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Gender, Voting Rights, and the Nineteenth Amendment

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Gender, Voting Rights, and the Nineteenth Amendment

PAULA A. MONOPOLI*

ABSTRACT

One hundred years after the woman suffrage amendment became part of the United States Constitution, a federal court has held—for the first time—that a plaintiff must establish intentional discrimination to prevail on a direct constitutional claim under the Nineteenth Amendment. In adopting that threshold standard, the court simply reasoned by strict textual analogy to the Fifteenth Amendment and asserted that “there is no reason to read the Nineteenth Amendment differently from the Fifteenth Amendment.” This paper’s thesis is that, to the contrary, the Nineteenth Amendment is deserving of judicial analysis independent of the Fifteenth Amendment because it has a distinct constitutional history and meaning. The unique historical context preceding and following the Nineteenth’s ratification militates for courts to adopt a holistic interpretative approach when considering a Nineteenth Amendment claim. Such an approach has both expressive and doctrinal implications, providing support for courts to adopt disparate impact, rather than intentional discrimination or discriminatory purpose, as a threshold standard for such claims. Reasoning beyond the text—from legislative intent, purposes, structure, and institutional relationships—could restore the lost constitutional history around the Nineteenth Amendment, making it a more potent tool to address gendered voter suppression today, especially for women of color. This paper provides a framework for judges willing to move away from rigid textual analogy toward a more holistic constitutional interpretation when evaluating a constitutional claim under the amendment.

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I. INTRODUCTION

The Nineteenth Amendment constitutes both a prohibition against and a grant of government power.¹ It constrains the states' authority to enact laws that regulate voting, preventing them from denying citizens the vote—or abridging it—on account of their sex.² The Nineteenth also includes express authority for enforcement legislation.³ The text is the same as that of the Fifteenth Amendment—the first express federal voting amendment—except that the Nineteenth includes the word “sex” rather than the phrase “race, color, or previous condition of servitude.”⁴ As a historical matter, the Nineteenth enfranchised a significantly larger

1. “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. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIX.

2. The title uses “gender” as opposed to “sex” to highlight the article’s focus on contemporary state voting statutes that have a disparate impact on women, which some scholars have described as “gendered voter suppression.” Note that the ratification of the Nineteenth Amendment in 1920 did not protect all women from disenfranchisement. Native American women were not permitted to become citizens until federal legislation was enacted in 1924. Asian American immigrant women were prohibited from becoming naturalized U.S. citizens until federal legislation was enacted in the 1940s and 1950s. Black women and Latinas were de facto disenfranchised through literacy tests, poll taxes, physical intimidation, and other devices for another forty-five years, until the Voting Rights Act of 1965. See PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 155–56 nn.5–6 (2020).

3. Article I, Section 4, Clause 1 of the U.S. Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art I, § 4, cl. 1. Note that this constitutional provision applies to elections for federal office. But the Nineteenth Amendment has a broader reach. It prevents the states from denying or abridging a citizen’s right to vote in either state or federal elections. See U.S. CONST. amend. XIX.

4. The Fifteenth Amendment provides that “[t]he 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 race, color, or previous condition of servitude. The Congress shall have the power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, §§ 1–2. Notably, 2020 marked both the 100th anniversary of the Nineteenth Amendment and the 150th anniversary of the Fifteenth Amendment. I use the phrase “the first express federal voting amendment” to distinguish the Fifteenth Amendment from Section 2 of the Fourteenth Amendment. The ratification of Section 2 of the Fourteenth inserted the word “male” into the Constitution for the first time. Section 2 also implicates voting, though less directly. See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 385 (2014) (“The

number of citizens than did the Fifteenth.⁵ Yet, only two U.S. Supreme Court cases have dealt directly with the Nineteenth: *Leser v. Garnett*⁶ (upholding its validity) and *Breedlove v. Suttles*⁷ (holding that a sex-differentiated poll tax regime did not violate the Nineteenth).⁸ Few federal cases even mentioned the Nineteenth after 1937.⁹ So, it is notable that in *Jones v. DeSantis*, a recent voting rights case, a federal district court addressed a direct constitutional claim under the Nineteenth.¹⁰ The *Jones* court failed to engage in an independent analysis and holistic interpretation of the Nineteenth.¹¹ Rather than considering the distinct constitutional history and meaning of the Nineteenth, which is different from that

legislative debates in 1866 over the language of section 2 [of the Fourteenth Amendment] demonstrate that Congress viewed its enforcement authority over voting and elections broadly. . . . [T]his provision sets a very low threshold for violations to trigger federal action (abridgment on almost any grounds) while giving Congress substantial authority to impose an extreme penalty to remedy such violations.”)

5. Some scholars have described the ratification of the Nineteenth Amendment as the “biggest democratizing event” in the nation’s history. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 419 (2005); see also J. KEVIN CORDER & CHRISTINA WOLBRECHT, *COUNTING WOMEN’S BALLOTS: FEMALE VOTERS FROM SUFFRAGE THROUGH THE NEW DEAL* 3 (2016). *But see generally* MONOPOLI, *supra* note 2, at 155–56 nn.5–6 (describing those groups of women in the country who were not enfranchised by the Nineteenth Amendment, either de jure or de facto).

6. 258 U.S. 130, 136 (1922).

7. 302 U.S. 277, 283–84 (1937), *overruled in part* by *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

8. While the U.S. Supreme Court did not ground its decision in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), on the Nineteenth, it did invoke the Amendment to justify striking down a minimum wage law for women on due process grounds, suggesting that the Amendment might have an impact on other constitutional doctrine. *Id.* at 553. Justice Sutherland gave some insight into what the Court thought the Amendment meant in 1923 when he described it as the culmination of a revolutionary change in women’s “contractual, political, and civil status.” *Id.* Also, note that courts cited the Nineteenth Amendment after its ratification far less often than they cited the Fifteenth Amendment. See MONOPOLI, *supra* note 2, at 156 n.11 (“A Lexis-Nexis search (January 1, 2020) indicated that there are 622 judicial opinions that cite the Nineteenth Amendment, with 291 of those in state courts and 331 in federal courts. The number of US Supreme Court opinions that cite the Nineteenth Amendment is 39. It is interesting to compare that with the same search for the Fifteenth Amendment, which has virtually the same text as the Nineteenth. That search turns up 2,845 total citations, with 2,734 of those coming after 1920. The split between federal and state courts is more skewed, with 439 state courts and 2,406 federal courts citing the Fifteenth Amendment. Finally, there are 194 citations to the Fifteenth Amendment in US Supreme Court decisions.”).

9. One of the few federal cases was *Ball v. Brown*, 450 F. Supp. 4, 8 (N.D. Ohio 1977) (describing the scope of a Nineteenth Amendment claim as being “encompassed within the [F]ourteenth [A]mendment guarantee of equal protection” in a case involving the automatic purging of voting registrations for women who had been married and thus presumably had changed their surnames). In my view, the Nineteenth Amendment is not simply co-extensive with, but also goes beyond, a Fourteenth Amendment equal protection claim in voting rights cases. In my book, *CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT*, I offer an account of why a federal amendment, which implicated important constitutional issues like federalism, the scope of women’s citizenship, and the constitutional definition of equality, was so rarely invoked, discussed, or developed by the courts. See *generally* MONOPOLI, *supra* note 2.

10. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1239–40 (N.D. Fla. 2020).

11. When this paper calls for an independent analysis and holistic interpretation of the Nineteenth Amendment, it means that a court should engage in a separate analysis of the Nineteenth—apart from the Fifteenth Amendment—when interpreting its meaning. Judges should fully consider its distinct constitutional history, rather than simply reasoning by rigid textual analogy to the Fifteenth Amendment.

of the Fifteenth, the trial judge simply reasoned by strict textual analogy to the Fifteenth when considering the plaintiffs' Nineteenth Amendment claim.¹² Reva Siegel has observed that:

In developing sex discrimination doctrine under the Fourteenth Amendment, the Court seems to have proceeded from the understanding that there is no constitutional history that would support a constitutional commitment to equal citizenship for women—that such a commitment is to be derived, to the extent it can be derived at all, by analogizing race and sex discrimination.¹³

This paper's primary argument is that courts should not repeat this mistake when reasoning about sex discrimination in the realm of voting rights today. Simply analogizing to the Fifteenth, without an independent analysis and holistic interpretation of the Nineteenth, ignores the unique constitutional history and public discourse around the ratification of the second federal voting amendment in 1920. It fails to take into account the different ways women's subordination manifests itself in society generally, and in voting practices in particular. If one views the Nineteenth Amendment as the only *express* commitment to sex equality in our Constitution, it is worth considering—and restoring—its unique history when reasoning about its meaning.¹⁴ Moreover, an interpretive approach that examines the amendment's history, both before and after 1920, may well yield a thicker understanding of the Nineteenth Amendment as a more potent constitutional tool today. Such an approach demonstrates fidelity to the dual purposes of the amendment: ensuring equality in political participation and expressing a commitment to sex equality in citizenship.

Part II of the paper describes the recent decision around the Nineteenth Amendment claim in *Jones v. DeSantis*, the first judicial decision to extend an intentional discrimination threshold standard to a constitutional claim under the Nineteenth. In *Jones*, the trial judge did not engage in an independent analysis of the Nineteenth. He simply reasoned by strict textual analogy to the Fifteenth Amendment in extending an intentional discrimination standard to the Nineteenth.¹⁵ That holding was subsequently affirmed by the Eleventh Circuit.¹⁶ Part II concludes that the unique history and meaning of the Nineteenth Amendment provides a basis for a more holistic interpretation of the amendment, as outlined in Part III.

12. *Jones*, 462 F. Supp. 3d at 1239–40. See discussion *infra* Section II.

13. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1022 (2002) [hereinafter Siegel, *She the People*].

14. I have written previously on the gendered norms that underlie our original constitutional design. See Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643 (2006); see also Eileen McDonagh & Paula A. Monopoli, *The Gendered State and Women's Political Leadership: Explaining the American Puzzle*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 169, 183–86 (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

15. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1239–40 (N.D. Fla. 2020).

16. *Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021) [hereinafter “the cross-appeal”].

Part III examines the text, purposes, and structural implications of the Nineteenth Amendment in light of its pre-ratification history and argues that, at the very least, the public understanding in 1920 was that the amendment meant equality of political participation and a commitment to sex equality in citizenship.¹⁷ By 1920, the public was well-versed in the meaning of a federal voting amendment because enforcement legislation fleshed out the Fifteenth Amendment. That legislation suggested to the public that the Fifteenth's meaning encompassed robust political participation in democratic governance, not only through voting but through jury service and public office-holding.¹⁸ Part III lays out an interpretive approach that might more effectively implement the promise of the Nineteenth: to make women full citizens with equal rights of political participation. Courts should combine an inquiry into the development of the amendment's text over time, its purposes, and its impact on the structural relationship between the states and the federal government, informed by its pre-ratification history.

Part IV asks what difference, if any, an independent analysis and holistic interpretation might make as a doctrinal matter. In answering that question, this section evaluates how the application of such an interpretation to state voting statutes might use a feminist constitutionalism as its framework—one that asks which interpretative choice is least disadvantageous to women. This pragmatic framework recognizes the value of empirical evidence in demonstrating the intersection of facially neutral state voting rules with the realities of women's continuing subordination on the ground, especially women of color. This part argues that the roots of the disparate impact of that intersection are structural and may be found in the legal regime of coverture that the nineteenth-century women's

17. See MONOPOLI, *supra* note 2, at 11 (citing suffragist letters making clear that it was political freedom that these suffragists felt they had secured upon ratification of the Nineteenth Amendment in 1920); see also Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 472 (1995) ("Thus, the Nineteenth Amendment can be understood as protecting more generally full rights of political participation."); Brief in Support of Petition for Certiorari at 19, *Dreher v. Louisiana*, 278 U.S. 641 (1928) (No. 451) (describing "the right of women to serve on juries when, by the adoption of the Nineteenth Amendment of the Constitution of the United States, they were given the right of suffrage in this country, which carried with it all the accessory rights of citizenship").

18. Section 2 of the Act of 1871, promulgated pursuant to the Fourteenth Amendment, provided penalties for conspiring to "prevent any person from accepting or holding any office or trust or place of confidence under the United States. . . ." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, 17 Stat. 13, 13–14 § 2 (1871). Section 4 of the Act of 1875, promulgated pursuant to the Thirteenth, Fourteenth, and Fifteenth Amendments, provided "[t]hat no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or any State, on account of race, color, or previous condition of servitude. . . ." An Act to Protect all Citizens in their Civil and Legal Rights, Rev. Stat. § 1978, 18 Stat. 335, 336–37 § 4 (1875). There has been a paucity of scholarship by legal historians around women, suffrage, and office-holding, both before and after 1920. However, Elizabeth Katz has recently done important work around these connections. See Elizabeth D. Katz, *A Woman Stumps Her State: Nellie G. Robinson and Women's Right to Hold Public Office in Ohio*, 53 AKRON L. REV. 313 (2019); Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office*, 33 YALE J.L. & FEMINISM (forthcoming 2022), <http://ssrn.com/abstract=3896499>.

movement sought to dismantle. The lingering effects of that regime manifest themselves today in the ways women are still socially and economically subordinated, albeit not in formal legal terms. That historic discrimination by the state is the foundation of today's continuing disparities in compensation, caregiving, and naming conventions that intersect with voting laws regulating the time, place, and manner of elections. This intersection often creates barriers that keep women away from the polls, producing inequality of access and participation.

This part also argues that construction of the Nineteenth, as applied to such laws, should be informed by its post-ratification history, beginning with the presidential election of November 1920. That history is one of disenfranchisement—long lines, poll taxes, literacy tests, and physical intimidation for many women, particularly Black women. State laws imposing pre-conditions to voting, such as poll taxes, also kept poor white women from the polls, much as social norms kept many middle and upper-class women away, even after the Nineteenth's enactment in 1920.¹⁹ The U.S. Supreme Court reflected this social reality in its use of gendered stereotypes, grounded in the remnants of coverture, in *Breedlove*, as the Court analyzed whether the sex-differentiated poll tax regime at issue violated the Fourteenth and the Nineteenth Amendments. Post-ratification history thus supports a judicial construction of the Nineteenth that only requires plaintiffs to demonstrate a disparate impact, rather than intentional discrimination/discriminatory purpose in voting cases.²⁰ This part concludes by suggesting that an

19. See FREDERIC D. OGDEN, *THE POLL TAX IN THE SOUTH* 177 (1958) (“Examination of the form of the tax indicated that the tax tends to bear more harshly on women than men and analysis . . . disclosed that more white women had been prevented from voting by the tax than either white men or Negroes.”); see also CORDER & WOLBRECHT, *supra* note 5, at 13 (“It is not surprising that the turnout of women, as new voters, lagged behind that of men. Voting has long been characterized as a learned behavior and an acquired habit. . . . [Women] had been taught to understand themselves as ‘by nature unsuited to politics’. . . . Dominant (but evolving) social customs equated femininity with the private sphere of home, as opposed to the public world of politics.” (citations omitted) (emphasis omitted)).

20. “Disparate impact” is used in the paper as a signifier for a standard that is lower than intentional discrimination or discriminatory purpose. Fleshing out the terms of that standard is beyond the scope of this paper. See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 *YALE L.J.* 1566 (2019) (arguing that disparate impact in voting (at least under Section 2 of the Voting Rights Act) should be the same as disparate impact under statutes like Title VII of the Civil Rights Act and the Fair Housing Act); *Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary: The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*, 117th Cong. (July 16, 2021), <https://perma.cc/3R7P-TZ9S> (testimony of Prof. Stephanopoulos) (explaining the impact of *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), on the Voting Rights Act Section 2 discriminatory effects/results standard and suggesting a burden shifting framework that incorporates disparate impact, from which discriminatory purpose may be inferred). *Id.* This burden-shifting framework offers much to recommend it. However, requiring even an inference of discriminatory purpose may be problematic in the context of sex-discrimination, since such discrimination may often be more difficult for courts to find than discrimination based on race. See, e.g., *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1235 (N.D. Fla. 2020), *rev'd and vacated sub nom. Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (finding that plaintiffs had come much closer to establishing intentional discrimination in the Fifteenth Amendment claim than in the Nineteenth Amendment claim).

intersectional reading of the Nineteenth with the Fifteenth Amendment further strengthens the argument that disparate impact is the proper threshold standard.²¹

II. THE HISTORY OF REASONING BY ANALOGY TO THE FIFTEENTH AMENDMENT

Seventeen years after the Nineteenth Amendment's ratification, the U.S. Supreme Court heard the only case in which it ever directly addressed whether a state statute violated the Nineteenth Amendment. Its 1937 decision in *Breedlove v. Suttles* upheld a sex-based poll tax regime.²² The Court invoked gender stereotypes and implicitly relied on the remnants of coverture to justify its decision, reasoning that:

In view of burdens necessarily borne by [women] for the preservation of the race, the state reasonably may exempt them from poll taxes. The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden.²³

The Court concluded that the poll tax payment regime was not unconstitutional under the Fourteenth and Nineteenth Amendments, even though it was class legislation which, on its face, differentiated between men and women. The Court reasoned that “[d]iscrimination in favor of all women” was permissible under the Fourteenth Amendment, and thus the male appellant “may not complain because the tax is laid only upon some or object to registration of women without payment of taxes for previous years,” and that the scope of the Nineteenth Amendment did not include the state’s general taxing power.²⁴

The Court had previously addressed the validity of the Nineteenth in *Leser v. Garnett*.²⁵ In reasoning about its validity, the Court simply analogized it to the Fifteenth, noting that “[t]his amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid.”²⁶ Several subsequent Supreme Court cases, none of which directly addressed a Nineteenth Amendment claim,

21. This paper’s primary focus is on distinguishing the Nineteenth Amendment from the Fifteenth Amendment to support an independent analysis and holistic interpretation of the Nineteenth by courts when a plaintiff brings a direct constitutional claim under the Nineteenth in a voting rights case. That focus should not be read to suggest that the Fourteenth Amendment, read synthetically with the Nineteenth, is not also important in achieving substantive sex equality in citizenship. See generally Siegel, *She the People*, *supra* note 13; Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450 (2020).

22. *Breedlove v. Suttles*, 302 U.S. 277, 280 (1937), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966). Note that the Nineteenth Amendment has been cited far fewer times than the Fifteenth Amendment since 1920. See MONOPOLI, *supra* note 2, at 156 n.11.

23. *Breedlove*, 302 U.S. at 281 (citations omitted).

24. *Id.* at 282. See also Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27, 32 (2020).

25. *Leser v. Garnett*, 258 U.S. 130 (1922).

26. *Id.* at 136.

similarly twinned the Fifteenth and the Nineteenth Amendment. For example, in *Gray v. Sanders*, the Court said, “[t]he Fifteenth Amendment prohibits a State from denying or abridging a Negro’s right to vote. The Nineteenth Amendment does the same for women.”²⁷

While *Breedlove*’s Fourteenth Amendment’s equal protection prong was later overturned in *Harper v. State Board of Elections*,²⁸ the Court’s holding that a differential poll tax payment regime based on sex did not violate the Nineteenth Amendment has never been overturned. Technically, it stands to this day.²⁹ However, in one of the few cases since *Breedlove* to directly address the Nineteenth, a federal district court recently adjudicated whether a state statute violates the Nineteenth Amendment. The following is a brief description of that complicated litigation, in what became *Jones v. DeSantis*.³⁰

In 2018, the citizens of Florida voted for Amendment 4, an amendment to the state constitution that gave citizens previously convicted of a felony the opportunity to vote again.³¹ There were approximately 1.5 million Floridians in this category.³² Amendment 4 provided that those citizens who had completed their sentence were eligible for re-enfranchisement. After the people of Florida spoke via passage of the amendment, the Florida legislature enacted S.B. 7066, a statute that required those eligible for re-enfranchisement under Amendment 4 to pay all fees, fines, and restitution associated with their prior convictions, as part of their eligibility to vote again.³³ In response, the Southern Poverty Law Center filed a lawsuit on behalf of two Black women, Rosemary McCoy and Sheila Singleton. McCoy, a Navy veteran, had served twenty-four months in prison and had been on probation for an additional eighteen months. After Amendment 4, McCoy registered and actually voted in a Jacksonville city council election. However, after SB 7066 passed, she would no longer be eligible to vote until she paid thousands of dollars. McCoy could not afford to pay that amount, “as interest continue[d] to accrue—even as her struggle to find employment ha[d] become harder due to her criminal conviction.”³⁴

Like McCoy, Sheila Singleton could not afford to pay all of the amounts related to her conviction. McCoy and Singleton’s amended complaint asserted

27. *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

28. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

29. See Hasen & Litman, *supra* note 24, at 32 (“The Court has never returned to the issue, leaving *Breedlove* to be at least nominally good law on the meaning of the Nineteenth Amendment right to vote.”); *Id.* at n. 33 (citing *Harper*, 383 U.S. at 669, and noting that it overruled “*Breedlove* only to ‘that extent’ that it upheld a poll tax against equal protection challenge”).

30. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020).

31. Tim Mak, *Over 1 Million Florida Felons Win Right to Vote with Amendment 4*, NPR (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4> [<https://perma.cc/4YWN-7XZC>].

32. *Id.*

33. FLA. STAT. ANN. § 98.0751 (West 2021).

34. *McCoy, et al. v. DeSantis, et al.*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/mccoy-et-al-v-desantis-et-al> [<https://perma.cc/Q9VB-Z9QA>] (last visited July 30, 2021).

that Florida “has a very long and storied history of denying poor people, racial minorities, and women the right to vote.”³⁵ The complaint further argued that SB 7066 discriminated against the two women on the basis of “low-income economic status”³⁶ and that “[w]omen of color also continue to be paid less than their male and white female counterparts” and were thus likely to be more adversely affected by the new law.³⁷ Nearly a quarter of all Black women in Florida lived below the poverty line, and the unemployment rate for Black women with a felony conviction was more than 43 percent.³⁸

McCoy and Singleton brought direct constitutional claims against the Florida statute, including a claim under the Nineteenth Amendment. Their lawsuit was consolidated with several other lawsuits that included Fourteenth and Fifteenth Amendment claims and a Twenty-Fourth Amendment claim.³⁹ In *Jones v. DeSantis*, the federal district court held that the state statute at issue was unconstitutional under the Twenty-Fourth Amendment because it constituted a tax prohibited by the amendment.⁴⁰ In addition, the court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against re-enfranchised voters based on wealth.⁴¹ It also suggested the Florida process attendant to the statute violated the Fourteenth Amendment’s Due Process Clause.⁴² But Judge Robert Hinkle rejected a claim that the statute also violated the Fifteenth and the Nineteenth Amendments because the requisite threshold intentional discrimination or discriminatory purpose standard had not been met.⁴³ In doing so, he did not engage in a separate analysis of the Nineteenth Amendment. He analyzed the threshold standard that the Eleventh Circuit had applied to the Fifteenth and simply extended it to the Nineteenth, without much, if any, further analysis.⁴⁴

The State of Florida appealed the decision, and the Eleventh Circuit agreed to hear the case. But it stayed the McCoy and Singleton cross-appeal of the Nineteenth Amendment claim until the appeal of the lower court’s decision on the other claims was decided.⁴⁵ In a 200-page, 6-4 opinion issued after an *en banc* hearing, the Eleventh Circuit overruled the lower court’s decision with regard to the Twenty-Fourth Amendment.⁴⁶ The majority rejected the idea that the Florida

35. First Amended Complaint for Declaratory and Injunctive Relief at 2, *McCoy v. DeSantis*, No. 19–304 consolidated into *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020) (4:19-cv-300-RH/MJG), <https://perma.cc/9SRL-GGNJ>.

36. *Id.* at 1.

37. *Id.* at 23.

38. *Id.* at 18–19.

39. S. POVERTY L. CTR., *supra* note 34.

40. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1233–34 (N.D. Fla. 2020).

41. *Id.* at 1234.

42. *Id.* at 1241–42.

43. *Id.* at 1235–40.

44. *Id.* at 1239.

45. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020).

46. *Id.* The appellate court also lifted the stay on the cross-appeals. Cross-appellants McCoy and Singleton filed their Opening Brief on October 21, 2020. Appellants’ Brief, *Jones v. Governor of Fla.*,

statute violated the amendment because it required the payment of government fees and costs prior to being re-enfranchised after a felony conviction.⁴⁷

As noted above, in his district court decision, Judge Hinkle engaged in little, if any, independent analysis of the Nineteenth Amendment. He reasoned that, “[t]he Nineteenth Amendment was an effort to put women on the same level as men with respect to voting, just as the Fifteenth Amendment was an effort to put African American men on the same level as white men.”⁴⁸ Judge Hinkle focused narrowly on the textual similarity between the two amendments, writing “[i]ndeed, the Nineteenth Amendment copied critical language from the Fifteenth.”⁴⁹ He thus analogized to the Fifteenth, noting “[a]s is settled, a claim under the Fifteenth Amendment requires the same [threshold] showing of intentional discrimination as the Fourteenth Amendment’s Equal Protection Clause.”⁵⁰ Therefore Judge Hinkle concluded, “there is no reason to read the Nineteenth Amendment differently from the Fifteenth.”⁵¹

Judge Hinkle noted that the plaintiffs introduced empirical evidence, “that women with felony convictions, especially those who have served prison sentences, are less likely than men to obtain employment and, when employed at all, are likely to be paid substantially less than men,” especially African American women.⁵² However, he concluded that the evidence was insufficient to find intentional discrimination.⁵³ While it constituted disparate impact:

975 F. 3d. 1016 (11th Cir. 2020) (No. 20-12304), https://www.splcenter.org/sites/default/files/documents/mccoys_cross-appellants_opening_brief.pdf [<https://perma.cc/Y3ZW-5EMB>]. They filed their Reply Brief on February 10, 2021. Appellants’ Reply Brief, *Jones v. Governor of Fla.*, 975 F. 3d. 1016 (11th Cir. 2020) (No. 20-12304), https://www.splcenter.org/sites/default/files/documents/mccoys_reply_brief.pdf [<https://perma.cc/7XKU-PS6B>]. Note that counsel for the State of Florida argued that the case was not a voting rights case. Rather, they argued that it was a felony re-enfranchisement case. Answer Brief of the Governor and Secretary of State at *4, *McCoy v. Governor of Fla.*, No. 20–12304 (filed Dec. 21, 2020) (“This case, however, concerns . . . a felon re-enfranchisement scheme—not the right to vote”) The Eleventh Circuit subsequently affirmed the district court’s holding that intentional discrimination was the appropriate threshold standard for a Nineteenth Amendment claim. *Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021). Because the Governor of Florida took the position that this was not a voting rights case, there is an argument that the decision should not preclude a contrary finding in a future voting rights case that does not involve felony re-enfranchisement.

47. *Jones*, 975 F. 3d at 1037–46.

48. *Jones*, 462 F. Supp. 3d at 1239.

49. *Id.*

50. *Id.* at 1239 (stating “vote dilution, vote denial, and traditional race discrimination claims arising under the Fourteenth and Fifteenth Amendments all require proof of intentional discrimination” (quoting *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 n.8 (11th Cir. 1999))). Note that Judge Hinkle also ruled against plaintiffs McCoy and Singleton on their Fourteenth Amendment equal protection claim. That ruling was also affirmed by the Eleventh Circuit. *See Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021).

51. *Jones*, 462 F. Supp. 3d at 1239.

52. *Id.*

53. *Id.* at 1239–40.

For gender discrimination, as for race discrimination . . . disparate impact is relevant to, but without more does not establish, intentional discrimination. Here there is nothing more—no direct or circumstantial evidence of gender bias, and no reason to believe gender had anything to do with the adoption of Amendment 4, the enactment of SB7066, or the State’s implementation of this system.⁵⁴

Judge Hinkle proceeded to opine that even if disparate impact were the threshold standard, the Florida statute would not disproportionately affect women as a class. “Moreover, the pay-to-vote requirement renders many more men than women ineligible to vote. . . . Even if disparate impact was sufficient to establish a constitutional violation, the plaintiffs would not prevail on their gender claim.”⁵⁵

As noted above, on September 11, 2020, the Eleventh Circuit reversed Judge Hinkle’s order that the Florida statute was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause, that its implementation was defective under the Due Process Clause, and that it constituted a tax and thus violated the Twenty-Fourth Amendment.⁵⁶ In its opinion, the Eleventh Circuit shed some light on what it thought about the meaning of the Nineteenth Amendment:

The Supreme Court has discussed the Nineteenth Amendment in detail only twice—once in a decision upholding the amendment against a challenge to its validity, *Leser v. Garnett*, and once in a decision upholding a poll tax that included an exception for nonvoting women, *Breedlove v. Suttles*. In both decisions, the Court confirmed that the Nineteenth Amendment operates just like the Fifteenth Amendment. The Court explained in *Leser* that the Nineteenth Amendment “is in character and phraseology precisely similar to the Fifteenth.” And in *Breedlove*, the Court stated that the Nineteenth Amendment, like the Fifteenth, is an absolute and self-enforcing prohibition on discriminatory classifications in voting.⁵⁷

After reversing the lower court, the Eleventh Circuit lifted the stay on the Nineteenth Amendment claim. The remaining cross-appeal moved forward and on October 18, 2021, the Eleventh Circuit affirmed Judge Hinkle’s holding with regard to the plaintiff’s Nineteenth Amendment claim.⁵⁸ In her opinion, Judge Pryor noted the “Supreme Court has said that the Nineteenth Amendment . . . ‘is in character and phraseology precisely similar to the Fifteenth,’” citing *Leser v. Garnett* and the Eleventh Circuit’s prior opinion

54. *Id.*

55. *Id.*

56. *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

57. *Id.* at 1043 (citations omitted) (quoting *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937)) (“[The Nineteenth Amendment] applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state.”).

58. *Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021).

in *Jones*.⁵⁹ But *Leser* was a case about the amendment's validity under Article V.⁶⁰ It was not a case in which the Supreme Court directly addressed a constitutional claim that a state statute violated the Nineteenth Amendment. The only such Supreme Court case was *Breedlove*.⁶¹ The *Breedlove* Court did not reason extensively about the Nineteenth and it barely mentioned the Fifteenth Amendment, saying only that the “[p]rivilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate.”⁶²

Despite what she noted as the plaintiffs’ “well-crafted arguments,” Judge Pryor concluded:

It is true the Supreme Court has never held that the Nineteenth Amendment contains an intentional discrimination requirement. But given what the Court has said about the two amendments, we as an inferior court are not at liberty to craft a different rule for the Nineteenth than the one the Court has applied to the Fifteenth.⁶³

However, I would argue that the Supreme Court has reasoned so rarely, and in a less than robust way, about the Nineteenth Amendment that lower federal courts are not bound by the Supreme Court’s thin characterization of it. They could refuse to extend the intentional discrimination threshold standard to the Nineteenth.

Judge Jordan wrote a concurrence in the cross-appeal, noting that “when identical words or phrases are used in the Constitution, we should generally presume—absent some good reasons to the contrary—that they mean the same thing throughout.”⁶⁴ Since both the Fifteenth and the Nineteenth include the phrase “on account of,” he reasoned that “if ‘on account of’ requires a showing of intentional discrimination for the Fifteenth Amendment, it should also require proof of intentional discrimination for the Nineteenth Amendment unless there is a sound basis for a different reading.”⁶⁵ Judge Jordan concluded that “there is no good reason to avoid the presumption that identical words or phrases in the Constitution generally mean the same thing.”⁶⁶

Contrary to Judge Jordan’s assertion, this article’s thesis is that there *is* a sound basis for a different reading and there *is* a good reason to avoid the presumption.

59. *Id.* (quoting *Leser v. Garnett*, 258 U.S. 130, 136 (1922), and the Eleventh Circuit’s earlier opinion in *Jones*, 975 F.3d at 1043).

60. *Leser*, 258 U.S. at 130.

61. *Breedlove*, 302 U.S. at 277.

62. *Id.* at 283. Note that the Nineteenth Amendment holding in *Breedlove* has never been overruled. See Hasen & Litman, *supra* note 24, at 32.

63. *Jones*, 15 F.4th at 1068.

64. *Id.*

65. *Id.*

66. *Id.* at 1068-69.

Judge Jordan cited Akhil Amar for the general proposition that “the same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way.”⁶⁷ But Judge Jordan failed to mention that Amar went on, in the same article, to concede that the presumption could be overcome:

But even if two clauses were initially designed to work together, if their underlying problems have evolved in different ways, something must give. If we adapt each clause’s doctrine to fit the new shape of problems, then the initial linkage between the two doctrines must give. If we preserve the linkage of doctrine by arguing that what’s sauce for one is sauce for the other, maybe one sauce will taste bad (because one underlying problem has changed in some way that the other has not).⁶⁸

In fact, Amar used the Fifteenth and the Nineteenth Amendments to illustrate this point:

For example, the Fifteenth and Nineteenth Amendments are *in pari materia*, with the first addressing race and the second, sex. But the overall ratio of male voters to female voters is more likely to approximate fifty-fifty than the ratio of white voters to black voters. And although sex is conventionally understood as binary (male/female), the same is not true of race, given the emergence of more than two socially recognized ‘races’ in America. Also, suppose racially polarized voting begins to emerge far more vividly than gender polarized voting. In such a world, perhaps doctrinal rules for implementing the Fifteenth Amendment (in, say, apportionment cases) should diverge from those doctrinal rules implementing the Nineteenth Amendment, despite their textually parallel form.⁶⁹

This article lays a foundation for just such a divergence because gendered voter suppression can present and has evolved somewhat differently than racialized voter suppression. It also recognizes that the two can intersect in unique ways. The article offers the distinct constitutional history and meaning of the Nineteenth Amendment as a sound basis and good reason to rebut the presumption that the Nineteenth and the Fifteenth Amendments should be read the same way. And it concludes that other federal courts should not follow the Eleventh

67. *Id.* at 1068 citing Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 761 (1999).

68. *Id.* at 800. Note that in responding to the state’s strict textual similarity argument at oral argument on July 22, 2021, Judge Jordan did acknowledge that even under a purely textualist approach, the same language in two different amendments may have different meanings if the words carried a different understanding when each amendment was ratified. They might even have *radically* different meanings. Judge Jordan noted that while this may not be that case, there is still a way to get to such a result in some scenarios, even “under a pure textualist pedigree.” Oral Argument at 23:20, *McCoy v. Governor of Fla.*, No. 20-12304 (11th Cir. argued July 22, 2021), <https://www.ca11.uscourts.gov/oral-argument-recordings> [https://perma.cc/9TG6-MY3Q].

69. *Id.* at 800 n.202.

Circuit in automatically extending the intentional discrimination standard to the Nineteenth Amendment for the first time.

Direct constitutional claims of gendered voter suppression, like those made by Rosemary McCoy and Sheila Singleton, have been rare. The judicial opinions described above demonstrate that there is significant room for the development of judicial reasoning around such claims. State voting laws that arguably produce gendered voter suppression vary in terms of their structure. Rick Hasen and Leah Litman have suggested that “[p]laintiffs’ claims against these laws should rely at least partially on the Nineteenth Amendment. Further, by eliminating these state laws, Congress would be eliminating voting barriers that differentially affect people on account of sex.”⁷⁰ They note that voter roll maintenance systems are an “obstacle that may disproportionately burden women’s ability to vote.”⁷¹ Such systems may “disadvantage women who change their names after getting married” in addition to having “differential socio-economic burdens, similar to voter identification laws.”⁷² Hasen and Litman also identify “[l]aws that restrict access to voting (by limiting early or absentee voting or reducing the number of polling places)” as those which “may also disproportionately burden women. . . . The restrictions may be felt more severely among those with less socioeconomic power, who find it harder to make additional time to wait in line at the polls or to take time off to vote.”⁷³ They describe women’s disproportionate child, elder and domestic labor obligations as a social condition that intersects with such voting laws to yield a disparate impact. For example, “[t]he longer the trip to the polling place, the longer it takes to vote. Long trips combined with a narrower time window in which to vote make voting more difficult for people in charge of family care (which is less flexible than a job that offers days off).”⁷⁴

Celeste Montoya, too, argues that “examinations of voter suppression remain relatively silent on the issue of gender. Rather, historical and contemporary studies tend to emphasize race and, to a lesser extent, socioeconomic status.”⁷⁵ She cites empirical evidence of the disparate impact on women in terms of voter ID laws.⁷⁶ *Jones v. DeSantis* is one of the few federal voting rights cases to raise the

70. Hasen & Litman, *supra* note 24, at 57.

71. *Id.*

72. *Id.*

73. *Id.* at 58 (citing Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y. U.L. REV. 1120, 1151–52 (2018)).

74. *Id.*

75. Celeste Montoya, *From Seneca to Shelby: Intersectionality and Women’s Voting Rights*, in 100 YEARS OF THE NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN’S ACTIVISM 105–27 (Holly J. McCammon & Lee Ann Banaszak eds., 2018).

76. *See id.* at 122 (citing evidence of disparate impact, including “a 2006 survey by the Brennan Center. [That survey] suggests the disparate impact they might have. According to the survey, as many as 11% of U.S. citizens (just over 21 million individuals) do not have government-issued photo identification. This is disproportionately higher among African Americans (25%), Latinos (16%), those over age sixty-five (18%), those ages eighteen to twenty-four (18%), and those earning less than thirty-five thousand dollars a year (15%). In particular, the Brennan Center reported that only 66% of voting-age women with ready access to any proof of citizenship (already a restricted number) have a document

kind of Nineteenth Amendment claim that Hasen, Litman, and Montoya envision.⁷⁷ But Judge Hinkle rejected that claim by reasoning that the language of the Fifteenth, which provides that a citizen's right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude," is so textually similar to the Nineteenth, that "there is no reason to read the Nineteenth Amendment differently from the Fifteenth."⁷⁸ He thus concluded, and the Eleventh Circuit subsequently affirmed, that the same standard the Eleventh Circuit has applied to the Fifteenth Amendment, an intentional discrimination/discriminatory purpose standard, should automatically extend to the Nineteenth.⁷⁹

Such claims of gendered voter suppression deserve more fulsome consideration by courts. The intentional discrimination/discriminatory purpose threshold standard all but ensures that they will not receive such full consideration. The following sections proceed on the premise that such claims are at least worthy of an independent analysis as to whether they come within the ambit of the state action prohibited by the Nineteenth Amendment. To allow for such consideration, courts should adopt a lower threshold standard for plaintiffs who bring such a direct constitutional claim. The following section suggests that a holistic

with their current legal name. This translates into roughly 32 million women who might be excluded due to inadequate voter identification. While these trends represent different dimensions of discrimination that are problematic when viewed in isolation, they are complicated by virtue of their intersections.").

77. Rosemary McCoy and Sheila Singleton, plaintiffs in *Jones v. DeSantis*, provided the following statistical evidence in their amended complaint. First Amended Complaint for Declaratory and Injunctive Relief at 20, *Jones v. DeSantis*, (No. 4:19-cv-00304-RH-CAS) (filed Oct. 28, 2019), https://www.splcenter.org/sites/default/files/documents/first_amended_complaint_0.pdf [<https://perma.cc/ESZ8-UFXL>] ("Between 1978 and 2015, the rate of growth of the incarceration of women in state prisons has vastly outstripped that of men. Women's incarceration grew 834%, more than twice the rate of growth for their male counterparts. . . . 72% of women made less than \$23,000 annually, compared to only 57% of men for whom the same was true. In Florida, 14.8% of working-age women have incomes below the poverty line as compared to 11.6% of men. 25.2% of Black women in Florida are living in poverty as compared to 11.9% of white women. Post incarceration, women are more likely to be unemployed than men. The unemployment rate among formerly incarcerated people between the ages of 35-44 was 43.6% among Black women (compared to 35.2% of Black men) and 23.2% among white women (compared to 18.4% of white men.)" (citations omitted)).

78. *Jones v. DeSantis*, 462 F. Supp. 3d at 1239; see also U.S. CONST. amend. XV, *supra* note 4.

79. Note Judge Hinkle's statement suggesting that the disparate impact of SB7066 would fall on men rather than women. *Jones*, 462 F. Supp. 3d at 1240. The Eleventh Circuit did not address this "[b]ecause we conclude that the district court correctly required evidence of intent to discriminate." *Jones v. Governor of Fla.*, 15 F.4th 1062, 1065 n.2 (11th Cir. 2021). It is important to note that the Nineteenth Amendment does not apply only to women. It also applies to state statutes that abridge the rights of men since it prohibits denial or abridgment of voting rights on account of sex. Thus, if disparate impact were the threshold standard for a Nineteenth Amendment claim, a state statute that disproportionately abridges *either* women's or men's right to vote could potentially violate the Nineteenth Amendment. See Steve Kolbert, *Does the Woman Suffrage Amendment Protect the Voting Rights of Men?*, 43 SEATTLE U. L. REV. 1147 (2021). Recently, some have argued for the Nineteenth Amendment's extension beyond this strict binary conception to include the voting rights of transgender and gender non-conforming citizens. See Michael Milov-Cordoba & Ali Stack, *Transgender and Gender Non-Conforming Voting Rights After Bostock*, 24 U. PENN. J.L. & SOC. CHANGE 323 (2021).

interpretation of the meaning and scope of the Nineteenth Amendment supports judicial adoption of this lower threshold standard.

III. INTERPRETING THE NINETEENTH AMENDMENT HOLISTICALLY

A. Text

A direct Nineteenth Amendment claim calls on a court to evaluate whether a state or federal statute denies or abridges a citizen's right to vote on account of their sex. In considering the meaning and scope of the Nineteenth Amendment, what if a court were to move beyond strict textual analogy to the Fifteenth Amendment? Courts might engage in an independent analysis and holistic interpretation of the Nineteenth Amendment—one animated by its unique history, its text, and its purposes—while taking into account empirical evidence of the unique ways in which women are socially and economically subordinated. The following part investigates what such an approach that “uses the constitutional text as a constraint on completely open-ended adjudication, but permits some interpolation [and] extrapolation” might look like.⁸⁰ The section also explains how history should inform such a holistic interpretation in a variety of ways.⁸¹

As noted above, such an interpretive exercise might begin with the text of the amendment. Amar characterizes the Fifteenth and Nineteenth as being *in pari materia*.⁸² He suggests that there is a presumption that similar words should be read in similar ways.⁸³ Section 1 of the Nineteenth Amendment provides that “[t]he 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.”⁸⁴ Clearly, the Amendment is intended to constrain state laws that deny or abridge voting. However, note that an earlier version of what became the Nineteenth Amendment provided for something quite different: a more affirmative or substantive right of suffrage linked to citizenship status. Introduced into Congress on March 15, 1869—within a few weeks of enactment of the Fifteenth Amendment on February 27, 1869—the initial draft of what would have been the Sixteenth Amendment, provided:

The right of suffrage in the United States shall be based on citizenship, and shall be regulated by Congress, and all citizens of the United States, whether native or naturalized, shall enjoy this right equally, without any distinction or discrimination whatever founded on sex.⁸⁵

80. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 955 (2002).

81. For the variety of ways in which history informs constitutional argument, see Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 355–58 (2020).

82. Amar, *supra* note 67, at 800 n.202.

83. *Id.* at 761.

84. U.S. CONST. amend. XIX.

85. Siegel, *She the People*, *supra* note 13, at 974. The current version of the text was not introduced in the House of Representatives until 1882 and not considered by the Senate until 1885, fifteen years after the Fifteenth Amendment had been ratified. *See id.* at 974 n.76. The debates about woman suffrage

That earlier text had as much to do with the Fourteenth Amendment, on whose citizenship provision women based their claims to vote, as it did the final version of the Fifteenth Amendment.⁸⁶ With the U.S. Supreme Court's 1875 decision in *Minor v. Happersett*, which rejected suffragists' claims that the Privileges or Immunities Clause of the Fourteenth Amendment gave them the right to vote, suffragists turned in earnest to advocating for a federal voting amendment.⁸⁷ This proposed woman suffrage amendment was, in large part, a reaction to the exclusion of women from the Reconstruction Amendments and the inclusion of the word "male" in Section 2 of the Fourteenth Amendment.⁸⁸ The proposal came in the wake of congressional debates that clearly distinguished the kind of discrimination and subordination suffered on account of race from that experienced on account of sex in order to justify extending the vote to Black men but not to women:

Ladies are part of the family with most of us [I]nasmuch as the negro is not even of the white family[,] is of a different race and so treated . . . you have no right to strip him of every attribute of manhood You do not associate with him; you did not affiliate with him . . . you do not sympathize with him None of these causes operate in regard to the family.⁸⁹

Another member of Congress argued:

[T]here is not the same pressing necessity for allowing females as there is for allowing the colored people to vote; because the ladies of the land are not under the ban of a hostile race grinding them to powder. They are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female.⁹⁰

These statements capture the arguments of the time which asserted that citizenship was inherently masculine and that women were sufficiently "virtually"

were grounded in citizenship claims under the Fourteenth and the Fifteenth Amendments in the mid-nineteenth century. *Id.* at 969 n.59.

86. *Id.* at 968–76.

87. *Minor v. Happersett*, 88 U.S. 162 (1874). See also Siegel, *She the People*, *supra* note 13, at 973–75 (describing the suffragists' "New Departure" campaign that included the trial of Susan B. Anthony for illegal voting and ended with the decision in *Minor v. Happersett*, after which suffragists turned to advocating for a new federal woman suffrage amendment).

88. Siegel, *She the People*, *supra* note 13, at 968–69.

89. *Id.* at 984 n.108 (citing CONG. GLOBE, 39th Cong., 1st Sess. 410 (1866) (statement of Rep. Bromwell)).

90. *Id.* at 985 n.109 (citing CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866) (statement of Sen. Wade)). Senator Frelinghuysen asserted that, "there is a vast difference between the situation of the colored citizen and the women of America." *Id.* at 986 n.111 (citing CONG. GLOBE, 39th Cong., 2d Sess. 66 (1866)).

represented by fathers and husbands.⁹¹ These mainstays of anti-suffrage arguments highlight the differences between the way the public saw the subordination of Black men differently from that of women in the mid-nineteenth century. However, women’s rights activists on the pro-suffrage side argued that the subordination of women was also the product of a legal regime: coverture. These women sought the vote in order to dismantle that legal regime. Black suffragists argued that they were doubly subordinated by both the legal regimes of chattel slavery and coverture.⁹² The structural effects of both legal regimes continue to the present day.⁹³ Yet the differences in those legacies, in terms of how they intersect with state voting laws, militate for at least an independent reading of the two amendments.

Such a reading could focus on the major *distinction* between the Fifteenth and Nineteenth Amendments—the word “sex” instead of the phrase “race, color, or previous condition of servitude,” the language in each amendment which defined the expanded class of citizens to be included in those eligible to govern. Courts have focused on the similarities in language between the amendments, but their fundamental difference is that language. Different understandings of the two groups originally covered by the Fifteenth and the Nineteenth Amendments, in conjunction with the structural barriers those groups faced in terms of achieving full citizenship, warrant an independent analysis and holistic interpretation of the Nineteenth Amendment, especially in the context of facially neutral voting laws, described in Part IV below. As noted in Part II above, Akhil Amar suggests there is a presumption that similar words within the text should be construed the same way. However, he concedes the presumption can be overcome, especially when the problems addressed by two similar provisions have diverged.⁹⁴ He notes that if the problems the two clauses were meant to address have changed, they can be read differently.⁹⁵ And he uses the Fifteenth and the Nineteenth Amendments as

91. LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* 33–55 (2015); *see also* CATHLEEN CAHILL, *RECASTING THE VOTE: HOW WOMEN OF COLOR TRANSFORMED THE SUFFRAGE MOVEMENT* 192 (2020) (making a similar connection between manhood and citizenship and describing Congressional enactment of the Veteran’s Citizenship Act on Nov. 6, 1919, granting “every American Indian who served in the Military or Naval Establishment of the United States during [World War I] . . . full citizenship with all the privileges pertaining thereto,” five years before Congress conferred full citizenship on all Native Americans in 1924).

92. ROSLYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN AND THE STRUGGLE FOR THE VOTE, 1850–1920*, at 36–42 (1998).

93. *See, e.g.*, Dorf, *supra* note 80, at 979 (“The fact that a characteristic was historically a basis for denial of the franchise—thereby necessitating a constitutional suffrage amendment in an earlier era—shows that people are likely to be vulnerable to discrimination on that basis even after the suffrage amendment.”). Dorf notes there is an affirmative argument that, “the Constitution’s commitments to equality in voting are tied up with and implement its commitment to equality in general. . . . [T]he historical struggles that gave rise to the Fifteenth and Nineteenth Amendments are seen as struggles for equality, not just for technical changes in the rules of voting. Accordingly, the Fourteenth Amendment’s Equal Protection Clause should be read in the light of, rather than in juxtaposition to, the voting rights amendments.” *Id.* at 979–80.

94. Amar, *supra* note 67, at 761. *See* discussion *supra* Section II.

95. *Id.* at 800.

an example of when such a different construction might be justified, “despite their textually parallel form.”⁹⁶ In addition to the ways in which the public understood the subordination of women differently described above, Part IV below discusses how a court might determine that the “underlying problems” of racial and sexual subordination have evolved differently by looking at empirical evidence.

The Fifteenth and Nineteenth Amendments both use the phrase “on account of.” The Nineteenth’s text prohibits state action that denies or abridges a citizen’s right to vote “on account of sex.” In his concurrence in the *Jones* cross-appeal, Judge Jordan asserted that the phrase “on account of” has been understood to mean “because of” since the late 1700s.⁹⁷ In 1922, close in time to the Nineteenth’s ratification, Webster’s Dictionary defined “because” to mean “on account of” or “by reason of.”⁹⁸ In the Eleventh Circuit’s earlier opinion in *Jones*, three judges in the majority acknowledged that dictionaries over the years have defined the two phrases “in circular reference to one another.”⁹⁹ Yet they distinguished between “on account of” and “by reason of”—the latter phrase used in the Twenty-Fourth Amendment’s ban on poll taxes. Those judges asserted that “on account of” should be construed as a “but-for-causation test” but that “by reason of” should not. The judges argued that “interpreting the phrase ‘by reason of’ only as a synonym for ‘on account of’ violates well-established principles of textual interpretation.”¹⁰⁰

However, viewed in light of the other voting amendments such as the Twenty-Sixth Amendment, which uses the same “on account of” language, one might argue that the operative characteristic—race, sex, or age—should matter. State voting laws that draw lines based on age may be easier for a state to justify than state voting laws that draw lines based on sex or race, which are generally subject to more heightened scrutiny. For example, “[t]he [Twenty-Sixth] Amendment itself, even while condemning most age discrimination in voting, authorizes denying the franchise to citizens under the age of eighteen. This fact distinguishes

96. *Id.* at 800 n.202; *see id.* at 800 (“Another possible weakness of intratextualism is that it invites strong inferences about constitutional meaning from the document’s grammar and syntax. For example, interpolation-style intratextualism presumes that two clausal commands should receive identical treatment because they feature the same basic grammar and syntax. But even if two clauses were initially designed to work together, if their underlying problems have evolved in different ways, something must give.”).

97. *Jones v. Governor of Fla.*, 15 F.4th 1062, 1069 (11th Cir. 2021).

98. *Because*, WEBSTER’S NEW MODERN ENGLISH DICTIONARY (Consolidated Book Publishers 1922) [hereinafter WEBSTER’S].

99. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1041 (11th Cir. 2020).

100. *Id.* at 1043–44. The majority opinion states that “the Nineteenth Amendment forbids the use of sex as a voter qualification in the same way [as the Fifteenth Amendment.]” *Id.* at 1043. It also discusses both the Fifteenth and Nineteenth Amendments in terms of “voter qualifications” but does not extend its analysis to voter access. *Id.* (Note that three judges from the majority did not join in this part of the opinion (III-B-2)).

the Twenty-Sixth from the Fifteenth and Nineteenth Amendments” despite their virtually identical text.¹⁰¹

The Nineteenth Amendment specifies that the nature of the regulated state action is the denial or abridgement of voting. The question then becomes what kind of state action constitutes denial or abridgement of the vote. Clearly, state laws that explicitly limited voting to “males” were within the ambit of the Amendment.¹⁰² But did the Nineteenth extend to facially neutral laws? Those who enacted it in 1919 and ratified it in 1920 would have known that the Supreme Court had already interpreted the first federal voting amendment to apply to facially neutral laws. In 1915, the Supreme Court announced in *Guinn v. United States* that the Fifteenth Amendment applied to such laws when it struck down an amendment to the Oklahoma constitution that exempted voters whose ancestors had been eligible to vote prior to January 1, 1866 from literacy tests.¹⁰³ The Court could not find any reason for the state’s enactment of the so-called “grandfather clause” other than to circumvent the purposes of the Fifteenth Amendment.¹⁰⁴ This knowledge of *Guinn* is salient when evaluating the public’s understanding of the Nineteenth Amendment. In light of *Guinn*, the public would have understood that the phrase “on account of sex” did not, as a matter of plain meaning, require explicit use of sex-based classifications on the face of a state law in order for a court to find a statute unconstitutional under the Nineteenth Amendment.¹⁰⁵

While attending to constitutional text is important in terms of constraining judicial discretion, a holistic interpretation process does not have to end with the

101. Dorf, *supra* note 80, at 990. Note that several recent federal decisions have unfortunately simply reasoned by strict textual analogy to the Fifteenth Amendment in adopting a threshold standard for Twenty-Sixth Amendment claims. Compare *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364 (1st Cir. 1975) with *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wisconsin 2016); *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. Apr. 25, 2016), *rev’d*, 831 F.3d 204, (4th Cir. July 29, 2016); *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D. Va. 2016), *aff’d*, Lee, 843 F.3d 592 (4th Cir. 2016); and *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018). See *infra* note 223 (Part IV) for a discussion of these cases.

102. MONOPOLI, *supra* note 2, at 71. In *Brown v. City of Atlanta*, 109 S.E. 666 (Ga. 1921), the Georgia Supreme Court found that the Nineteenth Amendment struck the word “male” and left the remainder of the law defining who may become qualified voters intact. *Id.* at 672.

103. *Guinn v. United States*, 238 U.S. 347 (1915).

104. *Id.* at 365. One can infer from the text that the Court found a discriminatory purpose, although it did not articulate an explicit intentional discrimination test until much later into the twentieth century. The *Guinn* Court explained its reasoning as follows: “In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by, in substance and effect, lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment.” *Id.* at 364.

105. *Id.*

text itself.¹⁰⁶ Courts should move beyond the text of the Nineteenth Amendment to consider its meaning in historical context. As Michael Dorf explains:

History can and should be studied as part of the process of constitutional interpretation because history teaches object lessons, and those object lessons take on special importance when a historical struggle yields textual change. Moreover, when we look to history understood in this way, we find that it supports, or at least does not undermine, the enterprise of extrapolating a general gender-equality norm from the Nineteenth Amendment.¹⁰⁷

What happens when the history preceding and following such a historic struggle has been erased? While some would argue that the Nineteenth Amendment “only” concerned voting, “voting was *the* central question” for nineteenth-century Americans, and “[they] knew what woman suffrage signified, even if its full significance to *them* is no longer legible to *us* today.”¹⁰⁸ Thus, it follows that advocates must reconstruct that history, amplifying the voices of the disenfranchised, so that courts can evaluate the context within which the text was developed, enacted, ratified, and subsequently construed. The following section looks at how the public at large understood the Nineteenth Amendment when it was ratified, with particular focus on how its advocates and its opponents described its intended constitutional purposes and social consequences.

Given the fifty years between ratifications and the many Supreme Court decisions interpreting the Fifteenth Amendment and its enforcement legislation during that period, it seems reasonable to suggest that the original public understanding of the second federal voting amendment in 1920 was more fulsome than the first federal voting amendment in 1870.¹⁰⁹ The federal amendment was known in 1920 as the “woman suffrage amendment.”¹¹⁰ Webster’s Dictionary defined “woman suffrage” as “the legalized right of women to cast a vote”¹¹¹ and “vote” as “an expression of choice or preference for some particular candidate . . . by ballot.”¹¹² It defined “ballot” as “the system of secret voting by

106. Dorf, *supra* note 80, at 984 (noting one can “use[] constitutional text as a source of value to begin, though not necessarily to end, a process of holistic construction”).

107. *Id.* at 981.

108. Dorf, *supra* note 80, at 980 (citing Siegel, *She the People*, *supra* note 13, at 1045). See also Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19 (2022).

109. This paper uses the phrase “original public understanding” rather than “original public meaning” to signal that while the suggested approach begins with the text, it should also be informed by constitutional history, purposes, structure, and institutional relationships. With regard to the function of “original public meaning” in originalist interpretation, see Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9–10 (2018).

110. MARJORIE J. SPRUILL, *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 12 (2d ed. 2021).

111. *Woman suffrage*, WEBSTER’S, *supra* note 98, at 910.

112. *Vote*, WEBSTER’S *supra* note 98.

the use of balls, tickets, or papers.”¹¹³ Thus, a court might view the words of the Nineteenth Amendment as prohibiting any abridgement (defined as to “curtail” or “shorten” in the same 1922 dictionary) of a woman’s eligibility for, or ability to engage in, the *system* of voting.¹¹⁴

Some state courts that were engaged in construction of the Nineteenth Amendment, in the context of state statutes about preconditions to voting like poll taxes, reflected this public understanding. They understood the Nineteenth to affect the state’s *system* of voting and pre-conditions to voting, like registration rules around paying poll taxes. For example, in *Graves v. Eubank*, the Alabama Supreme Court interpreted the Nineteenth to extend not just to voting rules *per se*, but to encompass poll tax payment and exemption requirements.¹¹⁵ Poll tax statutes and constitutional provisions were arguably promulgated pursuant to the state’s general taxing power, an independent power related but not identical to its power to decide which groups of citizens were eligible to vote. Thus, at least some courts understood the Nineteenth as having import for state authority in areas beyond voting and that the amendment could affect the system of voting as a whole.¹¹⁶

If one looks at the public discourse around the amendment’s meaning, it is important to reiterate that the public in 1920 understood voting to be the apex of political rights, which subsumed all other political rights. Thus, many—though not all—members of the public, understood the Nineteenth as extending to subsidiary political rights, like jury service and holding public office. In other words, it meant women, as citizens, were entitled to robust political participation in democratic governance in all its forms. Why did some members of the public understand a federal voting amendment in this way? Because they were familiar with the enforcement acts promulgated under the Reconstruction Amendments.¹¹⁷ In a National Woman’s Party editorial in *The Suffragist*, the leadership described the enforcement legislation they were seeking pursuant to the Nineteenth, as being

113. *Ballot*, WEBSTER’S, *supra* note 98.

114. *Abridgement*, WEBSTER’S, *supra* note 98.

115. *Graves v. Eubank*, 87 So. 587 (Ala. 1921). The Alabama Supreme Court cited *Neal v. Delaware*, 103 U.S. 370 (1880) and *Guinn v. United States*, 238 U.S. 347 (1915) in adopting a capacious interpretation of the Nineteenth Amendment’s impact on state law. Untethered by federal guidance in the form of either Congressional enforcement legislation or federal case law, the *Graves* Court in effect held that the Nineteenth could affect other state constitutional doctrine: the general taxing power. As explained in *infra* Part IV, the failure of enforcement legislation gave state courts broad discretion to interpret the Nineteenth Amendment either narrowly or more capaciously and to infuse that interpretation with their own normative commitments.

116. Note that the U.S. Supreme Court in *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), indicated that the Nineteenth Amendment could not affect a state’s authority to levy a tax. That decision came in 1937, years after *Graves v. Eubank* and ratification of the Nineteenth Amendment.

117. The so-called Force Acts included An Act to protect all persons in the United States in their Civil Rights, 14 STAT. 27 (1866); An Act to enforce the Rights of Citizens of the United States to vote in the several States of this Union, 16 STAT. 140 (1870); An Act to Amend an Act approved May 31, 1870, ch. 99, 16 STAT. 433 (1871); An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, 17 STAT. 13 (1871); and An Act to Protect all Citizens in their Civil and Legal Rights, 18 STAT. 335 (1875).

“modelled upon the one applying to the amendment enfranchising the negro men of this country.”¹¹⁸ The 1922 version of Webster’s included definitions of both the Civil Rights Act and the Civil Rights Bill, so they were clearly in the public lexicon. “Civil Rights Act” is defined as “[a]n act of Congress in 1875 providing for equal enjoyment by all persons, without regard to race, of hotels, public conveyances, etc.”¹¹⁹ And “Civil Rights Bill” is defined as “[a] bill passed by Congress in 1866 securing equal civil and political rights to all citizens, irrespective of race and previous condition of slavery.”¹²⁰

No similar legislation emerged after ratification of the Nineteenth, depriving it of the chance for federal courts to opine more extensively about its meaning and scope.¹²¹ This was unlike the cases that followed ratification of the Reconstruction Amendments, like *Strauder v. West Virginia*¹²² and *Neal v. Delaware*,¹²³ which involved criminal convictions that had been removed from state to federal court.¹²⁴ The U.S. Supreme Court in *Strauder* reasoned extensively about the purposes of the Fourteenth Amendment and its relation to the other Reconstruction amendments. The Court cited the *Slaughter-House Cases* to explain its understanding that the Fourteenth Amendment should be interpreted as applying predominantly to formerly enslaved persons, rather than other groups. The Court stated that the Fourteenth was “one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”¹²⁵ The *Strauder* Court went on at length

118. *An Editorial*, 8 SUFFRAGIST 301, 301 (1920); see also *infra* Part IV.

119. *Civil Rights Act*, WEBSTER’S, *supra* note 98.

120. *Civil Rights Bill*, WEBSTER, *supra* note 98.

121. See MONOPOLI, *supra* note 2, at 43–67; *infra* Part IV.

122. 100 U.S. 303 (1879).

123. 103 U.S. 370 (1880).

124. I invoke *Strauder* and *Neal* here not as formal legal authority, but for their impact on the public understanding and expectations around the meaning and scope of a second federal voting amendment in 1920. I would argue that it was quite reasonable for suffragists and others to expect that, as the Fourteenth and Fifteenth Amendments were invoked in Supreme Court discourse around extending jury service to black men on an equal basis, a similar discursive connection would be made by courts around the meaning of the Nineteenth Amendment and women serving on juries. For example, “[e]arlier in the [Strauder] opinion, the Court expressly associates the Fourteenth and Fifteenth Amendments [and it] describe[s] the Fourteenth Amendment as ‘one of a series of constitutional provisions having a common purpose.’” Dorf, *supra* note 80, at 976 n.73.

125. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879). There were, of course, several other significant U.S. Supreme Court cases beyond *Strauder* and *Neal* that interpreted, and often cabined, enforcement legislation enacted pursuant to the Reconstruction Amendments. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214, 217 (1875); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); and *The Civil Rights Cases*, 109 U.S. 3 (1883). While often limiting the scope of the legislation, one of the points in this paper is to note that these cases generated an extensive discussion by the Court about the purposes of the Reconstruction Amendments and their relationship to each other, and the legislation at hand provided insight into the scope and meaning of the amendments. For example, the *Reese* Court makes clear that “[t]he Fifteenth Amendment does not confer the right of suffrage upon any one.” *Reese*, 92 U.S. at 217. This discursive effect was missing around the Nineteenth Amendment, in part because of the lack of enforcement

about the purposes and meaning of the Fourteenth.¹²⁶ The *Neal* Court did the same for the Fifteenth, asserting that it was:

[b]eyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election.¹²⁷

The Nineteenth was deprived of that discursive process to more fully parse and develop its meaning. Congress failed to promulgate enforcement legislation under its Section 2 as a result of racist opposition. This was fueled by fears of a “second Reconstruction” on the part of white southern politicians. White suffragists, who needed these southern congressional votes for the Equal Rights Amendment to which the National Woman’s Party had pivoted immediately after ratification of the Nineteenth, quietly withdrew their advocacy for such enforcement legislation within a year of ratification.¹²⁸ Such legislation would have facilitated concurrent jurisdiction and federal court review of Nineteenth Amendment violations. The resulting gap in federal discursive development left state courts without much guidance as to how broadly (or narrowly) the Nineteenth should be applied.¹²⁹

The *Strauder* Court went on to suggest that the removal power under enforcement legislation was important to the protection of rights under an amendment because removing a case from state court, “in which the right is denied by the State law, into a Federal court, where it will be upheld” is “one very efficient and appropriate mode of” protecting constitutional rights.¹³⁰ The Court emphasized that the Fourteenth was about removing “badges of inferiority.” (This concept of removing badges of inferiority could arguably justify invalidating state action in voting practices today that reifies sex-based subordination.)¹³¹ Thus, the failure of enforcement legislation helps explain the Nineteenth’s constitutional under-

legislation under Section 2, which resulted in limited opportunities for a federal forum in which to parse its scope and meaning. Such constitutional development was thus left to state courts engaging in construction and concomitant discussion, untethered by very little—if any—federal guidance about the meaning of the bare bones of the amendment. See MONOPOLI, *supra* note 2, at 43–115.

126. In expounding on the meaning of the Fourteenth Amendment, the *Strauder* Court unfortunately indicated that it was still perfectly fine for states to limit jury service to male citizens. *Strauder*, 100 U.S. at 310 (“We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males . . . We do not believe the Fourteenth was ever intended to prohibit this.”).

127. *Neal*, 103 U.S. at 389.

128. See *infra* Part IV; see also MONOPOLI, *supra* note 2, at 62–63.

129. See MONOPOLI, *supra* note 2, at 113.

130. *Strauder*, 100 U.S. at 311.

131. *Id.* at 308.

development after its ratification.¹³² The thin understanding of the amendment that emerged in the decade after its ratification was, in part, a product of state courts untethered by Congressional or federal judicial guidance as to what the amendment meant, or how it related to other amendments.¹³³ Part IV below describes how courts today could fill that discursive gap.

In evaluating the public understanding of the amendment in 1920, one must take into particular account the voices of those who advocated ratification of the Nineteenth Amendment.¹³⁴ Therefore, in interpreting the amendment, courts should pay close attention to those who were instrumental in developing the amendment, but who were generally excluded from formal participation in the political process.¹³⁵ In 1920, women were not entitled to vote in most states. There was only one female member of Congress who voted on an early version of the Nineteenth Amendment.¹³⁶ Thus, courts should read the voices of the disenfranchised back into the interpretive process and give them significant weight.

What did the suffragists, the primary institutional actors in civil society most instrumental in persuading Congress to enact the Nineteenth Amendment, think it meant? And what did their opponents, the anti-suffragists, think? Many suffragists spoke in terms of the ratification of the Nineteenth Amendment as securing their “political freedom” as opposed to full social, economic, and legal equality. In a telegram from one supporter to Alice Paul, the sender noted, “the long struggle of American women for political freedom is at and [sic] end.”¹³⁷ That was the suffragists’ understanding of what had been achieved when the Nineteenth was

132. See MONOPOLI, *supra* note 2.

133. See *infra* Part IV.

134. See James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 677 (2016) (rejecting the idea of a single public and proposing that such a search for meaning must incorporate multiple “partial publics” including those excluded groups like women and minorities). The author argues, “that there was no definitive ‘public’, but instead a series of partial publics, some who were legally and socially privileged and dominant (white men), and others who operated as dissenting communities which developed their own normative discourse and challenged dominant views and interests (feminists, African-Americans).” *Id.* He suggests that “these dissenting communities, or counterpublics, provide important sources of public discourse and activity that speak to precisely the questions and ideas raised in constitutional amendments, and particularly in the Reconstruction Amendments.” *Id.*

135. I use the phrase “generally excluded” because by 1920, fifteen states had granted women full suffrage, and in twelve states, women had partial suffrage as Congress debated enactment of the Nineteenth Amendment in 1919. See MONOPOLI, *supra* note 2, at 160 n.13.

136. See JAMES L. LOPACH & JEAN A. LUCKOWSKI, JEANNETTE RANKIN: A POLITICAL WOMAN 146 (2005).

137. See MONOPOLI, *supra* note 2, at 159 n.7. See also Telegram from Bertha W. Fowler to Alice Paul (Aug. 27, 1920) (available as part of the NWP Records, Manuscript Division, Library of Congress, Box II: 6). And Alice Paul herself wrote, “The women who have been working for the enfranchisement of all women through the passage of the National Suffrage Amendment express to you their deep appreciation of the splendid aid which California women voters have given in the campaign for the political freedom of women.” Telegram from Alice Paul to Mrs. John R. Haynes, California League of Women Voters Chair (Aug. 28, 1920) (available as part of the NWP Records, Manuscript Division, Library of Congress, Box II: 6).

ratified.¹³⁸ While many suffragists thought that ratification also meant even broader emancipation, one overlapping area of agreement was that it meant that women were now full citizens, members of the political community who had the right to equal participation in the political process.¹³⁹ Even anti-suffragists presumably agreed with this view, which is why they fought so hard against a federal suffrage amendment.¹⁴⁰ They opposed the fundamental shift that such equal political participation and self-governance would create, allowing women to move from the private into the public sphere. This shift threatened to disrupt the social order and weaken patriarchal institutions, including the family.¹⁴¹

While white suffragists excluded Black suffragists over the course of the suffrage movement, and while the rhetoric around the enactment and ratification process of the Nineteenth Amendment was racist and nativist, Black suffragists still advocated for its passage.¹⁴² For example, in 1915 prominent Black suffragist Mary Church Terrell wrote in W.E.B. DuBois's *The Crisis*, trying to persuade Black men to support the woman suffrage amendment:

Even if I believed that women should be denied the right of suffrage, wild horses could not drag such an admission from my pen or lips, for this reason:

138. Although Alice Paul characterized ratification of the federal amendment as the political freedom of women, she sometimes spoke in terms of strict formal equality or neutrality, particularly when making tactical moves to avoid supporting efforts to address racial discrimination. In writing to white NAACP co-founder Mary White Ovington, Paul said, “The National Woman’s Party has only one object, the passage of an amendment to the National Constitution removing the sex qualification from the franchise regulations . . . All that our amendment would do would be to see the franchise conditions for every state were the same for women as for men.” Letter from Alice Paul to Mary White Ovington (Mar. 31, 1919) (available through ProQuest NAACP Papers, Women’s Suffrage folder, 001517-002-0678).

139. Suffragists like socialist Crystal Eastman, for example, asked, “What . . . do we mean by a *feminist organization*? It does not mean mere women juries, congressmen, etc., but it means to raise the status of women, making them self-respecting persons.” VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN WORKERS AND THE MINIMUM WAGE* 116 (1994).

140. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 77 (2011) (“One popular objection to enfranchising women was that women were unable to fulfill the duties that are connected to political rights: jury duty and military service. Both require time away from the home and care of children. The opponents of the Nineteenth Amendment thus argued that it was fair and appropriate to deny women the right to vote.”). It is also worth noting that Calabresi and Rickert argue that women were not seen as a “caste” akin to Black men in 1870 when the Fourteenth Amendment was ratified. But “[s]ex discrimination, although not generally understood to be a form of caste in 1868, had come to be recognized as a form of caste by 1920, when the Nineteenth Amendment was ratified. The definition of caste had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution.” *Id.* at 9–10.

141. See Siegel, *supra* note 21. For similar concerns at the time about the impact of empowering women in other spheres, see Sarah C. Haan, *Corporate Governance and the Feminization of Capital* 17 (Dec. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740608 (“The influential Harvard economist, William Z. Ripley, was particularly direct in his critique of women stockholders. In his view—expressed only seven years after the Nineteenth Amendment gave women the right to vote in political elections—shareholder governance was *less* appropriate for women’s participation than political governance.”).

142. See generally TERBORG-PENN, *supra* note 92, at 41.

precisely the same arguments used to prove the ballot be withheld from women are advanced to prove that colored men should not be allowed to vote. The reasons for repealing the Fifteenth Amendment differ but little from the arguments advanced by those who oppose the enfranchisement of women.¹⁴³

In other words, “[f]or Terrell and other African American suffragists, saving the Fifteenth Amendment and extending the vote to women were two fronts in the same fight.”¹⁴⁴ As Black suffragist leader Adella Hunt Logan wrote in *The Colored American Magazine* in 1905:

If white American women, with all of their natural and acquired advantages, need the ballot, that right protective of all other rights; if Anglo Saxons have been helped by it—and they have—how much more do Black Americans, male and female need the strong defense of a vote to help secure them their right to life, liberty and the pursuit of happiness? And neither do the colored citizens of the Republic lag behind in the fundamental duties of tax-paying and using the elective franchise. The price of their freedom as far as that freedom has progressed, was too dear a price to be treated lightly.¹⁴⁵

Even suffragists who would not benefit from the Nineteenth Amendment because they could not be citizens, like Native American women and Asian American immigrant women, spoke out in favor of the federal woman suffrage amendment.¹⁴⁶ Mabel Ping-Hua Lee, who emigrated from China to the United States as a child, was a suffragist who spoke about the status of women in the United States, in contrast to the new Chinese nation which enfranchised women in 1912. While addressing a group of notable American suffragists that year, Lee

spoke eloquently on the topic, concluding with a plea for equality and a condemnation of the racism that limited Chinese women in the United States. . . . For Chinese women, suffrage was important, and they were clearly in support of it, but they also recognized that unlike their white sisters, the political arena was not the only site from which they were excluded, nor was their exclusion solely on the basis of their sex.¹⁴⁷

143. Liette Gidlow, *The Sequel: The Fifteenth Amendment, The Nineteenth Amendment, and Southern Black Women's Struggle to Vote*, 17 *J. GILDED AGE & PROGRESSIVE ERA* 433, 438 (2018).

144. *Id.*

145. TERBORG-PENN, *supra* note 92, at 60–61 (citing Adella Hunt Logan, *Woman Suffrage*, *COLORED AM. MAG.*, Sept. 1905, at 489).

146. Native Americans were not made citizens by federal statute until 1924, and Asian American immigrants were not allowed to become naturalized citizens until the 1940s and 1950s. See *MONOPOLI supra* note 2, at 155 n.5.

147. CATHLEEN D. CAHILL, *RECASTING THE VOTE: HOW WOMEN OF COLOR TRANSFORMED THE SUFFRAGE MOVEMENT* 32 (2020) (citing *Suffrage Notes*, *BUFFALO (N.Y.) ENQUIRER*, Apr. 12, 1912; *Education of the Chinese Women*, *BUFFALO (N.Y.) ENQUIRER*, Apr. 12, 1912; *Chinese Women Complain*, *DES MOINES REGISTER*, Apr. 17, 1912).

Similarly, other women of color like Native American suffragist Gertrude Simmons Bonnin (Zitkala-Ša) spoke often about the intersection of race, sex and citizenship, and the significance of suffrage for all Americans.¹⁴⁸ While conventional interpretive methodologies often look only to those formal office-holders who enacted and ratified constitutional amendments, the broader view of women as constitution-makers described above is the proper approach to interpreting the Nineteenth Amendment. These voices of the disenfranchised who spoke about the meaning of the Nineteenth, should be read together with those of legislators, described below, who enacted and ratified the amendment.

B. Legislative Intent

There are several comprehensive legislative histories in the legal scholarship that detail the Congressional debates prior to the enactment of the Nineteenth Amendment. Steve Kolbert makes a persuasive case that some of those debates were around motherhood and childcare duties.¹⁴⁹ This alone distinguishes them from debates around the Fifteenth Amendment. And Steven Calabresi and Julia Rickert argue that, “[t]he legislative history of the Nineteenth Amendment reveals important things about its original public meaning in 1920: supporters of the Nineteenth Amendment believed and said that it would make women equal to men under the law.”¹⁵⁰

This idea that the amendment would make women the equals of men—particularly in their ability to fully participate in democratic governance—was reflected in the state ratification debates. In the Tennessee General Assembly, House member Tom Riddick, chair of the Constitutional Amendment Committee and suffrage supporter said, “[i]sn’t it time for the South to quit being the tail-end of creation, the backyard of civilization, remaining backward on the march of progress.”¹⁵¹ Riddick described opposition to women suffrage as “a relic of barbarism,” and quoted the Golden Rule and the Declaration of Independence asking, “[i]f women are human beings, why shouldn’t the first sentence of the Declaration of Independence apply alike to them?”¹⁵² But anti-suffragist Creed Boyer said, “Women are the best thing God ever made . . . and I honor women above all humankind. But I would not pollute them by allowing them to wade

148. *See id.* at 20.

149. Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 557 (2016) (quoting one senator who “argued that if mothers could vote and were more involved in politics, it would better enable them to train their children in civic responsibility.”).

150. *See* Calabresi & Rickert, *supra* note 140, at 86–87 (quoting Senator Miles Poindexter of Washington to recognize women “as equal partners in the State as well as in business and in the home”). Note that there were fifteen states in which women had full suffrage, and twelve more where they had partial suffrage, as Congress debated enactment of the Nineteenth Amendment in 1919. MONOPOLI, *supra* note 2, at 160 n.13.

151. ELAINE WEISS, *THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE* 285 (2018).

152. *Id.*

through the filthy waters of politics.”¹⁵³ Creed said that he and his sons could represent the women of their family at the polls.¹⁵⁴ State legislators who ratified the amendment, or who opposed ratification, understood the amendment would allow women broad access to politics and give them an equal role in democratic governance.

Of course, those involved in ratifying the amendment also invoked the connection with the first federal voting amendment, the Fifteenth Amendment, in more or less overtly racist ways.¹⁵⁵ Pro-suffrage House members in the Tennessee legislature argued, “[t]he working women of this country should have the same right accorded to Negro chauffeurs or a Negro porter.”¹⁵⁶ And House Speaker Seth Walker, arguing in opposition to ratification, invoked the threat of a race war: “Just as soon as this 19th Amendment—this Susan B. Anthony Amendment—is put upon a state like Georgia . . . Hell’s going to break loose in Georgia!”¹⁵⁷

In the Congressional debates, one can also see the historical connections between the enactment of the Nineteenth Amendment and the legacy of the Fifteenth Amendment.¹⁵⁸ “Senator Ellison ‘Cotton Ed’ Smith of South Carolina summarized the anti-suffrage position when he proclaimed that ‘the Southern Man who votes for the Susan B. Anthony [Nineteenth] Amendment votes to ratify the Fifteenth Amendment’ which he further described as ‘the crime of the century.’”¹⁵⁹ Yet, prior to enactment, Congress rejected a proposed amendment to the text that would have limited the Nineteenth to white women. “[E]arly in the debate Sen. Williams (D-MS) introduced an amendment calling for the term ‘white’ to be inserted before the word ‘person’ in the resolution.” Williams was an opponent of the Nineteenth Amendment, and his proposal was defeated.¹⁶⁰ The record is clear that white southern members of Congress were particularly afraid of Black women voting. “The substantial opposition to the adoption of the Nineteenth Amendment throughout the South was due to the perception of many

153. *Id.* at 285–86.

154. *Id.* at 286.

155. There were many ways in which white suffragists and their allies deployed racism to either assure potential supporters of woman suffrage that white female voters would offset Black voters, or to argue that it was unacceptable that white women could not vote when Black men and uneducated immigrant men could vote. A description of these arguments can be found in Ann D. Gordon’s Introduction to *AFRICAN AMERICAN WOMEN AND THE VOTE, 1837–1865*, at 1–9 (Ann D. Gordon & Bettye Collier-Thomas eds., 1997). See also *MONOPOLI*, *supra* note 2, at 21–67 for an extensive discussion of the National Woman’s Party’s tactical separation of race and sex in order to avoid losing white southern political support for the Equal Rights Amendment.

156. WEISS, *supra* note 151, at 287.

157. *Id.* at 289.

158. See Gidlow, *supra* note 143, at 435 (“The implications of the Fifteenth Amendment for woman suffrage were much on the minds of leading African American suffragists and many white supremacists who opposed them. Even as suffragists intensified their campaigns in the first and second decades of the twentieth century, some white supremacists worked to repeal the Fifteenth Amendment, trying to close the door once and for all to any path back to the ballot for black men.”).

159. Kimberly A. Hamlin, *The Nineteenth Amendment: The Fourth Reconstruction Amendment?*, 11 *CONLAWNOW* 103, 110 (2020) (quoting 66 *CONG. REC.* 618–19 (1919) (statement of Sen. Smith)).

160. Hasen & Litman, *supra* note 24, at 44 (citations omitted).

whites that Black women were eager to win the right to vote in the entire region.”¹⁶¹ The fear of Black women voting was connected to the fact that in several southern states, there were more Black than white citizens. For example, in South Carolina:

Black women were the largest group of voters. With this in mind, South Carolina’s Senator Ben “Pitchfork” Tillman responded to an article . . . which advocated that all women in the South be enfranchised. Citing the figures of the Black population in his state, Tillman wrote the editor: “A moment’s thought will show you that if women were given the ballot, the negro woman would vote as well as the white woman.” The consequences would be particularly disturbing because, Tillman wrote, “Experience has taught us that negro women are much more aggressive in asserting the ‘rights of the race’ than the negro men are. In other words, they have always urged the negro men on in the conflicts we have had in the past between the two races for supremacy.”¹⁶²

By rejecting Senator Williams’s proposed amendment to limit the Nineteenth Amendment to white women—in the face of the fear that Black women would vote in larger numbers than Black men—Congress protected the *de jure* right of Black women to vote.¹⁶³ Despite that constitutional move, southern states systematically disenfranchised Black women following ratification of the Nineteenth Amendment, much as their male counterparts had been effectively disenfranchised following Reconstruction.¹⁶⁴

161. TERBORG-PENN, *supra* note 92, at 131. We owe much to Terborg-Penn, whose chapter on the history of the Black women’s suffrage movement, written for a seminal 1987 conference, “Afro-American Women and the Vote: 1837–1965,” appeared in Rosalyn Terborg-Penn, *African American Women and the Vote: An Overview*, in *AFRICAN AMERICAN WOMEN AND THE VOTE, 1837–1865*, at 10–23 (Ann D. Gordon & Bettye Collier-Thomas eds., 1997), and whose 1998 book was central to much of the scholarship and discourse in the Nineteenth’s centennial year. Similarly, Paula Giddings’s 1984 book was a significant contribution to the scholarly understanding of the intersection of race and sex in the suffrage movement. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984).

162. GIDDINGS, *supra* note 161, at 123.

163. While the proposed amendment that would have explicitly limited the Nineteenth Amendment to white women was defeated, members likely understood that Black women, like Black men, would still be *de facto* disenfranchised in the southern states with literacy tests, poll taxes, and similar devices. See Zornitsa Keremidchieva, *The Congressional Debates on the 19th Amendment: Jurisdictional Rhetoric and the Assemblage of the US Body Politic*, 99 Q.J. SPEECH 51, 58 (2013).

164. In the 1890s, white southern suffragists began to work with northern suffrage leaders in the National American Woman Suffrage Association to pursue state campaigns to persuade white southern politicians to support woman suffrage by state amendment, while assuring them that the white female vote would be “a means of solving the South’s ‘negro problem.’” MARJORIE SPRUILL WHEELER, *NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES* 21 (1993). But it is important to note that their expediency strategy failed. The white southern suffragists were defeated “in every attempt to win full enfranchisement through state constitutional amendments.” *Id.* at 24. The nearest that any southern full-suffrage campaign came to success was Louisiana in 1918 but the referendum was narrowly defeated. See *id.* And two of most prominent white southern suffragists, Kate Gordon and Laura Clay, actually opposed the federal woman suffrage amendment in the end. See *id.* at 180. “[I]n deciding to oppose the federal amendment, these women

Given the textual analysis, the historical context, and the legislative history described above, the Nineteenth Amendment is clearly meant to be a robust constraint on state power over state voting laws (and a grant of power to Congress to enforce that constraint by legislation). One can see from the history of the public discourse around the Nineteenth Amendment, including that of its advocates and opponents, that the amendment was meant to ensure equality of political rights and participation, and that it was a commitment to sex equality in citizenship. The history of its legislative development preceding and following 1920 supports that reading of its purposes. The Nineteenth Amendment was a direct product of a long struggle by women who sought equal civil citizenship through the abolition of the subordinating legal regime of coverture and equal political citizenship in the form of suffrage. That dual push shifted from a primary focus on the former to an emphasis on the latter over the course of seventy-two years.¹⁶⁵ Those purposes—in particular the amendment as constraint on state power—suggest that courts should also consider constitutional structure in interpreting the Amendment.

C. Structure

A structural reading of the Nineteenth Amendment reveals a realignment of the relationship between the national government and the states. A review of the original public understanding of the text, including dictionary definitions of voting and state court decisions following ratification, suggests that terms like “vote” or “ballot” could be read to mean, not simply the casting of a vote, but the system of voting. Thus, laws which deny or abridge eligibility for and access to voting should come within the Amendment’s ambit. As a consequence, the Nineteenth had the effect of vastly enlarging the group of citizens entitled to participate in democratic governance. Its purposes include cabining state power over

chose to delay their own freedom rather than jeopardize state sovereignty. Most Southern suffragists, however, decided otherwise; in defying the tradition that demanded their subordination for the sake of ‘Southern civilization,’ they freed themselves. . . . These Southern suffragists did not want the role of ‘hostages to the Lost Cause,’ and they were determined not to play it.” *Id.* at 185–86. But the white men of their states would neither agree to woman suffrage by state amendment, nor would they agree to a federal suffrage amendment. In the end, nine of the states that failed to ratify the Nineteenth Amendment were below the Mason-Dixon line, and “[m]ost Southern states . . . united in opposition to the amendment, and Southern politicians made ‘heroic’ efforts to block ratification.” *Id.* at 31. But while Black women were widely blocked from voting in the southern states, where most Black women lived in 1920, Black women who lived in northern states like Illinois actively exercised their right to vote with intentionality. See LISA G. MATERSON, *FOR THE FREEDOM OF HER RACE: BLACK WOMEN AND ELECTORAL POLITICS IN ILLINOIS, 1877–1932*, at 3 (2009) (noting that “African American women who lived beyond the reach of southern white supremacists . . . served as ‘proxy’ voters and canvassers for African Americans who remained under the tyranny of southern white supremacy. . . . They sought to create an activist federal government that would use its power to protect African American’s basic citizenship rights”).

165. See Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 *STAN. J. C.R. & C.L.* 349, 350 (2020). See also Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, *GEO. L.J. 19TH AMEND. SPECIAL EDITION* 73, 78 (2020).

voting and making a constitutional commitment to sex equality as a matter of citizenship.¹⁶⁶ If one then reasons from those purposes—as one compares Article 1, Section 4, Clause 1 to the Nineteenth Amendment—this intra-textual reading yields a hierarchy of authority that puts the national government above the states.

This conclusion about federal supremacy is buttressed by an intra-textual reading of the Nineteenth Amendment in light of the Fifteenth Amendment. As noted above, Congress enacted legislation pursuant to the Fifteenth's Section 2 after the Civil War and again in 1965.¹⁶⁷ Federal courts interpreted both the Fifteenth and its enforcement legislation at great length. When read together, the Fifteenth Amendment and its connected legislation provide broad authority for the federal government to limit state authority over voting. This understanding was, in part, a product of the historical context in which the Fifteenth Amendment was enacted and ratified: in the wake of a Civil War, by a Congress that had waged that war to defeat southern states challenging federal authority and championing state sovereignty. Federal courts delineated the scope of federal authority over civil rights under the Fourteenth Amendment and political rights under the Fifteenth Amendment. The supremacy of the national government over states was established by the Reconstruction Amendments, the legislation that followed their ratification, and the cases that interpreted that legislation.¹⁶⁸

The Nineteenth Amendment was born into a very different political and historical context. By 1920, the south had succumbed to Jim Crow. Reconstruction had been defeated. Lynching was rampant. Literacy tests, poll taxes, and physical intimidation had hollowed out the Fifteenth Amendment. In this environment, white southern concerns about a second Reconstruction, and the fact that there were no female members of Congress, made it less likely that enforcement legislation could actually be enacted, even though it was introduced.¹⁶⁹ Thus, the Nineteenth was denied the opportunity for full development by the political and social conditions of the time in which it was ratified. This does not diminish its significance. The Amendment had the potential to double the size of the electorate, a sea-change in the original constitutional compact between the states and the

166. See Dorf, *supra* note 80, at 981 n.85 (“I view the Fourteenth Amendment as having had constitutional progeny in each of the four Amendments subsequent to the Fourteenth that affirmed the basic constitutional value of equality in the exercise of rights of citizenship—notably, voting. The Fifteenth (1870), Nineteenth (1920), Twenty-Fourth (1964), and Twenty-Sixth (1971) Amendments all sought to expand and secure the right to vote. They thus can be read as elaborations of the basic message of equality of national citizenship founded in Section 1 of the Fourteenth Amendment [and] should be understood as importantly redefining what the basic values of this Constitution are.”) (quoting Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1290–91 (2001)).

167. See *supra* note 117 for citations to various enforcement acts after the Civil War. See also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10313).

168. See *Ku-Klux Cases*, 110 U.S. 651, 664 (1884) (“[The Fifteenth Amendment] clearly shows that the right of suffrage was considered to be of supreme importance to the national government and was not intended to be left within the exclusive control of the States.”).

169. See *infra* Part IV. See also MONOPOLI, *supra* note 2, at 5.

national government so profound that some challenged it as an unconstitutional constitutional amendment.¹⁷⁰

The Reconstruction Amendments were congressional moves to push back on southern resistance to dismantling slavery. As described below, race and the Fifteenth Amendment played an important role in the ratification of the Nineteenth. But the Nineteenth Amendment also represented a distinct multi-generational movement to change women's status in the social, economic, and political realm. The early women's rights movement was focused on reforming the legal regime of coverture by enacting state legislation that allowed women control over property and the ability to contract.¹⁷¹ Women's rights activists sought legislative reform that would give women equality in important areas of the domestic sphere, like custody of their children following divorce. As noted above, this focus narrowed by the late nineteenth-century, as activists split over the issue of the exclusion of women from the Reconstruction Amendments, and their effort to persuade the Supreme Court to interpret the Fourteenth Amendment to protect women's right to a profession and to vote failed.¹⁷²

Prompted by its centennial year, a number of historians, political scientists, and legal scholars have explored the close connections between ratification of the Nineteenth Amendment and the legacy of the Fifteenth Amendment.¹⁷³ Those connections are significant. Nonetheless, an independent judicial analysis would serve the expressive function of conferring constitutional stature and restoring the long history that preceded ratification of the Nineteenth. It would be an act of constitutional signaling that the amendment is distinct and worthy of independent analysis and holistic interpretation. This does not mean that such an interpretative exercise could not include an intersectional reading of the Nineteenth with the Fifteenth Amendment. In fact, as described in the next section, such an intersectional reading provides additional support for a court to adopt a disparate impact standard, rather than an intentional discrimination/discriminatory purpose threshold standard for plaintiffs. But that kind of reading is distinct from "twinning" the two amendments and simply reasoning by rigid textual analogy from the Court's previous statements about the relationship between the Fifteenth and the Nineteenth Amendments. The following section explores how a court might

170. *But see* *Leser v. Garnett*, 258 U.S. 130 (1922) (rejecting the arguments that Congress had exceeded the scope of its authority under Article V to amend the Constitution and that some state ratifications were invalid because those states had violated their own procedures).

171. *See* Thomas, *supra* note 165, at 350

172. *See id.* at 353. *See also generally* *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Minor v. Happersett*, 88 U.S. 162 (1874).

173. *See, e.g.*, CATHLEEN D. CAHILL, *RECASTING THE VOTE: HOW WOMEN OF COLOR TRANSFORMED THE SUFFRAGE MOVEMENT* (2020); KIMBERLY A. HAMLIN, *FREE THINKER: SEX, SUFFRAGE, AND THE EXTRAORDINARY LIFE OF HELEN HAMILTON GARDENER* (2020); MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* (2020); Montoya, *supra* note 75; Taunya Lovell Banks, *Commemorating the Forgotten Intersection of the Fifteenth and Nineteenth Amendments*, 94 ST. JOHN'S L. REV. 899 (2020); Gidlow, *supra* note 143; Hamlin, *supra* note 159.

apply such an independent analysis and holistic interpretive approach in construing how the Nineteenth applies to facially neutral voting statutes that have a disparate impact on women.

IV. APPLYING THE NINETEENTH AMENDMENT TO FACIALLY NEUTRAL VOTING LAWS

A. *Empirical Evidence*

The previous section describes how a court might engage in a holistic interpretation of the Nineteenth Amendment, reasoning from text, legislative intent, and purposes in light of constitutional structure. Such a reading yields an amendment that carries great constitutional significance because it sought to double the size of the electorate, ensure women's equal participation in democratic governance, and express a constitutional commitment to sex equality in citizenship.¹⁷⁴ But how does such an interpretive approach play out when applied to facts on the ground, an exercise some would characterize as construction of the amendment?¹⁷⁵

In evaluating whether a facially neutral statute that disparately affects women's ability to vote as a class violates the Nineteenth Amendment, a court might move beyond an understanding of equal political participation in a formal legal sense to a more substantive equality in political participation. A court could make that move in its construction of the Nineteenth by viewing its decision about which threshold standard to apply through the lens of a feminist constitutionalism. Such a move recognizes the magnitude of the constitutional commitment to sex equality made by the Nineteenth Amendment that a purely formal understanding of what equality in political participation means has not. In this more capacious interpretive approach, a court might embrace disparate impact rather than intentional discrimination/discriminatory purpose as the threshold standard for a direct constitutional claim under the Nineteenth. This approach recognizes that the root of the disparate impact of such statutes is the historic and structural sexism inherent in the legacy of the legal regime of coverture, as well as in cultural norms about proper gender roles. Thus, the disparate impact of such laws is arguably a

174. Note that the Amendment did not actually double the size of the electorate because many women of color were de facto disenfranchised and other women of color were denied the opportunity to become citizens. See MONOPOLI, *supra* note 2, at 46–47.

175. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013) (“‘Constitutional interpretation’ is the activity that discerns the communicative content (linguistic meaning) of the constitutional text. ‘Constitutional construction’ is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text. Thus, the interpretation-construction distinction marks the difference between (1) inquiries into meaning of the constitutional text and (2) the process of deciding which doctrines of constitutional law and what decisions of constitutional cases are associated with (or required by) that meaning. . . . [C]onstruction is the determination of legal effect, construction always occurs when the constitutional text is applied to a particular legal case or official decision.”).

direct result of that structural discrimination, which continues to produce subordination in the realm of political participation.¹⁷⁶

Catharine MacKinnon has noted that “[a] feminist constitutionalism would . . . require a substantive equality of women both as an overarching theme in the document and as an underlying reality in the social order, in active engagement with a society recognized as unequal based on sex and gender, necessarily in interaction with all salient inequalities.”¹⁷⁷ If one examines the impact of recent state laws around voting in light of the economic reality that women—as a class—earn less than men, the social reality that women bear the disproportionate burden of both child and elder care, and the social and legal norm that women change their names more often than men, one can see how such a feminist constitutionalism might operate to yield a capacious understanding of the proper threshold burden on plaintiffs in evaluating a Nineteenth Amendment claim.

As Daphne Barak-Erez has explained, a feminist constitutionalism, as applied to the realm of constitutional interpretation, requires one to “ask[] the woman question.” Such a method “avoid[s] interpretive choices that disproportionately burden women and[] prefer[s], where possible, interpretive alternatives that promote the just allocation of social burdens (and thus eventually improve also the situation of men, who are burdened by other social stereotypes and expectations).”¹⁷⁸ A feminist constitutionalism would prioritize the consideration of social and economic realities and the goal of remedying subordination—the concept so important to the Supreme Court in *Strauder* in the context of race—as a polestar of decision-making. In deciding where to draw the line between federal and state sovereignty in elections, courts should consider which interpretive choice would result in less disadvantage for women. Choosing a disparate impact standard rather than an intentional discrimination standard avoids an interpretive choice that disproportionately burdens women. The intentional discrimination standard makes it virtually impossible for courts to even consider voting rules that restrict polling locations and times, that require an exact match for ID, and that require payment of fees, fines, or payment for ID. All of these rules may have a disparate impact on women given factors such as the gender pay gap, women’s disproportionate child and elder care responsibilities, and social norms around naming. Such an interpretive move is consistent with the public understanding of the Nineteenth Amendment as a constitutional commitment to equal participation in democratic governance and to sex equality. It is also consistent with judicial interpretations of other voting amendments that trump state sovereignty in the

176. For a discussion of the nexus between the legal regime of coverture and sex equality in governance, see generally Nan D. Hunter, *supra* note 165, at 73 (arguing that “[c]overture [] provided the predicate for denial of the vote”).

177. Catharine MacKinnon, *Foreword*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES*, *supra* note 14, at ix-xii, x.

178. Daphne Barak-Erez, *Her-meneutics Feminism and Interpretation*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES*, *supra* note 14, at 85–97, 95.

realm of voting in order to eliminate racial subordination.¹⁷⁹ One could argue, in a similar vein, that Congress intended the Nineteenth and its commitment to sex equality in political rights to take priority over state sovereignty when courts balance federalism with sex equality in the realm of state voting practices.

Today, we have extremely sophisticated and reliable methods of data-analysis.¹⁸⁰ A pragmatic interpretive method would take into consideration these sophisticated empirical methods that measure the disparate impact social and economic realities create when combined with restrictions on access to voting.¹⁸¹ Consistent with the thin understanding of the Nineteenth Amendment and the erasure of its history, voting discrimination was not seen as a matter of sex as much as it was a matter of race well into the latter half of the twentieth-century. In 1965, when the Voting Rights Act was enacted, sex was not included among its actionable categories. Sex was still not included in 1982, when Section 2 of the Voting Rights Act was amended to include a discriminatory effects and results standard.¹⁸² As noted above, the original failure of enforcement legislation, introduced into Congress in 1920 pursuant to Section 2 of the Nineteenth Amendment, was the product of both racism and sexism. Federal courts today could fill the developmental gap left by that failure by adopting a disparate impact standard that would allow more of these cases to be fully evaluated and discussed by federal courts.¹⁸³

In the years following ratification of the Nineteenth, the definition of sex equality was highly contested, with the Nineteenth Amendment's supporters split between those who supported formal equality in the form of legal neutrality between the sexes and those who advocated for a more substantive equality in the form of special, protective legislation for women.¹⁸⁴ Subordinating legal regimes persisted throughout the twentieth and into the twenty-first century, including in the realm of political rights like jury service and public office-holding, economic rights like access to equal pay and credit, and civil rights like freedom from

179. See, e.g., *The Ku-Klux Cases*, 110 U.S. 651, 664 (1884) (“The [F]ifteenth [A]mendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.”).

180. See Ben Merriman & Jeffrey Nathaniel Parker, *Voting Rights and the Cloak of Administrative Incompetence*, 12 WAKE FOREST J.L. & POL’Y 1, 52 (2022) (“Ubiquitous computing has also transformed statistics into a labor efficient means of describing social reality. Used thoughtfully, many statistical methods can identify a particular causal link amid the profuse, messy processes that characterize social reality.”).

181. *Id.* See also *supra* note 76 with regard to empirical evidence of gendered voter suppression in particular.

182. Note that the discriminatory effects and results standard has been significantly cabined by the U.S. Supreme Court’s recent decision in *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021). See Richard L. Hasen, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES, July 1, 2021, at A19.

183. See *infra* Part IV.

184. MONOPOLI, *supra* note 2, at 127–44. See generally JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (2020).

domestic violence. Subsequent judicial constructions of sex equality were grounded in the Fourteenth Amendment and rooted in formal equality, with sex-based classifications triggering heightened scrutiny by the Court.¹⁸⁵ This history teaches us that formal legal equality—of the type espoused by neutrality feminists like Alice Paul—is necessary but not sufficient to achieve sex equality in democratic governance today.¹⁸⁶ We might understand the Nineteenth today as a constitutional provision that—at the very least—expressed a commitment to sex equality in voting, the primary instrument of democratic governance. The ability to vote was intended to make women full legal citizens, even if some enactors and ratifiers did not believe that it also made women equal social and economic citizens.

Substantive equality has not been widely embraced by the Court in interpreting our Constitution beyond the realm of affirmative action.¹⁸⁷ A narrow anti-discrimination approach to equality has persisted, requiring animus. But there is an argument, grounded in the text of the Nineteenth Amendment, that states are not only prohibited from denying women the right to vote—they also cannot abridge the right to vote based on sex. I would argue that abridgement includes not simply restricting eligibility for, but it also includes limiting access to, the ballot. In other words, the text, when read in light of the history of the voting amendments—including the elimination of the poll tax in federal elections by the Twenty-Fourth Amendment—supports a substantive rather than simply a formal right to vote.

Using “later-enacted text to inform earlier-enacted text” in interpreting an amendment makes sense as a matter of incorporating and honoring new constitutional commitments by later generations.¹⁸⁸ The term “abridge” in the Nineteenth Amendment should arguably be read to cabin facially neutral state laws that make it harder for women to get to the polls and to cast a ballot. A feminist constitutionalism embraces this kind of robust anti-discrimination or anti-subordination norm in all areas of constitutional construction.¹⁸⁹ However, one could embrace this definition of equality in the realm of political participation, without

185. The U.S. Supreme Court did not hold that the Fourteenth Amendment’s Equal Protection Clause applied to women until the 1970s. *See Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Virginia*, 518 U.S. 515 (1996). *See also* Tracy A. Thomas, *Reclaiming the Long History of the “Irrelevant” Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 101, 134–35 (2021).

186. *See* Paula A. Monopoli, *Women, Democracy, and the Nineteenth Amendment*, 100 B.U. L. REV. 1727 (2020).

187. *See* Dorf, *supra* note 80, at 1010.

188. *See id.* at 972, 972 n.63 (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“reasoning that it would be ‘unthinkable’ to impose a duty on the federal government under the Fifth Amendment’s Due Process Clause that is less than the one imposed on the states under the Fourteenth Amendment’s Equal Protection Clause”)).

189. *Id.* at 962 n.34 (“The classic statement of the antisubordination principle was given by Professor Fiss, who argued that the Equal Protection Clause prohibits laws or official practices that ‘aggravate[] (or perpetuate[?]) the subordinate position of a specially disadvantaged group.’” (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976))).

necessarily extending it beyond voting rights. In the realm of voting rights, such an anti-subordination norm would mean that states must provide reasonable access to voting for groups like women who were legally subordinated by the nation's laws under the legal regime of coverture as a historical matter. Affording a remedy for that regime's continuing legacy of subordination provides a doctrinal basis for the Court to adopt a substantive view of equality when interpreting the Nineteenth Amendment.

Our constitutional history with regard to voting rights has been one of enlarging the group entitled to full citizenship, if citizenship is defined as those adults in the polity who have voting rights. And, over time, it has been a history of reducing barriers to voting, like poll taxes. The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, as well as cases like *Harper*, demonstrate this.¹⁹⁰ The Court has found voting to be a fundamental right, with restrictions sometimes entitled to heightened scrutiny.¹⁹¹ If those who have been kept out of the political process are entitled to special consideration, then women, as a historically subordinated group in our polity, should be so entitled. The history and text of the Nineteenth, in light of the cases that characterize voting as a fundamental right, support this reading. The amendment's textual commitment to sex equality in voting is clear. In addition, women constitute half of the adult population. The history of legal subordination, as well as the particular burdens on women of color, militate for courts to err on the side of facilitating their access to voting. Suffragists (both Black and white) wanted the vote for many reasons, but most, if not all, of them wanted the vote in order to change laws that relegated them to second-class citizenship.

Finally, if there is a concern about limiting judicial discretion in interpreting the broad language of the voting amendments, courts should look to the sophisticated empirical evidence available to them today that documents disparate impact.¹⁹² That evidence demonstrates the tangible ways women's social and economic subordination intersect with state laws about the time, place, and manner of elections to create substantial obstacles to voting. In addition to extensive empirical evidence, we have clear evidence of women's continued subordination,

190. See U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI; see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

191. *Harper*, 383 U.S. at 663; *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). See generally Joshua A. Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008) ("For over forty years, the Supreme Court has fostered confusion surrounding the right to vote by creating two lines of election law cases. In one breath the Court calls the right to vote fundamental and applies strict scrutiny review. In another, the Court fails to recognize the right as fundamental and uses a lower level of scrutiny.") *Id.* See also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), cited by Dorf, *supra* note 80, at 962 n.35 ("Although there is no substantive right to vote for any particular office, when a state makes a particular office elective, inequalities in the distribution of the franchise are subject to strict scrutiny.").

192. See Dorf, *supra* note 80, at 961 n.32 (discussing how courts could look to empirical evidence to better guide their decisions). See also Merriman & Parker, *supra* note 180 (describing the reluctance of courts to embrace the use of statistical evidence in voting cases).

in the form of the pandemic's disproportionate impact on women. Millions more women than men were forced out of the workforce during the pandemic.¹⁹³ This is stark evidence of how social and economic conditions like disproportionate caregiving burdens and lower earnings intersect to disparately affect women. As a political group, women thus have an even more significant interest in political representation post-pandemic as a means of alleviating this disparity and its impact on their economic security going forward.¹⁹⁴ And we have empirical studies that document that women's policy interests are, in fact, less effectively represented by their legislative representatives than those of their male counterparts.¹⁹⁵

Recent developments in state voting laws have reinforced the lesson that women's subordination in terms of the gender pay gap, disproportionate child and elder care responsibilities in society, and societal naming norms may intersect with state laws that regulate the time, place, and manner of voting in ways that have a disparate impact on women, especially women of color. While facially neutral, as applied these state laws can have effects akin to that of literacy tests and poll taxes on women one-hundred years ago. Not all such laws will run afoul of the Nineteenth Amendment, but some may.¹⁹⁶ Courts should have the opportunity to fully address them by adopting a threshold standard that at least gives plaintiffs an opportunity to move past the initial stage of a constitutional claim. Considering the fundamental nature of the right to vote as expressed by the Court in case law, in conjunction with the clear anti-discrimination (if not anti-

193. See generally Ella Koeze, *A Year Later, Who Is Back to Work and Who Is Not?*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html> [<https://perma.cc/V6EF-NZ7Y>]; Ellen McCarthy, *Many Moms Left the Workforce During the Pandemic. For Some, Going Back Isn't So Simple*, WASH. POST (June 29, 2021), https://www.washingtonpost.com/lifestyle/style/working-moms-pandemic-jobs/2021/06/28/a1abcb8c-c93a-11eb-81b1-34796c7393af_story.html [<https://perma.cc/QS8D-G8ZK>]; Helen Lewis, *The Coronavirus Is a Disaster for Feminism*, ATLANTIC (Mar. 19, 2020), <https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/> [<https://perma.cc/T5TW-TCTY>]; Megan Cassella, *The Pandemic Drove Women Out of the Workforce. Will They Come Back?*, POLITICO (July 22, 2021), <https://www.politico.com/news/2021/07/22/coronavirus-pandemic-women-workforce-500329> [<https://perma.cc/7YEW-NQA4>]; Claire Cain Miller, *Shorter Hours, No Promotions: How the Pandemic Stalled Some Parents' Careers*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/upshot/coronavirus-careers.html> [<https://perma.cc/Y5CB-DK6K>];

194. See generally Kristin Schumacher, *The COVID-19 Recession Further Undercuts California Women's Opportunities for Economic Security*, CAL. BUDGET & POL'Y CTR. (Mar. 2021), <https://calbudgetcenter.org/resources/covid-19-recession-further-undercuts-economic-security-for-california-women/> [<https://perma.cc/G322-5KMK>]; World Bank Grp., *Supporting Women Throughout the Coronavirus Emergency Response and Economic Recovery*, GENDER INNOVATION LAB (Oct. 2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/33612/Supporting-Women-Throughout-the-Coronavirus-Covid-19-Emergency-Response-and-Economic-Recovery.pdf?sequence=8&isAllowed=y> [<https://perma.cc/9CXQ-HDUJ>]; Editorial, *Help Women Get Back to Work*, BOSTON GLOBE (July 12, 2021), <https://www.bostonglobe.com/2021/07/12/opinion/help-women-get-back-work/> [<https://perma.cc/7ZM3-YZMB>].

195. See *infra* note 234.

196. See, e.g., *Ball v. Brown*, 450 F. Supp. 4, 8 (N.D. Ohio 1977) (holding that the automatic purging of voting registrations for women who had been married, and thus presumably had changed their surnames, violated 42 U.S.C. §1971).

subordination) norm underlying the Nineteenth, gives more weight to the argument that the Court should select a lower threshold as it applies the amendment to a particular state voting law. Reading the Nineteenth in light of the Fifteenth in an intersectional way strengthens that argument.¹⁹⁷

In terms of such an intersectional reading, courts might consider the important role legal scholar and activist Pauli Murray played in the story of how “sex” was added to Title VII of the Civil Rights Act of 1964. “[W]hen the bill reached the Senate, African American lawyer Pauli Murray, a veteran of the civil rights movement and of personal battles against ‘Jane Crow,’ wrote an influential memorandum designed to persuade civil rights supporters that the sex amendment was integral, rather than antithetical, to Title VII’s goals.”¹⁹⁸ Murray argued that it there were:

[N]o ‘sex’ amendment . . . both Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex. These two types of discrimination are so closely intertwined [sic] and so similar that Negro women are uniquely qualified to affirm their interrelatedness.

As Serena Mayeri has noted, Murray was describing the concept that Kimberlé Crenshaw later termed “intersectionality.”¹⁹⁹

Adding “sex” to Title VII gave courts the opportunity to recognize intersectional claims of race and sex. Such an approach recognizes that discriminatory harm is not simply additive and is more than the sum of its parts.²⁰⁰ There is a unique harm done to those who are the subjects of bias on more than one axis. An intersectional claim calls on the court to consider the reality of the doubly subordinate status of women of color in the social and economic order. The theory of “intersectionality” originally evolved in the employment discrimination context because such claims were presumably authorized by Title VII since it included both race and sex as grounds for a claim. Some courts have recognized intersectional claims under Title VII, acknowledging that the impact of those two axes taken together is distinct from the harm of either alone. “Courts [initially] proved

197. Note that some scholars do not agree that the Court has actually extended the intentional discrimination standard to the Fifteenth Amendment. *See infra* note 236.

198. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 718 (2015).

199. *See id.* at 719. For a recent application of intersectionality theory to the U.S. Constitution, see Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J. F. (Dec. 26, 2019), <https://www.yalelawjournal.org/forum/reconstituting-the-future-the-equality-amendment> [<https://perma.cc/WGH7-L6PY>] (arguing for “a new constitutional amendment embodying a substantive intersectional equality analysis”).

200. *See generally* SHREYA ATREY, INTERSECTIONAL DISCRIMINATION (2019) (arguing that intersectional discrimination should be recognized as a distinct category, given its theoretical, conceptual, and doctrinal underpinnings).

especially reluctant to recognize multi-dimensional discrimination against African American female plaintiffs . . . [but by] the mid-1990s, most courts no longer rejected intersectional claims out of hand.”²⁰¹

Mayeri admits that “judicial opinions containing thoughtful analysis of intersectional claims remain few and far between; legal theory and scholarship on intersectionality continue to vastly outpace actual Title VII doctrine. To this day, there is no robust canon of intersectionality case law.”²⁰² But the essence of the idea that intersectional harm, on more than one axis, merits a unique claim is also germane to voting rights, as plaintiffs Rosemary McCoy and Sheila Singleton argued in *Jones*.²⁰³ Consider the Supreme Court’s early interpretation of the Fourteenth and Fifteenth Amendments as applying primarily to only formerly enslaved persons. As a historical matter, the Court’s articulation of that original focus supports an intersectional reading. Even though we do not embrace that understanding today as the sole application of the Fourteenth and Fifteenth Amendments, one can argue that those amendments, in conjunction with the Nineteenth, provide more than one constitutional basis for protecting Black women’s right to vote, given both their sex and their race. Black women’s response to ratification of the Nineteenth demonstrates that they saw these intersections. Historians like Liette Gidlow teach us that Black women like Lula Murry had their voter registration applications rejected despite the protections of the Fourteenth, Fifteenth, and Nineteenth Amendments:

Lula Murry knew her rights. After the Jefferson County, Alabama Board of Registrars rejected her voter registration application in the fall of 1923, Murry, a woman in her fifties whose roots reached back to Georgia and whose husband made a steady living as a mattress maker, took the problem straight to President Calvin Coolidge. Her family had fulfilled its obligations to the nation; she expected the federal government to fulfill its obligations to her. Two of her brothers had answered the nation’s call to military service in its “time of . . . Greatest necessity,” she wrote, one giving his life “in the defense cause in [the] time known as the world war to elevate to safe democracy.” Her complaint? That, in Birmingham, “safe democracy” was nowhere to be found. “Here I stand denied the constitution rights in Article XIV and XV . . . [and] I being a woman[,] the 19th Amendment of the Constitution of U.S.”²⁰⁴

In applying the Nineteenth to voting laws today, courts should be informed as to *why* Congress has never enacted enforcement legislation pursuant to its section

201. Mayeri, *supra* note 198, at 714.

202. *Id.* at 730.

203. See Reply Brief for Appellant at 24, *McCoy v. Governor of Fla.*, No. 20-12304 (11th Cir. Feb. 10, 2021), https://www.splcenter.org/sites/default/files/documents/mccoy_reply_brief.pdf [<https://perma.cc/J8LS-4QRN>] (describing expert witness testimony that “[t]he wage and income differential for women of color places women of color at a distinct disadvantage (because of their gender and race) in terms of their ability to pay fines and legal financial obligations”).

204. Gidlow, *supra* note 143, at 433.

2. I have argued that white suffragist leaders did not argue that enforcement legislation was necessary to protect Black women, in part because after ratification of the Nineteenth they immediately began to advocate for another amendment: the Equal Rights Amendment.²⁰⁵ Suffragists still needed white southern political support in Congress and state legislatures for that amendment.²⁰⁶ I have also given an account of how other white suffragists did try to bring organizational resources to bear on the *de facto* disenfranchisement of Black women after ratification of the Nineteenth.²⁰⁷ In the November 1920 issue of *The Suffragist*, Mary White Ovington pleaded for readers to join in her cause: “We must not rest until we have freed black as well as white of our sex. Will not those who wish to see this come to pass write me to that effect? There are only a few of us in this Negro cause and we need the knowledge that you have gained in your long campaigns.”²⁰⁸

The National Woman’s Party leadership made it clear that the specter of enforcement legislation had been resisted by those white southern politicians concerned about a “second Reconstruction.”²⁰⁹ Party leadership described the inclusion of the enforcement clause (Section 2 of the Nineteenth Amendment) as something “about which so much controversy arose while the amendment was before Congress. Repeated attempts were made to induce suffragists to accept a compromise measure leaving out the enforcement sections of the amendment, but they always insisted, upon the advice of their lawyers, on the inclusion of the

205. See MONOPOLI, *supra* note 2.

206. But note that in a private conversation reported in a letter from Florence Kelley to Mary White Ovington, 22 December 1920, Kelley reported that Paul had suggested the “enforcement bill prescribed in the second paragraph of the Woman Suffrage Amendment . . . would take care, so far as a Congressional law can do it, of the suppression of Negro women voters anywhere. She considers this by far the most important item of their immediate program, in fact the only one on which all their efforts should be centred [sic] until the task is accomplished.” Letter from Florence Kelley to Mary White Ovington (Dec. 22, 1920) (available at ProQuest NAACP Papers, Women’s Suffrage Folder, 001517-002-0678).

207. See MONOPOLI, *supra* note 2.

208. Mary White Ovington, *Free Black as Well as White Women*, 8 SUFFRAGIST 279, 280 (1920) (Mary White Ovington was a co-founder of the National Association for the Advancement of Colored People (NAACP)).

209. See Calabresi & Rickert, *supra* note 140, at 89–90. Calabresi and Rickert argue that during the debates around the Fourteenth Amendment, both sides “generally . . . agreed that women were a class” but not one that was “suffering from arbitrary, caste-like discrimination.” *Id.* at 52; See also Letter to the Editor of *The State*, in Columbia, South Carolina, in which the author identified himself as “An Alabamian [who] appeals to the assembly of South Carolina, and of all other Southern states.” ProQuest NAACP Papers, Women’s Suffrage Folder, 001517-002-0678, at 12–13. The tenor of his letter is that they had a solemn duty, under the oath they swore to uphold the state constitution, to resist ratification of the Nineteenth Amendment because it included an enforcement clause akin to that under the Fourteenth and Fifteenth. See *id.* The author wrote, “Think, men, of South Carolina, think of your ‘simple great ones gone forever and ever by!’ Would they have tolerated for one moment even the proposal of this curse, to revive the 14th and 15th amendments, adding a third, and worst of all, with the pitiable excuse of ‘political expediency’ to further our humiliation? . . . You have had a white man’s government, best for both races.” *Id.*

enforcement provisions as a necessary protection.”²¹⁰ The National Woman’s Party declared that the work for the federal suffrage amendment could not be considered complete “until [an] enforcement measure is passed.”²¹¹ Yet, in May 1921, the Party quietly withdrew its active support for enforcement legislation, presumably concerned about the potential impact that support might have on white southern political support for the Equal Rights Amendment.²¹² The enforcement legislation died in committee, and as described above, the Nineteenth failed to be as fully invoked or developed by the courts as the Reconstruction Amendments had been.²¹³ Courts should understand this history and that it provides a substantial basis for courts to engage in a more fulsome discussion of the Nineteenth and its relationship to the Reconstruction and other voting amendments. However, this discursive development opportunity can only be realized if plaintiffs have a fair chance to meet the threshold standard, and thus shift the burden to states to argue why the disparate impact of laws on women’s political participation may be justified.

B. Threshold Standards

Courts generally subject most state laws “to minimal scrutiny under the Equal Protection Clause,” in deference to proper institutional spheres among the branches of government.²¹⁴ However, the Supreme Court has applied heightened scrutiny to both laws that implicate sex and laws that implicate the right to vote.²¹⁵ Thus, a court would be well within its proper sphere to lower the barriers for plaintiffs to challenge laws that implicate both sex and voting simultaneously. This point is reinforced by the very existence of the Nineteenth Amendment, which brought those two categories together into a single constitutional mandate. As the Eleventh Circuit said in *Jones*, amendments like the Nineteenth are self-executing. They need no legislation to enforce their terms. They

“remove . . . or render inoperative” any suffrage provision in a state constitution that refers to race [or sex], even in the absence of implementing legislation by Congress. The amendment has similar bite even when States impose discriminatory voting qualifications by facially neutral means.²¹⁶

210. *An Editorial*, *supra* note 118.

211. *Id.*

212. *See* MONOPOLI, *supra* note 2.

213. *See infra* Section IV.B.

214. Dorf, *supra* note 80, at 952.

215. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996) (regarding sex discrimination); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (regarding voting).

216. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1042 (11th Cir. 2020) (citing *Neal v. Delaware*, 103 U.S. 370, 389 (1880); *Guinn v. United States*, 238 U.S. 347, 363 (1915)).

Courts, through judicial review, are called upon to decide whether state laws violate the Nineteenth Amendment, and by doing so, they effectively play a role in ensuring that the amendment's purposes are effectuated.²¹⁷ In terms of institutional relationships, one might argue that courts thus share with Congress, to some extent, the role of ensuring the amendment's purposes are realized. Courts engage in that role, in part, by their selection of burdens of proof in constitutional litigation. A court's choice of threshold standard is a burden shifting exercise:

[D]isputes over the theory of disparate impact are disputes over the burden of proof. As an initial matter, disputes over whether the theory is available at all reduce to the question of whether the plaintiff has to carry the entire burden of proving intentional discrimination or only the lesser burden of proving disparate impact. And if the theory is recognized, most disputes over its implementation turn on how much of the burden of proof is shifted onto the defendant—whether the defendant has a lighter or heavier burden of justifying a practice with disparate impact.²¹⁸

In *Greater Birmingham Ministries v. Secretary of State*, the Eleventh Circuit described its threshold standard for plaintiffs bringing direct constitutional claims under the Fourteenth or Fifteenth Amendments:²¹⁹

There are two prongs to an equal protection analysis under the Fourteenth Amendment and a denial or abridgment analysis under the Fifteenth Amendment. Plaintiffs must first show that the State's "decision or act had a discriminatory purpose and effect." If Plaintiffs are unable to establish both intent *and* effect, their constitutional claims fail. Once discriminatory intent and effect are established, the second prong provides that "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor."²²⁰

217. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 297, 305–06 (2000) (discussing the proper role of courts, including the Supreme Court's failure to give teeth to the Fifteenth Amendment in *Giles v. Harris*, 189 U.S. 475 (1903) (affirming a lower court's decision that it did not have equitable jurisdiction to force a state election registry to enroll a black citizen as a voter)).

218. George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2323 (2006).

219. I would argue that intentional discrimination/discriminatory purpose should not be the threshold standard for constitutional claims under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Sixth Amendments. Some voting rights scholars have questioned the oft-repeated assertion that U.S. Supreme Court precedent requires a finding that plaintiffs must establish intentional discrimination to prevail on a Fifteenth Amendment claim. See *infra* note 236. Neither the original Civil Rights Statute of 1866, nor any of the voting amendments include such a requirement as a purely textual matter.

220. *Greater Birmingham Ministries v. Sec'y of State*, 966 F.3d 1202, 1225 (11th Cir. 2020) (citations omitted). *But see* *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (distinguished by plaintiffs in Reply Brief of Appellants McCoy and Singleton at *9, *McCoy v. DeSantis*, No. 19–304, consolidated into *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020), arguing that this case "expressly holds that '[t]o establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent").

In finding whether a plaintiff had met the threshold discriminatory intent and effect standard, the Eleventh Circuit noted that it was guided by the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²²¹ *Arlington Heights* provides a multi-factor test for courts to use in evaluating whether a plaintiff has met the threshold for discriminatory intent and effect:

As we turn to the first prong of the equal protection analysis to determine whether the Alabama photo ID law has both a discriminatory intent and effect, we are further guided by the multiple factor approach articulated by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* The *Arlington Heights* analysis, which applies to both Fourteenth Amendment and Fifteenth Amendment claims, requires us to start by determining whether the challenged law has a discriminatory impact and “whether it bears more heavily on one race than another.”²²²

The *Arlington Heights* factors include: “(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators. And, because these factors are not exhaustive, the list has been supplemented: (6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives.”²²³

221. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977). The Supreme Court subsequently rejected a disparate impact claim (in the context of employment discrimination, not voting rights) that veterans' preferences disproportionately affected and harmed women. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979). Note that *Feeney* was not a voting rights case, although some courts have explicitly extended its reasoning to evaluating discriminatory intent in electoral rules. See *Luft v. Evers*, 963 F.3d 665, 670–71 (7th Cir. 2020).

222. *Greater Birmingham Ministries*, 966 F.3d at 1225 (citing *Village of Arlington Heights*, 429 U.S. 252, (1977)).

223. *Id.* (citing *Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983)). Note that in the years immediately after its 1971 ratification, courts grappled with which standard to apply to claims under the Twenty-Sixth Amendment, which banned state action that denied or abridged voting “on account of age.” U.S. CONST. amend. XXVI. For example, the court in *Walgren v. Board of Selectmen of Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975), noted “that no clear test had yet emerged to determine when the Twenty-sixth Amendment is violated by governmental action bearing disproportionately on those enfranchised by that amendment ‘it seems only sensible that if a condition, not insignificant, disproportionately affects the voting rights of citizens specially protected by a constitutional amendment, the burden must shift to the governmental unit to show how the statutory scheme effectuates, in the least drastic way, some compelling governmental objective.’” (citation omitted). *Id.* at 1366–67. To this day, “there is no controlling caselaw from . . . the Supreme Court regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote.” *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016) (quoting *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 757, No. 15–cv–210, 2015 WL 9307284, at *6 (M.D. Tenn. Dec. 21, 2015)).

Unlike *Walgren*, *One Wisconsin* was decided after the U.S. Supreme Court's *Village of Arlington Heights*. Adhering rigidly to the similarities in text, the *One Wisconsin* court reasoned that simply

Rather than considering the unique historical background of the Nineteenth Amendment in his decision in *Jones*, Judge Hinkle simply applied the Eleventh Circuit's threshold standard for the Fifteenth Amendment, articulated by the court in *Greater Birmingham*, to the Nineteenth Amendment.²²⁴ However, Hasen and Litman have argued that when Congress enacted the Nineteenth in 1919, it intended "[a] thick reading of the Nineteenth Amendment."²²⁵ They contend that such a reading "is consistent with its text, which prohibits not just denial but *abridgement* of the right to vote on account of sex. . . . Nothing about the term 'abridgement' suggests the term applies only to intentional discrimination. Thus, the term 'abridgement' is consistent with a thick reading of the Amendment as barring laws that have discriminatory effect on voting power on the basis of gender."²²⁶ In addition, Steve Kolbert has argued that the legislative history "shows

because, "[t]he text of the Twenty-Sixth Amendment is patterned on the Fifteenth Amendment, which prohibits the denial or abridgement of the right to vote on the basis of race. This suggests that *Arlington Heights* provides the appropriate framework for evaluating plaintiffs' claims of intentional age discrimination." *One Wisconsin*, 198 F. Supp. 3d at 926 (citing *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D.Va. 2016)). The *One Wisconsin* court did acknowledge that other courts, like "the district court in *North Carolina State Conference of the NAACP* expressed doubt that the Twenty-Sixth Amendment was intended to operate just like the Fifteenth Amendment." *Id.* Yet, despite that doubt, "the court followed an *Arlington Heights*-style analysis for the purposes of its decision." *Id.* The *One Wisconsin* court found no violation of the Twenty-Sixth Amendment. Its reasoning by analogy to the Fifteenth Amendment, in this regard, was approved in *Luft v. Evers*, 963 F.3d 665, 673 (2020).

In *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018), the court noted that, "[a] consensus has been emerging . . . as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims," citing both *One Wisconsin* and *Lee*. It embraced the *One Wisconsin* court's textual similarity reasoning, and it applied the *Arlington Heights* framework. Yet, unlike the *One Wisconsin* court, the *Detzner* court did find a violation of the Twenty-Sixth Amendment. It held that the state Division of Elections' Opinion was, "unexplainable on grounds other than age because it bears so heavily on younger voters than all other voters. Defendant's stated interests for the Opinion (following state law, avoiding parking issues, and minimizing on-campus disruption) reek of pretext." *Id.* at 1222. The *Detzner* court then analogized to the facially neutral statute struck down in *Guinn v. United States*, 238 U.S. 347 (1915). *See id.* The Court continued, "While Oklahoma in 1910 abridged voting rights by choosing an invidious date to exclude African-Americans from voting, Florida in 2014 limited places to stymie young voters from early voting." *Id.* The *Detzner* court concluded that "[i]f a unanimous Senate, near-unanimous House of Representatives, and 38 ratifying states intended the Twenty-Sixth Amendment to have any teeth, then the Amendment must protect [against] those blatant and 'unnecessary burdens and barriers' on young voters' rights." *Id.* at 1223. And it found that the plaintiffs were likely to succeed on their claim. *See id.* at 1221-23.

224. *See Jones*, 462 F. Supp. at 1239 (noting that "a claim under the Fifteenth Amendment requires the same showing of intentional discrimination as the Fourteenth Amendment's Equal Protection Clause. . . . In sum, there is no reason to read the Nineteenth differently from the Fifteenth.")

225. *See Hasen & Litman, supra* note 24, at 39.

226. *See id.* ("When a state passes a law that results in greater burdens on women being able to register and vote compared to men, a court should conclude that the law 'abridges' the Nineteenth Amendment. Abridgment occurs when a state 'diminishes' or 'shortens' a voting right on account of sex. The Supreme Court has made this point in the analogous context of the Fifteenth Amendment's prohibition of abridgement of the right to vote on account of race. At the very least, laws and procedures diminishing voting on the basis of gender are constitutionally impermissible.")

that the Nineteenth Amendment targets more than intentional discrimination.”²²⁷ He asserts that “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—whether or not the restrictions intentionally target women.”²²⁸

As outlined above, the public knew about the *Guinn* case when the Nineteenth Amendment was ratified.²²⁹ They understood that the first federal voting amendment not only protected against explicit class legislation as to eligibility, but that it also protected against facially neutral legislation that abridged the right to vote. They understood the Nineteenth Amendment’s dual purpose as ensuring equal political participation and expressing a commitment to sex equality in citizenship. That understanding of the history supports judicial adoption of a disparate impact rather than an intentional discrimination standard. Such a standard would at least allow a court to consider a claim that facially neutral state voting statutes impinged on women’s ability to engage in that system on an equal basis with men.

Women make up half the electorate, so they may not technically be an “insular minority” in the sense the U.S. Supreme Court described in its *Carolene Products* decision.²³⁰ But sex has clearly been recognized as a class subject to heightened scrutiny.²³¹ The kind of state voting statutes that have been promulgated of late, as applied in the context of the actual socio-economic conditions of women, may disproportionately discourage and deter women from robust political participation.²³² Statutes that require payments, like the Florida statute at issue in *Jones*, may be more burdensome to women due to the gender pay gap. Statutes that limit early voting may be more burdensome to women who must seek childcare or be left to stand in long voting lines, holding a toddler in their arms. And statutes that require an exact match for a voter ID may be more burdensome to women

227. Kolbert, *supra* note 149, at 561.

228. *Id.*

229. See *supra* note 105 and accompanying text.

230. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

231. See Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1531 (2015) (“First, the powerlessness factor stems from the third paragraph of *Carolene Products*’s famous fourth footnote. In relevant part, this paragraph states that ‘more searching judicial inquiry’ may be needed when the ‘operation of those political processes ordinarily to be relied upon to protect minorities’ is ‘curtail[ed].’ It states, that is, that heightened scrutiny may apply when a minority yields less power than it would if the political system were functioning properly.”).

232. See Mandy Velez, *The Surprising Ways Voter Suppression Particularly Hurts Women*, SALON (Jan. 14, 2018, 12:29 AM), https://www.salon.com/2018/01/13/the-surprising-ways-voter-suppression-particularly-hurts-women_partner/ [<https://perma.cc/H5VN-3YU8>] (describing how voter ID laws affect particular subgroups of women, including those who are poor or work hourly wage jobs, women who are abused, students (since a higher proportion of college students are women), and disabled/older women); Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, WASH. POST (Nov. 5, 2013), <https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/> [<https://perma.cc/GX2L-GP5R>] (describing the disparate impact on women of voter suppression laws in Texas).

because of naming norms in society. In *Greater Birmingham Ministries*, the Eleventh Circuit stated that “[i]f Plaintiffs are unable to establish both intent *and* effect, their constitutional claims fail.”²³³ Adopting a lower threshold standard that allows such a claim *to at least be considered* by courts would give those courts the chance to review state voting statutes as applied in light of the unique social and economic inequality of women. That inequality often manifests itself as subordination in the private sphere, which can, in turn, limit women’s robust political participation in the public sphere.²³⁴

A Nineteenth Amendment claim implicates federalism, a structural feature of our Constitution. The right to vote has been characterized as fundamental by some courts and federal courts have held state laws regulating voting to be unconstitutional because they placed too high a burden on that fundamental right.²³⁵ While some federal courts have held that the standard for a direct constitutional claim under the Fifteenth Amendment is intentional discrimination or discriminatory purpose, no case—until *Jones*—had adopted that standard for a direct constitutional claim under the Nineteenth Amendment.²³⁶ A voter who seeks relief from a discriminatory state voting law on account of race may bring suit under Section 2 of the Voting Rights Act under what was (at least prior to *Brnovich*) a lower discriminatory effects/results standard.²³⁷ But a voter who seeks relief from a discriminatory state voting law on account of sex has no similar path. Their

233. *Greater Birmingham Ministries v. Sec’y of State for Alabama*, 966 F.3d 1202, 1225 (11th Cir. 2020) (citations omitted).

234. See Stephanopoulos, *supra* note 231, at 1575 (“But they show that women are substantially underrepresented relative to men, in terms of both proximity and win ratios, when their legislators are Republicans or there is a Republican House majority. In contrast, women enjoy a representational advantage (albeit a smaller one) when their legislators are Democrats or there is a Democratic House majority. These results suggest that women’s political influence is mediated by partisan forces. It waxes when Democrats are ascendant and wanes when Republicans are the dominant party.”).

235. See *supra* note 191; see also *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315, 1327 (11th Cir. 2019) (“‘Voting is the beating heart of democracy. It is a ‘fundamental political right, because [it is] preservative of all rights.’” “It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” . . . [T]he public interest is served when constitutional rights are protected.” (citations omitted) (quoting *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1215 (N.D. Fla. 2018))).

236. However, Travis Crum recently argued that the “Court has never held that intentional discrimination is a necessary ingredient of a Fifteenth Amendment claim. In *City of Mobile v. Bolden*, a mere plurality reached that conclusion. 446 U.S. 55, 62 (1980).” Brief of Amicus Curiae Professor Travis Crum in Support of Respondents at 11 n.7, *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257 & 19-1258 (Jan. 20, 2021). See also Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 33 CONST. COMMENT. 1, 65 n.373 (2021) (noting that “[a] plurality would have held that ‘racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation’ in *City of Mobile v. Bolden*. Subsequently, in *City of Rome v. United States*, the Court ‘assumed’ (but didn’t hold) that the Fifteenth Amendment ‘prohibits only intentional discrimination in voting.’” (citations omitted)).

237. 52 U.S.C. § 10301. “In its first review of a case brought under the 1982 amendment, the Supreme Court explained that the ‘essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.’” *Section 2 of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/M3S4-6C3L>] (last updated Sept. 11, 2020) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

only path is a direct constitutional claim. And the court in *Jones* found that the intentional discrimination/discriminatory purpose standard is what they, as a plaintiff, must establish in order to meet the initial threshold. Only if they meet this bar does the burden then shift to the state to justify its statute.

The lack of a legislative right of action also supports the argument that courts should embrace a lower threshold standard to ensure that states adhere to the self-executing provisions of the Nineteenth Amendment. Implicit in the amendment itself is the authority of courts to strike down offending state legislation that violates the amendment, even absent specific enforcement legislation. In fact, courts are uniquely situated to determine standards for burdens of proof. In construing the amendment in the context of present-day statutes which may disproportionately affect women's access to the ballot, courts should be animated by the kind of feminist constitutionalism Barak-Erez proposes.²³⁸ When balancing whether to embrace a disparate impact or an intentional discrimination/discriminatory purpose standard for the Nineteenth Amendment, courts should ask whether women will be more or less disadvantaged by their choice of one threshold standard or another. "Asking the woman question" is consistent with the purposes of the Nineteenth Amendment and its constitutional commitment to sex equality in citizenship, rendering women fully able to engage in democratic governance.

This suggested approach reasons from text, legislative intent, and purposes in light of constitutional structure and institutional relationships. It begins with attention to the original public understanding of the text. But it also considers the Nineteenth in light of other constitutional amendments, animated by a feminist constitutionalism, when courts analyze the question of which standard is most consistent with the sex equality commitment represented by the Nineteenth Amendment. Such an approach is also consistent with the amendment's assertion of federal supremacy.²³⁹ And it yields a result that considers the intent of the amendment's enactors and ratifiers, expanded to include the voices of the disenfranchised. A moral imperative underpins this inclusion of those voices. To do otherwise fails to account for the fact that at the time of the Nineteenth's enactment a majority of states withheld full voting rights from half the adult population, and there were no female members of Congress, a condition replicated in most of the ratifying state legislatures.²⁴⁰ The approach is mindful of the risk that a court engages in excessive judicial discretion, unmoored from the text of the amendment itself. It remains consistent with the original public understanding of

238. See Barak-Erez, *supra* note 178.

239. See *supra* note 168.

240. Note that Montana's Jeannette Rankin was a member of the 65th Congress from 1917 to 1919. She was the first woman elected to Congress and voted on a previous version of the bill that became the Nineteenth Amendment. See JAMES L. LOPACH & JEAN A. LUCKOWSKI, JEANNETTE RANKIN: A POLITICAL WOMAN 146 (2005). See also Katz, *supra* note 18 (tracing the history of women's officeholding prior to ratification of the Nineteenth Amendment).

the text—that it was meant to ensure women’s equal access to voting as a fundamental characteristic of full citizenship.²⁴¹

Amendments to the U.S. Constitution are spare, bare-bones instruments. As noted above, courts flesh out those bare bones through the process of judicial interpretation and construction. And federal courts often engage in a discursive process about the relationship of new amendments to pre-existing amendments. Those cases are sometimes the result of enforcement legislation that allows for jurisdiction by federal courts, through the removal process or by conferring concurrent jurisdiction. Congress can put meat on the bones of an amendment by enacting such legislation, promulgated pursuant to the specific authority granted in an enforcement clause. That process of constitutional development was truncated in the case of the Nineteenth Amendment. The amendment is like a two-legged stool. It is missing the kind of discursive judicial development that enforcement legislation would have provided.²⁴² This unique history around the Nineteenth’s ratification and constitutional development, and the consequent thin understanding of the Nineteenth, militate for courts to interpret the amendment in a way that facilitates direct constitutional claims of gendered voter suppression. But if courts fail to do so, it is worth considering how new Congressional enforcement legislation that targets gendered voter suppression could be used today to enforce the Nineteenth Amendment.²⁴³

V. CONCLUSION

As with every constitutional amendment, no full consensus existed around the meaning of the Nineteenth Amendment in 1920. But there was an overlapping area of agreement—the Nineteenth was meant to ensure equality of political

241. The holistic interpretive approach in this paper draws on several interpretive traditions and modes of argument. See Jack Balkin, *Arguing About the Constitution: Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 181 (2018) on the variety of such modalities. While the suggested approach begins with the text, it should also be informed by constitutional history, legislative intent, purposes, structure, and institutional relationships. See Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black’s White Lectures*, 54 LOY. L.A. L. REV. 675 (2021) (discussing a mode of constitutional reasoning from structure and institutional relationships). As noted above, this paper does not address the Fourteenth Amendment equal protection claims that are also important tools in addressing state voting laws which may have a disparate effect on women. But the analytical framework laid out in this paper would also support an interpretive approach to the Fourteenth Amendment, as applied to voting, which reads that amendment together with the Nineteenth and incorporates its unique constitutional history. See Siegel, *supra* note 13; Siegel, *supra* note 21 (developing a theory of synthetic interpretation of the Fourteenth Amendment with the Nineteenth Amendment).

242. See *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Neal v. Delaware*, 103 U.S. 370 (1881). *Strauder* was decided under the Fourteenth Amendment, as some scholars have suggested it has a connection to the Fifteenth Amendment. See *supra* note 124. Paired with *Neal*, which did invoke the Fifteenth, the two cases shed light on why suffragists and other members of the public understood the first federal voting amendment, and its enforcement legislation, to mean that states must extend the right of jury service to Black men. Thus, it was reasonable for suffragists and others to expect that the second federal voting amendment, the Nineteenth, would be interpreted to do the same for women.

243. See generally Hasen & Litman, *supra* note 24.

participation for women. In suggesting that courts engage in an independent analysis and holistic interpretation of the Nineteenth Amendment, it is fitting to remember the women who were constitution-makers, the suffragists who engineered one of the most significant shifts in power from the states to the national government the country had ever seen. Like the male Founders, their goal was self-government, which they sought through full and equal participation in representative democracy. Their path was the franchise, as a means of reforming law and policy. Their success in retrofitting the Constitution through a federal amendment that eventually doubled the size of the political community entitled to full citizenship was a significant constitutional moment—one that deserves judicial recognition equal to that of the Reconstruction Amendments. The Nineteenth was the product of “wide public debate.”²⁴⁴ And that public discourse implicated “questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually a consensus was reached, which culminated in the Nineteenth Amendment.”²⁴⁵

As noted above, the judicial decisions in the *Jones* case failed to give sufficient deference to the equal stature and significance of the Nineteenth in our constitutional order when they simply reasoned by rigid textual analogy to the Fifteenth Amendment.²⁴⁶ But the two amendments have different histories and purposes. The Nineteenth has a distinct constitutional meaning as applied to state action in the context of the ongoing subordination of women, especially women of color.²⁴⁷ Suffragists spoke in terms of the Nineteenth Amendment ensuring their political freedom or political liberty. But the Nineteenth did not actually ensure full participation in democratic governance after its ratification, in part, because of its construction by many state courts and the failure of its proposed enforcement legislation.²⁴⁸ Thus, recognizing that women understood the newly ratified

244. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 684 (1966).

245. *Id.*

246. And, as noted above, the only case to directly analyze whether a state statute violated the Nineteenth—*Breedlove*—sustained the sex-differentiated poll tax regime at issue based on overtly sex-based reasoning about men and women. While the *Breedlove* court’s holding that the poll tax did not violate the Fourteenth Amendment’s Equal Protection Clause was overturned in *Harper*, “[a]s Justice Black pointed out in dissent, however, the *Harper* majority did not overrule the part of *Breedlove* approving gender discrimination in the application of the poll law on the meaning of the Nineteenth Amendment right to vote.” Hasen & Litman, *supra* note 24, at 32.

247. For example, as recently as October 22, 2020, the CDC issued guidelines that discouraged voters from taking children to the polls and suggested that if a voter were the “main caregiver” they should arrange to “ask someone to watch [their] loved ones.” Since women are disproportionately the primary caregivers for children and elderly, this suggestion on the part of the CDC, while well intentioned, makes it clear how the intersection of state action, in the form of government speech about voting, can deter women, in particular, from voting. See *Tips for Voters to Reduce Spread of COVID-19*, CTRS. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/going-out/Voting-tips.html> [<https://perma.cc/334J-69XF>] (last visited Feb. 26, 2021).

248. For an assessment of the current status of women’s participation in democratic governance in our liberal constitutional democracy, see Monopoli, *supra* note 186. Early interpretations of the Nineteenth by state courts were untethered by federal enforcement legislation or federal case law. Thus, divining the meaning of the federal amendment was at the complete discretion of state judges.

amendment to mean that they were now fully part of “the People” should be foundational to its interpretation.²⁴⁹ And while it did not ensure that Native American women, Asian American immigrant women, Black women, and Latinas were all actually able to vote, courts today could respond to the prophecy by Black suffragists that the full power of the Nineteenth Amendment could not be realized until the right of all women to vote was protected.²⁵⁰ Restoring the voices of women, especially women of color, as constitution-makers merits such consideration. The Nineteenth is the only express commitment to sex equality in the U.S. Constitution. In the wake of its centennial, it is time for courts to acknowledge its full and equal stature in our constitutional order.

See MONOPOLI, *supra* note 2. Regardless of whether those interpretations were “thick” or “thin,” they were vulnerable to individual agendas about expanding political participation by women or preserving the status quo. The lack of federal guidance by Congress and the courts, in the wake of ratification, facilitated the use of construction—either narrow or broad—by state judges to infuse the meaning and scope of the amendment with their own normative commitments—progressive or regressive as they may have been. *See id.*

249. Congratulating Alice Paul on the ratification victory just days before, suffragist Louise McKay wrote these words to Paul, “Never say Die. We are the People.” Letter from Louise R. McKay to Alice Paul (22 August 1920) (available as part of the National Woman’s Party Records, Manuscript Division, Library of Congress, Box II: 6.).

250. GIDDINGS, *supra* note 161, at 169 (citing Resolutions re: NWP, 15–18 February 1921, NAACP files, Suffrage, Library of Congress) (“We have come here as members of various organizations and from different sections representing five million colored women of this country. We have also come today to call your attention to the flagrant violations of the Susan B. Anthony Amendment in the elections of 1920. . . . We cannot . . . believe that you will permit this Amendment to be so distorted in its interpretation that it shall lose its full power and effectiveness. Five million women in the United States cannot be denied their rights without all the women of the United States feeling the effect of that denial. No women are free until all women are free.”).