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"A Dollar Ain't Much if You've Got It": Freeing Modern-Day Poll Taxes from Anderson-Burdick

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"A DOLLAR AIN'T MUCH IF YOU'VE GOT IT"[*]: FREEING MODERN-DAY POLL TAXES FROM *ANDERSON-BURDICK*

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> "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."
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> – Justice Douglas, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

How much should it cost to vote in the United States? The answer is clear from the Supreme Court's landmark opinion in Harper v. Virginia State Board of Elections—nothing. Yet more than fifty years later, many U.S. voters must jump over financial hurdles to access the franchise. These hurdles have withstood judicial review because the Court has drifted away from Harper and has instead applied the more deferential Anderson-Burdick analysis to modern poll tax claims—requiring voters to demonstrate how severely the cost burdens them. As a result, direct and indirect financial burdens on the vote have proliferated. Millions of voters are required to expend financial resources to provide postage for mail ballots, comply with voter ID requirements, notarize ballots, and pay off

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[*] During post-Reconstruction, a Georgia woman, when asked her thoughts on the poll tax, replied "[a] dollar ain't much if you've got it." Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 431 (2020)

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legal financial obligations ("LFOs") in order to vote and have their vote counted. This Note argues that the Court fails to appreciate the special constitutional and statutory protections against wealth-based voting qualifications when it applies Anderson-Burdick to monetary burdens on the right to vote. In highlighting the specific protections afforded by Harper, the Twenty-Fourth Amendment, and Section 10 of the Voting Rights Act, this Note calls for not only the Court, but also Congress, to restore the intended power of these protections and to untangle laws that impose monetary burdens on voters from ordinary voting regulations subject to Anderson-Burdick.

INTRODUCTION

In its 1966 decision, *Harper v. Virginia State Board of Elections*, the United States Supreme Court unequivocally declared that a poll tax violated the Equal Protection Clause of the Fourteenth Amendment.[1] Writing for the majority, Justice Douglas announced that a state law is inconsistent with Equal Protection "whenever it makes the affluence of the voter or payment of any fee an electoral standard."[2] Put simply, the Court found that "[v]oter qualifications have no relation to wealth."[3]

With the ratification of the Twenty-Fourth Amendment shortly before *Harper*, Congress and thirty-eight states sought to abolish financial barriers to the ballot.[4] In *Harper,* the Court approved of the Amendment's intent and expanded its reach, holding that conditioning a voter's ability to cast a ballot on her wealth violated the Fourteenth Amendment.[5]

Yet more than fifty years after Douglas penned the decision in *Harper*, many voters in the United States must still jump over financial hurdles to access the franchise.[6] Some of these financial

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[1] Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

[2] *Id.*

[3] *Id.*

[4] Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 434–37 (2020).

[5] *Harper*, 383 U.S. at 666.

[6] *See* CAMPAIGN LEGAL CTR., CAN'T PAY, CAN'T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 19–33 (2019), https://campaignlegal.org

barriers, often called modern-day or *de facto* poll taxes, include: voter ID requirements;[7] voter-provided postage for mail ballots;[8] lost wages due to long lines to vote;[9] requiring absentee voters to notarize their ballots[10] and permitting notaries to charge fees for ballot notarization;[11] and conditioning re-enfranchisement of convicted felons upon payment of all legal financial obligations ("LFOs").[12]

Unfortunately, the Supreme Court has recently been unwilling to recognize the serious constitutional problems these *de facto* poll taxes present. In 2008, it decided *Crawford v. Marion County Election Board*, in which it failed to follow *Harper* and instead analyzed the financial burdens placed on voters under the *Anderson-Burdick* balancing test,[13] a more deferential sliding-scale standard that evaluates whether a state election regulation impermissibly burdens the right to vote by weighing the burden against the state's interests.[14]

The Court fails to appreciate special protections against wealth-based voting qualifications when it applies *Anderson-Burdick* to monetary burdens on the right to vote. A financial barrier to the

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/document/cant-pay-cant-vote-national-survey-modern-poll-tax; *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. OF ST. LEGIS. (Aug. 25, 2020) [hereinafter *Voter Identification Requirements*], https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx; *VOPP: Table 12: States with Postage-Paid Election Mail*, NAT'L CONF. OF ST. LEGIS. (Sept. 14, 2020) [hereinafter *VOPP*], https://www.ncsl.org/research/elections-and-campaigns/vopp-table-12-states-with-postage-paid-election-mail.aspx; David Thun, *Notarizing Mail-in Ballots: Preparing Notaries for the November 2020 Election*, NAT'L NOTARY BULL. BLOG (Oct. 8, 2020), https://www.nationalnotary.org/notary-bulletin/blog/2020/10/notarizing-mail-in-ballots-preparing-notaries-for-the-november-2020-election.

[7] *Voter Identification Requirements*, *supra* note 6.

[8] *VOPP*, *supra* note 6.

[9] *E.g.*, Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 178–79 (2009).

[10] Thun, *supra* note 6.

[11] *Id.*

[12] CAMPAIGN LEGAL CTR., *supra* note 6, at 19–33.

[13] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008).

[14] *See* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Norman v. Reed, 502 U.S. 279, 288–89 (1992); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

ballot is never an insignificant burden when a voter cannot pay. More importantly, the Twenty-Fourth Amendment was intended to abolish financial burdens on the franchise broadly—not just the customary poll tax—which the Court recognized in its expansion of the Amendment's application to state elections in *Harper*.[15] Since *Crawford*, the Court has failed to recognize the special status of financial burdens on the franchise and has applied the simple *Anderson-Burdick* balancing test to modern poll tax claims, leading to inconsistent and undemocratic results.[16] Congress has the authority to obviate financial burdens on the franchise with appropriate legislation under its enforcement powers granted by the Fourteenth and Twenty-Fourth Amendments,[17] and in fact attempted to do so when it enacted Section 10 of the Voting Rights Act ("VRA"), prohibiting poll taxes.[18] The Court should disentangle financial burdens on the ballot from other ordinary election regulations and return to applying the *Harper* standard to laws that place financial burdens on voting rights. If the Court refuses to do so, Congress should amend Section 10 of the VRA to strengthen its provisions and restore the *Harper* test.[19] Only then would the call of *Harper*—that the wealth of a voter bear no relation to her ability to vote—be fulfilled.[20]

This Note argues that modern poll tax jurisprudence has strayed impermissibly far from *Harper* and calls for the courts and, more importantly, lawmakers, to address the present financial barriers to the free exercise of the fundamental right to vote. Part I surveys the history of poll taxes from the American Revolution to the ratification of the Twenty-Fourth Amendment in 1964, unpacking the intended broad scope of the Amendment. Part II traces the Supreme Court's approach to poll tax claims and argues that the Court mistakenly treated *de facto* poll taxes like ordinary state

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[15] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

[16] *See* New Ga. Project v. Raffensperger, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *20 (N.D. Ga. Aug. 31, 2020) (holding that Georgia's failure to provide pre-paid postage for mail ballots was not an unconstitutional poll tax or an undue burden).

[17] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XXIV, § 2.

[18] 52 U.S.C. § 10306.

[19] *Id.*

[20] *Harper*, 383 U.S. at 666.

election regulations by applying the *Anderson-Burdick* balancing test in *Crawford v. Marion County Election Board*.[21] Part III outlines the various financial burdens states have imposed on the right to vote post-*Crawford*—especially since the Court invalidated key provisions of the VRA in *Shelby County v. Holder*[22]—and their impact. Part IV examines the difficulty lower courts have had applying *Anderson-Burdick,* particularly when there is a monetary burden on the ballot. Part V calls for the Court to correct the error and return to applying strict scrutiny analysis in cases of wealth-based burdens on the ballot, as *Harper* demanded.[23] Further, this Note calls for Congress to use its enforcement powers under the Twenty-Fourth and Fourteenth Amendments to update Section 10 of the VRA and define a poll tax as *any* financial barrier placed between a voter and the ballot.

I. HISTORY AND BACKGROUND OF POLL TAXES AND THE TWENTY-FOURTH AMENDMENT

Historically, the customary poll tax was an annual fee that voters were required to pay in order to participate in an election.[24] Now, the poll tax is considered unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment[25] and the Twenty-Fourth Amendment.[26] But even in the mid-twentieth century, the poll tax was a common, albeit controversial, element in American elections.[27]

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[21] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008).

[22] Shelby County v. Holder, 570 U.S. 529 (2013).

[23] *Harper*, 383 U.S. at 670.

[24] Some states, like Georgia, went further and required the poll tax to be paid before registering. Many states required voters to hold onto receipts to show poll workers before voting on election day. David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 388–90 (2011).

[25] *See Harper*, 383 U.S. at 666.

[26] U.S. CONST. amend. XXIV, § 1.

[27] Partelow, *supra* note 4, at 428–34.

A. Early History and Jim Crow

While the poll tax is mostly remembered for suppressing black voters in the Jim Crow south, its origin in American elections began long before the Reconstruction period.[28] Over the course of American history, the tax has been used to both limit and restrict the franchise.[29] After the American Revolution, many states held on to the British tradition[30] of restricting the franchise to property owners—specifically white, male property owners—based on the theory that "owning property showed an investment in the welfare of the community."[31] Other states expanded access to the franchise by allowing non-property owners to vote upon payment of a poll tax,[32] effectively broadening the voting population only to white men who owned property or were sufficiently wealthy. But by the mid-nineteenth century, nearly all states liberalized voter qualifications, establishing "universal white male suffrage" and discontinuing the poll tax.[33]

After the Civil War and the ratification of the Fifteenth Amendment granted black men the right to vote, states reenacted poll taxes—along with literacy tests, grandfather clauses, and white primaries—with the explicit intent to keep black voters from the polls.[34] By 1904, every state in the former Confederacy had a poll tax law on its books.[35] While the intent of these poll taxes was undoubtedly racially motivated,[36] class politics were also a motivating factor.[37] The economic interests of poor white farmers had diverged from those of wealthy white southerners, resulting in poor white farmers splitting from the Democratic Party to join the

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[28] *Id.* at 427–28.

[29] *Id.* at 427.

[30] Schultz & Clark, *supra* note 24, at 381.

[31] Partelow, *supra* note 4, at 427.

[32] *Id.*

[33] Schultz & Clark, *supra* note 24, at 385.

[34] *Id.* at 386.

[35] Partelow, *supra* note 4, at 428.

[36] "[S]tate constitutional conventions of [the reconstruction] era were explicit about their intention to disenfranchise black voters . . . ." *Id.* at 430.

[37] *Id.* at 428–29.

Populists.[38] That being said, while the poll tax targeted all low-income voters, it disproportionately impacted and disenfranchised black voters.[39]

The cost of the poll tax in the post-Reconstruction south ranged between $1.00 to $2.00,[40] roughly equivalent to at least $32.00 in 2020.[41] At the time, the tax was considered a relatively small amount that had "no appreciable hindrance on voting for the well-to-do . . . but created a serious burden for those of low economic status."[42] Additionally, some states made actual payment bureaucratically difficult either by making little-to-no effort to collect the tax or limiting the time when the tax could be paid to specific, narrow timeframes.[43] The tax also accrued over time and nonpayment one year resulted in a higher fee the following year,[44] which meant with each passing year it became harder and more expensive for individuals to access the ballot.

B. The Path to the Twenty-Fourth Amendment and Early Supreme Court Decisions

During the New Deal era of reform, calls to abolish the poll tax began with President Franklin Delano Roosevelt ("FDR") as a chief supporter.[45] He saw the poll tax as a class issue rather than a civil rights issue, and called for more liberal Democrats to challenge southern incumbents supporting—and benefitting from—the poll tax.[46] FDR, however, abandoned his attempts to end the poll tax after most southern conservative incumbents fought off challengers

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[38] *Id.* at 429.

[39] *Id.* at 430.

[40] Partelow, *supra* note 4, at 431.

[41] MEASURING WORTH, https://www.measuringworth.com/dollarvaluetoday/?amount=1.00&from=1900 (last visited Mar. 4, 2021) (insert "1" in the dollar amount field; then type "1900" in the year field).

[42] Partelow, *supra* note 4, at 431.

[43] *Id.*

[44] *Id.*; 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, 455 (2020).

[45] Partelow, *supra* note 4, at 432–34.

[46] *Id.*

in the 1938 elections and the Supreme Court defended the poll tax in *Breedlove v. Suttles*.[47]

But anti–poll taxers still made progress by passing the Soldier Vote Act of 1942, which prohibited a poll tax on absentee ballots in federal elections,[48] and by getting the Republican Party to oppose the poll tax in its 1944 national platform.[49] In 1949, an Article V Constitutional Amendment to abolish the poll tax was first brought to the Senate floor by Senator Spessard Holland, a Democrat from Florida.[50] He framed the poll tax as a class issue, distinct from the civil rights movement.[51] In fact, Holland was a lifelong segregationist and supported ending the poll tax in spite of its customary use to disenfranchise black voters.[52] Repeatedly during the debates in Congress, Holland and other Senators stressed class-based, rather than civil rights–based, justifications for the Amendment.[53] As a result, "many politicians nonetheless supported it because they believed their poor, white constituents would benefit from the Amendment."[54]

The battle against the poll tax was won in the court of public opinion long before it succeeded on Capitol Hill. When the Amendment finally passed Congress in 1962, all but five states had

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[47] Brendan F. Friedman, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 HOFSTRA L. REV. 343, 347 (2013); Partelow, *supra* note 4, at 434; Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (holding that a Georgia poll tax was constitutional under the Fourteenth and Fifteenth Amendments).

[48] Partelow, *supra* note 4, at 434–35.

[49] *Id.* at 435.

[50] 108 CONG. REC. 2851, 4152 (1962).

[51] Friedman, *supra* note 47, at 365.

[52] Partelow, *supra* note 4, at 435.

[53] 108 CONG. REC. 4151 (1962) (statement of Senator Russell) ("I have never been able to understand how poll tax legislation can be called civil rights legislation."); 108 CONG. REC. 4154 (1962) (statement of Senator Holland) ("[T]he proposal does not come under the ordinary classification of the ordinary civil rights legislation. It applies to majorities, to minorities, and to every person of every color."); 108 CONG. REC. 4585 (1962) (statement of Senator Yarborough) ("I think [the poll tax] has unjustly discriminated against the people of limited means.").

[54] Friedman, *supra* note 47, at 366.

already ended the poll tax and the Amendment was "relatively uncontroversial."[55] It was quickly ratified and added to the Constitution in 1964.[56] It provides:

> 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.[57]

Like the other voting amendments, there is also a second section which reads: "The Congress shall have power to enforce this article by appropriate legislation."[58]

It has been argued that the legislative history[59] and the text of the Amendment both express an intent to abolish all financial burdens on the franchise—not only customary poll taxes.[60] In particular, as Chief Justice Warren explained in the only Supreme Court decision interpreting the Amendment,[61] the language "denied or abridged" points to a broader prohibition than direct denial of the

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[55] Partelow, *supra* note 4, at 436–37.

[56] Friedman, *supra* note 47, at 349.

[57] U.S. CONST. amend. XXIV, § 1.

[58] U.S. CONST. amend. XXIV, § 2.

[59] 108 CONG. REC. 17,657 (1962) (statement of Rep. Fascell) ("[T]he payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not be allowed a scintilla of this in our free society."); 108 CONG. REC. 17,660 (1962) (statement of Rep. Baldwin) ("No person should have to pay for the privilege of voting."); 108 CONG. REC. 17,665 (1962) (statement of Rep. Addabbo) ("I believe it is our responsibility to at least give to all those qualified to vote the right to do so without having to pay for that right and to continue to work for the moral rights of all."); 108 CONG. REC. 17,665 (1962) (statement of Rep. Dingell) (supporting the Twenty-Fourth Amendment because "[i]t prohibits other taxes being used as a device to evade the legislative purpose of the amendment"); 108 CONG. REC. 17,666 (1962) (statement of Rep. Boland) ("[T]here should not be any price tag or any kind of tax on the right to vote. For some people this financial imposition may be enough to discourage participation in the electoral process.").

[60] *E.g.*, Friedman, *supra* note 47, at 364–68.

[61] Harman v. Forssenius, 380 U.S. 528, 540–41 (1965).

ballot for failure to pay.[62] Additionally, the inclusion of "or other tax" also signals broad application to financial burdens on the franchise.[63] In short, "[t]he broader purpose of the Twenty-fourth Amendment thus should be read as a rejection of this linkage between wealth and voting . . . and should be interpreted to prohibit . . . practices that deny voting and voting-related activities due to wealth-based burdens."[64] As President Johnson exalted at the certification signing of the Twenty-Fourth Amendment, "there can be no one too poor to vote."[65]

Just over one year later, Congress enacted the historic and hard-fought Voting Rights Act of 1965.[66] The Act provided sweeping voting rights protections and intended to protect Black voters' access to the ballot.[67] In addition to abolishing literacy tests[68] and requiring certain jurisdictions to seek preapproval for new voting laws,[69] the Act doubled down on the abolition of the poll tax.[70] Section 10 of the Act—a little-known and rarely-used provision—adds a statutory remedy against poll taxes, grants the U.S. Attorney General enforcement authority,[71] and provides an implied private right of action.[72]

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[62] Friedman, *supra* note 47, at 367.

[63] *Id.* at 367–68; Schultz & Clark, *supra* note 24, at 416–17 (citing Allison Hayward, *What Is an Unconstitutional "Other Tax" on Voting? Construing the Twenty-Fourth Amendment*, 23 ELECTION L.J. 103, 117 (2008)).

[64] Schultz & Clark, *supra* note 24, at 377. *See also* Friedman, *supra* note 47, at 364–68; Partelow, *supra* note 4, at 454–59.

[65] Friedman, *supra* note 47, at 349.

[66] Erin Blakemore, *How the U.S. Voting Rights Act Was Won—and Why It's Under Fire Today*, NAT'L GEOGRAPHIC (Aug. 6, 2020), https://www.nationalgeographic.com/history/reference/united-states-history/history-voting-rights-act/#close.

[67] *Id.*

[68] 52 U.S.C. § 10303.

[69] *Id.* § 10304.

[70] *Id.* § 10306.

[71] *Id.*

[72] Morse v. Republican Party of Va., 517 U.S. 186, 230–34 (1996) (holding that Section 10, like Section 5 of the VRA, provides an implied private right of action).

II. EVOLUTION OF POLL TAX JURISPRUDENCE

The foundational poll tax cases invalidated customary poll taxes in the 1960s and set forth the test for eliminating monetary burdens on the ballot. Later in the twentieth century, a distinct line of ballot access cases established the *Anderson-Burdick* balancing test, and in the Supreme Court's most recent decision concerning a state law that imposes financial burdens on voters, it merged the poll tax cases with *Anderson-Burdick* jurisprudence.

A. The Foundational Poll Tax Cases: Harman and Harper

Since ratification, the Twenty-Fourth Amendment has only once been directly applied by the Supreme Court, in *Harman v. Forsennius*, which struck down Virginia's annual $1.50 poll tax to participate in federal elections.[73] The Court explained that the 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."[74] Moreover, the Court notes that the Twenty-Fourth Amendment, like the Fifteenth Amendment, "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed."[75] For plaintiffs to show that a restriction violated the Twenty-Fourth Amendment, the Court reasoned, they must demonstrate "that [the restriction] imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax."[76] However, this test was never successfully used by the Court, because one year after *Harman*, the Court issued its decision in *Harper v. Virginia State Board of Elections*, forever shifting poll tax jurisprudence under the Equal Protection Clause of the Fourteenth Amendment.[77]

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[73] Partelow, *supra* note 4, at 437.

[74] Harman v. Forssenius, 380 U.S. 528, 540 (1965).

[75] *Id.* at 540–41 (internal quotations omitted).

[76] *Id.* at 541.

[77] Partelow, *supra* note 4, at 439.

In *Harper*, Virginia's poll tax was at issue again, although this time the Court considered its use in state elections.[78] The Court found an implied right to participate in state elections and held that conditioning that right on payment of a tax was unconstitutional.[79] Writing for the majority, Justice Douglas quoted *Yick Wo v. Hopkins*, an early Equal Protection case, and noted, "'the political franchise of voting' [is] a 'fundamental political right, because [it is] preservative of all rights.'"[80] This statement effectively situated the right to vote among other fundamental rights which receive heightened constitutional protection.[81] Accordingly, the Court ruled that strict scrutiny should apply and concluded that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications,"[82] and the Equal Protection Clause prohibits states from setting voter qualifications that "invidiously discriminate."[83]

B. Ballot Access Cases: The Anderson-Burdick Balancing Test

Following *Harper,* the Court applied strict scrutiny analysis[84] to all voting rights cases—not just cases involving financial burdens

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[78] Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

[79] *Id.* at 666–67.

[80] *Id.* at 667 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[81] *Id.* The Court has often repeated *Harper*'s assertion that voting is a fundamental political right. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) ("[T]hese rights of voters are fundamental . . . ."); Bush v. Gore, 531 U.S. 98, 105 (2000) (holding that the recount mechanisms in Florida did not meet the requirements for "treatment of voters necessary to secure the fundamental right").

[82] *Harper*, 383 U.S. at 666–70. While the Court does not use the term strict scrutiny, it is widely recognized that the standard the Court applies in *Harper* is strict scrutiny. *See*, *e.g.*, Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 13 (2009); Kelly E. Brilleaux, *The Right, the Test, and the Vote: Evaluating the Reasoning Employed in Crawford v. Marion County Election Board*, 70 LA. L. REV. 1023, 1030 n. 50 (2010); Friedman, *supra* note 47, at 370.

[83] *Harper*, 383 U.S. at 666.

[84] Strict scrutiny is the most exacting level of scrutiny, typically applied to Equal Protection claims concerning suspect classes or fundamental rights. Under strict scrutiny the government bears the burden of proving that the challenged law

on voters—and invalidated voting regulations that were not narrowly tailored to further a compelling state interest.[85] The Court even applied *Harper* to strike down a Texas ballot access law that required candidates pay a fee to appear on the ballot, reasoning that "the rights of voters and the rights of candidates do not lend themselves to neat separation," and a candidate's ability to pay the fee depended on the wealth of her supporters.[86]

But the "carefully constructed framework began to fray"[87] in 1983 when the Court decided *Anderson v. Celebrezze*, a case predominately concerning ballot access.[88] In *Anderson,* the Court evaluated whether an Ohio law requiring independent candidates for president to file their petitions early placed an "*unconstitutional burden* on the voting and associational rights of Anderson's supporters."[89] Finding that there is no "neat separation" between the rights of voters and candidates, the Court developed a balancing test.[90] It held that when reviewing a challenge to a state election law under the First and Fourteenth Amendments,

> a court 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. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the

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furthers a compelling state interest and that the law is narrowly tailored to further that interest. PRACTICAL LAW GOV'T PRACTICE, SECTION 1983: EQUAL PROTECTION CLAIMS (2021), Westlaw Practical Law Practice Note W-002-6708.

[85] In two Supreme Court decisions from the 1970s related to residency requirements—Dunn v. Blumstein, 405 U.S. 330 (1972) and Marston v. Lewis, 410 U.S. 679 (1973)—the Court used the *Harper* strict scrutiny analysis to consider a state voting regulation purportedly designed to prevent voter fraud. Benson, *supra* note 82, at 13–14.

[86] Bullock v. Carter, 405 U.S. 134, 143 (1972).

[87] Benson, *supra* note 82, at 14.

[88] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[89] *Id.* at 782 (emphasis added).

[90] *Id.* at 786 (quoting *Bullock*, 405 U.S. at 143).

> extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[91]

The Court relied on prior "ballot access cases"[92] to support this standard, not voting rights cases.[93] Applying the balancing test, the Court found the burdens placed on Ohio's "independent-minded voters"[94] were severe and therefore outweighed the state's "minimal" interest.[95] Unfortunately, "[e]ven though the facts of *Anderson* dealt with . . . ballot access, the open-ended language of its new balancing test allowed for varying applications with regard to voting in subsequent jurisprudence."[96]

Almost a decade later, the Court relaxed the *Anderson* test and continued to drift from the exacting scrutiny called for in *Harper*. In *Burdick v. Takushi*, the Court sided with the State of Hawaii, rejecting a constitutional challenge to a law that prohibited write-in voting.[97] Before undertaking the *Anderson* analysis, the Court signaled it was employing a weakened standard when it stated, "'[i]t is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute."[98] The Court rejected the petitioner's claim that the case concerned voting rights rather than ballot access, but acknowledged that every election regulation

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[91] *Id.* at 789.

[92] While voting rights cases generally focus on the voter, ballot access cases generally involve a candidate who faces an obstacle running for office. *See, e.g.*, *Bullock*, 405 U.S. 134; Anderson v. Celebrezze, 460 U.S. 780 (1983).

[93] *Anderson*, 460 U.S. at 789 (citing Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); *Bullock,* 405 U.S. at 142–43; Am. Party of Tex. v. White, 415 U.S. 767, 780–81 (1974); and Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 183 (1979)); *Anderson*, 460 U.S. at 793.

[94] *Anderson*, 460 U.S. at 792.

[95] *Id.* at 806.

[96] Brilleaux, *supra* note 82, at 1032.

[97] Burdick v. Takushi, 504 U.S. 428 (1992).

[98] *Id.* at 433 (quoting *Ill. Bd. of Elections*, 440 U.S. at 184) (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).

places some burdens on voters and that there is no rigid line between ballot access and voting rights cases.[99] Based off that reasoning, the Court claimed "[t]he appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."[100] Under this "more flexible standard,"[101] a court may give greater consideration to a state's interest but may, as it did in *Burdick*, uphold a regulation that imposes "minimal" burdens on a voter's First and Fourteenth Amendment rights.[102]

C. *Applying Anderson-Burdick to Voting Rights: Crawford v. Marion County*

The expansion of the test in *Burdick* set the stage for the Supreme Court's controversial opinion in *Crawford v. Marion County Election Board*, "prov[ing] to be the [*Anderson-Burdick*] test's most expansive and far reaching application to date."[103] At issue in *Crawford* was a strict Indiana voter ID law passed by its legislature in 2005, which required voters to "provide proof of identification . . . before being permitted to sign the poll list . . . ."[104] For proof of identification to be accepted, the law required it to include a photo of the individual[105] and be issued by the state of Indiana or the federal government.[106]

The suit was brought on behalf of "disabled, poor, and elderly voters"[107] who could not afford a birth certificate and were required to travel to the clerk's office to validate their provisional ballot within days of voting.[108] The suit raised a number of claims, including a Twenty-Fourth Amendment claim which the Court did

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[99] *Id.* at 437–38.

[100] *Id.* at 438.

[101] *Id.* at 434. Since *Burdick* was decided in 1992, the standard—now known as the *Anderson-Burdick* test—has been largely unchanged. Brilleaux, *supra* note 82, at 1034.

[102] *Burdick*, 504 U.S. at 434.

[103] Brilleaux, *supra* note 82, at 1034.

[104] IND. CODE ANN. § 3-10-1-7.2 (West 2006).

[105] *Id.* § 3-5-2-40.5(2) (West 2006).

[106] *Id.* § 3-5-2-40.5(4) (West 2006).

[107] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 187 (2008).

[108] *Id.* at 200.

not consider.[109] However, the Court did evaluate whether the law was a burden on Indiana voters' rights inconsistent with the Fourteenth Amendment, and a majority[110] of the justices upheld the law, finding that the financial burden the voter ID law placed on voters was not severe, though there was no majority opinion.[111]

While the plurality and concurrence disagreed on how to apply the *Anderson-Burdick* test, both believed that it, rather than *Harper*, was the proper standard to apply.[112] The plurality began the opinion affirming the fundamental nature of the right to vote and discussing *Harper*.[113] It noted that, "under the standard applied in *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."[114] Additionally, it recognized that *Harper* requires even "slight" burdens to be supported by "legitimate state interests" that are "sufficiently weighty to justify the limitation" in order to withstand constitutional scrutiny.[115]

The plurality then undertook the *Anderson-Burdick* analysis and dug into the state's asserted interest of preventing voter fraud "with less skepticism than did the Court in *Anderson*."[116] In fact, it noted that "the record contain[ed] no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history"[117] but still found that "[t]here is no question about the legitimacy or importance of the State's interest."[118] Ultimately, the Court found that the plaintiffs failed to carry their burden of persuasion,[119] in part because the factual record was inadequate to show the nature of the

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[109] Friedman, *supra* note 47, at 372.

[110] There was no majority opinion. Justice Stevens wrote a lead opinion which Justices Roberts and Kennedy signed on to. Justice Scalia's concurrence with Justices Alito and Thomas made this a 6-3 decision in favor of the outcome. *Crawford*, 553 U.S. at 181.

[111] *Id.* at 204.

[112] Benson, *supra* note 82, at 17–18.

[113] *Crawford*, 553 U.S. at 189.

[114] *Id.*

[115] *Id.* at 191.

[116] Benson, *supra* note 82, at 18.

[117] *Crawford,* 553 U.S. at 194.

[118] *Id.* at 196.

[119] *Id.* at 199–200.

burden on voters.[120] Thus those burdens, it reasoned, including monetary burdens, derived more from "life's vagaries" and were not serious or frequent enough to outweigh the state's interest.[121] Nonetheless, the plurality left breadcrumbs indicating that this was a close case, noting that voters' ability to cast a provisional ballot as well as obtain a free ID from the Indiana Bureau of Motor Vehicles mitigated constitutional concerns.[122]

After *Crawford*, strict voter identification laws were enacted in at least fourteen states between 2009 and 2013.[123] The trend of states enacting new, heightened voting restrictions accelerated after 2013[124] when the Court in *Shelby County v. Holder* invalidated the preclearance regime of the VRA.[125] The new heightened restrictions include voter identification requirements, voter purges, polling place closures, cutbacks to early voting, and other policies that suppress the vote.[126] Unfortunately, voting is becoming more challenging and more expensive for American voters.[127]

III. WEALTH-BASED BURDENS AND THEIR IMPACT

In *Crawford*, the plurality focused attention on the plaintiffs' proof problems, questioning whether any voters were actually

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[120] *Id.* at 201.

[121] *Id.* at 197.

[122] *Id.* at 198–200.

[123] BRENNAN CTR. FOR JUST., VOTER ID LAWS PASSED SINCE 2011 (2013), https://www.brennancenter.org/our-work/policy-solutions/voter-id-laws-passed-2011; Friedman, *supra* note 47, at 357.

[124] Richardson, *supra* note 44, at 458.

[125] Shelby Cty. v. Holder, 570 U.S. 529, 556–57 (2013) (holding that the "coverage formula" used in Section 4 of the Voting Rights Act, which determined whether states were subject to the Act's Section 5 preclearance regime, was unconstitutional because it imposes "current burdens" that are not "justified by current needs"). *See infra* Part III.B.

[126] *Voting Rights in America, Six Years After Shelby v. Holder*, BRENNAN CTR. FOR JUST. (June 25, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder.

[127] *See* U.S. GOV'T ACCOUNTABILITY OFF., ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS (2014), https://www.gao.gov/assets/670/665965.pdf; Quan Li et al., *Cost of Voting in the American States*, 17 (No. 3) ELECTION L.J. 234 (2018), http://doi.org/10.1089/elj.2017.0478.

burdened by the voter ID law.[128] Since that decision in 2008, as more states have enacted restrictive election laws[129] and more social science research has been dedicated to the issue,[130] the degree of the problem has become more apparent.

A. Low-Income Voter Participation

Low-income eligible voters participate in elections at consistently lower rates than middle-class and wealthy Americans.[131] According to a 2020 study conducted by the Poor People's Campaign and Columbia University, low-income[132] eligible voters are 22% less likely to vote in national elections compared to higher-income eligible voters.[133] The trend holds in midterm and presidential election cycles, with turnout consistently dipping about 10% across all income groups in midterm years.[134] Additionally, analysis of Census data from the 2016 election shows that lower household income is directly correlated with low voter turnout rate.[135] Low-income non-voters are a large and potentially powerful voting group nationwide; in many states they would represent over 20% of the electorate.[136]

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[128] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200–01 (2008).

[129] BRENNAN CTR. FOR JUST., *supra* note 126.

[130] *See* ROBERT PAUL HARTLEY ET AL., THE POOR PEOPLE'S CAMPAIGN, UNLEASHING THE POWER OF POOR AND LOW-INCOME AMERICANS: CHANGING THE POLITICAL LANDSCAPE 9 (2020), https://www.poorpeoplescampaign.org/wp-content/uploads/2020/08/PPC-Voter-Research-Brief-18.pdf.

[131] *ID.*

[132] The study defines low-income individuals as "those with family income below twice the official poverty threshold." *Id.*

[133] *Id.*

[134] *Id.* at 10.

[135] Looking at the 2016 Census data on voter turnout, Richardson notes, "[t]he turnout rate decreases with the income bracket; the turnout rate was 48.8% for those with a household income of $15,000 to $19,999; 47.7% for $10,000 to $14,999; and 41.4% for $10,000 or below. Every household income bracket above $20,000 voted above a 50% rate—eligible voters whose household incomes top $150,000 voted at an 80% rate." Richardson, *supra* note 44, at 453.

[136] ROBERT PAUL HARTLEY ET AL., *supra* note 130, at 13–14.

While low-income eligible voters are not a political monolith,[137] their disproportionate lack of participation means they are consistently underrepresented in government.[138] And despite claims that low-income voters carried Donald Trump to the White House in 2016,[139] "President Trump did not win the votes of most low-income voters."[140] In actuality, just a 5% increase in low-income voter participation would have been the margin of victory in the 2016 presidential election and could have changed its result.[141] While early reports indicate that low-income voters participated at a higher rate in the 2020 election,[142] it is unclear how much of the increase is due to non-voters showing up at the polls versus an overall increase in the number of Americans struggling financially as a result of the COVID-19 pandemic.[143] But the fact that low-income voters do not overwhelmingly support one political party[144] provides political motivation for both Democrat and Republican legislators to support policies that make it easier for low-income voters to participate.

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[137] *Id.* at 11.

[138] Richardson, *supra* note 44, at 453.

[139] Nate Cohn, *Why Trump Won: Working-Class Whites*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/upshot/why-trump-won-working-class-whites.html.

[140] Richardson, *supra* note 44, at 453. *See also* John Hudack, *A Reality Check on 2016's Economically Marginalized*, BROOKINGS (Nov. 16, 2016), https://www.brookings.edu/blog/fixgov/2016/11/16/economic-marginalization-reality-check/; Jon Henley, *White and Wealthy Voters Gave Victory to Donald Trump, Exit Polls Show*, GUARDIAN (Nov. 9, 2016), https://www.theguardian.com/us-news/2016/nov/09/white-voters-victory-donald-trump-exit-polls.

[141] According to the Poor People's Campaign Report, Trump's margin of victory in three key states—Wisconsin, Pennsylvania, and Michigan—was less than or equal to 5% of the state's low-income eligible non-voting population. *See* ROBERT PAUL HARTLEY ET AL., *supra* note 130, at 11–12.

[142] Sarah Anderson & Margot Rathke, *After Boosting Low-Income Voter Turnout, Poor People's Campaign Mobilizes for Covid Relief*, COMMON DREAMS (Nov. 10, 2020), https://www.commondreams.org/views/2020/11/10/after-boosting-low-income-voter-turnout-poor-peoples-campaign-mobilizes-covid.

[143] Stefan Sykes, *8 Million Americans Slipped into Poverty Amid Coronavirus Pandemic, New Study Says*, NBC NEWS (Oct. 16, 2020, 6:00 PM), https://www.nbcnews.com/news/amp/ncna1243762.

[144] ROBERT PAUL HARTLEY ET AL., *supra* note 130, at 11.

Interestingly, low-income eligible non-voters say they choose not to vote because they are dissatisfied with the candidates or the electoral process at the same rate as higher income non-voters.[145] Low-income eligible voters, however, more often cite transportation problems and illness or disability as the reason they did not vote.[146]Additionally, a slightly higher rate of low-income voters chose to vote in-person in the 2016 election rather than by mail.[147] Due to the COVID-19 pandemic, many states have broadened access to mail voting[148] and a historic number of voters opted to vote by mail,[149] but it remains to be seen whether low-income voters took advantage of mail voting in the 2020 election more than they did in previous elections.[150]

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[145] Across income levels, 24% of non-voters say they did not vote because they did not like the candidates, were not motivated by the issues, or thought that their vote would not matter. *Id.* at 14–15.

[146] *Id.*

[147] 79.1% of high-income voters chose to vote in person (20.8% chose to vote by mail) whereas 80.4% of low-income voters chose to vote in person (19.5% chose to vote by mail) in the 2016 election. *See id.* at 16.

[148] While some of these policy changes are temporary and only for the 2020 election, other states have made no-excuse mail voting widely accessible to voters going forward. *See* NAT'L CONF. OF ST. LEGIS., ABSENTEE AND MAIL VOTING POLICIES IN EFFECT FOR THE 2020 ELECTION (2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx.

[149] Lazaro Gamio et al., *Record-Setting Turnout: Tracking Early Voting in the 2020 Election*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/interactive/2020/us/elections/early-voting-results.html.

[150] Although national data on low-income voter behavior in the 2020 general election is not yet available, a study of Philadelphia voters found that low-income voters opted to vote by mail at a lower rate than higher income voters. It remains to be seen if this trend was similar on the national level. Jonathan Lai et. al., *Easier? Not for All.,* PHILA. INQUIRER (Oct. 22, 2020), https://www.inquirer.com/politics/election/a/pennsylvania-mail-ballots-election-2020-poor-voters-20201022.html.

B. Rush of Restrictive Election Regulations Post-Shelby County

Prior to the *Shelby County* decision in 2013,[151] Section 5 of the VRA required certain states to submit election regulations to the Department of Justice for approval before they could be enacted.[152] Through the Act's coverage formula, Section 5's preclearance regime applied to states and localities that had a history of discriminatory voting practices.[153] The Department of Justice reviewed whether the regulations had a retrogressive discriminatory purpose or effect.[154] The preclearance regime was regarded as wildly successful at proactively preventing injuries to the right to vote.[155] From 1965 to 2013, the law struck down restrictive election laws including reapportionment plans, cutbacks to early voting periods, and voter ID requirements.[156]

Immediately after the *Shelby County* decision struck down the preclearance regime, states that had been subjected to preapproval took the opportunity to enact regulations that were previously blocked or deterred by the VRA.[157] In North Carolina, the legislature moved to pass an omnibus package of voting restrictions the very

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[151] *See generally* Shelby Cty. v. Holder, 570 U.S. 529 (2013) (holding that the preclearance formula in Section 4 of the VRA is unconstitutional because it is no longer supported by current needs).

[152] 52 U.S.C. § 10304.

[153] *Id.* § 10303.

[154] *Id.* § 10304.

[155] "The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights." *Shelby*, 570 U.S. at 560 (Ginsburg, J., dissenting).

[156] Suevon Lee, *Voting Rights Act: The State of Section 5*, PROPUBLICA (Aug. 30, 2012, 8:27 AM), https://www.propublica.org/article/the-state-of-section-5.

[157] *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

next day.[158] In Texas, hours after the *Shelby County* decision, the Governor announced that a strict photo voter ID law, previously blocked by the VRA, would take effect.[159] By the 2016 election, the first presidential election without the full protection of the VRA, fourteen states had enacted new restrictive voting laws.[160]

New restrictive election rules were enacted under the guise of factors like partisanship,[161] promoting voter confidence, or fraud prevention.[162] These restrictions took varying shapes and targeted both registration and voting processes.[163] Florida, Virginia, and Iowa undertook voter purges that targeted alleged "non-citizens" on the rolls.[164] The names on the voter rolls were compared with the Department of Homeland Security's Systematic Alien Verification for Entitlements ("SAVE") database, which has been criticized as faulty and particularly flawed for election administration use.[165] The practice resulted in the disproportionate disenfranchisement of Hispanic voters.[166] In North Carolina, the state eradicated same-day voter registration, shortened early voting, and restricted when provisional ballots could be counted.[167] Ohio similarly cut back its early voting days, crucially ending "golden week"—the one week

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[158] Jedediah Purdy, *A Voting-Rights Victory in North Carolina*, NEW YORKER (Aug. 2, 2016), https://www.newyorker.com/news/news-desk/a-voting-rights-victory-in-north-carolina.

[159] *The Effects of Shelby County v. Holder*, *supra* note 157.

[160] *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers#section5.

[161] N.C. St. Conf. of NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) (discussing the state's argument that the law intentionally discriminated against Democrats, not racial minorities).

[162] Veasey v. Abbott, 830 F.3d 216, 227 (5th Cir. 2016) (discussing the state's argument that the law was enacted to "prevent in-person voter fraud and increase voter confidence and turnout").

[163] Lee, *supra* note 156.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Purdy, *supra* note 158.

period when voters could register and vote at the same time.[168] Georgia, Texas, and Arizona have closed hundreds of polling places since the *Shelby County* decision, disproportionately in minority and low-income neighborhoods.[169] While some of these new election regulations have been challenged and struck down by federal and state courts, many still remain in effect.[170]

One of the most popular voting restrictions post–*Shelby County* is voter ID. These laws generally require that voters show a government-issued ID in order to vote in person at a polling place.[171] According to the National Conference of State Legislatures, thirty-six states have a voter ID law on their books.[172] Prior to enacting voter ID policies, most states used other methods, like a signature check, to verify the identity of voters at the polling place.[173]

Voter ID laws are often described as "strict" or "non-strict."[174] States with strict voter ID laws require presentation of an ID in order to vote, and if a voter does not show the required ID, they must vote with a provisional ballot.[175] Provisional ballots are a specific type of ballot given to voters whose eligibility cannot be verified[176] and they

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[168] Adam Liptak, *Supreme Court Won't Restore 'Golden Week' Voting in Ohio*, N.Y. TIMES (Sept. 13, 2016), https://www.nytimes.com/2016/09/14/us/politics/supreme-court-wont-restore-golden-week-voting-in-ohio.html.

[169] LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12–18, 33 (2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

[170] Polling place closures are particularly difficult to challenge because jurisdictions are no longer required to notify voters of the closure. As a result, voters (and lawyers who seek to challenge the closure) have to rely on local news, social media, or word of mouth to hear about the closure and "[i]n most cases, closures go unnoticed, unreported, and unchallenged." *ID.* at 6–8 ("Courts have, in fact, found intentional discrimination in at least 10 voting rights decisions since Shelby."); Lee, *supra* note 156.

[171] *See Voter Identification Requirements*, *supra* note 6.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Provisional ballots, sometimes referred to as "challenge ballots" or "affidavit ballots," are a creation of the Help America Vote Act of 2002 ("HAVA") and the voter must follow up with the polling place or county election officials after she votes in order for it to count. *Provisional Ballots*, NAT'L CONF.

are "often not counted" because voters must follow up and verify their vote.[177] Non-strict voter ID states allow "at least some voters" without a required ID to cast a ballot that does not require any follow-up.[178] Whether a photo is required on the ID varies from state to state, regardless of whether the state is a strict or non-strict voter ID state.[179] Nine states have strict voter ID laws, and six of those states require photo ID. Strict ID laws have been challenged with varied success,[180] and many states changed from strict ID policies to non-strict ID policies after courts and scholars raised concern about the constitutionality of strict ID laws.[181] To date, the Supreme Court has declined opportunities to take up the question of voter ID laws since *Crawford*.[182]

OF ST. LEGIS. (Sept. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx.

[177] RICHARD SOBEL, THE HIGH COST OF 'FREE' PHOTO VOTER IDENTIFICATION CARDS 7 (2014), http://charleshamiltonhouston.org/wp-content/uploads/2015/01/FullReportVoterIDJune2014.pdf.

[178] The process a voter without ID must follow varies state by state. "For instance, a voter may sign an affidavit of identity, or poll workers may be permitted to vouch for the voter. In some of the 'non-strict' states (Colorado, Florida, Montana, Oklahoma, Rhode Island, Utah and Vermont), voters who do not show required identification may vote on a provisional ballot. After the close of Election Day, election officials will determine (via a signature check or other verification) whether the voter was eligible and registered, and therefore whether the provisional ballot should be counted." *Voter Identification Requirements*, *supra* note 6.

[179] *Id.*

[180] *Compare* One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (holding that Wisconsin's strict voter ID law was unconstitutional unless a free ID was provided), *and* N.C. St. Conf. of NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016) (finding that the strict voter ID law makes voting less efficient, not more), *with* Veasey v. Abbott, 830 F.3d 216, 225 (5th Cir. 2016) (upholding the strict voter ID law because it was not enacted with discriminatory purpose).

[181] For example, North Dakota enacted a strict voter ID law in 2013 and amended it in 2015 and 2017, changing it to non-strict, after litigation. *Voter Identification Requirements*, *supra* note 6.

[182] Pam Fessler, *Supreme Court Declines to Hear Challenge to Strict Wisconsin Voter ID Law*, NPR (Mar. 23, 2015, 3:51 PM), https://www.npr.org/sections/itsallpolitics/2015/03/23/394898151/supreme-court-declines-challenge-to-strict-wisconsin-voter-id-law.

While some states have taken steps to restrict access to the ballot, others have made moves to expand access to the franchise.[183] Many states have made adjustments to their election administration rules due to the COVID-19 pandemic, including broadening access to mail voting and establishing drop boxes to deal with the volume of mail ballots.[184] But even though states have made voting by mail and early voting more accessible during the pandemic, barriers and burdens remain. For instance, while more voters were able to (and chose to) vote by mail in 2020 than ever before,[185] four states continued to enforce witness or notary requirements on their mail ballots,[186] including South Carolina, whose witness requirement was enjoined by a district court and later restored by the Supreme Court after mail voting had started.[187] Additionally, only seventeen states provide voters with postage-paid envelopes for mail ballots, meaning that voters in the other states must pay to send their ballot in.[188] Many states permitted drop boxes to help voters ensure their ballots were delivered on time and provide a workaround for the

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[183] Jesse McKinley, *Early Voting and Other Changes to Election Laws Are Coming to New York*, N.Y. TIMES (Jan. 10, 2019), https://www.nytimes.com/2019/01/10/nyregion/voting-reform-election-ny.html; Jonathan Li, *2019 Was a Big Year for Voting Rights and Election Reform in Pennsylvania and New Jersey*, PHILA. INQUIRER (Dec. 31, 2019), https://www.inquirer.com/politics/election/pennsylvania-new-jersey-voting-election-reform-20191231.html.

[184] Adriana Balsamo, *Bringing Clarity to the Voting Process Before Election Day*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/insider/2020-voter-guide.html; Omar Abdel-Baqui*, 9 States Where the Rules for Voting Have Been Changed or Challenged Ahead of 2020*, NBC NEWS (July 13, 2019, 7:06 AM), https://www.nbcnews.com/politics/2020-election/9-states-where-rules-voting-have-been-changed-or-challenged-n1026886; *2020 Election Litigation Tracker*, SCOTUSBLOG, https://www.scotusblog.com/election-litigation/ (last visited Feb. 28, 2021).

[185] Lazaro Gamino et al., *Record-Setting Turnout: Tracking Early Voting in the 2020 Election*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/interactive/2020/us/elections/early-voting-results.html.

[186] Mississippi, Missouri, Alabama, and South Carolina all enforced their witness or notary requirements for mail ballots during the 2020 election. *See* Elaine Kamark et al., *Voting by Mail in a Pandemic: A State-by-State Scorecard*, BROOKINGS, https://www.brookings.edu/research/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/ (last visited Feb. 28, 2021).

[187] Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020).

[188] *VOPP, supra* note 6.

postage.[189] But not all states did,[190] and even those that did often provided a limited number of drop-off sites.[191]

Even before the COVID-19 pandemic, many states had taken major strides over the last twenty years to relax or abolish felon disenfranchisement laws.[192] Florida voters made headlines in 2018 when they overwhelmingly passed an amendment to the state's constitution restoring the right to vote to most individuals convicted of a felony.[193] Following the amendment's passage, however, the Republican state legislature enacted a law to "clarify" it.[194] The new law mandates that felons in Florida pay off all Legal Financial Obligations ("LFOs")[195] before they are eligible for a restoration of voting rights, severely limiting the impact of the amendment.[196] Many have called this bill a modern-day poll tax because it directly conditions the right to vote on one's ability to pay a fee.[197] Unfortunately, it is common for states to condition an individual's eligibility for rights restoration on payment of LFOs, or completion of a full sentence, which often includes payment of LFOs.[198]

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[189] *See* Kamark et al., *supra* note 186.

[190] Missouri and South Carolina do not provide for in-person ballot drop-off and do not prepay for postage. *See* Kamark et al., *supra* note 186; DEMOCRACY DOCKET, SAFEGUARDING OUR DEMOCRACY WITH VOTE BY MAIL 31–47 (Apr. 2020), https://www.democracydocket.com/wp-content/uploads/sites/41/2020/04/Safeguarding-Our-Democracy-with-Vote-by-Mail_April2020.pdf.

[191] Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions, No. 20-0846, 2020 WL 6295076, at *1 (Tex. Oct. 27, 2020).

[192] MORGAN MCLEOD, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM (2018), https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/.

[193] Lesley Stahl, *The Legal and Political Fight Over Amendment 4, Granting as Many as 1.4 Million Florida Felons the Right to Vote*, 60 MINUTES (Sept. 27, 2020), https://www.cbsnews.com/news/amendment-4-florida-felony-voting-rights-60-minutes-2020-09-27/.

[194] *Id.*

[195] Legal Financial Obligations (LFOs) are the fines and fees that are attached to a conviction and accrue during the term of imprisonment. A Campaign Legal Center report projects "an estimated 10 million people owe more than $50 billion in fines and fees related to criminal convictions." CAMPAIGN LEGAL CTR., *supra* note 6, at 19, 22.

[196] Stahl, *supra* note 193.

[197] Partelow, *supra* note 4, at n. 221, 459.

[198] CAMPAIGN LEGAL CTR., *supra* note 6, at 19–33.

Additionally, these claims fall under the line of jurisprudence about felon disenfranchisement[199] and courts have held that states can discriminate on the basis of wealth when restoring a felon's right to vote.[200]

C. *Monetary Burdens Imposed by Restrictive Election Regulations*

While the Court recognized in *Burdick* that all election regulations impose some burden on voters,[201] not all impose monetary costs. Some scholars have broadly construed the costs of these restrictions in terms of their social impact,[202] but it may be more helpful to think of financial burdens on the ballot as either direct or indirect monetary costs.

Direct financial burdens on the vote are those which require voters to pay some amount to register, access the ballot, or have their ballot counted.[203] Because they generally require a specific transfer of money, they are the easiest to quantify. These types of monetary burdens on the ballot are the most constitutionally suspect and present the strongest case for invalidation as a poll tax;[204] however few have been successfully challenged.[205] They include: states that

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[199] Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding that a state constitutional provision disenfranchising felons did not violate the Equal Protection Clause of the Fourteenth Amendment).

[200] Jones v. Governor of Fla., 975 F.3d 1016, 1025 (11th Cir. 2020) (holding that Florida conditioning voting rights restoration on payment of LFOs did not violate the Equal Protection Clause of the Fourteenth Amendment or the Twenty-Fourth Amendment).

[201] Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[202] Quan Li et al., *supra* note 127, at 235–37 (revealing an updated cost of voting index that compares new election regulations to voting behavior).

[203] *See* CAMPAIGN LEGAL CTR., *supra* note 6, at 19–33; *Voter Identification Requirements*, *supra* note 6; *VOPP*, *supra* note 6; Thun, *supra* note 6.

[204] Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 668 (1966) ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.")

[205] *See, e.g.*, Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1323–24 (N.D. Ga. 2020); New Georgia Project v. Raffensperger, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *18–19 (N.D. Ga. Aug. 31, 2020); DCCC

require voters to pay the postage on mail ballots and ballot request forms;[206] states that require mail ballots to be notarized and do not statutorily prohibit notaries from charging a fee;[207] and states that condition criminal voting rights restoration on payment of all LFOs.[208] States with strict voter ID laws that charge a fee to obtain qualifying IDs would also fall in this category; however, the language in *Crawford*[209] and strategic litigation has pushed states to provide a free ID to at least some voters.[210]

Indirect financial burdens, on the other hand, are burdens that do not appear to cost voters money, but that actually do—often due to lost wages.[211] These burdens are more insidious and harder to quantify, but still have real financial consequences for voters.[212] These include: long wait times at polling places,[213] especially in

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v. Ziriax, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *22 (N.D. Okla. Sept. 17, 2020).

[206] *VOPP*, *supra* note 6.

[207] In Alabama, Alaska, and Maine at least some voters are required to notarize mail ballots and state law does not require notaries to refrain from charging fees. Generally, Minnesota, North Carolina, and Rhode Island also require mail ballots to be notarized and allow notaries to charge a fee, but the notarization requirement was waived for the 2020 election due to the exigencies of the COVID-19 pandemic. Thun, *supra* note 6.

[208] As mentioned previously, despite the fact that LFOs are the clearest example of a financial barrier to the ballot, courts have been unwilling to recognize them as a poll tax because of *Richardson v. Ramirez*, which held that states may constitutionally disenfranchise convicted felons under the Fourteenth Amendment. 418 U.S. 24, 54 (1974). *See also* CAMPAIGN LEGAL CTR., *supra* note 6, at 19–33.

[209] "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." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008).

[210] *See, e.g.,*. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1366–70 (N.D. Ga. 2005) (holding that a voter ID that cost at least $20 was a poll tax and an undue burden on the right to vote).

[211] Mukherjee, *supra* note 9, 204–06.

[212] Kaveh Waddell, *Here's How Much It Costs to Vote in States with Voter ID Laws*, THE ATLANTIC (Oct. 8, 2014), https://www.theatlantic.com/politics/archive/2014/10/heres-how-much-it-costs-to-vote-in-states-with-voter-id-laws/458109/.

[213] Mukherjee, *supra* note 9, at 193–95.

states with limited or no time-off-to-vote statutes;[214] states with strict voter ID laws that charge a fee to obtain the documents needed to apply for an ID card;[215] and states that require a witness sign mail ballots.[216] The plurality in *Crawford* said that these burdens are due to "life's vagaries" and are less constitutionally suspect;[217] however, social science research indicates that these policies may be the reason some voters do not cast a ballot.[218]

IV. RECENT CHALLENGES AND APPLICATIONS OF *ANDERSON-BURDICK*

Since *Crawford* and *Shelby County,* restrictive election laws have been challenged with mixed success.[219] Post–*Shelby County*, the most reliable way to invalidate a restrictive election law is to prove that the law was enacted with racially discriminatory intent in

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[214] *See State Laws on Voting Rights/Time Off to Vote*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/voting-rights-time-off-work (last visited Nov. 20, 2020).

[215] "Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U.S. citizenship by birth. The total fees for a passport, moreover, are up to about $100. So, most voters must pay at least one fee to get the ID necessary to cast a regular ballot." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 215–16 (2008) (Souter, J., dissenting).

[216] Alabama, Alaska, Louisiana, Mississippi, North Carolina, Rhode Island, South Carolina, Virginia, and Wisconsin election codes require that mail ballots be signed by a witness in order to be accepted. *VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF ST. LEGIS. (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

[217] *Crawford*, 553 U.S. at 197.

[218] U.S. GOV'T. ACCOUNTABILITY OFF., *supra* note 127.

[219] *Compare* N.C. St. Conf. of NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016) (holding that North Carolina's restrictive election reform package violated the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the VRA because it was enacted with racially discriminatory intent), *with* Veasey v. Abbott, 888 F.3d 792, 802 (5th Cir. 2018) (holding that Texas' revised voter ID law was not discriminatory, reversing the district court decision).

violation of the Fourteenth and Fifteenth Amendments.[220] Unfortunately, proving racially discriminatory intent is difficult since courts rarely accept statistical showings of disparate impact[221] as evidence, and because state legislatures often use coded language to hide the racial motivations behind an offending law.[222]

Against this backdrop, the value of *Harper*'s determination that the right to vote is "too fundamental to be so burdened or conditioned" is evident.[223] Challenging a law because it unduly burdens the fundamental right to vote does not require proving discriminatory purpose or intent, instead plaintiffs only need to show that the state has placed an obstacle in between the voter and the ballot.[224] As mentioned previously, under *Harper*, once a voter demonstrated that there was a burden, courts applied strict scrutiny.[225] But now, under the *Anderson-Burdick* sliding scale test, a voter must show that the burden is severe to trigger strict scrutiny.[226] While the Court did not clearly evaluate the nature of the burden in *Crawford*, the decision effectively raised the burden of proof and made it harder for plaintiffs to reach strict scrutiny.[227]

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[220] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 139–40 (2013).

[221] Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 408 (2017) (explaining that disparate impact means that a law "disproportionately burden[s] members of one race over another").

[222] *Id.* at 394–96.

[223] Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 670 (1966).

[224] *See* Jennifer L. Clark, *An Unconstitutional Burden on the Right to Vote*, BRENNAN CTR. FOR JUST. (Oct. 17, 2014), https://www.brennancenter.org/our-work/analysis-opinion/unconstitutional-burden-right-vote.

[225] *Harper*, 383 U.S. at 670.

[226] Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC'Y (Sept. 24, 2019), https://www.acslaw.org/expertforum/a-tale-of-two-election-law-standards/.

[227] Because of this, scholars have analogized between *Anderson-Burdick* and the "undue burden" standard used in abortion cases. Brilleaux, *supra* note 82, at 1056–59. *See also* Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 140 (2018).

A. Inconsistent Applications of Anderson-Burdick

The Court has not clarified *Anderson-Burdick* since *Crawford* and lower courts have struggled to apply the test,[228] leading many to disparage it as indeterminate.[229] The Sixth Circuit recently criticized the test and even questioned whether it should be used in Equal Protection voting rights cases, claiming it asked courts to engage in "legal gymnastics" to evaluate the burdens on voters.[230] In a different case, the Sixth Circuit bemoaned the test's lack of guidelines and reliance on "a judge's subjective determination."[231] Additionally, Marc Elias, the renowned election attorney for national Democratic campaign committees, tweeted that the balancing test is why "[w]e need a new voting rights jurisprudence."[232] Applications of the test have been so inconsistent that one election law expert noted, "litigants' hopes should not ride on a federal court coming to the rescue under this doctrine."[233]

For example, consider the Sixth Circuit's decision in *Obama for America v. Husted*, which held that Ohio's shortened early vote period in the 2012 election presented a "particularly high" burden on voters and was unconstitutional.[234] Importantly, the district court found that the burden was not mitigated by the availability of alternatives—like mail voting, other early voting days, or election

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[228] *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, https://www.scotusblog.com/educational-resources/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/ (last visited Nov. 28, 2020).

[229] *E.g.*, Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1859 (2013).

[230] Mays v. LaRose, 951 F.3d 775, 783 n.4 (6th Cir. 2020).

[231] Daunt v. Benson, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring).

[232] Marc Elias (@marceelias), TWITTER (Feb. 25, 2021, 10:16 PM), https://twitter.com/marceelias/status/1365138730231754754.

[233] Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, EXCESS OF DEMOCRACY (Apr. 20, 2020), https://excessofdemocracy.com/blog/2020/4/the-fundamental-weakness-of-flabby-balancing-tests-in-federal-election-law-litigation.

[234] Obama for Am. v. Husted, 697 F.3d 423, 431 (6th Cir. 2012) (quoting Obama for Am. v. Husted, 888 F. Supp. 2d 897, 906 (S.D. Ohio 2012)).

day voting[235]—and the Sixth Circuit held that finding was not clearly erroneous.[236]

On the other hand, in *Texas LULAC v. Hughs* the Fifth Circuit found the availability of voting alternatives did mitigate the burden and reversed the district court's injunction.[237] The case concerned Governor Abbott's proclamations permitting voters to return their mail ballots in-person during the entire early voting period, due to the COVID-19 pandemic.[238] County election officials were allowed to set up drop boxes for ballot collection, but when populous counties announced multiple drop boxes, Governor Abbott issued a one drop box per county rule.[239] In direct contrast to *Obama for America*, the Fifth Circuit found that the overall effect of the Governor's proclamations was to expand access—and because voters could still cast their ballot in-person or by mail, the drop box limit was only "a *de minimis* burden."[240]

B. Monetary Burdens Under Anderson-Burdick

Even in the 2020 election litigation, when some courts were willing to take the exigencies of the COVID-19 pandemic into consideration when weighing burdens on voters,[241] challenges to direct monetary burdens on the vote were largely unsuccessful under *Anderson-Burdick*.[242] The pandemic pushed a historic number of

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[235] *Obama for Am.*, 888 F. Supp. 2d at 907, *aff'd*, 697 F.3d 423 (6th Cir. 2012).

[236] *Obama for Am.*, 697 F.3d at 431–32.

[237] Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 145 (5th Cir. 2020).

[238] *The Fifth Circuit Got It Wrong: Last-Second Burdens on Voting Should Be Prohibited*, STATE OF ELECTIONS (Oct. 21, 2020), http://electls.blogs.wm.edu/2020/10/21/fifth-circuit-got-wrong-last-second-burdens-voting-prohibited/.

[239] *Id.*

[240] *Tex. League of United Latin Am. Citizens*, 978 F.3d at 145–48.

[241] Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos/.

[242] *See* Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1323–25 (N.D. Ga. 2020); New Ga. Project v. Raffensperger, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *18–19 (N.D. Ga. Aug. 31, 2020); DCCC v.

voters to vote by mail in the 2020 election,[243] and some voters and progressive organizations challenged states' failure to pre-pay postage on ballots or ballot requests as an unconstitutional financial burden on the vote.[244] Some states negotiated settlements on the issue.[245] But in the few cases where the issue was considered on the merits, courts were largely unsympathetic—finding that the burden was not severe enough to require strict scrutiny or that voters had no-cost alternatives for returning their ballot.[246]

In Georgia, two suits specifically challenged the postage issue: *Black Voters Matter Fund v. Raffensperger*[247] and *New Georgia Project v. Raffensperger*, but the latter was decided after the *Black Voters Matter* case and deferred to its reasoning.[248] Plaintiffs claimed the pandemic made voting by mail the only "meaningful option" for most voters and the postage requirement imposed an unavoidable monetary burden on the franchise.[249] The court disagreed, reasoning under *Anderson-Burdick* that the burden was only moderate and was mitigated by no-cost alternatives like voting in person, dropping off the ballot at a drop box, or delivering the ballot to the county elections office.[250] The court also emphasized the public health measures the state had taken to facilitate safe in-person voting as evidence that these alternatives to mail voting were

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Ziriax, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *22 (N.D. Okla. Sept. 17, 2020).

[243] Stephanie Saul & Danny Hakim, *As Counting Begins, a Flood of Mail Ballots Complicates Vote Tallies*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/03/us/elections/mail-ballot-counting-vote.html.

[244] DEMOCRACY DOCKET, *supra* note 190.

[245] *See, e.g.*, Joint Stipulation Resolving Prepaid Postage Claims at 2, Middleton v. Andino, No. 3:20-CV-01730-JMC, 2020 WL 5591590 (D.S.C. Sept. 18, 2020) (No. 3:20-cv-1730-JMC); Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment at 2, N. Carolina All. for Retired Ams. v. N. Carolina State Bd. of Elections, 848 S.E.2d 496 (N.C. 2020) (No. 20-CVS-8881).

[246] *See Black Voters Matter Fund*, 478 F. Supp. 3d at 1323–25; *New Ga. Project*, 2020 WL 5200930, at *18–19; *Ziriax*, 2020 WL 5569576, at *22.

[247] *Black Voters Matter Fund*, 478 F. Supp. 3d at 1284, 1307.

[248] *New Ga. Project*, 2020 WL 5200930, at *18–19.

[249] *Black Voters Matter Fund*, 478 F. Supp. 3d at 1313, 1322.

[250] *Id.* at 1323–24.

viable.[251] Moreover, the court found that the plaintiffs' burdens did not outweigh the state's legitimate interest in fiscal responsibility[252]—running counter to *Harman.*[253]

Democratic Party organizations in Oklahoma brought a virtually identical claim in *DCCC v. Ziriax*, and the district court rejected it with scant reasoning.[254] The court there acknowledged the Georgia decisions but did not argue that alternatives mitigate the monetary burden of voter-provided postage.[255] Instead, the court pointed to the lack of evidence that voters were burdened and claimed that postage is the kind of "usual burden on voting" that *Crawford* permits.[256]

These decisions demonstrate the weakness of constitutional protections against monetary burdens on the vote under *Anderson-Burdick* and how far courts have strayed from the protections that *Harper,* the Twenty-Fourth Amendment, and Section 10 of the VRA were meant to provide. The notion that plaintiffs must show that a monetary burden on the vote is severe to receive relief from a court cannot be reconciled with *Harper*.[257] Under *Harper*, the real issue is whether voters must pay to get a ballot, not whether voters are able to pay the price.[258] Once a plaintiff demonstrates that a fee is necessary to vote, *Harper* requires courts to open the door to strict scrutiny.[259] Instead, under *Anderson-Burdick*, the court refuses relief unless plaintiffs provide specific evidence that voters cannot pay and gives deference to proffered state interests, seldom evaluating whether the interest is actually served by the financial burden.[260]

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[251] *Id.*

[252] *Id.*

[253] Harman v. Forssenius, 380 U.S. 528, 544 (1965) (holding that the Twenty-Fourth Amendment abolished the poll tax "regardless of the services it performs").

[254] DCCC v. Ziriax, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *22 (N.D. Okla. Sept. 17, 2020).

[255] *Id.*

[256] *Id.* at *7, *22.

[257] Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 666–69 (1966).

[258] *Id.* at 668–70.

[259] *Id.*

[260] Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 (No. 3) ELECTION L.J. 263, 282 (2020).

V. RECOMMENDATIONS

By using the *Anderson-Burdick* test to evaluate monetary burdens on the ballot in *Crawford*, the Court weakened the constitutional protections for the right to vote in an area where Congress,[261] the majority of the states,[262] and even the Court had explicitly sought to bolster protection.[263] Both the Court and Congress should take action to restore the strong constitutional command against *de facto* poll taxes and disentangle financial burdens on the ballot from other ordinary election regulations. Until such action is taken, the call of *Harper*—that wealth bears no relation to voting qualifications—will not be fulfilled.[264]

First, the Court can address this problem by realigning *de facto* poll tax cases under *Harper,* rather than *Anderson-Burdick.* Due to *Anderson-Burdick*'s inconsistent applications and general unpredictability, many have called for the test to be clarified and reigned in,[265] and this need has become only more urgent after the COVID-19 pandemic election litigation shined a spotlight on the test's problems.[266] The Supreme Court should grant certiorari to a *de facto* poll tax case that presents a direct financial burden on voters, like *Black Voters Matter Fund*, and use the case to clarify that monetary burdens on the vote are special and should therefore be considered under *Harper* rather than *Anderson-Burdick*. The Court should rest this claim on the Twenty-Fourth Amendment's text and legislative history which indicate the Amendment was meant to protect voters from financial burdens on the ballot beyond the customary poll tax;[267] Congress' clear intent to double down on the elimination of poll taxes in Section 10 of the VRA;[268] and the Court's expansion of the Twenty-Fourth Amendment in *Harper*, which went beyond striking down Virginia's poll tax to declare that "wealth or fee-paying has . . . no relation to voting qualifications;

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[261] *See* 52 U.S.C. § 10306.

[262] *See* U.S. CONST. amend. XXIV, § 1.

[263] *Harper*, 383 U.S. at 670.

[264] *Id.* at 666.

[265] Hasen, *supra* note 260, at 282; Douglas, *supra* note 226.

[266] Stephanopoulos, *supra* note 241.

[267] *E.g.*, Friedman, *supra* note 47, at 364–68.

[268] 52 U.S.C. § 10306.

the right to vote is too precious, too fundamental to be so burdened or conditioned."[269]

Additionally, Congress should use its enforcement authority under the Fourteenth and Twenty-Fourth Amendments[270] to revise Section 10 of the VRA to explicitly broaden its applicability and realign monetary burdens under *Harper*.[271] Section 10 is an under-utilized portion of the VRA that prohibits poll taxes and largely codifies the constitutional standard.[272] Congress, however, should strengthen this provision by amending the statute in two ways. First, it should define poll taxes to include not only customary poll taxes, but also *de facto* poll taxes. Put another way, Congress should expand the definition to cover and eliminate *all* monetary burdens on the vote. To do this, Congress would need to find that all financial burdens, not just customary poll taxes, prevent low-income potential voters from exercising the franchise.[273] As explained in part III, ample evidence exists to support this finding and, from a practical political perspective, there is ample motivation on both sides of the aisle to bolster the protections for low-income voters because they are not a monolithic voting bloc.[274]

Second, Congress should statutorily correct the Supreme Court's course and require courts to review monetary burdens on the vote using the *Harper* test rather than *Anderson-Burdick* for claims brought under Section 10. This approach is not unprecedented; in fact, in 1982 Congress amended Section 2 of the VRA to overturn a problematic Supreme Court decision on reapportionment.[275] Congress could either statutorily require the *Harper* strict scrutiny standard[276] or shift the burden of proof onto the state when a plaintiff

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[269] *Harper*, 383 U.S. at 670.

[270] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XXIV, § 2.

[271] 52 U.S.C. § 10306.

[272] *Id.*

[273] 52 U.S.C. § 10306(a).

[274] ROBERT PAUL HARTLEY ET AL., *supra* note 130, at 11–12.

[275] SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 768–74 (Robert C. Clark et al. eds., 5th ed. 2016) (chronicling Congress' 1982 amendment to Section 2 of the VRA to overturn the results test for vote dilution announced in City of Mobile v. Bolden, 446 U.S. 55 (1980)).

[276] Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 670 (1966).

claims, under Section 10, that her vote has been financially burdened.

If Congress made either (or both) of these proposed changes to Section 10, the door would likely open for more plaintiffs to challenge direct and indirect *de facto* poll taxes, despite hard-to-quantify burdens, and states would be required to provide more than mere pretext for their interest behind a restrictive and financially burdensome election law. In other words, it would be one significant step toward a stronger constitutional protection of the right to vote.

CONCLUSION

By tracing poll tax jurisprudence from its origin to its modern state, it is clear that the condemnation of wealth-based burdens on the ballot established by the Twenty-Fourth Amendment, *Harper*, and Section 10 of the VRA has not been recognized.[277] The Court in *Harper* held that states cannot require voters to pay for access to the ballot,[278] yet many voters still must expend financial resources to get to the ballot box, either directly or indirectly. When the Court uses *Anderson-Burdick* to analyze monetary burdens on the vote it focuses on whether voters are able to pay the price, disregarding the fundamental nature of the right to vote[279] and the special protections against financial burdens on the ballot.[280] The Court and Congress must take action to affirm the special status of monetary burdens on the vote and untangle *de facto* poll taxes from the ordinary election regulations subject to *Anderson-Burdick*. Only then would the full promise of the Twenty-Fourth Amendment be realized, because "there [should] be no one too poor to vote."[281]

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[277] *See* U.S. CONST. amend. XXIV, § 1; *Harper*, 383 U.S. at 670; 52 U.S.C. § 10306.

[278] *Harper*, 383 U.S. at 670.

[279] *Id.*

[280] *See* U.S. CONST. amend. XXIV, § 1; *Harper*, 383 U.S. at 670; 52 U.S.C. § 10306.

[281] Nan Robertson, *24th Amendment Becomes Official*, N.Y. TIMES, Feb. 5, 1964, at 14.