting).

64. *Id.* at 668.

65. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) ("[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."); Stewart v. Blackwell, 444 F.3d 843, 858 (6th Cir. 2006) ("[U]sing wealth or ability to pay as a factor in the power of the franchise is to introduce a capricious or irrelevant factor and thus is inherently anathema to the Equal Protection Clause.") (internal quotations omitted); Common Cause/Georgia v. Billups II (*Billups II*), 439 F. Supp. 2d 1294, 1343 (N.D. Ga. 2006) (suggesting that categorically "the Supreme Court has observed that wealth or the ability to pay a fee is not a valid qualification for voting").

66. Harman v. Forssenius, 380 U.S. 528 (1965) (striking down a Virginia law that gave voters the option to either pay a poll tax or file a certificate of residence).

67. Valencia Richardson, *Voting While Poor: Reviving the 24th Amendment and Eliminating the Modern-Day Poll Tax*, 27 GEO. J. ON POVERTY L. & POL'Y 451, 452 (2020).

Clause and that requiring a voter to buy an item to vote—there, a voter identification card—is a constructive poll tax.[68]

Crawford also confirmed that when a court considers a "burden" on the right to vote that is outside the ambit of a poll tax or constructive poll tax, it employs a balancing test—the *Anderson/Burdick* test—to scrutinize whether the burden violates the Equal Protection Clause.[69] The *Anderson/Burdick* test derives from the cases *Anderson v. Celebrezze* and *Burdick v. Takushi*, in which the right to vote was *burdened* but not completely denied by regulations pertaining to third-party candidates.[70] In both *Anderson* and *Burdick*, the regulation at issue did not have the capacity to wholesale deny voters access to the ballot.[71] As a result, the Court in each of these cases applied a balancing test that first looked to whether the regulation posed a severe burden.[72] The Courts held that if the burden is severe, strict scrutiny applies; if not, courts should apply a sliding scale of review based on the extent of the burden weighed against the importance of the state's interests.[73] Applying this framework, *Crawford* held that the voter identification law at issue did not severely burden the right to vote because identification cards were offered for free.[74] *Crawford* further credited the state's proffered interests of election

68. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) ("[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.").

69. *Id.* at 189–190 ("In *Anderson v. Celebrezze*, however, we confirmed the general rule that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious . . . rather than applying any litmus test' . . . we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule" (quoting Anderson v. Celebrezze, 460 U.S. 780 (1980)).

70. *Anderson* dealt with an Ohio state law requiring an early filing deadline for independent candidates. Anderson v. Celebrezze, 460 U.S. 780, 789 (1980). *Burdick* involved a Hawaii state law that prohibited write-in voting. Burdick v. Takushi, 504 U.S. 428 (1992). Both challenges failed.

71. *See id.*

72. *Burdick*, 504 U.S. at 434.

73. *Anderson*, 460 U.S. at 789 ("It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule"); *Burdick*, 504 U.S. at 434 ("[W]e have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.").

74. *Crawford*, 553 U.S. at 199.

modernization, preventing voter fraud, and "safeguarding voter confidence."[75]

In the 2020 case of *Black Voters Matter Fund v. Raffensperger*,[76] plaintiffs cited both the *Anderson/Burdick* test and *Harper* to argue that the requirement to pay for postage on mail ballots violates the Equal Protection Clause. There, the United States District Court for the Northern District of Georgia, and later the Eleventh Circuit, denied plaintiffs' petition for an injunction to eliminate Georgia's mail ballot postage requirement. The courts rejected both the Fourteenth Amendment *Harper* claim and the *Anderson/Burdick* claim.[77] The reasoning in these opinions provides ample ground for criticism and, as will be discussed *infra* in Part V.B.1, misconstrues constructive poll tax doctrine.

It is also worth noting that in July 2020, the United States District Court for the Western District of Texas heard a similar postage poll tax case in *Lewis v. Hughs*. That case, however, had only proceeded to the motion to dismiss stage by the time of the 2020 election.[78] As a result, the district court never substantively addressed the merits of the poll tax claim, allowing the claim to withstand the motion to dismiss with a short analysis that relied on coronavirus exigencies outside the scope of this Note.[79] Other pre-election postage poll tax claims similarly never reached the merits and unlike in the *Black Voters Matter Fund* case, were typically add-on claims to other litigation about voting burdens during the coronavirus pandemic.[80]

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75. *Id.* at 192–198, 200. As is discussed *infra*, Part IV.C.2, the Court also noted that petitioners failed to properly allege a constructive poll tax in their challenge to fees associated with obtaining copies of their birth certificates. *Id.* at 199.

76. Later called *Black Voters Matter Fund v. Secretary of State for Ga.* on appeal to the Eleventh Circuit.

77. *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1284–85, 1307, 1315–16 (N.D. Ga. 2020), *aff'd sub nom.* Black Voters Matter Fund v. Sec'y of State for Ga., 11 F.4th 1227 (11th Cir. 2021).

78. Lewis v. Hughs, 475 F. Supp. 3d 597 (W.D. Tex. 2020), *aff'd and remanded*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020), *order withdrawn*, No. 20-50654, 2020 WL 6066178 (5th Cir. Oct. 2, 2020).

79. *Id.* at 620 ("The Secretary argues that this claim should be dismissed because the State has not instituted the alleged tax. The State also does not receive the revenues from sold postage. The Secretary also argues that willful intent is required for a cost to be considered an unconstitutional poll tax. The Court declines to rely on these arguments at the 12(b)(6) stage. Instead, the Court finds that Plaintiffs have alleged that the cost of a stamp is a 'fee' that they must either pay, or risk harming their health to vote in person.").

80. In the final months before the 2020 election, there were also several cases that had the opportunity to address whether postage of mail ballots constitutes a poll tax, but unlike *Black Voters Matter Fund v. Raffensperger*, these cases did not get to a stage in the litigation where substance of the claims was addressed. These cases were mostly pleaded as a set of

III. REQUIRING THE PAYMENT OF POSTAGE COSTS FOR MAIL BALLOTS CONSTITUTES A POLL TAX, NOTWITHSTANDING TWO RECENT CIRCUIT DECISIONS

Harper's rationale, the line of poll tax cases flowing from *Harper*, and prudential policy principles suggest that required postage costs on mail ballots constitute a constructive poll tax in violation of the Fourteenth Amendment. Some scholars, however, have misinterpreted *Crawford* to suggest that strict scrutiny no longer applies to state poll tax jurisprudence.[81] Extracting what constitutes a constructive poll tax from the limited case law requires careful attention to *Harper*'s rationales.

Part III.A will first explain that, despite characterizations to the contrary, *Crawford* leaves *Harper*'s per se standard unscathed. Given the dearth of literature that explores what constitutes a constructive poll tax subject to *Harper*'s per se standard,[82] Part

challenges to voting restrictions during Covid-19, and thus, the postage poll tax claim was not the primary issue during the litigation. *See* DCCC v. Ziriax, 487 F. Supp. 3d 1207, 1236 (N.D. Okla. 2020) (citing only to the Twenty-Fourth Amendment, and summarily dismissing the claim by pointing to the *Black Voters Matter Fund* decision); Nielsen v. DeSantis, No. 20CV236-RH, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020) (relying solely on the Twenty-Fourth Amendment and devoting solely five sentences in concluding there is a low likelihood of success on the merits); New Georgia Project v. Raffensperger, 484 F. Supp. 3d 1265, 1289–99 (N.D. Ga. 2020), appeal dismissed, No. 20-13360-DD, 20221 WL 4128939 (11th Cir. Mar. 9, 2021) (relying solely on the precedent created by the *Black Voters Matter Fund* decision [which occurred in the same court merely three weeks prior]); League of Women Voters v. LaRose, 2020 WL 6115006, at *12 2771911 (S.D. Ohio Apr. 3, 2020) (failing to address the issue substantively, such that the *Black Voters Matter Fund* court describes it is as not a useful precedent [*see* Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d at 1308]).

81. *See, e.g.*, Vanessa Wright, *Voter Identification and the Forgotten Civil Rights Amendment: Why the Court Should Revive the Twenty-Fourth Amendment*, 67 UCLA L. REV. 472, 475 n.8 (2020); s*ee also* Allison R. Hayward, *What Is an Unconstitutional "Other Tax" on Voting? Construing the Twenty-Fourth Amendment*, 8 ELECTION L. J. 103, 117 (2009) ("There is no reason to assume that results under the 24th Amendment should be identical to those under equal protection [*Harper* analysis]. The 24th Amendment's terms do not allow for balancing or for any consideration of the state's interest—'poll taxes' or 'other taxes' as a voting prerequisite are categorically unconstitutional."); Alexander E. Preller, *Jury Duty Is a Poll Tax: The Case for Severing the Link between Voter Registration and Jury Service*, 46 COLUM. J. L. & SOC. PROBS. 1, 26 (2012) ("*Harman*, *Harper*, and *Crawford* make clear that, when evaluating restrictions on the right to vote that can be construed as poll taxes, the Court follows three steps of analysis [the balancing steps in the *Anderson/Burdick* test]").

82. One piece in the literature tries to establish what constitutes a "poll tax" for the purposes of the Twenty-Fourth Amendment. However, the article necessarily cites to a different line of cases, and also argues (albeit in passing) that mail ballot postage is not a poll tax due to the alternative of in-person voting. *See* Hayward, *supra* note 81, at 118–19. Professors Ackerman's and Nou's definitive history of the poll tax, which argues that *Harper* should be enshrined as a "superprecedent," adds a significant contribution to understanding

IV.B argues—based on *Harper*'s philosophical underpinnings, case law, and policy—that states impose a constructive poll tax whenever they require a voter to pay a tax or fee unrelated to elections or buy an item or service to cast a ballot. Finally, Part III.C responds to two recent circuit court decisions—*Jones v. Governor of Florida* and *Gonzalez v. Arizona*—that fail to accurately capture the meaning of a constructive poll tax.[83]

A. STRICT SCRUTINY WITHSTANDS *CRAWFORD*

Crawford v. Marion County Elections Board—the most recent Supreme Court case to address *Harper* in the context of poll taxes—unambiguously recognized that a state cannot require voters to pay for a document directly needed to vote, even if most voters would not need to make that payment. Because *Crawford* applied the *Anderson/Burdick* test to evaluate the burden on voting in that case, there is some—albeit limited—scholarly confusion regarding *Harper*'s legacy. This section makes clear that *Harper*'s core instruction—that a "[s]tate violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard"—remains fully intact.[84]

Crawford reaffirmed *Harper*'s core holding that all poll taxes are per se violative of the Fourteenth Amendment's Equal

how the scope of *Harper* is informed in large part by the recent enactment of the Voting Rights Act § 10 and the ratification of the Twenty-Fourth Amendment. Thus, Professors Ackerman and Nou argue that *Harper* analysis not only should look to the fact that a tax or fee bears no rational relationship to voting qualifications, but also independently to whether the tax "'impose[s] unreasonable financial hardship' on 'persons of limited means.'" *See* Ackerman & Nou, *supra* note 46, at 136, 146. This Note, however, focuses on defining what constitutes a "tax or fee" that inherently bears no relation to a voter's qualifications. Finally, a short, six-page piece discusses the meaning of poll tax following *NFIB v. Sebelius* where the Court held that the government's characterization of something as a "tax" versus a "fee" is not conclusive. The piece is on to something in claiming that when "synthesizing *Harman v. Forssenius* and *Harper v. Virginia* with *Burdick v. Takushi*, a direct cost to other eligible voters always outweighs any government interest, no matter how compelling. Thus, a poll tax or any direct cost of obtaining the voting franchise is a per se violation of both the Equal Protection Clause and the Twenty-Fourth Amendment abolishing poll taxes in federal elections." André L. Smith, *After NFIB v. Sebelius, When Does the Cost of Voting Become an Illegal Poll Tax*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 230, 234 (2014). This Note seeks to more definitively define what a "direct" versus "indirect" cost is.

83. Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc); Gonzalez v. Arizona, 677 F.3d 383, 409 (9th Cir. 2012) (en banc) *aff'd on other grounds sub nom*. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013).

84. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (emphasis added).

Protection Clause.[85] In unconditional terms, *Crawford* reaffirmed that "[u]nder *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford*'s formulation of *Harper* contradicts some recent literature that has suggested that *Harper* is now subsumed within the *Anderson*/*Burdick* balancing test.[86] *Crawford*, however, entertained a Fourteenth Amendment claim in the case of a voter identification law where "the State offer[ed] free photo identification to qualified voters."[87] Because the identification in question was provided for free, there was no purchase or fee required to vote, and the Court correctly decided to not apply *Harper*. Even the dissenting judge on the Seventh Circuit panel below, who argued that the voter identification law violated the Fourteenth Amendment recognized that the law was not a poll tax. Rather, he would have applied "something akin to 'strict scrutiny light'—[to] strike [the voter identification law] down as an undue burden on the fundamental right to vote."[88] Thus, it is clear that *Crawford* simply dealt with a burden that did not fall within the ambit of a "poll tax" without altering *Harper*'s per se standard.

B. A CONSTRUCTIVE POLL TAX EXISTS ANYTIME PAYMENT OF A TAX OR FEE UNRELATED TO VOTING OR PURCHASE OF AN ITEM OR SERVICE IS REQUIRED TO VOTE

Although *Crawford* is clear that *Harper*'s per se rule remains in force, the definition of what constitutes a "constructive poll tax" for the purposes of the Fourteenth Amendment remains unsettled. This Part argues—based on *Harper*'s normative underpinnings, the limited poll tax case law following *Harper*, and prudential policy principles—that states impose an unconstitutional constructive poll tax whenever they require a voter to (i) pay a tax or fee unrelated to elections or (ii) buy an item or service to cast a ballot.[89] The definition, however, does not include "indirect" costs

85. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008). *See also Harper*, 383 U.S. at 668.

86. *See* Ackerman and Nou, *supra* note 82.

87. *Crawford*, 553 U.S. at 186.

88. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008).

89. With *Harper* serving as the foundation, the cases of *Weinschenk v. State*, *Common Cause/Georgia League of Women Voters v. Billups* ("*Common Cause/Ga I*"), and *Crawford*—when synthesized—illustrate the approach to defining constructive poll taxes

such as opportunity costs or the price of gas to drive to the polls. These costs, although worthy of constitutional scrutiny, are more akin to the "burdens" assessed in the *Anderson/Burdick* analysis.

1. Harper*'s Normative Underpinnings Suggest That a Constructive Poll Tax Exists Anytime the State Requires Payment of a Tax or Fee Unrelated to Elections or Purchase of an Item or Service to Vote*

First, as has been discussed in the historical framing in Part III, *Harper* lays out normative guideposts that underpin its per se prohibition on poll taxes. *Harper* suggests that a poll tax violates the Fourteenth Amendment because it only functions to demonstrate a voter's ability to pay the poll tax—nothing more. Imposition of a poll tax is thus, an irrelevant qualification and per se violates the Constitution as a result. The stringency of *Harper*'s standard reflects the fact the voting is a higher order fundamental right "because [it is] preservative of all rights."[90] In addition, *Harper* rooted its rationale in the discriminatory impact that poll taxes have on the poor.[91] The definition of a constructive poll tax should therefore reflect both (i) the irrelevance of a ballot requirement to a voter's qualifications and (ii) the discriminatory impact a ballot access requirement may have on those of lesser means.

Finally, and crucially in light of the *Black Voters Matter Fund* decisions, the definition of a constructive poll tax must reflect *Harper*'s application of the per se rule to "payment[s] of any fee[s]" in addition to requirements considered "taxes." The Court's inclusion of the term "fee" suggests that the Fourteenth Amendment goes farther than striking down costs that are strictly "taxes" in a legal sense.[92] The *Merriam-Webster Dictionary* defines

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advocated here. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); *Crawford*, 553 U.S. 181; Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006); Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

90. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

91. *Id.* at 668 ("Lines drawn on the basis of wealth or property, like those on the basis of race are traditionally disfavored.").

92. *Id*; *see also* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 561–74 (2014) (explaining the "functional" approach to determining whether a cost or payment is a "tax" as a matter of law).

"fee" as a "fixed charge" or "a sum paid . . . for a service."[93] *Harper* therefore stands for a broad prohibition on conditioning the ballot that includes "fees" in addition to "taxes."

Combining these principles from *Harper*, it is clear that requiring voters to pay a tax or fee unrelated to elections is just as much of a poll tax as requiring voters to pay a tax or fee related to elections. *Harper* broadly prohibits conditioning the right to vote on taxes or fees of any sort,[94] irrespective of whether those payments are characterized as "poll taxes" or some unrelated requirement such as paying all back-income taxes one might owe the IRS. Requiring a voter to purchase an item or service to vote is "invidious" under *Harper* because ability to pay for that item or service has no bearing on one's qualifications to vote even if the underlying item does have an important function.[95] The requirement to purchase the item or service would also discriminate against individuals with lesser means who may be deterred from voting as a result of the cost of the purchase.

The Missouri Supreme Court adopted *Harper*'s normative view of constructive poll taxes in *Weinschenk v. State*. There, the court examined the validity of Missouri's voter identification law under Missouri's state constitution. Similar to the voter identification law in *Crawford*, the Missouri law provided free voter identification cards for people without a driver's license, but required payments for Missouri birth certificates, which were necessary to obtain the free identification.[96] Unlike the *Crawford* plaintiffs, who did not plead a poll tax claim[97] and failed to provide

93. *Fee*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fee [https://perma.cc/MWX9-EKQ8].

94. *Harper*, 383 U.S. at 668 ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an invidious discrimination that runs afoul of the Equal Protection Clause.") (internal quotations omitted).

95. *Id.* at 670.

96. Weinschenk v. State, 203 S.W.3d 201, 206–208 (Mo. 2006).

97. *Compare* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 n.20 (2008) ("while it is true that obtaining a birth certificate carries with it a financial cost, the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication") *with* Weinschenk v. State, 203 S.W.3d 201, 209, 214 (Mo. 2006) ("This case stands in stark contrast to the Georgia and Indiana cases, for their decisions were largely based on those courts' findings that the parties had simply presented theoretical arguments and had failed to offer specific evidence of voters who were required to bear these costs in order to exercise their right to vote").

evidence at trial of the Indiana law's impact on voters who needed to pay for a copy of their birth certificates to obtain an identification, the plaintiffs in *Weinschenk* properly pleaded their poll tax claim with respect to birth certificate fees.[98] With an ideal opportunity to consider the birth certificate fees, the *Weinschenk* court first looked to the Fourteenth Amendment as a baseline for the Missouri state constitution's protections. The court reaffirmed that "*Harper* makes clear that all fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law" and, after an analysis that relied on its state constitution, found the statute unconstitutional.[99] Although *Weinschenk* relied on Missouri's constitution, its consideration of the Fourteenth Amendment generally affirms the view that *Harper*'s per se rule applies not only to payments that are explicitly labeled as "poll taxes," but also to all "fee[s] that qualified, eligible, registered voters . . . are required to pay" in order to vote.[100] *Weinschenk* exemplifies how to correctly apply the text of *Harper*, demonstrating that "fee[s]" required in the process of voting are also impermissible constructive poll taxes under the Equal Protection Clause.[101] *Weinschenk* also demonstrates that *Harper*'s per se rule likely extends to requirements that condition the ballot on the purchase of items or services.

2. Billups *and* Crawford *Support Defining Constructive Poll Taxes as Anytime Payment of a Tax or Fee Unrelated to Voting or Purchase of an Item or Service Is Required to Vote*

Although *Harper* suggests that states impose a constructive poll tax whenever they require a voter to pay a tax or fee unrelated to elections or buy an item or service to cast a ballot, the imposition of indirect burdens on voters does not constitute a constructive poll

98. Brief for Petitioners at 31, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (No. 07-25) (explaining that the primary error below was failure to "apply the heightened scrutiny appropriate for a law that imposes severe and discriminatory burdens on voting" as in *Anderson/Burdick* analysis step 1, where the court must assess whether or not the burden was severe).

99. *Weinschenk*, 203 S.W.3d at 213; *Harper*, 383 U.S. at 666.

100. *Id.*

101. *Black Voters Matter Fund v. Secretary of State for Georgia*, the case this Note primarily critiques, explicitly agrees that there exists impermissible constructive poll taxes. 478 F. Supp. 3d 1278, 1310 (N.D. Ga. 2020) ("[A] line of authority has developed around so called 'constructive' or 'de facto' poll taxes, which do not necessarily involve a literal tax assessed on voting, but which entail monetary burdens to voter qualification or the voting process. These cases typically involve some form of voter identification requirement.").

tax. Case law helps parse the distinction between a required payment and an indirect burden that is subject to *Anderson/Burdick* balancing. *Common Cause/Georgia League of Women Voters v. Billups (Billups I)*, a federal district court case litigated just before *Crawford*, provides a useful example.[102] In *Billups I*, the United States District Court for the Northern District of Georgia considered whether a voter identification law that required photo identification was within the ambit of *Harper*'s restrictions.[103] Georgia gave indigent voters the option to either sign an affidavit stating that they could not afford the identification fee or to pay $20 to obtain the required identification to vote.[104] The court deemed the $20 fee a *facially* unconstitutional poll tax in violation of *Harper* because the $20 fee was a monetary payment imposed on an item that the state requires to cast a ballot via in-person voting for voters who are unable to vote absentee and lack an identification.[105]

The *Billups* court also relied extensively on *Harper* to enjoin the voter identification law for *all* Georgia voters, including those who could vote absentee (which did not require identification) and those who could afford the fee.[106] In *Harper*, the fact that many voters could presumably afford the $1.50 poll tax had no bearing on the Court's promulgation of a per se rule prohibiting poll taxes.[107] Similarly, in *Billups*, the existence of alternatives to paying the required fee—such as voting by mail—did not save the voter identification law from impermissibly making a payment a

102. *Billups I* concerned enjoinment of a Georgia voter identification law that required a fee to obtain an identification suitable to vote. After the court enjoined enforcement of the law, the voter identification law was amended to make the identification free of charge, but still did not address fees for underlying documents to obtain an identification. *See* Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006). Following the amended voter identification law, Common Cause and the Georgia League of Women Voters filed another suit this time claiming that the costs of the underlying documents constituted a poll tax. *Billups II*, 439 F. Supp. 2d 1294, 1297 (N.D. Ga. 2006). The court this time denied the poll tax claim. *Id.* The *Weinschenk* court distinguished this case as well as *Crawford* in claiming, "the Georgia and Indiana cases . . . failed to offer specific evidence of voters who were required to bear these costs in order to exercise their right to vote." Weinschenk v. State, 203 S.W.3d 201, 209, 214 (Mo. 2006). However, the disputes about the underlying documentation ultimately do not dictate the question of mail ballot postage, which remains more similar to the fee for the identification in *Billups I*.

103. Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

104. *Id.* at 1369–70.

105. *Id.* at 1370.

106. *Billups I*, 406 F. Supp. 2d at 1334, 1335, 1359, 1368, 1369 n.9.

107. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

prerequisite to voting.[108] Both cases disallowed election laws that included an irrelevant condition of payment to access the ballot. Thus, *Billups* stands for the proposition that a constructive poll tax exists whenever the state requires voters to pay for something that the state requires to vote, *irrespective of the existence of alternative forms of voting* through which the fee could be avoided.

In *Crawford*, the Supreme Court signaled approval of the district court's logic in *Common Cause* when it suggested that requiring a voter to purchase a voter ID constituted a constructive poll tax. *Crawford* stated that "the fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification."[109] *Crawford*, therefore, confirms that a constructive poll tax exists when the state requires voters to purchase an item to vote—even if the same item can be required to vote when it is provided for free.

The *Crawford* Court, however, refused to provide a remedy to the "limited number of persons—*e.g.*, elderly persons born out of State" who would be required to pay a fee for a copy of their birth certificate, which may, in turn, be necessary for obtaining a free identification.[110] As a result, some may wonder how *Crawford* leaves *Harper* unscathed, even though the *Crawford* Court refused to declare that the requiring some individuals to pay a fee to obtain their birth certificates constituted a constructive poll tax. *Crawford*'s decision to not require the free provision of birth certificates to voters who need a copy to obtain a voter identification can be reconciled with *Harper* because the *Crawford* plaintiffs failed to properly allege harm during the litigation as to this narrower class of people who both lack an identification and lack the documentation needed to obtain identification. The lead opinion explains in a footnote that although "obtaining a birth certificate carries with it a financial cost" the plaintiffs failed to provide "even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible

108. *Billups I*, 406 F. Supp. 2d at 1369.
109. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008).
110. *Id.* at 184.

evidence subject to cross-examination in constitutional adjudication."[111]

The Court left open the possibility of future as-applied challenges for this narrow class of voters, further suggesting that it took issue with these second-order birth certificate fees as well.

Finally, *Crawford* illuminates that some burdens on ballot access are not necessarily constructive poll taxes, but rather, are subject to *Anderson*/*Burdick* balancing. *Crawford* distinguished between (i) "restrictions on the right to vote [that] are invidious,"[112]—including any required payment of a tax or fee unrelated to elections, or purchase of an item or service—and (ii) "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" that nonetheless create burdens for voters.[113] Some indirect "costs," such as opportunity costs, would fall into the burdens category, because indirect costs do not require a transaction of any sort akin to a tax, fee, or purchase.[114] In *Obama for America v. Husted*, for example, the United States District Court for the Southern District of Ohio held that plaintiffs successfully petitioned to enjoin implementation of an Ohio early voting deadline of the Friday before the election at 6 p.m. as a violation of the Equal Protection Clause.[115] The court did not rule that the early voting deadline functioned as a poll tax, even though it would have made voting more costly for the many hourly workers who would have to take time off on a weekday in order to vote (among other financial burdens). Rather, the court invoked the *Anderson/Burdick* test to determine that "the State fails to substantiate its precise interests to justify the burden to Plaintiffs' right to vote."[116] Burdens on the right to vote must be scrutinized carefully, especially when the burden is high and would have unjustified disenfranchising effects, but are not scrutinized through the lens of *Harper*'s per se rule regarding poll taxes.

111. *Id.* at 202 n.20.
112. *Id.* at 189.
113. *Id.* at 189–190.
114. *Contra* Mukherjee, *supra* note 20, at 215–17 (arguing that the long wait times at some polling places constitute a poll tax).
115. Obama for America v. Husted, 888 F. Supp. 2d 897 (S.D. Ohio 2012).
116. *Id.* at 907.

3. *Policy Justifications for the Constructive Poll Tax's Definition*

Prudential policy principles also support defining a constructive poll tax as a requirement that voters pay a tax or fee unrelated to elections or buy an item or service to be able to cast a ballot. *Harper*'s per se rule only applies to required monetary payments because there are no state interests that could possibly justify such a requirement.[117] Implicit in this proposition is not only the irrelevance of paying a tax or fee or making a purchase to voter qualifications, but also the ease with which the state can waive the tax, fee, or purchase requirement.

Consider the payment underlying postage. It would be difficult for a state to claim in good faith that it cannot easily pre-stamp every absentee ballot using a postmark. After all, this is something that states already do for many types of mail, and seventeen states already do for voting.[118] Conversely, indirect financial burdens on voters may not be so easily remedied, and are often difficult for the state to substantively address. Consider, for example, the difficulty a state would have in completely eliminating the financial burden that results from getting to and from a polling station. Although there may be successful *Anderson/Burdick* claims when there is a particular lack of polling places in certain areas, there is no easily administrable way for the state to pay for everyone's transportation to the polls.[119]

Further, the definition of a constructive poll tax for Fourteenth Amendment purposes is easy to judicially administer. Taxes, fees, and required purchases are clearly identifiable. They all involve a transaction mandated by the government itself. Conversely, indirect costs that impose a burden on the right to vote are not easily quantifiable or clearly identifiable. The cost of

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117. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever* it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.") (emphasis added).

118. *See VOPP: Table 12, supra* note 5.

119. Thus far, *Anderson/Burdick* claims for insufficient polling places have had mixed results. *See, e.g.*, Nemes v. Bensinger, 467 F. Supp. 3d 509, 526 (W.D. Ky 2020) (finding that the existence of only a single in-person polling place in each of Fayette, Kenton, and Jefferson Counties, Kentucky constituted "no more than a modest burden on the right to vote"); *but see* League of Women Voters of Florida v. Detzner, 314 F. Supp. 3d 1205 (N.D. Fla. 2018) (holding that the state Secretary of State's opinion preventing college buildings from being early voting sites did impose a significant burden on university students and lacked a weighty government interest).

transportation to the polls will be different for almost every voter, and will vary based on a number of factors, including density of polling places, public transportation options, and the price of gas. There are certainly many instances where transportation costs pose an extreme burden on voters, and in such cases, should be subject to strict or heightened scrutiny based on the *Anderson/Burdick* test. Such an inquiry—as *Anderson/Burdick* demands—however, will require a plaintiff to show a set of facts that, when added up, amount to a burden. The detail-specific nature of the burden means that a per se rule would be hard to administer because it would be difficult to parse when a burden crosses the bright line. Rather, the fact-intensive inquiry in *Anderson/Burdick* analysis would be more fitting. On the other hand, identifying a tax, fee, or required purchase is easy, making these most suitable for *Harper*'s per se rule.

C. FOLLOWING *CRAWFORD*, SOME APPELLATE COURTS HAVE MISAPPLIED *HARPER* AND ERRONEOUSLY NARROWED ITS APPLICATION

Some appellate decisions over the last eight years have incorrectly narrowed the application of *Harper*'s per se rule. The Note addresses these cases—*Jones v. Governor of Florida* and *Gonzalez v. Arizona*—as they give further reason for other courts to clarify the scope of *Harper*'s per se rule.

1. *Jones v. Governor of Florida*

In *Jones*, the Eleventh Circuit, sitting *en banc*, reheard a suit bringing *Harper* and Twenty-Fourth Amendment challenges against a Florida state requirement that newly enfranchised individuals who were formerly convicted of felonies pay all outstanding "fines, fees, costs, and restitution" stemming from their sentences in order to vote.[120] The court upheld the requirement.[121]

The *Jones* court distinguished *Harper* by arguing that Supreme Court precedent allows for the creation of restrictions on the

120. Jones v. Governor of Fla., 975 F.3d 1016, 1035 (11th Cir. 2020) (en banc). The court also denied the ex-prisoners' relief based on procedural due process and vagueness challenges. *Id.*

121. *Id.*

franchise associated with former felony status.[122] The court construed the payment of restitution and other fees associated with incarceration as "penalties," rather than "taxes" under the functional analysis of *National Federation of Independent Business v. Sebelius*, because the behavior to which the payments applied was illegal.[123] Because the Supreme Court in *Richardson v. Ramirez* allowed for restrictions on the right to vote on the basis of felon status, the court viewed these payments as part of an individual's prison sentence, which in turn is "highly relevant to voter qualifications."[124]

As one of the dissents noted, however, it is inaccurate to characterize the fees as part of the former felons' sentence, because "they bear no relation to the crimes charged" and "their primary purpose is the raising of revenue" for the Florida state court system.[125] The dissent faithfully applied *Harper*, because the fees upon which ballot access was conditioned had no relation to former prisoners' crimes and thereby bore no relation to the former prisoners' qualifications to vote. It is true that under *Richardson*, Florida need not grant automatic re-enfranchisement to all people formerly convicted of felonies who are no longer incarcerated.[126] *Harper* mandates, however, that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[127]

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122. *Id.* at 1031 ("Amendment 4 and Senate Bill 7066 are markedly different from the poll tax in *Harper*. They do not make affluence or the payment of a fee an 'electoral standard.' They instead impose a different electoral standard: to regain the right to vote, felons, rich and poor, must complete all terms of their criminal sentences. Unlike the poll tax in *Harper*, that requirement is highly relevant to voter qualifications."). The court cited the 1974 Supreme Court case of *Richardson v. Ramirez*, which affirmed that it is generally permissible under the Equal Protection Clause for a state to prohibit formerly convicted felons from voting. 418 U.S. 24 (1974).

123. *Id.* at 1038–39. *NFIB v. Sebelius* concerned a challenge to the Affordable Care Act. The Supreme Court assessed the Act's legitimacy through determining whether a provision that requires individuals who do not purchase health insurance to make a payment to the government (the "individual mandate") was an impermissible penalty or a permissible tax. In finding that the individual mandate was a tax, the Court held that it lacked the typical characteristics of "punishment" that a penalty usually possesses. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 566–570 (2012).

124. *Jones v. Governor of Fla.*, 975 F.3d at 1030.

125. *Id.* at 1101–02 (Jordan J., dissenting).

126. Although many, including this Note author believe as a matter of policy that all states should. *See e.g.*, David Litt, *Before Telling Protestors for George Floyd to Vote, Remember Not All of Them Are Allowed To*, NBC NEWS (June 4, 2020), https://www.nbcnews.com/think/opinion/telling-protesters-george-floyd-vote-remember-not-all-them-are-ncna1224011 [https://perma.cc/M7FB-PWYR].

127. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

Once Florida re-enfranchised former convicted felons via referendum, it forfeited the right to impose burdens on the right to vote that would otherwise violate the Equal Protection Clause, including conditioning the right to vote on payment of a fee when that fee was not part of the prison sentence. Finally, it is worth noting that the Eleventh Circuit's decision was a highly divided 6–4 vote that produced several lengthy dissents.[128]

2. *Gonzalez v. Arizona*

The Ninth Circuit also erred in its interpretation of *Harper* in the case of *Gonzalez v. Arizona*. The court answered the question the *Crawford* Court left open: whether fees associated with obtaining the documentation to obtain an item required to vote—in particular, a birth certificate required to obtain required voter identification—are subject to *Harper*'s per se rule.[129] As it relates to the postage poll tax question, this decision is not authoritative, because postage is most analogous to a requirement to pay for the identification itself. On that matter, *Crawford* was explicit in saying that identification cards must be made available at no cost. Still, determining whether the underlying documentation needed to obtain identification must be made available for free to voters is crucial to understanding the farthest reach of what constitutes a constructive poll tax subject to *Harper*'s per se rule.

In *Gonzalez v. Arizona*, the Ninth Circuit declared that the imposition of fees to obtain a birth certificate does not violate *Harper*, because "requiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents. On the contrary, such a requirement falls squarely within the state's power to fix core voter qualifications."[130] The court confused the legitimacy of

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128. Of the four dissenting judges, three wrote dissenting opinions, which amounted to more pages of opinion than the majority opinion and concurrences combined. *See generally* Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc).

129. The Fifth Circuit in the extensive *Veasey* litigation also addressed this issue, but by the time of the final en banc ruling, Texas had eliminated its fees for acquiring birth certificates. The *Veasey* court in dicta, however, takes a position similar to the Ninth Circuit in *Gonzalez*. Veasey v. Abbott, 830 F.3d 216, 267 (5th Cir. 2016) (en banc) ("The [*Crawford*] Court implied that requiring voters to obtain photo identification and charging a fee for the required underlying documentation would not qualify as a poll tax. . . .").

130. Gonzalez v. Arizona, 677 F.3d 383, 409 (9th Cir. 2012) (en banc) *aff'd on other grounds sub nom*. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013).

identification laws generally with the legitimacy of *how* the particular identification law at hand functioned in practice. It is true that following *Crawford*, the Court has recognized that requiring voter identification is permissible and falls within the state's power to set qualifications to vote.[131] The *Crawford* Court, however, did not suggest that the state's power to set voter qualifications includes a right to charge classes of voters who lack both identification and a copy of their birth certificate a fee.[132] The plaintiffs' failure to allege a poll tax for the birth certificate fees, in addition to the deficiencies in the evidentiary record, required the *Crawford* Court to leave the birth certificate issue open.

Plaintiffs did not plead *Crawford* as a poll tax case, focusing instead on *Anderson/Burdick* balancing.[133] In fact, the petitioner's brief did not cite *Harper* once.[134] Thus, the Ninth Circuit at a minimum relied on a misreading of *Crawford* in determining the document fees were not a poll tax. If anything, the *Crawford* Court's admonition that "the fact that most voters already possess a valid driver's license . . . would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification" suggests an analytical concern with the birth certificate fees.[135] In substance, there is little difference between needing to pay for identification and needing to pay for the document to obtain the identification card.

The ultimate answer on the birth certificate question is still open. It does not make analytical sense, however, to say that unavoidable fees on a document needed to obtain another document that is required to vote is not a constructive poll tax. The government is still requiring a voter to purchase an item in order to vote. Legitimizing fees for birth certificates that are necessary for obtaining a proper voter identification would mean that states

131. *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

132. The plaintiffs in *Crawford* did not even allege that the birth certificate fees are a poll tax, but rather argued that they constituted an excessive burden that should subject the entire voter identification law to heightened scrutiny. *See* Brief for Petitioners at 31, Crawford, 553 U.S. 181 (2008) (No. 07-25) ("The Seventh Circuit's central error in this case was its failure to apply the heightened scrutiny appropriate for a law that imposes severe and discriminatory burdens on voting by one class of individuals—nondrivers who lack government issued photo identification and cannot readily obtain it."). As such, the Court only makes reference to the birth certificate issue as a burden-benefit question, which it then describes as lacking sufficient evidence to move forward with that claim. *Crawford*, 553 U.S. at 199.

133. *See* Brief for Petitioners, *Crawford*, 553 U.S. 181 (2008) (No. 07-25).

134. *Id.*

135. *Crawford*, 553 U.S. at 198.

could circumvent the Fourteenth Amendment and impose poll taxes with highly formalistic laws. States could enact laws that require "Document A" to vote, and make Document A free. States could then enact a separate statute that says in order to receive Document A, voters need to purchase "Document B" for a fee. The logical implication of this hypothetical regime is that the state is requiring voters to buy an item (Document B) to cast a ballot, which in turn, impermissibly makes "payment of [a] fee an electoral standard."[136]

Few courts have had the opportunity to address constructive poll taxes, especially in the thirteen years since *Crawford*. Two of the only courts that have recently addressed constructive poll taxes—the Eleventh and Ninth Circuits—have unfortunately failed to follow *Harper*'s per se rule and have misconstrued *Crawford*'s reach. The flaws in the majority opinions in *Jones v. Governor of Florida* and *Gonzalez v. Arizona* provide further reason to litigate in other, more favorable fora and clarify constructive poll tax doctrine.

IV. AS APPLIED TO POSTAGE COSTS, *HARPER* IS "FATAL IN FACT"

Applying *Harper* with the glosses of *Weinschenk*, *Billups*, and *Crawford,* demonstrates that requiring postage on mail ballots is an unconstitutional poll tax in violation of the Equal Protection Clause. First, a court must determine whether the requirement to provide one's own postage on a mail ballot is akin to requiring voters to buy an item or service to cast a ballot.

A. POSTAGE ON MAIL BALLOTS SUBSTANTIVELY FITS THE DEFINITION OF CONSTRUCTIVE POLL TAXES

Postage on a mail ballot falls squarely within the prohibition on requiring voters to buy an item or service. For voters who wish to cast a ballot by mail, the state governments in thirty-three states require one to four 55-cent Forever Stamps affixed to the return envelope of a ballot.[137] All mail voters in these states who do not

136. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

137. It is true that the postal service is a part of the federal government, however, states that do not pre-stamp ballots actively choose to push the cost of ballots onto voters. Either

have stamps must incur a uniform, monetary cost to purchase them. For these mail voters, a stamp is absolutely required for the mail ballot to be delivered to the relevant elections office and counted. Postage is, therefore, identical to the impermissible voter identification fee in *Billups*, to which *Crawford* later alludes. In both cases, the court construed fees associated with acquiring photo identification—which was required to vote in person—as an impermissible electoral standard, where failure to pay the identification fee would in turn prevent an individual from voting in person.[138] A monetary payment is also required to obtain stamps, making the possession of stamps an electoral standard for any voter who wishes to successfully cast a ballot by mail. It is of no import that many voters may already own stamps. *Crawford* held (in the identification context) that under *Harper*, "the fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute [voter identification law] . . . if the State required voters to pay a tax or a fee to obtain a new photo identification."[139]

The Eleventh Circuit in *Black Voters Matter Fund* disagreed, and found that postage costs do not function in substance as a constructive poll tax.[140] The court first looked to the Twenty-Fourth Amendment and found that postage is a "cost of a service" and not a tax under the plain meaning of the term as construed in both case law and dictionaries.[141] Accepting, for the moment, the court's Twenty-Fourth Amendment logic at face value,[142] the court went on to claim that there is also no Fourteenth Amendment issue because Georgia does not explicitly require "voters to pay a poll tax or fee . . . to be eligible to vote."[143] As a result, the court held that

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way, poll taxes are unconstitutional at both the federal and state levels as per the Twenty-Fourth and Fourteenth Amendments, respectively.

138. Billups I, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

139. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008).

140. Notably, the district court did not address the substance of whether relying instead on the alternatives argument discussed *infra* Part IV.B.

141. Black Voters Matter Fund v. Secretary of State for Georgia, 11 F.4th 1227, 1232–34 (11th Cir. 2021).

142. Although the court's definition of tax as a "monetary exaction imposed by the government" is not universally supported, *see e.g.*, Brief for Tax and Constitutional Law Professors as Amici Curiae Supporting Plaintiff-Appellees at 17, Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020) (en banc) (No. 20-12003) (arguing that "[f]or the Twenty-Fourth Amendment, [the] functional approach [advocated for] involves an examination of whether raising revenue is one of the purposes of the financial obligation at issue.").

143. *Black Voters Matter Fund*, 11 F.4th at 1234.

payment of postage is not an "electoral standard."[144] The court's painfully literal reading of *Harper* misses the fact that without paying for postage, a mail voter's ballot will not be carried to the Board of Elections and will not be counted. To put it simply, the postage is *required* to vote by mail. It does not matter whether there is a particular law that conditions eligibility for mail voting on paying for postage.[145] The Eleventh Circuit also failed to describe why postage is not an impermissible fee. In fact, the court's description of postage as a "cost of a service" is an apt description of a fee, which is defined as a "fixed charge" or "a sum paid . . . for a service."[146] By the Eleventh Circuit's own definition, postage is a fee. The court therefore failed to follow *Harper*'s authoritative prohibition on requiring fees to vote.

Critics may also contend that the cost of postage is incidental to mail voting, because mail itself almost always requires postage, and states merely default to requiring postage on mail ballots. This argument, however, fails to account for the fact that seventeen states already pre-stamp all mail ballots.[147] These seventeen states demonstrate that there is always the legislative choice to require or not require postage for mail ballots, meaning postage is not merely an incidental cost. Further, *Crawford* warned of a *Harper* violation if required identification cards came with fees on unconditional terms, even if the imposition of state identification fees predate voter identification laws.[148] Failing to cure a constitutional deficiency that results from the status quo is no defense.[149]

Further, the motives of the state are irrelevant under *Harper*. *Harper* introduced a per se rule because requiring monetary payments to vote introduces a "capricious or irrelevant factor" into a person's qualifications to vote.[150]

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144. *Id.* (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966)).

145. In *Crawford*, for example, the Court claimed that Indiana's voter identification law would violate Harper if the state made voters pay for the required identification. The Court did not even mention the existence of an Indiana law that made payment of an "electoral standard." Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

146. *See supra*, note 93.

147. *See VOPP: Table 12, supra* note 5.

148. *Crawford*, 553 U.S. at 198.

149. Several substantive due process cases exemplify situations where default policy positions in the absence of affirmative legislative enactments produced constitutional infirmities. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (finding the constitutional right to an attorney shrouded in the Sixth and Fourteenth Amendments, notwithstanding the absence of an explicit policy denying this right).

150. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

A voter's ability to pay for a stamp is equally irrelevant to a voter's qualifications as that voter's ability to pay for identification or a $1.50 poll tax. In the electoral context, the introduction of an irrelevant and capricious "requirement of fee paying causes an 'invidious' discrimination, that runs afoul of the Equal Protection Clause."[151] Thus, the fees states impose when they require postage for mail ballots are analogous to the impermissible fees described in *Crawford* and fall directly in the sweep of *Harper*'s per se rule.

B. THE ARGUMENT THAT POSTAGE IS NOT TRULY "REQUIRED" WILL NOT IMPEDE STRATEGIC LITIGATION

The greatest obstacle to a litigation strategy to abolish the poll tax is the argument raised in *Black Voters Matter Fund* that postage is not truly "required," and thus does not constitute a constructive poll tax subject to *Harper*'s per se rule.[152] Proponents of this argument would claim that if a voter has discretion to pay, then the cost does not transform payment of a tax or fee into an "electoral standard."[153] This argument, however, is unpersuasive in light of precedent.

1. *The Alternatives Argument*

Unlike the Eleventh Circuit, the district court below in *Black Voters Matter Fund* avoided determining whether the requirement of ballot postage substantively functions like a constructive poll tax. The court recognized that "de facto" poll taxes exist under *Harper* and *Harman*[154] even if the state does not "designate the payments as such."[155] Nonetheless, the court found that the postage costs were not constructive poll taxes. The district court held that a tax must be mandatory and that mail ballot postage costs are not truly "required" because "any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any 'extra steps' besides showing up at the

151. *Id.*

152. Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1314 (N.D. Ga. 2020), *aff'd sub nom.* Black Voters Matter fund v. Sec'y of State for Ga., 11 F.4th 1227 (11th Cir. 2021).

153. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

154. *See* Harman v. Forssenius, 380 U.S. 528 (1965) (striking down a Virginia law that gave voters the option to either pay a poll tax or file a certificate of residence).

155. *Black Voters Matter Fund*, 478 F. Supp. 3d at 1307.

voting precinct and complying with generally applicable election regulations."[156] The court's holding that there are alternative methods of voting where a postage fee is not incurred is broadly rejected in both the election law context and in constitutional law generally.

First, the philosophical underpinnings of the law's rejection of the "alternatives" argument derive from *Harman v. Forssenius*, the only Supreme Court case invoking the Twenty-Fourth Amendment to strike down a poll tax. In *Harman*, the Court invalidated a Virginia statute that gave voters an option to either pay a poll tax or file a certificate of residence.[157] By the time *Harman* was argued, the Twenty-Fourth Amendment had been adopted, abolishing federal-level poll taxes. Nonetheless, Virginia argued that by creating an alternative to paying the poll tax, providing the *option* to pay the poll tax was permissible.[158] The Court, however, declared that "the Twenty-[F]ourth [Amendment] does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason."[159] The Court required that the plaintiffs show that the "alternative"—filing a certificate of residency—"imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax."[160] *Harman* thus stands for the rejection of the "alternatives" argument in the poll tax space, so long as plaintiffs can pass the low bar of demonstrating that the alternative is a "material requirement."[161]

Billups considered the alternatives question in both the Twenty-Fourth Amendment and the Equal Protection Clause context.[162] There, the district court enjoined a photo identification

156. *Raffensperger*, 478 F. Supp. 3d at 1311. The Eleventh Circuit agreed in two short paragraphs. Black Voters Matter Fund v. Secretary of State for Georgia, 11 F.4th 1227, 1234–35 (11th Cir. 2021).

157. 380 U.S. 528 (1965).

158. *Id.*

159. *Id.* at 540.

160. *Id.* at 541.

161. *Id.*

162. As well as the Twenty-Fourth Amendment context, given the plaintiffs pleaded a poll tax based on both amendments. Billups I, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005) ("Plaintiffs contend that the State cannot evade the requirements of the Fourteenth and Twenty-Fourth Amendments by labeling something as a 'fee' when, in reality, it is a tax on the right to vote.").

requirement that applied only to in-person voting, because the state charged a $20 fee for voters to obtain the required identification (if they presently lacked a suitable form of identification).[163] Crucially, the court held that the fee requirement constituted a poll tax, even though voters had two alternatives: (i) voting by mail, which did not require identification,[164] and (ii) signing a fee waiver affidavit certifying a voter's indigent status.[165] In applying *Harman* to the fee waiver alternative, the district court noted that the mere fact plaintiffs would have to travel to a state Department of Driver Services center constituted a "material requirement" in violation of the Twenty-Fourth Amendment.[166] Most importantly, it held that the fee violated the Equal Protection Clause given "that some individuals avoid paying the cost for the Photo ID card [via mail voting or signing the affidavit] does not mean that the Photo ID card is not a poll tax."[167]

Applying *Billups* to mail ballots is a relatively straight-forward task. The district court in *Black Voters Matter Fund* held that the alternative of in-person voting sufficiently militates against any claim that postage on a mail ballot constitutes a poll tax.[168] But voting in-person imposes, at a minimum, an equally material requirement as does going to a state DMV to obtain identification, as in *Billups*. Voting in-person is also procedurally analogous to the physical effort of traveling to a DMV to obtain identification and sign a waiver. Further, a voter who utilizes a mail ballot presumably does so because they are unable to vote in-person or believe voting in person will be more burdensome than voting by mail. *Harman* and *Billups* are thus directly on point as to the constitutionality of postage poll taxes, and stand for the proposition that the state cannot justify a poll tax merely by providing an alternative.

Surprisingly, the *Black Voters Matter Fund* district court acknowledged "that voting in person is materially burdensome for a sizable segment of the population" but then dismissed this

163. Billups I, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).
164. *Id.* at 1361–62.
165. *Id.* at 1369.
166. *Id.* at 1370.
167. *Id.* at 1369–70.
168. Black Voters Matter Fund v. Raffensperger 478 F. Supp. 3d 1278, 1313–15 (N.D. Ga. 2020), *aff'd sub nom.* Black Voters Matter fund v. Sec'y of State for Ga., 11 F.4th 1227 (11th Cir. 2021).

weighty concern with a short, unelaborated aside that "these concerns [i.e., postage costs] . . . are not the specific evils the Twenty-Fourth Amendment was meant to address."[169] The court provided no evidence to support this contention. In fact, the Twenty-Fourth Amendment was explicitly ratified to address the evil of conditioning the franchise on the arbitrary ability to make a payment.[170] The court also failed to address why the required postage was beyond the scope of *Harper* and the Equal Protection Clause, despite referring explicitly to the fact that plaintiffs claimed a poll tax under both *Harper* analysis and the Twenty-Fourth Amendment just two sentences later.[171]

Further, the alternatives argument fails to account for *Harper*'s protections against wealth discrimination.[172] Requiring a $1.50 payment would preclude many from voting by mail, and grant wealthy individuals privileged access to the mail ballot system. After all, granting wealthy white elites privileged access to the ballot was the invidious initial intent of the poll tax of the Jim Crow era.[173] The creation of a mail ballot program implies the state's recognition that mail voting is necessary for many segments of the voting population. Unsurprisingly, low-income Americans utilize mail voting more than other demographic groups, including 25.7% of voters with under $30,000 in family income in the 2016 election.[174] It is perverse for government to require payment for the form of voting that low-income Americans more than any other

169. *Id.* at 1314.

170. *See* Remarks of Attorney General Katzenbach, *supra* note 43.

171. *Id.* at 1315 ("Otherwise, accepting Plaintiffs' argument under *Harman* and *Harper* would necessitate ruling that the postage requirement on absentee ballots in Georgia is now and has always been a poll tax, even before the pandemic, because voting in person presents a material burden for some segment of the population. The Court is not prepared under these circumstances to make such a ruling under the Twenty-Fourth Amendment framework.").

172. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) ("[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.").

173. For example, one South Carolina Congressman said on the House floor in 1901 that members of the overwhelmingly poor Black community of Jim Crow South Carolina did not register to vote "because they would rather save the dollar which would be required as poll tax." J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, 63 (1974).

174. Charles Stewart III, *The Demographics of Voting by Mail*, ELECTION UPDATES BLOG (Mar. 22, 2020), https://electionupdates.caltech.edu/2020/03/20/some-demographics-on-voting-by-mail/ [https://perma.cc/9REV-6GZA].

income group are likely to utilize.[175] Denying many low-income voters the option to vote by mail because voters may alternatively choose to vote in person flies in the face of *Harper*'s anti-wealth-discrimination rationale.

2. *The Post Office Official Policy Argument*

Finally, a critic of the argument that mail ballot postage is truly "required" may point to the United States Postal Service's policy to generally deliver all ballots irrespective of proper postage.[176] This argument, however, fails on several grounds. The USPS provides conflicting answers to the public regarding ballot delivery, stating elsewhere on its website that:

> Unless your state or local election officials provide you with a prepaid return envelope, you should make sure appropriate postage is affixed to your return ballot envelope. To help voters, the Postal Service requires election officials to inform voters of the amount of First-Class postage required to return their ballots, if the voter decides to return their completed ballot by mail. Not only does federal law require proper postage, but it also helps ensure timely processing and delivery by the Postal Service.[177]

To compound the confusion, there are many documented instances of the Postal Service failing to deliver ballots with improper postage. In email correspondence with a state elections official from North Dakota, the author was told that "USPS will attest that it's the policy of USPS to always deliver envelopes without postage, billing to the jurisdiction, but in my experience here [in North Dakota], . . . as well as anecdotally hearing from other states, that policy doesn't always get executed at the branch

175. *Id.*

176. *2020 U.S. Postal Service Election Mail Fact Sheet*, U.S. POSTAL SERV. (Oct. 21, 2020), https://about.usps.com/newsroom/statements/1021-usps-election-mail-fact-sheet.htm [https://perma.cc/7X2M-G6TN] ("If a return ballot is nevertheless entered into the mailstream with insufficient or unpaid postage, it is the Postal Service's policy not to delay the delivery of completed absentee balloting materials, including mail-in ballots. In cases where a ballot enters the mailstream without the proper amount of postage, the Postal Service will deliver the ballot and thereafter attempt to collect postage from the appropriate Board of Elections.").

177. *Election Mail*, U.S. POSTAL SERVICE, https://about.usps.com/what/government-services/election-mail/ [https://perma.cc/5W7X-KH2P].

level."[178] Irrespective of USPS policy, the instructions of the mail ballots lead individual voters to believe they must procure, and pay for, postage to successfully vote. USPS policy is not only poorly enforced, but also fails to cure the disenfranchising effects of the postage requirement in the first place. Finally, the official policy of the USPS cannot cure a constitutional infirmity that results from the official policy of the states, which are the primary promulgators of the laws pertaining to the "Times, Places, and Manners" of elections.[179]

The imposition of postage fees in thirty-three states constitutes a required payment in order to vote that runs afoul of the Equal Protection Clause and *Harper*'s dictates. It does not matter that mail voters may vote in-person or that the Postal Service has an unofficial policy of delivering unstamped election mail. The payment of a fee as a prerequisite to voting is invidious and unconstitutional, both because it discriminates against the poor and because the ability to pay a fee bears no relation to a voter's qualifications. Ignoring *Harper*'s mandate for mail ballots because of the in-person voting alternative would permit a class of voters to gain privileged access to the electoral process solely due to their ability to pay a fee. Permitting those of means to have privileged access to a widely used form of voting is anathema to the Equal Protection Clause. It is also contrary to the idea that democratic legitimacy flows from a political process that affords an equal opportunity to participate.

V. LITIGATION IS THE BEST WAY TO TACKLE THE POSTAGE POLL TAX

A Fourteenth Amendment claim to require the pre-stamping of mail ballots would have the strongest likelihood of success, notwithstanding the unfavorable decision in *Black Voters Matter Fund*. It is therefore imperative to tackle disenfranchisement of mail voters for failure to affix sufficient postage through strategic litigation.

Legislative efforts at the state and local level fail to be feasible strategies to eradicate the postage poll tax nationwide, but should be pursued in addition to litigation. Currently, 33 states do not

178. *See* Ackerman, *supra* note 7.
179. U.S. CONST. art. I § 4 cl. 1.

provide postage for mail ballots.[180] It is difficult to enact legislation in 33 separate legislative bodies, especially in a short time-frame. There is, however, the possibility that advocacy in some states that are friendly to voting rights measures may be viable. For example, Connecticut does not provide for pre-stamped mail ballots.[181] But, this year, Connecticut enacted a law authorizing automatic voter registration.[182] Connecticut may be a state where enacting the comparatively modest measure of pre-stamping mail ballots is realistic. On the other hand, some states have been especially hostile to legislative proposals expanding voting rights, and have enacted new laws making it harder to access the ballot. Arkansas and Iowa, for example, enacted legislation shortening the deadline to deliver mail ballots.[183] It is unlikely these states will proactively eliminate the postage poll tax.

In Congress, there is a significant push for "democracy reform," including a host of ballot access measures in a pending bill called the "For the People Act" or "H.R.1."[184] One provision of H.R.1 actually includes a mandate for all states and localities to prepay for postage on mail ballots.[185] Because the Senate filibuster is likely to remain intact for general legislation,[186] the chances of the bill's enactment are slim.[187]

Exacerbating the issue of legislative feasibility is the fact that legislation that positively impacts low-income earners tend to get less traction. For example, one study shows that when the policy preferences of high-income earners diverge from middle or low-income earners, the likelihood of a policy change correlates strongly with the percent of high-income earners favoring the

180. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

181. *See VOPP: Table 12, supra* note 5.

182. *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/6ZKP-MY76].

183. *Id.*

184. For the People Act, H.R. 1, 117th Cong. (2021).

185. *Id.*, § 1623 (2021).

186. Burgess Everett, *Manchin Emphatic He 'Will Not Vote' to Kill the Filibuster*, POLITICO (Jan. 25, 2021), https://www.politico.com/news/2021/01/25/joe-manchin-filibuster-462364 [https://perma.cc/SD3W-KRM9] (showing the practical difficulties of eliminating the filibuster during the 117th Congress).

187. This assumes that at least forty of the fifty Senate Republicans serving in the 117th Congress oppose the legislation.

change.[188] Conversely, there is almost no correlation between low and middle-income earners' policy preferences and the likelihood of a policy change when these preferences diverge from high-income earners.[189] Although there is little empirical evidence that high-income earners oppose pre-stamping absentee ballots while low earners favor pre-stamping absentee ballots, the general proposition is clear: there is less legislative responsiveness to the needs of low-income Americans.

Litigation also provides a key benefit that legislation does not: precedent that could have positive implications for striking down constructive poll taxes of all stripes. As demonstrated throughout the doctrinal analysis of Parts IV and V, the case law on constructive poll taxes is sparse. Mail ballot postage presents a case that fits neatly into the paradigm of the doctrine, but also opens up the possibility of a wider range of challenges. For example, many states require that voters submit a copy of identification with their mail ballots.[190] Were a court to reject the *Black Voters Matter Fund* holding, future litigants would have support to argue that paying for photocopies also constitutes a poll tax in violation of the Equal Protection Clause. Given the dearth of precedents in the constructive poll tax space, the creation of new precedent could ultimately expand poll tax doctrine and provide another meaningful avenue for voting rights litigants to try cases, in addition to arguments made under the *Anderson/Burdick* standard.

There is always the risk that strategic litigation does not turn out favorably. After all, conservative judges, especially justices of the Supreme Court, are much less likely to read the Fourteenth and Twenty-Fourth Amendments expansively in the context of voting rights claims.[191] It would therefore be prudent to relitigate

188. Martins Gilens, *Affluence & Influence: Economic Inequality and Political Power in America*, PRINCETON UNIVERSITY, https://ash.harvard.edu/files/ash/files/gilens_0.pdf [https://perma.cc/U7X6-JFFH].

189. *Id.*

190. *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 7, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/HA9C-CFQ7].

191. *See e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurring) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."); Merrill v. People First of Ala., 141 S. Ct. 25 (2020) (wherein the Court stayed a permanent injunction allowing for curbside voting amidst the Covid-19 pandemic after an initial *Anderson/Burdick* challenge); Democratic Nat'l Comm. v. Wis. State Legislature,

the postage poll tax issue in a different circuit, friendlier to expansive readings of the Equal Protection Clause than the Eleventh Circuit, instead of appealing the Eleventh Circuit decision immediately to the Supreme Court. Finally, litigating the issue in state courts may be another avenue for developing favorable precedents. State courts in some instances would be more favorable to abolishing the postage poll tax than the same state's legislature. Further, state court interpretations of federal constitutional law do not bind federal courts of appeal. State court litigation, therefore, carries less risk for the development of authoritative negative precedents if the litigation goes poorly. Moreover, only the Supreme Court can reverse the decision of a state high court.

CONCLUSION

Although voting is commonly thought of as a right equally shared amongst all eligible Americans, as a functional process, it brings to bear tangible financial costs—and inequalities—both incidental and intentional. With these costs comes an associated burden on lower-income individuals, that ultimately distorts the political process writ large. One study found that individuals with annual incomes greater than $50,000 voted in the 2016 election at a rate 19 percentage points greater than individuals with incomes less than $50,000.[192] From this perspective, it should be unsurprising that legislative responsiveness to the needs of lower and middle income Americans is weak in comparison to the needs of the wealthy.[193] The Fourteenth and Twenty-Fourth Amendments represent an acknowledgement that without a categorical ban on poll taxes and their constructive equivalents, income disparities can be leveraged to further invidious discrimination that entrenches the advantages of wealth into the fabric of the American political process. Constructive poll taxes continue to prevent the ballot from being a greater leveler where

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141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("This Court has long recognized that a State's reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues under the traditional Anderson-Burdick balancing test.").

192. *Voter Turnout*, MIT ELECTION DATA AND SCI. LAB, https://electionlab.mit.edu/research/voter-turnout [https://perma.cc/4HQS-KKQD].

193. *See* Gilens, *supra* note 188.

the interests of all groups, rich, poor, and middle class, are effectively accounted for and represented. With mail voting playing a more crucial role than ever in the Covid and post-Covid world, it is imperative that *Black Voters Matter Fund* is overturned and that a new era of constructive poll tax doctrine emerges.