

# ARTICLES

## Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It

RICHARD L. HASEN\* & LEAH M. LITMAN\*\*

*This Article, prepared for a Georgetown Law Journal symposium on the Nineteenth Amendment's one-hundred-year anniversary, explores and defends a "thick" conception of the Nineteenth Amendment right to vote and Congress's power to enforce it. A "thin" conception of the Nineteenth Amendment maintains that the Amendment merely prohibits states from enacting laws that prohibit women from voting once the state decides to hold an election. And a "thin" conception of Congress's power to enforce the Nineteenth Amendment maintains that Congress may only supply remedies for official acts that violate the Amendment's substantive guarantees.*

*This Article argues the Nineteenth Amendment does more. A "thick" understanding of the Nineteenth Amendment's substantive right is consistent with the Amendment's text and history, as well as with a synthetic interpretation of the Constitution and its expanding guarantees of voting rights. The thick understanding of the Nineteenth Amendment would allow voting-rights plaintiffs to attack restrictive voting laws burdening women—especially those laws burdening young women of color, who are also guaranteed nondiscrimination in voting on the basis of age and race. A thick understanding of Congress's power to enforce the Nineteenth Amendment would give Congress the ability to pass laws protecting women from voter discrimination and promoting their political equality. The thick understanding offers a way to redeem the Amendment from some of its racist origins and entanglement with the sexism that limited the Amendment's reach. It also reinforces the democratic legitimacy of the Constitution. Nonetheless, the current Court is unlikely to embrace a thick understanding of the Nineteenth Amendment.*

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\* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. © 2020, Richard L. Hasen & Leah M. Litman.

\*\* Assistant Professor of Law, University of Michigan Law School. The authors thank Erwin Chemerinsky, Ellen DuBois, Steve Kolbert, Paula Monopoli, Neil Siegel, Reva Siegel, and Adam Winkler for very helpful comments, Hannah Bartlett (UC Irvine, class of 2021) and Emma Rosen (University of Michigan, class of 2021) for excellent research assistance, Christina Tsou and Dianna Sahhar for wonderful research assistance, and Judge M. Margaret McKeown and the editors of *The Georgetown Law Journal* for inviting us to contribute this Article to the 19th Amendment Special Edition.

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## INTRODUCTION

"The Nineteenth Amendment merely gives the vote to women."<sup>1</sup> Justice John Marshall Harlan II wrote this simultaneous overstatement and understatement in his 1963 dissent in an early one-person, one-vote case, *Gray v. Sanders*. Justice Harlan's claim was an overstatement because nothing in the Nineteenth Amendment, which prohibits denial or abridgement of the right to vote "on account of sex,"<sup>2</sup> enfranchised African-American women. Despite the Fifteenth

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1. *Gray v. Sanders*, 372 U.S. 368, 386 (1963) (Harlan, J., dissenting).

2. U.S. CONST. amend. XIX.

Amendment's bar on racial discrimination in voting, African-American women continued to face disenfranchisement, especially in the American South, until after the passage of the Voting Rights Act of 1965.<sup>3</sup> Indeed, the Nineteenth Amendment did not give any women—or men—the right to vote in elections; instead, it just barred discrimination in voting once a state agreed to hold an election.<sup>4</sup>

Justice Harlan's observation was an understatement because there was nothing "mere" about the significance of the Nineteenth Amendment's passage. Its 1920 ratification was the numerically largest single act of voter enfranchisement since the American founding, roughly doubling the voting population from only eligible men to eligible men plus women.<sup>5</sup>

The Court decided *Gray* just a year after its decision in *Baker v. Carr*, which declared justiciable one-person, one-vote challenges under the Fourteenth Amendment.<sup>6</sup> The year after *Gray*, the Court struck down unequally apportioned state legislative districts in *Reynolds v. Sims*<sup>7</sup> and unequally apportioned congressional districts in *Wesberry v. Sanders*.<sup>8</sup> At issue in *Gray* was Georgia's weighted voting system for choosing U.S. Senators and statewide officeholders.<sup>9</sup> The

3. See ROSALYN TERBERG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920*, at 1–2 (1998) ("For black women, however, the struggle to maintain the vote continued for two generations after the passage of the woman suffrage amendment, as most were robbed of their ballots by the success of white political supremacy in the South."); Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 *DUKE J. GENDER L. & POL'Y* 235, 241–42 (2020). Indeed, it was not just African-American women who remained disenfranchised:

Women who could not pay a poll tax, pass a literacy test, or a "moral character" evaluation; American women who lost their citizenship by marrying a non-citizen man and women from immigrant groups barred from naturalization; and many American Indian women, via citizenship denials and other avenues, were all still easily and legally excluded by state voter disqualifications after the Nineteenth Amendment took effect.

CORRINE M. MCCONNAUGHY, *THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT* 251–52 (2013).

4. *Cf. Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. . . . History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors." (citations omitted)).

5. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 175 (rev. ed. 2009) ("The electorate nearly doubled in size between 1910 and 1920, but voting patterns and partisan alignments were little affected."); see also AILEEN S. KRADITOR, *THE IDEAS OF THE WOMEN SUFFRAGE MOVEMENT: 1890–1920*, at 29–30 (W.W. Norton & Co. 1981) (1965) (explaining argument against enfranchising women who were also members of an undesirable class, political persuasion, or race: "Doubling the electorate would increase the preponderance of 'undesirable' voters.").

6. See 369 U.S. 186, 204 (1962).

7. 377 U.S. 533, 581 (1964).

8. 376 U.S. 1, 18 (1964).

9. *Gray v. Sanders*, 372 U.S. 368, 372 (1963).

“county unit” voting system gave greater voting power to voters in rural counties compared to urban counties and to voters in smaller rural counties compared to larger rural counties.<sup>10</sup> The Court in *Gray* struck down that system as an equal protection violation.<sup>11</sup>

Although *Gray* decided the constitutional question under the Fourteenth Amendment, Justice Douglas’s majority opinion also relied upon a nascent thick understanding of the Nineteenth Amendment, situating it within the greater struggle to expand voting rights in the United States:

The Fifteenth Amendment prohibits a State from denying or abridging a Negro’s right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?<sup>12</sup>

Near the end of his majority opinion, Justice Douglas wrote: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”<sup>13</sup> The Court repeated this language in *Reynolds*.<sup>14</sup>

A similarly thick conception of the Nineteenth Amendment, with an emphasis on broad congressional enforcement power, appears in a provocative, short footnote in Justice Ruth Bader Ginsburg’s dissent in the 2013 case *Shelby County v. Holder*.<sup>15</sup> In *Shelby County*, the Supreme Court struck down the coverage formula in section 4(b) of the Voting Rights Act, which set forth the jurisdictions that had to submit their voting changes for federal approval.<sup>16</sup> The Court majority held that because Congress had not updated the coverage formula, the law that Congress had extended repeatedly (and that the Supreme Court had upheld repeatedly<sup>17</sup>) now violated the “equal sovereignty” of states.<sup>18</sup> The Court

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10. *Id.* at 372–73.

11. *Id.* at 381.

12. *Id.* at 379 (citation omitted).

13. *Id.* at 381.

14. *Reynolds v. Sims*, 377 U.S. 533, 557–58 (1964).

15. 570 U.S. 529 (2013); see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 728–29 (2014) (describing the footnote as offering a “muscular and integrated vision of the five constitutional amendments mentioning the right to vote and, coupled with its view of the Elections Clause in Article 4, [viewing] the Constitution [as] giv[ing] Congress broad power to protect the franchise and democratic processes against state encroachment”).

16. *Shelby County*, 570 U.S. at 556–57.

17. See *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999); *City of Rome v. United States*, 446 U.S. 156, 187 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

18. *Shelby County*, 570 U.S. at 544.

determined that this part of the Voting Rights Act was no longer within Congress's power to enforce the Fourteenth or Fifteenth Amendments.<sup>19</sup>

Justice Ginsburg disagreed, finding ample congressional power in the Fifteenth Amendment.<sup>20</sup> She included the following footnote, expressing the view that the constitutional amendments mentioning the "right to vote" gave Congress broad power to protect voting rights:

The Constitution uses the words "right to vote" in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections.<sup>21</sup>

In contrast to this thick conception of the Fifteenth Amendment, Justice Harlan's *Gray* dissent offered a "thin" conception of the Nineteenth Amendment's right to vote.<sup>22</sup> Rather than reading the constitutional provisions concerning the right to vote to reinforce one another, Justice Harlan viewed each of the provisions in isolation, so that the Nineteenth Amendment's enfranchisement of women had nothing to do with the enfranchisement of African-Americans in the Fifteenth Amendment or the right to equal protection in the Fourteenth Amendment. This was the context in which Justice Harlan recognized the "mere[]" enfranchisement of women; he thought that their enfranchisement had nothing to say about how courts should interpret voting rights under the Fourteenth Amendment.<sup>23</sup>

Justice Harlan returned to this theme in his *Reynolds v. Sims* dissent, arguing that if the Fourteenth Amendment really protected the right to vote, the Fifteenth or Nineteenth Amendments would have been unnecessary.<sup>24</sup> Each amendment did its work alone.<sup>25</sup>

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19. *Id.* at 557. For a critique of the Court's use of the principle, see generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

20. *Shelby County*, 570 U.S. at 567 (Ginsburg, J., dissenting).

21. *Id.* at 567 n.2.

22. See *Gray v. Sanders*, 372 U.S. 368, 382 (1963) (Harlan, J., dissenting). Reva Siegel uses the term "thin" in a different way: to refer to arguments that the Nineteenth Amendment affected *only* voting rights. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 947, 1022 (2002). "Modern sex discrimination doctrine is built on this 'thin' conception of the Nineteenth Amendment — on the assumption that the Nineteenth Amendment is a nondiscrimination rule governing voting that has no bearing on questions of equal citizenship for women outside the franchise." *Id.*

23. *Gray*, 372 U.S. at 385–86 (Harlan, J., dissenting) ("Certainly no support for this equal protection doctrine can be drawn from the Fifteenth, Seventeenth, or Nineteenth Amendment.").

24. 377 U.S. 533, 612 (1964) (Harlan, J., dissenting).

25. *Id.* at 611–12 ("[U]nless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself unprotected, the conclusion is

Although Justice Harlan in his *Gray* and *Reynolds* dissents did not mention it, the Court's 1937 opinion in *Breedlove v. Suttles* provides an even thinner view of the Nineteenth Amendment.<sup>26</sup> Justice Harlan had offered a gender-neutral, formalist view of the Nineteenth Amendment that prohibited only laws that explicitly discriminate in voting on the basis of sex.<sup>27</sup> The Court in *Breedlove* viewed the Nineteenth Amendment as doing even less: The Court's sexist interpretation of the Nineteenth Amendment allowed for de jure gender discrimination in voting rules.<sup>28</sup>

In *Breedlove*, the Court upheld a Georgia election law that imposed a poll tax on men and women but exempted women who declined to register to vote.<sup>29</sup> As we will show,<sup>30</sup> *Breedlove*, the only Supreme Court case to directly decide whether a state law violated the Nineteenth Amendment, drips with sexism.<sup>31</sup> In 1966, the Court in *Harper v. Virginia State Board of Elections* overruled the portion of *Breedlove* that rejected an equal protection challenge to state poll taxes.<sup>32</sup> As Justice Black pointed out in dissent, however, the *Harper* majority did not overrule the part of *Breedlove* approving gender discrimination in the application of the poll tax.<sup>33</sup> The Court has never returned to the issue, leaving *Breedlove* to be at least nominally good law on the meaning of the Nineteenth Amendment right to vote.

In this Article, we explore what it would mean for Congress and the Supreme Court to take seriously a thick conception of the Nineteenth Amendment substantive right and Congress's enforcement power as part of a constellation of amendments expanding the right to vote. Part I explains where *Breedlove* and Justice Harlan's dissents in *Gray* and *Reynolds* went wrong in adopting a thin reading of the Nineteenth Amendment's voting right, and offers instead a synthetic and intersectional thick reading. Part II sets forth the kinds of voting rights reforms that Congress could pass pursuant to a thick understanding of its Nineteenth Amendment enforcement power, consistent with Justice Ginsburg's thick reading

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inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.”).

26. See 302 U.S. 277 (1937), overruled by *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1996).

27. See *Gray*, 372 U.S. at 385–86.

28. See *Breedlove*, 302 U.S. at 283–84.

29. *Id.*

30. See *infra* Part II.

31. For a rare modern case discussing Nineteenth Amendment voting rights, see *Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977). The court treated the Amendment as coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 8.

32. 383 U.S. 663, 669 (1966).

33. *Id.* at 673 (Black, J., dissenting) (“The *Breedlove* case upheld a poll tax which was imposed on men but was not equally imposed on women and minors, and the Court today does not overrule that part of *Breedlove* which approved those discriminatory provisions.”); see also *id.* at 669 (majority opinion) (overruling *Breedlove* only to “that extent” that it upheld a poll tax against equal protection challenge). Justice Harlan, joined by Justice Stewart, separately dissented in *Harper*. *Id.* at 680 (Harlan, J., dissenting); see also Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 73 NOTRE DAME L. REV. 839, 887 (1998) (“The issue of gender discrimination in *Breedlove* was left intact.”).

of Congress's power to protect voting rights. This Part considers legislation related to voting power, political equality, and political economy. Finally, Part III returns to reality, explaining the likelihood that the current Supreme Court would reject the thick reading of Congress's Nineteenth Amendment enforcement power by relying on state action and congruence and proportionality requirements, a narrow interpretation of "on account of" sex, and external constitutional constraints.

### I. JUSTIFYING A THICK READING OF THE NINETEENTH AMENDMENT

Given the paucity of judicial interpretations and scholarly writings on the scope of the Nineteenth Amendment, even one hundred years after its ratification, we believe that its interpretation remains up for grabs in important respects. Interpretations of the Amendment's scope fall on a continuum from thin readings (which maintain the Amendment does very little) to thick readings (which interpret the Nineteenth Amendment to do more). Thin readings include the view that the Nineteenth Amendment provides little substantive relief from gender inequality in voting (as in *Breedlove*) and the gender-neutral, formalist view that Justice Harlan embraced in his *Harper* dissent. Thick readings include Justice Ginsburg's view that the Amendment, together with other constitutional provisions, secures more substantial voting rights under the Constitution.

In this Part we advocate a thick interpretation of the Nineteenth Amendment's substantive right. This reading recognizes that the Constitution protects against the perpetuation of political-power disparities on the basis of gender. The thick reading is gender-conscious (not gender-neutral), and it recognizes that the main purpose of the Amendment was originally and should continue to be read as protective against the subordination of women in U.S. politics. In this way, it rejects both *Breedlove*'s sexism and Justice Harlan's formalism. The text and history of the Nineteenth Amendment and the broader struggle over voting rights and women's equality for the last 150 years support this thick reading.

The thick reading also protects voting rights holistically rather than in a piecemeal fashion. In other words, the Constitution's voting rights protections should be read broadly and synergistically rather than discretely focused on whether a voting restriction burdens age, gender, or race. Discrimination that affects groups of people who fall within a number of constitutionally protected classes (such as race, gender, and age) should be viewed as especially suspect, even if restrictive voting laws would fail if they had a disparate impact on people in just one of these categories.

Further, as we explain in Part II, a thick reading of the Nineteenth Amendment includes a muscular interpretation of congressional power to protect voting rights. Congress can go beyond the Elections Clause (which gives it power only over federal elections and voting) and the Fourteenth Amendment in passing laws assuring greater political equality across genders and across other classes of people.

## A. THIN

To believers in the promise of a strong Nineteenth Amendment, *Breedlove v. Suttles*<sup>34</sup> is a profound disappointment. The 1937 *Breedlove* opinion offers the Supreme Court's most extensive application of the scope of the Amendment—although it is only one paragraph long<sup>35</sup>—and the opinion sadly reflects the sexism of the day. The case offers the thinnest possible version of the Nineteenth Amendment, even thinner than what Justice Harlan offered in his *Gray and Reynolds* dissents, and future courts and constitutional scholars should reject it.<sup>36</sup>

Nolen R. Breedlove was a twenty-eight-year-old white, male American citizen and resident of Georgia.<sup>37</sup> He brought suit against a Georgia tax collector who would not register him to vote because Breedlove refused to pay a poll tax.<sup>38</sup> The relevant Georgia statute required that every inhabitant of the state between the ages of twenty-one and sixty pay a poll tax of one dollar, “but that the tax shall not be demanded from the blind or from females who do not register for voting.”<sup>39</sup> In other words, a sighted male or female citizen between the ages of twenty-one and sixty who wished to vote had to pay the poll tax before voting. And sighted males between twenty-one and sixty, but not females, had to pay the tax whether or not they registered or were even eligible to vote.

Breedlove argued that the poll tax violated three provisions of the Constitution: the Equal Protection Clause of the Fourteenth Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment, and the Nineteenth Amendment.<sup>40</sup> The Court rejected each of the arguments, spending the most time on the equal protection argument (the only part of the *Breedlove* decision that the Supreme Court reversed in the 1966 *Harper* case<sup>41</sup>).

After declaring that “[t]he equal protection clause does not require absolute equality,” the Court stated that it would be “harsh and unjust” to require the collection of a tax from those who were “too poor to pay.”<sup>42</sup> It justified the exclusion of minors from the tax because a tax would burden “their fathers or others upon whom they depend for support.”<sup>43</sup> It also justified the exclusion of men over the

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34. 302 U.S. 277 (1937), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

35. *Id.* at 283–84.

36. On the historical reasons for the emergence of a thin Nineteenth Amendment, see Paula A. Monopoli, *The Constitutional Development of the Nineteenth Amendment in the Decade Following Ratification*, 11 CONLAWNOW 61, 71 (2019) (“With Congress, state legislatures and state and federal courts important sources of constitutional enforcement and interpretation, the suffrage movement faced powerful patriarchal agents that were, as a matter of institutional self-interest, likely inclined to limit the impact of women’s enfranchisement.”). Monopoli fleshes out this argument in PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT (forthcoming 2020) (manuscript at 57–58) (on file with authors).

37. *Breedlove*, 302 U.S. at 280.

38. *Id.*

39. *Id.* at 279–80 (citing GA. CODE § 92-108 (1933)).

40. *Id.* at 280. Breedlove did not argue against the exemption of the blind from the poll tax requirement. *Id.* at 280–81.

41. See *supra* notes 26–33 and accompanying text.

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

43. *Id.*



age of sixty on the grounds that older men were “often, if not always, excused from road work, jury duty and service in the militia” and many had already served the public before turning sixty.<sup>44</sup>

The Court then justified the exclusion of women who declined to register to vote from poll tax obligations:

The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes. The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden. Moreover, Georgia poll taxes are laid to raise money for educational purposes, and it is the father’s duty to provide for education of the children. Discrimination in favor of all women being permissible, appellant may not complain because the tax is laid only upon some or object to registration of women without payment of taxes for previous years.<sup>45</sup>

After quickly disposing of the privileges or immunities argument,<sup>46</sup> the Court offered a single paragraph analyzing and rejecting the Nineteenth Amendment argument.<sup>47</sup> The Court declared that the Amendment “applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state.”<sup>48</sup> The Court held that the provision’s purpose “is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a limitation upon the power to tax.”<sup>49</sup> Citing the long history of state poll taxes and declaring them a “familiar and reasonable regulation,” the Court held that:

[B]y the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex.<sup>50</sup>

It is hard to know where to begin in describing modern objections to *Breedlove*’s analysis of the Nineteenth Amendment. The Court’s reasoning is short, perfunctory, and conclusory, for starters. And the little substantive analysis it did contain was objectionable: The Court based its equal protection analysis

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44. *Id.* at 281–82.

45. *Id.* at 282 (citations omitted).

46. *Id.* at 283 (“To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution the state may condition suffrage as it deems appropriate.”).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 283–84.

upon sexual stereotypes and sexist state laws that placed the husband as the head of the family.<sup>51</sup> It also saw the exclusion of nonregistered women from the poll tax as a way to relieve a financial burden on men but failed to acknowledge the burden of the tax on unmarried women.<sup>52</sup>

Implicitly gesturing toward the still-extant racial discrimination of the day, the Court declared that women were entitled to exemptions from some laws because of the “burdens necessarily borne by them for the preservation of the race.”<sup>53</sup> Here, the Court relied upon earlier cases, including the 1908 case, *Muller v. Oregon*, which upheld the imposition of a ten-hour maximum workday on women and not on men because of (white) women’s maternal burden.<sup>54</sup> The Court reasoned that “as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”<sup>55</sup> White women, in other words, were too busy bearing and raising children to vote.<sup>56</sup>

There are other flaws in the Court’s analysis as well. The Court declared that a state would not violate the Nineteenth Amendment by burdening men, but not women, with a poll tax.<sup>57</sup> It treated the issue of taxes on the act of voting and voting as two separate and distinct issues. But the poll tax may have effectively given husbands a veto over their wives’ ability to vote given the various ways husbands exercised financial control over their wives at the time.<sup>58</sup> And most

51. *See id.* at 282 (“The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden.” (citing GA. CODE § 51-501 (1933))).

52. *See* LESLIE FRIEDMAN GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* 101 (2d ed. 1988) (“Is there any part of Justice Butler’s reasoning [in *Breedlove*] that justifies exempting unmarried women from this tax?”).

53. *Breedlove*, 302 U.S. at 282.

54. 208 U.S. 412, 421–23 (1908). The other cases the *Breedlove* Court cited for this proposition were *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Miller v. Wilson*, 236 U.S. 373 (1915); and *Bosley v. McLaughlin*, 236 U.S. 385 (1915). *Breedlove*, 302 U.S. at 282.

55. *Muller*, 208 U.S. at 421.

56. The reference to “the race” here could be read more charitably as referring to the human race rather than the white race, but the racism of the Court in *Muller*, and by extension, *Breedlove*, is at least implicit. *See* Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 *UCLA WOMEN’S L.J.* 201, 247 n.188 (1997) (“A public interest in fertility has often been asserted as a reason for special protections or restrictions on women’s activities. This interest is typically racist, either implicitly, *see Muller*, or explicitly. The mid-nineteenth-century campaign to restrict the availability of abortion, for example, was supported by arguments that the decline in white birth rates must be reversed to prevent the nation from being overrun by immigrants.”).

57. It was not just sexism which caused the Court to ignore this issue of Georgia’s penalty on registering and voting women; it was the nature of a Nineteenth Amendment claim brought by a male plaintiff. *See* JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 *UCLA WOMEN’S L.J.* 103, 205 n.511 (1994) (“Perhaps because the Court was faced with a male petitioner, the possibility that Georgia’s scheme actually militated against women’s right to vote was even more obscured.”).

58. *See* Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 *LAW & INEQ.* 225, 227–46 (1993) (outlining various rules that solidified economic subordination of wives to husbands); Siegel, *supra* note 22, at 981–87 (same); Reva Siegel, *Why Equal*

importantly, the Court ignored the fact that imposing a poll tax only on women who chose to register discouraged women from voting. Women who registered to vote had to pay (or have others pay) the tax; women who declined to register to vote did not have to pay. The Georgia poll tax therefore amounted to a penalty upon voting women. Far from the tax and voting rights being separate, Georgia law tied them together and discriminated against women.

*Breedlove* is not unique in failing to recognize discrimination against women. The Court would continue this trend over the next several decades. *Goesaert v. Cleary* upheld a Michigan statute that provided bartending licenses to women only if they were the wife or daughter of a man who owned a business licensed to sell beer.<sup>59</sup> *Hoyt v. Florida* upheld the exclusion of women from jury service.<sup>60</sup> The Court overruled *Hoyt*, but not until 1975.<sup>61</sup> And it was only around that time that the Court began to invalidate laws that discriminated on the basis of sex.<sup>62</sup>

But the sexism of the 1937 opinion in *Breedlove* and its reliance on the paternalistic reasoning in *Muller* is nonetheless curious. Fourteen years before *Breedlove*, the Court had rejected *Muller* and embraced a more formal account of gender equality in *Adkins v. Children's Hospital*.<sup>63</sup> Whereas *Muller* had upheld a law imposing maximum work hours on women but not men, *Adkins* held that such laws discriminated against women by denying them the same freedom to contract as men.<sup>64</sup>

This “freedom of contract” idea was a relic of the *Lochner* era and later reversed as to minimum-wage and maximum-hour laws in the 1937 *West Coast Hotel Co. v. Parrish* case.<sup>65</sup> But the 1923 *Adkins* opinion is still notable for its partial acceptance of gender equality and how it rooted that acceptance in the Nineteenth Amendment:

[T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* has continued “with diminishing intensity.” In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.<sup>66</sup>

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*Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116–19 (1997) (same).

59. 335 U.S. 464, 467 (1948).

60. 368 U.S. 57, 69 (1961).

61. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

62. *See Reed v. Reed*, 404 U.S. 71, 77 (1971); *see also* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 97–104 (2019) (documenting hosts of public discrimination against women and the movement toward public accommodations laws in the 1970s).

63. 261 U.S. 525 (1923), *overruled in part by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

64. *Id.* at 552–53.

65. 300 U.S. at 400.

66. *Adkins*, 261 U.S. at 553 (citation and internal quotation marks omitted).

*Breedlove's* embrace of sexism, its reliance of the repudiated *Muller* case, and its decision to ignore *Adkins's* more progressive view of the Nineteenth Amendment, moved the issue of women's voting rights and the scope of the Amendment backwards.

Justice Harlan did not perpetuate or repeat *Breedlove's* sexist views in his dissents in *Gray v. Sanders* and *Reynolds v. Sims*. His analysis recognized the formal equality of voters regardless of gender.<sup>67</sup> But, as explained in the Introduction, his brief analysis minimized the Nineteenth Amendment's significance, both as an act of enfranchisement and as part of a growing constellation of enfranchising changes to the Constitution.

#### B. THICK

Justices Douglas in his *Gray v. Sanders* majority opinion and Justice Ginsburg in her *Shelby County v. Holder* dissenting opinion have led the way toward a thicker and more robust understanding of the Nineteenth Amendment's protection against gender discrimination in voting. Rather than viewing the 1920 enfranchisement of women in isolation, one can trace an expansion of voting rights from the Declaration of Independence's recognition that "all men are created equal,"<sup>68</sup> to President Abraham Lincoln's reiteration of that principle in the Gettysburg Address in the midst of the Civil War struggle to end slavery of African-Americans, to the passage of a number of voting-related constitutional amendments including: the Fourteenth Amendment (imposing a penalty of representation in the U.S. House of Representatives upon states that deny the votes to male, citizen, nonfelon residents), the Fifteenth Amendment (prohibiting discrimination in voting on the basis of race), the Seventeenth Amendment (providing that voters could directly elect U.S. Senators), the Nineteenth Amendment (prohibiting discrimination in voting on the basis of gender), the Twenty-Third Amendment (granting Washington, D.C. the power to choose presidential electors), the Twenty-Fourth Amendment (barring the use of poll taxes in federal elections), and the Twenty-Sixth Amendment (barring discrimination in voting against eighteen- to twenty-one-year-olds).

This Part offers three reasons for embracing a thick reading of the Nineteenth Amendment, which would give Congress broad authority to enact laws promoting political equality in voting. First, a thick reading is consistent with the text of the Nineteenth Amendment as well as with certain aspects of the history of the Amendment's passage. One of the most significant fights over the Amendment in Congress was whether enfranchising women would be decided on a national or on a state-by-state basis. The Amendment marked the success of nationalist forces, which supports reading the Amendment to contain strong congressional enforcement power to further its aims.<sup>69</sup>

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67. See *supra* text accompanying notes 2–4, 22–25.

68. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

69. We acknowledge that this thick reading is in some tension with some of the exclusivist arguments that some supporters of women's suffrage made. See *infra* notes 71–115 and accompanying text.

Second, the thick reading is justified by a synthetic interpretation of the Constitution. Reading the amendments to the Constitution chronologically demonstrates the nation's growing commitment toward political equality and toward giving Congress the tools to promote it.

Third, the thick reading reflects evolving standards of political equality, dating back to Supreme Court cases in the 1960s recognizing voting as a fundamental right for all citizen, adult resident nonfelons. It is also consistent with the long-standing political process theory that grounds many of those Supreme Court decisions.<sup>70</sup> Despite the Court's conservative turn, these precedents still appear to be firmly established judicial doctrines.

### 1. Text and History

A thick reading of the Nineteenth Amendment is consistent with its text, which prohibits not just denial but *abridgement* of the right to vote on account of sex. When a state passes a law that results in greater burdens on women being able to register and vote compared to men, a court should conclude that the law "abridges" the Nineteenth Amendment. Abridgment occurs when a state "diminishes" or "shortens" a voting right on account of sex.

The Supreme Court has made this point in the analogous context of the Fifteenth Amendment's prohibition of abridgement of the right to vote on account of race.<sup>71</sup> At the very least, laws and procedures diminishing voting on the basis of gender are constitutionally impermissible. Nothing about the term "abridgement" suggests the term applies only to intentional discrimination.<sup>72</sup> Thus, the term "abridgement" is consistent with the thick reading of the Amendment as barring laws that have discriminatory effect on voting power on the basis of gender.

The historical argument for the thicker reading of the Nineteenth Amendment is more complex, but it begins with this basic fact: women and men who supported passage of the Nineteenth Amendment believed that laws denying women's full and equal participation in the political process should be

70. See generally *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (explaining that judicial review should be especially searching when laws limit access to the political process); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (same).

71. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333–34 (2000) (explaining that the "core meaning" of the term "abridge" is "to shorten" according to two dictionaries, and that "abridging" in context of Fifteenth Amendment "refer[s] . . . to discrimination"); see also *United States v. Alabama*, 252 F. Supp. 95, 104 n.53 (M.D. Ala. 1966) ("Significantly, the Fifteenth Amendment uses the term 'abridged' as well as 'denied.' Webster's New International Dictionary defines abridged as: 'To make shorter; to shorten in duration; diminish; curtail; as, to abridge a visit \* \* \*. To deprive; to cut off;— followed by 'of', and formerly by from; as, to abridge one of his rights.' Webster's New International Dictionary, Second Edition, 1959, p. 7."); Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1062 n.84 (2013) (quoting the *Black's Law Dictionary* definition of abridge as "[t]o reduce or diminish"); Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 KY. L.J. 659, 717 (2004) (discussing nineteenth century dictionary and legal dictionary definitions of "abridge").

72. See *Bossier Par. Sch. Bd.*, 528 U.S. at 333–34; *United States v. Alabama*, 252 F. Supp. at 104 n.53; Ho, *supra* note 71, at 1062 n.84; O'Connor, *supra* note 71, at 717.

unconstitutional and that the national government should have broad powers to enforce the right contained in the Amendment when states fail to do so on their own accord.

Members of Congress and ratifying state legislatures understood the Amendment as granting full, equal political rights to at least white women. Indeed, Zornitsa Keremidchieva's analysis of the debates contemporaneous to the passage of the Nineteenth Amendment shows that Congress focused less on whether women were entitled to equal voting rights than on whether this question was better resolved at the state or national level.<sup>73</sup> Congress rejected an amendment that would have left the power to enforce the Amendment in the hands of the states.<sup>74</sup>

The complexity arises because some supporters of women's suffrage, mostly in the last decade before the ratification of the Nineteenth Amendment,<sup>75</sup> advanced their cause by opposing the voting rights of other groups, particularly African-Americans. Although this reality arguably undermines a broad synthetic reading of voting rights in the Constitution, it is important not to hold supporters of women's suffrage to a higher standard than other political movements whose principles are reflected in the Constitution, and whose aims were also infected with racism. As Ellen Carol DuBois writes, "every other white-dominated popular political movement of that era similarly accommodated to insurgent white supremacy. And yet only the woman suffrage movement—not the Gilded Age labor movement or the People's Party or even Progressivism itself—has been so fiercely criticized for the fatal flaw of racism."<sup>76</sup> Those movements produced principles that have been divorced from their racist underpinnings and racist limitations, and the movement that agitated for the passage of the Nineteenth Amendment can do the same.

Equally important, Reva Siegel has argued that the Women's Suffrage Movement began with claims for universal human rights and human suffrage, even though some wings of the Movement subsequently embraced the period's racism.<sup>77</sup> For example, early suffrage proponents Elizabeth Cady Stanton and Susan B. Anthony, on behalf of the Women's Loyal National League, organized a petition that collected almost half a million signatures demanding emancipation.<sup>78</sup> As Siegel's historical analysis suggests, the history of the Nineteenth

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73. Zornitsa Keremidchieva, *The Congressional Debates on the 19th Amendment: Jurisdictional Rhetoric and the Assemblage of the US Body Politic*, 99 Q.J. SPEECH 51, 55 (2013).

74. Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 544–45 (2016); see also *infra* notes 243–65 and accompanying text.

75. ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE* 3–4 (2020).

76. *Id.* at 4.

77. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L. J.F. 450, 456–62 (2020).

78. See Letter from E. Cady Stanton, President, and Susan B. Anthony, Sec'y, The Women's Loyal Nat'l League, to the Women of the Republic (Jan. 25, 1864) (supporting the abolition of slavery), <https://www.senate.gov/artandhistory/history/resources/pdf/WomensLoyalNationalLeague.pdf> [https://perma.cc/CKE3-U54T].

Amendment began with antebellum efforts for universal equality, including racial equality.<sup>79</sup>

It is nonetheless worth noting that when the Nineteenth Amendment was ratified, the promotion of women's suffrage sometimes led to denigrating the suffrage prospects of others. We cannot ignore this history even as we argue later in this Article toward a more intersectional, holistic approach to voting rights. The struggle for women's suffrage was never easy. Aileen Kraditor in her key history of the woman's suffrage movement reports that, "The early pioneers for women's rights were subjected to humiliation and occasional violence. . . . No rights were handed to them on a platter; they fought long and hard for every victory they won down to and including the Nineteenth Amendment."<sup>80</sup> In 1875, the Supreme Court in *Minor v. Happersett* rejected the argument that the Fourteenth Amendment's recognition of the privileges and immunities bestowed upon all citizens conferred equal voting rights on women in the United States.<sup>81</sup>

After that defeat, supporters of women's suffrage began a decades-long struggle to pass a constitutional amendment guaranteeing women the right to vote.<sup>82</sup> Sometimes that fight led women's suffrage supporters to make questionable alliances and to advance now-unpalatable arguments to aid in the movement's progress.

Corrine McConnaughy recently explored the complex passage of the Nineteenth Amendment, which required coalitional politics.<sup>83</sup> The path to ratification, which began in the states decades before the ratification of the Nineteenth Amendment, did not follow the "strategic enfranchisement" model through which African-Americans achieved formal enfranchisement.<sup>84</sup> Under the strategic enfranchisement model, Republicans at the end of the Civil War supported granting blacks voting rights "anticipating that the party could profit from its claim as the liberator of the country's slave population by reaping the votes of these new citizens. Blacks were seen as a promising voting bloc, one the Republicans sorely needed, especially to have any electoral hope in the readmitted Confederate states."<sup>85</sup>

According to McConnaughy, the strategic enfranchisement model could not work for women's enfranchisement because of the commonly held belief that women would follow the leads of their husbands in voting, with the expectation that the number of votes would double without causing a shift in partisan

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79. See Siegel, *supra* note 77, at 460–63.

80. KRADITOR, *supra* note 5, at xiv.

81. 88 U.S. 162, 171 (1875) ("It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."). For an argument that women suffragists were early "living constitutionalists" in asking for the Fourteenth Amendment to guarantee women's suffrage, see Adam Winkler, *A Revolution Too Soon: Women Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1458 (2001).

82. For an excellent history, see generally DUBOIS, *supra* note 75.

83. MCCONNAUGHY, *supra* note 3, at 10.

84. *Id.* at 34–35 & 35 n.19.

85. *Id.* at 253–54.

politics.<sup>86</sup> These predictions initially turned out to be correct, despite the later emergence of a “gender gap” between men and women.<sup>87</sup> As states began to enfranchise white women in the early twentieth century, each state’s partisan political alignment remained mostly the same.<sup>88</sup> McConnaughy argues that women’s suffrage supporters instead followed a “programmatically enfranchisement” model: “changes in state laws came when suffragists could build coalitions with groups able to leverage for their cause from *inside* party politics; woman suffrage was delivered by politicians as part of a program of policies meant to appease their existing constituents.”<sup>89</sup>

Supporters of women’s suffrage allied themselves with other groups, such as farmers, in an effort to build on existing interest-group power to push for changes in voting laws.<sup>90</sup> Women’s suffrage was not the top agenda item for these other interest groups, but they were happy to have the additional support and help toward electoral viability and, in turn, supported women’s suffrage.<sup>91</sup> Given the middle- and upper-class white base of the Women’s Suffrage Movement,<sup>92</sup> some coalitions proved harder to forge, such as with labor unions and, in some places,<sup>93</sup> with supporters of enfranchisement rights for nonwhites.<sup>94</sup>

Among the most important coalitionist activities of women’s suffragists was to ally with minor political parties. These parties, which typically held only a few seats in state legislatures, often affected the balance of power within states and influenced the eventual policy positions of the major parties.<sup>95</sup>

This same pattern of third-party influence emerged on the national scale. The decades-long effort to convince Congress to pass a constitutional amendment

86. *See id.* at 11. This argument is in some tension with the idea that women would help to enforce prohibition, because they were more likely to support morals legislation, and the later argument that women would support Jim Crow as the price for southern support for women’s suffrage.

87. DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW—CASES AND MATERIALS* 43 n.f. (6th ed. 2017).

88. MCCONNAUGHY, *supra* note 3, at 11.

89. *Id.* at 10, 252; *see also id.* at 215–16, 249–50.

90. *See id.* at 252–53.

91. *Id.* at 258.

92. It was a mostly white, middle-class women’s movement, but, as Rosalyn Terborg-Penn has shown, African-American (also mostly middle-class) women also played an important, underreported role in the struggle for the right to vote, fighting “racism and sexism simultaneously.” TERBORGPENN, *supra* note 3, at 2; *see also generally* Liette Gidlow, *The Sequel: The Fifteenth Amendment, The Nineteenth Amendment, and Southern Black Women’s Struggle to Vote*, 17 J. GILDED AGE & PROGRESSIVE ERA 433 (2018) (describing the suffrage struggles of black women in the South between the 1870s and 1920s).

93. MCCONNAUGHY, *supra* note 3, at 222, 253; *see also* KRADITOR, *supra* note 5, at xiv (“Although working-class, Negro, and foreign-born women received the vote along with the rest, the suffrage movement was essentially from beginning to end a struggle of white, native-born, middle-class women for the right to participate more fully in the public affairs of a society the basic structure of which they accepted.”).

94. MCCONNAUGHY, *supra* note 3, at 206, 208, 219–20.

95. *Id.* at 210 (“Nine of the fifteen full woman suffrage adopter[] [states] and six of fifteen presidential or primary suffrage adopter[] [states] acted after an election in which the reform party garnered more than 5 percent of the gubernatorial vote.”).



barring discrimination in voting on the basis of gender finally bore fruit.<sup>96</sup> President Teddy Roosevelt, who had not been an early supporter of women's suffrage, became a supporter when he ran again as a candidate for president in 1912 as part of the Bull Moose Party.<sup>97</sup> As this new progressive party started to organize, it allied with other organizations, including organizations supporting women's suffrage, to build political power.<sup>98</sup> Roosevelt lost the 1912 presidential election to Woodrow Wilson, but the push for women's suffrage survived. By 1916, both the Democratic and Republican Party platforms endorsed the extension of the franchise to women (although through state-based decisions, not via a constitutional amendment).<sup>99</sup>

The Women's Suffrage Movement had the hardest time using coalitional politics in geographic areas where they could not form partnerships with other groups, a problem most common in the American South.<sup>100</sup> It is not as though Southerners were more opposed to women's suffrage compared to the rest of the country. Instead, there was great concern that allowing women's voting rights on a national scale could open up the system to effective re-enfranchisement of African-Americans, which Southern senators strongly opposed.<sup>101</sup> By this point in history, African-American voters had been effectively disenfranchised throughout the South, and preserving that status quo was the paramount aim of Southern politicians.<sup>102</sup> Further, Southern states generally had stricter election- and ballot-access rules to block African-American voting, and these rules also made it harder for women's suffrage supporters to engage in political action to assure nondiscrimination in voting on the basis of gender.<sup>103</sup>

Partially in an appeal for Southern support, some women's suffrage activists pitted themselves against those fighting for African-American and others' voting rights. Although women's suffrage pioneer Susan B. Anthony "believed in universal suffrage on the theory that women, Negroes, propertyless workers, and

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96. *See id.* at 247–48.

97. *Id.* at 238–39.

98. *Id.*

99. *Id.* at 244. The Democratic party platform recommended "the extension of the franchise to the women of this country, State by State, on the same terms as to the men," and the Republican party "favor[ed] the extension of the suffrage to women, but recogniz[ed] the right of each State to settle this question for itself." *Id.* On the changing coalitional politics that led to conditions for the passage of the Amendment, see KEYSSAR, *supra* note 5, at 173–75.

100. MCCONNAUGHY, *supra* note 3, at 250 ("The result was that states with large non-white populations often presented nearly impossible political challenges for suffragists — no matter how large suffrage organization memberships and budgets grew."); *see also* KRADITOR, *supra* note 5, at xv ("The Southern [women's] suffragist movement was a white women's movement, and the participation of Southern individuals and organizations in [the National American Woman Suffrage Association] signified a permanent break with the abolitionist tradition from which the women's right agitation had sprung.").

101. MCCONNAUGHY, *supra* note 3, at 245–46; *see also* Kimberly A. Hamlin, *How Racism Almost Killed Women's Right to Vote*, WASH. POST (June 4, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/06/04/how-racism-almost-killed-womens-right-vote/>.

102. *See* KEYSSAR, *supra* note 5, at 173–75; MCCONNAUGHY, *supra* note 3, at 244, 251–52; Siegel, *supra* note 3, at 7–8; TERBORG-PENN, *supra* note 3, at 1–2.

103. MCCONNAUGHY, *supra* note 3, at 208–09.

naturalized citizens had the same inalienable right to consent to the laws they objected as did white, rich, and native-born men,” over time some supporters of women’s suffrage were willing to cast aside support for African-American suffrage—sometimes even embracing racist arguments—to assure women’s suffrage on the state and national levels.<sup>104</sup> These later women’s rights supporters “unanimously believed that the stability of government depended on the rule of the ‘intelligent’ portion of the population, and so they could easily see the consistency of decreasing the political power of ‘unfit’ groups with increasing their own.”<sup>105</sup>

Keremidchieva demonstrated that the congressional debates contemporaneous with the Nineteenth Amendment’s passage reflected an understanding that the right of (white) women to vote would not lead to rights for noncitizens and for African-American women and men. “[E]arly in the debate Sen. Williams (D-MS) introduced an amendment calling for the term ‘white’ to be inserted before the word ‘person’ in the resolution.”<sup>106</sup> Williams was an opponent of the Nineteenth Amendment, and his proposal was defeated.<sup>107</sup>

Despite Southern resistance, the Amendment mandating women’s suffrage rights on a national scale gained the reluctant support of President Wilson during World War I and enough momentum to pass in Congress.<sup>108</sup> But it is “wildly inaccurate” to think of women’s enfranchisement in the United States as happening in a single episode with the Amendment’s approval.<sup>109</sup> By the time of the Amendment’s ratification in 1920, “woman suffrage in some form was already a reality in nearly every state. Thirty states had changed their laws to do away with sex qualifications to vote in elections of national consequence.”<sup>110</sup> Many of the senators voting in favor of the Amendment did so because of the support in their states for women’s suffrage, as demonstrated by earlier state-enfranchisement

104. KRADITOR, *supra* note 5, at 163, 165 (“Southern white women began building a suffrage movement the principal argument of which was that the enfranchisement of women would insure the permanency of white supremacy in the South.”).

105. *Id.* at 164; see also Rabia Belt, *Outcasts from the Vote: Women’s Suffrage and Mental Disability 4* (unpublished manuscript) (on file with authors) (“Using techniques from petitions to posters, elite white woman suffrage activists applied mental disability to leverage their privilege in order to gain the franchise. They countered the images of female lunatics deployed by anti-suffragists, homogenized the image of white women as able-minded, and offered these able-minded white women to able-minded white men as allies and a bulwark against a potential menace of enfranchised mentally impaired men.”).

106. Keremidchieva, *supra* note 73, at 58.

107. See *id.*; Kolbert, *supra* note 74, at 543 n.201.

108. See DUBOIS, *supra* note 75, at 211–12, 222–29 (discussing Wilson’s reluctance); *id.* at 244 (discussing Wilson’s final capitulation after years of protests during World War I); KEYSSAR, *supra* note 5, at 173–74 (discussing the connection between the war effort and the Women’s Suffrage Movement).

109. MCCONNAUGHY, *supra* note 3, at 251.

110. *Id.* States did so “either by striking the word male from the suffrage clauses of their state constitutions, or by amending state law to remove the sex qualification for presidential electors or primary voters.” *Id.*

efforts.<sup>111</sup> Ultimately, the Nineteenth Amendment passed without much support from Southern senators<sup>112</sup> and without ratification in Southern states.<sup>113</sup>

Scholars continue to debate the racism of the later Women's Suffrage Movement,<sup>114</sup> and the extent to which the tactics embraced by some in the Movement reflected the views of suffrage supporters generally. In the end, the Women's Suffrage Movement proved successful enough that (white) women quickly gained the franchise where it had not already been granted by a state. Others who were denied the franchise had to wait decades more to achieve full voting rights. The Nineteenth Amendment barely needed judicial review because few states directly discriminated against white women in voting, whereas discrimination against African-American men and women returned many times to the courts, often with embarrassingly little done about it until after the passage of the Voting Rights Act of 1965.<sup>115</sup>

## 2. Synthetic Interpretation

As the last section demonstrated, the text of the Nineteenth Amendment as well as its history indicate that its drafters and supporters intended to give the national government a key role in ensuring equal voting rights regardless of gender. The Amendment mandated gender equality in voting on a national scale, with federal protection and congressional enforcement power to be wielded against resisting states. Less clear from that history is support for our argument that the Nineteenth Amendment should be read more broadly as part of a general expansion of voting rights in the United States. Indeed, some of the history points toward a kind of gender exclusivism, which rejected concerns about voting laws discriminating against other groups.

We advance the argument for a holistic and broad approach by looking synthetically at the Constitution,<sup>116</sup> viewing the Nineteenth Amendment as one of a

111. *Id.* at 243.

112. *Id.*

In the end, enough senators, including a few from below the Mason-Dixon Line, voted "yes" on the Susan B. Anthony Amendment for it to pass on June 4, 1919. Senators approved the amendment not because they thought it would enfranchise women of color or compel the enforcement of the 15th Amendment, but because they knew it would not.

Hamlin, *supra* note 101.

113. KEYSSAR, *supra* note 5, at 175.

114. Marjorie Julian Spruill, *Race, Reform, and Reaction at the Turn of the Century; Southern Suffragists, the NAWSA, and the "Southern Strategy" in Context*, in VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED 102, 102 (Jean H. Baker ed., 2002).

115. See *Shelby County v. Holder*, 570 U.S. 529, 560–63 (2013) (Ginsburg, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 310–17 (1966).

116. Here, we follow Reva Siegel and others in "approach[ing] the Constitution as a charter of government forged in history by successive generations of authors and emphasize[ing] the ways that they modified the Constitution's meaning by amending the document over time." Siegel, *supra* note 22, at 967 & n.54. Synthetic readings of the Constitution differ from "intratextualism," which "urges a reader interpreting 'a contested word or phrase that appears in the Constitution; to consider its meaning as it appears in other passages.'" Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 135 (2015) (quoting Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999)).

number of important amendments expanding the right to vote in the United States and Congress's enforcement powers, and looking at the Supreme Court's history of expanded voting rights. The thick reading recognizes that the Constitution's voting rights protections should be read broadly and synergistically rather than focusing discretely on whether a voting restriction burdens age, gender, or race.

Imagine a state law imposing especially high burdens on the voting rights of young women of color. Such a law could require voting to take place only during ten hours on Election Day and offer no early or no-excuse absentee voting, despite evidence that young women of color are most likely among the voting population to have difficulty in voting given work and childcare obligations. A thick, synthetic reading of the Nineteenth Amendment would recognize that these voters' rights are also protected by the Fourteenth, Fifteenth, and Twenty-Sixth Amendments, and find such a law unconstitutional.

This is not to say that such laws would be unconstitutional only if they burdened people who fit in all three categories. But courts should be especially sensitive to laws imposing disproportionate political burdens on people potentially facing discrimination for multiple reasons.

The text of the Nineteenth Amendment, read in the context of the entire Constitution and especially the other amendments protecting voting rights, supports the thick reading. This reading could provide a basis not only for a lawsuit attacking the state's failure to offer meaningful alternatives to Election Day voting, but also for congressional legislation mandating that states offer early or no-excuse absentee voting, even in state and local elections.<sup>117</sup>

We are not the first to suggest that the Nineteenth Amendment should be read synthetically and in a thick way. In a famous 2002 article, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, Professor Reva Siegel argued that the passage of the Nineteenth Amendment strengthened the scope of equal protection rights contained in the earlier-ratified Fourteenth Amendment.<sup>118</sup> "When Americans finally voted to ratify the Nineteenth Amendment, they were breaking with understandings of the family that had organized public and private law and defined the position of the sexes since the founding of the republic."<sup>119</sup> Her "synthetic reading" of the Fourteenth and Nineteenth Amendments

would bring to the interpretation of the Equal Protection Clause a knowledge of the family-based status order through which women were disfranchised for most of this nation's history and from which they were emancipated after over a half century of struggle. Interpreted from this sociohistoric standpoint, a core

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117. No doubt Congress would have the power under the Elections Clause to require such opportunities in elections with federal candidates on the ballot. See *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8–9 (2013).

118. Siegel, *supra* note 22, at 952. For an originalist argument following Siegel's lead, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 12–13, 67–68 (2011) (describing where the authors agree and disagree with Siegel's analysis).

119. Siegel, *supra* note 22, at 951.

meaning of equal protection for women is freedom from historic forms of subordination in the family.<sup>120</sup>

Our argument is much narrower than Siegel's because it is focused specifically on the question of voting and political rights contained in the Constitution, and not, for example, on issues of family law.

In a nutshell, no one reading the Constitution and its amendments in chronological order could miss the progression in favor of expanded voting rights. At the time of the original Constitution, there was no direct election of the U.S. Senate<sup>121</sup> until the passage of the Seventeenth Amendment in 1913 and the Electoral College gave state legislatures broad powers to choose the manner of selecting presidential electors.<sup>122</sup> The Fourteenth and Fifteenth Amendments prohibited discrimination in voting on account of race; the Seventeenth Amendment provided for the direct election of senators; the Nineteenth Amendment prohibited discrimination in voting on account of sex; the Twenty-Third Amendment effectively enfranchised Washington, D.C. residents to vote for President; the Twenty-Fourth Amendment prohibited poll taxes; and the Twenty-Sixth Amendment assured that voters as young as eighteen years old would not face discrimination in voting. Each of these steps expanded voting rights, and no amendments have ever constricted them.

It is easy to imagine a litigation strategy premised on a revived Nineteenth Amendment within the scope of a cluster of new voting rights claims. Indeed, although Nineteenth Amendment litigation has been virtually nonexistent, parallel arguments recently have emerged in terms of potential state violations of the Twenty-Sixth Amendment barring discrimination in voting on the basis of age. Eric Fish has argued that the Amendment "should be interpreted to protect voters of all ages from age discrimination, not merely the young. It should also be interpreted to permit Congress to enact legislation overriding state policies that abridge voting rights on the basis of age, even if such discrimination is not those policies' main purpose."<sup>123</sup>

Yael Bromberg notes that thus far, most courts have avoided deciding whether the Twenty-Sixth Amendment has its own legal force when plaintiffs allege that

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120. *Id.* at 952; see also Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1344 (2011) ("The Nineteenth Amendment . . . overturned the hollow conception of the political meaning of citizenship at the heart of *Minor*—the proposition that while 'citizens' might have some civil rights, in terms of politics they are nothing more than subjects who happen to reside in a republic.").

121. U.S. CONST. art. I, § 4, cl. 1.

122. U.S. CONST. amend. XVII. State legislators retain the power to directly choose present electors even as all states have allowed voters to choose. See *supra* note 4. Franita Tolson has argued that the Elections Clause gives Congress broad power to regulate elections. See Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 321 (2019).

123. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1172 (2012); see also *Symm v. United States*, 439 U.S. 1105, 1105 (1979) (mem.) (summarily affirming the district court, which struck down a law burdening college-student voters as a violation of the Twenty-Sixth Amendment).

they face burdens as young voters.<sup>124</sup> She also argues that courts need to think more creatively about the standard under the Twenty-Sixth Amendment and should pay particular attention when age discrimination in voting overlaps with discrimination on the basis of race and partisanship.<sup>125</sup>

### 3. Supreme Court Precedent

Beginning in the 1960s, the Supreme Court's constitutional voting rights jurisprudence began to recognize this expansion of voting rights. The Court has come a long way since it rejected the right to women's suffrage under the Fourteenth Amendment in the 1875 case *Minor v. Happersett*;<sup>126</sup> tolerated Southerners' continued disenfranchisement of African-Americans in 1903 with *Giles v. Harris*<sup>127</sup> and whites-only political primaries in 1935 under *Grove v. Townsend*;<sup>128</sup> and accepted poll taxes in the 1937 *Breedlove v. Suttles*<sup>129</sup> case and literacy tests in 1959 through *Lassiter v. Northampton County Board of Elections*.<sup>130</sup>

But two decades later, the Court reversed *Grove*, holding that whites-only primaries violate the Constitution.<sup>131</sup> And beginning in the 1960s, the Court's greater protection for voting rights took hold. As noted in the Introduction, the Court in a series of cases created and applied the one-person, one-vote rule to federal, state, and local elections.<sup>132</sup> The Court partially reversed *Breedlove* and struck down poll taxes on equal protection grounds in the 1966 *Harper* case.<sup>133</sup> The Court established voting as a fundamental right, rendering most citizen, adult, resident nonfelons eligible to vote in local and state elections.<sup>134</sup> It struck down long durational-residency requirements<sup>135</sup> and oppressive ballot access rules.<sup>136</sup> And in dealing with the formerly intractable problem of continued Southern resistance to the Fifteenth Amendment, the Supreme Court upheld Congress's power under the Fourteenth and Fifteenth Amendments to pass key

124. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1111–12 (2019).

125. *Id.* at 1113–15.

126. 88 U.S. 162, 171 (1875).

127. 189 U.S. 475, 476 (1903).

128. 295 U.S. 45, 55 (1935), *overruled in part by* *Smith v. Allwright*, 321 U.S. 649 (1944). Before *Grove*, the Court at first sidestepped the question of the white primary's constitutionality in *Newberry v. United States*, 256 U.S. 232 (1921), and then struck down white primaries in *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) and *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

129. 302 U.S. 277, 284 (1937), *overruled by* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

130. 360 U.S. 45, 53–54 (1959).

131. *Terry v. Adams*, 345 U.S. 461, 470 (1953); *Smith*, 321 U.S. at 666.

132. *See supra* notes 1–14 and accompanying text. The extension to local elections occurred in *Avery v. Midland County*, 390 U.S. 474, 481 (1968).

133. *Harper*, 383 U.S. at 666–69.

134. *See* *Evans v. Comman*, 398 U.S. 419, 424–26 (1970); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969); *Carrington v. Rash*, 380 U.S. 89, 96 (1965). The exception is for special-purpose units of government. *See* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 733 (1973).

135. *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972).

136. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

provisions of the 1965 Voting Rights Act,<sup>137</sup> including a nationwide ban on literacy tests.<sup>138</sup> The Voting Rights Act has been the most important step toward effective enfranchisement of African-American men and women voters in American history.<sup>139</sup>

The current Supreme Court has been unwilling to further extend voting rights.<sup>140</sup> In 2013, it struck down the coverage formula in the Voting Rights Act because it held that Congress acted unconstitutionally in relying on old data.<sup>141</sup> In 2019, it refused to recognize a standard for policing partisan gerrymandering.<sup>142</sup> But the much more conservative judicial body has not touched any of the Warren Court-Era precedents expanding the right to vote. When the Court returned to one-person, one-vote issues in the *Evenwel v. Abbott* case, which raised the question whether the one-person, one-vote standard requires drawing districts with equal numbers of voters or citizens, only Justice Thomas suggested revisiting the earlier precedents and allowing states to draw districts with unequal populations.<sup>143</sup> The Warren Court-Era voting rights cases seem firmly established even in the hands of a much more conservative Supreme Court.

That these cases have endured for more than half a century despite the more conservative turn of the Supreme Court demonstrates the strong commitment to expanded political equality under the Constitution. The cases begin with the supposition that all eligible voters are entitled to an equal vote that will be fairly counted, and that distinctions among groups of voters will be subject to strict scrutiny. Together, the cases support the thick reading of the Nineteenth and other voting Amendments, along with broad congressional power to enforce such rights through appropriate legislation.

## II. CONGRESS'S THICK NINETEENTH AMENDMENT ENFORCEMENT POWER

Some work advancing gender equality in politics can occur at the state level: States can pass laws seeking to equalize political power across genders. Other work could be done in the courts: Individuals or entities could bring lawsuits challenging state and local voting restrictions as violating the Nineteenth Amendment and potentially other voting-related Amendments. But some states

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137. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966); *see also supra* note 19 and accompanying text (describing Court's continued recognition of congressional power to impose preclearance under the Voting Rights Act until the *Shelby County* decision).

138. *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970).

139. *See* LOWENSTEIN ET AL., *supra* note 87, at ch. 5 (analyzing Voting Rights Act cases and issues of minority voting rights).

140. For a look at the Roberts Court's record on voting rights in its first decade, see Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn But with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016).

141. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

142. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

143. 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring) (“I write separately because this Court has never provided a sound basis for the one-person, one-vote principle.”). Justice Alito also concurred separately expressing caution, *id.* at 1142 (Alito, J., concurring), but did not go as far as Justice Thomas and did not join Justice Thomas's concurrence.

will not act, and some courts will not view the Nineteenth Amendment's substantive protections broadly enough. In such an instance, Congress may act to ensure greater political equality across genders. Inevitably, the question will arise whether Congress has exceeded its powers in passing such legislation. Congress already has broad authority to set rules for federal elections under the Elections Clause.<sup>144</sup> We believe courts and scholars should embrace a thick conception of Congress's enforcement power contained in Section 2 of the Nineteenth Amendment to allow Congress to act even more broadly in the areas of state and local elections and to go beyond direct enfranchisement and towards laws that equalize political power across genders more broadly.

Justice Ginsburg in her *Shelby County* dissent emphasized the congressional enforcement powers contained in many of the amendments expanding the franchise.<sup>145</sup> Like several of the preceding amendments (and in particular, the Reconstruction Amendments), the Nineteenth Amendment contains both a substantive provision and a grant of power to Congress.<sup>146</sup> The Nineteenth Amendment Enforcement Clause also similarly gives Congress the "power to enforce this article by appropriate legislation."<sup>147</sup> Justice Ginsburg wrote that these Amendments are "in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections."<sup>148</sup>

A thick reading of the Nineteenth Amendment's voting right could justify broad federal voting rights legislation as well as more generally applicable legislation promoting political equality regardless of gender. This Part offers a glimpse of how Congress might exercise its powers under the Nineteenth Amendment.

There are several different reasons to think—and theories that explain—why Congress has the power to prohibit state laws or policies that might not violate the Nineteenth Amendment's substantive provision. We will refer to this as a "thick" conception of Congress's enforcement power (similar to the "thick" conception of the right to vote). Some of these theories have been—or could be—applied to the preceding Reconstruction Amendments; the fact that they have not is an important reason to doubt that the modern Court would adopt a thick conception of Congress's powers under the Nineteenth Amendment. Part III explains the various obstacles that a thick conception of Congress's enforcement powers would likely encounter; this Part, however, explores what a thick conception of Congress's enforcement powers might look like, and some reasons to prefer that conception.

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144. *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8–9 (2013).

145. Justice Ginsburg did not mention the Seventeenth Amendment, which lacks any congressional enforcement mechanism, and neither Justice Douglas nor Justice Ginsburg mentioned the Twenty-Third Amendment.

146. See U.S. CONST. amend. XIX.

147. U.S. Const. amend. XIX, § 2.

148. *Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013).



One thick conception of the Enforcement Clause views the Clause as remedial and primarily backward looking,<sup>149</sup> allowing Congress to remedy past discrimination on the basis of sex and sex inequality. Some of the gender disparities that exist today are vestiges of the regime that the Nineteenth Amendment (partially) dismantled—a regime in which women were not allowed to vote and were viewed as unfit for public and political life.<sup>150</sup> Congress’s enforcement power might conceivably allow Congress to eliminate the lingering effects of that regime in order to prevent preexisting gender disparities from compounding. For example, to the extent that certain social norms about what makes a successful political leader are informed by who has been a political leader in the past, Congress might be able to combat those perceptions, which may be driven, in part, by the history of sex discrimination.<sup>151</sup>

Another interpretation of Congress’s enforcement power would look to the way that the Court has interpreted the Eleventh Amendment and the principle of state sovereign immunity it reflects (but does not exhaust). The Eleventh Amendment, by its terms, prohibits the federal courts from hearing cases between a state and a citizen of another state.<sup>152</sup> But the Court has interpreted the Eleventh Amendment to reflect a broader principle of state sovereign immunity that prohibits the federal and state courts from hearing cases between a state and its citizens.<sup>153</sup> The Court has also held that the state sovereign immunity principle prevents Congress from subjecting states to suits in state or federal court under its power to regulate interstate commerce.<sup>154</sup> The Court has justified this principle by asserting that the Eleventh Amendment prohibited only one specific type of suit that was foremost on Americans’ minds at the time; the Amendment purportedly addresses the prototypical case implicating state sovereign immunity, but the Amendment applies more broadly than that specific example.<sup>155</sup>

One could imagine a similar approach to the Nineteenth Amendment.<sup>156</sup> That is, the substantive provision of the Nineteenth Amendment might address one particular manifestation of the sex disparities that existed at the time while

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149. This theory comports with *City of Boerne*’s focus on the remedial nature of the Enforcement Clause language. See *infra* notes 251–71 and accompanying text.

150. See Siegel, *supra* note 22, at 977–93. Women still face political-power disparities, even as women’s voter turnout has equaled or exceeded men’s turnout in recent U.S. elections, especially among younger voters. CTR. FOR AM. WOMEN & POL., GENDER DIFFERENCES IN VOTER TURNOUT (2019), <https://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<https://perma.cc/WKW3-78Z3>].

151. See *infra* notes 229–30 and accompanying text (discussing electability problems that female candidates encounter).

152. U.S. CONST. amend. XI.

153. See *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

154. See *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996).

155. See *Alden*, 527 U.S. at 723; *Seminole Tribe*, 517 U.S. at 69–70. We do not mean to endorse the Court’s interpretation of the Eleventh Amendment, but rather to demonstrate an instance in which the Court expanded the reach of an amendment beyond its text and toward a broader principle.

156. Reva Siegel’s article takes a similar approach. See Siegel, *supra* note 22, at 1046.

reflecting a more far-reaching principle, at least under the Enforcement Clause (such that Congress could prohibit additional forms of discrimination).<sup>157</sup>

Another interpretation of Congress's enforcement power views the power as a backstop to judicial enforcement of the Constitution. Judicial doctrines implementing the Constitution imperfectly identify conduct that violates the Constitution. The tiers of scrutiny, for example, create some false positives (by invalidated laws under heightened scrutiny when the laws do not offend the Constitution) as well as some false negatives (by upholding laws under only minimal scrutiny when the laws do violate the Constitution).<sup>158</sup> Other doctrinal apparatuses also imperfectly capture constitutional substance. For example, the Court has held that facially neutral laws amount to unconstitutional discrimination only where the laws are motivated by a discriminatory purpose.<sup>159</sup> The doctrine's focus on legislative intent creates the risk that judges might lack the pertinent fact-finding capabilities to conclude that a state actor had an impermissible purpose.<sup>160</sup> Judges' deference to the political branches might also lead them to err on the side of upholding laws.<sup>161</sup>

Congress's capacity to legislate beyond the substantive provisions of the Nineteenth Amendment compensates for these realities. Congress can conclude that some restrictions on voting amount to impermissible discrimination on the basis of sex. That is, Congress can reach a conclusion even if federal courts could not and should not reach that same conclusion based on the judicial doctrines that limit judges' implementation of substantive constitutional guarantees.<sup>162</sup> Congress also has fact-finding capabilities and is able to draw lines that might seem arbitrary on the margins but nonetheless distinguish between laws that are different in important respects.<sup>163</sup>

Congress's enforcement power might also be a vehicle for legislative constitutionalism and departmentalism. Departmentalism is the idea that other branches of government besides the federal courts interpret the Constitution.<sup>164</sup> Legislative constitutionalism is one particular manifestation of this idea—where Congress

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157. The Eleventh Amendment, of course, contains only a substantive prohibition.

158. See Richard H. Fallon, Jr., *The Supreme Court, 1966 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 83–88 (1997) (arguing that doctrinal rules implement substantive constitutional guarantees and only imperfectly capture them); Eric A. Posner & Adrian Vermuele, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1131–33 (2006) (similar).

159. See *Washington v. Davis*, 426 U.S. 229, 248 (1976).

160. *E.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018) (upholding voting restriction that had disparate effects).

161. *Id.* at 2315–16 (implying that the district court erred by failing to defer to Texas legislature).

162. This principle, too, was arguably reflected in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In that case, the Court allowed Congress to prohibit a voting test (a literacy test) that the Court had previously upheld against a facial challenge under the Fourteenth Amendment. See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

163. See Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-finding*, 84 IND. L.J. 1, 4 (2009) (“[T]here is a widely accepted view that legislative bodies are better than courts at fact-finding.”).

164. See Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017).

makes a constitutional determination.<sup>165</sup> As Reva Siegel and Robert Post explained with reference to the Fourteenth Amendment, Congress's enforcement power might authorize Congress to arrive at a different conclusion than the federal courts about whether any particular law violates the Constitution, or even about the meaning of a particular substantive guarantee in the Constitution.<sup>166</sup> Post and Siegel elaborated on why, as a matter of constitutional governance and democratic legitimacy, the Constitution would assign Congress this power—particularly with respect to rights-reinforcing legislative powers.<sup>167</sup> And Michael McConnell, among others, has explained why, as a matter of history, the public that ratified the Fourteenth Amendment would have wanted Congress to be on the forefront of enforcing the amendment's substantive guarantees, rather than the federal courts.<sup>168</sup> Given that the Nineteenth Amendment uses the same language as the Fourteenth Amendment, it may embody a similar principle.<sup>169</sup>

Another conception of Congress's enforcement power maintains that Congress can adopt prophylactic measures that prevent future constitutional violations. *Katzenbach v. Morgan* arguably reflected this understanding of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.<sup>170</sup> In that case, the Court allowed Congress to prohibit the state of New York from subjecting anyone educated in Puerto Rico to literacy tests as preconditions to voting. Although the Court had previously upheld a similar literacy requirement,<sup>171</sup> the Court explained that reinforcing citizens' ability to vote might prevent the state from denying them social services or civic access in the future—and thus deter future constitutional violations.<sup>172</sup>

For purposes of the Nineteenth Amendment, these prophylactic or preventative measures might have several different orientations. One would be to address burdens (in addition to voter-access restrictions or voter-identification requirements) that might contribute to burdens on voting for women. Consider, for example, recent research by Jamila Michener, which has shown that individuals who obtain Medicaid coverage or health insurance are more likely to vote than people who are uninsured.<sup>173</sup> To the extent there are aspects of social citizenship (like health

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165. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003).

166. See *id.* at 1946–66, 2026–32.

167. *Id.* at 2026–32.

168. See, e.g., Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 156 (1997).

169. See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XIX, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

170. 384 U.S. 641, 658 (1966). *City of Boerne v. Flores*, of course, changed *Katzenbach*'s standard of review. 521 U.S. 507, 527–28 (1997); see also *infra* notes 250–62. But *City of Boerne* appears to endorse this interpretation of *Katzenbach*. See 521 U.S. at 527–29.

171. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

172. *Katzenbach*, 384 U.S. at 651–58.

173. See generally JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* (2018).

insurance) that facilitate political participation, Congress could reduce impediments to voting by reducing barriers to social citizenship. Another approach to preventing future constitutional violations would be to address preemptively ways in which women's political participation could be impeded. For example, eliminating economic barriers to political participation might have the effect of safeguarding women's political participation and preventing future constitutional violations. Some scholars have questioned whether the staggering costs of elections (and the reality that large amounts of money appear to garner political influence) deter citizens from voting.<sup>174</sup> If that is correct, then eliminating or attempting to combat that impediment to voting might also be a way of enforcing the Nineteenth Amendment.<sup>175</sup>

Finally, a thick conception of Congress's enforcement power provides an important mechanism for the possibility of a Second Reconstruction, but for sex equality,<sup>176</sup> which could make the Nineteenth Amendment deeper and longer lasting. As the previous Part recounted, voting rights for African-Americans were not realized until almost a century after the Reconstruction Amendments, when Congress enacted the Voting Rights Act.<sup>177</sup> Since the Nineteenth Amendment was ratified, elections have also become more democratic and the franchise has expanded significantly.<sup>178</sup> That is partially because the Supreme Court recognized the one-person, one-vote principle and invalidated various antidemocratic laws and policies,<sup>179</sup> and because the Constitution has been amended to expand the number of eligible voters.<sup>180</sup> These developments mean that many of the groups who stood to benefit from the Nineteenth Amendment (black women, younger women, and women in more urban areas, among other groups) are only now in a position to make claims that sound in the Amendment.

The same is true of the Amendment's (albeit limited) promise of sex equality. When the Amendment was ratified, the country had certainly not rid itself of discrimination on the basis of sex. At the time, people expected women to vote like their husbands, and many of them did so.<sup>181</sup> Some of the arguments for suffrage

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174. See Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1166–70 (2018).

175. This is not to say that the Nineteenth Amendment alone would displace all of constitutional antidiscrimination law, or that any law that conceivably affects political power could be justified as an exercise of Nineteenth Amendment powers. But laws that more directly allow for women's full participation in the political process should be within Congress's power to enforce the Amendment. This would be true, for example, about the Violence Against Women Act. See *infra* note 244.

176. Reva Siegel helpfully raises the need for this Second Reconstruction. Reva B. Siegel, *The Pregnant Citizen, From Suffrage to the Present*, 108 GEO. L.J. 19TH AMEND. SPECIAL EDITION 167 (2020); see also Siegel, *supra* note 77.

177. See *supra* text accompanying notes 2–4.

178. See *supra* text accompanying notes 126–43.

179. See *supra* text accompanying notes 1–14.

180. See *supra* text accompanying note 69.

181. See *supra* text accompanying note 5.

even centered around the idea that women would remain in the home.<sup>182</sup> The country was still in the grips of these regressive notions about sex (in addition to race). The continued acceptance of sexism may (partially) explain why there has never been any congressional legislation attempting to enforce the Nineteenth Amendment. But in the last several decades, there have been significant advances in sex equality.<sup>183</sup> Congressional enforcement offers a way out and a way forward—a path to moving beyond the societal expectations and shared understandings that limited the reach of the Nineteenth Amendment and that contributed to cramped judicial interpretations of it. A thick notion of congressional enforcement also offers a deeper grounding for the democratic legitimacy of the Constitution by enabling congressional protection of voting rights and legislative solidification of sex equality.

Whatever the precise theory, however, the point is that many different conceptions of Congress's enforcement power would allow Congress to legislate in ways other than providing remedies for conduct that violates the Nineteenth Amendment. For the remainder of this Part, we survey how this thick conception of Congress's enforcement power might work: Congress's enforcement power might conceivably allow it to address restrictions on voting that disproportionately burden women; and prevent other impediments to women's political equality.

#### A. VOTING EQUALITY

To enforce the Nineteenth Amendment's substantive provision, Congress might enact legislation that eliminates obstacles to women voting. Short of prohibiting women from casting votes (or discounting women's votes), states sometimes enact preconditions to voting that have the effect of prohibiting some women from voting, or making it more difficult for them to do so. Some preconditions to voting might limit people's ability to vote on account of sex because they rely on proxies for sex or correlates with sex.<sup>184</sup> For example, state laws previously allowed only property owners to vote.<sup>185</sup> When state laws prohibited women from holding property, that precondition prohibited women from voting.<sup>186</sup>

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182. See 58 CONG. REC. 80, 88 (1919) (arguing that suffrage would not change women's traditional role in the home); 52 CONG. REC. 1436 (1915) ("If women vote, it will not destroy the home. It only means a short time, once or twice a year, to go to the polls and deposit a marked piece of paper, and during these few minutes she wields a power that is doing more to protect her home and all other homes than any other possible influence, and she need not neglect her household nor her children in order to do it. Almost any woman has enough time to go to the polls, and enough time to inform herself so she can vote intelligently."); Robert B. Jones, *Defenders of "Constitutional Rights" and "Womanhood": The Antisuffrage Press and the Nineteenth Amendment in Tennessee*, 71 TENN. HIST. Q. 46, 60 (2012) (highlighting similar arguments made in Tennessee).

183. Sepper & Dinner, *supra* note 62, at 97–128 (discussing advances against public discrimination on the basis of sex).

184. See *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 206–07 (1970).

185. *Id.*

186. *Id.*; see Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 31 (2014).

But there are also modern preconditions that impede women's ability to vote, which Congress might restrict under its enforcement power. Steve Kolbert pioneered the idea that Congress might legislate to address modern voting preconditions under its Nineteenth Amendment enforcement powers.<sup>187</sup> He argued that Congress's Nineteenth Amendment enforcement powers could target restrictive voting laws that disproportionately fall upon women, including voter-identification laws, documentary-proof-of-citizenship requirements, improper voter-registration database maintenance practices, and cutbacks in voting access.<sup>188</sup> Until recently, Kolbert observed, "the extent to which these restrictions on voting may disproportionately affect *women* had gone largely unnoticed."<sup>189</sup>

The Nineteenth Amendment might be used not only to attack the constitutionality of some of these restrictive laws, but also to provide the predicate for congressional legislation eliminating state restrictions. Consider the case of strict state voter-identification laws, which may disproportionately burden women voters for a few reasons.<sup>190</sup> Women change their names more frequently than men when they get married.<sup>191</sup> As a result, women will need to obtain updated identification documents before voting more frequently than men, which imposes a burden on women who would like to vote. Even if women do obtain the updated identification documents, they might still be prevented from voting to the extent the states voter-registration lists have not been updated to reflect their changed names.<sup>192</sup>

Voter-identification laws may also disproportionately burden women because of socioeconomic disparities in the United States. It is no secret that women possess less wealth than men;<sup>193</sup> they receive less money for doing similar work,<sup>194</sup> and several predominantly female occupations are plagued by underpayment and wage theft.<sup>195</sup> Courts have recognized that the burden of voter-identification laws

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187. See Kolbert, *supra* note 74.

188. *Id.* at 508–29, 543–59; see also DuBOIS, *supra* note 75, at 5 ("Today's voter suppression is the contemporary manifestation of the opposition to extending the franchise to African Americans and women.").

189. See Kolbert, *supra* note 74, at 511.

190. *Id.* at 511–16.

191. See Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 785–89 (2007).

192. Kolbert, *supra* note 74, at 523 ("[W]omen are particularly vulnerable to problems related to database-matching: a database that lists a woman under her maiden name may report a non-match against the woman's married name in the voter registration database (or an outdated voter registration record may not match up with an updated driver's license or social security database)."). Further, counsel in Florida voting rights litigation reported voting "problems for married women who hadn't changed their name on Social Security or DMV information." *Id.*

193. See, e.g., Maria Cancian & Deborah Reed, *Family Structure, Childbearing, and Parental Employment: Implications for the Level and Trend in Poverty*, 26 FOCUS 21, 24 tbl.1 (2009).

194. Valentia Zarya, *Female Founders Got 2% of Venture Capital Dollars in 2017*, FORTUNE (Jan. 31, 2018, 7:30 AM), <https://fortune.com/2018/01/31/female-founders-venture-capital-2017/>; Claire Zillman, *The Fortune 500 Has More Female CEOs Than Ever Before*, FORTUNE (May 16, 2019, 6:30 AM), <https://fortune.com/2019/05/16/fortune-500-female-ceos/>.

195. For a long time, domestic work was specifically not covered by the federal wage laws. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (current version at 29 U.S.C. § 213

“will fall most heavily on the poor,” in part because wealthier individuals may be more likely to have drivers’ licenses and individuals with greater wealth may also find it easier to obtain the required documentation.<sup>196</sup> Plaintiffs’ claims against these laws should rely at least partially on the Nineteenth Amendment. Further, by eliminating these state laws, Congress would be eliminating voting barriers that differentially affect people on account of sex.

Voter-roll maintenance systems are another obstacle that may disproportionately burden women’s ability to vote. Voter-roll maintenance occurs when states remove persons from the voter rolls, ostensibly to ensure that voter rolls are up-to-date.<sup>197</sup> The National Voter Registration Act requires officials to perform voter-list maintenance to remove ineligible voters from voter registration.<sup>198</sup> Some states remove voters because there is no record of the person voting in a recent election.<sup>199</sup> Other times, states may eliminate a voter from the voter rolls when the voter-registration list contains a name that does not match a name on the state’s other identification lists (such as DMV lists).<sup>200</sup> Indeed, the Help America Vote Act requires states to verify the names on the voter-registration database with other databases in order to verify voters’ identity.<sup>201</sup> That method may disadvantage women who change their names after getting married.<sup>202</sup> The voter purges and voter-roll maintenance system may also have differential socio-economic burdens, similar to voter-identification laws. Getting back on the voter-registration list may require administrative hurdles that are particularly difficult for persons in lower-paying jobs with less flexible work schedules. And there is no question that states occasionally (and perhaps quite frequently) mistakenly eliminate voters from voter rolls—some estimates have suggested that Florida improperly removed almost 20,000 voters from voter-registration rolls.<sup>203</sup> Another estimate found that Ohio’s proposed list of voter purges would have mis

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(2018)). They are still not covered by civil rights laws on the workplace. See Madeleine Jourg, *Domestic Workers Aren’t Protected by Anti-Discrimination Law. This New Bill Would Change That*, TIME (July 15, 2019, 12:04 PM), <https://time.com/5626156/domestic-workers-anti-discrimination-law-ndwa> [<https://perma.cc/J4VH-NNNB>].

196. *Texas v. Holder*, 888 F. Supp. 2d 113, 140 (D.D.C. 2012), *vacated on other grounds by* 570 U.S. 928 (2013) (mem.).

197. See Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1108–09 (2019).

198. 52 U.S.C. § 20507(c)(2)(A) (2018).

199. See, e.g., *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838, 1848 (2018) (upholding Ohio’s ability to eliminate voters from the voter rolls where the voter did not vote in the most recent election and failed to return a form to the state).

200. See Kolbert, *supra* note 74, at 523–24.

201. 52 U.S.C. § 21083(a)(5).

202. See *supra* note 191 and accompanying text.

203. See Katie Sanders, *Bill Nelson Compares Rick Scott’s Voter Purge with a 2000 Attempt*, POLITIFACT FLA. (June 5, 2012 4:02 PM), <https://www.politifact.com/factchecks/2012/jun/05/bill-nelson/bill-nelson-compares-rick-scotts-voter-purge-2000/> [<https://perma.cc/K2H7-Q965>]; see also David Margolick et al., *The Path to Florida*, VANITY FAIR (Oct. 2004), at 310–11, <https://archive.vanityfair.com/article/2004/10/the-path-to-florida>.

takenly removed 40,000 voters.<sup>204</sup> (Ohio's mistakes were identified only because volunteers checked the state's proposed list of ineligible voters.<sup>205</sup>)

Laws that restrict access to voting (by limiting early or absentee voting or reducing the number of polling places) may also disproportionately burden women. These laws result in abridgments on voting rights on account of sex for similar reasons why voter-identification laws do. The restrictions may be felt more severely among those with less socioeconomic power, who find it harder to make additional time to wait in line at the polls or to take time off to vote.<sup>206</sup> Because women are less socioeconomically well-off than men, these restrictions may burden women more than men.<sup>207</sup> Moreover, women frequently undertake a greater proportion of work around the house, including child care and what Elizabeth Emens calls "life admin," relative to men.<sup>208</sup> That work may be more difficult to set aside (or opt out of) in order to overcome various barriers to voting. The longer the trip to the polling place, the longer it takes to vote. Long trips combined with a narrower time window in which to vote will make voting more difficult for people in charge of family care (which is less flexible than a job that offers days off).

Two pieces of the Nineteenth Amendment's history help to put into focus why eliminating these kinds of barriers to voting is a way of ensuring that voting will not be abridged "on account of sex." Some states used fears of voter fraud to restrict women's access to voting. In 1807, the New Jersey legislature prohibited women from voting on the ground that it would prevent voter fraud.<sup>209</sup> Today, some Republican-controlled states routinely recite an interest in preventing extremely rare voter fraud as a justification for enacting voter-identification requirements and for restricting absentee or early voting—restrictions that disproportionately burden women.<sup>210</sup>

More importantly, the voting restrictions discussed above have disparate racial effects as well as disparate effects based on sex; voter-identification laws and restrictions on access to voting disproportionately hurt racial minorities.<sup>211</sup> Interpreting the Nineteenth Amendment to give Congress the power to remedy

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204. See Nicholas Casey, *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html>.

205. *Id.*

206. For a description about how socioeconomic disparities in voting are a political problem, see Ross II, *supra* note 174, at 1151–52.

207. See *supra* notes 191–93 and accompanying text.

208. Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1433–39, 1440–41 (2015); see also Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 181–82 (2000); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1053–54 (2012).

209. Act of Nov. 16, 1807, 1807 N.J. Laws 33; see also Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776-1807*, 63 RUTGERS L.J. 1017, 1022–23 (2011).

210. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195–96 (2008); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016); RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* ch. 1 (2020).

211. See, e.g., Ben Pryor et al., *Voter ID Laws: The Disenfranchisement of Minority Voters?*, 134 POL. SCI. Q. 63, 68 (2019).



voting restrictions that disproportionately hurt racial minorities (black women in particular) is a way of redeeming the Nineteenth Amendment from the racist history with which it is entangled. As we have described,<sup>212</sup> some of the suffragists who agitated for women's right to vote were concerned with *white* women's ability to vote; many of the most prominent women in the Movement as the Nineteenth Amendment neared ratification were content to exclude black women from their movement and from the ambit of the Movement's concern.<sup>213</sup> Indeed, some of the arguments for the Nineteenth Amendment were that white women would help to maintain racial subordination and Jim Crow (and many white women did).<sup>214</sup>

Interpreting the Nineteenth Amendment, and in particular Congress's enforcement power, in a way that allows Congress to transcend the racist ideologies of the Amendment's contemporaries is an important part of legitimating the Amendment and constitutional governance. An analogy here is helpful: The Fourteenth Amendment has been interpreted as an aspirational guarantee that secures protections beyond the racist practices and racist views of its ratifiers (many of whom embraced segregated schools, among other invidious laws).<sup>215</sup> Interpreting Congress's enforcement power under the Nineteenth Amendment to allow Congress to address the unique burdens faced by black women is a way of reinforcing the substantive and democratic legitimacy of the amendment itself. It allows the Amendment to function as a guarantee that protects women of color in addition to white women, and as a tool for Congress to rectify the burdens disproportionately experienced by these women.

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212. See *supra* notes 73–114 and accompanying text.

213. See ALAN P. GRIMES, *THE PURITAN ETHIC AND WOMAN SUFFRAGE* 124–25 (1967); Brent Staples, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/suffrage-movement-racism-black-women.html>; Tammy L. Brown, *Celebrate Women's Suffrage, but Don't Whitewash the Movement's Racism*, ACLU (Aug. 24, 2018, 5:45 PM), <https://www.aclu.org/blog/womens-rights/celebrate-womens-suffrage-dont-whitewash-movements-racism> [<https://perma.cc/52PQ-85BA>]. For work documenting the contributions of black women to suffrage, see generally TERBORG-PENN, *supra* note 3.

214. *Breedlove v. Suttles*, 302 U.S. 277, 282 (“In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes.”), *overruled by Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). Supporters also argued that women would impose traditional values on politics. 58 CONG. REC. 80 (1919); Holly J. McCammon & Karen E. Campbell, *Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866-1919*, 15 GENDER & SOC'Y 55, 58 (2001).

215. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1803–05 (1997); Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1648 (2009). For work exploring the Fourteenth Amendment ratifiers' embrace of racist ideologies and practices, see generally Siegel, *supra* note 58 (exploring the post-Civil War embrace of “civil” rights in contrast to continued denials of “social” rights), and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (arguing that *Brown v. Board of Education* cannot be justified on an originalist interpretation of the Fourteenth Amendment).

## B. POLITICAL EQUALITY AND POLITICAL ECONOMY

Another way for Congress to enforce the Nineteenth Amendment would be eliminating obstacles to women's political equality—including obstacles to other exercises of political power besides voting.

Some elements of political power relate to the political economy of voting and elections. There is no dearth of scholarship (or concern) about the relationship between money and politics. Donating money to a candidate can facilitate access to a lawmaker—and provide the potential to sway or influence them (even if the money, as such, is not the influence).<sup>216</sup> As Larry Lessig has written, only a small number of people possess the kind of money that would allow them to single-handedly inject themselves (or a particular candidate) into federal politics.<sup>217</sup> Guy-Uriel Charles has described this issue in terms of “the structural and economic barriers that preclude a vast majority of citizens from participating in politics or from financing elections”;<sup>218</sup> through its method of financing elections, “the state has created a barrier for political participation (wealth) that some citizens will never be able to overcome.”<sup>219</sup> In this framing, spending money *is* an aspect of political participation akin to voting.<sup>220</sup> Along these lines, Ryan Scoville's recent study of ambassadorships has shown how, over the last few decades, ambassadors have been selected in part based on their campaign contributions.<sup>221</sup> In this context, at least, money buys political opportunities.

As the preceding section noted, the vast majority of people who possess the kind of wealth that opens up these political opportunities are men.<sup>222</sup> If Congress sought to ensure women's ability to participate in politics on equal terms as men,

216. GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 10–11 (2001); ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT 297 (2009) (outlining the view that donors give money to “reinforce established connections”); Larry Makinson, *What Money Buys*, in SHADES OF GRAY: PERSPECTIVES ON CAMPAIGN ETHICS 171, 181 (Candice J. Nelson et al. eds., 2002). The ABA Task Force Report on Lobbying refers to “a self-reinforcing cycle of mutual financial dependency.” Am. Bar Ass'n, Task Force on Federal Lobbying Laws, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, 63 ADMIN. L. REV. 419, 451 (2011). For a description of how legislators can influence policy, short of legislation and roll call votes, see Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 566–67 (2012) (reviewing LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS POLITICS — AND A PLAN TO STOP IT (2011) and JACK ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011)).

217. Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1, 18 (2014).

218. Charles, *supra* note 186, at 34 & n.37 (citing Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004)).

219. *Id.* at 34

220. *Id.* at 35. This idea is consistent with the Court's First Amendment cases that equate spending money with (political) speech. See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); see also *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (conflating campaign donors with “constituents,” and remarking that “ingratiation and access . . . embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns” (citation and internal quotations omitted)).

221. Ryan M. Scoville, *Unqualified Ambassadors*, 69 DUKE L.J. 71, 109–18 (2019).

222. Think about the billionaires who run for President—Steyer, Perot, Schultz, Bloomberg.

then Congress might enact a few different kinds of legislation to address the political economy of elections and politics. These might include some of the reforms that scholars have proposed, including public funding of elections, or laws that provide voters with monetary vouchers to give to candidates.<sup>223</sup> Other related proposals include restrictions on the amount of money that any one person can give in an election, through any medium.<sup>224</sup> These laws address political participation and political power by leveling up and leveling down the playing field respectively.

Another way of addressing the disparities in political economy would be to address the underlying economic disparities themselves. If the reason why women lack political power is partially because they do not have access to the same kind of wealth that men do, then laws that seek to ensure equal economic opportunities for women might advance women's political equality. These might include prohibitions on pay discrimination or other forms of sex discrimination in the workplace,<sup>225</sup> as well as prohibitions against pregnancy discrimination.<sup>226</sup> These laws might not eliminate the wealth gap between men and women, but they might mitigate ways that the economic disparities between men and women are entrenched over time.

Congress might also address some of the root causes of the disparities in political economy. Some of the disparities in pay between men and women may be attributable to lingering sex stereotypes and antiquated notions of gender roles that undermine women's success in the workplace.<sup>227</sup> Laws trained at rooting out these stereotypes (such as laws mandating equal parental or family-care leave for men and women<sup>228</sup>) might enforce women's political equality by challenging stereotypes that contribute to inequality.

These stereotypes affect more than just the political economy aspects of political equality. They may also limit women's ability to obtain and exercise political power. Concerns about electability often dog female candidates more than their male counterparts, and they may make it harder for women to succeed in politics.<sup>229</sup> Female candidates are criticized for being too knowledgeable or not

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223. Hasen, *supra* note 216, at 580; Richard L. Hasen, *Is 'Dependence Corruption' Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L. J. 305, 311–12 (2013); Lessig, *supra* note 217, at 18.

224. Lessig, *supra* note 217, at 19.

225. See 42 U.S.C. 2000e-2(a)(1) (2018) (prohibiting employment discrimination because of sex).

226. See *Id.* § 2000e(k) (including pregnancy in the definition of “because of sex” or “on the basis of sex” under the antidiscrimination statute).

227. See, e.g., Kate Manne, *Warren Succeeded Because Voters Saw Her as Caring. That's Also Why She Failed.*, WASH. POST (Mar. 6, 2020, 9:57 AM), [https://www.washingtonpost.com/outlook/warren-succeeded-because-voters-saw-her-as-caring-thats-also-why-she-failed/2020/03/06/8064b7c2-5f0f-11ea-b014-4fafa866bb81\\_story.html](https://www.washingtonpost.com/outlook/warren-succeeded-because-voters-saw-her-as-caring-thats-also-why-she-failed/2020/03/06/8064b7c2-5f0f-11ea-b014-4fafa866bb81_story.html) (citing studies that indicate that men are deemed more competent and likeable in the workplace).

228. See Family and Medical Leave Act, 29 U.S.C. § 2612 (2012).

229. See Amelia Thomson-DeVeaux, *Americans Say They Would Vote for a Woman, But . . .*, FIVETHIRTYEIGHT (July 15, 2019), <https://fivethirtyeight.com/features/americans-say-they-would-vote-for-a-woman-but/> [https://perma.cc/E95U-YPDA] (highlighting common stereotypes of female

informed enough, whereas similar traits in male candidates are written up as character features and elements of their character appeal.<sup>230</sup> Combating these stereotypes may be a way of ensuring women have similar political power and opportunities to exercise political power as men.

The political economy of elections is not the only other aspect of political participation that Congress might reach under its enforcement power. There are other avenues for political participation beyond voting, donating to campaigns, or lobbying those who are in political office—such as serving on a jury. The jury is a forum for citizens to have input into the criminal process and a mechanism for self-governance.<sup>231</sup> In part for these reasons, some early state cases relied on the Nineteenth Amendment to invalidate state restrictions on women serving on juries.<sup>232</sup> (Some state laws made all persons eligible to vote eligible for jury service.<sup>233</sup>) Although the Supreme Court later grounded that principle in the Fourteenth Amendment, rather than the Nineteenth Amendment,<sup>234</sup> the state decisions on jury service underscore the idea that political participation extends beyond the ballot box.

Congress might enforce gender equity in political participation by reducing obstacles to these other forms of political participation. Consider, for example, that some courthouses apparently lack spaces to allow breastfeeding mothers to breast pump, which states then use as a reason to dismiss breastfeeding mothers from jury service.<sup>235</sup>

Congress's ability to reach other aspects of political participation besides voting and areas that are adjacent to political equality is bolstered by the combined force of the Nineteenth and Fourteenth Amendments.<sup>236</sup> The Nineteenth Amendment, in conjunction with the Fourteenth Amendment, solidifies Congress's power to dismantle gender hierarchies outside the specific context of voting because the Fourteenth Amendment is not limited to issues of political equality—it encompasses social equality and civic equality as well.<sup>237</sup> And the Constitution

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candidates and using statistics to show that female candidates are at a disadvantage as a result of stereotypes).

230. *See id.*

231. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2195–202 (2014).

232. *See* *People v. Barltz*, 180 N.W. 423, 425 (Mich. 1920); *Parus v. Dist. Court of Fourth Judicial Dist. of Nev.*, 174 P. 706, 708 (Nev. 1918).

233. The Supreme Court relied on similar reasoning to invalidate a restriction used to disenfranchise a black man. *See* *Neal v. Delaware*, 103 U.S. 370, 389 (1880).

234. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

235. Judith P. Miller, *My Attempt at Jury Duty Failed — Because I'm a Nursing Mother*, CHI. TRIB. (Oct. 13, 2017, 10:17 AM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-jury-duty-breastfeeding-1015-story.html>. Some states give mothers the option of postponing jury duty service if they are breastfeeding. *See* *Cuomo Signs Legislation That Exempts Breastfeeding Mothers from Jury Duty*, WKBW (Oct. 21, 2019, 12:14 PM), <https://www.wkbw.com/news/local-news/cuomo-signs-legislation-that-exempts-breastfeeding-mothers-from-jury-duty> [<https://perma.cc/D2PA-DCUS>].

236. *See generally* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016) (exploring different ways that combination analysis can be used in constitutional law).

237. *See* Siegel, *supra* note 58, at 1131 (documenting the evolution to encompassing social equality within the Fourteenth Amendment rather than just civic equality).

specifically prevents discrimination on the basis of only three characteristics (race, in the Fifteenth Amendment;<sup>238</sup> sex, in the Nineteenth Amendment;<sup>239</sup> and age, in the Twenty-Sixth Amendment<sup>240</sup>), which augments Congress's authority to break down gender disparities.

### III. THE SUPREME COURT'S FEDERALISM JURISPRUDENCE AND THE THIN VERSION OF CONGRESS'S NINETEENTH AMENDMENT ENFORCEMENT POWER

This Part applies the Court's current approach to congressional power (and in particular, congressional power to enforce constitutional provisions) to the Nineteenth Amendment. It highlights the myriad roadblocks that a thick conception of Congress's Nineteenth Amendment enforcement power might encounter: (1) a state action limitation; (2) a congruence and proportionality requirement; (3) a limited definition of what constitutes discrimination "on account of sex"; and (4) other external obstacles, including the First Amendment.

#### A. STATE ACTION

The Nineteenth Amendment allows Congress to "enforce th[e] article," and the substantive Article provides that, "The right of citizens of the United States to vote shall not be denied or abridged *by the United States or by any State* on account of sex."<sup>241</sup> The Court has interpreted similar language in the Fourteenth Amendment to mean that Congress can regulate only state action.<sup>242</sup> Section 5 of the Fourteenth Amendment allows Congress to "enforce . . . th[e] article," and the substantive Article provides that:

*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>243</sup>

If Congress may reach only state action under its Nineteenth Amendment enforcement power, then Congress could not, for example, enact legislation addressing workplace-pay disparities or wealth gaps between men and women, even if those disparities contribute to political inequality of men and women; nor could Congress address sex stereotyping among private actors, even if they influence (or are influenced by) how the state treats women, or how the state regards burdens on women voting.<sup>244</sup>

238. U.S. CONST. amend. XV, § 1.

239. U.S. CONST. amend. XIX, § 1.

240. U.S. CONST. amend. XXVI, § 1.

241. U.S. CONST. amend. XIX (emphasis added).

242. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

243. U.S. CONST. amend. XIV, §§ 1, 5 (emphasis added).

244. There are, of course, difficult questions about what constitutes state action. In her Note on the Nineteenth Amendment, for example, Sarah Lawsky argued that marriage was a proper subject of regulation under the Nineteenth Amendment because marriage is a state-created institution. Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J.

The idea that Congress may regulate only state action under the Fourteenth Amendment has its critics. Richard Primus has argued that the Court's key state action decision, the *Civil Rights Cases*, was driven, in part, by racial resentment and antipathy toward legislation addressing racial discrimination, as well as the Court's failure to appreciate how the Civil War and Reconstruction Amendments nullified elements of the constitutional order that disadvantaged African-Americans.<sup>245</sup> That critique provides a powerful argument against modeling other constitutional rules on such a flawed decision.<sup>246</sup> The Court has nonetheless stuck with the state action requirement, including when it struck down the Violence Against Women Act, which provided a civil remedy for victims of gender-based violence, as exceeding Congress's powers under the Fourteenth Amendment.<sup>247</sup> And just last Term, the five conservative Justices described the state action requirement as a core component of liberty.<sup>248</sup>

Given the similarities in the language between the Fourteenth and Nineteenth Amendments, it is extremely unlikely that the Court would permit Congress to regulate private actors under the Nineteenth Amendment. That is so despite some possible differences between the Fourteenth and Nineteenth Amendments. Consider, for example, that the Court's reasoning in the *Civil Rights Cases* included the claim that a state action requirement was necessary to constrain Congress's powers, because if Congress could regulate private parties under the Fourteenth Amendment, its powers would be considerably augmented.<sup>249</sup> Although the Court might have a similar concern with allowing Congress to regulate private conduct under the Nineteenth Amendment, part of the reason why the Court feared expansive congressional power under the Fourteenth Amendment was because the substantive provisions of the Fourteenth Amendment are so far-reaching.<sup>250</sup> The substantive provisions in that Amendment guarantee equal protection, privileges and immunities, and due process of law. The substantive provision of the Nineteenth Amendment, by contrast, limits one ground for state differentiation (differentiation on the basis of sex), and the Amendment applies that limit to only some contexts (voting, politics, citizenship, or perhaps

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783, 808–15 (2000). Lawsky extended that argument to mean that Congress could also regulate on topics of state criminal law, such as gender-based violence, because those, too, are state-created or enabled institutions. *Id.* at 815.

245. See Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1724–30 (2006).

246. Primus also notes that the Court's reasoning rested on a misguided analogy between the Fourteenth Amendment and the Contracts Clause: The Court maintained that the Fourteenth Amendment, like the Contracts Clause, was applicable only to the states. See *The Civil Rights Cases*, 109 U.S. at 12–13. But this analogy overlooked that the Fourteenth Amendment contains a grant of power to Congress whereas the Contracts Clause does not. Primus, *supra* note 245, at 1720.

247. *United States v. Morrison*, 529 U.S. 598, 621–27 (2000).

248. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019). For criticism, see Genevieve Lakier, *Manhattan Community Access Corp. v. Halleck: Property Wins Out Over Speech on the Supposedly Free-Speech Court*, AM. CONST. SOC'Y, <https://www.acslaw.org/analysis/acs-supreme-court-review/manhattan-community-access-corp-v-halleck-property-wins-out-over-speech-on-the-supposedly-free-speech-court/> [<https://perma.cc/MX72-Z8GB>].

249. See *The Civil Rights Cases*, 109 U.S. at 13–15.

250. See *id.* at 14–15.

something else). Even if the areas that fall within the ambit of the substantive provision of the Nineteenth Amendment go beyond voting, they are still narrower than the set of areas that fall within the ambit of the substantive provisions of the Fourteenth Amendment—which the Court understood to reach essentially every aspect of life.<sup>251</sup>

#### B. CONGRUENCE AND PROPORTIONALITY

Another limitation on Congress's Nineteenth Amendment enforcement power would also be drawn from a limitation on Congress's Fourteenth Amendment enforcement powers: the congruence and proportionality requirement. In *City of Boerne v. Flores*, the Court held that the Fourteenth Amendment allows Congress to enact legislation that is "congruen[t] and proportional[]" to a pattern of constitutional violations.<sup>252</sup> In doing so, the Court required there to be a closer fit between a law's means and ends when Congress legislates under Section 5 of the Fourteenth Amendment than when it legislates under Article I.<sup>253</sup> And, the Court declared, Congress's powers under Section 5 are only remedial; Congress cannot define or create new constitutional rights.<sup>254</sup>

A congruence and proportionality limitation, like a state action requirement, would prevent Congress from addressing many aspects of sex discrimination. It would limit Congress's ability to address sex discrimination among private actors (assuming Congress could regulate non-state actors at all). It would also limit Congress's ability to address facially neutral laws or policies that have differential burdens on the basis of sex.<sup>255</sup> The congruence and proportionality standard requires Congress to tie legislation to a pattern of constitutional violations.<sup>256</sup> But many if not most facially neutral laws would be constitutional under existing doctrine; therefore, congressional legislation that prohibited those facially neutral laws might not be closely tied to or remedy a pattern of constitutional violations.<sup>257</sup>

Like the state action requirement, the congruence and proportionality limit has been subject to considerable scholarly criticism. Michael McConnell, among others, has argued that the requirement misreads the drafting history of the

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251. *See id.*; *see also* *City of Boerne v. Flores*, 521 U.S. 507, 523, 529 (1997) (noting that an expansive interpretation of the Fourteenth Amendment would make it "difficult to conceive of a principle that would limit congressional power").

252. *See City of Boerne*, 521 U.S. at 520.

253. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see also* *United States v. Comstock*, 560 U.S. 126, 130 (2010) ("[T]he Constitution grants Congress the authority to enact [laws which are] 'necessary and proper for carrying into Execution' the powers 'vested by' the 'Constitution in the Government of the United States.'" (citing U.S. CONST. art. 1, § 8, cl. 18)).

254. *See City of Boerne*, 521 U.S. at 519.

255. *See, e.g.,* *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 39 (2012); *see also* Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1153–58 (2001) (explaining the congruence and proportionality requirement of *City of Boerne*).

256. *E.g.,* Caminker, *supra* note 255, at 1153–58.

257. *See, e.g.,* *Coleman*, 566 U.S. at 39; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

Fourteenth Amendment and ignores the basic reality that the Fourteenth Amendment drafters trusted Congress more than the courts.<sup>258</sup> He concludes that it is therefore unlikely that the framers would have limited Congress's powers and tied Congress's powers to judicial interpretations of the Constitution.<sup>259</sup> Doug Laycock has mounted a similarly forceful critique.<sup>260</sup>

There are, again, some possible distinctions between the Fourteenth and Nineteenth Amendments that are also based on the text and histories of the two Amendments, such that the congruence and proportionality requirement might apply to the former but not the latter. The textual differences between the two Amendments are similar to those that might justify treating the two Amendments differently for purposes of the state action requirement. Specifically, *City of Boerne v. Flores* justified the congruence and proportionality requirement in part by pointing to the otherwise expansive reach of Congress's powers under the Fourteenth Amendment. Those powers would be expansive, *City of Boerne* reasoned, because of the expansive reach of the substantive provisions of the Article: If Congress could enact legislation that was merely somewhat related to a list of far-reaching substantive protections, then Congress's powers would be significantly expanded.<sup>261</sup> These concerns are less potent in the context of the Nineteenth Amendment, whose substantive provision, the preceding section explained, is narrower than the substantive provisions of the Fourteenth Amendment (even if the substantive provision of the Nineteenth Amendment is interpreted to apply outside the specific context of voting).<sup>262</sup>

Nonetheless, there will still be concerns about allowing Congress to regulate in areas of traditional state concern, which is where a thick conception of Congress's enforcement power would likely lead, given that vestiges of sex discrimination remain in criminal law, family law, and morals legislation, among other areas.<sup>263</sup> Moreover, the core textual basis for *City of Boerne's* congruence and proportionality requirement applies equally to both the Nineteenth and Fourteenth Amendments. *City of Boerne* reasoned that Congress could enact laws that are congruent and proportional to a pattern of constitutional violations because the Fourteenth Amendment gave Congress remedial, rather than substantive, powers by permitting Congress to "enforce" the provisions of the Article.<sup>264</sup> Given that the Nineteenth Amendment also grants Congress the power to enforce the provisions of the Article, it is likely the Court would say that the Nineteenth

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258. See, e.g., McConnell, *supra* note 168, at 181–83.

259. *Id.*

260. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 766–67 (1998).

261. *City of Boerne*, 521 U.S. at 523, 529.

262. See Caminker, *supra* note 255, at 1191 & n.269, 1197–98 (outlining this argument with respect to the Fifteenth Amendment).

263. Cf. Siegel, *supra* note 22, at 1022–24 (arguing that Congress can regulate these areas under the Nineteenth Amendment).

264. *City of Boerne*, 521 U.S. at 520–29.



Amendment also requires Congress to enact laws that are congruent and proportional to a pattern of constitutional violations.

There are also some possible historical differences between the Fourteenth and Nineteenth Amendments that are relevant to whether the congruence and proportionality standard applies to both Amendments. *Boerne* relied on the Fourteenth Amendment's drafting history and, specifically, Congress's rejection of a provision that would have allowed Congress to enact all laws necessary and proper to secure the Amendment.<sup>265</sup> But the drafting history of the Nineteenth Amendment suggests Congress attempted to expand the scope of Congress's enforcement authority, rather than constrict it. After some members of the House warned that the Nineteenth Amendment's Enforcement Clause "gives to Congress the full, absolute, unrestricted, and exclusive power" over elections,<sup>266</sup> the Senate considered and rejected an amendment that would have replaced the Enforcement Clause with the following:

That the several States shall have the authority to enforce this article by necessary legislation, but if any State shall enforce or enact any laws in conflict therewith, then Congress shall not be excluded from enacting appropriate legislation to enforce it.<sup>267</sup>

Congress, however, elected to keep the broader Enforcement Clause. Equally important is that when Congress selected the Nineteenth Amendment Enforcement Clause, it had before it some evidence that the language of the Enforcement Clause allowed Congress to legislate far beyond the substantive provisions of the Amendment. (The Court did not announce the congruence and proportionality requirement until 1997.) When Congress picked the Enforcement Clause language in the Nineteenth Amendment, Congress had exercised its authority under the analogous Enforcement Clause of the Eighteenth Amendment to enact laws that extended well beyond the substantive provisions of the Eighteenth Amendment. The Eighteenth Amendment prohibited only "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."<sup>268</sup> But relying on the Eighteenth Amendment's Enforcement Clause, Congress had enacted legislation prohibiting the simple possession of liquor.<sup>269</sup> Congress had also prohibited non-intoxicating liquors and regulated alcohol that was not used for beverage purposes.<sup>270</sup>

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265. *Id.* at 520–21. For a critique of the Court's historical analysis on *Boerne*, see McConnell, *supra* note 168.

266. 58 CONG. REC. 90 (1919) (statement of Rep. Clark).

267. *Id.* at 634 (text of amendment proposed by Sen. Gay).

268. U.S. CONST. amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI, § 1.

269. National Prohibition Act, ch. 85, §§ 3, 25, 41 Stat. 307, 308, 315 (1919).

270. *Id.* §§ 1, 4–13, 41 Stat. at 307–12.

A Court committed to grafting a congruence and proportionality requirement onto the Nineteenth Amendment might point to the only legislation that Congress ever proposed pursuant to its enforcement power under the Amendment. That legislation provided for a cause of action against officials who violated the substantive provisions of the Amendment by prohibiting women from casting votes because they were women.<sup>271</sup> That legislation is certainly consistent with a narrow conception of Congress's enforcement power that allows Congress only to remedy constitutional violations, but it does not prove that supplying a remedy against unconstitutional conduct exhausts the full scope of Congress's enforcement power under the Nineteenth Amendment.

### C. "ON ACCOUNT OF" SEX

The scope of Congress's enforcement power also depends on what it means for a law or policy to be "on account of sex." This section outlines two related issues about interpreting the phrase "on account of sex" that will affect the scope of Congress's enforcement powers. The first is whether "on account of sex" refers to restrictions that intentionally discriminate on the basis of sex versus restrictions that have the effect of discriminating on the basis of sex; the second is whether "on account of sex" encompasses restrictions that differentially affect transgender or nonbinary individuals.

#### 1. Intent Versus Effects

We assume, consistent with the Court's equal protection doctrine, that voting restrictions that explicitly include a reference to sex (or whose application turns on a reference to sex) are on account of sex.<sup>272</sup> In addition to laws that are explicitly sex-based, some facially neutral laws will also discriminate on account of sex, and there are at least two different accounts of what it means for a facially neutral voting restriction to be on account of sex. One is that a facially neutral restriction is on account of sex if the restriction intentionally seeks to treat people differently because of their sex.<sup>273</sup> The other is that a voting restriction is on account of sex when it has the effect of producing differential burdens on certain groups of people on the basis of sex.<sup>274</sup>

If on account of sex refers only to those laws that explicitly mention sex or intentionally target people because of their sex, then Congress's enforcement power would be considerably narrower than if on account of sex encompassed laws that produced disparate effects. This is particularly true if, as we expect, the current Court would read a congruence and proportionality requirement into the

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271. S. 4739, 66th Cong. § 2 (1920); H.R. 15018, 66th Cong. § 2 (1920); S. 4323, 66th Cong. § 2 (1920).

272. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286–88 (2011) (defining the "anticlassification" principle).

273. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 257, 275 (1979).

274. See Siegel, *supra* note 272, at 1288 (explaining how "facially neutral" policies can have a "disparate impact on minorities").

Nineteenth Amendment.<sup>275</sup> If on account of sex includes only laws that purposefully differentiate between sexes, then it would be harder for Congress to address laws that impose differential burdens on the different sexes, because federal legislation targeting those laws would not be as closely tied to a pattern of constitutional violations.

We believe that a discriminatory effect standard is a better way to judge Nineteenth Amendment violations.<sup>276</sup> But the Supreme Court's 1980 decision in *City of Mobile v. Bolden* imposed a purpose requirement on Fourteenth and Fifteenth Amendment claims of racially discriminatory voting,<sup>277</sup> and the Court has adopted an increasingly restrictive account about what it means to discriminate based on certain characteristics.<sup>278</sup> The Court is therefore likely to adopt a discriminatory purpose standard, which would further narrow the scope of Congress's enforcement authority. Further evidence of this is that the Court has (remarkably) ruled that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex,<sup>279</sup> and it also has concluded that a state rule preferencing a group that was over 98% male does not constitute intentional discrimination on the basis of sex.<sup>280</sup> As scholars have noted, the Court has adopted demanding rules about the kind of evidence required to establish intentional discrimination (circumstantial evidence is often not enough) and has relied on a very narrow definition about what constitutes intentional discrimination (focusing on whether decisionmakers desire to hurt a particular group).<sup>281</sup> A narrow definition of "on account of sex" would limit Congress's enforcement power, particularly in conjunction with a congruence and proportionality requirement.

## 2. Gender Identity

The phrase "on account of sex" is most commonly understood to refer to distinctions between men and women. But linguistically and conceptually, it might also refer to burdens that fall on transgender or nonbinary individuals. If these laws are considered voting abridgments on account of sex, then Congress's enforcement authority could include legislation protecting the voting rights and political rights of transgender individuals.

Consider how voter-identification requirements or voter-roll maintenance systems might burden transgender individuals. These laws might result in the disenfranchisement of transgender individuals if state-recognized forms of

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275. However, under certain conceptions of Congress's enforcement power, Congress could either disagree with judges' conclusions that particular laws intentionally target individuals because of their sex, or disagree that the substantive principle embodied in the Nineteenth Amendment prohibits only intentional discrimination. See *supra* notes 158–61 and accompanying text.

276. At least, we do not believe that discriminatory purpose is always required to establish a constitutional violation. This Part, however, is focused on what the Court is likely to do.

277. 446 U.S. 55, 61–64 (1980); see also *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 n.3 (noting that the Court had never held that vote dilution violates the Fifteenth Amendment).

278. Jessica A. Clarke, *Explicit Bias*, 113 *Nw. U. L. Rev.* 505, 523–40 (2018).

279. See *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974).

280. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 257, 275 (1979).

281. See, e.g., Clarke, *supra* note 278, at 523–40.

identification do not reflect an individual's identified or expressed gender—such as where an individual starts to live consistently with their gender identity, which does not correspond with their sex assigned at birth, or where an individual does not identify as gender binary.<sup>282</sup> An individual who changes one method of identification runs the risk that database matching will turn up other records that have not been updated; and the burden of updating one's state identification is itself an additional barrier to voting that falls on the genderqueer community.<sup>283</sup>

These distinctions and burdens are sex-based in at least one respect—they necessarily depend on an individual's sex assigned at birth.<sup>284</sup> If a transgender man was assigned male sex at birth, then the voting-identification requirements or database matching would not have been an obstacle to him. But because he was assigned female sex at birth, they are. The resulting burden is therefore on account of sex.

If on account of sex encompasses regulations whose operation is contingent on or depends on an individual's sex, then burdens that fall on the genderqueer community might fall within the set of restrictions that Congress can eliminate in the course of enforcing the Nineteenth Amendment.<sup>285</sup>

#### D. EXTERNAL CONSTRAINTS

Finally, legislation attempting to enforce the Nineteenth Amendment might encounter a variety of obstacles external to the Nineteenth Amendment. The Court has been generally skeptical of legislation designed to remedy inequities and enforce civil rights. For example, the Court invalidated section 4 of the Voting Rights Act on the basis of the “equal sovereignty principle,”—a free-floating principle that is not based in the constitutional text and lacks a serious historical foundation or roots in the constitutional structure.<sup>286</sup>

The First Amendment may prove to be another obstacle to some of the legislation discussed in the previous Part. In particular, some of the laws designed to counter wealth-based disparities in the political process are likely inconsistent with the Court's current interpretation of the First Amendment.<sup>287</sup> In *Citizens*

282. See Kolbert, *supra* note 74, at 513–14.

283. See *id.*

284. They may also embody a form of sex stereotyping. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

285. This term, the Court is expected to decide a pair of cases that shed some light on how it might interpret the Nineteenth Amendment. In *EEOC v. R.G. & G.R. Harris Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.), and *argued* No. 18-107 (Oct. 8, 2019), and *Bostock v. Clayton County Board of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.), and *argued* No. 17-1618 (Oct. 8, 2019) (consolidated with *Altitude Express, Inc. v. Zarda*, No. 17-1623), the Court is considering whether, for purposes of Title VII, discrimination against members of the transgender community or against gays, lesbians, and bisexuals constitutes discrimination on the basis of sex. The plaintiffs in the cases argue that it does because any such differential treatment is contingent on an individual's sex assigned at birth (or their partner's sex assigned at birth). The employers, on the other hand, are relying more on the fact that the enacting Congress did not expect the prohibition against discrimination on the basis of sex to encompass legal protections for the LGBTQ community.

286. See Litman, *supra* note 19, at 1209–19.

287. See Hasen, *supra* note 223, at 307; Hasen, *supra* note 216, at 574–75.

*United v. FEC*, the Court rejected the argument that restricting corporate spending in politics could be justified on the ground that the restrictions protected political equality (given that some individuals have the resources to make contributions through different mediums, including corporations).<sup>288</sup> Previously, the Court had allowed Congress to restrict these expenditures in order to limit the “distorting effects of immense aggregations of wealth” accumulated with the help of the corporate form.<sup>289</sup> The sex-based-disparity rationale for some of the hypothetical legislation discussed in the previous part resembles this justification insofar as its goal is to offset resource and wealth advantages (or other political advantages) that are, in part, the product of sex discrimination. And some of the legislative means to accomplish that objective—in particular, restricting campaign contributions—would implicate the First Amendment’s protections for speech.<sup>290</sup> Others, like public funding for elections, would not.<sup>291</sup>

### CONCLUSION

One view of the Nineteenth Amendment is that it is a remarkable story of constitutional success. After the Amendment’s ratification, few states passed laws discriminating on the basis of sex in voting, meaning there was little need for litigation or for congressional enforcement against state voting laws.

Our view is more measured. We view the Nineteenth Amendment as partially successful in ending the most blatant discriminatory voting practices against most white women. But it took the Civil Rights Movement of the 1960s and the passage of the 1965 Voting Rights Act to fully grant the franchise to all women. We also think the current thin understanding of the Nineteenth Amendment fails for lack of imagination about the scope of its promise.

Courts have interpreted the Nineteenth Amendment to do very little, at least of its own force, in part because the Nineteenth Amendment was ratified at a moment when the march toward women’s equality was very much unfinished and was still hamstrung by the racial ideologies of the first part of the twentieth century. When the Amendment was ratified, women were still treated as second-class citizens—not capable of participating in all aspects of public life, as unfit to work, and as natural caretakers, which kept them out of many parts of civil life.<sup>292</sup>

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288. 558 U.S. 310, 356–61 (2010).

289. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. 310.

290. *See generally* *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Citizens United*, 558 U.S. 310.

291. *See* *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 564 U.S. 721, 722 (2011) (striking down, under the First Amendment, a provision of Arizona’s public-financing system that provided extra financing to participating candidates who faced large spending by opponents or outside groups).

292. *See, e.g.*, 52 CONG. REC. 1443 (statement of Rep. Brown) (arguing that Nineteenth Amendment would not displace generally accepted poll taxes or educational tests); *id.* at 1408–09 (statement of Rep. Campbell) (arguing that women would use the vote to reflect their traditional place in the home); *id.* at 1413–14 (statement of Rep. Clark) (same); Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836, 862 (1987); McCammon & Campbell, *supra* note 214, 59–69 (describing resistance to implementing the Nineteenth Amendment in several states).

Those shared beliefs probably informed judicial interpretations of the Nineteenth Amendment. But they were also built into the narrow scope of the substantive protections in the Nineteenth Amendment—the substantive provision is aimed only at voting, rather than all measures of citizenship, political equality, and public life. Although some proponents of women’s suffrage surely wanted (and some critics undoubtedly feared) the Amendment would effect a radical reshaping of women’s lives and sex equality, the reality is that it has had far more tepid results.

Subsequent Congresses and later body politics need not be limited by those same regressive intuitions. By delegating to Congress (including all future Congresses) the power to play a role in the effectuation of the Nineteenth Amendment, the Enforcement Clause invites future legislatures to shed the impulses that may have contributed to a more restrictive substantive provision and to more restrictive judicial interpretations of that substantive provision. Congressional enforcement is a mechanism—indeed, *the* mechanism—to move beyond the ideas and principles that contributed to such a narrow account of the Nineteenth Amendment. That is part of the problem with the fact that the current Court is so skeptical of congressional enforcement and so wedded to a notion of judicial supremacy.<sup>293</sup>

A thicker and more robust Nineteenth Amendment, viewed in light of other constitutional amendments expanding voting rights and giving Congress the prime tool to enforce these amendments, gives ample room for eliminating many remaining voting and political-power disparities that continue to exist a century after ratification.<sup>294</sup> Courts should read congressional power broadly to protect women’s political and voting rights. And given the synthetic reading of the Constitution that points to a constitutional commitment to enhanced voting rights, courts should be especially skeptical of state laws—and especially deferential to federal legislation targeting state laws—that infringe upon the rights of groups of voters who enjoy multiple voting protections in the Constitution such as younger, female voters of color. As Justice Ginsburg reminded us in her 2013 *Shelby County* dissent: “Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens.”<sup>295</sup> It is time for Congress to take that rein.

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293. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1435–37 (2017).

294. Acceptance of the ratification of the Equal Rights Amendment, which provides that “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” would considerably strengthen these arguments. *Frequently Asked Questions*, ERA, <https://www.equalrightsamendment.org/faq> [<https://perma.cc/Z7H5-MKK6>] (last visited Apr. 5, 2020).

Congress passed the Amendment in 1972 and, at the time of this Article, enough states had ratified the Amendment, but not within the time limit originally set by Congress. Litigation over the Amendment’s ratification has begun. Sarah Rankin & Michelle L. Price, *Democratic AGs Sue to Force U.S. to Adopt ERA in Constitution*, ASSOCIATED PRESS (Jan. 30, 2020), <https://apnews.com/4913397a57f671c62989a1a5ec10df17> [<https://perma.cc/MZ4U-HWG7>].

The full scope of the effect of ratification on the voting rights claims advanced here is well beyond the scope of this Article. But accepted ratification of the Equal Rights Amendment would bolster a twenty-first century synthetic reading of the Nineteenth Amendment as part of a contemporary franchise-extending and rights-extending U.S. Constitution.

295. *Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (Ginsburg, J., dissenting).