

RESURRECTING THE NINETEENTH AMENDMENT: WHY STRICT VOTER ID LAWS UNCONSTITUTIONALLY DISCRIMINATE AGAINST TRANSGENDER VOTERS

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ABSTRACT

With the fall of the coverage formula of the Voting Rights Act, many states are quickly passing strict voter identification laws. While most of the litigation surrounding the new laws are racial challenges, these stricter voter identification laws are also affecting another minority group: transgender Americans. This paper questions the constitutionality of these new laws: while the traditional legal framework fails to adequately protect transgender Americans, the Nineteenth Amendment provides additional protections. This paper concludes that, under this Nineteenth Amendment approach, strict voter identification laws unconstitutionally discriminate against transgender Americans on the basis of sex.

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I. INTRODUCTION

Imagine, for a moment, the near future. The date is November 3, 2020. You have finally made it to your polling place. You wait in line for hours in the brisk fall weather to perform a seemingly simple task: vote in the 2020 presidential election. Finally, your turn to vote arrives. Like the countless people before you, you hand your driver's license to the poll worker, expecting a ballot in return.

But the poll worker does not hand you a ballot. Instead, they study both you and your license, looking from your license to your face and back again. They begin to look confused. "Is this your license?" they ask.

The people in line behind you fall silent in order to listen in on your conversation with the poll worker. "Yes, it's mine," you assure them.

“But you’re not a girl. It says girl on this license. You can’t vote with someone else’s license.”

You now have a decision to make: Do you argue with the poll worker, ask to see a different poll worker, or walk away, hoping to try a different voting place? Or maybe you just do not vote at all?

That was the decision facing over 78,000 transgender Americans in states with strict voter identification (ID) laws in November 2018.¹ In one case, a transgender woman was only able to vote because a good Samaritan drove her to a different polling place after her ID was rejected by a poll worker.² But what if this did not have to be an issue in 2020?³

In this paper, I consider what legal protections a transgender person has in this sort of situation; while I find that the traditional protections are limited, the Nineteenth Amendment should provide additional protections. Part II of this paper examines the experience of voting as a transgender American and discusses some of the new voter ID laws and their impact on transgender Americans. Part III of this paper analyzes these new voter ID laws under the burden-weighting analysis of the *Anderson-Burdick* framework traditionally used for voter qualification litigation. Part IV explores a different option: reviving the Nineteenth Amendment. Part V concludes this paper and looks optimistically ahead to the 2020 presidential election.

II. VOTING WHILE TRANS IN A STRICT VOTER ID STATE

In an attempt to curtail racially discriminatory election practices, Congress enacted the Voting Rights Act of 1965.⁴ Among other things, the Act required certain states to “preclear” any changes to election laws with federal authorities.⁵ When the United States Supreme Court struck down the preclearance formula in § 4(b) of the Act,⁶ critics worried it would lead to racially discriminatory voting regulations in the previously covered jurisdictions.⁷ They were right.

Take Georgia, for example. Georgia’s current voter ID law, colloquially titled the “Exact Match” or “No Match, No Vote” law, requires that the identification

1. Jody L. Herman & Taylor N.T. Brown, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2018 General Election*, UCLA SCHOOL OF LAW: THE WILLIAMS INSTITUTE, at 2 (Aug. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Aug-2018.pdf>.

2. Glenn Garner, *Trans Woman Turned Away from Polls in Vermont*, OUT (Nov. 6, 2018, 7:41 PM), <https://www.out.com/news-opinion/2018/11/06/trans-woman-turned-away-polls-vermont>.

3. Researchers at the Williams Institute estimate that 81,000 voting-eligible transgender Americans currently live in states with strict photo ID voting laws and “could face substantial barriers and potential disenfranchisement in the November 2020 general election.” Kathryn O’Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election*, UCLA SCHOOL OF LAW: THE WILLIAMS INSTITUTE, at 2 (Feb. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>.

4. *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

5. *Id.* at 544.

6. *Id.* at 556–57.

7. *See, e.g., id.* at 593 (Ginsburg, J., dissenting) (“[A] remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.”). *See also* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55; Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

documents provided by persons registering to vote match exactly with state and federal records.⁸ To register to vote in Georgia today, a prospective voter must fill out a registration form.⁹ The form requires the prospective voter to provide either a valid Georgia driver's license or state ID card number; if the prospective voter does not have either of these, the last four digits of their social security number are required.¹⁰ The "exact match" program works by comparing the identification information listed on this registration form with the records on file with the Georgia Department of Driver Services (DDS) and the Social Security Administration (SSA).¹¹ If the information doesn't match, the prospective voter is placed on "pending" status and given the opportunity to correct the misinformation.¹² If the information is not corrected to match, the registration is cancelled.¹³ But what exactly does "exact match" mean, anyway?

It means *exact* match. Did you write "Snoop" as your first name on your registration form but the DDS has you listed as "Snoop Dogg"? No vote for you.¹⁴ Did you omit a hyphen from your last name and write "Beyonce Knowles Carter," but the SSA has you listed as "Beyonce Knowles-Carter"? No vote for you. Did you forget a suffix and write "Robert Downey" instead of "Robert Downey, Jr."? No vote for you. Did you think you were finally famous enough to just write "The Rock" instead of "Dwayne Johnson"? No vote for you, no matter how many spot-on renditions of the People's Eyebrow¹⁵ you give the poll worker.

So where does this leave transgender Georgians without a legally matching gender marker on their identification documents? That's right: no votes for them.

8. GA. CODE ANN. § 21-2-220.1(b) (West 2020). The current law was enacted in 2017, but this wasn't the first time Georgia has tried to enact such legislation: in 2008, Georgia attempted to introduce an "exact match" law. Brentin Mock, *How Dismantling the Voting Rights Act Helped Georgia Discriminate Again*, CITYLAB (Oct. 15, 2018), <https://www.citylab.com/equity/2018/10/how-dismantling-voting-rights-act-helped-georgia-discriminate-again/572899/>. That one, however, was rejected by the Justice Department as a violation of the Voting Rights Act. *Id.* After adding a "few new safeguards," Georgia finally appeased the Justice Department and passed an "exact match" law in 2010. *Id.* This law was challenged in 2016, right before the 2016 presidential election, alleging that the law discriminated disproportionately against racial minority voters. Kristina Torres, *Federal Lawsuit Alleges Georgia Blocked Thousands of Minority Voters*, ATLANTA J.-CONSTITUTION (Sept. 14, 2016), <https://www.ajc.com/news/state--regional-govt--politics/federal-lawsuit-alleges-georgia-blocked-thousands-minority-voters/EKb979oRoBe4yJ3Uo1nDfP/>. The lawsuit settled and, as part of the settlement agreement, Georgia agreed to permanently suspend the "exact match" program. Mock, *supra*. Apparently, "permanent suspension" means "do it all over again next year," because that is what happened next: Georgia passed HB 268 in 2017, codifying the "exact match" program still in force today. H.B. 268, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); GA. CODE ANN. § 21-2-220.1 (West 2020).

9. *State of Georgia Application for Voter Registration*, GA. SECRETARY OF ST., https://sos.ga.gov/admin/files/GA_VR_APP_2019.pdf (last visited May 19, 2020).

10. *Id.*

11. GA. CODE ANN. § 21-2-220.1 (West 2020); *Information for Pending Voters*, GA. SECRETARY OF ST., (last visited May 19, 2020), https://sos.ga.gov/index.php/general/information_for_pending_voters.

12. *Information for Pending Voters*, *supra* note 11.

13. *Id.*

14. See Mock, *supra* note 8.

15. See, e.g., Norberto Briceño, *Stop What You're Doing and Look at the Rock's Eyebrow*, BUZZFEED (Mar. 24, 2017, 4:31 PM), <https://www.buzzfeed.com/norbertobriceno/smelalalalalalalow>.

The term “transgender,” or “trans” for short, is used to describe a person whose gender identity differs from the gender they were thought to be at birth.¹⁶ “Gender identity” is a person’s own internal knowledge of their gender, whereas “gender expression” is how a person presents their gender externally.¹⁷ When a transgender person begins to express their gender identity externally, this is called the “gender transition” period.¹⁸ This period can entail changes in hair or clothing style, a name or pronoun change, or even medical procedures such as hormone therapy or gender reassignment surgery.¹⁹ The gender transition process is unique to each individual, and not every person undertakes every possible step.²⁰

Only a person’s name, not their gender marker, is listed on a physical social security card.²¹ The SSA, however, does keep track of gender markers in its records.²² The SSA recognizes that the gender transition process is a unique experience, and will update a person’s gender marker after receiving a letter from a licensed physician stating that the person has undergone “appropriate clinical treatment.”²³ In fact, the physician does not even need to disclose the details of the treatment.²⁴ As far as dealing with administrative bureaucracy and red tape, this may not seem too big a burden for some; but remember, under Georgia’s “exact match” law, the voter registration form must match both the SSA records and the DDS records.

To change a gender marker on a Georgia driver’s license, a person also has to provide proof that a gender change has occurred.²⁵ The person attempting to change their gender marker must go to a DDS branch and, in person,²⁶ prove they have undergone gender reassignment surgery by providing either a court order or a physician’s letter that states the date of the surgery.²⁷ This is the only option under Georgia law: a person *must* have undergone gender reassignment surgery in order to change their gender marker on their driver’s license.²⁸

Say you live in Georgia and have finally finished your gender transition period. Your gender expression finally matches your gender identity: you dress in the

16. *Understanding Transgender People: The Basics*, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Know Your Rights: Social Security*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/know-your-rights/social-security> (last visited Apr. 20, 2020).

22. *Id.*

23. *Id.* “The phrase ‘appropriate clinical treatment for gender transition’ is meant to capture a range of treatments that may be appropriate, in each individual case, to facilitate gender transition. Clinical treatment methods are outlined in the World Professional Association for Transgender Health Standards of Care, and treatment can include psychotherapy, changes in gender expression and role, hormone therapy, or surgery, or any combination thereof. No specific treatment is required . . .” *Id.*

24. *Id.*

25. *Update/Change License Information*, GA. DEP’T OF DRIVER SERVS., <https://dds.georgia.gov/updatechange-license-information?con=1748208403&ty=dl> (last visited Apr. 20, 2020).

26. *Id.* I’d like to point out that the in-person requirement also opens the door to discrimination by ever-cheerful DDS employees, but that’s beyond the scope of this paper.

27. *Id.*

28. *Id.*

clothes you want, wear your hair how you want, and your friends and family have finally gotten used to calling you by a different name and/or pronoun. You and your doctor made the medical decision to use hormone therapy, rather than gender reassignment surgery, to complete this transition because that was what made sense for your unique transition. As the 2020 election approaches, you decide you should do your civic duty as an American and vote. You fill out the registration form, proudly using the gender marker that finally reflects your gender identity and gender expression.

Of course, your registration is placed on “pending” status: the gender marker you wrote on the registration form does not match the one in the DDS records. You now have a choice: undergo a medically-unnecessary and often prohibitively expensive²⁹ gender reassignment surgery so that you can update your driver’s license and thus cure the mismatch of information so you can vote, or you can forego voting.

How many people currently face this choice? There are an estimated 1.4 million transgender people currently living in the United States.³⁰ Between 2000 and 2014, there were 4,118 reported gender reassignment surgeries in the United States.³¹ So, even assuming that all of those surgeries have been performed on persons still alive today, only 0.29% of transgender people have undergone gender reassignment surgery.

Georgia has a population of roughly 10.6 million people.³² According to the Williams Institute, 0.75% of Georgia’s population identify as transgender,³³ thus, we can estimate that there are approximately 79,500 transgender people currently living in Georgia. If only 0.29% of transgender people have undergone gender reassignment surgery, this means that, out of the 79,500 transgender people in Georgia, only 231 of those people have undergone gender reassignment surgery.

Under the “exact match” law, 231 transgender people are currently eligible to vote in Georgia in 2020. Conversely, this means that approximately 79,269 transgender people must either undergo gender reassignment surgery or lose the

29. See Benji Jones, *The Staggering Costs of Being Transgender in the US, Where Even Patients with Health Insurance Can Face Six-Figure Bills*, BUSINESS INSIDER (July 10, 2019, 12:38 PM), <https://www.businessinsider.com/transgender-medical-care-surgery-expensive-2019-6>.

30. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, UCLA SCHOOL OF LAW: THE WILLIAMS INSTITUTE, at 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

31. Joseph K. Canner et al., *Temporal Trends in Gender-Affirming Surgery Among Transgender Patients in the United States*, 153 JAMA SURGERY 609, 611–12 (2018). This number includes all “gender-affirming” surgeries; genital surgery accounted for 3,586 of these surgeries. *Id.*

32. *Quick Facts: Georgia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/GA> (last visited Mar. 30, 2020) (the population estimate as of July 1, 2019 is 10,617,423).

33. Flores et al., *supra* note 30.

ability to vote. And this is only Georgia: other states have surgical requirements as well.³⁴

III. BEEN THERE, DONE THAT: THE FAILINGS OF THE *ANDERSON-BURDICK* FRAMEWORK

Could a transgender voter challenge Georgia's approach as discriminatory vote denial? While the right to vote is fundamental,³⁵ states may impose voting qualifications and regulations.³⁶ The legal question then becomes whether the qualification or regulation is unconstitutionally burdensome under the *Anderson-Burdick* framework.

The *Anderson-Burdick* framework works like this: A plaintiff brings a challenge to a voting rule under the First and Fourteenth Amendments, arguing that it unconstitutionally burdens his or her right to vote.³⁷ The Supreme Court then "must weigh 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"³⁸

The Supreme Court used this flexible framework in *Crawford v. Marion County Election Board*, when plaintiffs challenged an Indiana law requiring voters to present a government-issued photo ID in order to cast a vote.³⁹ The plaintiffs alleged that this law burdened their right to vote for several reasons,⁴⁰ while Indiana put forth its interests in enacting the law: election modernization, deterring and detecting voter fraud, and safeguarding voter confidence.⁴¹

The Supreme Court sided with Indiana, stating "[t]he state interests identified as justifications for [the voter ID law] are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute"⁴² and that "[t]he

34. Alabama, for example, also requires that a person requesting to change the gender marker on their driver's license have undergone gender reassignment surgery. *ID Documents Center: Alabama*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/documents/state/alabama> (last visited Mar. 30, 2020).

35. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966).

36. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute."). "[S]tates retain the power to regulate their own elections." *Id.* "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections . . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

37. *Burdick*, 504 U.S. at 430.

38. *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

39. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008).

40. *Id.* at 199. First, they argued that in order to receive a valid photo ID, they had to gather other identification documents, such as birth certificates, which were difficult to obtain for elderly people who were born out-of-state or for people who could not afford to pay the \$12 fee required to obtain a birth certificate. *Id.* Second, there was a lot of travel involved: first traveling to the DMV to obtain a photo ID and then back again to vote. *Id.* Third, the photograph requirement hindered those who had religious objections to getting their photo taken. *Id.*

41. *Id.* at 191–97.

42. *Crawford*, 553 U.S. at 204.

application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’”⁴³ “Each [of Indiana’s proffered interests] is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.”⁴⁴

As for election modernization, even “Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”⁴⁵ Indiana “has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.”⁴⁶ Furthermore, though Indiana had no record of “any [in-person voter] fraud actually occurring in Indiana at any time in its history,” the fact that “flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history” was enough to render deterring and detecting voter fraud a relevant and legitimate state interest.⁴⁷ The Court also noted that, while closely related to the other two proffered reasons, safeguarding “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”⁴⁸

The Supreme Court’s decision in *Crawford v. Marion County* is likely fatal for any plaintiffs attempting to challenge Georgia’s strict voter ID law on the grounds that it unfairly burdens transgender voters. Like Indiana, Georgia can simply cry “voter fraud,” even if it has never happened in Georgia. Furthermore, while a significant number of transgender Georgians are affected by the law,⁴⁹ only a small portion of Georgians are affected.⁵⁰ Thus, the application of the statute to the vast majority of Georgia voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process.⁵¹

Is all hope lost for prospective transgender voters unwilling or unable to undergo gender reassignment surgery? Under *Crawford v. Marion County*, yes. But maybe there is another way.

IV. FORGOTTEN BUT NOT GONE: THE NINETEENTH AMENDMENT

The Nineteenth Amendment, ratified almost a century ago in 1920, provides that “[t]he right of citizens of the United States to vote shall not be denied or

43. *Id.* (quoting *Anderson*, 460 U.S. at 788 n.9).

44. *Id.* at 191.

45. *Id.* at 193.

46. *Id.* at 191.

47. *Id.* at 195–96.

48. *Crawford*, 553 U.S. at 197.

49. ~79,269 people out of 79,500. *See supra* Part II.

50. Only ~79,269 people out of 10.6 million Georgians are affected; this amounts to 0.75% of Georgia’s population. *See supra* Part II.

51. This is a paraphrase of *Crawford*, 553 U.S. at 204 (quoting *Anderson*, 460 U.S. at 788, n.9).

abridged by the United States or by any State on account of sex.”⁵² Once a hard-won victory for (white) female citizens, the Nineteenth Amendment has since been relegated to a simple example of constitutional amendments that address voting rights.⁵³

The last challenge brought before the Supreme Court under the Nineteenth Amendment—ironically originating in Georgia—was the 1937 case *Breedlove v. Suttles*, which involved a challenge by a male citizen who was required to pay a poll tax of \$1 per year whether or not he voted that year.⁵⁴ Female citizens who did not vote were not required to pay the tax.⁵⁵ Of course, all poll taxes were deemed unconstitutional three decades later,⁵⁶ but the *Breedlove* Court⁵⁷ reasoned that “by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex.”⁵⁸

Breedlove is important here because it interprets “sex” broadly and establishes that the Nineteenth Amendment “applies to men and women alike”⁵⁹ So why should it not also apply to transgender men and women?

Perhaps the biggest hurdle in extending the protections of the Nineteenth Amendment to transgender Americans lies in the historical interpretation of the word “sex.” It is fairly obvious that, in 1920, the passage of the Nineteenth Amendment was not intended to apply to transgender Americans: the first known use of the word “transgender,” at least according to Merriam-Webster, was in 1974.⁶⁰

This should not be dispositive. For starters, the Nineteenth Amendment was primarily advantageous to white women.⁶¹ Black women still faced the same issues

52. U.S. CONST. amend. XIX, § 1.

53. See e.g., *Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013). (Ginsburg, J., dissenting) (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.”); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2692 (Roberts, C.J., dissenting) (2015) (“Indeed, several constitutional amendments over the past century have involved modifications of the electoral process. Amdts. 19, 22, 24, 26.”).

54. *Breedlove v. Suttles*, 302 U.S. 277, 279–80 (1937).

55. *Id.*

56. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966).

57. The Court, ever a feminist entity, reasoned that “[i]n 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. Moreover, Georgia poll taxes are laid to raise money for educational purposes, and it is the father’s duty to provide for education of the children.” *Breedlove*, 302 U.S. at 282.

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

59. *Id.* at 283.

60. *Transgender*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/transgender> (last visited Apr. 20, 2020).

61. See Kimberly A. Hamlin, *How Racism Almost Killed Women’s Right to Vote*, WASH. POST (June 4, 2019, 4:00 AM), <https://www.washingtonpost.com/outlook/2019/06/04/how-racism-almost-killed-womens-right-vote/>; see also 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, 433 (2018) (“[F]or aspiring African American voters in the South, the failure of the Nineteenth Amendment

as black men attempting to vote—“the chicanery, the poll taxes, the literacy tests, the resort to intimidation and violence.”⁶² Yet, does the Nineteenth Amendment only apply to white women? No—it applies to all women. And men, according to *Breedlove*.

Speaking (or writing, as it were) of race, let us turn our attention for a moment to the Fifteenth Amendment:

Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.⁶³

The Fifteenth Amendment, ratified five years after the end of the American Civil War, 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.”⁶⁴ This is essentially the same language as the Nineteenth Amendment, only the word “sex” replaced the phrase “race, color, or previous condition of servitude.” Certainly, including transgender men and women under the umbrella of the Nineteenth Amendment would “go beyond” the original objective of the Nineteenth Amendment, “transcending the particular controversy which was the immediate impetus for its enactment.” But so does including white people under the umbrella of the Fifteenth Amendment.⁶⁵

Thus, the Nineteenth Amendment should be interpreted broadly to encompass all sexes, just as the Fifteenth Amendment encompasses all races. And if we do read the Nineteenth Amendment broadly, how could we utilize it to launch a challenge on Georgia’s “exact match” voter ID law?

In keeping with the analogy between the Fifteenth and Nineteenth Amendments, potential challenges⁶⁶ under the Nineteenth Amendment would

to secure voting rights for black women constituted a sad sequel to the failure of the Fifteenth Amendment to secure voting rights for black men.”).

62. Gidlow, *supra* note 61, at 445–46.

63. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (invalidating a law which provided that only people of Hawaiian ancestry could cast a vote).

64. U.S. CONST. amend. XV, § 1.

65. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

66. Aside from *who* is covered, there is a debate about exactly *what* the Nineteenth Amendment covers. See Richard L. Hasen & Leah Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, GEORGETOWN L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501114 (last visited Apr. 20, 2020) (arguing for a “thick” reading of the Nineteenth Amendment). Under a “thick” reading of the Nineteenth Amendment, “[w]hen a state passes a law which 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.” *Id.* at *13. In contrast, a “thin” reading would “merely prohibit[] states from enacting laws

likely share certain characteristics with challenges under the Fifteenth Amendment: namely, a plaintiff making a Nineteenth Amendment challenge will likely have to show not only disparate impact, but discriminatory intent as well. For example, in *Mobile v. Bolden*, plaintiffs challenged the at-large election process of the City Commission on the basis that it diluted the voting strength of black residents.⁶⁷ Because the law was facially neutral on the basis of race, the Supreme Court required that the plaintiffs show not only that the black residents were disproportionately impacted by the law, but also that the law was enacted due to racial animus.⁶⁸ The Fifteenth Amendment, the Court said, “prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote ‘on account of race, color, or previous condition of servitude.’”⁶⁹ As such, any challenge to a law that is “sexually neutral” on its face will likely have the same requirement under the Nineteenth Amendment.

So what’s a prospective voter in Georgia to do? As discussed *supra*, Georgia has a valid interest in protecting the integrity and reliability of the electoral process.⁷⁰ The “exact match” law is sexually neutral on its face: every gender type is required to provide a registration form that exactly matches DDS and SSA records. Preventing voter fraud and safeguarding voter confidence, as Georgia is sure to argue, are assuredly not sexually discriminatory purposes.

Rather than challenging the “exact match” law itself, a plaintiff should instead challenge the requirement that anyone attempting to change the gender marker on their driver’s license undergo gender reassignment surgery, and this in turn infringes on the right to vote on the basis of sex. Even assuming the Court would require discriminatory intent under the Nineteenth Amendment, what non-discriminatory purpose could Georgia possibly allege here? Detecting or deterring voter fraud simply will not cut it; thus, while Georgia’s probable justifications are likely strong enough to survive the *Anderson-Burdick* framework’s deferential standard, they probably will not withstand heightened scrutiny under the Nineteenth Amendment.

V. CONCLUSION: THE NINETEENTH AMENDMENT TO THE RESCUE

Imagine again, for a moment, the near future. The date is November 3, 2020. You have finally made it to your polling place. You wait in line for hours in the brisk fall weather to perform a seemingly simple task: vote in the 2020 presidential election. Finally, your turn to vote arrives. Like the countless people before you, you hand your driver’s license to the poll worker, expecting a ballot in return.

This time, instead of questioning whether the license is really yours, the poll worker obliges and hands you a ballot, because your gender marker finally matches

that prohibit women from voting, once the state decides to hold an election.” *Id.* at *1. This Paper assumes a “thick” reading, such that the Nineteenth Amendment “has its own legal force when plaintiffs allege they face burdens” *Id.* at *22.

67. *Mobile v. Bolden*, 446 U.S. 55, 58 (1980).

68. *Id.* at 62 (“[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”).

69. *Id.* at 65.

70. *See supra* Part III.

2020

*RESURRECTING THE NINETEENTH AMENDMENT: WHY
STRICT VOTER ID LAWS UNCONSTITUTIONALLY
DISCRIMINATE AGAINST TRANSGENDER VOTERS*

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your gender expression. You cast your vote and move on with your day, waiting with the rest of America to see who wins the next presidential election