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Andre L. Smith

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AFTER NFIB V. SEBELIUS, WHEN DOES THE COST OF VOTING BECOME AN ILLEGAL POLL TAX?

ANDRE L. SMITH

State, county and local legislatures in the South are enacting laws designed to reduce the participation of Blacks, Hispanics and the poor of all races in the voting franchise. Devices being used to prevent or discourage wide voter participation include photo identification laws requiring voters to obtain a particular type of photo identification and prohibiting forms of identification, which are more cheaply and easily obtained. They also include reducing the number of polling places and changing their location, both which impose significant direct and indirect costs on voters relating to time and travel, as well as opportunity costs with respect to missed work. The Attorney General of the United States recognizes over 15 types of election changes that could disparately impact minority voters, from voter registration procedures and language requirements to redistricting and annexation of voter precincts. The Voting Rights Act authorized the Department of Justice to review all election changes from ‘covered’ States.

In 2013, however, the Supreme Court struck down section 4 of the Voting Rights Act in *Shelby County, Ala. v. Holder*,¹ finding that Congress did not properly consider whether the Act was still necessary in today’s racial environment. The Court cited advancements in minority voting percentages since the Voting Rights Act was enacted to determine that the Act was no longer needed. But the Voting Rights Act, rather than evidencing a change of racial attitudes, is the most likely reason for increased minority voting percentages. Inconsistent with the Court’s rose-colored view of race relations in the United States, the Justice Department has objected to over 2,400 voting law changes since 1982, because they would be unduly burdensome on minority populations.² Moreover, the Attorney General successfully proved in 2012 that proposed voting law changes in *Florida v. United States*³ and *Texas v. Holder*⁴ would cause minority voter retrogression. As Justice Ginsburg noted in dissent, “[it] is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁵

¹ *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612 (2013).

² Brief of Amicus Curiae in Support of Respondents, *Shelby County v. Holder*, (No. 12-96) (Patricia A. Broussard) (“Broussard Brief”).

³ *Florida v. United States*, 888 F. Supp.2d 299, 312 (D. D.C. Cir. 2012).

⁴ *Texas v. Holder*, 888 F. Supp.2d 113, 117 (D. D.C. Cir. 2012).

⁵ *Shelby Cnty. v. Holder*, 133 S.Ct. at 2650 (Ginsburg, J., dissenting).

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Southern legislatures are emboldened not only by the judicial repeal of the Voting Rights Act, but also by the Court's decision in *Crawford v. Marion County*⁶, upholding voter identification laws. The cost of obtaining photo identification may be negligible and insignificant for those with a modicum of wealth. But for those without resources, the direct, indirect and opportunity costs can be significant, even substantial. Photo ID laws by themselves may reduce the number of minority voters by over 700,000.⁷ If poor white voters are included, this number should easily exceed one, perhaps two million disenfranchised American citizens. Proponents of voter identification laws cite the government's legitimate interest in preventing voter fraud. But while the interest is legitimate, the actual threat is minimal and references to it are clearly pretextual. Recently, former U.S. Secretary of State, Colin Powell asked, "how can voter fraud be widespread and undetected?"⁸

With the Voting Rights Act repealed, are there any other federal laws that might serve to prevent the disenfranchisement of minorities and the poor? Is there any other legal basis for challenging voter ID laws and other laws that disenfranchise minority voters by increasing the indirect and direct costs of participation? In *The Cost of the Vote*,⁹ Atiba Ellis flirts with the idea that undue, legislatively induced costs associated with voting could fall within the definition of poll taxes and are thus illegal pursuant to the 24th Amendment to the U.S. Constitution¹⁰ and *Harper v. Virginia* (1966).¹¹

Neither Congress nor any state legislature can require otherwise eligible voters to pay a fee for the privilege of exercising the franchise. Historically, poll taxes were designed to disenfranchise those without property and marginalize their civic participation and their material interests. The *Harper* Court rejected the traditional rationale that those with property could effectively represent those who are without property and who are supposedly uninterested in politics in the first place. The right to vote is

⁶ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

⁷ Broussard Brief *supra* note 2, at 17, citing Jon C. Rogowski & Cathy Cohen, *Turning Back the Clock on Voting Rights, The Impact of New Photo Identification Requirement on Young People of Color*, The African American Youth Project, available at <http://research.AfricanAmericanyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf>.

⁸ Remarks of Colin Powell, August 22, 2013, North Carolina CEO Forum, Raleigh, North Carolina.

⁹ Atiba Ellis, *The Cost of the Vote: Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023 (2009).

¹⁰ XXIV. Amend outlawed the "poll tax"; *Harper v. Virginia Board of Elections* 383 U.S. 663

¹¹ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

fundamental and one's wealth has no rational relationship with voting qualifications.¹²

Perhaps, Professor Ellis is on to something. Can the Poll Tax Amendment serve the same purposes as the Voting Rights Act, "to correct the actions of States and jurisdictions which intentionally sought to exclude citizens from exercising their right to vote and to deter States from either deliberate attempts at future exclusion or deter legislative actions that, veiled as 'fraud prevention,' deny minorities their right to vote?"¹³ The prohibition against poll taxes could not possibly reach nearly all things covered by the Voting Rights Act, but it could apply to some.

So when do costs associated with voting mandated by a legislature amount to an unconstitutional poll tax? Chief Justice Roberts' functional analysis of the 'Affordable Care Act' and determination that the penalty provision, or "shared responsibility payment," constitutes a tax for purposes of the Constitution gives cause to consider whether voting-related laws that impose undue burdens on the poor can be characterized as illegal poll taxes.¹⁴

The Court in *NFIB v. Sebelius* held that the labels a legislature affixes to enactments do not control the determination of whether something is properly characterized a "tax."¹⁵ The Court in *NFIB* found that "the shared responsibility payment" of the Affordable Care Act was a tax.¹⁶ Conversely, they have previously found that other enactments labeled as taxes, like the "child labor tax" in *Bailey v. Drexel Furniture* were actually "penalties" and not taxes at all. Just as it is hard to distinguish penalties from taxes, the Court also has difficulty distinguishing taxes from fees.

While *NFIB v. Sebelius* gives cause for reconsideration, it does not necessarily give cause for much hope. The Court did not provide a precise definition; instead it identified factors relevant to determining when something may reasonably be called a tax. Some of these factors support characterizing the costs associated with voting as an illegal poll tax. Some of the factors do not. While Justice Roberts opinion in *Sebelius* provides some ammunition for voting rights advocates, it also provides ample means for a state or local legislature to avoid the characterization.

¹² *Id.*

¹³ Broussard Brief, *supra* note 2, at 19.

¹⁴ National Federation of Independent Business (NFIB) v. Sebelius, 132 S.Ct. 2566, 2582 (2013) (opinion of Roberts, C.J.).

¹⁵ *Id.* at 2582.

¹⁶ *Id.*

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When it comes to designating something a poll tax, the Court ultimately requires its lower divisions to “give practical effect to the legislature’s enactment.” And they have, to some extent. In *Common Cause/Georgia v. Billups I*, the U.S. District Court for the Northern District of Georgia struck down that state’s Photo ID Act of 2005 as an unconstitutional poll tax because otherwise eligible voters without a driver’s license (somewhere between 300,000 and 1,000,000 people) were required to purchase a photo voter identification card from the state for \$20.¹⁷

To avoid the poll tax characterization, the Georgia legislature amended the law (Photo ID Act of 2006) to remove the fee for a voter identification card and also to expand the privilege of absentee voting, which does not require identification. It worked. The district court in *Common Cause/Georgia v. Billups II*, citing an Indiana federal district court dealing with a substantially similar photo ID law, held that indirect and opportunity costs relating to legitimate voting regulations never constitute a poll tax.¹⁸ The court did not question the legitimacy of the state’s interest in preventing voter fraud, or whether the law was even rationally related to furthering that interest, despite the fact the State Secretary testified that voter fraud was much more likely to occur with respect to absentee voting, which the Photo ID Act of 2006 specifically expanded.¹⁹

The district court paid lip service to *Harman v. Forssenius*,²⁰ which held that the 24th Amendment prevented the state of Virginia from requiring voters to choose between paying a fee or filing a certificate of residence. According to the Court, “Constitutional rights would be of little value if they could be . . . indirectly denied, or manipulated out of existence. . . . Thus, like the Fifteenth, the Twenty-fourth [Amendment] nullified sophisticated as well as simple-minded modes’ of impairing the right guaranteed. It hits onerous procedural requirements which effectively handicap exercise of the franchise.”

However, without any further reference to *Harman*, the district court turned around cited *Burdick v. Takushi* for the proposition that, “election laws will invariably impose some burden upon individual voters. . . . Thus, the imposition of tangential burdens does not transform a regulation into a poll tax.”²¹ Then, the court overstated what was an otherwise reasonable point: “the cost of time and transportation cannot plausibly qualify as a

¹⁷ *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

¹⁸ *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1354 (N.D. Ga. 2006).

¹⁹ *Id.* at 1356-57.

²⁰ *Id.* at 1352 citing *Harman v. Forssenius*, 380 U.S. 528 (1965).

²¹ *Id.* at 1354 citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

prohibited poll tax because those same ‘costs’ also result from voter registration and in person voting requirements.”²² *Harman v. Forssenius* clearly stands for the proposition that the 24th amendment prohibits the legislature from mandating *any direct cost* relating to voting along with *undue indirect costs* that produce the same effect, disenfranchisement of poor voters. Thus, at some point the cost of time and transportation imposed by a legislature must qualify as a poll tax, even if the Georgia Photo ID Act of 2006 at issue was reasonable.

That indirect and opportunity costs can never be a poll tax is a dubious proposition. Neutrally worded voting regulations that further a legitimate government interest still amount to an impermissible burden under the *Burdick* standard if the burdens imposed far exceed marginal furtherance of the government’s interest. These burdens are not just taxing, they are a tax. Thus, despite the overstatements of the Georgia and Indiana district courts, at some point, a combination of requiring specific forms of identification, scheduling elections for days when there is little public transportation, offering only one or a few polling locations located in obscure places with defective machines, along with other costly regulatory devices, constitutes a poll tax.

In a sense, the standard in *Burdick v. Takushi* for Equal Protection Clause challenges to voter regulations is entirely consistent with the *Harman* Court standard for determining whether regulations create an impermissible poll tax. The *Burdick* test requires courts to weigh the interest of the government against the burdens placed on discrete groups of voters. 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 24th Amendment abolishing poll taxes in federal elections.

Still, with respect to either Equal Protection or the 24th Amendment, the *Burdick* standard is somewhat wanting. Government interest in preventing voter fraud is legitimate, even if not compelling. But to the extent a cost-inducing government regulation related to voting does not demonstrably further this or some other legitimate legislative purpose, it should constitute a violation of both the Equal Protection Clause and the 24th Amendment. Of course, such a rule involves a bit of judicial second-guessing of the legislature. On one hand, *Shelby County, Ala. v. Holder* sets a

²² *Id.*

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precedent for this trend, since the Court required Congress to engage in a copious statistical analysis of race relations before they are allowed to legislate in favor of minorities. On the other, the Court in *Crawford v. Indiana* allowed the state of Indiana to determine the prevalence of voter fraud on pure belief and faith.