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Prohibiting Cashless Retailers and Protecting the Impoverished

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PROHIBITING CASHLESS RETAILERS AND PROTECTING THE IMPOVERISHED

Allison Kretovic*

ABSTRACT

A growing number of customer-facing businesses have opted to implement cashless policies, declining to accept cash for payment and limiting consumers' options on how they can pay for goods and services. Proponents for cashless policies cite the efficiencies gained by removing cash from a business and concerns about theft as their primary reasons for supporting such policies. Opponents to the move toward cashless express concerns that the policy is discriminatory and has a disparate impact on lower-income consumers who do not have access to financial institutions. Policymakers at the local and state levels have responded by proposing and enacting legislation prohibiting discrimination against cash buyers.

This Note examines the controversy regarding cashless policies and the appropriate government response to this practice. This Note argues that the U.S. Supreme Court should classify poverty as a suspect class and apply strict scrutiny to any legislation that impacts a low-income person's ability to participate in the marketplace freely. Additionally, this Note argues that Congress should enact federal legislation to prohibit businesses from implementing cashless policies because the policies discriminate against those who do not have access to financial services.

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INTRODUCTION

On March 10, 2019, Mercedes-Benz Stadium, home of Major League Soccer's (MLS) Atlanta United FC and the National Football League's (NFL) Atlanta Falcons, went completely cashless, becoming the first MLS or NFL stadium to do so.¹ And it is not alone. Across the country, a growing number of customer-facing businesses have opted to go cashless, declining to accept dollar bills and coins for payment and limiting consumers' options on how they can pay for goods and services.² Although the majority of stores and restaurants around the United States still accept cash, some experts estimate that in five years, a third of all retailers will be cashless, up from about 17% in 2019.³ About 10% of brick-and-mortar stores will be cashless in five years, up from less than 1% in 2019.⁴

Businesses point to their freedom of choice and the efficiency gained by removing cash from the establishment as justifications for opting to go cashless.⁵ By eliminating the time spent counting money, a company can serve customers faster.⁶ Many businesses no

1. Simon Ogus, *Mercedes-Benz Stadium Will Become First Pro Sports Venue to Go Cashless*, FORBES (Mar. 7, 2019, 7:30 AM), <https://www.forbes.com/sites/simonogus/2019/03/07/mercedes-benz-stadium-will-become-first-pro-sports-venue-to-go-cashless/#70d1ab8f366a> [https://perma.cc/2JXN-S8HH]; Tim Tucker, *Mercedes-Benz Stadium Will Convert to Cashless Operation*, ATLANTA J.-CONST. (Mar. 8, 2019), <https://www.ajc.com/sports/mercedes-benz-stadium-will-convert-cashless-operation/7GdAOUNpqYUrB5b4dpdNZI/> [https://perma.cc/LX97-5U7S] (“The change follows extensive testing last year . . . Stadium-wide, the percentage of customers using cash dropped from 42 percent at the start of the Falcons season to 30 percent at the end . . . Cash usage has been lower at Atlanta United games than Falcons games . . .”).

2. CLAIRE WANG, CASH PROD. OFF. FED. RSRV. SYS., CASH ME IF YOU CAN: THE IMPACTS OF CASHLESS BUSINESSES ON RETAILERS, CONSUMERS, AND CASH USE 3 (2019), <https://www.frbsf.org/cash/files/Cash-Me-If-You-Can-August2019.pdf> [https://perma.cc/Z9V8-NJK8] (“In recent years, numerous businesses have made headlines for refusing to accept cash as a form of payment. These businesses span a variety of industries, including airlines, eateries, sports stadiums, and general merchandise stores. This phenomenon is not just limited to a few cities, either. Cashless businesses have popped up across the country, including places like New York, Atlanta, and Chicago.”).

3. Olga Kharif & Krista Gmelich, *As Amazon Leads Cashless Charge, States and Cities Push Back*, BLOOMBERGQUINT, <https://www.bloombergquint.com/onweb/who-is-banning-cashless-stores-amazon-go-could-be-next> [https://perma.cc/F6NR-VKTF] (Mar. 30, 2019, 10:36 AM).

4. *Id.*

5. Wang, *supra* note 2, at 5 (“Particularly in high-volume businesses, these faster transaction times can translate to increased customer satisfaction, fewer opportunities for error in making change, and increased revenue.”).

6. *Id.* (“Counting cash can take time, both for the customer and the employee. Several businesses

longer accept hard currency because handling cash can add as much as 10% to overhead costs.⁷ Safety, particularly minimizing the risk of theft or robbery, is also a top reason a business cites when making the switch.⁸

Credit card companies and banks are proponents of the move towards a cashless economy and view cash as a competitor.⁹ In 2017, Visa ran a promotion, the Visa Cashless Challenge, awarding fifty eligible businesses in the U.S. up to \$10,000 if they committed to going cashless.¹⁰ Proponents of cashless retailers claim that a ban on the refusal to accept cash stifles innovation and inhibits growth.¹¹

On the other hand, opponents to cashless retailers point out that the policy is discriminatory and impacts lower-income consumers who do not have access to financial institutions.¹² Many financial

that have gone cashless have cited benefits like faster transactions and increased store throughput.”).

7. Kharif & Gmelich, *supra* note 3; Wang, *supra* note 2, at 4 (“Small- and medium-sized businesses are reported to pay tens of billions of dollars annually on cash handling expenses. Eliminating cash payments eliminates the costs associated with handling and transporting cash.”).

8. Wang, *supra* note 2, at 4 (“Not having cash on store premises also reduces opportunities for both internal and external robberies. . . . Externally, cash-intensive businesses can be targets for robberies. Nearly a quarter of U.S. robberies (26 percent) took place at some type of retailer—either a gas station, convenience store, or other commercial residence When businesses forego cash on their premises, there may be fewer opportunities and incentives for internal and external theft.”).

9. Rey Mashayekhi, *Bank of America CEO: ‘We Want a Cashless Society,’* FORTUNE FIN., at 10:34 (June 19, 2019, 5:04 PM), <https://fortune.com/2019/06/19/bank-of-america-ceo-cashless> [<https://perma.cc/XQ9R-9QYQ>] (“We want a cashless society. It costs us \$5 billion for checks and cash to move around our company. . . . We have more to gain than anybody in the sense from a pure operating costs [perspective].” (quoting Bank of America CEO, Brian Moynihan)); Emily Bary, *Visa’s Plan to Vanquish Its ‘Biggest Competitor,’* BARRON’S (July 18, 2017, 8:49 AM), <https://www.barrons.com/articles/visas-plan-to-vanquish-its-biggest-competitor-1500382183> [<https://perma.cc/YZ32-RVU4>] (“Visa benefits considerably as consumers skip trips to the ATM. ‘Our biggest competitor is cash,’ Avin Arumugam, Visa’s head of ‘Internet of Things’ efforts . . . told us.”).

10. *Visa to Help U.S. Small Businesses Go Cashless*, VISA (July 12, 2017), <https://usa.visa.com/about-visa/newsroom/press-releases.releaseId.2285993.html> [<https://perma.cc/GF9F-8K23>] (“Aiming to create a culture where cash is no longer king . . . Visa will be awarding up to \$500,000 to [fifty] eligible [U.S.]-based small business food service owners who commit to joining the 100% cashless quest.”).

11. Rebeca Ibarra, *New Jersey Bans Cashless Stores*, WNYC NEWS (Mar. 18, 2019), <https://www.wnyc.org/story/new-jersey-bans-cashless-retailers> [<https://perma.cc/B23M-RUHN>] (“‘Consumers of all income levels are able to access prepaid cards for purchasing.’ Michael Wallace, vice president of government affairs for the New Jersey Business and Industry Association, said in a statement. ‘As such, this law will ultimately stifle innovation and act as a further deterrent to doing business in New Jersey.’”).

12. Ginia Bellafante, *How the Cashless Economy Shuts Out the Poor*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/nyregion/how-the-cashless-economy-shuts-out-the-poor.html>

institutions require customers to maintain minimum account balances, charge monthly fees, or impose penalties for overdrafting an account.¹³ These types of policies make it difficult for low-income customers to maintain bank accounts.¹⁴ Banks lack incentives to provide options for low-income customers.¹⁵ Regulatory efforts aimed at compelling banks to meet the needs of the poor have largely failed.¹⁶

Other opponents cite the loss of privacy when consumers are forced to use a credit card to make a purchase.¹⁷ The use of electronic transfers or debit and credit cards for “transactions allow banks, stores, and app providers to track a person’s habits and can expose users to fraud.”¹⁸ Additionally, as consumers increase the frequency of their noncash transactions, their vulnerability to cyberattacks intensifies.¹⁹ Several of the most significant cyberattacks targeted

[<https://perma.cc/VFW2-G4F9>] (“The strongest objection relates to the ways in which rejecting physical currency plays out as a bias toward the poor, advancing segregation in retail environments.”); Nick Bourke et al., *Rise of Cashless Retailers Problematic for Some Consumers*, PEW CHARITABLE TRS. (Nov. 8, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/08/rise-of-cashless-retailers-problematic-for-some-consumers> [<https://perma.cc/89LS-5DQN>] (“[Twenty-three] percent of households with incomes under \$50,000 say they primarily pay with cash compared with just 10 percent of households earning \$50,000 or more per year.”).

13. Nadra Nittle, *Why Cashless Retailers Put Low-Income People at Even More of a Disadvantage*, VOX (Nov. 30, 2018, 2:00 PM), <https://vox.com/the-goods/2018/11/30/18119887/cashless-stores-cash-only-low-income-disadvantage> [<https://perma.cc/E2R5-RWJM>].

14. *Id.*

15. MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 152–53 (Harvard Univ. Press, 2015) (“Most policymakers and scholars have given up trying to force banks to meet the needs of the poor, claiming the cost considerations simply prevent banks from operating in this market.”).

16. *Id.* (“Banking regulators have tried numerous times to induce mainstream banks to provide small loans to the poor, but . . . these attempts have failed.”).

17. Hannah H. Kim, *The Future of Cash: Will Digital Payment Systems Replace Paper Currency?*, CQ RESEARCHER (July 19, 2019), <http://library.cqpress.com/cqresearcher/cqresre2019071900> [<https://perma.cc/HA6Y-QSH3>] (“While digital payment methods create transaction records for each user, cash can be anonymous, providing a measure of privacy to the purchaser. Internal Revenue Service (IRS) rules require a cash transaction to be reported only when it exceeds \$10,000. Cash is also essentially untraceable.”).

18. Anna Kramer, *NYC Pushing Ahead with Cashless Retail Ban, Joining Neighbors*, BLOOMBERG L. (June 10, 2019, 4:45 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/nyc-pushing-ahead-with-cashless-retail-ban-joining-neighbors> [<https://perma.cc/QB5F-LS4R>].

19. Kim, *supra* note 17 (“[A]ttacks on financial service firms are more frequent than in other industries[] and increased by more than 70 percent worldwide in 2017 over the previous year . . .”).

databases that store sensitive personal and financial information.²⁰ When compromised, personal and financial information can be used for identity theft and fraud.²¹

In response to the rise in the number of cashless retailers, several state and local legislators enacted bills requiring retailers to accept cash as a form of payment.²² This Note discusses the controversy regarding cashless policies and the appropriate government response to this practice. Part I examines current and proposed legislation aimed at addressing the cashless retailer trend and the arguments for and against cashless policies. Part II analyzes the two primary methods of challenging cashless policies—under the Legal Tender Act or under the Equal Protection Clause by treating wealth as a suspect classification. Finally, Part III suggests an updated approach to the Equal Protection Clause method by making poverty a suspect classification and enacting federal legislation to ensure consumers who choose to use cash retain their ability to participate in the consumer marketplace.

I. BACKGROUND

A. *History of Legislative Efforts*

Massachusetts enacted a bill in 1978 prohibiting discrimination against cash buyers.²³ Although the law has been on the books for over forty years, it has not been actively enforced.²⁴ More recently,

20. *Id.* (“One of the largest data breaches was the 2017 hack involving Equifax, the consumer reporting agency, in which more than 150 million customer records were stolen, including Social Security numbers, birthdates and credit card data.”).

21. Tamara Kurtzman, *Cashing Out*, L.A. LAW., Mar. 2019, at 22, 26 (“In 2017 alone, more than 1,500 data breaches occurred compromising more than 170 million records, including approximately 14 million credit card numbers.”).

22. Wang, *supra* note 2.

23. MASS. GEN. LAWS ch. 255D, § 10A (2017) (“No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer.”).

24. Chris Sweeney, *Should Boston Stop Using Cash?*, BOS. MAG. (Feb. 6, 2018, 5:44 AM), <https://www.bostonmagazine.com/news/2018/02/06/cashless-boston> [<https://perma.cc/8JFR-CVGG>] (“Today, the law is a rat’s nest of red tape in which oversight and enforcement is shared between the

Rhode Island and New Jersey passed similar legislation.²⁵ Oregon and Connecticut have proposed legislation aimed at prohibiting cashless businesses.²⁶ Cities like New York City, San Francisco, and Philadelphia have also passed ordinances restricting the practice.²⁷ Other cities, such as St. Louis and the District of Columbia, have proposed (and even enacted) bills aimed at limiting retailers' abilities to reject cash payments.²⁸ New York City Councilman Ritchie Torres, who introduced the NYC legislation, explained:

It is bad enough that the poor are already so stigmatized, and now we are stigmatizing them even further for the way they consume goods and services I talk a lot about effective discrimination. But this amounts to intentional discrimination, because these businesses that don't accept cash know exactly who they are keeping out.²⁹

Not all proposals have been successful, though—Chicago's city council declined to pass proposed legislation outlawing cashless retailers.³⁰

Attorney General's Office and the Division of Banks at the Office of Consumer Affairs and Business Regulation—and it doesn't seem to be actively enforced. The AG's office . . . has received only six complaints about cashless businesses since 2013 and has taken no enforcement actions."); Cristina Quinn, *As Society Becomes Increasingly Cashless, Is Massachusetts Ready?*, WGH (Feb. 13, 2018), <https://www.wgbh.org/news/2018/02/13/news/society-becomes-increasingly-cashless-massachusetts-ready> [https://perma.cc/HPG5-DNGP] ("It may be somewhat ambiguous whether a restaurant qualifies [I]t's incumbent upon the Legislature to give us some guidance here so that we all know whether restaurants must abide by these regulations in the era of the cashless economy. It's up to the Legislature to handle this and create a uniform interpretation of 'retail establishment.'" (quoting Northeastern University law professor Daniel Medwed)). In 2019, several lawmakers in Massachusetts proposed legislation to repeal the prohibition against cashless retailers. S.B. 181, 191st Gen. Ct. (Mass. 2019). In February of 2020, the bill accompanied a study order, authorizing the Joint Committee on Consumer Protection and Professional Licensure to make an investigation and study of proposed Senate bills related to consumer protection. S.B. Order No. 2534, 191st Gen. Ct. (Mass. 2020).

25. 6 R.I. GEN. LAWS § 6-13.1-30 (2019); N.J. STAT. ANN. § 56:8-2.33 (West 2019).

26. S.B. 716, 80th Legis. Assemb., Reg. Sess. (Or. 2019); H.B. 5703, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

27. N.Y.C., N.Y., ADMIN. CODE § 20-840 (2019); PHILA., PA., CODE § 9-1132 (2019); S.F., CAL., POLICE CODE art. 55, §§ 5500–06 (2019).

28. St. Louis, Mo., Proposed Ordinance 47 (May 23, 2019); D.C. CODE §§ 28-5401–5404 (2021).

29. Bellafante, *supra* note 12.

30. Chicago, Ill., Proposed Ordinance 7145 (Oct. 11, 2017).

While the Massachusetts and Rhode Island statutes include an outright ban on cashless retailers, most municipal and state laws have included exceptions in their bills.³¹ Most of the bills make exceptions for online retailers and those that are completing transactions over the telephone or through the mail.³² Other exceptions include airport vendors, car rental facilities, and parking garages—sectors where cash purchases are not possible or where cards act as a form of collateral.³³

Currently, no federal statute mandates that a private business, individual persons, or organizations must accept cash payment for goods or services.³⁴ The Coinage Act of 1965 states: “United States coins and currency . . . are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.”³⁵ The Act, however, does not require businesses to accept cash for goods and services.³⁶ Private businesses can choose whether to accept cash unless there is a state law that prohibits cashless policies.³⁷ At the same time, courts have upheld state and local governments’ authority to require payment for government-provided services in certain forms.³⁸

31. Compare MASS. GEN. LAWS ch. 255D, § 10A (2017), and 6 R.I. GEN. LAWS § 6-13.1-30 (2019) (prohibiting any retail establishment from discriminating against a cash buyer by requiring the use of credit), with N.J. STAT. ANN. § 56:8-2.33 (West 2019) (prohibiting a seller from requiring a buyer to use credit, but providing exemptions for retailers located at an airport, certain parking facilities, rental car companies, and certain sports and entertainment venues).

32. N.J. STAT. ANN. § 56:8-2.33(d) (“As used in this section, ‘at retail’ shall include any retail transaction conducted in person and exclude any telephone, mail, or Internet-based transaction.”).

33. Kramer, *supra* note 18.

34. *Legal Tender Status*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/resource-center/faqs/Currency/Pages/legal-tender.aspx> (Jan. 4, 2011, 4:47 PM).

35. Coinage Act of 1965, 31 U.S.C. § 5103; *see also* Legal Tender Cases, 79 U.S. 457, 553 (1870), *abrogation recognized by* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency, 535 U.S. 302 (2002).

36. *Legal Tender Status*, *supra* note 34.

37. *Id.* (“Private businesses are free to develop their own policies on whether or not to accept cash unless there is a State law which says otherwise. For example, a bus line may prohibit payment of fares in pennies or dollar bills. In addition, movie theaters, convenience stores and gas stations may refuse to accept large denomination currency (usually notes above \$20) as a matter of policy.”).

38. *Genesee Scrap & Tin Baling Co. v. City of Rochester*, 558 F. Supp. 2d 432, 434, 436–37 (W.D.N.Y. 2008) (upholding city ordinance requiring junkyard operators to use checks for purchases because the ordinance was a valid exercise of the city’s police power).

B. *Equal Protection Challenge*

Cashless practices may raise constitutional concerns of discrimination against the poor.³⁹ Under the Equal Protection Clause of the Fourteenth Amendment, “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁰ The Equal Protection Clause applies only to state and local action, but current U.S. Supreme Court precedent does not require the state to treat people equally—it only requires the government to justify any classification with a sufficient rationale.⁴¹ The Supreme Court has held that the Due Process Clause of the Fifth Amendment extends analogous equal protection requirements to the federal government.⁴²

The U.S. Supreme Court’s deference to a governmental classification within a law depends on the interest at stake.⁴³ There are typically two types of classifications: facially discriminatory classifications and facially neutral classifications.⁴⁴ Facially discriminatory classifications are found directly in the text of the law and are challenged by showing that the law is unconstitutional in all of its applications.⁴⁵ Facially neutral classifications may have a discriminatory impact either from the law or from its administration.⁴⁶ If a law is facially neutral, demonstrating a

39. Kim, *supra* note 17 (“New Jersey Assemblyman Paul Moriarty, who supported his state’s law, said he did so because ‘a ban on cash is discriminatory. It marginalizes the poor, marginalizes young people who haven’t established credit yet.’”).

40. U.S. CONST. amend. XIV, § 1.

41. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U.L. REV. 135, 135 (2011).

42. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law’ . . .”).

43. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 725 (6th ed. 2019) (“Many government laws draw a distinction among people and thus are potentially susceptible to an equal protection challenge.”); Strauss, *supra* note 41 (“In most cases of unequal treatment under law, courts simply defer to the legislative judgment that the distinction is rational; only in certain unusual circumstances will the courts subject the government’s classifications to more rigorous examination.”).

44. CHERMERINSKY, *supra* note 43, at 727.

45. *Id.*

46. *Id.* at 726.

potentially improper classification requires proof that there is some discriminatory purpose behind the law.⁴⁷

Discrimination based on suspect classifications (such as race or national origin) is subject to a strict scrutiny test.⁴⁸ Under the strict scrutiny test, the government interest must be compelling, and the classification must be necessary or narrowly tailored to the government interest.⁴⁹ Intermediate scrutiny applies to semi-suspect or quasi-suspect classifications like gender.⁵⁰ In intermediate scrutiny, the government interest must be important, and the means must be substantially related to meet the ends.⁵¹ All other legislative actions that do not involve a suspect or semi-suspect classification are subject to a rational basis review—the minimum level of scrutiny, which requires that there be a legitimate government interest and that the means be rationally related to meet the ends.⁵²

Unless a person is seeking to exercise a fundamental right, such as voting or seeking to place their name on a ballot, wealth classifications are traditionally subject to a rational basis review.⁵³ The U.S. Supreme Court has held that poverty is not a suspect classification and that discrimination against the poor should only receive a rational basis review.⁵⁴

47. *Washington v. Davis*, 426 U.S. 229, 237 (1976) (“[D]isproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation”); *id.* at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

48. *CHEMERINSKY*, *supra* note 43, at 727.

49. *Id.*

50. *Strauss*, *supra* note 41, at 137.

51. *CHEMERINSKY*, *supra* note 43, at 727; *Strauss*, *supra* note 41, at 137 (“[L]aws that affect a ‘quasi-suspect class’ receive intermediate scrutiny review. Such laws are upheld if the classification is substantially related to an important government purpose. Striking down laws under an intermediate level of scrutiny is difficult but not insurmountable.”).

52. *Strauss*, *supra* note 41, at 136.

53. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding a poll tax violated the Equal Protection Clause because wealth was not relevant to one’s ability to participate intelligently in the electoral process); *Bullock v. Carter*, 405 U.S. 134, 143–44 (1972) (finding excessive ballot fees violated the Equal Protection Clause in part because the effect of the exclusionary mechanism’s limitation would fall more heavily on the less affluent segment of the community).

54. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the

C. Proposed Federal Legislation

As long as poverty remains a non-suspect classification, addressing no-cash policies at a national level would require legislation. In May of 2019, Congress considered two bills designed to limit or outright prohibit cashless retailers.⁵⁵ The first, the Cash Always Should Be Honored Act (CASH Act), proposed that the practice of operating a cashless business would be considered a violation of section 18(a)(1)(B) of the Federal Trade Commission Act.⁵⁶ The second proposal, the Payment Choice Act of 2019 (Payment Choice Act), allowed a party to commence a civil action for preventive relief, including pursuing an application for a permanent or temporary injunction or restraining order against such persons.⁵⁷ The Payment Choice Act also allowed for intervention by the Attorney General.⁵⁸

Both bills cited Congress's authority to regulate the practice of cash retail pursuant to Article I, Section Eight, Clause Three of the Constitution, the Commerce Clause.⁵⁹ The Commerce Clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁶⁰ Under the Commerce Clause power, Congress can regulate intrastate activities if there is a rational basis for believing that there is an interstate effect.⁶¹

majoritarian political process. . . . [T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

55. H.R. 2630, 116th Cong. (2019); H.R. 2650, 116th Cong. (2019).

56. H.R. 2630 § 2(a) ("It shall be unlawful for any physical retail establishment to refuse to accept legal tender as payment for any products or services offered for sale by such physical retail establishment.").

57. H.R. 2650 § 3(a) ("No person selling or offering goods or services at retail to the public may— (1) refuse to accept United States legal tender of cash as payment for goods or services; (2) post signs or notices in, on, or about the business premises of such person stating that cash payment is not accepted; or (3) charge a higher price to any customer who pays by cash than customarily is charged to a customer using other forms of payment.").

58. *Id.* ("Upon timely application, a court may, in its discretion, permit the Attorney General to intervene in a civil action brought under this subsection, if the Attorney General certifies that the action is of general public importance.").

59. See H.R. 2630; H.R. 2650.

60. U.S. CONST. art. I, § 8, cl. 3.

61. CHEMERINSKY, *supra* note 43, at 277.

In deciding whether to act, the government balances competing goals when examining the viability and constitutionality of a future cashless society.⁶² On the one hand, the risk and frequency of cyberattacks increase as society moves cashless.⁶³ On the other, electronic payments allow the government to track the flow of money and increase tax collection.⁶⁴ Understatement of the amount of taxes owed by businesses contributes to the federal tax gap—the difference between what taxpayers owe and what they pay.⁶⁵ A 10% increase in the adoption of digital money would result in a \$150 billion boost to consumer spending.⁶⁶ An increase in payment digitization could net the government more than \$100 billion in incremental taxes.⁶⁷ Restricting the use of cash may also reduce the prevalence of money laundering and other financial crimes.⁶⁸

Cash critics say the rising demand for \$100 bills but simultaneous decline in the average number of cash consumer purchases points to the use of cash in facilitating illegal activities such as money

62. *The Future of Money: Coins and Bank Notes: Hearing Before the Subcomm. on Monetary Pol'y and Trade of the H.R. Comm. on Fin. Servs.*, 115th Cong. 5 (2018) [hereinafter *The Future of Money Hearings*].

63. *Id.* (statement of Leonard Olijar, Director of the United States Bureau of Engraving and Printing) (“[A] cashless society presents a significant economic risk and neglects to serve those who do not have access to smartphones, computers, banks, and credit. I believe the 21st century warfare has a significant cyber component If your enemy is able to take down your electronic infrastructure or a natural disaster hits, there will be no way to conduct commerce in a cashless environment, crippling the economy.”).

64. Jennifer Surane, *Digital Payments' \$95 Trillion Tide Undaunted by Cash Holdouts*, BLOOMBERG (Mar. 29, 2019, 5:00 AM), <https://www.bloomberg.com/amp/news/articles/2019-03-29/cashless-backlash-in-u-s-fails-to-dent-a-95-trillion-industry> [<https://perma.cc/ST2Y-2HBU>].

65. Jeremy Temkin, *Tax Gap Estimates Show That Compliance Rates Remain Unchanged*, FORBES (Oct. 18, 2019, 9:55 AM), <https://www.forbes.com/sites/insider/2019/10/18/tax-gap-estimates-show-that-compliance-rates-remain-unchanged/#66bf870f5edd> [<https://perma.cc/U9TZ-D9WP>] (“[T]he IRS attributes the vast majority of the tax gap to taxpayers who understate the amount of taxes they owe on timely filed returns (\$352 billion), followed by taxpayers who file returns but do not pay their taxes on time (\$50 billion) and non-filers who do not pay their taxes on time (\$39 billion).”); Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37, 37 (2009) (“Underpayment of tax on business income is commonly attributed to the receipt of cash.”).

66. Surane, *supra* note 64.

67. *Id.*

68. Kurtzman, *supra* note 21, at 22; Kim, *supra* note 17 (“Cash serves another purpose: it is the medium of choice for illicit activities. This helps explain two seemingly contradictory trends: a steady increase in the demand for U.S. dollars, most notably the \$100 bill, even as the average value of consumer purchases made in cash declines.”).

laundering, tax evasion, and the purchase of illegal goods.⁶⁹ Additionally, the government must consider the cost of producing coinage.⁷⁰ Since 2006, the cost of creating pennies and nickels has exceeded their worth.⁷¹

However, the government also has a potential competing interest in ensuring financial inclusion.⁷² Some have argued that legislators should update the Federal Reserve's (the Fed) mission to mandate that the Fed promote efficiency and financial inclusion to benefit more Americans rather than forcing Americans to work with the Fed through a bank.⁷³ According to the Federal Deposit Insurance Corporation (FDIC), in 2017, 6.5% of U.S. households were "unbanked," meaning no one in the household had a checking or savings account, and 18.7% of U.S. households were "underbanked," meaning a household had an account at an insured institution but also obtained financial products outside of the banking system.⁷⁴ The

69. Kim, *supra* note 17 ("In 2017, the \$100 bill became the most widely circulated note in circulation, even exceeding the \$1 bill. . . . Cash critics say the rising demand for \$100 bills is directly tied to paper currency's utility for activities such as money laundering, tax evasion and purchases of illegal goods."); KENNETH S. ROGOFF, *THE CURSE OF CASH* 60 (2016) ("By far the most important area of tax noncompliance comes from underreporting of business income by individuals who conduct a significant share of their transactions in cash. . . . Overall, small business owners report less than half their income and account for 52% of the tax gap.").

70. *The Future of Money Hearings*, *supra* note 62, at 2.

71. *Id.* at 108 ("The cost of producing a penny has varied from about \$0.014 per unit in 2006 to \$0.025 per unit in 2011.").

72. COUNCIL OF ECON. ADVISERS, *ISSUE BRIEF: FINANCIAL INCLUSION IN THE UNITED STATES* 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/docs/20160610_financial_inclusion_cea_issue_brief.pdf [<https://perma.cc/SY6X-T9J6>] ("A lack of financial inclusion has broader consequences for the macroeconomy, having the potential to hurt both equity and efficiency by reducing access to credit, which can be essential for entrepreneurship, homeownership, and economic development more broadly.").

73. *Examining Regul. Frameworks for Digit. Currencies and Blockchain: Hearing Before S. Comm. on Banking, Hous., and Urb. Affs.*, 116th Cong. 1 (2019) (testimony of Mehrsa Baradaran, Professor of Law, University of California Irvine School of Law); E. Kylie Norman, *Banking at the Fed with FedAccounts: The Demise of Commercial Banks?*, 23 N.C. BANKING INST. 451, 452 (2019) ("To include this underserved population, there is a current proposal . . . to let all individuals have access to bank accounts at the Federal Reserve. . . . The FedAccounts proposal seeks to make holding a deposit account with the central bank—currently limited only to banking institutions—available to individuals and nonbank businesses.").

74. FED. DEPOSIT INS. CORP., 2017: FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1 (2018).

most common reason cited for being unbanked was that households do not have enough money to keep in their accounts.⁷⁵

Unbanked families face disproportionately higher costs in financial transactions and spend almost 10% of their income on financial transactions alone—more than many of these families spend on food.⁷⁶ Many lower-income people find themselves living in banking deserts, meaning there are no banks in a travelable distance around them.⁷⁷ Residents of banking deserts may still have access to alternative “fringe” providers of financial services such as check-cashing firms, pawnshops, and payday loan stores.⁷⁸ In addition, the homeless population is especially vulnerable in a cashless society.⁷⁹ Many banks require identification and sometimes a secondary proof of identification such as a utility bill to open an account.⁸⁰

75. *Id.* at 4; Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REGUL. 121, 136 (2004) (“Low-income households face key barriers to increased saving, and their low income leaves them little opportunity to save. . . . [T]hey face higher opportunity costs for putting their funds toward savings rather than current consumption.”).

76. BARADARAN, *supra* note 15, at 139 (“[T]he average unbanked family with an annual income of around \$25,000 spends about \$2,400 per year, *almost 10 percent of its income*, on financial transactions. This is more money than these families spend on food.”).

77. Donald P. Morgan et al., *Banking Deserts, Branch Closings, and Soft Information*, FED. RESRV. BANK OF N.Y.: LIBERTY ST. ECON. (Mar. 7, 2016), <https://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information.html> [<https://perma.cc/NS8B-YDU5>] (“[W]e define a banking desert as a census tract—a relatively homogeneous area or neighborhood containing about 4,000 people—with no branches within ten miles of the center of the tract . . .”).

78. *Id.*; MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 260 (2017) (“Most black neighborhoods are ‘banking deserts,’ neighborhoods abandoned by mainstream banks. . . . When banks leave a neighborhood, the sharks usually fill the void. Banking deserts are left vulnerable to high-cost payday lenders, title lenders, and other fringe banks.”).

79. Kharif & Gmelich, *supra* note 3; Jay Stanley, *Say No to the “Cashless Future” — and to Cashless Stores*, ACLU (Aug. 12, 2019, 3:30 PM), <https://www.aclu.org/blog/privacy-technology/consumer-privacy/say-no-cashless-future-and-cashless-stores> [<https://perma.cc/U97K-MFYR>] (“Opening a bank account requires an ID, which many poor and elderly people lack, as well as other documents such as a utility bill or other proof of address, which the homeless lack, and which generally create bureaucratic barriers to participating in electronic payment networks.”).

80. 31 C.F.R. § 1020.220 (2020). A bank “must implement a written Customer Identification Program (CIP).” *Id.* If a bank is using a non-documentary method to verify a customer’s identity, its CIP must contain procedures describing the non-documentary methods the bank will use, such as “contacting a customer; independently verifying the customer’s identity through the comparison of information provided by the customer with information obtained from a consumer reporting agency, public database, or other source; checking references with other financial institutions; and obtaining a financial statement.” *Id.*

II. ANALYSIS

There are several avenues that challengers to cashless policies and similar legislation have used to object to the practice. First, opponents to cashless policies cite the Coinage Act of 1965 in arguing that legal tender should be accepted for all debts incurred.⁸¹ Second, plaintiffs have cited the Equal Protection Clause as a constitutional basis for challenging cash discrimination because it disproportionately impacts the unbanked and underbanked.

A. *Legal Tender*

Critics to the cashless movement point to the language printed on U.S. currency—“legal tender for all debts, public and private”—to justify their argument that cash should always be accepted.⁸² Black’s Law Dictionary defines “legal tender” as the money (bills and coins) approved in a country for the payment of debts, the purchase of goods, and other exchanges for value.⁸³ In the United States, “coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues.”⁸⁴ Although critics opposed to cashless policies frequently cite the legal tender rule, the rule does not require an establishment to accept cash as a form of payment.⁸⁵

From a contract law perspective, a person does not incur a debt until after they receive a good or service.⁸⁶ As long as a cashless restaurant discloses their cashless policy upfront, the restaurant is offering to serve a customer a meal, but they are offering it on their

81. 31 U.S.C. § 5103.

82. Stanley, *supra* note 79.

83. *Legal Tender*, BLACK’S LAW DICTIONARY (11th ed. 2019).

84. 31 U.S.C. § 5103.

85. *Legal Tender Status*, *supra* note 34.

86. Andy Newman, *Cash Might Be King, but They Don’t Care*, N.Y. TIMES. (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/nyregion/no-cash-money-cashless-credit-debit-card.html> [<https://perma.cc/WYQ4-AS2T>].

terms.⁸⁷ If a customer consumes the meal, they have accepted the terms of the contract.⁸⁸

Challenges to cashless policies that employ the Legal Tender Act as a basis for the claim have been mostly unsuccessful.⁸⁹ In *Nemser v. New York City Transit Authority*, bus riders brought a challenge to the transit authority's policy of refusing to accept cash for bus fare.⁹⁰ The Supreme Court of New York held that the Legal Tender Act "cannot be interpreted to require acceptance of a particular denomination of currency . . . for bus fare."⁹¹

Similarly, in *Rosen v. Continental Airlines, Inc.*, an airline passenger challenged Continental's "cashless cabin" policy on a flight when he could not make purchases because he did not have a debit or credit card.⁹² The passenger challenged the practice, in part, under the Coinage Act.⁹³ The U.S. District Court for the District of New Jersey rejected his challenge under the Federal Coinage Act and stated that the Act "provides nothing more than a definition of legal tender" and "does not create a cause of action."⁹⁴

87. *Id.*

88. *Id.*

89. Erdberg v. On Line Info. Servs., Inc., No. 12-CV-3883, 2013 WL 5570062, at *13–15 (N.D. Ala. Oct. 9, 2013) (challenging the court's mandatory e-filing policy for all attorneys in civil matters); Martinez v. Mattern, No. H-05-3237, 2006 WL 1295571, at *13–14 (S.D. Tex. May 10, 2006) (challenging a water utility's no-cash policy).

90. 140 Misc. 2d 369, 369–70 (N.Y. Sup. Ct. 1988) (finding reasonable the New York City Transit Authority's decision to limit the acceptance of cash to locations where its employees, with appropriate safeguards, could issue tickets).

91. *Id.* at 370.

92. Civ. No. 10-5859, 2011 WL 1467209, at *5 (D.N.J. Apr. 18, 2011), *aff'd*, 62 A.3d 321 (N.J. Super. Cit. App. Div. 2013) (stating that the plaintiff was unable to purchase a headset and cocktail on a flight because he did not possess a debit or credit card and the airline had a no-cash cabin policy).

93. *Id.*

94. *Id.* The plaintiff also attempted to bring a class action claim on behalf of all low-income individuals and unaccompanied minors that have traveled on Continental flights because the cashless policy denied them the opportunity to purchase amenities on those flights. *Id.* Since the plaintiff was not a member of either of those classes, he did not have standing as a representative of the class, and his claim was denied. *Id.*

B. Constitutional Challenges

In addition to challenging cashless policies under the Coinage Act, several cases have raised equal protection claims.⁹⁵ In *Erdberg v. On Line Information Services*, for instance, the plaintiff challenged the Supreme Court of Alabama’s mandatory e-filing policy as violating equal protection.⁹⁶ The court rejected the equal protection claim because the plaintiff failed to adequately allege that he was treated disparately from other “similarly situated” persons.⁹⁷ Although the plaintiff alleged that the policy violated his fundamental right of access to the courts, the court found that what was actually at issue was the additional fee imposed on civil attorneys, thus subjecting the policy to only a rational basis review.⁹⁸

Currently, a court will uphold legislative actions that burden poor persons as a class under the Equal Protection Clause if the actions have any rational relationship to a legitimate end of government.⁹⁹ In the absence of infringement on some fundamental right or interest, a classification that operates to disadvantage the poor is not suspect.¹⁰⁰ In such circumstances, a court will use the traditional rational basis standard of review.¹⁰¹

95. See, e.g., *Martinez v. Mattern*, No. H-05-3237, 2006 WL 1295571, at *4 (S.D. Tex. May 10, 2006) (upholding a water utility’s no-cash policy and finding that the utility had a legitimate governmental interest in protecting the funds it received in payment for water services where the implementation of the water utility’s policy followed a robbery and where the court found that the policy was rationally related to that interest).

96. No. 12-CV-3883, 2013 WL 5570062, at *13–15 (N.D. Ala. Oct. 9, 2013).

97. *Id.*

98. *Id.* at *4.

99. CHEMERINSKY, *supra* note 43; Raphael Holoszyk-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015) (“Rational-basis review, the most deferential form of scrutiny under the Equal Protection Clause, rarely invalidates legislation. Between the 1971 and 2014 Terms, the Supreme Court has held laws violative of equal protection under rational-basis scrutiny only seventeen times, out of over one hundred challenges analyzed under rational-basis scrutiny.”).

100. CHEMERINSKY, *supra* note 43; *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) (“The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’”).

101. CHEMERINSKY, *supra* note 43.

To move from a rational basis review to a strict scrutiny standard on legislation that disadvantages the poor, such as permitting retailers and other entities to implement cashless policies, the U.S. Supreme Court would likely have to recognize the poor as a suspect class. In determining whether a group should be considered a suspect class, a court will look at whether the person is a “discrete and insular minorit[y].”¹⁰² The Supreme Court considers several factors in determining whether a group should be classified as a suspect class.¹⁰³ First, the Court assesses whether the group has suffered historical discrimination.¹⁰⁴ Second, the Court evaluates whether the group “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.”¹⁰⁵ Third, the Court considers whether the group is politically powerless.¹⁰⁶ Fourth, the Court determines whether the classifying trait—here, wealth—is relevant to the group’s ability to contribute to society.¹⁰⁷ The poor meet the last criterion because a person’s wealth does not necessarily govern an individual’s ability to contribute to society.¹⁰⁸ Thus, this Note focuses its analysis on the first three factors.

1. *Historical Discrimination*

If a group has historically faced discrimination, the Court may find that they fall into a suspect classification.¹⁰⁹ However, the Court has

102. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

103. Maurice R. Dyson, *Rethinking Rodriguez After Citizens United: The Poor As a Suspect Class in High-Poverty Schools*, 24 GEO. J. ON POVERTY L. & POL’Y 1, 12–13 (2016).

104. *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973) (applying the suspect classification analysis to sex discrimination).

105. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that a challenge to a statute that distinguished parents, children, and siblings in determining eligibility for food stamps met the rational basis review and that parents, children, and siblings were not a suspect class for purposes of equal protection analysis).

106. *Id.*

107. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 333, 343 (2016).

108. *Id.* at 344.

109. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (outlining the “traditional

not set forth precise criteria for finding historic abuse such as the amount, type, or recentness of past discrimination.¹¹⁰ Without precise guidelines, courts have relied on comparing the discriminatory history of the group to the experiences of African Americans or women.¹¹¹

Impoverished persons have faced discrimination throughout American history, much of which continues today.¹¹² For instance, various laws throughout U.S. history have prohibited vagrancy.¹¹³ Laws, such as prohibitions against panhandling or restrictions on sleeping or bathing in public, have been used against those living in poverty.¹¹⁴

A report analyzing the laws in over a hundred cities and metropolitan areas throughout the United States found that in 2016 47% of cities prohibited sitting and lying down in public, 32% outlawed loitering citywide, and 6% restricted food sharing.¹¹⁵ Compared to a decade earlier, there were nearly twice as many citywide camping and loitering bans and more than twice as many bans against living in vehicles.¹¹⁶ People living in poor neighborhoods are more likely to be the target of police harassment, brutality, and killings than those in affluent areas.¹¹⁷ Although advocates for the homeless population have mounted challenges to anti-homeless laws by arguing that these laws violate the First,

indicia of suspectness,” which includes a history of purposeful unequal treatment).

110. J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 981 (1975).

111. Strauss, *supra* note 41, at 151.

112. *Id.* at 140.

113. Jennifer E. Watson, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 523 (2003) (“History reveals discrimination against homeless persons began in the fourteenth century; this discrimination continues to confront the homeless today.”).

114. See *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 353–56 (S.D.N.Y.), *vacated*, 903 F.2d 146 (2d Cir. 1990), for the historical treatment of begging.

115. Trevor Bach, *Will Fines and Jail Time Fix the Homelessness Crisis?*, U.S. NEWS (Oct. 7, 2019, 1:25 PM), <https://www.usnews.com/news/cities/articles/2019-10-07/us-cities-are-increasingly-cracking-down-on-homelessness>; NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 56 (2019) [hereinafter HOUSING NOT HANDCUFFS], <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/KB22-KCRZ>].

116. Bach, *supra* note 115.

117. Dyson, *supra* note 103, at 28.

Fourth, Eighth, and Fourteenth Amendments, only some of the challenges have been successful.¹¹⁸

Before the ratification of the Twenty-Fourth Amendment in 1964, poll taxes were used to disenfranchise poor voters.¹¹⁹ The Amendment prohibits both Congress and the states from conditioning the right to vote in federal elections on payment of a poll tax or other types of taxes.¹²⁰ Even today, voter identification laws are being used as a tool to disenfranchise poor voters.¹²¹

2. *Immutable Trait*

Members of a suspect class often share an immutable trait.¹²² However, the Court has not articulated a clear, definitive definition of immutability.¹²³ In *Frontiero v. Richardson*, the Court defined an immutable trait as a “characteristic determined solely by the accident of birth.”¹²⁴ Some courts have expanded the definition, and now immutability depends on whether the trait is difficult to change.¹²⁵ The trait may be difficult to change because it is out of a person’s

118. Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 *HARBINGER* 1, 4 (2015).

119. *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (upholding the constitutionality of Georgia’s requirement of the payment of a poll tax to vote in state elections), *overruled by Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

120. U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election . . . 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.”).

121. Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You’re Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html [https://perma.cc/7SB8-YRCX] (“[M]any election experts say that the process for obtaining a photo ID can be far more difficult than it looks for hundreds of thousands of people across the country who do not have the required photo identification cards. Those most likely to be affected are elderly citizens, African Americans, Hispanics and low-income residents.”).

122. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Examples of immutable traits are a person’s sex, race, or national origin. *Id.*

123. Strauss, *supra* note 41, at 162.

124. 411 U.S. at 688, 690–91 (finding that the differential treatment of male and female military personnel for purposes of determining dependent benefits was unconstitutional because “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny”).

125. Strauss, *supra* note 41, at 162.

control or because to change the trait would require too high of a cost.¹²⁶

The official poverty rate in 2018 was 11.8%.¹²⁷ The number of people in poverty in 2018 was 38.1 million.¹²⁸ Every year, the U.S. Census Bureau uses a set of dollar value thresholds that vary by family size and composition to determine who is in poverty.¹²⁹ In 2018, for example, the poverty threshold for a family of four was an annual income of \$26,324.¹³⁰

Although poverty is not a completely immutable trait, it is something one is born into and can be difficult to change.¹³¹ The likelihood of escaping poverty for a child born into impoverished conditions is low.¹³² Income mobility varies across the country, depending on where a child grows up.¹³³ Children in parts of the Midwest, the Northeast, and the West have greater chances of upward mobility.¹³⁴ However, the likelihood of escaping poverty for children in the South and portions of the Rust Belt is much lower.¹³⁵ For example, a child born in Atlanta, Georgia, or Charlotte, North Carolina, into a household making less than \$25,000 a year has only a 4% chance to move into the upper 20% of income strata over a lifetime.¹³⁶ A family's wealth is more likely to impact whether a

126. *Id.*

127. JESSICA SEMEGA ET AL., INCOME AND POVERTY IN THE UNITED STATES: 2018: U.S. CENSUS BUREAU 1 (2020), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/SD2E-WH9U>].

128. *Id.*

129. *Id.* at 49.

130. *Id.*

131. Christina Pazzanese, *The Costs of Inequality: Increasingly, It's the Rich and the Rest*, HARV. GAZETTE (Feb. 8, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-increasingly-its-the-rich-and-the-rest> [<https://perma.cc/8CGW-ST8K>].

132. *Id.*; Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html> [<https://perma.cc/V6RE-XDCY>] (“A project . . . found that 42 percent of American men raised in the bottom fifth of incomes stay there as adults. . . . Meanwhile, just 8 percent of American men at the bottom rose to the top fifth.”).

133. Pazzanese, *supra* note 131.

134. *Id.*

135. *Id.*

136. *Id.*

person can pursue an education or a high-paying job.¹³⁷ Those living in poverty often live in resource-poor communities with subpar schools, limited social connections, and limited opportunities to secure a higher education.¹³⁸

3. *Lack of Political Power*

In determining whether a suspect classification is warranted, the Court also reviews whether the group was powerless to protect themselves via the political process.¹³⁹ Two different approaches to measuring political power have emerged.¹⁴⁰ The first is the descriptive representation approach, which focuses on the extent to which the group's members occupy political offices.¹⁴¹ The second approach focuses on whether a group has benefited from favorable legislation or executive action.¹⁴²

From a descriptive representation approach, poor people are underrepresented in politics.¹⁴³ Though working-class jobs (defined as manual labor, service industry positions, and clerical jobs) make up more than half of the economy in the United States, politicians from the working-class make up less than 3% of the average state legislature.¹⁴⁴ On a national level, the average member of Congress spent less than 2% of their career in working-class positions.¹⁴⁵

137. BARADARAN, *supra* note 78, at 250.

138. *Id.*

139. Ross & Li, *supra* note 108, at 325; Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807, 1817 (2017) (“Justices ultimately justified the denial of suspect-class status to new groups in part on the basis . . . that such groups have sufficient political power to defend themselves in the political process. This determination, however, has been based on an unsubstantiated and undefended measure of political power that was designed to exclude all groups from special protection.” (footnote omitted)).

140. Ross & Li, *supra* note 108, at 326.

141. *Id.*

142. *Id.*

143. Nicholas Carnes, *Working-Class People Are Underrepresented in Politics. The Problem Isn't Voters*, VOX (Oct. 24, 2018, 8:00 AM), <https://www.vox.com/policy-and-politics/2018/10/24/18009856/working-class-income-inequality-randy-bryce-alexandria-ocasio-cortez> [<https://perma.cc/Q6K9-KPDL>].

144. *Id.*

145. *Id.* (“The exclusion of working-class people from American political institutions isn't a recent phenomenon.”); Nicholas Carnes, *Why Are So Few US Politicians from the Working Class?*, THE

From a favorable legislation approach, a stronger case can be made that the poor have political power, but it is uncertain whether the legislation is in response to political influence of the poor or for other reasons.¹⁴⁶ There are several federal and state laws and programs that are targeted at assisting low-income residents.¹⁴⁷ The Supplemental Nutrition Assistance Program (SNAP) provides food-purchasing assistance to low-income people.¹⁴⁸ Several programs assist low-income children and families, such as Head Start, which provides early childhood education, health, and nutrition services.¹⁴⁹ More recently, the expansion of Medicaid and increased minimum wage across several states work to help lower-income people.¹⁵⁰ On the other hand, as discussed *supra*, state and local governments continue to pass legislation targeted at homeless people and lower-income residents.¹⁵¹

Participation in the political process, particularly the ability to vote, is also limited for the poor.¹⁵² At least twenty-four states have implemented laws aimed at restricting voting since 2010.¹⁵³ Several

GUARDIAN (Oct. 4, 2018, 5:00 AM), <https://www.theguardian.com/us-news/commentisfree/2018/oct/04/few-us-politicians-working-class> [<https://perma.cc/Z6TG-LFK3>] (“In nationwide surveys of people campaigning for state legislatures in 2012 and 2014, candidates from working-class jobs made up just 4% of both Republican and Democratic candidates.”).

146. Ross & Li, *supra* note 108, at 328 (“Recent social science studies of political inequality provide strong evidence that the poor lack political power, as defined by elected officials’ and legislatures’ responsiveness to the group’s preferences on an array of social, economic, and foreign policy issues, calling into question the Supreme Court’s emphasis on the passage of favorable legislation.”).

147. *Id.*

148. See generally *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP’T AGRIC.: FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> [<https://perma.cc/C5B7-JAYY>].

149. *Head Start Services*, U.S. DEP’T HEALTH & HUM. SERVS.: ADMIN. FOR CHILD. & FAMS. (Nov. 3, 2020), <https://www.acf.hhs.gov/ohs/about/head-start> [<https://perma.cc/G8SY-XPZC>].

150. Benjamin D. Sommers & Donald Oellerich, *The Poverty-Reducing Effect of Medicaid*, 32 J. HEALTH ECON. 816, 829 (2013) (“Medicaid and [the Children’s Health Insurance Program] play a significant role in poverty reduction for millions of Americans, in all age groups. Beyond the program’s presumed primary benefit of improved access to care and health, . . . Medicaid has significant poverty reducing effects of a similar order of magnitude as other dedicated anti-poverty government programs.”).

151. HOUSING NOT HANDCUFFS, *supra* note 115, at 77.

152. Jordan Malter, *Why Poor People Still Aren’t Voting*, CNN BUSINESS (Aug. 5, 2015, 10:02 PM), <https://money.cnn.com/2015/08/05/news/economy/poor-people-voting-rights/> [<https://perma.cc/HRX9-EPS7>].

153. Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities, Journalist Says*,

states have enacted stricter voter identification laws, which on the face appear to be neutral, but poor people are more likely to lack the identification necessary to vote.¹⁵⁴ The U.S. Supreme Court has been reluctant to invalidate voter identification laws, reasoning that the state's interest in preventing voter fraud outweighs the burdens placed on voters.¹⁵⁵ Other factors, such as poll closings or reductions in election staff, have led to other barriers such as long lines and limited polling hours.¹⁵⁶ These barriers have a disproportionate impact on the poor who face insecure employment or inflexible work schedules.¹⁵⁷ In the 2018 election, the most common reason cited for not voting by those with a family income of less than \$20,000 was “[t]oo busy, conflicting schedule.”¹⁵⁸ As a result, the poor's participation in voting is diminished, and the poor would likely be considered a group with little to no political power.¹⁵⁹

III. PROPOSAL

There are two possible approaches to protect the impoverished and their ability to use cash in financial transactions. First, the U.S. Supreme Court should classify poverty as a suspect class and apply strict scrutiny to any legislation that impacts their ability to

NPR (Oct. 23, 2018, 2:04 PM), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says> [<https://perma.cc/TVP9-B9RJ>].

154. *Id.*

155. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008). In his dissent, Justice Souter pointed out that an estimated 43,000 Indiana citizens lacked the proper identification to be able to vote, and it would require spending anywhere from \$3 to \$100 to obtain the requisite documentation, in addition to travel costs associated with completing the process. *Id.* at 215–19 (Souter, J., dissenting).

156. Anna North, *Why Long Lines at Polling Places Are a Voting Rights Issue*, VOX (Nov. 6, 2018, 4:10 PM), <https://www.vox.com/2018/11/6/18068506/midterm-election-voting-lines-new-york-georgia> (“In urban counties where a majority of voters are people of color, voters lost an average of seven polling places and more than 200 poll workers, according to *USA Today*. Meanwhile, in counties where more than 90 percent of the population was white, voters lost just two locations and two workers on average during that time period.”).

157. *Id.* (“[C]losures have a disproportionate impact on poor voters or those with insecure employment or inflexible work schedules, many of whom are people of color.”).

158. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2018, at tbl.10 (2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> [<https://perma.cc/UV24-FACN>].

159. North, *supra* note 156.

participate in the marketplace freely.¹⁶⁰ Second, Congress should enact federal legislation to prohibit cashless policies to put a stop to the practice because cashless policies discriminate against those who do not have access to banking and financial institutions.¹⁶¹

A. *Classifying Poverty As a Suspect Class*

The U.S. Supreme Court's current laissez-faire review of legislation impacting the impoverished has left little protection for those who need it.¹⁶² The lack of strict scrutiny has allowed a climate of scapegoating, stereotyping, and stigmatization against the poor to continue.¹⁶³ Some argue that government policies, such as criminal justice policies, decisions about funding for education, and policies related to housing, contribute to the intensification and persistence of poverty.¹⁶⁴

Some scholars argue that the judiciary is the most effective branch for making decisions regarding fundamental rights, including the rights of the poor.¹⁶⁵ Courts are not hindered by the same time constraints and media influence as the legislature and can deliberate on complex issues.¹⁶⁶ Courts are also more likely to have expertise in deciding fundamental rights questions.¹⁶⁷ With the protection of

160. Rebecca Bellan, *As More Cities Ban Cashless Businesses, New York Wants to Follow*, BLOOMBERG CITYLAB (Mar. 6, 2019, 1:25 PM), <https://www.citylab.com/equity/2019/03/cashless-cash-free-ban-bill-new-york-retail-discrimination/584203> [<https://perma.cc/2WTL-NYRQ>] (“Cashless institutions encourage a FinTech Jim Crow by restricting the places where people of color can shop, eat, and receive basic services . . .” (quoting Edgard Laborde, deputy political director of the Retail Wholesale Department Store Union)).

161. Kim, *supra* note 17 (“Barriers to banking and technology may deny portions of the population access to basic goods and services . . . Others may not have the access, finances or skills to acquire formal banking services or a smartphone, or simply do not like banks.”).

162. Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 UNIV. PA. L. REV. 1277, 1285 (1993).

163. *Id.*

164. Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 45 (1987); Michael Tanner, *How the Government Helps Keep People Poor*, N.Y. POST, <https://nypost.com/2018/12/05/how-the-government-helps-keep-people-poor> [<https://perma.cc/FP3G-K9CF>] (Dec. 5, 2018, 7:46 PM).

165. DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* 119 (2007).

166. *Id.*

167. *Id.* at 122–23.

lifetime tenure, the judicial branch does not face the same pressures as legislatures to make decisions favoring the majority opinion and is thus able to protect the interests of all citizens.¹⁶⁸

Once the Court establishes the poor as a suspect classification, any government classification included in legislation or related to a state action that disfavors the poor may be challenged on equal protection grounds under the Fourteenth Amendment.¹⁶⁹ The Government would then carry the burden of showing that the classification is necessary and narrowly tailored to promote a compelling interest of the State.¹⁷⁰ A change in the classification of the poor as a suspect class must come from the judicial system because the classification hinges on judicial interpretation of the Constitution.¹⁷¹

Despite the ability to recognize the poor as a suspect class, the U.S. Supreme Court is not likely to do so for a variety of reasons.¹⁷² Since the 1970s, the Court has been reluctant to apply any form of heightened scrutiny to wealth discrimination cases.¹⁷³ In fact, since the Court announced a standard for determining which classes are suspect under the Equal Protection Clause, the Court has not deemed a new class as suspect.¹⁷⁴ The Court declined to extend the suspect classification to groups such as the elderly, the disabled, and the poor.¹⁷⁵

168. *Id.* at 124–25.

169. Dyson, *supra* note 103, at 8.

170. *Id.*

171. CHEMERINSKY, *supra* note 43, at 586 (“In a very famous footnote in *United States v. Carolene Products Co.*, the Supreme Court articulated the idea that different constitutional claims would be subjected to varying levels of review.”).

172. Ross, *supra* note 139, at 1815.

173. *Id.* at 1814 (“Many legal scholars claim that the suspect-class doctrine is dead. It has been over forty years since the Court recognized a new suspect class, a determination that triggers heightened scrutiny of laws that discriminate against the class and creates a presumption of unconstitutionality for those laws.”).

174. Ross & Li, *supra* note 108, at 325; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004) (“The Court did not articulate detailed indicia for discerning which classifications should fill this set until the early 1970s—decades after it first referred to race as a suspect classification. Almost immediately, the ‘set’ closed when a majority of the Court accorded sex-based classifications quasi-suspect status. It has not expanded since.” (footnotes omitted)).

175. Goldberg, *supra* note 174; Ross, *supra* note 139, at 1814–15 (“[T]he Supreme Court has denied or avoided deciding claims of entitlement to suspect-class protection by the poor, the elderly, the disabled, and the LGBTQ community.”).

Although the Court's reasoning is unknown, scholars have hypothesized several reasons why the Court may be hesitant to extend suspect classifications. First, the Court may be reluctant to extend special protection to too many groups.¹⁷⁶ One fear is that the Court may intervene too frequently in the political process and require even more intervention.¹⁷⁷ Judges are reluctant to second-guess decisions made by the legislatures when it comes to economic and social policy choices.¹⁷⁸

Second, the Court may have embraced the originalist view of the Fourteenth Amendment and intended only to protect African Americans.¹⁷⁹ Under this interpretation, no other groups would be entitled to protection under the Equal Protection Clause.¹⁸⁰ Supporters of the originalist view argue that the Court has used the Fourteenth Amendment to assume power under the guise of constitutional interpretation, which was not the original intention.¹⁸¹

Third, there may be a fear that protecting the poor as a suspect class may have further implications, such as creating a constitutional right to government benefits like welfare, food, shelter, or medical

176. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). In his dissent in *Sugarman*, Justice Rehnquist expressed concern that the classification of minorities would become too broad:

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority."

Id.

177. Ross, *supra* note 139, at 1813.

178. Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 *DRAKE L. REV.* 1023, 1033 (2012); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

179. Ross, *supra* note 139, at 1815; CHEMERINSKY, *supra* note 43, at 752–53 ("[T]he initial Supreme Court decisions construing the [E]qual [P]rotection [C]lause suggested that it could be used only to protect [B]lacks.").

180. Ross, *supra* note 139, at 1815.

181. Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 *NW. U. L. REV.* 253, 264 (2001).

care.¹⁸² If the Court treats wealth as a suspect class, lower courts will adhere to precedent and will scrutinize laws that discriminate against the group in other contexts.¹⁸³ The broad application of the suspect classification to other contexts may deter the Court from acting and providing special judicial protection to the poor.¹⁸⁴ The Court may also be reluctant to overrule precedent with respect to extending suspect classification to the poor.¹⁸⁵ Despite the unlikelihood of the Court recognizing the poor as a suspect class, the Court should rectify the past decisions and provide the poor greater constitutional protection.

B. Enacting Federal Legislation

Even if the U.S. Supreme Court refuses to recognize the poor as a suspect class, Congress should enact federal legislation targeted at prohibiting cashless retailers under the Commerce Clause power—Congress’s power to regulate interstate commerce.¹⁸⁶ Federal legislation enacted under Congress’s Commerce Clause power would restrict private businesses’ abilities to establish cashless policies but would not limit such restrictions to federal and state actions.

Federal legislation is preferable to address the problem to ensure consistency and alleviate the need for state and local governments to enact legislation. Congress should recognize that allowing retailers to establish no-cash policies restricts the ability of consumers who are unbanked or underbanked from participating fully in the economy.¹⁸⁷

182. CHEMERINSKY, *supra* note 43.

183. Ross, *supra* note 139, at 1835.

184. *Id.*

185. Ross & Li, *supra* note 108, at 342 (“In the early 1970s, the Court decided the case of *San Antonio Independent School District v. Rodriguez*, which would serve as the foundation for the Court’s eventual denial of suspect class status to the poor. The irony is that while the Court would later cite *Rodriguez* to support its denial of suspect class status to the poor, the Court never actually decided the question in the case.” (footnotes omitted)).

186. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

187. Bourke et al., *supra* note 12 (“Cash made up nearly 40 percent of in-person transactions in 2017, according to the Federal Reserve, and, although its usage continues to decline, cash is still the most widely used payment type.”).

The federal legislation would help impoverished consumers preserve their freedom of consumer choice.¹⁸⁸

To effectively preserve consumer choice, federal legislation should incorporate several key terms already enacted or proposed by state and local legislators. First, there should be an overall ban on refusing to accept cash with a limited number of exceptions.¹⁸⁹ The primary exception should be to exempt online retailers and transactions completed over the telephone or through the mail. Ideally, the legislation should mirror Rhode Island’s cash payment bill, which simply states: “All retail establishments shall accept legal tender currency when offered as payment. Provided, the provisions of this section shall not apply to online purchases or sales made over the internet.”¹⁹⁰ The legislation should focus on brick-and-mortar retailers, defined as any place of business operating at a fixed, permanent physical premises.¹⁹¹

Second, retailers should be prohibited from posting notices stating that cash is not accepted or discouraging potential customers from using cash during the transaction.¹⁹² Even if the retailer ultimately does accept cash, a sign discouraging the use of cash defeats the purpose of the cashless policy prohibition. Third, retailers should be prohibited from charging higher prices to those customers who choose to pay with cash.¹⁹³ Although charging a higher fee for paying cash is not a typical practice currently, it could become an issue in the future as the cashless movement grows if a retailer is attempting

188. *Id.* (“Millions of consumers rely on cash to make purchases, either by necessity or by choice.”).

189. *See, e.g.*, PHILA., PA., CODE § 9-1132(1) (2019) (“A person selling or offering for sale goods or services at retail is prohibited from refusing to accept cash as a form of payment to purchase goods or services.”).

190. 6 R.I. GEN. LAWS § 6-13.1-30 (2019).

191. S.F., CAL., POLICE CODE art. 55, § 5502 (2019) (“‘Brick-and-Mortar Business’ means any place of business operating at a fixed, permanent physical premises. Brick-and-Mortar Business does not include any business not operating at a physical premises in San Francisco (one example being a business operating in the City exclusively via the Internet without any physical premises in the City) . . .”).

192. PHILA., PA., CODE § 9-1132(1)(b) (“A person selling or offering for sale goods or services at retail shall not . . . [p]ost signs on the premises that cash payment is not accepted . . .”).

193. *Id.* § 9-1132(1)(c) (“A person selling or offering for sale goods or services at retail shall not . . . [c]harge a higher price to customers who pay cash than they would pay using any other form of payment.”).

to discourage the use of cash. Some retailers add surcharges for customers using a credit card for purchases.¹⁹⁴ Although retailers have the right to add surcharges to transactions when a customer is paying with a credit card, ten states have enacted regulations prohibiting retailers from imposing a surcharge on the buyer for using a credit card in lieu of payment by cash.¹⁹⁵

Federal legislation, rather than state laws or local ordinances, will overcome jurisdictional issues that prevent state and local legislation from reaching certain businesses. For example, the Airline Deregulation Act includes language that makes airlines' policy decisions related to a price, route, or service immune to state laws.¹⁹⁶ A federally enacted law will also trump any state and local ordinances that contradict the federal legislation and ensure consumers, particularly poor consumers, are treated consistently across the country.¹⁹⁷

The Federal Trade Commission (FTC) should primarily handle enforcement of the federal statute.¹⁹⁸ The FTC is a bipartisan federal agency with a dual mission of protecting consumers and promoting competition.¹⁹⁹ The FTC is divided into three bureaus: the Bureau of

194. Justin Pritchard, *Credit Card Surcharges: Why It Can Cost More to Use Credit*, THE BALANCE (Sept. 16, 2020), <https://www.thebalance.com/credit-card-surcharges-315423> [<https://perma.cc/A7S8-D2UL>] (“If merchants decide to use credit card surcharges, they must: [c]learly disclose the fact that there is a surcharge to you *before* the transaction[,] [d]isplay the credit card surcharge on the receipt[,] [and] [k]eep surcharges below 4% of the transaction, or the amount of fees the merchant pays to the credit card companies, whichever is less.” (emphasis added)).

195. See CAL CIV. CODE § 1748.1(a) (West 2019); COLO. REV. STAT. § 5-2-212(1) (2019); CONN. GEN. STAT. § 42-133ff(a) (2019); FLA. STAT. § 501.0117 (2018); KAN. STAT. ANN. § 16a-2-403 (2010); MASS. GEN. LAWS ch. 140D, § 28A (2015); ME. REV. STAT. ANN. tit. 9-A, § 8-509 (2011); N.Y. GEN. BUS. LAW § 518 (McKinney 2018); OKLA. STAT. tit. 14A, § 2-417 (2019); TEX. BUS. & COM. CODE ANN. § 604A.0021 (West 2017).

196. Airline Deregulation Act, 49 U.S.C. § 41713(b) (“Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least [two] States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”).

197. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

198. *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/AB3Z-NY49>] (“The Federal Trade Commission was created on September 26, 1914, when President Woodrow Wilson signed the Federal Trade Commission Act into law.”).

199. *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do>

Consumer Protection, the Bureau of Competition, and the Bureau of Economics.²⁰⁰ The cashless ban would fall into similar consumer protection statutes that the FTC's Bureau of Consumer Protection currently enforces, such as the Fair Debt Collection Practices Act, which prohibits deceptive, unfair, and abusive debt collection practices.²⁰¹

FTC investigations can be initiated in several ways.²⁰² An investigation may stem from a consumer complaint made directly to the FTC, from a business alerting the FTC to a practice of one of their competitors, from a member of Congress forwarding the complaint from a constituent, or from the direct observations of FTC employees during their interactions with a business.²⁰³ Following an investigation, if the FTC has "reason to believe" that a law has been violated, the FTC may initiate an enforcement action through either an administrative or judicial process.²⁰⁴

Penalties for non-compliance should mirror New Jersey's law, which prohibits a retailer from requiring a buyer to pay using credit or to prohibit cash as payment to purchase the goods or services.²⁰⁵ A person in violation of the law would be subject to a civil penalty of up to \$2,500 for a first offense and up to \$5,000 for a second offense.²⁰⁶ These penalties would make most businesses think twice before violating the law because the cost of multiple violations would far outweigh the costs associated with facilitating cash transactions.

[<https://perma.cc/96U3-LKAP>].

200. CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW & POLICY* 90 (2016); *see also Federal Trade Commission*, BRITANNICA, <https://www.britannica.com/topic/Federal-Trade-Commission> [<https://perma.cc/5C9T-CJ62>].

201. *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes> [<https://perma.cc/2Q6D-KD4B>] ("The Commission has enforcement or administrative responsibilities under more than 70 laws."); 15 U.S.C. §§ 1692–1692p.

202. 16 C.F.R. § 2.2 ("A complaint or request for Commission action may be submitted via the Commission's web-based complaint site . . . by a telephone call . . . or by a signed statement setting forth the alleged violation of law with such supporting information as is available . . .").

203. HOOFNAGLE, *supra* note 200, at 103.

204. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/8EU3-35S2>].

205. N.J. STAT. ANN. § 56:8-2.33(a) (2019).

206. *Id.*

The CASH Act, one of the bills recently proposed in Congress, closely aligns with the suggested provisions. The CASH Act states that “[i]t shall be unlawful for any physical retail establishment to refuse to accept legal tender as payment for any products or services offered for sale.”²⁰⁷ Online and telephone transactions are exempt from the compliance in the proposed bill. The CASH Act designates enforcement to the FTC and classifies the practice as an “unfair or deceptive act, or practice,” and allows for the FTC to promulgate regulations to implement enforcement of the bill.²⁰⁸

CONCLUSION

If the current trend of businesses instituting cashless policies gains momentum, the impact on the poor will be devastating.²⁰⁹ Many impoverished people are unbanked and underbanked and lack access to banking and financial institutions.²¹⁰ Without judicial and legislative intervention, those lacking access to banks will be shut out of the economy. Judicial intervention in the form of recognition of the poor as a suspect class is necessary to protect the poor.²¹¹ A suspect classification will protect the poor from state and local laws that limit their ability to transact with the government and government agencies.²¹² In addition, federal legislation is necessary to ensure that private businesses engaged in interstate commerce are also prohibited from implementing no-cash policies.²¹³ Congress should proactively ensure the poor’s protection and ability to participate in the marketplace.

207. H.R. 2630, 116th Cong. (2019).

208. *Id.*

209. Bellafante, *supra* note 12.

210. BARADARAN, *supra* note 15, at 139.

211. Loffredo, *supra* note 162.

212. Dyson, *supra* note 103, at 8.

213. Kim, *supra* note 17.