THE NINETEENTH AMENDMENT ENFORCEMENT POWER (BUT FIRST, WHICH ONE IS THE NINETEENTH AMENDMENT, AGAIN?)

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I. THE NINETEENTH AMENDMENT—WHICH ONE IS THAT, AGAIN?

The history of voting rights in the United States has primarily centered on the struggle to enfranchise African-Americans[1]—first after the Civil War, then in the Jim Crow South, and even today in the midst of "the Voting Wars."[2] Accordingly, most voting rights legislation, litigation, and literature have focused on race-based barriers to the ballot and on using Fourteenth and Fifteenth Amendment-based tools to break those barriers.[3] This race-centered focus neglects a substantial population that may face its own barriers to the ballot: women.

This neglect is particularly curious, given that an entire constitutional amendment deals exclusively with protecting "[t]he right of citizens of the United States to vote [from] deni[al] or abridg[ment] . . . on account of sex."[4] Yet, no legislation and barely any litigation have arisen as a result of the Nineteenth Amendment.[5]

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1. *See, e.g.*, GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICA DEMOCRACY (2013); *see also* 111 CONG. REC. 5058-61 (1965) (statement of President Lyndon B. Johnson) (urging Congress to pass the Voting Rights Act); *id.* at 5061-63 (same).

2. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015).

3. For an example of voting rights legislation, see Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended at 52 U.S.C. § 10101 (Supp. II 2014)). For an example of voting rights litigation, see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). For an example of voting rights literature, see Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859 (1995).

4. U.S. CONST. amend. XIX.

5. For two examples of Nineteenth Amendment litigation, see *Breedlove v. Suttles*, 302 U.S. 277 (1937), and *Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977). If there were Nineteenth Amendment enforcement legislation, it would be codified in subtitle I of title 52 of the United States Code, which concerns "Voting Rights." *See* 52 U.S.C. §§ 10101-10702

One legal encyclopedia spends a mere sixty-nine words on the Nineteenth Amendment.[6] On the rare occasion that scholarly literature discusses the Nineteenth Amendment in depth, authors seem preoccupied with the provision's impact on areas *other than voting*.[7] The Nineteenth Amendment receives so little attention, scholars joke about it.[8] The prevailing understanding of the Nineteenth Amendment is that it merely requires that women be permitted to vote[9]—no more, no less—and is therefore not an appropriate subject for scholarly attention.

This inattention from legislators, litigators, and legal scholars is all the more curious today, when voting rights enjoy mainstream attention not seen since the Civil Rights Movement.[10] In the past few years, a nationwide wave of new state laws and procedures has burdened the right to vote. Today, women face a variety of obstacles to voting that may disproportionately impact voters on the basis of sex.

Despite the Nineteenth Amendment's existence for nearly a century and the recent popular and scholarly attention to voting

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(Supp. II 2014). Subtitle I contains no legislation concerning discrimination in voting on account of sex.

6. *See* 46 AM. JUR. 2d *Elections* § 151 (2016).

7. *See, e.g.*, Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 472 (1995) (noting women's right to serve on juries); Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2175 (1993) (recognizing the Nineteenth Amendment as "an affirmation of women's constitutional equality"). Scholars have argued that the Nineteenth Amendment impacts sex classifications more generally, *see* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 66-96 (2011), that it guarantees women the right to serve on juries, *see* Amar, *supra*, that it provides a constitutional justification for Congress to pass the Violence Against Women Act, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1022-44 (2002); Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783 (2000), that it "should be recognized as an affirmation of women's constitutional equality," Brown, *supra*, or that it "established the total equality of women with men," W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 50 (1970). One scholar even curiously claimed that "the 19th amendment [sic] really had very little to do with the vote." Hodes, *supra*.

8. *See* Erik M. Jensen, *16th Century 19th Amendment Jurisprudence*, 4 GREEN BAG 2d 465, 465 (2001). The article, in its entirety, reads, "Consistent with my research on another previously unstudied area of the law, I have determined that there were no cases construing the Nineteenth Amendment in the sixteenth century." *Id.* (footnote omitted).

9. *See, e.g.*, JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 191 (1994) ("With the passage of the Nineteenth Amendment, women's right to vote became part of the constitutional framework . . . .").

10. *See, e.g.*, Melissa Block, *ID Laws Bring New Attention to Voting Rights Act*, NAT'L PUB. RADIO (Sept. 10, 2012, 3:00PM), http://www.npr.org/2012/09/10/160899032/id-laws-bring-new-attention-to-voting-rights-act. Leading voting rights litigator Jon Greenbaum of the Lawyers Committee for Civil Rights Under Law once used similar terms to describe the increased nationwide interest in voting rights in a conversation with me about recent election litigation.

rights, the Nineteenth Amendment has not received any serious treatment or consideration as a tool to protect voting rights. This Article fills that gap by offering a discussion of the history and purpose of the Nineteenth Amendment, and its application to modern-day voting restrictions.

Part II will examine the need for Nineteenth Amendment enforcement legislation by exploring modern restrictions on voting that may affect voters disproportionately on the basis of sex. Part III will explore the background against which the Nineteenth Amendment was proposed and ratified. Part IV will explore the legal and legislative history of the Nineteenth Amendment in a novel way—with an eye toward the provision's application to voting rights—in an attempt to discern what the framers of the Amendment would expect it to mean today. Part V considers the constitutionality of possible enforcement legislation and demonstrates how Nineteenth Amendment litigation to defend voting rights could remedy the restrictions on voting mentioned earlier. Part VI will conclude with a recommendation for action under the Nineteenth Amendment and explain the practical benefits and disadvantages of using the Nineteenth Amendment to protect voting rights.

II. VOTING RIGHTS UNDER ATTACK: THE NEED FOR NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION AND LITIGATION

In recent years, states across the country have engaged in an extraordinary effort to make it harder to register to vote, to cast a ballot, and to have that vote counted.[11] Between 2010 and mid-2015, twenty-one states imposed over thirty separate restrictions on the franchise.[12] Much of the attention in the media has focused on the disproportionate effect of these laws on racial minority voters, student voters, elderly voters, lower-income voters, and Democratic-leaning voters.[13] Scholarship has maintained a similar

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11. *See, e.g.*, Ari Berman, *The GOP War on Voting*, ROLLING STONE (Aug. 30, 2011), http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830; Alexander Keyssar, *Voter Suppression Returns: Voting Rights and Partisan Practices*, HARV. MAG., July-Aug. 2012, http://harvardmagazine.com/2012/07/voter-suppression-returns.

12. *See* BRENNAN CTR. FOR JUSTICE, STATES WITH NEW VOTING RESTRICTIONS SINCE 2010 ELECTION 1-4 (2016), http://www.brennancenter.org/sites/default/files/analysis/Restrictive_Appendix_Post-2010.pdf.

13. *See, e.g.*, Jamelle Bouie, *Republicans Admit Voter-ID Laws Are Aimed at Democratic Voters*, DAILY BEAST (Aug. 28, 2013, 4:45 AM), http://www.thedailybeast.com/articles/2013/08/28/republicans-admit-voter-id-laws-are-aimed-at-democratic-voters.html (Democrats); Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC (Mar. 16, 2012), http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/ (low-income voters); Terry Evans & Anna M. Tinsley, *Voter ID Law Snags Former House Speaker Jim Wright*, FORT WORTH STAR-TELEGRAM (Nov. 2, 2013), http://www.ledger-enquirer.com/news/politics-government/article29311579.html (elderly

focus.[14] Until recently,[15] however, the extent to which these restrictions on voting may disproportionately affect *women* had gone largely unnoticed.

A. Voter ID Laws

Voter ID laws are one such type of voting restriction that may disproportionately impact women. Generally, and with limited exceptions,[16] voter ID laws bar any voter from casting a ballot unless the voter provides the precinct official with documentary proof of the voter's identity.[17] For a voter whose name appears differently on his or her voter registration record and identifying document, this discrepancy could present additional burdens—as in Texas, where

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voters); Brentin Mock, *Florida to Minorities: Don't Vote Here*, NATION (June 27, 2012), http://www.thenation.com/article/168619/florida-minorities-dont-vote-here (racial minorities); Max J. Rosenthal, *Texans Allowed to Show Gun Permits But Not Student IDs at Voting Booth*, HUFFINGTON POST (Nov. 16, 2011, 10:57 AM), http://www.huffingtonpost.com/2011/11/15/texans-gun-permits-student-ids-voting_n_1095530.html (students).

14. *See, e.g.*, Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331 (2012); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007); Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292 (2013).

15. A local Texas television outlet reported that poll workers temporarily blocked a Texas state court judge from voting—on the grounds that her maiden name listed on her driver's license did not match her full name as listed in the voter registration records—until she signed an affidavit affirming her identity. *See Voter ID Law May Cause Problems for Women Using Maiden Names*, KIII-TV (Oct. 22, 2013, 7:02 PM), http://www.kiiitv.com/story/23761660/voter-id-law-may-cause-problems-for-women-using-maiden-names. Following that story, a surge of national media attention focused on the effect that voter ID laws may have on women. *See, e.g.*, Wade Goodwyn, *Texas' Voter ID Law Creates a Problem for Some Women*, NAT'L PUB. RADIO (Oct. 30, 2013, 4:40 PM), http://www.npr.org/2013/10/30/241891800/texas-voter-id-law-creates-a-problem-for-some-women; Martha T. Moore, *State Voter ID Laws Snare Women with Name Changes*, USA TODAY (Oct. 30, 2013, 7:05 PM), http://www.usatoday.com/story/news/politics/2013/10/30/voter-id-laws-name-changes/3315971. My research has not revealed any corresponding increase in scholarship, legislation, or litigation.

16. *See, e.g.*, MISS. CODE ANN. § 23-15-563(3)(b) (2015) (religious objection); S.C. CODE ANN. § 7-13-710(D)(1)(b) (2015) ("a reasonable impediment"); TENN. CODE ANN. § 2-7-112(f) (2015) (indigency); TEX. ELEC. CODE ANN. § 65.054(b)(2)(C) (West 2015) (natural disaster); WIS. STAT. § 6.79(6) (2015) (victims of domestic violence, sexual assault, or stalking). Some voter ID laws contain no exceptions, imposing an absolute bar to voting on a voter who does not produce the required identification. *See, e.g.*, GA. CODE ANN. § 21-2-417(b) (2015) (providing that "if an elector is unable to produce any of the [approved] items of identification" at the polls, then the voter's ballot will not count unless the voter presents valid ID to election officials within three days after the election, pursuant to section 21-2-419).

17. *See, e.g.*, FLA. STAT. § 101.043(a) (2015); TENN. CODE ANN. § 2-7-112(a)(1) (2015).

the voter must complete additional paperwork[18]—or even prevent the voter from casting a ballot altogether.[19] Voters lacking any appropriate form of ID may likewise be unable to cast a ballot.[20]

Even in jurisdictions that bar a voter from casting a ballot due to a non-match or lack of an approved ID, the voter retains the ability to cast a provisional ballot—a ballot separated from the normal ballots and counted later only if the election authority can determine that the provisional voter is, in fact, eligible to vote.[21] However, there is anecdotal evidence that poll workers improperly turn away voters with questionable voting eligibility, rather than offering them the opportunity to vote by provisional ballot, as required.[22] Even for voters who are able to vote by provisional ballot, they generally must still obtain the required identifying document and provide it to the election authority within a set time period.[23]

No serious student of election law disputes that at-the-polls voter-impersonation fraud—the type of misconduct that voter ID laws target—is a pernicious problem when it occurs; the relevant question

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18. TEX. ELEC. CODE ANN. § 63.001(c) (West 2012). This is the provision that sparked national media attention over the impact on women of voting restrictions. *See, e.g.*, Goodwyn, *supra* note 15; Moore, *supra* note 15.

19. *See, e.g.*, WIS. STAT. § 6.79(3)(b) (2015) ("[I]f the name appearing on the [identification] document presented [by the voter] does not conform to the name on the poll list . . . the elector shall not be permitted to vote . . . ."). Not every jurisdiction has statutory or regulatory guidance on how to treat discrepancies between the name on the voter's identifying documents and the voter's registration record, forcing election administrators to make their own decision about how to handle name discrepancies. For instance, despite the text of the Wisconsin statute cited above, Wisconsin's voter ID brochure states (without citing any legal authority) that minor discrepancies between the first name listed on a voter's ID and the first name listed in the voter's registration record will not bar the voter from casting a ballot. *See* Brochure, Wis. Gov't Accountability Bd., Bring It to the Ballot (Oct. 7, 2015), http://www.gab.wi.gov/sites/default/files/publication/137/_2015_brochure_for_bring_it_website_color_pdf_54021.pdf ("So, Richards who go by Rich and Susans with IDs that say Sue can relax."). The ad hoc nature of these decisions by state and local election administrators across the country makes it difficult to assess the procedures in this area.

20. *See, e.g.*, N.D. CENT. CODE § 16.1-05-07(1) (2015) ("Before delivering a ballot to a [voter], the poll clerks shall require the [voter] to show [an approved type of] identification . . . .").

21. *See* 52 U.S.C. § 21082(a) (Supp. II 2014).

22. *See* ELECTORAL DYSFUNCTION at 38:00 (Trio Pictures 2012). The film shows a training session in which poll workers role-play an example of how to politely handle a voter who comes to vote without possessing the required identification or who is not on the voter rolls for that location. *Id.* The portions of the training shown in the film make no mention of offering the voter a provisional ballot. *Id.*

In my experience as an election administrator, poll worker recruitment and training were among the most vexing challenges an election administration office faced.

23. *See, e.g.*, IND. CODE § 3-11.7-5-2.5(a)-(b) (2015). Less onerous provisional ballot requirements also exist. For instance, Rhode Island's voter ID law requires election officials to count a provisional ballot so long as the signature accompanying the provisional ballot matches the signature in the voter's registration record. *See* 17 R.I. GEN. LAWS § 17-19-24.3 (2015).

is whether the minimal risk posed by at-the-polls voter-impersonation fraud justifies the burden imposed by these laws.[24] Women voters may be more likely to encounter these burdens than men, considering that the vast majority of women change their name following marriage, while only a small minority of men do the same.[25] While the data are so far insufficient to draw broad conclusions,[26] the early evidence suggests this may be the case: the plaintiffs' expert witness in the litigation over Pennsylvania's voter ID law[27] concluded that "[a]mong eligible [Pennsylvania] voters, women are less likely to possess a valid, non-expired photo ID with [their] name substantially conforming than their male counterparts," in part because of the "higher likelihood of women lacking an ID with an exact name match to the voter rolls due to marriage."[28] An empirical study of Indiana's voter ID law concluded that "some disfranchisement occurs and, to the extent that disfranchisement occurs, this research suggests that women are disproportionately disfranchised."[29]

Data also suggests that transgender voters are especially likely to lack the required documentation: in a national survey of transgender individuals, 40% reported lacking a driver's license reflecting their current gender, 74% reported lacking an updated passport, and 27% reported "that they had *no identity documents or records* that list their correct gender."[30] A voter whose outward appearance suggests

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24. *See* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST: WONKBLOG (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast.

25. *See* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 785-89 (2007). For heterosexual couples, Professor Emens reports that "[t]he vast majority of women who marry men change their names to Mrs. His Name, while very few men change their names at all when they marry," and that "only 10 percent of married women in the U.S. have as their last name their own birthname or any name other than their husband's birthname." *Id.* at 785. For gay and lesbian couples, Professor Emens explains that the limited data available show that "[six] percent share some or all of their last names, suggesting that one or both partners changed his or her name," and that lesbian couples (seven percent) are more likely to share names than gay couples (four percent). *Id.* at 789.

26. *See* E-mail from Justin Levitt, Assoc. Professor of Law, Loyola Univ. Sch. of Law, to author (Aug. 28, 2013, 9:29 PM) (on file with author).

27. *See* Applewhite v. Commonwealth, 54 A.3d 1 (Pa. 2012); 25 PENN. CONS. STAT. § 3050 (2013), *invalidated by* Applewhite v. Commonwealth, No. 330 M.D.2012, 2014 WL 184988, at *24 (Pa. Commw. Ct. Jan. 17, 2014).

28. MATT A. BARRETO ET AL., RATES OF POSSESSION OF VALID PHOTO IDENTIFICATION, AND PUBLIC KNOWLEDGE OF THE VOTER ID LAW IN PENNSYLVANIA, NO. 330 MD 2012, at 27 (2012).

29. Michael J. Pitts, *Empirically Measuring the Impact of Photo ID over Time and Its Impact on Women*, 48 IND. L. REV. 605, 623 (2015).

30. JODY L. HERMAN, WILLIAMS INST. AT THE UCLA SCH. OF LAW, THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS 4 (2012) (emphasis added), http://williamsinstitute.law.ucla.edu/research/transgender-issues/the-potential-impact-of-voter-identification-laws-on-transgender-voters.

that the voter is of a different sex than that shown on the voter's ID may face problems under a broad voter ID law that, for instance, requires polling place officials to be able to verify a voter's identity from the ID the voter provides.[31]

Even where a voter already possesses an acceptable ID under his or her prior name, the burdens of obtaining an updated ID may cause the voter difficulty, especially when the legal requirements for obtaining the documents are so burdensome as to make it extraordinarily difficult for some people (and impossible for others) to qualify for the IDs, when the government offices which distribute the IDs are so far away as to require a 200- to 250-mile round-trip, when the law is improperly administered by a front-line civil servant, or when the government limits the days on which the ID-issuing offices are open.[32]

The burden of obtaining additional or corrected documentation is likely to affect women in three ways.[33] First, because women assume a disproportionate share of the household work and childcare burdens,[34] these distance and complexity concerns may be more

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31. *See, e.g.*, TEX. ELEC. CODE ANN. § 63.001(d) (West 2015); *see also* Andy Marso, *Transgender Kansans Fear Voter ID Law Is Roadblock*, TOPEKA CAP.-J. (July 20, 2014, 3:44 PM), http://cjonline.com/news/2014-07-20/transgender-kansans-fear-voter-id-law-roadblock.

32. *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d 113, 139-41 (D.D.C. 2012) (three-judge court) (explaining that in some cases, the nearest government office providing acceptable identifying documents could be 100–125 miles away, necessitating a 200–250 mile round trip, and that public transportation was essentially unavailable), *vacated*, 133 S. Ct. 2886 (2013); *Applewhite*, 54 A.3d at 3-4 (explaining that the process for obtaining a voting ID "is a rigorous one" which requires applicants to submit four different types of documents, and quoting testimony from the government official responsible for distributing the IDs, "at the end of the day there will be people who will not be able to qualify for" the voting ID); Ansley Haman, *96-Year-Old Chattanooga Resident Denied Voting ID*, CHATTANOOGA TIMES FREE PRESS (Oct. 5, 2011), http://www.timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells; Brian Lyman, *Alabama Will Reopen Closed DMV Offices in Black Counties*, GOVERNING (Oct. 20, 2015), http://www.governing.com/topics/politics/drivers-license-offices-will-reopen-on-limited-basis.html.

33. There is some dispute about the number of voters actually affected by voter ID laws. *Compare* DON PALMER, HERITAGE FOUND., BACKGROUNDER NO. 3069, FAULTY DATA FUEL CHALLENGES TO VOTER ID LAWS 9 (2016), http://www.heritage.org/research/reports/2016/01/faulty-data-fuel-challenges-to-voter-id-laws (arguing that voter ID laws affect only a small percentage of voters), *with* Jennifer L. Clark, *Separating Fact from Fiction on Voter ID Statistics*, BRENNAN CTR. FOR JUST. (Nov. 25, 2014), http://www.brennancenter.org/blog/separating-fact-fiction-voter-id-statistics (arguing that voter ID laws affect a much larger segment of the electorate). The key here is the degree to which women are disproportionately affected, not the absolute number of voters affected.

34. *See, e.g.*, Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 181-82 (2000) ("Upon marriage or cohabitation, the average woman increases her household work by 4.2 hours, while the average man decreases his household work by 3.6 hours. Studies of the amount of time that men and women spend in parenting consistently show that women perform more childcare than men, although the data are somewhat conflicting on just how large the differential actually is.") (footnote omitted); Andrew B. Coan, *Is There A Constitutional Right to Select the Genes of One's Offspring?*, 63 HASTINGS L.J. 233, 258 (2011) ("[W]omen as a group shoulder a grossly disproportionate share of

onerous for women than men. Second, as previously discussed, because married women change their name more frequently than married men,[35] women may have to face the burden of obtaining additional or corrected documentation more often. Finally, problems of economic inequality are particularly likely to plague women.[36] Across all occupations, women earn only 81.2% of what men earn (and in some white-collar professions, less than two-thirds).[37] A full-time working woman earns only 77 cents for every dollar her male counterpart earns, resulting in $11,084 less in median earnings every year.[38] Women (16.3%) are also more likely than men (13.6%) to live in poverty.[39] As the three-judge preclearance court recognized in the context of reviewing Texas's voter ID law, "[s]ignificantly, these burdens [imposed by the voter ID law] will fall most heavily on the poor,"[40] which means the monetary burden of obtaining qualifying documents may disproportionately impact women.[41]

Additionally, the burdens of obtaining corrected identifying documents may fall particularly hard on transgender voters.[42] Texas, for instance "enacted a voter ID law that . . . is the most stringent in the country."[43] There, transgender voters seeking to update the sex listed on their driver license must *obtain a court order* reflecting the

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child-care responsibilities . . . ."); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1053-54 (2012) ("[S]eventy-one percent of mothers provided care on a daily basis as compared to fifty-four percent of fathers, but mothers provided nearly three times the care of fathers, measured by time. Men spend less time in sole charge of children, of the time that they do provide care. Even when both parents are employed full time, mothers do twice the amount of housework.") (footnotes omitted).

35. *See* Emens, *supra* note 25, at 785.

36. *See* Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty*, 16 J. GENDER RACE & JUST. 1, 5-9 (2013) (surveying the available data on the degree of economic inequality between the women and men).

37. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATS., BLS SPOTLIGHT ON STATISTICS: WOMEN AT WORK 7 (2011), http://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf.

38. NAT'L WOMEN'S LAW CTR., FACT SHEET: THE WAGE GAP IS STAGNANT IN LAST DECADE 1 (2012), http://www.nwlc.org/sites/default/files/pdfs/poverty_day_wage_gap_sheet.pdf.

39. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, NO. P60-245, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 16 (2013), http://www.census.gov/prod/2013pubs/p60-245.pdf.

40. Texas v. Holder, 888 F. Supp. 2d 113, 140 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (mem.) (vacating decision in light of later-decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

41. *Cf. id.* at 140-41 (finding that "[i]n Texas, however, the poor are disproportionately racial minorities," and that therefore "it is virtually certain that these burdens will disproportionately affect racial minorities").

42. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 759-75 (2008) (documenting the barriers transgender individuals face to obtaining official recognition of their sex transition).

43. *Holder*, 888 F. Supp. 2d at 144.

voter's transition.[44] As if the burden of obtaining a court order was insufficient, Texas courts have created barriers to judicial recognition of sex changes.[45]

Litigation challenging these laws has had limited success. Lawsuits under section 2 of the Voting Rights Act have been hit-or-miss.[46] Lawsuits under section 5 of the Voting Rights Act had some success until the Supreme Court gutted the provision.[47] Suits bringing constitutional claims have not fared well.[48] State court lawsuits have had mixed results.[49]

B. Documentary-Proof-of-Citizenship Requirements

Documentary-proof-of-citizenship laws may also disproportionately impact women. Enacted in Alabama, Arizona, Georgia, Kansas, and

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44. *See* 37 TEX. ADMIN. CODE § 15.24(2)(C) (2015) (requiring an "original or certified copy of court order with name and date of birth (DOB) indicating an official change of . . . gender"). If the voter has already managed to document his or her transition on certain federal documents, like a passport, military identification, or naturalization certificate, the voter need not obtain the court order. *See id.* § 15.24(1).

45. *See* Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999) (finding that a post-operative male-to-female transsexual woman was nonetheless still a male as a matter of law, notwithstanding an earlier judicial order amending her birth certificate to reflect her post-transition sex).

46. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 237 (4th Cir. 2014) (affirming denial of preliminary injunction against North Carolina's voter ID law but noting that "[p]laintiffs may well succeed with their challenge to the [voter] identification law at trial"). *Compare* Veasey v. Abbott, 796 F.3d 487, 519-20 (5th Cir. 2015) ("[W]e conclude that the district court did not clearly err in determining that [Texas' voter ID law] has a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act."), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016) (mem.), *with* Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014) ("[O]ur conclusion [is] that [Wisconsin's voter ID law] does not violate § 2 [of the Voting Rights Act] . . . ."), *and* Gonzalez v. Arizona, 677 F.3d 383, 407 (9th Cir. 2012) (rejecting a Voting Rights Act § 2 claim against Arizona's voter ID law), *aff'd on other grounds sub nom.* Arizona v. Inter-tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2260 (2013).

47. *Compare* Texas v. Holder, 888 F. Supp. 2d at 113 (blocking Texas' voter ID law), *vacated*, 133 S. Ct. 2886 (2013), *with* South Carolina v. Holder, 898 F. Supp. 2d 30 (D.D.C. 2012) (declining to block South Carolina's voter ID law).

48. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189 (2008).

49. *Compare* Martin v. Kohls, 444 S.W.3d 844, 852-53 (holding that Arkansas' voter ID law is an additional qualification imposed on voters in violation of the Arkansas Constitution), *and* Applewhite v. Commonwealth, 54 A.3d 1, 5 (Pa. 2012) (per curiam) (temporarily blocking Pennsylvania's voter ID law on state constitutional grounds), *with* Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262, 280-81 (Wis. 2014) (finding that Wisconsin's voter ID law does not violate the Wisconsin Constitution), *and* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 315-16 (Wis. 2014) (upholding that state's voter ID law), *and* City of Memphis v. Hargett, 414 S.W.3d 88, 111 (Tenn. 2013) ("[W]e find no basis for invalidating [Tennessee's voter ID law] on [Tennessee] constitutional grounds."), *and* Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 71-75 (Ga. 2011) (finding that Georgia's voter ID law does not violate the Georgia Constitution), *and* League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 772 (Ind. 2010) (finding that Indiana's voter ID law does not violate the Indiana Constitution).

Tennessee, these laws bar voter registration applicants from registering unless the applicant proves, with adequate documentation, his or her U.S. citizenship.[50] Although the Supreme Court blocked Arizona from enforcing its proof-of-citizenship requirement against certain voters, Kansas and Arizona both took advantage of a federalism loophole in the Court's decision and began to implement a two-tier system of voter registration:[51] applicants who comply with the documentary-proof-of-citizenship requirement may vote in all elections, but applicants who merely swear to their citizenship under penalty of perjury, without providing any supporting documentation, may vote only in federal elections.[52] After a state court lawsuit blocked Kansas' two-tier voter registration program,[53] the executive director of the Election Assistance Commission (without action by the Commission itself) authorized the

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50. *See* ALA. CODE § 31-13-28(c) (2015); ARIZ. REV. STAT. ANN. § 16-166(F) (2015), *partially preempted*, Arizona v. Inter Tribal Council of Ariz., 133 S. Ct. 2247, 2260 (2013); GA. CODE ANN. § 21-2-216(g)(1) (2015); KAN. STAT. ANN. § 25-2309(*l*) (2015); TENN. CODE ANN. § 2-2-141 (2015). Generally, other states permit an applicant to prove his or her citizenship by affirmation under penalty of perjury on the application form, without requiring any additional documentation. *See, e.g.*, *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2252 ("[T]he Federal Form [a nationally applicable voter registration application form that all fifty states 'shall accept and use,' 52 U.S.C. § 20505(a)(1) (Supp. II 2014)] includes a statutorily required attestation, subscribed to under penalty of perjury, that an . . . applicant meets the State's voting requirements (including the citizenship requirement), but does not require concrete evidence of citizenship.") (citation omitted).

51. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2260 ("We hold that 42 U.S.C. § 1973gg–4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself."). The Supreme Court based its decision on Congress's power under the Elections Clause to regulate federal elections. *See id.* at 2253-54; *see also* U.S. CONST. art. I, § 4, cl. 1. The "loophole" is that, because Congress's Elections Clause power extends only to federal elections, Congress cannot force Arizona or Kansas to "accept and use," 52 U.S.C. § 20505(a)(1), the Federal Form in a voter registration system that applies only to non-federal elections.

In addition, Arizona and Kansas jointly filed a lawsuit bringing administrative law claims to achieve what their constitutional claims failed to accomplish before the Supreme Court. *See* Kobach v. U.S. Election Asst. Comm'n, 772 F. 3d 1183, 1188-89 (10th Cir. 2014). Had Arizona and Kansas prevailed, the lawsuit would have obviated the need for the two-tier voter registration system and allowed both states to implement the documentary-proof-of-citizenship requirement with respect to all voters. However, the Tenth Circuit rejected the two states' claims. *Id.* at 1199.

52. *See* Ari Berman, *Separate and Unequal Voting in Arizona and Kansas*, NATION (Oct. 15, 2013), http://www.thenation.com/blog/176650/separate-and-unequal-voting-arizona-and-kansas; Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html. Georgia may also implement a two-tier system. *See* Liz Halloran, *States Renew Battle to Require That Voters Prove Citizenship*, NAT'L PUB. RADIO (Nov. 19, 2013, 11:36 AM), http://www.npr.org/blogs/itsallpolitics/2013/11/18/246015934/states-renew-battle-to-require-that-voters-prove-citizenship; *see also* Jeremy Redmon, *Georgia Voter Registration Law Partly Blocked*, ATLANTA J. CONST. (June 20, 2013, 11:28 AM), http://www.ajc.com/news/news/national-govt-politics/georgia-voter-id-law-blocked/nYP9p.

53. *See* Belenky v. Kobach, No. 2013CV1331, slip op. at 26-27 (Kan. Dist. Ct. Jan. 15, 2016) (unpublished opinion).

implementation of proof-of-citizenship laws, obviating the federal law barriers that had previously prevented the state proof-of-citizenship laws from taking effect.[54] Voting rights groups filed suit to halt the executive director's action, but the proof-of-citizenship laws may remain in effect while the litigation remains pending.[55]

No one doubts the importance of ensuring that only eligible voters participate at the ballot box.[56] The issue with proof-of-citizenship laws concerns the means states use to reach that goal. For instance, the documentary-proof-of-citizenship requirement in Kansas, combined with ineffective administrative implementation, have already caused major havoc for voters in that state. In September 2013, the law had barred over 15,000 voter registration applicants from registering to vote.[57] That number rose to over 22,000 by October 2014.[58] By September 2015, the law prevented over 36,000 would-be voters from registering to vote, and Kansas election officials began to purge these voters from the state's list.[59] The effect of these documentary-proof-of-citizenship laws may fall disproportionately on women. According to a 2006 study by the Brennan Center for Justice, 7% of U.S. citizens lack ready access to citizenship documents, but "only 48% of voting-age women with ready access to their U.S. birth certificates have a birth certificate with [their] current legal name—and only 66% of voting-age women with ready access to *any* proof of citizenship have a document with [their] current legal name."[60]

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54. *See* Letter from Brian D. Newby, Exec. Dir., U.S. Election Assistance Comm'n, to Brian Caskey, Election Dir., Kan. Office of Sec'y of State, at 1 (Jan. 29, 2016); Letter from Brian D. Newby, Exec. Dir., U.S. Election Assistance Comm'n, to Hon. Brian P. Kemp, Ga. Sec'y of State, at 1 (Jan. 29, 2016); Letter from Brian D. Newby, Exec. Dir., U.S. Election Assistance Comm'n, to Hon. John H. Merrill, Ala. Sec'y of State, at 2 (Jan. 29, 2016).

55. *See* League of Women Voters v. Newby, No. 16-CV-236, at 4 (D.D.C. Feb. 23, 2016) (denying motion for temporary restraining order).

56. *See* Richard L. Hasen, Op-Ed, *When It Comes to Election Law, Red America and Blue America Are Not at All Alike*, L.A. TIMES (Oct. 20, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-1020-hasen-red-blue-election-law-20151020-story.html ("All eligible voters, and only eligible voters, should have the right to easily register and cast a ballot that will be accurately counted.").

57. *See* Brad Cooper, *Would-be Voters Are Exasperated by Kansas' New Registration Law*, KAN. CITY STAR (Sept. 2, 2013, 12:57 PM), http://www.mcclatchydc.com/news/politics-government/article24755164.html.

58. *See* Peggy Lowe, *Will Voting Problems Give Kansas an Election Night Limbo?*, KCUR 89.3 (Oct. 31, 2014), http://kcur.org/post/will-voting-problems-give-kansas-election-night-limbo.

59. Kelsey Ryan & Bryan Lowry, *Young Voters, Witchitans Top Kansas' Suspended Voter List*, WICHITA EAGLE (Sept. 26, 2015, 4:35 PM), http://www.kansas.com/news/politics-government/article36705666.html.

60. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2 (2006) (footnote omitted), http://www.brennancenter.org/analysis/citizens-without-proof. This report has drawn criticism. *Compare* HANS A. VON SPAKOVSKY & ALEX INGRAM, HERITAGE FOUND., WITHOUT PROOF: THE UNPERSUASIVE CASE AGAINST VOTER IDENTIFICATION 5

Because women are disproportionately unlikely to have access to these documents, they will have to obtain them, which may disproportionately burden women for the same reasons as the requirement that women must obtain voter ID documents.

C. *Improper Voter Registration Database Maintenance Practices*

Improper voter registration list maintenance may also disproportionately impact women. List maintenance is the act of removing ineligible voters from the voter registration rolls because the voter died, moved from the jurisdiction, was convicted of a felony, lacks U.S. citizenship, or has otherwise become ineligible.[61] The National Voter Registration Act mandates that election officials perform list maintenance to remove ineligible voters from the registration rolls,[62] but it also "provides procedures and standards . . . to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction . . . ."[63] The Help America Vote Act requires states to match the names of voters on the voter registration rolls with other databases in order to verify voter registration applicants' identity but leaves to states how to treat non-matches.[64] Done properly, voter registration list maintenance is an ordinary and necessary element of proper election administration.[65] Problems arise when election officials conduct their purges poorly. Often, the source of the problem is bad data.

Perhaps the most famous case of controversial voter purging is Florida's pre-2000 effort to remove ineligible felons from the voter

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(2011), http://www.heritage.org/research/reports/2011/08/without-proof-the-unpersuasive-case-against-voter-identification, *with* Wendy Weiser et al., *"Citizens Without Proof" Stands Strong*, BRENNAN CTR. FOR JUST. (Sept. 8, 2011), https://www.brennancenter.org/analysis/citizens-without-proof-stands-strong.

61. *See, e.g.*, CAL. CONST., art II, § 2 (citizenship); FLA. CONST., art VI, § 4 (non-felon); VA. CONST., art. II, § 1 (residency); N.Y. ELECTION LAW § 5-400(e) (McKinney 2015) (not deceased).

62. *See* 52 U.S.C. § 20507(c)(2)(A) (Supp. II 2014); *see also* H. REP. NO. 103-66, at 20-22 (1993) (Conf. Rep.) (describing the list maintenance requirements).

63. S. REP. NO. 103-6, at 2 (1993) (discussing the list maintenance requirements); *see also id.* at 17-20; H. REP. NO. 103-9, at 14-19 (1993) (same).

64. *See* 52 U.S.C. § 21083(a)(5) (Supp. II 2014); *see also* Nathan Cemenska, *HAVA's Matching/ID Requirement: A Meaningless Tale Told by . . . Congress*, 12 RICH. J.L. & PUB. INT. 27, 29 (2008).

65. *See* ROBERT F. BAUER ET AL., PRES. COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 27-29 (2014) [hereinafter BAUER-GINSBERG REPORT], http://www.supportthevoter.gov; *see also* NAT'L ASS'N OF SEC'YS OF STATE, MAINTENANCE OF STATE VOTER REGISTRATION LISTS: A REVIEW OF RELEVANT POLICIES AND PROCEDURES 4 (2009), http://www.nass.org/index.php?option=com_docman&task=doc_download&gid=792.

rolls:[66] Florida election officials contracted with a data clearinghouse to compile a list of individuals with felony convictions, but officials specifically requested that the contractor make the list broader than necessary.[67] In an e-mail to the contractor, an official from the Department of State wrote, "[o]bviously, *we want to capture more names that possibly aren't matches* and let the supervisors make a final determination rather than exclude certain matches altogether."[68] Election officials used the overbroad list to remove voters from the registration rolls.[69] In its investigation, U.S. Commission on Civil Rights determined, "As a result [of the improperly administered purge], many Floridians were erroneously removed from the voter lists."[70] Journalists put the number of improperly purged voters anywhere between 1100 and 20,000.[71]

Notwithstanding the negative publicity over its pre-2000 felon purge, Florida continued to engage in controversial voter registration list maintenance practices. In 2005, the Florida Legislature enacted a statute barring individuals from registering to vote unless the state could verify either (1) that the applicant's name and driver's license number (or non-driver identification number) provided on the voter registration application matched the information in the state's driver's license database, or (2) the last four digits of a social security number listed on the applicant's voter registration application matched the information in the Social Security Administration's database.[72] After litigation temporarily barred the state from enforcing its matching requirement,[73] the Legislature amended the statute to permit registration of applicants who offered supplemental evidence of their identity in the event of a non-match.[74] Subsequent litigation failed to block the amended statute.[75]

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66. *See generally* U.S. COMM'N ON CIVIL RIGHTS, NO. 005-902-00064-9, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION ch. 5 (2001), http://www.usccr.gov/pubs/vote2000/report/main.htm. The improper felon voter purge made an appearance in the made-for-television movie about the 2000 Florida recount. *See* RECOUNT: THE STORY OF THE 2000 PRESIDENTIAL ELECTION (HBO 2008).

67. *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 66.

68. *Id.* (emphasis added) (quoting E-mail from Emmett "Bucky" Mitchell, Ass't Gen. Counsel, Florida Dep't of State, to DBT Online (Mar. 23, 1999)).

69. *See id.*

70. *Id.*

71. Katie Sanders, *Bill Nelson Compares Rick Scott's Voter Purge with a 2000 Attempt*, POLITIFACT FLA. (June 5, 2012, 4:02 PM), http://www.politifact.com/florida/statements/2012/jun/05/bill-nelson/bill-nelson-compares-rick-scotts-voter-purge-2000-.

72. *See* FLA. STAT. § 97.053(6) (2005).

73. *See* Order Granting Motion for Preliminary Injunction at 27, Fla. State Conf. of the NAACP v. Browning, No. 4:07-0042-CV-1-SPM-WCS (N.D. Fla. Dec. 18, 2007), ECF No. 105, *rev'd*, 522 F.3d 1153 (11th Cir. 2008).

74. *See* FLA. STAT. § 97.053(6) (2007) (providing that in the event of a non-match, "the voter must provide evidence to the supervisor sufficient to verify the authenticity of the

Other states implemented similar database matching requirements, with mixed results. For instance, Georgia administratively implemented a program similar to Florida's, which flagged more than 4200 voters by the time litigation temporarily halted the program;[76] yet, the program remains in force today.[77] When the Washington Legislature enacted a similar statutory matching requirement, a court enjoined its enforcement.[78] The Legislature subsequently amended the statute to allow voters to submit supplemental evidence of their identity in the event of a non-match.[79] In one unique case, a private plaintiff unsuccessfully sued to force the Ohio Secretary of State to implement such a program.[80]

Florida, however, remains ground zero for controversy over voter registration list maintenance practices. Just prior to the 2012 presidential election, Florida began a purge of suspected non-citizen voters.[81] After initially suggesting that there were over 182,000 illegally registered non-citizens, the Department of State later pared that number down to 2600, and eventually to 198 suspected non-citizen voters—out of over 12 million total registered active voters in the state.[82] Critics of the purge process, noting that the list of

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number provided on the application. If the voter provides the necessary evidence, the supervisor shall place the voter's name on the registration rolls"). The Legislature also made minor changes in 2008, just days prior to a hearing in the litigation over the provision. *See* FLA. STAT. § 97.053(6) (2008).

75. *See* FLA. STAT. § 97.053(6) (2015); Fla. State Conf. of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1259 (N.D. Fla. 2008).

76. *See* Morales v. Handel, No. 08-CV-3172, 2008 WL 9401054 (N.D. Ga. Oct. 27, 2008); Complaint Exhibit 6, Georgia v. Holder, 748 F. Supp. 2d 16 (D.D.C. 2010) (three-judge court) (No. 1:10-CV-1062), ECF No. 1-6 (describing the program); Bill Rankin, *With Court Approval, State Continues to Verify Voters*, ATLANTA J. CONST. (July 14, 2010, 6:55 AM), http://www.ajc.com/news/news/local-govt-politics/with-court-approval-state-continues-to-verify-vote/nQhZN.

77. *Holder*, 748 F. Supp. 2d 16, 19 (2010) (order granting dismissal); *see also* Response to Plaintiff's and Defendant's Joint Motion to Dismiss by Defendant-Intervenors at 3, Georgia v. Holder, 748 F. Supp. 2d 16 (2010) (noting the peculiar circumstances surrounding the Department of Justice's decision to reverse its earlier determination by granting administrative preclearance after the filing of this litigation).

78. *See* WASH. REV. CODE § 29A.08.107 (2015); Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1271 (W.D. Wash. 2006) (enjoining enforcement).

79. *See* WASH. REV. CODE § 29A.08.107 (2015).

80. *See* Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 959-61 (S.D. Ohio), *vacated*, 555 U.S. 5 (2008).

81. *See* Marc A. Caputo, *58 Percent of Voters Targeted in Noncitizen Hunt Are Hispanic. Whites, GOP Least Likely to Face Purge*, MIAMI HERALD: NAKED POL. (May 13, 2012, 11:00 AM), http://miamiherald.typepad.com/nakedpolitics/2012/05/58-percent-of-voters-targeted-in-noncitizen-hunt-are-hispanic-whites-gop-least-likely-to-face-purge.html.

82. Steve Bousquet & Michael Van Sickler, *Renewed 'Scrub' of Florida Voter List Has Elections Officials on Edge*, TAMPA BAY TIMES (Aug. 3, 2013, 8:59 PM), http://www.tampabay.com/news/publicsafety/crime/renewed-scrub-of-florida-voter-list-has-elections-officials-on-edge/2134695; *see* Annual Voter Registration Totals in the State of

suspected non-citizen voters included a decorated World War II veteran and an active duty Navy Captain (both United States citizens), charged that the lists of non-citizens were hopelessly inaccurate and filed lawsuits to enjoin the program, with varying degrees of success.[83] After the Supreme Court invalidated a key part of the Voting Rights Act the following summer, the Secretary of State resumed the program.[84] Although the Florida Department of State began using a new immigration database from the U.S. Department of Homeland Security to check for non-citizens, this did not blunt criticism: opponents pointed out that the database was not designed for checking the citizenship status of registered voters and that even the Department of Homeland Security warned that its database was not a foolproof way to verify citizenship status.[85] Eventually, the Secretary of State suspended the program.[86]

Florida is not the only state to face controversy over improper voter registration purges, though. Within the past few years alone,

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Florida, FLA. DEP'T OF ST., http://election.dos.state.fl.us/NVRA/history.asp (last updated Sept. 30, 2015) (showing 12,038,571 active registered voters in 2012).

83. Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1348 (11th Cir. 2014) (holding that the purge program violated the National Voter Registration Act); Mi Familia Vota Educ. Fund v. Detzner, 891 F. Supp. 2d 1326 (M.D. Fla. 2012) (finding that the Secretary of State had not obtained preclearance for the purge program, as required under the Voting Rights Act); United States v. Florida, 870 F. Supp. 2d 1346 (N.D. Fla. 2012) (refusing to enjoin the purge program under the National Voter Registration Act); *see also* Noah Pransky, *#ProtectYourVote: Active Service Members Upset Over Removal from Voting Rolls*, WTSP 10 NEWS (Nov. 2, 2012, 4:04 PM), http://www.wtsp.com/news/topstories/article/280780/250/ProtectYourVote-Service-members-removed-from-voting-rolls; Amy Sherman, *South Florida Democrats Say Gov. Rick Scott Leading "Misguided" Effort to Purge Voters from State Rolls*, MIAMI HERALD (May 29, 2012), http://www.miamiherald.com/2012/05/29/2822073/south-florida-democrat-say-gov.html.

84. Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. TIMES (Aug. 7, 2013), http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html.

85. *See* Lizette Alvarez, *Florida Defends New Effort to Clean Up Voter Rolls*, N.Y. TIMES (Oct. 9, 2013), http://www.nytimes.com/2013/10/10/us/florida-defends-new-effort-to-clean-up-voter-rolls.html; *see also* Amy Sherman, *One of the 'Main Functions' of the Department of Homeland Security's SAVE Database Is 'Checking Voter Registration Citizenship Status,' Ken Detzner Says*, POLITIFACT FLA. (Nov. 14, 2013), http://www.politifact.com/florida/statements/2013/nov/14/ken-detzner/main-functions-save-database-department-homeland-s (rating Secretary of State's statement as "[f]alse"); Amy Sherman, *Homeland Security Warned That the SAVE Database Is Not Foolproof Way to Verify the Voter Rolls, LWV Says*, POLITIFACT FLA. (Oct. 30, 2013, 1:36 PM), http://www.politifact.com/florida/statements/2013/oct/30/league-women-voters-florida/league-women-voters-says-homeland-security-warned- (rating the League of Women Voters' statement as "[t]rue").

86. *See* Steve Bousquet & Amy Sherman, *Florida Halts Purge of Noncitizens from Voter Rolls*, TAMPA BAY TIMES (Mar. 27, 2014, 1:02 PM), http://www.tampabay.com/news/politics/elections/florida-halts-purge-of-noncitizens-from-voter-rolls/2172206.

Colorado, Iowa, Indiana, Ohio, Puerto Rico, Texas, and Virginia have all faced criticism and, in some cases, litigation over their list maintenance procedures.[87]

Women may disproportionately bear the burden of improper voter registration purges. Because the vast majority of women change their name following marriage,[88] women 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). Former counsel for the plaintiffs in the Florida litigation reports that "yes, there were problems for married women who hadn't changed their name on Social Security or DMV information (we know this to be true from anecdotes collected for litigation) . . . ."[89]

Along similar lines, consider the likelihood that among the millions of voters in a state's voter registration database, a surprisingly large number are likely to share both a name and other identifying variables (like a date of birth) with another voter (the

87. *See* Colón-Marrero v. Vélez, 813 F.3d 1, 23 (1st Cir. 2016) (invalidating Puerto Rico's list maintenance procedure); Democratic Party of Va. v. Va. State Bd. of Elections, No. 1:13-CV-1218, 2013 WL 5741486, at *2 (E.D. Va. Oct. 21, 2013) (denying preliminary injunction against a list maintenance procedure); Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1279 (D. Colo. 2010) (upholding a list maintenance procedure); *see also* Dan Casey, *'Purged' Voter's Experience Raises Questions*, ROANOKE TIMES (Nov. 13, 2013, 7:00 PM), http://www.roanoke.com/news/columns_and_blogs/columns/dan_casey/purged-voter-s-experience-raises-questions/article_90519971-e202-53d2-9f3a-81b0008d8f27.html; Jeff Eckhoff, *Polk Judge Refuses to Throw Out Voting Rules Lawsuit Against Iowa Sec. of State Matt Schultz*, DES MOINES REG. (Sept. 12, 2012, 11:04 AM), http://blogs.desmoinesregister.com/dmr/index.php/2012/09/12/polk-judge-refuses-to-throw-out-voting-rules-lawsuit-against-iowa-sec-of-state-matt-schultz; Ivan Moreno, *Colo. Furthers Citizenship Checks*, DENVER POST (Oct. 23, 2012, 5:27 PM), http://www.denverpost.com/recommended/ci_21838811; Lise Olsen, *Texas' Voter Purge Made Repeated Errors*, HOUS. CHRON. (Nov. 2, 2012, 8:09 AM), http://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php; Jim Siegel, *Democrats Call Ohio's Purgings of Voter Rolls Too Aggressive*, COLUMBUS DISPATCH (Dec. 3, 2015, 7:10 AM), http://www.dispatch.com/content/stories/local/2015/12/03/legislator-opposes-ohios-purgings-of-voter-rolls-as-too-aggressive.html; Bill Turque, *Voter Purge in Key Indiana County Goes Overboard*, WASH. POST (Oct. 26, 2012), http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/26/voter-purge-in-key-indiana-county-goes-overboard.

88. *See* Emens, *supra* note 25, at 785, 789.

89. E-mail from Justin Levitt, Assoc. Professor of Law, Loyola Univ. Sch. of Law, to Author (Aug. 28, 2013, 9:29 PM) (on file with author). Professor Levitt also cautioned that "there were enough other problems for men ('James' for 'Jim,' typos, compound names like Jean-Jacques) that there wasn't a clear overall disparity," *id.*, but this is irrelevant to the question of whether database matching programs "den[y] or abridge[]" "[t]he right . . . to vote" of married women who change their names "on account of sex." U.S. CONST. amend. XIX. Even if men also face name-related database matching burdens to a greater extent than women, this would not negate the fact that database matching programs may burden women's right to vote on the basis of post-marriage name-changing, which is an action predominantly undertaken by women, not men.

"birthday problem").[90] When states conduct list maintenance using database matching, this leads to a surprising number of false positive matches,[91] which could lead to a voter's erroneous removal from the voter rolls if they share a name and birthdate with a felon, non-citizen, deceased individual, or other ineligible voter. Because women are more likely to change their name following marriage,[92] more women than men may be subject to the birthdate problem twice: once under their maiden name and once under their married name.

D. Cutbacks in Access: Early Voting, Election Day Registration, Third-Party Voter Registration Groups

States have long enacted a host of measures to make voting easier and more convenient. Lately, however, states have been repealing these popular measures in an effort to make voting more difficult; these cutbacks may have an acute impact on women. States' actions have included reducing the availability of early voting, eliminating Election Day registration, and placing restrictions on third-party voter registration groups.

Of all the states to make voting more difficult, perhaps most controversial is North Carolina: in 2013, its General Assembly passed a law that managed to make voting more difficult on *all three fronts*—cutting the early voting period (while allowing for the same number of hours of early voting to be spread over the fewer number of days), eliminating a same-day registration provision that enabled voters to register and vote on the same day during the early voting period, and placing restrictions on third-party voter registration organizations.[93] Other states, however, have imposed less comprehensive restrictions.

1. Early Voting

First, consider early voting. Early voting is a procedure by which a voter, in the days leading up to Election Day, may appear in person at election officials' office or another designated location to cast a

90. *See* Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111, 112-13 (2008).

91. *See id.*

92. *See* Emens, *supra* note 25, at 785, 789.

93. *See* Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505 (codified in scattered sections of Chapter 163, N.C. GEN. STAT. (2014)). While litigation against the changes remains ongoing, a preliminary injunction is in effect to ensure the continued operation of same-day registration. But it does not apply to the early voting reductions nor the restrictions on third-party registration groups. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236, 248 (4th Cir. 2014).

ballot.[94] Thirty-two states and the District of Columbia allow some form of early voting for all voters, for any reason.[95] Beyond the benefits that early voting provides election administrators, early voting also makes voting more accessible to voters.[96]

Recently, some states have cut back on early voting. In 2011, Florida enacted a controversial law to reduce by nearly half the number of early voting days.[97] A study of the law's effects determined that "it very well could negatively impact turnout among Democratic, minority, younger[,] occasional, and first-time voters in the Sunshine State."[98] Litigation to stop the cutback yielded mixed results.[99] After long lines at Florida polling places became a national story in the subsequent presidential election, the Legislature reinstated the full amount of early voting previously available.[100] In 2012, a series of bizarre events led the Ohio General Assembly to enact, essentially by accident, an early voting regime which cut early voting hours, except for military voters.[101] Litigation proceeding on a unique *Bush v. Gore* equal protection theory succeeded in opening up the full early voting availability to all voters.[102] In 2013, Ohio's General Assembly again reduced the days available for early voting.[103] Litigation to block the

94. DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, EARLY VOTING: WHAT WORKS 2-3 (2013), http://www.brennancenter.org/publication/early-voting-what-works.

95. *See id.*

96. *See id.* at 5-8; *see also* BAUER-GINSBERG REPORT, *supra* note 65, at 54-58.

97. FLA. STAT. § 101.657(d) (2011). The law also allowed, but did not require, local election administrators to offer the same number of hours of early voting as were previously available; the officials merely had to offer those hours over the shortened number of days. *See id.*

98. *See* Herron & Smith, *supra* note 14, at 347.

99. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1256 (M.D. Fla. 2012) (refusing to block the cutback in early voting); Florida v. United States, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (three-judge court) (partially blocking cutback in the five Florida counties then covered by the preclearance requirement of the Voting Rights Act).

100. *See* FLA. STAT. § 101.657(d) (2013); *see also* Amanda Terkel, *Florida Early Voting Fiasco: Voters Wait for Hours at Polls as Rick Scott Refuses to Budge*, HUFFINGTON POST (Nov. 5, 2012, 3:08 PM), http://www.huffingtonpost.com/2012/11/04/florida-early-voting_n_2073119.html.

101. Although the discussion is too lengthy to quote here, the Sixth Circuit explained the bizarre events in detail. *See* Obama for Am. v. Husted, 697 F.3d 423, 426-27 (6th Cir. 2012).

102. *See id.* at 437.

103. *See* OHIO REV. CODE ANN. § 3509.01(B)(2), (3) (LexisNexis 2014).

cuts settled, restoring some of the early voting period.[104] Following the settlement, a different set of plaintiffs brought separate litigation, which is currently pending.[105]

2. Election Day Registration

Second, consider Election Day registration. Most states require voters to file their voter registration application a certain number of days in advance of the election;[106] voters who fail to do so may not vote in that election. Advance registration requirements impose a barrier to voting.[107] Some states, however, allow voters to register to vote on Election Day itself,[108] which eliminates the barrier by ensuring that any registration problems can be corrected by simply re-registering at the polls on Election Day.

Despite the benefits, the Maine Legislature repealed its Election Day registration regime, only to have voters reject the repeal in a referendum, reinstating Election Day registration.[109] The Montana Legislature twice attempted to repeal that state's Election Day registration law, only to face vetoes by two different governors.[110] The Montana Legislature also authorized a referendum on the subject, but voters overwhelmingly chose to retain Election Day registration.[111] Ohio's General Assembly eliminated the week of early voting during which voters could simultaneously register to vote and cast a ballot.[112] Litigation to block the removal settled without

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104. *See* Settlement Agreement Among Plaintiffs and Defendant Sec'y of State Jon Husted ¶ 10, Ohio State Conference of the NAACP v. Husted, No. 2:14-CV-404 (S.D. Ohio Apr. 17, 2015), ECF No. 111-1.

105. *See* Ohio Org. Collaborative v. Husted, No. 2:15-CV-1802, slip op. at 1 (S.D. Ohio Dec. 4, 2015) (noting that a bench trial in the case concluded on Dec. 3, 2015).

106. *See, e.g.*, FLA. STAT. § 97.055 (2015) (29 days); TEX. ELEC. CODE ANN. § 13.143 (West 2015) (30 days).

107. *See* WENDY WEISER ET AL., BRENNAN CTR. FOR JUSTICE, VOTER REGISTRATION MODERNIZATION: POLICY SUMMARY 3-7 (2009). In the author's experience as an election administrator, the single greatest category of election-day calls for assistance concerned voters with registration problems.

108. *See, e.g.*, MINN. STAT. § 201.061(3) (2015); WIS. STAT. § 6.55 (2015).

109. *See* ME. REV. STAT. ANN. tit. 21A, § 122(4-A) (2011), *repealed by* People's Veto (Nov. 8, 2011).

110. *See* H.B. 30, 63d Leg., Reg. Sess. § 2 (Mont., as enrolled Apr. 9, 2013), *vetoed*, Veto Message from Gov. Steve Bullock, to Hon. Mark Blasdel, Speaker of the Mont. House of Reps., and Hon. Jeff Essmann, Pres. of the Mont. Sen. (Apr. 22, 2013); H.B. 180, 62d Leg., Reg. Sess. § 2 (Mont., as enrolled Apr. 4, 2011), *vetoed*, Veto Message from Gov. Brian Schweitzer, to Hon. Mike Milburn, Speaker of the Mont. House, and Hon. Jim Peterson, Pres. of the Mont. Sen. (Apr. 13, 2011).

111. *See* S.B. 405, 63d Leg., Reg. Sess. § 2 (Mont., as enrolled Apr. 22, 2013); Damon Daniels, *Montana Voters Keep Same-Day Registration*, DEMOS: POLICYSHOP (Nov. 7, 2014), http://www.demos.org/blog/11/7/14/montana-voters-keep-same-day-registration.

112. *See* OHIO REV. CODE ANN. § 3509.01(B)(2), (3) (LexisNexis 2014).

restoring the period of same-day registration.[113] Following the settlement, a different set of plaintiffs also brought separate litigation, which is currently pending.[114] Wisconsin also cut its state's early voting period.[115] Litigation to restore the cuts is ongoing.[116]

3. Third-Party Voter Registration Organizations

Finally, consider third-party voter registration organizations. The National Voter Registration Act requires that states accept written voter registration applications by applicants not physically present at the office of election officials.[117] As a result, many organizations will send volunteers or staff into the community to find eligible but unregistered voters, offer them an opportunity to fill out an application, and mail in the application on the voter's behalf.

Some states, however, impose restrictions on these groups. Three separate times over half a decade Florida enacted stringent requirements for these groups, backed by fines and penalties, only to have courts enjoin each law.[118] In 2011, Texas enacted its own restrictions on third-party voter registration organizations, but litigants were less successful at seeking to overturn them.[119] In 2005, New Mexico enacted similarly tough restrictions, which later litigation also failed to strike down.[120] Plaintiffs had better luck in

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113. *See* Settlement Agreement Among Plaintiffs and Defendant Sec'y of State Jon Husted ¶ 10, Ohio State Conference of the NAACP v. Husted, No. 2:14-CV-404 (S.D. Ohio Apr. 17, 2015), ECF No. 111-1.

114. *See* Ohio Org. Collaborative v. Husted, No. 2:15-CV-1802, slip op. at 1 (S.D. Ohio Dec. 4, 2015), http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORDERregardingpost-trialbriefs120415.pdf (noting that a bench trial in the case concluded on Dec. 3, 2015).

115. *See* WIS. STAT. § 6.86(1)(b) (2011) (limiting early voting to a twelve-day period that begins on the third Monday preceding an election and ends on the Friday before Election Day).

116. *See* One Wis. Inst., Inc., v. Nichol, No. 3:15-CV-324, slip op. at 9-10 (W.D. Wis. Dec. 17, 2015), http://moritzlaw.osu.edu/electionlaw/litigation/documents/OneWisconsin-Opinion121715.pdf (refusing to dismiss the plaintiffs' "political fencing" claims).

117. 52 U.S.C. § 20505(a)(1) (Supp. II 2014).

118. *See* FLA. STAT. § 97.0575 (2011), *enjoined*, League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155, 1167-68 (N.D. Fla. 2012); FLA. STAT. § 97.0575 (2007), *enjoined*, League of Women Voters of Fla. v. Browning, 575 F. Supp. 2d 1298, 1325 (S.D. Fla. 2008); FLA. STAT. § 97.0575 (2005), *enjoined*, League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314, 1341 (S.D. Fla. 2006).

119. *See* TEX. ELEC. CODE ANN. §§ 13.031-.048 (West 2011), *upheld by* Voting for Am., Inc. v. Steen, 732 F.3d 382, 391-94 (5th Cir. 2013).

120. *See* N.M. STAT. ANN. § 1-4-49 (2008), *preliminary injunction denied*, Am. Ass'n of People with Disabilities v. Herrera, 580 F. Supp. 2d 1195, 1247 (D.N.M. 2008) (denying preliminary injunction); *see also* Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1189 (D.N.M. 2010) (granting in part and denying in part Secretary of State's motion to dismiss), *aff'd on reconsideration*, No. CIV 08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. 2010).

Ohio, where they successfully attacked a 2006 statute restricting third-party voter registration drives.[121] Georgia plaintiffs also obtained injunctive relief against an administrative practice that imposed similar burdens on third-party voter registration organizations.[122]

4. The Effect on Women of Cutbacks in Access

Cutbacks in early voting, eliminating same-day registration, and restricting third-party voter registration organizations can burden all voters but may especially burden women voters. Because women carry a disproportionate share of the childcare burden in the United States,[123] women may have a particular need for the flexibility these accessibility provisions afford voters.

A third-party voter registration drive at the school of a woman's child might be the difference between that woman turning in her voter registration form before the deadline, or not. Expanded early voting might be the difference between a woman voting or not, because the following day she may be too busy with a sick daughter to wait in a polling place line. Same-day registration could be the difference for a woman who has only a half-hour to vote before she has to pick up her son from school and cannot remain at the polling place to sort out her registration problem.

E. Barriers to the Ballot: What It All Means

As the above discussion illustrates, a host of legislative and administrative matters present barriers to the ballot.[124] Many of

121. *See* OHIO REV. CODE ANN. §§ 3503.14(A), 3503.19(B)(2)(b)-(c), 3503.29(C), 3599.11(B)(2)(a), 3599.11(C)(2) (2008), *preliminary injunction granted*, Project Vote v. Blackwell, 455 F. Supp. 2d 694, 709 (N.D. Ohio 2006); *see also* Project Vote v. Blackwell, No. 1:06-CV-1628, 2008 WL 397585, at *4 (N.D. Ohio Feb. 11, 2008) (granting plaintiff's motion for partial summary judgment).

122. *See* Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349, 1351, 1356 (11th Cir. 2005).

123. *See, e.g.*, Cahn, *supra* note 34, at 181-82; Coan, *supra* note 34, at 258; Dowd, *supra* note 34, at 1053-54.

124. The barriers mentioned above are hardly the only recent restrictions imposed on voting. For instance, the above discussion does not mention efforts to make voting more difficult for students. *See, e.g.*, CAMPUS VOTE PROJECT, FAIR ELECTIONS LEGAL NETWORK, COLLEGE STUDENTS AND VOTING: A CAMPUS VOTE PROJECT PERSPECTIVE 5-9 (2013), http://fairelectionsnetwork.com/wp-content/uploads/2013-Student-Voting-Report-Handout-DRAFT.pdf. The gender gap in higher education enrollment is not as pronounced as in other areas: "In college, over half of both undergraduate (55 percent) and graduate students (57 percent) were women. Combining undergraduate and graduate levels, women made up 53 percent of all college students in 2011 . . . ." JESSICA DAVIS & KURT BAUMAN, U.S. CENSUS BUREAU, NO. P20-571, SCHOOL ENROLLMENT IN THE UNITED STATES: 2011, at 13 (2013), http://www.census.gov/prod/2013pubs/p20-571.pdf. It is harder to draw the conclusion that attacks on student voting are restrictions "on account of sex," U.S. CONST. amend. XIX, than it is to draw a similar conclusion about restrictions that burden those

these barriers may impact women significantly more than men.[125] The question then is what, if anything, can the Nineteenth Amendment do to help?

III. LEGAL HISTORY OF WOMAN SUFFRAGE LEADING TO THE NINETEENTH AMENDMENT

When trying to determine the scope of the Nineteenth Amendment's power to fight restrictions on voting, it is appropriate to review the history leading to the proposal and ratification of the Amendment.[126]

A. Early American History: New Jersey

Some early American women were, in fact, entitled to vote: New Jersey's Constitution of 1776 did not restrict the franchise on account of sex.[127] Women, in fact, voted in New Jersey until 1807.[128] That year, the Legislature barred women from voting, ostensibly justifying its decision on the questionable ground of fighting voter fraud.[129] In an eerie foreshadowing of today's voting restrictions,[130] voter fraud

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without financial resources, or those with childcare responsibilities, or those who change their name—all of which are categories which contain significantly more women than men.

125. Although this Article focuses on barriers to the ballot that impact *women*, this does not foreclose the possibility that the Nineteenth Amendment could protect the voting rights of *men*. After all, the Nineteenth Amendment "applies to men and women alike." Breedlove v. Suttles, 302 U.S. 277, 283 (1937). Voting rights advocates might use the Nineteenth Amendment to protect military voters, because significantly more men than women serve in the military. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 335 tbl.510 (2012), http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/defense.pdf. Advocates might similarly use the Nineteenth Amendment to attack felony disenfranchisement statutes: the impact of these provisions falls almost exclusively on men. *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT RATES FOR WOMEN 2 (2008), http://www.sentencingproject.org/doc/publications/fd_bs_women.pdf.

126. Siegel, *supra* note 7, at 967-68 (arguing that a proper interpretation of the Nineteenth Amendment must include a review of the history leading to its enactment).

127. *See* N.J. CONST. of 1776, ¶ IV, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2595 (Francis Newton Thorpe ed., 1909).

128. *See* Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776-1807*, 63 RUTGERS L. REV. 1017, 1024-25 (2011).

129. *See* Supplement to an Act to Regulate the Election of Members of the Legislative Council and General Assembly, Sheriffs and Coroners in New Jersey, November 1807, 1807 N.J. Laws 14; *see also* Lewis, *supra* note 128, at 1029-33.

130. *See* Keyssar, *supra* note 11 ("The [modern restrictive voting] laws seem tailored less to guarantee the integrity of elections than to achieve a partisan purpose . . . ."); *see also* HASEN, *supra* note 2, at 41-73 (detailing the cottage industry of individuals who peddle less than compelling claims of voter fraud to defend restrictions on voting).

may have been merely a pretext for disenfranchising women because the Legislature did not like the way in which women were voting.[131]

B. Reconstruction Era and the Civil War Amendments

During Reconstruction, woman suffrage suffered a setback when Congress considered a constitutional amendment designed to secure the rights, including the right to vote, of newly-freed slaves. Despite the vigorous campaigning of woman suffrage supporters, Congress proposed a Fourteenth Amendment that protected the voting rights of only *male* voters.[132] Suffragists fared no better when Congress proposed the Fifteenth Amendment, which prohibited restrictions on suffrage on account of race, but made no mention of sex.[133]

In a last gasp effort at constitutional protection, woman suffrage advocates unsuccessfully attempted to obtain their own constitutional amendment, specifically guaranteeing for women the right to vote.[134] As an alternative, advocates lobbied Congress to pass ordinary legislation, purporting to enforce the Privileges and Immunities Clause of the Fourteenth Amendment, that would require states to enfranchise women.[135] Members of Congress, who once embraced a broad notion of suffrage and of congressional power to protect the right to vote, now rejected requests for legislation on the grounds that protecting the voting rights of women was beyond the power of Congress.[136]

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131. *See* CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 9 (2005); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 141 (rev. ed. 2009); Irwin N. Gertzog, *Female Suffrage in New Jersey, 1790-1807*, 10 WOMEN & POL. 47, 56 (1990). *But see* Lewis, *supra* note 128, at 1033-34 (suggesting that the real motivation may have been a genuine conviction concerning women's competence to vote, rather than a politically motivated concern about election outcomes).

132. *See* U.S. CONST. amends. XIV, § 2, XV. Woman suffrage advocates lobbied tirelessly to ensure the Reconstruction Amendments explicitly enfranchised women—or at least used only gender-neutral language when enfranchising former slaves—but were unable to overcome the political concerns of supporters in Congress who feared that the inclusion of woman suffrage would jeopardize black suffrage. *See* CATT & SHULER, *supra* note 131, at 49-52; KEYSSAR, *supra* note 131, at 143-44; Lind, *supra* note 9, at 162, 164-65; Siegel, *supra* note 7, at 968-69, n.58.

133. *See* U.S. CONST. amend. XV; CATT & SHULER, *supra* note 131, at 67-72; KEYSSAR, *supra* note 131, at 145; Siegel, *supra* note 7, at 969-70.

134. *See* CATT & SHULER, *supra* note 131, at 71; Siegel, *supra* note 7, at 970; Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1475 (2001).

135. *See* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1366 (1995); Siegel, *supra* note 7, at 972-73; Winkler, *supra* note 134, at 1479, 1484, 1499.

136. *See* Siegel, *supra* note 7, at 973; Winkler, *supra* note 134, at 1489-91, 1502.

C. Minor v. Happersett[137] *and the "New Departure"*

Having failed before Congress, woman suffrage advocates turned to the courts. Notwithstanding the explicit mention of "male" voters in Section 3, suffragists argued that the Privileges and Immunities Clause in Section 1 of the Fourteenth Amendment included voting as one of the protected "privileges and immunities."[138] Section 1 contained no explicit limitation on the basis of sex, the argument went, so women were entitled to vote.[139] Suffragists titled this theory the "New Departure."[140]

Although the criminal prosecution of noted suffragist Susan B. Anthony for illegally voting may be the most famous New Departure case,[141] the case to reach the Supreme Court was *Minor v. Happersett*.[142] Virginia Minor, the founder of the New Departure movement, applied for voter registration in her home state of Missouri.[143] The registrar rejected her application on the grounds that she was a woman and that Missouri law limited the franchise to men.[144] Minor sued the registrar, but she lost in both the trial court and the Missouri Supreme Court.[145] In the United States Supreme Court, Minor advanced the standard New Departure arguments.[146] In a unanimous opinion, the Court rejected Minor's claim.[147]

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137. 88 U.S. 162 (21 Wall.) (1874), *superseded by* U.S. CONST. amend. XIX.

138. *See* Siegel, *supra* note 7, at 971-72; Winkler, *supra* note 134, at 1475-76, 1480-83, 1485-87.

139. *See* KEYSSAR, *supra* note 131, at 145-46; Lobel, *supra* note 135, at 1365. Although the Privileges and Immunities Clause was the primary constitutional provision on which the New Departure relied, the theory invoked other constitutional clauses as well. *See* Siegel, *supra* note 7, at 972 n.66.

140. *See* Lobel, *supra* note 115, at 1365; Siegel, *supra* note 7, at 971.

141. *See* United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459). The fascinating full story of the case appears in several law review articles, a full-length book, and even an episode of the 1950s television series *You Are There*. *See generally* CATT & SHULER, *supra* note 131, at 99-104; N.E.H. HULL, THE WOMAN WHO DARED TO VOTE: THE TRIAL OF SUSAN B. ANTHONY (2012); Lobel, *supra* note 135, at 1368-70; Winkler, *supra* note 134, at 1506-14; *You Are There: The Trial of Susan B. Anthony* (CBS television broadcast Jan. 23, 1955).

142. 88 U.S. (21 Wall.) 162 (1874), *superseded by* U.S. CONST. amend. XIX. The *Anthony* and *Minor* cases were not the only New Departure test cases: "Overall, 150 women attempted to vote in ten states and the District of Columbia during 1871 and 1872." Winkler, *supra* note 134, at 1493. Usually, the local registrar denied the woman's voter registration application, so the woman would sue the registrar. CATT & SHULER, *supra* note 131, at 92; Lobel, *supra* note 135, at 1368; Winkler, *supra* note 134, at 1492.

143. *Minor*, 88 U.S. (21 Wall.) at 163. For an examination of Minor's role in the suffrage movement, see Winkler, *supra* note 134, at 1475-76.

144. *Minor*, 88 U.S. (21 Wall.) at 163-64.

145. *See* Minor v. Happersett, 53 Mo. 58, 65 (1873), *aff'd*, 88 U.S. (21 Wall.) at 178.

146. *Minor*, 88 U.S. (21 Wall.) at 164.

147. *See id.* at 178. Incredibly, the Court rejected Minor's claim even though Missouri sent no counsel to defend the decision below. *See id.* at 174 ("No opposing counsel").

First, the Court agreed that Minor was a citizen of the United States. Women, the Court held, had always been citizens from the founding of the Republic and did not need Section 1 of the Fourteenth Amendment[148] to stake a claim to citizenship:[149]

> The [F]ourteenth [A]mendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the [A]mendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship.[150]

The Court, however, rejected Minor's claim that voting was one of the "privileges and immunities" guaranteed to citizens.[151] The Court explained:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . .
>
> [T]he Constitution of the United States does not confer the right of suffrage upon any one, and . . . the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void . . . .[152]

Although the Court rejected the New Departure theory, the justices expressed no opinion on the merits of woman suffrage, explaining that such a policy question was not within the judiciary's purview.[153] Taking the Court's disclaimer as a suggestion, some suffrage advocates embarked on state-by-state campaigns to convince states and localities to enfranchise women.[154] But others nonetheless brought their fight back to Congress, where they lobbied once again for a constitutional amendment.[155]

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148. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

149. *Minor*, 88 U.S. (21 Wall.) at 165-70.

150. *Id.* at 170.

151. *Id.* at 170-78. The Court also rejected claims that the denial of woman suffrage violated the Guarantee Clause, U.S. CONST. art IV, § 4, the Bill of Attainder Clause, *id.* art. I, § 9, cl. 3, and the Due Process Clause, *id.* amend. V. *Minor*, 88 U.S. (21 Wall.) at 175-76.

152. *Minor*, 88 U.S. (21 Wall.) at 177-78.

153. *Id.* at 178.

154. *See* CATT & SHULER, *supra* note 131, at 107-31, 160-226; KEYSSAR, *supra* note 131, at 149.

155. *See* CATT & SHULER, *supra* note 131, at 227-49; KEYSSAR, *supra* note 131, at 149.

D. The Pre-Nineteenth Amendment History: What It All Means

The key events in the pre-Nineteenth Amendment history—New Jersey's withdrawal of suffrage from women on dubious grounds of voter fraud, the Fourteenth and Fifteenth Amendments' protection of voting rights for men only, the refusal of Congress to enact Fourteenth Amendment enforcement legislation to protect women's right to vote, and *Minor v. Happersett*'s holding that the Privileges and Immunities Clause does not protect voting—collectively tell a story in which voting rights are subject to the whims of individual states, entitled to only minimal protection from the federal government. The Nineteenth Amendment, as a constitutional rejection of that history,[156] constitutes more than just a requirement that states remove the word "male" from their list of voter qualifications.

Rather, the rejection of this pre-amendment history suggests that the Nineteenth Amendment constitutes a significant source of constitutional authority for the defense of voting rights *in general* against restrictions or barriers that discriminate on the basis of sex. The extent of that power—whether that power is sufficient to combat modern-day barriers to the ballot—is illustrated both by the Nineteenth Amendment's legislative history and by inferences from the jurisprudence of the era concerning the enforcement clauses in other constitutional provisions.

156. To illustrate how the Nineteenth Amendment was a rejection of the pre-Amendment constitutional history, consider that, in their pleas for a constitutional amendment to enfranchise women, suffrage advocates never truly gave up on their New Departure theory, despite their total defeat in the Supreme Court. *See* Siegel, *supra* note 7, at 975. Indeed, a report of the Senate Committee on Woman Suffrage specifically mentioned New Jersey's 1807 revocation of the franchise from women, and said, "History is largely an account of man's struggle for freedom, and from the beginning of the human race, down to the present time, its tendency has been toward liberty—mankind reaching out for freedom and immeasurably attaining it." S. REP. NO. 63-64, at 8 (1913); *see also id.* at 7 (noting "marked changes in political and social conditions in the U.S.").

IV. HOW ITS FRAMERS UNDERSTOOD THE NINETEENTH AMENDMENT[157]

In 1919, woman suffrage advocates finally succeeded: both chambers in the Sixty-Sixth Congress voted by the necessary two-thirds majority to propose a woman suffrage constitutional amendment to the states.[158] Just over a year later, the necessary three-fourths of state legislatures ratified the Nineteenth Amendment.[159]

A. Legislative Procedure Surrounding House Joint Resolution 1[160]

The most peculiar fact about the legislative history of the Nineteenth Amendment is how little history there is: members of Congress went to great lengths to hurry the consideration of the joint resolution which eventually became the Nineteenth Amendment. Neither chamber held any hearings, nor took any testimony; the House published a report of only forty-four words while the Senate issued no published report at all.[161] Unique parliamentary maneuvers—what one opponent called "parliamentary cleverness"[162] and another called "revolutionary tactics . . . in order to railroad a piece of legislation through"[163]—deviated from standard practice with the goal of speeding consideration of the joint resolution. In the House, woman suffrage supporters used the rare "Calendar

157. This Part discusses only the legislative history of Congress proposing the Nineteenth Amendment. State legislatures of the time generally did not maintain verbatim transcripts of proceedings akin to the *Congressional Record*; they merely maintained journals of proceedings, which offer the reader procedural details but not the substance of the discussion. *Cf.* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1203 n.160 (2012) (encountering similar problems concerning state legislatures' debates over the ratification of the Twenty-Sixth Amendment). An authoritative secondary source published shortly after ratification, however, suggests that the ratification debates in the state legislatures were substantially similar to the debates in Congress. *See* CATT & SHULER, *supra* note 131, at 343-63, 371-80, 387-413, 422-61.

158. *See* H.R.J. Res. 1, 66th Cong. (1919); *see also* 58 CONG. REC. 635 (recording passage of H.R.J. Res. 1 in the Senate on June 4, 1919, by a vote of 56-25); *id.* at 93-94 (recording passage of H.R.J. Res. 1 in the House on May 21, 1919, by a vote of 304-90).

159. *See* Certification of the Adoption of the Nineteenth Amendment to the Constitution, 41 Stat. 1823 (1920).

160. *See* H.R.J. Res. 1.

161. *See* H.R. REP. NO. 66-1 (1919). The report reads, in its entirety, "The Committee on Woman Suffrage, to which was referred the resolution (H.R.J. Res. 1) proposing an amendment to the Constitution extending the right of suffrage to women, after consideration, report the said resolution back to the House with a recommendation that it do pass." *Id.* The Senate's Committee on Woman Suffrage merely reported the joint resolution without a published report. *See* 58 CONG. REC. 348 (1919).

162. 58 CONG. REC. 78 (1919) (statement of Rep. Joseph Moore).

163. *Id.* at 228 (statement of Sen. Underwood); *see also id.* (statement of Sen. Oscar Underwood) ("revolutionary methods").

Wednesday" provision to bypass the Rules Committee and obtain swift consideration of the joint resolution.[164] In the Senate, woman suffrage supporters unsuccessfully attempted an innovative use of the motion to discharge a committee to bring the matter to the floor sooner, scaring opponents into allowing the joint resolution to reach the floor without delay.[165] A mere eighteen days into the Sixty-Sixth

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164. Without first having its Democratic members formally appointed, *see* 58 CONG. REC. 11 (1919) (appointing only Republican members), the House Committee on Woman Suffrage met on the first day of the new Congress (Monday) and reported out House Joint Resolution 1 the very next day (Tuesday). *See* H.R. REP. NO. 66-1 (1919). The joint resolution was referred to the House Calendar. *See* 58 CONG. REC. 70 (1919). The day after its referral (Wednesday), Representative James Mann of Illinois, the Chairman of the Committee and the chief sponsor of House Joint Resolution 1, used the "Calendar Wednesday" provision to call up the joint resolution for immediate consideration. *See id.* at 78; *see also* RULES OF THE U.S. HOUSE OF REPRESENTATIVES, 66th Cong., Rule XXIV, cl. 7 (1919) [hereinafter HOUSE RULES] (providing for the Calendar Wednesday procedure), *reprinted in* H. R. DOC. NO. 66-1019, at 393-94 (1921).

Under normal practice not followed in this instance, a legislative item reported by any House committee makes an additional stop at the Rules Committee. The Rules Committee examines the item anew, and proposes a privileged resolution which would order the House to consider the underlying legislative item under debate rules unique to the item. The House makes frequent use of this procedure because consideration of the Rules Committee's proposed resolution is a privileged question, which means the resolution gets immediate consideration over other business then pending. *See* HOUSE RULES, Rule XI, cl. 56, *reprinted in* H. R. DOC. NO. 66-1019, at 309-10. When the House passes the Rules Committee's resolution, the House is bound by the resolution's terms, which usually dictate that the underlying legislative item itself now receives immediate consideration over other business then pending and also dictate special debate rules for that consideration. *See, e.g.*, H. Res. 215, 65th Cong. (1918) (providing for immediate consideration of H.R.J. Res. 200, the 65th Congress's version of a constitutional amendment proposing woman suffrage); 56 CONG. REC. 762, 770 (1918) (using H. Res. 215 in the 65th Congress to manage debate on H.R.J. Res. 200).

Under the Calendar Wednesday procedure, however, a committee may obtain immediate consideration of a reported item on the House Calendar, without the necessity of going through the Rules Committee, but may do so *only on a Wednesday*. *See* HOUSE RULES, *supra*, Rule XXIV, cl. 7, *reprinted in* H. R. DOC. NO. 66-109, at 393-94.

By immediately considering House Joint Resolution 1 in committee, reporting it favorably, and immediately placing it on the House Calendar *before Wednesday*, Representative Mann was able to use the Calendar Wednesday provision to bypass the Committee on Rules and bring the joint resolution to the floor immediately. Had Representative Mann waited even another day to report the joint resolution, it would not have been eligible for the Calendar Wednesday procedure until the following Wednesday, by which time other committees might have reported their own measures which would also be eligible for the Calendar Wednesday procedure.

Another unique benefit of the Calendar Wednesday procedure was that it limited debate, *see id.* at Rule XV, cl. 6(b), preventing members from using debate as a means of blocking a vote. As a result, the House voted that same day by the necessary two-thirds majority to propose the joint resolution to the states as a constitutional amendment. *See* 58 CONG. REC. 93-94 (1919) (passing H.J. Res. 1 in the House by vote of 304-90).

165. Immediately upon receiving the joint resolution from the House, Senator Hiram Johnson unsuccessfully attempted to place the joint resolution on the calendar without the necessity of committee consideration. *See* 58 CONG. REC. 128 (1919). The Vice President referred the joint resolution to the Senate Committee on Woman Suffrage. *See* 58 CONG. REC. 128 (1919). Senator Wesley Jones then immediately entered a motion to discharge the Committee from consideration of House Joint Resolution 1. *See id.* at 129. Pursuant to the

Congress, large majorities in both chambers had passed a sweeping change to the Constitution, resulting in the single biggest one-time enfranchisement of any group of individuals in the history of the United States.[166] Congress is not known for its swift action in the normal course of legislating, and for the typically slow-moving institution to have moved with such speed on such an important issue seems curious, to put it mildly.

Congress apparently moved with such speed because previous Congresses built up a significant record over the course of previous decades. The first vote on a woman suffrage constitutional amendment came in the Senate in 1887.[167] Congress had been holding and publishing hearings on the subject of a woman suffrage constitutional amendment since at least 1892 in the House and 1878

Senate's rules, the motion had to lie over for one legislative day before it could receive a vote. *See* STANDING RULES OF THE U.S. SENATE, 66th Cong., Rule XXVI, ¶ 2 (1919), *reprinted in* S. DOC. NO. 66-427, at 31 (1921).

Senator Andrieus Jones, the Chair of the Committee on Woman Suffrage, called a meeting of the Committee the following day. *See* 58 CONG. REC. 226-27 (1919) (statement of Sen. Andrieus Jones) (detailing the Saturday meeting). This was itself somewhat controversial, because although Senator Andrieus Jones, a Democrat, chaired the Committee in the previous Democratic-controlled Sixty-Fifth Congress, he would not do so in the Republican-controlled Sixty-Sixth Congress. *See Republicans Win Senate and House*, N.Y. TIMES, Nov. 6, 1918, at 3. At Senator Andrieus Jones' request, the Committee decided to support the previous day's motion by Senator Wesley Jones to discharge the committee of House Joint Resolution 1, rather than follow the usual practice of reporting the joint resolution itself. *See* 58 CONG. REC. 228 (1919) (statement of Sen. Andrieus Jones). Several Senators vehemently protested that this constituted an abuse of the motion to discharge and that the Senate should follow the usual practice so as to allow all sides to express their views. *See id.* at 227-28 (statement of Sen. Oscar Underwood); *id.* at 231 (Statement of Sen. Hoke Smith); *id.* at 232-33 (statements of Sen. Thomas Gore); *id.* at 232 (statement of Sen. Albert Fall). A parliamentary battle ensued, involving a host of procedural mechanisms, until finally opponents ran out the clock, when another matter automatically arose by operation of a previously-enacted special order and preempted any vote on the motion to discharge. *See id.* at 235.

Having failed in their efforts to discharge the Committee by motion, suffrage supporters resigned themselves to following the normal practice, and the Committee reported House Joint Resolution 1 favorably to the Senate. *See id.* at 343, 348. A few days later, the Senate took up the joint resolution, *see id.* at 556, and the following day, the Senate voted by the necessary two-thirds majority to propose the joint resolution to the states as a constitutional amendment. *See id.* at 635 (recording passage of H.J. Res. 1 in the Senate by a vote of 56-25).

166. *See* 58 CONG. REC. 1, 5 (1919) (beginning of Sixty-Sixth Congress on May 19, 1919); *id.* at 93-94 (recording passage of H.J. Res. 1 in the House on May 21, 1919, by a vote of 304-90); *id.* at 635 (recording passage of H.J. Res. 1 in the Senate on June 4, 1919, by a vote of 56-25). For a discussion of how radical a change the Ninteenth Amendment made in the electorate, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 419 (2005). *But see* KEYSSAR, *supra* note 131, at 175-77 (stating that the enfranchisement of women did not dramatically affect politics).

167. *See* 18 CONG. REC. 1002-03 (1887) (failing to pass S. Res. 5 in the Senate by a vote of 26-34).

in the Senate.[168] Congressional committees had issued reports on a potential woman suffrage constitutional amendment since 1883 in the House and 1878 in the Senate.[169] Just months earlier, the Sixty-Fifth Congress narrowly missed the necessary two-thirds majority to propose the woman suffrage constitutional amendment to the states.[170] When suffrage opponents asked supporters about the absence of hearings and reports on the subject in the Sixty-Sixth Congress, supporters replied that "hearings have been had on this resolution for more than [fifty] years"[171] and that "[h]earings have been repeatedly held by committees of both House and Senate on this question in the past."[172] Relying on the record built in previous Congresses, the Sixty-Sixth Congress felt no need to study the merits or consequences of a woman suffrage constitutional amendment.[173]

For interpretive purposes, this means that debates, reports, hearings, and other legislative materials from previous Congresses can be just as useful as would be materials from the Sixty-Sixth Congress, which actually passed the Nineteenth Amendment. But the notion raises problems: is it proper to use the materials of a previous Congress to interpret a constitutional provision, when that Congress failed to pass (or even worse, voted down) a joint resolution proposing that provision? The reverse question also raises problems: is it proper to ignore the record developed by previous Congresses when the Sixty-Sixth Congress clearly relied on that record? Although some scholars use the entire half-century history of congressional efforts on woman suffrage,[174] an intermediate position

168. *See Hearing of the Woman Suffrage Association: Hearing Before the H. Comm. on the Judiciary*, 52d Cong. (1892); *Arguments in Behalf of a Sixteenth Amendment to the Constitution of the United States: Hearing Before the S. Comm. on Privileges and Elections*, 45th Cong. (1878). These are the first published hearings; Congress held unpublished hearings preceding these.

169. *See* H.R. REP. NO. 47-1997 (1883); S. REP. NO. 45-523 (1878).

170. *See* 57 CONG. REC. 3062 (1919) (showing that, on reconsideration, H.R.J. Res. 200 did not achieve the necessary two-thirds majority in the Senate, failing by a vote of 55-29); 56 CONG. REC. 10,987-88 (showing that, on the initial vote, H.R.J. Res. 200 did not achieve the necessary two-thirds majority in the Senate, failing by a vote of 53-31); 56 CONG. REC. 810 (1918) (showing that H.R.J. Res. 200 passed in the House by the necessary two-thirds majority with a vote of 274-136).

171. *See* 58 CONG. REC. 78 (1919) (statement of Rep. James Mann).

172. *See id.* at 557 (statement of Sen. James Watson).

173. Notably, state legislatures also moved with incredible speed to ratify the Nineteenth Amendment. Many legislative sessions had already concluded by the time Congress passed House Joint Resolution 1, so these states had to call their legislatures into special session in order to ratify the Amendment. *See* CATT & SHULER, *supra* note 131, at 343-63. In under fourteen months, the necessary three-fourths of state legislatures ratified the Nineteenth Amendment. *See* Amendment to the Constitution, 1920, 41 Stat. 1823, 1823 (1920) (certifying ratification by three-fourths of the state legislatures on Aug. 26, 1920).

174. *See, e.g.*, Siegel, *supra* note 7, at 948 (interpreting the Nineteenth Amendment in light of over a half-century of hearings, reports, and debates).

is more appropriate: legislative history from a previous Congress is useful *only if* the members of Congress producing the statements or other materials *also sat in the Sixty-Sixth* Congress. This limiting principle ensures that activity from prior Congresses might be plausibly ascribed to the Sixty-Sixth Congress.

B. Enfranchising Women: The Nineteenth Amendment's Primary Purpose

Having decided what materials are fair game to consider when attempting to discern Congress's intent in proposing the Nineteenth Amendment, the next question is what exactly does the Nineteenth Amendment do? Absent enforcement legislation, how far does the Nineteenth Amendment itself reach into the states' election machinery?

1. Judicial Interpretation of the Nineteenth Amendment

Given the circumstances of the case, one can forgive the Supreme Court for taking a cramped view of that question in *Breedlove v. Suttles*—the only case in which the Court has applied the Nineteenth Amendment.[175] In *Breedlove*, the Court held that the Nineteenth Amendment does not prohibit the denial of the right to vote for failure to pay a poll tax with an exemption for female non-voters.[176] Nearly 100 years after its ratification, the following 201 words are the only judicial application of the Nineteenth Amendment the Court has ever offered:

> The Nineteenth Amendment, adopted in 1920, declares: "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." It applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state. Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the [A]mendment a limitation upon the power to tax. The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to

175. 302 U.S. 277 (1937). The Court technically also applied the Nineteenth Amendment in *Leser v. Garnett*, 258 U.S. 130 (1922). In that case, the Supreme Court rejected a claim to remove two women from the voter rolls because although the state constitution limited suffrage to men, the operation of the Nineteenth Amendment forbid the state from enforcing its "men only" voter qualification. *Id.* at 135-36. The main question in that case was not, however, the operation of the Nineteenth Amendment, but rather whether it had validly become part of the Constitution. *Id.* at 136.

176. *See* 302 U.S. at 283-84.

> levy and power to collect are equally necessary. And, by 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. The challenged enactment is not repugnant to the Nineteenth Amendment.[177]

The challenged poll tax exemption applied differently to men and women; only female *non-voters* were eligible for the exemption—that is, in order to be eligible for the exemption, women had to give up their right to vote.[178] No *voters* were exempt from the poll tax on account of sex; the statute operated equally to deny both nonpaying men's and nonpaying women's rights to vote. *Breedlove* therefore stands for the unremarkable proposition that "the right to vote is neither denied nor abridged on account of sex"[179] by a voting restriction unless that restriction in some way impacts voters of one sex differently from voters of another sex.[180]

Breedlove does contain some dicta suggesting that the Nineteenth Amendment's reach is somewhat limited: that the provision's "purpose is not to regulate the levy or collection of taxes" and that the Nineteenth Amendment is not "a limitation upon the power to tax."[181] Modern readers should give these statements little credence: less than three decades after *Breedlove*, both the Supreme Court and a constitutional amendment would repudiate poll taxes,[182] overruling *Breedlove*'s equal protection holding and casting doubt on that case's cramped view of the Nineteenth Amendment's reach.

Breedlove, then, offers little in the way of interpretive guidance. Because the Court's Nineteenth Amendment jurisprudence is nearly non-existent, the legislative history of House Joint Resolution 1 might offer more insight.

2. *Legislative History*

Had the *Breedlove* Court surveyed the legislative history of the Nineteenth Amendment, the Court probably would have found little to either buttress or rebut its dicta concerning the Amendment's limited reach. Congress primarily thought that the Nineteenth Amendment would override state voter qualifications in order to

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177. *Id.* (footnote omitted) (citations omitted). Curiously, the Court cited *Minor v. Happersett* for the proposition that the Nineteenth Amendment should be interpreted narrowly. *See id.* at 283 (citing Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170 (1874)).

178. *See* GA. CODE § 92-108 (1933).

179. *Breedlove*, 302 U.S. at 284.

180. *See id.* at 283-84.

181. *Id.* at 283.

182. *See* U.S. CONST. amend. XXIV; Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

make women eligible to vote and gave less consideration to whether the provision would alter the procedures governing state election regimes.

For instance, the descriptive clause of House Joint Resolution 1 described the measure as "[p]roposing an amendment to the Constitution extending the right of suffrage to women."[183] The forty-four word report of the House Committee on Woman Suffrage used identical language.[184] Similarly, the more developed committee reports published by earlier Congresses opined on the wisdom of whether women should vote at all, not how to stop gender-based barriers like the poll tax at issue in *Breedlove*.[185] Testimony in the hearings of previous Congresses centered on the grant or complete denial of, not lesser restrictions on, the right to vote.[186] Much of the debate in both the House and the Senate maintained a similar focus.[187]

3. In Pari Materia: *Fifteenth Amendment Jurisprudence*

That ambiguous legislative history is consistent with the state of Fifteenth Amendment jurisprudence as it stood at the time of the Sixty-Sixth Congress. Congress modeled the Nineteenth Amendment after the Fifteenth, and the language of the two amendments is nearly identical.[188] The identical language suggests that the two amendments should be interpreted *in pari materia*.[189] Because

183. *See* H.R.J. Res. 1, 66th Cong. (1919) (enacted at 41 Stat. 362 (1919)).

184. *See* H.R. REP. NO. 66-1 (1919).

185. *See* H.R. REP. NO. 65-234, pt. 2, at 2 (1918) (minority views); H.R. REP. NO. 65-219, pt. 2, at 2 (1917) (minority views); S. REP. NO. 64-35, at 2 (1916); S. REP. NO. 63-64, at 3 (1913).

186. *See, e.g.*, *Woman Suffrage: Hearing Before the S. Comm. on Woman Suffrage*, 65th Cong. 12 (1917) (testimony of Sen. John B. Kendrick); *id.* at 27-28 (testimony of Sen. Charles Spalding Thomas); *id.* at 31 (testimony of Sen. Reed Smoot); *Woman Suffrage: Hearings Before the H. Comm. On the Judiciary*, Serial No. 11, pt. 4, 64th Cong. 161 (1916) (testimony of Rep. John E. Raker); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 1, 63d Cong. 11-12 (1914) (testimony of Rep. Frank W. Modell); *id.* at 83-84 (testimony of Rep. J. Thomas Heflin).

187. *See, e.g.*, 58 CONG. REC. 619-20 (1919) (statement of Sen. Frank Brandegee); *id.* at 88-89 (statement of Rep. Frank Clark).

188. The amendments are identical except for the replacement of the words "race, color, or previous condition of servitude" with the word "sex." *Compare* U.S. CONST. amend. XIX, *with* U.S. CONST. amend XV.

189. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) (arguing that the phrase "the right of citizens of the United States to vote" in several constitutional amendments should be interpreted *in pari materia* with one another); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1198 n.12 (2012) (arguing that the interpretation of the Elections Clause is informed by the interpretation of the Fourteenth and Fifteenth Amendments, and vice versa); *see also* Fish, *supra* note 157, at 1171, 1177-78 (arguing that the Twenty-Sixth Amendment's Enforcement Clause should be read *in pari materia* with the identical enforcement clauses in other constitutional provisions).

Congress is presumed to be aware of the state of Fifteenth Amendment jurisprudence at the time it proposed the Nineteenth Amendment to the states,[190] the handful of Fifteenth Amendment decisions decided as of 1919 is instructive in interpreting the Nineteenth Amendment.

First, in *Neal v. Delaware*, the Court held that the Fifteenth Amendment effectively excised the word "white" from all state voter qualifications, and did so automatically, without any necessary enforcement legislation from Congress.[191] The Court found that states need not actually remove the offending language; so long as the states were not taking affirmative steps to enforce the unconstitutional requirement, the Court would not presume that the states were actually following their state constitution to the detriment of the Fifteenth Amendment.[192]

Next, in *Elk v. Wilkins*, the Court noted that the Fifteenth Amendment, by its terms, applied only to "citizen[s] of the United States."[193] Having ruled that a Native American voter was not a "citizen of the United States" under the Fourteenth Amendment, the Court found that the would-be voter was not entitled to the protections of the Fifteenth Amendment.[194]

Later, in *James v. Bowman*, the Court invalidated the indictment of a man prosecuted for bribing several black voters to refrain from voting.[195] The Court held that the Fifteenth Amendment does not reach all improper election activity—like the bribery at issue here—simply because its victims were black; the unlawful conduct had to occur because of the race, color, or previous condition of servitude of the voters.[196]

Finally, in *Guinn v. United States*, the Court invalidated a state constitutional provision limiting suffrage only to those individuals who passed a literacy test, unless either the individual or his ancestor was eligible to vote prior to January 1, 1866 (i.e., before the

190. *Cf.* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978))).

191. 103 U.S. 370, 389-90 (1880).

192. *Id.* at 391-93. The Court went on to hold, however, that the defendant made out a prima facie case that black voters had been excluded from this jury selection pool in violation of the Fourteenth Amendment and overturned the conviction until the lower courts had heard evidence on that claim. *Id.* at 393-98.

193. *See* 112 U.S. 94, 109 (1884).

194. *Id.*

195. 190 U.S. 127, 127-28 (1903).

196. *Id.* at 139.

adoption of the Fourteenth and Fifteenth Amendments).[197] The Court held that although the so-called "grandfather clause" did not explicitly make race or color a condition of voting, the clause clearly had that effect: only white voters would be eligible to vote before the enactment of the Fourteenth and Fifteenth Amendments, and so only white voters or their (also white) descendants could vote under the challenged regime without passing the literacy test.[198] The Court also held that because the only possible purpose of such a clause could be to circumvent the constitutional prohibition against discrimination in voting on the basis of race or color, the grandfather clause could not stand.[199]

To summarize,[200] the Fifteenth Amendment (1) operated to automatically invalidate explicit race- or color-based voter qualifications; (2) protected only United States citizens and even then did not protect them from activity not motivated by race or color; and (3) reached non-explicit discrimination in voting on the basis of race or color, at least where the race- or color-based motivation was remarkably obvious. In short, the decisions did not deal with the sort of lesser restrictions prevalent today.

4. Summarizing the Nineteenth Amendment's Primary Purpose

Taken together, the legislative history of the Nineteenth Amendment combined with the state of Fifteenth Amendment jurisprudence support the conclusion that the Nineteenth Amendment was primarily concerned with striking the word "male"

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197. 238 U.S. 347, 354-58 (1915); *see also* Myers v. Anderson, 238 U.S. 368, 377-82 (1915) (reaching an identical result concerning another state's grandfather clause).

198. *Guinn*, 238 U.S. at 364-65.

199. *Id.* The Court also invalidated the literacy test, not because it also violated either the Fourteenth or Fifteenth Amendments, but because the literacy test was so intertwined with the grandfather clause as part of the entire voter qualification regime that one part could not stand without the other. *Id.* at 365-67.

200. In addition to these four cases, this Article addresses cases concerning the Fifteenth Amendment's enforcement authority, *infra*, Section IV.C. For an analysis of relevant lower court cases, see JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 97-126 (1909). Two other pre-1919 Fifteenth Amendment cases in the Supreme Court shed only minimal light on the constitutional provision. In *McPherson v. Blacker*, the Supreme Court held, without substantial discussion, that a particular change in the way a state appointed its presidential electors did not violate the Fifteenth Amendment. McPherson v. Blacker, 146 U.S. 1, 37-38 (1892). In *Giles v. Harris* and *Giles v. Teasley*, the Court held that it was powerless to decide a Fifteenth Amendment claim brought by a black voter against his local board of registrars for refusing to add him to the voter rolls on account of his race. Giles v. Teasley, 193 U.S. 146, 164 (1904) ("Giles II"); Giles v. Harris, 189 U.S. 475, 488 (1903) ("Giles I"). *Giles I* and *Giles II* are mostly notable not for what they say about the Fifteenth Amendment, but for what they say historically about the Court's willingness to fight the disenfranchisement of black voters in the South. *See* SAMUEL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 96-107 (4th ed. 2012).

from those state laws that governed voter qualifications but shed little light on whether the Amendment itself—absent enforcement legislation—would combat lesser restrictions on voting that discriminated on account of sex.

C. *The Enforcement Clause and Sex-Based Barriers to the Ballot*

It is not surprising that debates in Congress centered on enfranchising women rather than potentially combating post-enfranchisement hurdles women might face in order to vote. No one opposed woman suffrage out of a sex-based animus towards women in the way that many opposed black suffrage out of a race-based animus towards blacks.[201] Even members opposed to woman suffrage grounded their opposition in a reverence for women.[202] Congress hardly expected that, should three-quarters of the state legislatures ratify the Nineteenth Amendment, the states remaining opposed to woman suffrage would respond with state-sponsored restrictions that, while gender-neutral on their face, nonetheless cut more heavily against women than men—as states had done for decades with black voters.[203] Although House Joint Resolution 1 included an enforcement clause identical to that found in other constitutional amendments, Congress had no reason to expect to have to use it.

Yet Congress was not entirely unaware of the prospect that women might face barriers even after a constitutional amendment granted women the franchise. One report of the Senate Committee on Woman Suffrage stated that "ballot box . . . regulations [should be]

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201. *See* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 732-43 (1998) (detailing the systematic efforts to prevent black voters from voting in the late nineteenth and early twentieth centuries). The debate over the Nineteenth Amendment put this racial animus on display. *See* 58 CONG. REC. 619 (1919) (statement of Sen. Ellison Smith) (expressing concern over the enfranchisement of black women, but not white women). Senator John Williams even proposed to amend the joint resolution so that it would read "[t]he right of *white* citizens to vote [shall not be denied or abridged . . . on account of sex]." *See id.* at 557.

202. *See, e.g., id.* at 8830-31 (statement of Rep. William Lankford) (opposing the joint resolution but noting, "Without [women] our Nation would never have been established and without them our civilization would perish from the face of the earth. . . . Woman can never by the ballot become purer, sweeter, and nobler than she is. . . . I do not believe the ballot will degrade woman; I know that it can never make her better.").

203. *See* Jon Greenbaum et al., Shelby County v. Holder: *When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 816 (2014) ("For nearly 100 years [following the end of Reconstruction in 1876], many Southern states prevented most of their African American citizens from exercising their right to vote through laws and by force."). This racial animus was even on display during the debates over the Nineteenth Amendment. *See* 58 CONG. REC. 563 (1919) (statement of Sen. John Williams) ("It is true [Mississippi] took advantage of the fact that we knew there would be nine Negroes [sic] to one white man disqualified for these reasons [educational requirements, poll taxes, felony disenfranchisement provisions, and registration requirements], but not one of them is a disqualification 'on account of race, or color, or previous condition of servitude.' They are on account of the disqualifications themselves.").

designed to protect the voter and guarantee the freedom of elections"[204] and explained that if women are entitled to vote, "her right is equivalent to that of man, and like man, she should have [that right] unhampered by any restriction that is not common to both."[205] Although these barriers were not Congress's primary focus, the legislative history gives some clues about how the Sixty-Sixth Congress would view its power to address such barriers, if they did arise.

1. Legislative History of the Enforcement Clause

First, Congress understood that the power conferred on the legislative branch by the Nineteenth Amendment's Enforcement Clause was enormous. One member in the House noted that under the authority of the proposed amendment, states should soon expect to "find Federal supervisors and inspectors attending all our elections, and perhaps Federal appointees holding all our elections under this provision."[206] Another explained that the Enforcement Clause "gives to Congress the full, absolute, unrestricted, and exclusive power to 'enforce this article,' . . . '[b]y appropriate legislation.' . . . [The Enforcement Clause] invests Congress with complete power to carry [the Amendment] into effect by the enactment of [appropriate] legislation . . . ."[207] One Senator suggested that the Enforcement Clause would entitle Congress "to put [certain states] under Federal control as to elections.[208] The minority views put forth in the report of the House Committee on Woman Suffrage argued against proposing the suffrage amendment to the states precisely because it would work a fundamental shift in the power over elections from the states to Congress.[209]

Even more important than the views of individual members, the entire Senate is on record concerning the enforcement power. Prior to final passage of the joint resolution, the Senate considered an amendment that would have re-written the Enforcement Clause to read, "[T]hat the several States shall have the authority to enforce this article by necessary legislation, but if any State shall enforce or enact any legislation in conflict therewith, then Congress shall not be

204. S. REP. NO. 64-35, at 1 (1916).

205. *Id.* at 4.

206. 58 CONG. REC. 82 (1919) (statement of Rep. Rufus Hardy). He continued, "Even now, if and when Congress shall pass laws to enforce the [F]ifteenth and this proposed [A]mendment, the Federal Government will or may control not only all our elections for Federal offices, but every State, county, and municipal election." *Id.*

207. *Id.* at 90 (statement of Rep. Frank Clark).

208. *Id.* at 563 (statement of Sen. William Borah).

209. *See* H.R. REP. NO. 66-1, pt. 2, at 1-3 (1919) (minority views).

excluded from enacting appropriate legislation to enforce it."[210] By rejecting the amendment by greater than a three-to-one margin, the Senate reaffirmed both (1) that Congress alone, not the states with a congressional backup, would be the constitutional entity charged with enforcing the Nineteenth Amendment and (2) that the more flexible adjective "appropriate," rather than the stricter term "necessary," was the relevant standard that enforcement legislation had to meet.[211] Both chambers took similar action in the previous Congress as well: the Senate tabled a proposed amendment which would have removed the words "or by any State" from the text of the joint resolution; when a member proposed removing the enforcement clause from the joint resolution, the House took no action to overturn a point of order striking the proposal.[212]

Finally, after ratification, members of Congress proposed legislation pursuant to their enforcement power, suggesting how members of Congress who proposed the Nineteenth Amendment viewed the scope of their enforcement authority under the Amendment.[213] True to the statements made in debate over the Nineteenth Amendment, the legislation assumed significant authority. Although each piece of legislation enforced requirements no broader than the literal terms of the Nineteenth Amendment's prohibition, each did so by intruding not into elections for federal office, but into elections for the "State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision."[214] Second, each piece of legislation essentially federalized state election administrators by making the legislation apply to

> every person who shall be required by law to assess, enroll, or register citizens of the United States or to perform any other duty in order that such citizens may be qualified to vote; and every person who shall be required by law to receive or count the ballots

210. 58 CONG. REC. 634 (1919) (text of amendment proposed by Sen. Edward Gay).

211. *See id.* (recording a 19-62 vote to reject the amendment).

212. *See* 56 CONG. REC. 10,986-87 (1918) (showing a 50-33 vote in the Senate to table the amendment); *id.* at 810 (showing that the House took no action to overturn the point of order).

213. *See* S. 4739, 66th Cong. (1920); H.R. 15018, 66th Cong. (1920); S. 4323, 66th Cong. (1920). Enacted legislation that implements the will of the entire Congress would obviously be more probative than introduced legislation that expresses only the wishes of its sponsors. However, because ratification came over a year after Congress proposed the suffrage amendment to the states, the Sixty-Sixth Congress did not have time to consider and pass Nineteenth Amendment enforcement legislation after ratification. Introduced-but-not-enacted legislation is an incomplete but nonetheless probative substitute.

214. S. 4739 § 1; H.R. 15018 § 1; S. 4323 § 1.

> of voters or to perform any other duty as an officer of any election or to certify the result of any election.[215]

Third, the legislation backed up its requirements with both criminal sanctions and an authorization for courts to monitor compliance with the legislation: Congress authorized any state court to issue mandamus to bring state officials into compliance upon petition of any aggrieved citizen and authorized federal courts to issue similar writs of mandamus upon petition by the United States.[216] Finally, the legislation would have outright repealed "[a]ll laws or parts of laws in conflict with this Act," which would include not only state law provisions restricting voter qualifications to male voters but also state law provisions which might have hampered enforcement of the legislation.[217]

2. In Pari Materia *I: Lessons from Prohibition*

The now-repealed Eighteenth Amendment contained an enforcement clause nearly identical to the Enforcement Clause in the Nineteenth Amendment, strongly suggesting that the two enforcement clauses be read *in pari materia*.[218] The Eighteenth Amendment was proposed by the Congress immediately preceding the one that proposed the Nineteenth Amendment, and the two Congresses shared many of the same members.[219] Additionally, the Sixty-Sixth Congress passed Eighteenth Amendment enforcement

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215. S. 4739 § 2; H.R. 15018 § 2; S. 4323 § 2.

216. S. 4739 §§ 3, 4; H.R. 15018 §§ 3, 4; S. 4323 §§ 3, 4.

217. S. 4739 § 5; H.R. 15018 § 5; S. 4323 § 5. The most obvious example of a law "in conflict with this Act" might be a state law restricting state courts' authority to issue writs of mandamus, but one could imagine the provision applying to laws mandating that registration officials only receive applications for registration inside a males-only private membership club.

This is not as far-fetched as it sounds. Although election administrators now generally have offices inside government buildings, this has not always been the case: when Susan B. Anthony illegally registered to vote in the 1872 federal election, she did so at a local barber shop because that was where the Board of Registry was then housed. *See* Winkler, *supra* note 134, at 1506.

218. The only difference is that the Eighteenth Amendment gave concurrent enforcement power to both the states and to Congress; the Nineteenth Amendment assigned enforcement authority to Congress alone. *Compare* U.S. CONST. amend XVIII, *repealed by* U.S. CONST. amend. XXI, § 1, *with* U.S. CONST. amend. XIX. For arguments that similar constitutional provisions should be read *in pari materia*, see Amar, *supra* note 189, at 789; Fish, *supra* note 157, at 1171, 1177-78; Tolson, *supra* note 189, at 1198 n.12.

219. *See* S.J. Res. 17, 65th Cong., 40 Stat. 1050 (1917) (proposing the Eighteenth Amendment to the states). *Compare* 58 CONG. REC. 3-4 (1919) (listing Senators of the Sixty-Sixth Congress), *and id.* at 5-7 (listing Representatives of the Sixty-Sixth Congress), *with* 55 CONG. REC. 101 (1917) (listing Senators of the Sixty-Fifth Congress), *and id.* at 105-106 (listing Representatives of the Sixty-Fifth Congress).

legislation—the National Prohibition Act[220]—making the legislation an excellent case study for what the Sixty-Sixth Congress thought of the scope of its enforcement clause authority.[221]

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."[222] Congress, however, enacted a significantly broader statutory prohibition. First, Congress regulated not only the commercial activities prohibited by the Eighteenth Amendment but also other activities not within the Amendment's ambit: simple possession and non-commercial bartering involving liquor, fraud involving the shipment of liquor, advertising involving liquor, possession or use of the means for manufacturing liquor (whether or not actually used for that purposes).[223] Second, Congress applied the prohibition not only to intoxicating liquors prohibited by the Eighteenth Amendment but to non-intoxicating liquors, and it imposed a strict regulatory regime on alcohol not used for beverage purposes.[224] Third, Congress provided for the investigation and prosecution of violations in federal court.[225] Finally, Congress created a private right of action against persons who helped an intoxicated person procure liquor, if that intoxicated person harmed the plaintiff in some way as a result of being intoxicated.[226]

The reports of each chamber's respective Committee on the Judiciary explain the scope of Congress's enforcement clause authority and why the National Prohibition Act constituted "appropriate legislation" under that clause.[227] In the House, the Committee on the Judiciary explained that courts must uphold legislation passed under the Enforcement Clause unless "Congress could have no reason to believe that its provisions are either

220. Pub. L. No. 66-66, 41 Stat. 305, 305 (1919) (repealed 1935) (commonly known as the "Volstead Act").

221. *Cf.* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 422-25 (2014) (arguing that the interpretation of constitutional amendments is informed by analyzing legislation enacted (1) pursuant to the constitutional authority granted by those amendments and (2) shortly after the ratification of those amendments).

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

223. §§ 3, 10-19, 41 Stat. at 308, 312-13.

224. *See id.* § 1, at 307-08 (defining "liquor" and "intoxicating liquor" as having greater than 0.5% alcohol whether or not actually intoxicating); *id.* §§ 4-13, at 309-12 (creating the regulatory regime).

225. *Id.* §§ 1-9, at 305-11.

226. *Id.* § 20, at 313.

227. H.R. REP. NO. 66-91, at 4 (1919); S. REP. NO. 66-151, at 12 (1919).

necessary or appropriate for carrying such power into execution"[228] and specifically cited recent Supreme Court cases upholding congressional legislation if that legislation had "any reasonable relation to the object sought."[229] In the Senate, the Committee on the Judiciary explained that Congress's power under the Enforcement Clause "carries with it the power to enact any law having a reasonable relation to the end sought by the original authorized act" and specifically stated that "[t]he purpose of the legislation and difficulties attendant upon its enforcement are vital factors in determining what is appropriate legislation, such as authorized by the [Enforcement Clause]."[230]

After enactment, the Supreme Court upheld a variety of these provisions.[231] In contrast to today's Court, which frequently limits the scope of legislation in order to avoid potential constitutional difficulties,[232] the Court had no problem interpreting the National Prohibition Act broadly to effectuate its purpose.[233] Most importantly, the Court upheld Congress's view as to the standard governing review of legislation passed pursuant to the Enforcement Clause:

> [W]here the means adopted by Congress are not prohibited and are calculated to effect the object intrusted [sic] to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. Nor may it enquire [sic] as to the wisdom of the legislation. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion.

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228. H.R. REP. NO. 66-91, at 4. The Committee also asserted Congress's "right to define the power conferred upon it by the Constitution." *Id.*

229. *Id.* at 6.

230. S. REP. NO. 66-151, at 12 (1919); *see also id.* (citing Supreme Court cases to this effect).

231. *See* Nat'l Prohibition Cases, 253 U.S. 350, 387-88 (1920) ("While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the [broad definition of 'liquor']."); *accord* Vigliotti v. Pennsylvania, 258 U.S. 403, 408-09 (1922) (reaching an identical conclusion concerning an identical state law).

232. *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 192-95 (2009). Notably, this is particularly common in the voting rights context. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 21-23 (2009) (interpreting section 2 of the Voting Rights Act narrowly in order to avoid a constitutional question); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) (interpreting section 5 of the Voting Rights Act narrowly in order to avoid a constitutional question), *superceded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5(3), § 5(c), 120 Stat. 577, 580-81 (codified as amended 52 U.S.C. § 10304(c) (Supp. II 2014)).

233. *See, e.g.*, Cunard S.S. Co. v. Mellon, 262 U.S. 100, 126-29 (1923); Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80, 89-90 (1922); Corneli v. Moore, 257 U.S. 491, 496 (1922). *But see* United States v. Katz, 271 U.S. 354, 363-64 (1926).

> It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence.[234]

In short, the Sixty-Sixth Congress believed that (1) it had nearly plenary authority under the Eighteenth Amendment Enforcement Clause and that (2) its enforcement legislation was entitled to substantial deference from the judiciary. Later, the United States Supreme Court agreed on both counts. The Sixty-Sixth Congress likely intended to vest itself with similar authority and similar discretion under the Nineteenth Amendment Enforcement Clause.

3. In Pari Materia *II: Lessons from Fifteenth Amendment Jurisprudence*

Although scholars sometimes characterize the early Fifteenth Amendment enforcement clause jurisprudence as "play[ing] a pivotal role in invalidating national efforts to insure [sic] full citizenship to black citizens" and characterize the decisions as having "struck down and eviscerated various federal protections of black voting rights,"[235] it is not clear that such a characterization is warranted.

It is true that the cases struck down much of Congress's early Fifteenth Amendment enforcement legislation. In *United States v. Reese*, the Court invalidated an enforcement statute as overbroad, because it penalized an election official for improperly refusing to allow a black voter to cast a ballot without requiring that official action be taken on account of race, color, or previous condition of servitude.[236] However, the Court also held that Congress may protect rights emanating from the Constitution, like the Fifteenth Amendment right against racial discrimination in voting—the implication being that a statute with a hook into race or color would withstand judicial scrutiny.[237]

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234. James Everard's Breweries v. Day, 265 U.S. 545, 559-60 (1924) (internal citations omitted); *accord* Lambert v. Yellowley, 272 U.S. 581, 593-97 (1926) (relying on *James Everard's Breweries* to reach an identical result); Selzman v. United States, 268 U.S. 466, 468-69 (1925) ("The power of the [f]ederal [g]overnment, granted by the Eighteenth Amendment . . . carries with it power to enact any legislative measures reasonably adapted to promote the [Eighteenth Amendment's] purpose.").

235. ISSACHAROFF ET AL., *supra* note 200, at 97.

236. 92 U.S. 214, 219-22 (1875).

237. *Id.* at 217-18; *see also* James v. Bowman, 190 U.S. 127, 139 (1903) (invalidating an indictment against a man for bribing several black voters to refrain from voting on the ground that the indictment did not actually allege that the defendant bribed the black voters on account of their race or color).

A similar case, *United States v. Cruikshank*, arose out of a criminal prosecution of over a hundred individuals involved in the Colfax Massacre for their violent attempt to prevent black voters from casting ballots.[238] The Court held that while voting was not a right guaranteed by the Constitution (citing *Minor v. Happersett*), the right against race- or color-based discrimination in voting was guaranteed by the Fifteenth Amendment and thus under *Reese* constituted a proper subject of congressional enforcement legislation.[239] The Court nonetheless struck the indictment because although the Justices "may [have] suspect[ed] that race was the cause of the hostility[,] . . . it [wa]s not so averred" in the indictment and thus lacked the necessary Fifteenth Amendment connection.[240]

The tide began to turn in *Ex Parte Yarbrough*, in which several individuals challenged their criminal convictions for violently attacking a black voter to prevent him from voting in a federal election.[241] Distinguishing its earlier opinions in both *Minor* and *Reese*, the Court found that (1) not only was the right to vote free from race- or color-based discrimination a right protected by the Constitution which Congress had the power to protect but that (2) in operation, the Fifteenth Amendment might combine with the remaining non-discriminatory provisions of state law to affirmatively grant an individual the right to vote and that Congress could protect that right as well.[242] The Court explained:

> While it is quite true . . . that [the Fifteenth Amendment] gives no affirmative right to the colored [sic] man to vote, . . . it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where . . . the words 'white man' [exist] as a qualification for voting, [the Fifteenth Amendment] did, in effect, confer on him the right to vote, because, . . . it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. . . . In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro [sic] the right to vote, and Congress has the power to protect and enforce that right.[243]

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238. 92 U.S. 542, 544-46 (1875); *id.* at 560 (Clifford, J., dissenting) (mentioning the number of individuals involved at each stage of the litigation); ISSACHAROFF ET AL., *supra* note 200, at 97 (noting the case's connection with the Colfax Massacre).

239. *Cruikshank*, 92 U.S. at 551-56; *see also* United States v. Harris, 106 U.S. 629, 637 (1883) (holding that a criminal statute could not be sustained under the Fifteenth Amendment, because there was no connection to the right to vote free from discrimination on account of race, color, or previous condition of servitude).

240. *Cruikshank*, 92 U.S. at 556; *see also Harris*, 106 U.S. at 637.

241. 110 U.S. 651, 652-57 (1884).

242. *Id.* at 664-67 (distinguishing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), and *United States v. Reese*, 92 U.S. 214 (1875)).

243. *Id.* at 665 (citation omitted).

No case held that enforcement legislation had to be coextensive with the prohibition contained in the Fifteenth Amendment itself—meaning no decision held that enforcement legislation was limited to determining the venue for cases charging violations of the Amendment, or to setting the penalties for Amendment violations.[244] The cases merely required some connection, some hook, into race- or color-based discrimination. The Sixty-Sixth Congress understood this; it believed that its power to draft enforcement legislation was broad and that it had discretion to construct long chains connecting enforcement legislation to the constitutional prohibition.[245]

4. The Scope of Congress's Enforcement Clause Authority

The legislative history of the Nineteenth Amendment's Enforcement Clause, the enactment of Eighteenth Amendment enforcement legislation, and the state of then-existing Fifteenth Amendment jurisprudence all shed light on the scope of congressional power under the Nineteenth Amendment's Enforcement Clause. All three of these sources of law support the conclusion that the Sixty-Sixth Congress would have (1) thought it had extraordinary power to combat the voting restrictions that proliferate today and (2) expected that courts would substantially defer to Congress's determination about the appropriateness of its enforcement legislation.[246]

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244. *See, e.g.*, James v. Bowman, 190 U.S. 127, 136-39 (1903) (holding that enforcement legislation cannot attack activity by non-governmental actors).

245. The *Bowman* Court also held that enforcement legislation could not attack non-governmental activity. *See id.* Voting rights advocates have identified some private groups as being threats to the franchise. *See generally* LIZ KENNEDY ET AL., DEMOS & COMMON CAUSE, BULLIES AT THE BALLOT BOX: PROTECTING THE FREEDOM TO VOTE AGAINST WRONGFUL CHALLENGES AND INTIMIDATION (2012), http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf. However, these groups are nowhere near equivalent to the violent Ku Klux Klan of the late 1800s. Additionally, none of the threats to voting identified in Part II of this Article are private actions. Accordingly, this Article need not articulate a position on whether Congress adopted *Bowman's* "state action" limitation into the Nineteenth Amendment's Enforcement Clause. *See Bowman*, 190 U.S. at 136-39.

246. Contemporanous legal scholarship generally concurred that the Nineteenth Amendment represented a substantial increase in Congress's power over elections. *See* Emmet O'Neal, *The Susan B. Anthony Amendment. Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections*, 6 VA. L. REV. 338, 355 (1920); *cf.* Charles Hall Davis, Note, *Shall Virginia Ratify the Federal Suffrage Amendment?*, 5 VA. L. REG. 354, 363 (1919); Raeburn Green, Book Review, 30 HARV. L. REV. 406, 406-07 (1917) (reviewing HENRY ST. GEORGE TUCKER, WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT (1916)).

D. Types of Restrictions the Sixty-Sixth Congress Might Target

The breadth of Congress's enforcement power, however, provides little insight into what *types* of restrictions the Sixty-Sixth Congress might have targeted, if it could have foreseen them. Although the legislative history on this matter is sparse—again, because Congress did not expect states to resist the Nineteenth Amendment's mandate—the legislative history suggests Congress would have viewed several of the restrictions identified in Part II as onerous enough to warrant a legislative response.

1. Partisan and Ideological Motivations

One unsurprising concern motivating Congress was the political fortunes of individual members and their allies. Both Democrats and Republicans hoped to benefit electorally from the votes of newly enfranchised women. One member in the House spoke at length about the women elected to office on the strength of women voters in suffrage states.[247] Another boldly predicted that newly enfranchised women would side with one party over the other.[248] A third proclaimed, "No party in the future which hopes to win will ever name a man for President who opposes [woman suffrage]."[249] In the Senate, two senators predicted that enforcement legislation would be forthcoming specifically because of the political effects of ensuring women's right to vote.[250] Debate over the joint resolution in the Sixty-Fifth Congress also stressed the electoral benefits of enfranchising women.[251]

In a prior Congress, the Senate Committee on Woman Suffrage heard testimony that Congress could expect "women will take sides in party affairs, just as men do, and align themselves with one [political] organization or another."[252] The Committee heard testimony that some women had, in fact, already aligned with one party or another and that their tactics were having an effect on

247. *See* 58 CONG. REC. 87 (1919) (statement of Rep. William Vaile).

248. *See id.* at 91 (statement of Rep. Frank Clark).

249. *See id.* at 8834 (1919) (statement of Rep. Rufus Hardy).

250. *See id.* at 564 (statement of Sen. William Borah); *id.* at 627 (statement of Sen. James Reed).

251. *See* 56 CONG. REC. 764 (1918) (statement of Rep. James Cantrill) (explaining that he planned to vote for the joint resolution because women's votes had voted for members of his party in the 1916 election); *id.* at 10,979 (statement of Sen. Irvine Lenroot) (arguing that enfranchising women will help members of one particular party).

252. *See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 14 (1917) (testimony of Sen. John B. Kendrick). The Senator's testimony also made clear that he believed women would "put principle above partizanship [sic] and patriotism above patronage." *Id.*

election results.[253] The Committee also heard testimony that other women were politically independent and that their votes were up for grabs.[254] The House Committee on Woman Suffrage and its Committee on the Judiciary heard similar testimony concerning the political availability of women's votes.[255] One witness even testified that "[m]ore than 8,000,000 women will vote in the presidential election in 1920 and there can not [sic] be any doubt . . . that the present party in power has everything to gain and nothing to lose in putting [the woman suffrage amendment] through before the 1918 elections."[256]

Even where members did not speak of the advantage to be gained by an expanded electorate explicitly in terms of partisanship, members nonetheless spoke in positive terms of the effects women voters would have on election results. One report of the House Committee on Woman Suffrage explained that women's "influence upon politics and society in general has been a positive and not a negative force" and specifically stated that women-as-voters have "strengthen[ed] the demand for good laws governing home conditions and care of children."[257] A member in the House, from a suffrage state, explained that when women voted and campaigned for a particular issue, it was "usually of an improving and reformatory character."[258] The Senate Committee on Woman Suffrage heard testimony that allowing women to vote was necessary in order protect certain types of desirable laws.[259] A Senator from a suffrage state argued before that Committee that "in the last few years, through [women's] vote and influence, [the Senator's state] has

253. *See id.* at 29 (testimony of Sen. John B. Kendrick); *id.* at 47 (testimony of Rheta Childe Dorr); *Woman Suffrage: Hearings on S.J. Res. 1 and S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 64th Cong. 66 (1916) (testimony of A.J. George, Exec. Sec'y of the Cong. Comm., Nat'l Ass'n Opposed to Woman Suffrage).

254. *See Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage*, 63d Cong. 44 (1918) (statement of Rep. Burton L. French); *id.* at 84 (testimony of Helen H. Gardener).

255. *See Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200, Before the H. Comm. on Woman Suffrage*, 65th Cong. 51 (1918) (testimony of Maude Wood Park) (pointing out that both major parties have devoted substantial resources to recruiting women voters in the suffrage states); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pts. 2 & 3, 64th Cong. 48 (1916) (testimony of Helen Todd) (arguing that newly enfranchised women would reward with votes the party which proposed the suffrage amendment).

256. *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 5, 65th Cong. 184-85 (1917) (testimony of Anne Martin, Chairman Nat'l Woman's Party).

257. H.R. REP. NO. 65-234, at 2 (1918).

258. 58 CONG. REC. 8832 (1919) (statement of Rep. Henry Osborne).

259. *See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 51 (1917) (testimony of Madeline Z. Doty, Correspondent of the *New York Tribune*).

secured more progressive and more humane legislation . . . . This, I am sure, has been largely because women have decided to take these things into their own hands and to reckon with them."[260] In written testimony submitted at one hearing of the House Committee on Woman Suffrage, a witness argued that a host of legislative achievements in one state was due, in part, to the grant of suffrage to women some years earlier.[261] Essentially, these members argued that Congress must enfranchise women so that women can vote for candidates with whom the members agreed and so that those candidates can pass legislation that matches the members' ideological perspective—partisanship by another name.

In other words, Congress was not merely trying to enfranchise women in theory and then move on to other matters. Rather, it was deeply in members' political interest to see that women actually registered, actually voted, and that their votes actually counted. If modern-day barriers to the ballot would impede women's ability to vote, especially where there was evidence that those restrictions were at least partly motivated by opposition to the choices women voters were making at the ballot box, the Sixty-Sixth Congress would have felt justified in using its enforcement power to tear down the obstacles to voting women faced.

2. *War Effort and Women as Full Members of Society*

Political concerns were not members' only interest. One commonly mentioned reason for members who supported the joint resolution was that women had earned the vote through their activities in support of the nation's war effort in World War I.[262] Although women did not fight, they did provide vital support efforts. One member in the House expressed support for women's "service to the nation in times of both peace and war" and explained that "[t]he magnificent, efficient, and patriotic stand taken by the women of the United States during the Great War has proven" women's entitlement to suffrage.[263] Another member explained that society must grant women the vote, especially after it "praised [women] in every activity

260. *Id.* at 13 (testimony of Sen. John B. Kendrick).

261. *See Extending the Right of Suffrage to Women: Hearings on H.R.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 327 (1918) (reprinting Seward A. Simons, *A Survey of the Results of Woman Suffrage in California* (1917)).

262. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1352-53 (2003).

263. 58 CONG. REC. 8829 (1919) (statement of Rep. James C. Cantrill).

connected with the Great War. From the hospital to the firing line[,] every work of mercy and healing has been woman's."[264] A third member argued on the House floor:

> In the work of the Red Cross—the great mother of the world—in the hospitals and trenches on the battle fields of Flanders and France, and in all the tasks that lie at the very heart of civilization, women have displayed a patriotism and heroism born of devotion, sacrifice, and service . . . .[265]

Prior Congresses shared that sentiment. In the Sixty-Fifth Congress, Senators also defended woman suffrage as something women earned through their war effort, or even that woman suffrage was necessary for the proper prosecution of the war.[266] A report of the Senate Committee on Woman Suffrage noted, "She has . . . manufactured his ammunition, . . . operated his machines, bound up his wounds, buried his dead, and has been his comrade in arms upon the firing line."[267] A report of the House Committee on Woman Suffrage similarly remarked, "[T]he services of the women in the munition factories, the railways, the shipyards, the offices of administration, have first amazed men and then filled them with admiration and gratitude."[268] Committee hearings were practically overwhelmed with testimony concerning the contributions of women

264. *Id.* at 8834 (statement of Rep. Rufus Hardy). Earlier in his speech, the same member asked, "[I]f the man bears the musket and the woman bears and nurses the man, whose burden is the heavier?" *Id.* at 8833; *accord* 57 CONG. REC. 3055-56 (1919) (statement of Sen. William Calder) (noting women's service as nurses on the front lines); *id.* at 3061 (statement of Sen. Gay) (arguing that women's service in war justifies the extension of suffrage to women).

265. 58 CONG. REC. 83 (1919) (statement of Rep. Adolphus Nelson); *see also id.* at 84 (statement of Rep. John MacCrate) ("Everywhere you went during the past two years you saw women in uniform. You saw them in the Salvation Army, the Red Cross, the Knights of Columbus, the Young Men's Christian Association, Young Men's Hebrew Association, and other allied war activities. . . . [T]he women who maintained equal industrial and agricultural burdens and high moral burdens to win the war are entitled to the franchise.").

266. *See* 56 CONG. REC. 10,977 (1918) (statement of Sen. Albert Cummins); *id.* at 10,979 (statement of Sen. Irvine Lenroot).

267. S. REP. NO. 64-35, at 2 (1916). The report continued, "Man has become conscious of her powerful cooperation in war; he will soon recognize the justice of her demand to share his burden in public affairs in times of peace." *Id.* at 2-3.

268. H.R. REP. NO. 65-234, at 2 (1918).

to the war effort.[269] Even the President, Woodrow Wilson, spoke directly on the Senate floor, arguing that woman suffrage was necessary as a war measure.[270]

Beyond women's efforts to support the United States in wartime, members were recognizing that women were becoming members of society in their own right and therefore deserved the ballot. One member in the House responded to arguments that women's place was in the home, not the polling place, by asking, "[H]ow about woman [sic] in the public-school room? How about woman [sic] in the Sunday-school room? How about woman [sic] in the Red Cross? How about woman [sic] in the Salvation Army? Are they not proper activities for our mothers, wives, and daughters?"[271] Another member explained women's new role in society: "I can remember . . . when our women rarely left home except to go to church. That time is past."[272] A member from a suffrage state discussed women elected to office in his state: some had been school teachers, one had been a real estate developer, another a journalist, and yet another a physician; all, the member said, were a boon to the lawmaking process.[273]

Congress was proud of women's new role in society—especially, but not limited to, women's role in the war effort—and sought to reward them with the franchise. Having granted them the vote, Congress did not expect that states would enact voting restrictions that would burden women precisely because of the new responsibilities that women had undertaken—that is, Congress would not have wanted women to have to choose between making time to navigate hurdles to voting on the one hand and making time to fulfill their responsibilities in society on the other hand. To the extent that restrictions on voting required women to make such a choice, the Sixty-Sixth Congress would have felt justified in enacting enforcement legislation to break down those barriers.

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269. *See, e.g., Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 235-36 (1918) (testimony of Maud Wood Park, Cong. Chairman, Nat'l Am. Woman Suffrage Ass'n); *id.* at 165-67 (testimony of Maud Younger); *Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 40-45 (1917) (testimony of Mary Ritter Beard, Member, Nat'l Advisory Council of Woman's Party Last Year); *id.* at 36-37 (testimony of Carrie Chapman Catt).

270. *See* 56 CONG. REC. 10,928-29 (1918), *reprinted in* S. DOC. 65-284 (1918).

271. 58 CONG. REC. 8832 (1919) (statement of Rep. Israel Foster).

272. *Id.* at 8834 (statement of Rep. Rufus Hardy).

273. *See id.* at 87 (statement of Rep. William Vaile).

3. *Women as Caretakers*

Though Congress certainly respected and hoped to encourage women's new role in society, Congress also respected women's more traditional role as mothers and as caretakers of children[274] and cited that role as another reason for enfranchising women.

One member in the House specifically praised women because "she nurses her own little children."[275] Another member from a suffrage state justified his support for woman suffrage by stating that in his state, "it is not unusual to see a young matron wheel a baby carriage to the polling place and leave it in a shady place outside while she goes in to vote" and suggesting that this had a positive effect on the voting process itself.[276] Yet another argued that mothers, in particular, had earned the vote by bearing the dangers of childbirth, just as male soldiers earned the vote by facing the dangers of the battlefield.[277]

In the debate in the Sixty-Fifth Congress, one Senator argued that if mothers could vote and were more involved in politics, it would better enable them to train their children in civic responsibility.[278] Another Senator asked rhetorically, "Who shall deny the privilege to his mother to participate in the affairs of government?"[279]

Committee reports from earlier Congresses also defended suffrage as a right mothers *qua* mothers had earned. In 1918, the House Committee on Woman Suffrage observed that in suffrage states, "by strengthening the demand for good laws governing home conditions and care of children, mothers have been enabled to do their work in the world to better effect."[280] The 1913 report of the Senate Committee on Woman Suffrage incorporated a letter from woman suffrage advocates, which stated:

> We desire these rights in order to raise in dignity and power the mothers of this Nation . . . and the welfare of this Nation is not promoted by denying to the mothers of the nation the elemental right of suffrage which is essential, not only to protect their own

274. Modern law mirrors the Sixty-Sixth Congress's concern for the wellbeing of children. *See, e.g.*, Melanie Kalmanson, *Giving the Pawns a Voice: A Call for Mandatory Representation of Children in High-Conflict Custody Battles*, 5 THURGOOD MARSHALL SCH. L.J. ON GENDER, RACE, & JUST. 54, 57 (2015) (discussing the "best interests of the child" principle of family law in the child custody context).

275. *Id.* at 8834 (statement of Rep. Rufus Hardy).

276. *Id.* at 8832 (statement of Rep. Henry Osborne).

277. *See id.* at 79-80 (statement of Rep. Edward Little).

278. *See* 56 CONG. REC. 10,785 (1918) (statement of Sen. Kenneth McKellar).

279. *See id.* at 10,945 (statement of Sen. James Phelan).

280. H.R. Rep. No. 65-234, at 2 (1918).

> rights of life, liberty, property, and pursuit of happiness, but to protect their children, whom they have so loved, from the treacherous pitfalls that line the pathway of life.[281]

Members heard extensive testimony concerning the contributions of mothers to society. At a hearing before a Senate committee, one witness testified that, were it not for mothers caring for America's soldiers, the nation would never have succeeded in its military battles.[282] Another argued that the poor economic conditions in Germany were partially attributable to the fact that mothers had to work in munitions factories for substandard wages and did not earn enough money to afford proper nutrition for their children; the witness argued that access to the ballot would enable these women to improve these conditions through law.[283] A witness from a suffrage state testified, "[Women's] education as housekeepers, home makers, and mothers has proved a valuable contribution in voting on questions of public welfare."[284] In a hearing before a House committee, one woman relayed the powerful story of a nurse in a hospital on the front lines: "[D]uring the daytime the wounded were so cheerful, so brave, so gay, and so debonair, there was not a word of complaint, but during the long watches of the night, when self-restraint was gone, she had learned one word in seven different languages, and that word was 'Mother.' "[285] Tellingly, a letter from the mother of six children inserted into the record of one hearing stated that while she desired suffrage, her duties as a caregiver for her children left her no time to help campaign for women's right to vote.[286] Several witnesses testified that voting was necessary because women might influence the laws to create better conditions for childcare.[287]

Even as it embraced the new role of women in society, Congress hoped to protect mothers and their role as caregivers to their

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281. S. REP. NO. 63-64, at 8 (1913).

282. *See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 40-45 (1917) (testimony of Mary Ritter Beard, Member, Nat'l Advisory Council of Woman's Party Last Year).

283. *Id.* at 50-51 (testimony of Madeline Z. Doty, Correspondent of the *New York Tribune*).

284. *Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage*, 63d Cong. 72 (1913) (testimony of Elizabeth Kent).

285. *Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 26 (1918) (testimony of Mrs. Henry Ware Allen (witness's name not given)).

286. *Id.* at 100 (letter from Mrs. H.C. Davis).

287. *See Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 5, 65th Cong. 178-79 (1917) (testimony of Mrs. Donald R. Hooker); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 2, 64th Cong. 23 (1915) (testimony of Mrs. Harriet Stokes Thompson).

children. Had Congress foreseen that ostensibly gender-neutral restrictions on voting would disproportionately fall on mothers with childcare responsibilities, Congress would undoubtedly have opposed such restrictions and felt justified using its enforcement power to ensure women did not have to choose between childcare on one hand and access to the ballot on the other.

E. Summarizing the Contemporary Understanding of the Nineteenth Amendment

Students of the legislative history of the Nineteenth Amendment can draw three conclusions. First, the Sixty-Sixth Congress did not expect states to put up barriers in an attempt to prevent women from voting after ratification of the Nineteenth Amendment. Second, if the Sixty-Sixth Congress had foreseen the barriers in place today, it would have been particularly concerned about the barriers that keep women from voting for political reasons, the barriers that make voting increasingly difficult for women who choose to work outside the home instead of assuming a role that revolves around the home, and the barriers that make it harder for women with childcare responsibilities to vote. Finally, the Sixty-Sixth Congress viewed its Nineteenth Amendment enforcement power to be extremely broad and expected that Nineteenth Amendment enforcement legislation would receive extraordinary deference from the judiciary.

V. NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION TO COMBAT TODAY'S RESTRICTIONS ON VOTING

Faced with increasingly restrictive voting laws and procedures yet having such broad power to enforce voting rights against restrictions that discriminate on account of sex, what should Congress do with its Nineteenth Amendment enforcement authority? If Congress did pass legislation, would courts uphold the exercise of its authority?

A. The Appropriate Standard of Review

Although the Sixty-Sixth Congress expected that its broad authority to enact Nineteenth Amendment enforcement legislation would be subject to judicial review only under a rational relationship test,[288] the modern Court has invented the more demanding "congruence and proportionality" test to review Fourteenth

288. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.") (emphasis added) (demonstrating the great deference Congress receives under the rational relationship test).

Amendment enforcement legislation.[289] While it is not clear if the Court would ignore the wishes of the Sixty-Sixth Congress and apply the congruence-and-proportionality test to enforcement legislation enacted under the Nineteenth Amendment,[290] the following analysis shows how Nineteenth Amendment enforcement legislation meets even this more demanding test.

1. *The Right at Issue: The Right to Vote Free from Discrimination on Account of Sex*

The initial inquiry in a congruence-and-proportionality analysis is to determine the scope of the right Congress seeks to enforce with its prophylactic legislation.[291] For the Nineteenth Amendment, that right is phrased in the negative: "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."[292]

As previously discussed,[293] the primary thrust of the Nineteenth Amendment was to excise the word "male" from state voter qualifications, although it also applied to non-explicit discrimination in voting on account of sex where the discrimination was obvious.

Modern day Fifteenth Amendment jurisprudence has expanded that reach to all intentional discrimination in voting on account of race or color (whether or not the discrimination was as unusually obvious as in *Guinn v. United States*).[294] Actions that may have the effect of denying the right to vote on the basis of race or color are therefore consistent with the Fifteenth Amendment if they lack a discriminatory purpose.

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289. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

290. The standard is not even clear for the Fifteenth Amendment's Enforcement Clause, which has received a great deal of recent judicial attention. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) (refusing to decide whether the standard for review of Fifteenth Amendment enforcement legislation is congruence and proportionality or rational means); *see also* Richard Hasen, *The Curious Disappearance of* Boerne *and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race (observing that the Court failed to address an open question about the proper standard of judicial review for Congress's Fifteenth Amendment enforcement power).

291. *See* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1333-34 (2012); Tennessee v. Lane, 541 U.S. 509, 522 (2004) (citing Bd. of Trustees v. Garrett, 531 U.S. 356, 365 (2001)).

292. U.S. CONST. amend. XIX, § 1.

293. *See* discussion *supra* Section IV.B.

294. *See* City of Mobile v. Bolden, 446 U.S. 55, 61-65 (1980), *superseded as to the statutory holding*, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (1982) (codified as amended at 52 U.S.C. § 10301(a) (Supp. II 2014)); *see also* Guinn v. United States, 238 U.S. 347, 363-64 (1915).

The following analysis will assume the Nineteenth Amendment follows suit, such that the right at issue, at least in part, is the right to vote free from intentional discrimination based on sex. However, its legislative history also shows that the Nineteenth Amendment targets more than intentional discrimination. As discussed earlier, the Sixty-Sixth Congress would also have been concerned about restrictions affecting women that are politically motivated, restrictions that burden women who take an active role outside the home, and restrictions that burden women on account of their childcare responsibilities[295]—whether or not the restrictions intentionally target women.

2. *The Legislative Record: A "History and Pattern"[296] of Constitutional Violations*

After determining the right at issue, the next step is to inquire whether Congress had evidence of a pattern of constitutional violations.[297] But not all evidence is created equal:[298] courts will not uphold a congressional infringement on state sovereignty unless there is a certain quality and quantity of evidence.

First, the evidence must detail a pattern of actual, specific violations of the Constitution which Congress sought to remedy or prevent.[299] Evidence of wrongful conduct is not directly probative if that wrongful conduct does not actually violate the Constitution.[300] Further, the evidence must be relatively recent at the time of the enactment.[301] Additionally, Congress must collect more than a token

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295. *See* City of Mobile v. Bolden, 446 U.S. 55, 61-65 (1980), *superseded as to the statutory holding*, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (1982) (codified as amended at 52 U.S.C. § 10301(a) (Supp. II 2014)); *see also Guinn*, 238 U.S. at 363-64; *supra* Section IV.D (reviewing Congress's concerns over these three items).

296. Bd. of Trustees v. Garrett, 531 U.S. 356, 368 (2001).

297. *See supra* Section IV.D.

298. *But see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal . . . .").

299. *See* Tennessee v. Lane, 541 U.S. 509, 522 (2004) (citing *Garrett*, 531 U.S. at 365); *see also* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1334 (2012) ("The evidence did not suggest States had facially discriminatory self-care leave policies or that they administered neutral self-care leave policies in a discriminatory way.").

300. *See Coleman*, 132 S. Ct. at 1337 (rejecting a statutory provision aimed at self-care leave policies with a disparate impact on women, because those policies are not likely to be unconstitutional); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-86 (2000) (refusing to credit most instances of age discrimination because only irrational age discrimination violates the Constitution); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 641-46 (1999) (noting that a state deprives a patent holder of property when it infringes on a patent, but that deprivation only becomes a constitutional violation if effected without due process—i.e., without other state-level remedies).

301. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (striking down a statute in part because the "legislative record lacks examples of *modern* instances of" constitutional

amount of evidence of constitutional violations.[302] Finally, the evidence must demonstrate that the targeted jurisdiction—not some other entity—is guilty of the violations.[303]

Notably, the Court has explicitly ignored evidence of constitutional violations committed by local governments.[304] But the prophylactic enforcement legislation under review at the time (an abrogation of state sovereign immunity) did not apply to local governments (because they do not enjoy sovereign immunity in the first instance).[305] Accordingly, "[i]t would make no sense to consider constitutional violations [by local governments], as well as by the States themselves."[306] In the context of Nineteenth Amendment enforcement legislation, however, it seems clear that the record of local governments is relevant, since they, too, would be subject to the legislation.[307]

That said, provided Congress develops a legislative record in accord with the aforementioned requirements, courts must defer to Congress's determination.[308] Indeed, the Supreme Court has gone out of its way to read the legislative record in a light most favorable to Congress, finding all reasonable inferences that might be drawn from the record to weigh in Congress's favor.[309]

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violations) (emphasis added); *see also* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) ("[C]urrent burdens . . . must be justified by current needs.").

302. *See Coleman*, 132 S. Ct. at 1336-37 ("The few fleeting references to how self-care leave is inseparable from family-care leave fall short of what is required . . . . These isolated sentences clipped from floor debates and testimony are stated as conclusions, unsupported by evidence or findings . . . .") (citations and internal quotation marks omitted); Bd. of Trustees v. Garrett, 531 U.S. 356, 369-370 (2001) (finding minimal evidence of unconstitutional disability-based discrimination by states); *Kimel*, 528 U.S. at 89-90 (finding minimal evidence of unconstitutional age-based discrimination by states); *Coll. Sav. Bank*, 527 U.S. at 640-41 (finding almost no evidence of patent infringement by states); *Boerne*, 521 U.S. at 530-31 (finding no evidence of religious discrimination by state and local governments); *cf. Lane*, 541 U.S. at 528 (upholding a statute "[g]iven the sheer volume of evidence demonstrating the nature and extent of unconstitutional" conduct); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) (upholding a statute because "the States' record of unconstitutional" conduct is "weighty enough to justify" legislation).

303. *See Garrett*, 531 U.S. at 368-72 (ignoring disability discrimination by local governments and private actors); *Kimel*, 528 U.S. at 90-91 (ignoring age discrimination by the private sector).

304. *See Garrett*, 531 U.S. at 368-69.

305. *Cf.* Monell v. Dep't of Social Servs. of N.Y., 436 U.S. 658, 690 (1978).

306. *Garrett*, 531 U.S. at 369.

307. *See Lane*, 541 U.S. at 527-28 n.16; *cf.* United States v. Bd. of Comm'rs, 435 U.S. 110, 117-35 (1978).

308. *See* City of Boerne v. Flores, 521 U.S. 507, 531-32 (1997).

309. *See Lane*, 541 U.S. at 524-28 (crediting a wide variety of sources); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729-35 (2003) (making a series of inferences geared towards enhancing the strength of the legislative record); *see also Lane*, 541 U.S. at 528-29 n.17 (noting the weak state of the legislative record in *Hibbs*, which nonetheless was still sufficient to uphold the statute at issue there).

Specifically with regard to Nineteenth Amendment enforcement legislation, the Court should be particularly deferential to the record if the evidence amassed by Congress shows that the restrictions run counter to the Sixty-Sixth Congress's concerns about restrictions that are politically motivated, restrictions that burden women who take an active role outside the home, and restrictions that burden women on account of their childcare responsibilities.[310] This is so even if those restrictions do not amount to intentional discrimination on account of sex. The Court has shown a willingness in congruence-and-proportionality cases to enlarge pre-existing definitions of what constitutes a constitutional violation for purposes of determining whether a sufficient record of constitutional violations exists. In *Nevada Department of Human Resources v. Hibbs*,[311] for example, the Court for the first time "recognize[d] that laws regulating pregnant women can enforce unconstitutional sex stereotypes."[312] The expansion in *Hibbs* dovetails with the Sixty-Sixth Congress's concerns about the certain types of voting restrictions discussed in Section IV.D. Therefore, the Court should have no trouble similarly taking an expansive view of what constitutes a Nineteenth Amendment violation for purposes of determining the sufficiency of a record of violations.

3. *The Appropriateness of the Remedy: Congruence and Proportionality*

Finally, courts must look at the remedy to judge whether it is congruent and proportional to the constitutional violation Congress seeks to enforce.[313] There is no set formula for whether a remedy is appropriately tailored to the particular wrong it targets; rather, the congruence-and-proportionality test is something of a sliding scale, allowing for more powerful remedies for greater harms while allowing only less powerful remedies for lesser harms.[314]

In analyzing a remedy for congruence and proportionality, courts will examine the scope of the legislation and the swath of state

310. *See supra* Section IV.D (reviewing Congress's concerns over these three items).

311. 538 U.S. 721, 728-37 (2003).

312. Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1886 (2006) ("*Hibbs* is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes."); *see also id.* at 1886-91 (discussing the expanded scope of what constitutes unconstitutional sex discrimination under *Hibbs*).

313. *See Boerne*, 521 U.S. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

314. *See id.* at 530 ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

conduct it affects,[315] as well as statutory limits[316] on the legislation's reach. In addition to examining the breadth of affected state conduct, courts will inquire into the depth of the law's intrusion into state sovereignty.[317] Beyond the sovereignty costs, courts will consider the practical cost in state resources necessary to shoulder the increased burden imposed by the remedy.[318] Courts will also canvass alternative remedies to examine their availability and effectiveness.[319] The final step is to weigh all these factors against the significance of the harm Congress seeks to remedy.[320]

B. Proposing Nineteenth Amendment Enforcement Legislation

Congress should enact Nineteenth Amendment enforcement legislation—a Nineteenth Amendment Voting Rights Act, or "VRA-19"—to address each of the barriers to the ballot addressed in Part II of this Article. Whether or not such a VRA-19 would also include the "traditional" remedies of the Voting Rights Act of 1965—a private right of action, observers, examiners, preclearance, etc.—a VRA-19

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315. *See Hibbs*, 538 U.S. at 738 (finding the statute to be "narrowly targeted"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) ("An unlimited range of state conduct would expose a state to [liability under the statute] . . . ."); *Boerne*, 521 U.S. at 532 ("Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

316. *See* Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) (noting with approval substantive limits on a statute's application); *Hibbs*, 538 U.S. at 738-40 (noting with approval substantive limits on both the statute's reach and application); *Coll. Sav. Bank*, 527 U.S. at 646-47 (noting with disapproval that the statute applied to a wide range of cases with virtually no limits); *Boerne*, 521 U.S. at 533 (surveying limits on the Voting Rights Act); *cf.* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86-88 (2000) (finding that the statute's limits are too narrow to save it).

317. *See* Bd. of Trustees v. Garrett, 531 U.S. 356, 372-73 (2001) (observing that the statute prohibits a significantly greater set of conduct than is actually unconstitutional); *Kimel*, 528 U.S. at 86-88 (same); *Boerne*, 521 U.S. at 533-34 (noting that the statute's strict test would easily invalidate most challenged state action).

318. *See Coll. Sav. Bank*, 527 U.S. at 646 (declaring that the statute will "subject[] States to this expansive liability"); *Boerne*, 521 U.S. at 534 (noting the statute will increase state litigation costs).

319. *See Lane*, 541 U.S. at 531 (finding that the problem Congress sought to address "has persisted despite several legislative efforts to remedy" it); *Hibbs*, 538 U.S. at 737 (noting that earlier, weaker legislation was ineffective); *cf.* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1335 (2012) ("It follows that abrogating the States' immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed."); *Coll. Sav. Bank*, 527 U.S. at 643-45 (observing that state court remedies were available even if federal court remedies were not).

320. *See Lane*, 541 U.S. at 533-34 (upholding the statute as it applies to cases involving a fundamental right); *Boerne*, 521 U.S. at 530 ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

with provisions specifically tailored to address particular types of voting restrictions would meet the demanding congruence-and-proportionality test.

The first prong of the congruence-and-proportionality analysis—that Congress must develop a record of unconstitutional discrimination in voting on the basis of sex—is sufficiently similar for each of the restrictions on the franchise discussed above that a single discussion covers the entire group. First, as illustrated in Part II, these obstacles to voting are becoming more and more widespread. The proliferation of these barriers is a recent phenomenon and illustrates that the obstacles to voting may amount to more than mere token instances of restrictions on voting. Second, the discussion in Part II illustrates that these restrictions may have a disproportionate impact on the basis of sex—usually against women, but in some cases against men; however, either is sufficient, given the gender-neutral application of the Nineteenth Amendment.[321] Third, states—not some other party—are generally the entities responsible for the restrictions[322] and are therefore proper targets for enforcement legislation.

The more difficult question is whether these restrictions amount to voting discrimination *on account of sex*. They very well may. Part II already established that these restrictions may have a discriminatory impact on the basis of sex. The next relevant question becomes whether that impact is intentional. First, these restrictions are usually justified on the basis of preventing voter fraud.[323] But there is little evidence that the type of fraud targeted occurs often enough to warrant the restrictions.[324] Occasionally, advocates of these

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321. *See* Breedlove v. Suttles, 302 U.S. 277, 283 (1937) ("The Ninteenth Amendment . . . applies to men and women alike . . . .").

322. *See* Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 594 (2015) ("Many states, emboldened by the Court's lax review of election regulations, have passed stringent, partisan-based election administration rules in recent years.").

323. *See, e.g.*, Pat McCrory, *N.C. Governor: Protect Election Integrity*, USA TODAY (Aug. 29, 2013, 12:59 PM), http://www.usatoday.com/story/opinion/2013/08/28/voter-photo-id-early-voting-north-carolina-gov-pat-mccrory/2724925.

324. *See, e.g.*, *Exhaustive Database of Voter Fraud Cases Turns up Scant Evidence That It Happens*, NEWS21 (Aug. 12, 2012, 10:41 AM), http://votingrights.news21.com/article/election-fraud-explainer; Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 7 (2009) ("There is little empirical or systemic evidence to support the contention that voter-initiated fraud is widespread, be it ineligible voters seeking to vote or eligible voters casting multiple ballots in several locations.").

Although the rarity of voter fraud suggests that security and integrity concerns do not justify overly intrusive burdens on the right to vote, this does not mean that security and integrity are wholly unimportant. To the contrary, "improv[ing] the security and integrity of our elections" is "critically important," especially "[a]s the country once again prepares to elect a president." Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*,

restrictions also justify their support as a cost-saving measure; however, it is not clear those justifications hold up to scrutiny either.[325] For some, these less-than-compelling justifications may result from sincerely held but mistaken beliefs. For others, these ostensibly legitimate justifications, like fraud prevention or cost savings, may be a pretext for furthering partisan interests by imposing obstacles to the franchise that affect mostly one's political opponents.[326] Because women are more likely to register as members of and vote for the nominees of one party, political opponents of that party may be likely to intentionally target women with barriers to the ballot.[327] While a more complete analysis is beyond the scope of this Article, Congress could easily use its power to conduct hearings, take testimony, and issue subpoenas, to determine the extent to which these restrictions are intentionally aimed at women, for political reasons or otherwise.

Even if Congress could not conclude that these restrictions constitute intentional discrimination, it could nonetheless find that these laws impact women's scheduling flexibility—for instance, because women would be forced to spend time obtaining additional documentation or filling out additional paperwork (in the case of voter ID or proof-of-citizenship laws, or the elimination of same-day registration), or because women would have fewer opportunities to register or vote (in the case of early voting cutbacks and restrictions on third-party voter registration organizations). This impact, especially where the impact is severe, could force women to choose between their work or childcare obligations on one hand and their right to participate in democracy on the other. Viewed in light of the Sixty-Sixth Congress's concerns about women's active role outside the home and women's ability to care for their children, Congress

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11 ELECTION L.J. 90, 90 (2012); *see also* MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, ELECTION INTEGRITY: A PRO-VOTER AGENDA 1 (2016), https://www.brennancenter.org/sites/default/files/publications/Election_Integrity.pdf ("The clamor [over voting restrictions] should not obscure a fundamental shared truth: Our elections should be secure and free of misconduct.").

325. *See, e.g.*, KASDAN, *supra* note 94, at 8 (discussing whether or not early voting increases or decreases costs).

326. *See, e.g.*, Dara Kam & John Lantigua, *Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law*, PALM BEACH POST (Nov. 25, 2012, 9:58 AM), http://www.palmbeachpost.com/news/news/state-regional-govt-politics/early-voting-curbs-called-power-play/nTFDy; Ned Resnikoff, *Pennsylvania State Senator: Voter ID Law Is About 'Suppressing Votes,'* MSNBC (Sept. 6, 2013, 7:02 AM), http://www.msnbc.com/msnbc/pennsylvania-state-senator-voter-id-law.

327. *See, e.g.*, KELLY DITTMAR, RUTGERS CTR. FOR AM. WOMEN AND POL., THE GENDER GAP: GENDER DIFFERENCES IN VOTE CHOICE AND POLITICAL ORIENTATIONS (2014), http://www.cawp.rutgers.edu/sites/default/files/resources/closerlook_gender-gap-07-15-14.pdf.

could reasonably conclude that for purposes of building a record to justify enforcement legislation, these ostensibly gender-neutral burdens would constitute voting discrimination on account of sex.

However and wherever Congress builds a record, once it does so, the next question in a congruence and proportionality analysis is whether the provisions of the enforcement legislation it enacts—the remedies—are congruent and proportional to the right Congress seeks to protect.

1. Voter ID Laws

Congressional legislation responding to voter ID laws might take one of several forms. A VRA-19 might prohibit these laws altogether. More likely, however, is that enforcement legislation would regulate voter ID laws in some way. Call these regulations "Title I" of the VRA-19.

To solve the name-matching problem, legislation should impose a non-materiality principle[328] on state voter ID laws—that is, if the individual's name on the ID and name in the voter registration rolls do not match, but the difference is not substantial, states must permit the individual to vote without any extra burdens.

To address the problem of differential rates of ID possession as well as the financial burdens to obtaining an ID, a VRA-19 should require states to provide the option of documenting voters' identity at the polling place at the state's expense, by having polling place officials photograph the voter and upload the photograph to a state database. Polling place officials could review this database in lieu of an ID in subsequent elections, using Internet-connected tablet computers. Known in election administration circles as "electronic poll books," election officials in both Nevada and Minnesota have already proposed similar systems.[329]

These proposed VRA-19 voter ID provisions would be congruent and proportional to the violations Congress seeks to remedy. Title I would affect only a limited scope of state conduct—voter ID laws—and only to a limited extent. The proposals would impose minimal burdens on a state's sovereignty—indeed, the electronic poll book proposal merely requires additional activity to accompany state's voter ID rules. The proposals do not prohibit voter ID laws

328. *Cf.* Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 104-18 (2012).

329. *See* Laura Myers, *Nevada Secretary of State Grilled over Voter Verification Proposal*, LAS VEGAS REV.-J. (Jan. 11, 2013, 5:30 PM), http://www.reviewjournal.com/news/crime-courts/nevada-secretary-state-grilled-over-voter-verification-proposal; Jim Ragsdale, *DFLers Push for Photo ID Alternative*, MINNEAPOLIS STAR-TRIB. (Mar. 8, 2012, 9:43 PM), http://www.startribune.com/dflers-propose-photo-id-alternative/141952653.

altogether—laws that are normally within the state's sovereign authority to enact (provided the voter ID laws do not violate some other provision of federal law, like the Fifteenth Amendment or the Voting Rights Act). The cost of the electronic poll book proposal can reach $10 to $20 million,[330] but it pales in comparison to the overall cost of administering elections. States could also entirely avoid the costs of the electronic poll books by repealing their voter ID laws in the first place. Courts would be hard-pressed to find less intrusive measures that accomplish the same goal; indeed, Title I rejects the more intrusive measure of banning voter ID laws entirely. Voting rights advocates have tried other measures to block voter ID laws, but they have not had sustained success,[331] bolstering the conclusion that Title I is acceptable.

Weighing all those relatively minimal intrusions against the incredible importance of the right to vote free from discrimination on account of sex, VRA-19's Title I would pass the congruence-and-proportionality test.

2. Documentary-Proof-of-Citizenship Requirements

"Title II" of a VRA-19 might respond to documentary-proof-of-citizenship laws by reversing the burden of proof of citizenship, creating a rebuttable presumption that the applicant who certifies his or her citizenship under oath is, in fact, a citizen. The state would have to accept a voter's affirmation under oath of his or her citizenship, unless the state can bring forth contrary evidence of non-citizenship.

Alternatively (or in addition), Title II might permit a state to reject a voter registration application for lack of documentary proof of citizenship only if the state itself has thoroughly investigated the applicant's citizenship and found that the applicant is not a United States citizen. Such a provision might also include a requirement that state voter registration forms include an option for the applicant to authorize the state to act as the applicant's agent (and a corresponding requirement that other states and the federal government accept this delegation of authority) in procuring documentary proof of citizenship (like a birth certificate or certificate of naturalization). This would still allow states to insist on documentary proof of citizenship but would place on the state, not the voter, the burden of obtaining updated documents.

These remedies would be congruent and proportional to the violations. Title II would only affect a small swath of state

330. *See* Myers, *supra* note 329.

331. *See supra* Section II.A (discussing litigation against voter ID laws).

conduct—only documentary-proof-of-citizenship laws. With regard to the sovereignty intrusion, the Supreme Court has recently suggested that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications,"[332] suggesting that the sovereignty intrusion of such a law might be significant. However, Title II would not prevent states "from obtaining the information necessary to enforce its voter qualifications";[333] rather, it would merely require that states go about obtaining that information in a different way, a significantly lesser intrusion on the state's sovereignty. The actual cost of a system described in Title II—where the government must seek out proof of citizenship, not the applicant—is unclear, but intergovernmental cooperation will lead to distributed costs and greater efficiency than if individual voters each had to track down these documents on their own. Additionally, states can avoid the cost entirely by merely accepting a voter's sworn certification of United States citizenship. Title II is less intrusive than other possible remedies, like an outright ban on requiring documentary proof of citizenship. Even less intrusive remedies—like the National Voter Registration Act provision for a "federal form"[334]—are insufficient, because they reach only federal elections and because they are vulnerable to attack in the administrative realm.[335]

Balancing the importance of the right to vote free from discrimination on account of sex against the minimal intrusion at issue, Title II would withstand review under the congruence-and-proportionality standard.

3. Improper Voter Registration Database Maintenance Practices

"Title III" of a VRA-19 could address voter registration database management and list-matching practices by prohibiting states from taking adverse action against a voter or registration applicant solely on the basis of database list-matching, without some additional corroborating evidence. States might be able to fulfill this requirement by, for example, contacting the affected voter before taking any action or by obtaining corroborating information from another source. In the case of deceased voters, for instance, a state might learn that a voter had passed away from the Social Security Administration's Death Index, and confirm the death in a newspaper obituary or by the non-response of the voter to a written inquiry. For

332. Arizona v. Inter Tribal Council, 133 S. Ct. 2247, 2258-59 (2013).

333. *Id.*

334. 52 U.S.C. § 20505(a) (Supp. II 2014).

335. *See supra* Section II.B (discussing the controversy over the EAC executive director's unilateral action to amend the federal form instructions).

non-citizen voters, a state might discover a voter's non-citizenship from a federal immigration database and confirm the non-citizenship status by checking the voter's response to a jury selection form's question about citizenship.

Like Titles I and II before it, Title III would constitute a congruent and proportional remedy as well. Voter registration database management procedures regulate only a small swath of state conduct. Additionally, Title III imposes only minimal burdens on a state's sovereignty, because a state still controls its voter registration database; it merely has to comply with some additional requirements before taking action. Such a program would impose financial costs on states, but these costs are likely to constitute only a fraction of the overall cost of administering an election. Additionally, these costs are likely to decrease as inter-governmental cooperation allows states to better share data and eases the proposed corroboration requirement. Moreover, Title III's procedural safeguards are less burdensome than requiring states to submit to a federally run voter registration system, and even less burdensome than a requirement that states follow North Dakota's example[336] and do away with voter registration entirely. Finally, the alternative remedies described in Part II that Congress has attempted under the National Voter Registration Act and the Help America Vote Act, have proven unworkable and have resulted in significant litigation.[337]

Compared to the minimal burdens that Title III imposes, the right to vote free from discrimination on account of sex is sufficiently weighty to justify the regulation of state voter registration database management practices.

4. Cutbacks in Access: Early Voting, Election Day Registration, and Restrictions on Third-Party Voter Registration Groups

A hypothetical VRA-19 might include Titles IV through VI to address matters that increase the level of administrative hoops through which a voter must jump in order to cast a ballot: cutbacks in early voting and the revocation of Election Day registration. Title IV could set national standards requiring states to engage in a certain amount of early voting. Title V might require states to offer some variant of Election Day registration. Title VI could set national standards for third-party voter registration organizations so as to

336. *See* N.D. Leg. Council Staff for the Judiciary Comm., *Voter Registration–Background Memorandum*, N.D. SECRETARY OF STATE (Aug. 1999), http://www.legis.nd.gov/files/events/memorandum/19042.pdf.

337. *See* discussion *supra* Section II.C (discussing litigation over voter registration list maintenance practices).

preempt state restrictions. Each provision should contain an administrative procedure to allow states to request deviations from these national standards where the state shows a sufficient need.

By overruling state policy choices to the contrary, titles IV through VI would create the largest intrusions into state sovereignty of any of the VRA-19 proposals. Proposed Titles I to III, concerning voter ID, documentary-proof-of-citizenship, and voter registration database management, all allow states to continue their policy choices; they merely require the state to make some extra effort in order to maintain those procedures. Contrast those proposals with Titles IV through VI, which would outright overrule state policy choices, making the sovereignty intrusion more significant. This deeper intrusion into sovereignty, however, is still limited in scope—each proposal applies only to a narrow provision of election procedure. Additionally, the administrative "escape hatch" would decrease the burden on state sovereignty by allowing states to revert to their policy choices if they show a compelling justification.

Financial cost is only a potential issue with early voting, and even then, it's not clear whether early voting might save more resources than it requires in expenditures.[338] Election Day registration cannot increase costs—the cost to process a voter registration form is the same whether done on Election Day or prior to election. Any cost increase from more lenient, mandatory rules concerning third-party voter registration organizations—presumably attributable to the state having to process a greater number of voter registration applications because the third-party organizations are able to reach a greater number of potential voters—is likely to be minimal, given the small cost of processing each individual application. In fact, more lenient rules concerning third-party voter registration groups may save money, because states would no longer have to enforce more significant restrictions.

Other remedies, like litigation under the National Voter Registration Act, the Voting Rights Act, or constitutional provisions, as well as popular referenda, have had only mixed success stopping these specific cutbacks in convenience.[339] Additionally, each provision affects only one portion of state election activity.

Although Titles IV through VI make for a closer call given their larger intrusion into state sovereignty, all other factors weigh in favor of Congress's discretion to order these procedures. Especially

338. *See* KASDAN, *supra* note 94, at 8 (discussing whether or not early voting increases or decreases costs).

339. *See* discussion *supra* Section II.D (discussing litigation and other efforts to reverse (1) cutbacks in early voting, (2) repeal of Election Day registration, and (3) restrictions on third-party registration groups).

when balanced against the very weighty Nineteenth Amendment right at issue here, titles IV through VI all constitute congruent and proportional remedies.

VI. CONCLUSION

The Voting Wars are ongoing. States have erected a host of barriers to the ballot, many of which burden women voters significantly more than men. Using the Nineteenth Amendment, however, Congress could help swing the momentum back towards the side of voting rights. In passing the Nineteenth Amendment, the Sixty-Sixth Congress (1) rejected decades of history in which voting rights failed to achieve constitutional respect and (2) gave Congress a significant, broad new power to enforce the voting rights of newly enfranchised women. Using that power, Congress has the authority to enact Nineteenth Amendment enforcement legislation that will tackle a host of barriers to the ballot, consistent with the Sixty-Sixth Congress's stance that women, once enfranchised, not face lesser barriers that would keep them from exercising their right to vote in practice.

Congress not only has the authority to do so, but it must do so. States are getting more aggressive with their efforts to restrict the franchise. Some states are even attempting to avoid the reach of Congress's traditional means of enforcing voting rights—the Elections Clause, which applies only to federal elections[340]—by creating federal and non-federal elections systems, so as to put many of their attacks on voting beyond the Elections Clause's reach.[341] Other states may follow. Congress must act.

During the debate in the Sixty-Sixth Congress over the Nineteenth Amendment, Representative Israel M. Foster of Ohio said, "It is [a] kwoman's right to be allowed to help select the officers and help make the laws under which she shall live as an American citizen. Our children and our children's children will wonder with amazement why we so seriously debated this great act of simple justice."[342] Representative Foster was right: today, we are that generation, and we do "wonder with amazement why" the Nineteenth Amendment was so controversial. If Congress acts pursuant to its Nineteenth Amendment power to enforce the right to vote free from sex-based discrimination, succeeding generations may say the same about the proliferation of barriers to the ballot.

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340. U.S. CONST. art. I, § 4, cl. 1.

341. *See* Berman, *supra* note 52; Santos & Eligon, *supra* note 52.

342. 58 CONG. REC. 8832 (1919) (statement of Rep. Israel M. Foster).