Abstract. In *Bostock v. Clayton County*, the Supreme Court issued a landmark holding that allowed workplace protections for the LGBTQ+ community, including transgender people, to be subsumed into the Title VII provision prohibiting “sex” discrimination. Though *Bostock* was a Title VII case, the textualist logic of the majority opinion has important constitutional implications.

In this article, we use *Bostock* as a point of departure to lay out two novel constitutional theories that further the voting rights of transgender and gender-nonconforming voters. Under our first theory, we argue that because Title VII and the Nineteenth Amendment have almost identical language, the underlying logic of *Bostock* should govern modern interpretations of the Nineteenth Amendment, meaning that the Amendment’s protections should extend to transgender and gender-nonconforming voters. Because the Nineteenth Amendment should be treated as an analogue to the Fifteenth Amendment, voting regulations that uniquely burden transgender and gender-nonconforming voters should be regarded as per se unconstitutional under the Nineteenth Amendment. Under our second theory, we argue that *Bostock* provides a stepping stone to elevate the standard of review for gender-based as-applied challenges to voting regulations that implicate gender classifications under the Fourteenth Amendment from *Anderson-Burdick* review to intermediate scrutiny.

This article proposes that both theories offer opportunities to better address the barriers posed by the layering of voter ID laws on top of strict identity document requirements that transgender and gender non-conforming voters face at the ballot box. To prove this, we conclude by assessing a hypothetical Nineteenth and Fourteenth Amendment challenge to the joint operation of restrictive voter ID laws and restrictive identification document requirements as applied to transgender and gender-nonconforming voters and argue that such regulations should be struck down as violations of both the Nineteenth Amendment and the Fourteenth Amendment.
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INTRODUCTION

Last June, the Supreme Court issued a landmark holding that allowed workplace protections for the LGBTQ+ community, including transgender people, to be subsumed into Title VII’s provision prohibiting “sex” discrimination. In his majority opinion, Justice Gorsuch held that sex, which the Court defined as “the biological distinctions between male and female,” plays a “necessary and undisguisable role” in an employment decision that turns on a person’s gay or transgender identity. In so holding, the Bostock Court provided a textualist justification for a more expansive scope of workplace protections afforded on the basis of sex.

Though Bostock was a Title VII case, the textualist logic of the majority opinion implicates other civil rights and has important constitutional implications. For example, civil rights litigators are seeking to leverage the underlying logic of Bostock to further the civil rights of incarcerated transgender individuals, and Fourteenth Amendment Equal Protection analysis is already shifting in line with the Court’s post-Bostock understanding of sex and gender identity.

This article seeks to further the voting rights of transgender and gender-nonconforming voters by assessing the implications of Bostock on Nineteenth Amendment and Fourteenth Amendment voting rights jurisprudence. Regarding the former, the nearly identical language of the Nineteenth Amendment to the Title VII sex discrimination provision suggests that a similar textual reading of the Nineteenth Amendment can serve to protect the voting rights of transgender and gender-nonconforming individuals. Regarding the latter, the Bostock Court’s recognition that discrimination on the basis of sex necessarily contains discrimination on the basis of gender identity provides a foothold to broaden Fourteenth Amendment voting rights jurisprudence. Specifically, this article proposes that both theories offer opportunities to better address the barriers posed by the layering of voter ID laws on top of the strict identity document requirements that transgender and gender-nonconforming voters face at the ballot box.

In this article, we use Bostock as a point of departure to lay out two novel constitutional theories that further the voting rights of transgender and gender-nonconforming voters. Under our first theory, we argue that because Title VII and the Nineteenth Amendment have almost identical language, the logic of Bostock should govern analyses of the Nineteenth Amendment. Under this reading, “[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 [gender identity],” meaning that the Amendment’s protections should extend to transgender and gender-nonconforming voters. Because the Nineteenth Amendment should be treated as an analogue to the Fifteenth Amendment, voting regulations that uniquely burden transgender and gender-nonconforming voters should be regarded as “per se unconstitutional.”

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2 Id. at 1737.
3 See infra Part III.
4 As laid out in Part III, Courts have already begun to operationalize the Bostock Court’s logic to afford transgender individuals the gender protections inherent in the Equal Protection Clause. See infra note 106–07 and accompanying text.
5 See infra Part IV.
6 See infra Part II.
7 See Jones v. Governor of Fla., 975 F.3d 1016, 1043 (11th Cir. 2020) (“But the [Fifteenth] Amendment established a powerful baseline: States must set voter qualifications without any regard to race. The Fifteenth Amendment does not subject race-based voter qualifications to strict scrutiny—they are per se unconstitutional. . . . The Nineteenth Amendment forbids the
One all too common example of such regulations, assessed in detail in Part IV, is the enforcement of voter ID laws that require voters to show an identification card with a gender marker in order to vote or cast a provisional ballot. Operating in tandem with laws that require voters to undergo significant expenses to obtain an acceptable form of ID that matches their gender identity, these strict voter ID regimes necessarily implicate a gender classification between cisgender voters and transgender and gender-nonconforming voters, uniquely burdening the latter. Accordingly, such schemes should be regarded as unconstitutional under the Nineteenth Amendment, at least as applied to transgender and gender-nonconforming voters, and be struck down.

Under our second theory, we argue that *Bostock* has provided a stepping stone to elevate the standard of review for gender-based, as-applied challenges to voter ID laws under the Fourteenth Amendment. After the *Bostock* Court’s recognition that sex classifications operate not merely on a male/female sex binary but across a diverse range of gender identities, classifications that sort and burden voters on the basis of cisgender and transgender identity, as the combination of voter ID and strict identity document laws do, are more appropriately reviewed under intermediate scrutiny rather than under *Anderson-Burdick* review, which courts typically use to review generally applicable election laws, including voter ID laws.

This article proceeds in four parts. The first section makes the case that the textualist logic of *Bostock* should apply to the Nineteenth Amendment and, for that reason, the same group of individuals protected under Title VII’s prohibition against discrimination on the basis of sex should be protected under the Nineteenth Amendment—namely, that transgender and gender-nonconforming voters should also be protected under the Nineteenth Amendment. With clarity about who is protected under the Nineteenth Amendment, the second section examines what protections are afforded to voters under the Nineteenth Amendment. Here we argue that for textual and jurisprudential reasons, gender classifications in the voting context that disproportionately burden voters on one side of the classification should be treated like comparable racial classifications in the voting context and be regarded as per se unconstitutional. In the third section we argue that election laws that implicate gender classifications challenged under the Fourteenth Amendment should at least receive intermediate scrutiny, rather than *Anderson-Burdick* review. Finally, in the last section we assess a hypothetical Nineteenth and Fourteenth Amendment challenge to the joint operation of restrictive voter ID laws and restrictive identification document requirements as applied to transgender and gender-nonconforming voters. We argue that such a scheme should be struck down under our framework.

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8 See, e.g., ALA. CODE § 22-9A-19 (2019) (requiring a court order certifying that a person’s sex has been changed via a surgical procedure in order to issue an amended birth certificate). A petition for a name and gender marker change in Alabama costs roughly $100, which does not include fees for new identity documents or the gender confirmation surgery required by the state. Alabama, CAMPAIGN FOR S. EQUALITY: LEGAL RESOURCES (2021), https://southernequality.org/legal-resources/alabama [https://perma.cc/7Q6D-R8K6] (last visited June 30, 2021).

9 See *infra* Part IV. Prior to *Bostock*, Richard Hasen and Leah Litman had mounted a powerful argument to interpret Congress’ enforcement powers under the Nineteenth Amendment to include legislation that targets election policies that disproportionately burden transgender and gender-nonconforming voters, such as voter ID laws. See Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. 27, 69–70 (2020). Our article builds upon their important work but focuses on potential constitutional challenges to such laws after *Bostock*, rather than on Congress’ enforcement powers under the Nineteenth Amendment.

10 See *infra* Part III.
I. THE ROLE OF SEX: BOSTOCK’S IMPLICATIONS FOR THE NINETEENTH AMENDMENT

This section argues that the textualist logic of Bostock should apply to the Nineteenth Amendment and, accordingly, that the same scope of individuals protected under Title VII should also be protected under the Nineteenth Amendment in the voting context. Because the Bostock Court clarified that transgender individuals are protected from discrimination in employment under Title VII, the Nineteenth Amendment can and should be read to encompass the voting rights of transgender and gender-nonconforming voters.

A. On the Meaning of “Sex”

In Bostock, the Supreme Court held that discrimination against transgender and gay individuals fundamentally and inextricably turns on notions of “sex.” While sex was not the sole cause of discrimination in any of the consolidated cases before the Court, the Court found that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” 11 To argue for a transposition of this argument onto the Nineteenth Amendment, we explore the Bostock Court’s treatment of the meaning of sex and the causal language in Title VII.

The Bostock Court’s textualist focus allows us to draw clear parallels between Title VII and the Nineteenth Amendment. First, consider parallel language in the Title VII provision and the Nineteenth Amendment. The Nineteenth Amendment states: “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.” 12 The language used in the Title VII provision with respect to sex is nearly identical—discrimination in hiring, firing, and employment opportunities “because of [an] individual’s . . . sex” is prohibited. 13 On a textualist account, it is reasonable to infer from the nearly identical phrasing of these texts that those protected under Title VII’s prohibition against sex discrimination would also receive the protections of the Nineteenth Amendment.

Indeed, in his lengthy originalist dissent, Justice Alito confirms this theory. According to Justice Alito, where the text of both a statutory and constitutional provision are substantively indistinguishable, so too is the meaning of the text. 14 Applying this theory to Title VII, he specifically notes that the language in the Nineteenth Amendment is “substantively indistinguishable” from that of Title VII. 15 Justice Alito’s interpretive position is consistent with other Supreme Court precedent, where the Court has found that unless evidence of contrary intent is present in the text of a statute or the Constitution, it is appropriate to read the same meaning into substantively identical language. 16 All of

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12 U.S. CONST. amend. XIX, § 1.
14 Bostock, 140 S. Ct. at 1768 (Alito, J., dissenting) (“Long before Title VII was adopted, many pioneering state and federal laws [including the Nineteenth Amendment] had used language substantively indistinguishable from Title VII’s critical phrase, ‘discrimination because of sex.’”).
15 Id.
16 See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 133 (1976) (regarding prior constitutional interpretations of the Equal Protection Clause’s prohibition on sex discrimination as “a useful starting point” to interpret Title VII’s prohibition on sex discrimination due to textual “similarities”); Patton v. United States, 281 U.S. 276, 301 (1930) (holding that where language
this lends support to the argument that the *Bostock* Court’s holding clarifies the scope of voters protected under the Nineteenth Amendment.

Second, consider the ways in which *Bostock* jettisoned the intent of the drafters from the statute’s plain meaning. The Court does not entertain at length the scope of the term “sex” as it was understood at the time of passage of the Civil Rights Act of 1964. It adopts the narrowest interpretation of the meaning of “sex” offered by the parties—“biological distinctions between male and female”—and notes that its holding does not turn on what the drafters meant by the word, but rather on the fact that discrimination on the basis of sexual orientation or gender identity necessarily first requires sex-based discrimination. Even assuming the premise that the drafters of the Civil Rights Act did not intend to capture issues of gender identity or sexual orientation explicitly in the language of the provision, the Court was, through its singular focus on the text, nonetheless able to reach the conclusion that the provision protects transgender individuals. The same logic should apply to the Nineteenth Amendment.

An originalist position, such as that offered by Justice Alito in his dissent, may argue that contrary intent can be inferred from the genesis of the Nineteenth Amendment as the direct result of a women’s suffrage movement that sought the “equal treatment of men and women” and not of all homosexual, transgender, or gender-nonconforming individuals. On this basis, an originalist may argue that the framers of the Nineteenth Amendment could not have meant anything beyond sex as the biological differences between male and female, and thus the Court’s reading of Title VII should not be read into the Nineteenth Amendment. But this position returns to an immaterial debate about the meaning of “sex” as a basis for this assertion. Again, the *Bostock* Court did not dispute the meaning of “sex” at the time of enactment of Title VII. Courts should similarly not dispute its meaning in 1924.

But even if, in the case of a Nineteenth Amendment challenge, a court feels obliged to look to the plain meaning of sex at the time of the Amendment’s enactment, this would in turn reveal an even more robust definition of sex than the meaning of “sex” at the time of the passage of the Civil Rights Act that makes a stronger case for inclusion of transgender and gender-nonconforming individuals. Though there is little jurisprudential analysis of the word “sex” from the early twentieth century when the Nineteenth Amendment was enacted, the colloquial and even scholarly meaning of “sex” began to evolve around the turn of the century as scientists began to identify the biological bases of sex characteristics. Scientists and scholars began to recognize that biological sex distinctions were separate from social constructions, though sex continued to signify a bundle of “traits, attitudes, and

in a federal statute mirrored that of Article III of the Constitution, “it is fair to assume that the framers of the statute . . . intended they have the same meaning . . . ”); Baldwin v. Franks, 120 U.S. 678, 692 (1887) (holding that the meaning of the word “citizen” was the same in a federal statute and in the Fourteenth Amendment of the Constitution, given that there was “nothing to indicate that any[one] other than a citizen [as the meaning of the word in the Fourteenth Amendment] was meant . . . ”).

17 *Bostock*, 140 S. Ct. at 1739.
18 Id. at 1739.
19 Id. at 1754.
20 Id. at 1772 (Alito, J., dissenting).
21 Id. at 1739.
23 Id. at 602.
behaviors” until the later twentieth century when sex was uncoupled from gender. It would seem, then, that even early twentieth century conceptions of sex necessarily involved gendered traits, attitudes, and behaviors. Thus even if a court were to find that the drafters of the Nineteenth Amendment did not intend its protections to specifically include transgender people, this meaning of “sex” broadens the possible scope of a first but-for cause of discriminatory treatment in voting that would form the basis of a Nineteenth Amendment violation, following Bostock. Though few in 1920 might have expected the specific result of expanding Nineteenth Amendment protections to transgender people, it would be incorrect to deny that such a result follows from the text.

B. Causal Relationship Requirements Under Title VII and the Nineteenth Amendment

Title VII and the Nineteenth Amendment additionally share important causal language that is central to the Bostock Court’s holding and thus central to our argument here. Title VII prohibits discrimination “because of” sex, and the Nineteenth Amendment prohibits the abridgment or denial of the right to vote “on account of sex.” The Court has held that the ordinary meaning of “because of” is identical to the “on account of” phrasing used in the Nineteenth Amendment. Moreover, neither Title VII nor the Nineteenth Amendment include “solely” or “primarily because of” in their phrasing. In the context of Title VII, the Bostock Court determined that such an omission evinces Congress’s interest in preserving the possibility of more than one but-for cause of discrimination. Similarly, the drafters of the Nineteenth Amendment did not syntactically prohibit a second but-for cause of the denial or abridgement of the right to vote, over and above “sex.” This observation is integral to mirroring the Bostock Court’s interpretation of Title VII that we believe clarifies the broad scope of protections under the Nineteenth Amendment.

The Bostock Court built on the above textual interpretations to hold that in the case of an employer discriminating against a transgender employee, two causal factors are involved: first, the person’s sex assigned at birth (thereby satisfying the Title VII requirement) and second, the sex with which that individual identifies.

24 Id. at 603.
25 It is possible, though, that a court would not reach this extratextual consideration of the historical meaning of “sex.” The Bostock Court found the word to carry a plain meaning, and a court may find the same of the Nineteenth Amendment. See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).
26 See id.
28 U.S. CONST. amend. XIX, § 1.
31 U.S. CONST. amend. XIX, § 1.
32 Bostock, 140 S. Ct. at 1742. We note here that while “identification” with a sex is the language the Court employs to refer to a transgender or gender-nonconforming person’s gender, we recognize that phrases like “identifies with” are often used to undermine and detract from a person’s true gender.
33 Id. at 1737.
For the purposes of Title VII, then, an employer is in violation of the law as soon as sex is considered at all, even if the discrimination does not stop at the employee’s sex or perceived sex. The Court analogizes this situation to an employer who has a policy of firing any woman discovered to be a Yankees fan—that firing is “because of sex” if the employer retains men who are Yankees fans.\(^{34}\) In each of these examples, sex-based rules result in discrimination.\(^{35}\)

An employer’s insistence on a different but-for cause of discrimination is immaterial. First, the Court notes that it is not possible to understand transgender status without invoking the definition of sex as presented above.\(^{36}\) Necessarily, then, a decision to hire or fire a transgender individual is, in part, because of that person’s sex.\(^{37}\) The Court further discounts “conversational” answers to reasons for firing as notable or controlling—though colloquially, an employer may say that a person was fired for being transgender and not because of sex, the Court holds that the statute’s strict terms, as interpreted to allow multiple but-for causes, reign.\(^{38}\)

Even Justice Alito conceded that, in 1964, Congress did not require plaintiffs to show that a Title VII-protected category was the sole cause of the discrimination.\(^{39}\) In light of this concession, Justice Alito’s main position still holds true in light of the majority opinion: “[I]f ‘sex’ in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female . . . .”\(^{40}\) Indeed, the discrimination occurs not solely “because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender,” as Justice Alito squarely rejects, but in addition to discrimination based on a person’s perceived or actual sex assigned at birth. The application of the Bostock holding to the Nineteenth Amendment mirrors this logic: an unconstitutional classification that burdens only transgender and gender-nonconforming individuals—such as that presented in Part IV of this article—is necessarily a sex-based classification under the Bostock Court’s clarification of the scope of sex-based discrimination.

Fearing the slippery slope of the majority’s logic, Justice Alito raises a concern about the Court’s distinction between those characteristics that are “inextricably” related to sex and those which are only tangentially related to the concept of sex.\(^{41}\) Specifically, Justice Alito asks whether discrimination based on words modified by the adjective “sexual” would be violative of Title VII, and he presents a hypothetical about an employer discriminating on the basis of a person’s history of sexual harassment.\(^{42}\) Such a question is an oversimplification of the Court’s position that certain categories—

\(^{34}\) Id. at 1742.

\(^{35}\) Previous Title VII jurisprudence supports this textualist read of the statutory language. In Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998), the Court held that workplace sexual harassment, regardless of the sex of the harasser and the person harassed, constitutes “discrimination. . . . because of. . . . sex,” as the relevant inquiry is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

\(^{36}\) Bostock, 140 S. Ct. at 1742.

\(^{37}\) Id.

\(^{38}\) Id. at 1745.

\(^{39}\) Id. at 1757 (Alito, J., dissenting).

\(^{40}\) Id.

\(^{41}\) Id. at 1761 (Alito, J., dissenting).

\(^{42}\) Id.
like motherhood, as was the case in *Phillips v. Martin Marietta Corporation*—clearly depend on sex, while others do not. Justice Alito obtusely ignores the fact that “sex” here is a polyseme—that which concerns sexual relations and activity is distinct, in the context of the Court’s opinion, from characteristics that turn on biological sex. But more importantly, Justice Alito’s concern is simply irrelevant in the voting context. No voting process or mechanism invokes anything tenuously sexual beyond that which is inextricably linked to sex. A voter’s registration, identification requirements, polling place, and voting history only bear on a small subset of protected characteristics, not a person’s history of “sexual intercourse” or interest in “sexual content,” for example, as Justice Alito offers. Put simply, applied to the Nineteenth Amendment, Justice Alito’s concern about overprotection is inapposite.

Accordingly, as a result of the textual parallels between Title VII and the Nineteenth Amendment, it is possible to read these same conclusions into the voting context. An abridgement or denial of the right to vote because of, but not limited to, sex would therefore be a constitutional violation. Yet because it is not possible to deny or abridge the right to vote of a transgender person because of their gender identity without invoking the “bundle of traits, attitudes, and behaviors” attributed to sex, this abridgement or denial should receive constitutional protections under the Nineteenth Amendment.

II. THE NINETEENTH AMENDMENT’S PROTECTIONS

In offering a textual justification for a capacious understanding of discrimination on the basis of sex under Title VII, we believe *Bostock* necessarily clarified the scope of individuals protected by the Nineteenth Amendment. If that is the case, then the precise content of the protections of the Nineteenth Amendment have become more relevant. This section discerns those protections by examining the history of Nineteenth Amendment challenges, as well as recent Nineteenth Amendment scholarship.

We argue that the little Nineteenth Amendment case law that we have, the text and history of the Amendment, and existing scholarship on the Amendment all point toward what some scholars have termed a “thick” conception of the Nineteenth Amendment, understood as a binding commitment to the ideals of political equality in voting and equal access to the political process regardless of one’s sex. Although the depth of this commitment is yet to manifest in the Court’s underdeveloped Nineteenth Amendment jurisprudence, Fifteenth Amendment jurisprudence provides an analogous body of law.

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44 Though we highlight the Court’s position on motherhood here to distinguish between those characteristics that necessarily depend on sex and those that do not, we acknowledge a diverse conception of parenthood that includes transgender and gender-nonconforming parents.
45 *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting).
46 See Hasen & Litman, supra note 7, at 33 (defending a thick conception of the Nineteenth Amendment and defining it as “protect[ing] against the perpetuation of political-power disparities on the basis of gender” and “protect[ing] against the subordination of women in U.S. politics”); see also Paula A. Monopoli, *The Constitutional Development of the Nineteenth Amendment in the Decade Following Ratification*, 11 CONLAWNOW 61 (2019) (contrasting thick and thin conceptions of the Nineteenth Amendment).
47 See Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 Fla. St. U. L. REV. 507, 509–10 (2016) (“Despite the Nineteenth Amendment’s existence for nearly a century and the recent popular and scholarly attention to voting rights, the Nineteenth Amendment has not received any serious treatment or
on which to base renewed Nineteenth Amendment jurisprudence that aligns a court’s scrutiny of regulations implicating gender classifications in voting with this “thick” conception of the Amendment. As with voting regulations that set voter qualifications in any part on the basis of race, voting regulations that do comparable things with respect to gender identity should automatically be treated as per se unconstitutional, as they are under the Fifteenth Amendment. We believe our proposed framework is consistent with the text, purpose, and demands of the Nineteenth Amendment, and, as we show in Part IV, would offer voting rights litigators a new tool for challenging voter ID laws that disproportionately burden trans and gender-nonconforming voters.

A. The Nineteenth Amendment’s “Thick” Commitment to Equality

Since its passage in 1920, federal courts have had few occasions to specify the protections afforded to voters by the Nineteenth Amendment. The Nineteenth Amendment’s Enforcement Clause, for example, has never been interpreted by the Supreme Court. Indeed, scholars have explicitly noted the dearth of case law and scholarship on the Nineteenth Amendment.

To this day, the Supreme Court has heard only two Nineteenth Amendment challenges: Leser v. Garnett in 1922 and Breedlove v. Shuttles in 1937. Both provide little insight into the Amendment’s substantive content because the Court provides little analysis of the Amendment, and the cases precede the Court’s adoption of its modern voting rights jurisprudence. In Leser v. Garnett, the Court’s first foray into Nineteenth Amendment jurisprudence, the Court merely affirmed that the protections of the Nineteenth Amendment applied automatically after its ratification. Fifteen years later, in Breedlove v. Suttles, the court upheld a Georgia regulation that exempted women who did not register to vote from paying a poll tax against a Nineteenth Amendment challenge.

In doing so, the Court offered only a single paragraph of analysis on the Nineteenth Amendment. In this paragraph, the Court held that the Nineteenth Amendment does not place restrictions on a state’s ability to levy or collect taxes and concluded that “[i]t 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 consideration as a tool to protect voting rights.”)

48 For an analysis of the legislative history leading up to the passage of the Nineteenth Amendment, see Kolbert, supra note 49, at 534–40.
49 See Eric S. Fish, Note, The Twenty-Sixth Amendment Enforcement Power, 121 YALE L.J. 1168, 1178–79 (2012);
50 See, e.g., Hasen & Litman, supra note 7, at 33 (“Given the paucity of judicial interpretations and scholarly writings on the scope of the Nineteenth Amendment, even one hundred years after its ratification, we believe that its interpretation remains up for grabs in important respects.”); Kolbert, supra note 45, at 508–09. (“Yet, no legislation and barely any litigation have arisen as a result of the Nineteenth Amendment. One legal encyclopedia spends a mere sixty-nine words on the Nineteenth Amendment. . . . The Nineteenth Amendment receives so little attention, scholars joke about it.”) (footnote omitted). That said, the 100th anniversary of the Nineteenth Amendment has occasioned a recent resurgence of scholarship. For example, last winter the Yale Law Journal hosted a symposium on the Nineteenth Amendment, featuring three articles. See Symposium, The Nineteenth Amendment at 100, 129 YALE L.J. 450 (2020), https://www.yalelawjournal.org/collection/nineteenth-amendment-at-100 [https://perma.cc/WXR8-5LPI] (last visited June 30, 2021).
51 See Leser v. Garnett, 258 U.S. 130 (1922) (striking down a provision of Maryland’s Constitution limiting the franchise to men but providing minimal analysis of the substance of the Amendment itself).
of their sex.”\textsuperscript{53} By sanctioning a voting regulation containing an explicit gender-based classification, in its only word on the substantive protections of the Nineteenth Amendment, the Court appeared to put forward what some scholars have called a “thin” conception of the protections afforded by the Nineteenth Amendment: because Breedlove “allowed for de jure gender discrimination in voting rules,” Richard Hasen and Leah Litman argue in a recent article on the Nineteenth Amendment, “[t]he case offers the thinnest possible version of the Nineteenth Amendment.”\textsuperscript{54}

Yet one can also read Breedlove’s understanding of the Nineteenth Amendment in a more expansive light. Although the Court declined to strike down the gender classification, it also recognized that the Nineteenth Amendment “applies to men and women alike.”\textsuperscript{55} In this way, “the Nineteenth Amendment [was] understood [by the Court] to extend beyond [its] paradigmatic protected classes,”\textsuperscript{56} suggesting a more robust conception of the Nineteenth Amendment than Breedlove’s holding might indicate.

Although Breedlove is the Supreme Court’s one and only real assessment of a Nineteenth Amendment challenge, as other scholars have noted, one can glean the outline of a “thicker”\textsuperscript{57} conception of the Nineteenth Amendment in Supreme Court dicta in voting rights and non-voting rights cases. For some scholars, the seed of such a conception is found, ironically, in Adkins v. Children’s Hospital.\textsuperscript{58} In this case, the Court struck down a minimum wage law for women and children as a violation of the Due Process Clause.\textsuperscript{59} Yet in his majority opinion, Justice Sutherland briefly opined on the significance of the Nineteenth Amendment, which had passed just a few years earlier:

But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller case has continued “with diminishing intensity.” In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.\textsuperscript{60}

While the holding—and much of the language—of Adkins itself remains a paternalistic relic of another era, scholars have interpreted this passage as an affirmation by the Court that the ratification of the Nineteenth Amendment committed the country to the ideal of robust political sex equality. According to Reva Siegel, for example, by “discussing equality for women in the framework of the suffrage debates[,] as emancipation from the traditions of reasoning about gender embodied in the common law of marital status,” Adkins “approached the Nineteenth Amendment as embodying a sex

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\textsuperscript{53} Id. at 284.
\textsuperscript{54} See Hasen & Litman, supra note 7, at 27, 32, 34.
\textsuperscript{56} See Fish, supra note 48, at 1175.
\textsuperscript{57} See Monopoli, supra note 43, at 66.
\textsuperscript{59} See Adkins v. Children’s Hospital, 261 U.S. 525, 553 (1923) (striking down a D.C. minimum wage law as a violation of the Due Process Clause).
\textsuperscript{60} See id. (quoting Muller v. Oregon, 208 U.S. 412 (1908)).
\end{flushleft}
equality norm that had implications for constitutional questions other than voting.” In other words, the Amendment contains constitutional protections beyond the enfranchisement of women.

As other scholars have noted, the Court has occasionally drawn upon this thicker, emancipatory conception of the substantive protections of the Nineteenth Amendment. In Reynolds v. Sims, where the Court first applied one-person, one-vote to strike down a malapportioned districting plan, Justice Douglas characterized the Nineteenth Amendment, in passing, as part of a project of “political equality”—a far cry from Justice Brandeis’ implicit sanctioning of gender classifications in the voting context in Breedlove. Along similar lines, in a footnote to her Shelby County v. Holder dissent, Justice Ginsburg offered an intratextual reading of the Nineteenth Amendment, as embodying, along with the Fifteenth and Twenty-Sixth Amendments, a commitment “to mak[e] the right to vote equally real for all U.S. citizens.”

Although state courts were the primary locus for Nineteenth Amendment litigation shortly after the Amendment’s passage, the cases provide little insight as to how a modern court should apply the Amendment, as most of these cases were decided in the early twentieth century and involved challenges to facial bars to women’s right to vote. Yet even in these older cases, state appellate courts drew upon this thicker conception of Nineteenth Amendment protections. For example, in Graves v. Eubank, decided just two years prior to Adkins and one year after the Amendment’s ratification, the Alabama Supreme Court held that Alabama’s poll tax requirement extended to women. But in addition to offering this “thin” formal holding, the court went further, claiming that the Amendment “automatically strikes from the state laws, organic and statutory, all discriminatory features authorizing one sex to vote and excluding the other, or placing conditions or burdens upon one not placed upon the other as a condition precedent to the right to vote. . . .” Such language suggests something more robust than simple formal equality and certainly something far more protective than the paternalistic notion of the Nineteenth Amendment at work in Breedlove.

See Siegel, supra note 58, at 1013.


See Reynolds v. Sims, 377 U.S. 533, 558 (1964) (“And, finally, we concluded [in Gray v. Sanders]: ‘The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.’” (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))).

On the sexism in Breedlove, see Hasen & Litman, supra note 7, at 38 (“Breedlove’s embrace of sexism, its reliance of [sic] the repudiated Muller case, and its decision to ignore Adkins’ more progressive view of the Nineteenth Amendment, moved the issue of women’s voting rights and the scope of the Amendment backwards.”).

See Shelby County v. Holder, 570 U.S. 529, 567 n.2 (2013) (J., Ginsburg, dissenting). See also Hasen & Litman, supra note 7, at 31 (describing Justice Ginsburg’s dissent as embodying a thick conception of the Fifteenth Amendment, and thus, by implication, of the Nineteenth Amendment).

See Graves v. Eubank, 205 Ala. 174, 175 (1921) (emphasis added).

Beyond the few cases that constitute our Nineteenth Amendment Supreme Court jurisprudence, the text and history of the Amendment also point toward a thicker conception. See Hasen & Litman, supra note 7, at 38–56 (defending a thick conception of the Nineteenth Amendment on the basis of the Amendment’s text and history, the broader constitutional history of the expansion of voting rights, and the Court’s recognition of voting as a fundamental right); Siegel, supra note 58, at 952 (“This Article proposes a synthetic reading of the Fourteenth and Nineteenth Amendments that would bring to the interpretation of the Equal Protection Clause a knowledge of the family-based status order through which women were disfranchised for most of this nation’s history and from which they were emancipated after over a half century of struggle. Interpreted from this sociohistoric standpoint, a core meaning of equal protection for women is freedom from historic forms of subordination in the family.”).
B. The Nineteenth Amendment’s Scrutiny Framework: Per Se Unconstitutionality

Assuming the ratification of the Nineteenth Amendment committed the country to a “thick,” robust ideal of political equality, what sort of scrutiny framework should a modern court apply when assessing Nineteenth Amendment challenges?

We begin with what courts have done already. On the one hand, courts sometimes have read Nineteenth Amendments protections as simply coextensive with the Fourteenth Amendment. In Ball v. Brown, for example, a federal district court explicitly adopted this theory, noting that “[t]o the extent that the Nineteenth Amendment provides a further guarantee of the right to vote, that guarantee is encompassed within the [F]ourteenth [A]mendment guarantee of equal protection under laws prohibiting state action which invidiously encroaches upon the right to vote.”\(^{68}\) Under current Fourteenth Amendment jurisprudence, gender classifications receive intermediate scrutiny, requiring the government to show that the challenged law furthers an important government interest and uses means substantially related to that interest.\(^{69}\) By extension, according to the logic of the Ball v. Brown court, Nineteenth Amendment challenges to voting regulations implicating gender classifications should similarly receive intermediate scrutiny.

On the other hand, other courts have adopted the theory that the Nineteenth Amendment embodies analogous protections to those of the Fifteenth Amendment. The Supreme Court appeared to adopt such a theory in Leser v. Grant, noting that the Nineteenth Amendment “is in character and phraseology precisely similar to the Fifteenth.”\(^{70}\) Similarly, shortly after the Nineteenth Amendment’s passage, a state high court held that “[t]he privileges conferred upon women by the Nineteenth Amendment are precisely the same as those conferred upon the colored race by the Fifteenth.”\(^{71}\) This makes sense from a textualist perspective, as the Nineteenth Amendment was written as an analogue to the Fifteenth Amendment.\(^{72}\) Forty years later in Williams v. Rhodes, the Supreme Court affirmed this theory of the Nineteenth Amendment in dicta, writing that “[c]learly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections.”\(^{73}\) It did the same in Gray v. Sanders,\(^{74}\) and the Eleventh Circuit recently affirmed this understanding.\(^{75}\)

Whether there is a meaningful difference between these two theories—that the Nineteenth Amendment provides a further guarantee of the right to vote, that guarantee is encompassed within the Fourteenth Amendment guarantee of equal protection under laws prohibiting state action which invidiously encroaches upon the right to vote, or that the Nineteenth Amendment provides a further guarantee of the right to vote, that guarantee is precisely the same as those conferred upon the colored race by the Fifteenth Amendment—will be the subject of continued debate. The hope is that this debate will lead to a more equitable and just society for all citizens.

\(^{68}\) 450 F. Supp. 4, 8 (N.D. Ohio 1977) (citing Williams v. Rhodes, 393 U.S. 23, 89 (1968)).

\(^{69}\) See Craig v. Boren, 429 U.S. 190 (1976) (holding that intermediate scrutiny is the proper standard of review for scrutinizing gender classifications under the Equal Protection Clause).


\(^{71}\) See Opinion of the Justices, 113 A. 603, 616 (Me. 1921).

\(^{72}\) Compare U.S. Const. amend. XV (“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 race, color, or previous condition of servitude.”), with U.S. Const. amend. XIX (“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.”).

\(^{73}\) 393 U.S. 23, 29 (1968).

\(^{74}\) 372 U.S. 368, 379 (1963) (“The Fifteenth Amendment prohibits a State from denying or abridging a Negro’s right to vote. The Nineteenth Amendment does the same for women.”).

\(^{75}\) Jones v. Governor of Fla., 975 F.3d 1016, 1042 (11th Cir. 2020) (“Race is never a permissible criterion for determining the scope of the franchise [under the Fifteenth Amendment]. And this understanding extends to the Nineteenth Amendment’s prohibition of sex-based voter qualifications.”).
Amendment’s protections are coextensive with the Fourteenth Amendment or that the Nineteenth Amendment’s protections are analogous to those of the Fifteenth Amendment—depends in large part upon whether the Fifteenth Amendment’s protections are merely coextensive with those of the Fourteenth Amendment. In *Jones v. DeSantis*, a federal district court adopted this view, holding that:

The 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. . . . As is settled, a claim under the Fifteenth Amendment requires the same showing of intentional discrimination as the Fourteenth Amendment’s Equal Protection Clause.76

Yet, in the few modern cases in which the Supreme Court and Courts of Appeals have offered a Fifteenth Amendment analysis independent of a Fourteenth Amendment analysis, they have treated the Fifteenth Amendment as an independent and stronger source of protections beyond those afforded by the Fourteenth Amendment. In *Rice v. Cayetano*—the Court’s most recent Fifteenth Amendment case—the Court struck down a Hawaii statute limiting those who could vote for a certain office on the basis of ancestry as a violation of the Fifteenth Amendment.77 The Court explicitly treated the statute as a racial classification but then noted, in assessing the state’s claim that the Fourteenth Amendment’s one-person, one-vote command may be in conflict with the demands of the Fifteenth Amendment, that “[t]he Fifteenth Amendment has independent meaning and force” relative to the Fourteenth Amendment.78

Courts of Appeals have also treated the Fifteenth Amendment as an independent source of voting rights. In *Davis v. Guam*, for example, the Ninth Circuit elected to strike down racial classifications on Fifteenth Amendment grounds, rather than Fourteenth Amendment grounds,79 and in *Jones v. Governor of Florida*, the Eleventh Circuit spent considerable energy assessing plaintiffs’ claims under the Fourteenth, Fifteenth, and Nineteenth Amendments, offering distinct analyses for each.80

Assuming the Fifteenth Amendment—and by extension the Nineteenth Amendment81—provides protections separate from those afforded to voters under the Fourteenth Amendment, the question remains: what precisely are these protections? In the limited contexts where the Courts of Appeals have addressed this question, the answer has been absolute. In *Davis v. Guam*, the Ninth Circuit described restrictions imposed by the Fifteenth Amendment upon states as “fundamental and absolute.”82 Although the Ninth Circuit did not lay out a clear framework for Fifteenth Amendment challenges, it did note that “[a]s ‘there is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race,’ the levels of scrutiny applied to other

76 462 F. Supp. 3d 1196, 1239 (N.D. Fla. 2020).
77 528 U.S. 495, 499 (2000).
79 See 932 F.3d 822, 825 (9th Cir. 2019).
80 See generally 975 F.3d at 1029.
81 See id. at 1043 (“The Nineteenth Amendment forbids the use of sex as a voter qualification in the same way [as the Fifteenth Amendment].”).
82 932 F.3d at 832 (citing Shaw v. Reno, 509 U.S. 630, 639 (1993)).
constitutional restrictions are not pertinent to a race-based franchise limitation.”83 In other words, whatever the level of scrutiny the Fourteenth Amendment demands a court apply to a voting regulation implicating a racial classification, the Fifteenth Amendment demands more: “[o]ur decision makes no judgment about whether Guam’s targeted interest in the self-determination of its indigenous people is genuine or compelling. Rather, our obligation is to apply established Fifteenth Amendment principles, which single out voting restrictions based on race as impermissible whatever their justification.”84

The Eleventh Circuit reached a similar conclusion last September.85 Although the case ultimately upheld the Florida legislature’s severe restrictions on the scope of Amendment 4, which enfranchised thousands of former felons, the case’s analyses of the Fifteenth Amendment and Nineteenth Amendment are instructive. The en banc panel interpreted the Fifteenth Amendment, citing Rice, to stand for the proposition that “[s]tates must set voter qualifications without any regard to race.”86 For this reason, according to the panel “[t]he Fifteenth Amendment does not subject race-based voter qualifications to strict scrutiny—they are per se unconstitutional.”87 For the panel, treating laws that trigger the Fifteenth Amendment as per se unconstitutional, rather than evaluating them under strict scrutiny, “ensures that any argument that a race-based voter qualification is ‘tied rationally to the fulfillment’ of an important government interest falls on deaf ears.”88 Importantly, the panel was also clear that “[t]he Nineteenth Amendment forbids the use of sex as a voter qualification in the same way [as the Fifteenth Amendment].”89

Thus, based on the Supreme Court’s decision in Rice and decisions by the Courts of Appeals in Davis and Jones, any regulations that trigger the protections of the Fifteenth and therefore Nineteenth Amendment should not be evaluated under either intermediate scrutiny or strict scrutiny; rather, such regulations should be treated as per se unconstitutional. This rule makes it critical to understand precisely what sorts of regulations would trigger the Amendments’ protections. The next section explores this question in depth.

C. Triggers for Nineteenth Amendment Protections

While facial gender classifications without a doubt trigger the Nineteenth Amendment, the Amendment’s protections are not limited to such classifications. The Supreme Court acknowledged in Rice that the Fifteenth Amendment has been used to strike down voting regulations containing both “subtle” and “indirect” classifications.90 Although the statute in question in Davis involved a facial ethnic classification, in that case the Ninth Circuit made clear that courts should be suspicious of “sophisticated as well as simple-minded modes of discrimination.”91 To support this proposition, the

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83 Id. (quoting Cayetano, 528 U.S. at 523 (emphasis added)).
84 Id. at 843 (emphasis added).
85 Jones v. Governor of Fla., 975 F.3d 1016, 1025 (11th Cir. 2020).
86 Id. at 1043.
87 Id. (emphasis added).
88 Id. at 1043 (11th Cir. 2020) (quoting Cayetano, 528 U.S. at 548 (Ginsburg, J., dissenting) (internal quotation marks omitted)).
89 Id.
90 Cayetano, 528 U.S. at 514.
91 Davis v. Guam, 932 F.3d 822, 832–33 (9th Cir. 2019) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960)) (“Determining whether a law discriminates ‘on account of race’ is not, however, always straightforward. Voting qualifications
Ninth Circuit pointed to two additional types of laws that the Supreme Court has found trigger Fifteenth Amendment protections: laws with facially neutral classifications but passed with racially discriminatory intent, as the plurality in City of Mobile v. Bolden recognized,\(^{92}\) and facially neutral laws applied in a discriminatory manner, as the court recognized in Lassiter v. Northampton County Board of Elections.\(^{93}\) Thus, under the Nineteenth Amendment, facially discriminatory laws, laws passed with sexually discriminatory intent, and facially neutral laws applied in a manner that discriminates on the basis of sex should all trigger the Amendment’s protections.

The *Jones* panel provided a similar analysis, yet crucially it added an additional category of regulations that would trigger the protections of the Fifteenth and Nineteenth Amendment. The *en banc* panel confirmed that the Fifteenth Amendment is “powerful enough to ‘remove... or render inoperative’ any suffrage provision in a state constitution that refers to race, even in the absence of implementing legislation by Congress”\(^{94}\)—in other words, facial racial classifications. But the panel also made clear that the Amendment extends to facially neutral laws that *inherently implicate a suspect classification and uniquely burden voters on one side of that classification:*

The [Fifteenth] amendment has similar bite even when States impose discriminatory voting qualifications by facially neutral means. In *Guinn*, the Supreme Court invalidated an amendment to the Constitution of Oklahoma that created a literacy test for voting but exempted from the test any person who was eligible to vote before the ratification of the Fifteenth Amendment. Although the state constitution “contain[ed] no express words” limiting the franchise “on account of race, color, or previous condition of servitude,” the grandfather clause “inherently [brought] that result into existence,” which violated the Fifteenth Amendment.\(^{95}\)

For this category of Fifteenth Amendment cases, the panel ultimately—and importantly—landed on but-for causation as the trigger for the Amendment’s protections. The panel plainly stated that “[t]he Fifteenth and Nineteenth Amendments are best understood to forbid any voter qualification that makes race or sex a but-for cause of the denial of the right to vote.”\(^{96}\) That is, just as Title VII prohibits but-

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\(^{92}\) See City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (“Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”). Although this quoted language in *Bolden* appears to endorse a narrower interpretation of the Fifteenth Amendment that would only forbid voting laws passed with a racially discriminatory intent, only four justices signed on to this portion of the opinion.

\(^{93}\) See Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53 (1959) (“Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.”).

\(^{94}\) Jones v. Governor of Fla., 975 F.3d 1016, 1042 (11th Cir. 2020).

\(^{95}\) Id. (citations omitted).

\(^{96}\) Id. (emphasis added).
for discrimination on the basis of sex and gender identity, so too does the Nineteenth Amendment prohibit but-for discrimination in voting on the basis of sex and, as we argued in Part I, gender identity.

The panel’s particular formulation—“any voter qualification that makes race or sex a but-for cause of the denial of the right to vote”—focuses on but-for discrimination that denies the right to vote. While this may lead one to think that the Nineteenth Amendment does not reach laws that merely burden the right to vote, the text of the Amendment provides a clear rebuttal. As noted in Part II, the language of the Nineteenth Amendment reads: “[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.” In Fifteenth Amendment case law, courts have construed the term “abridge” to mean “shorten.” In the little Nineteenth Amendment case law we have, courts have similarly regarded the Nineteenth Amendment as extending to regulations that merely “burden” the right to vote on the basis of sex.

Thus, the Nineteenth Amendment’s protections should be understood to be triggered not only by regulations passed with sexually discriminatory intent, nor only by neutral laws applied in a sexually discriminatory manner, but also by “any voter qualification that makes . . . sex a but-for cause of the denial of the right to vote” or the abridgment or burdening of the right to vote. As laid out in Part I, these sex-based protections should be understood to encompass analogous gender-based protections. Any law that triggers these protection should be held per se unconstitutional.

**III. BOSTOCK’S IMPLICATIONS ON THE FOURTEENTH AMENDMENT**

We recognize that the relative dormancy of the Nineteenth Amendment in voting rights litigation, and in jurisprudence more broadly, may raise doubts among readers that there is enough “there there” to sustain our argument. Yet Bostock’s constitutional implications do not stop with the Nineteenth Amendment. While the textualist logic of Bostock and textual parallels between Title VII and the Nineteenth Amendment make it an obvious first target, the Bostock Court’s analysis of gender provides a solid foundation to expand voting rights for transgender and gender-nonconforming voters via the protections of the Fourteenth Amendment.

To recap Part I, in Bostock the Court recognized that gender identity classifications are sex classifications—or rather, that one cannot discriminate on the basis of gender identity without also discriminating on the basis of sex. Since then, courts have already begun to operationalize this logic to afford transgender individuals the gender protections inherent in the Equal Protection Clause. In Corbitt v. Taylor, for example, a district court in Alabama recently struck down a state law requiring Alabama residents to “surgically modify their genitals before they can change the sex designation on their

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97 Id.
98 U.S. CONST. amend. XIX (emphasis added).
100 See, e.g., Graves v. Eubank, 87 So. 587, 588 (Ala. 1921) (interpreting the Nineteenth Amendment to prohibit the state “placing conditions or burdens upon one [sex] not placed upon the other as a condition precedent to the right to vote.”); see also Hasen & Litman, supra note 7, at 39 (“[L]aws and procedures diminishing voting on the basis of gender are constitutionally impermissible [under the Nineteenth Amendment.”).
101 Jones v. Governor of Fla., 975 F.3d 1016, 1042 (11th Cir. 2020).
102 Hasen and Litman reach a similar conclusion by way of a different analysis. See Hasen & Litman, supra note 7, at 39 (“[T]he term ‘abridgement’ is consistent with the thick reading of the Amendment as barring laws that have discriminatory effect on voting power on the basis of gender.”).
licenses.” In doing so, the court applied intermediate scrutiny on the theory that “[a]ll state actions that classify people by sex are subject to the same intermediate scrutiny. The State need not favor or disfavor men or women to trigger such scrutiny; the classification itself is the trigger.” Civil rights litigators too are seeking to operationalize this logic, mounting arguments, for example, that “[d]iscrimination based on sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.”

As noted above, laws containing a gender classification are reviewed under intermediate scrutiny. To be sustained under intermediate scrutiny, the law must further an important government interest and must do so through means substantially related to that interest. Separately, challenges to generally applicable election laws brought under the Fourteenth Amendment are typically evaluated under Anderson-Burdick review. Under Anderson-Burdick review, “a court evaluating a constitutional challenge to an election regulation weighs the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’” Then, unless the court finds the burden to be severe, it should uphold the voting regulation at issue as a “reasonable, nondiscriminatory restriction” on the right to vote, justified by “the State’s important regulatory interests.” This applies to “evenhanded restrictions that protect the integrity and reliability of elections.”

104 Id. at *3.
106 See Craig v. Boren, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).
109 See Janelia N. Morgan, Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement, 9 Ala. C.R. & C.L. L. Rev. 93, 157 (2018) (“Unless courts are willing to characterize the burden on voting as a particularly severe or burdensome restriction, and require the defendant jurisdiction to demonstrate a narrowly tailored compelling interest, the plaintiff’s claim will typically be rebutted.”).
110 Burdick, 504 U.S. at 434.
111 Id. Many scholars have noted the ways in Anderson-Burdick review unthethered the court’s voting rights jurisprudence from the Warren Court’s more robust voting jurisprudence, giving states greater latitude to enact burdensome and discriminatory voting regulations. See Joshua S. Sellers, Political Participation, Expressive Association, and Judicial Review, 69 Am. U. L. Rev. 1617, 1626 (2020) (“Anderson introduced a less rigorous form of judicial review in the election regulations context.”); Pamela S. Karlan, Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law, 93 Ind. L.J. 139, 145 (2018) (“The retreat in voting rights began in Burdick v. Takushi. . . . The Court rejected the idea that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.”) (quoting Burdick, 504 U.S. at 432).
The Supreme Court has applied *Anderson-Burdick* review to challenges to voter ID laws. In *Crawford v. Marion County*, a constitutional challenge to Indiana’s voter ID law, the court upheld the law under *Anderson-Burdick* review. In doing so, the Court made it clear that *Anderson-Burdick* review applies to facially-neutral policies of election administration even if they have a disproportionate impact on an identifiable group: the Court recognized that the Indiana voter ID laws being challenged would make it more difficult for certain categories of voters to obtain the requisite ID, yet it decided to evaluate the laws under *Anderson-Burdick* review anyway.

The burdens imposed by the voter ID law in *Crawford* differ in important ways from the burdens imposed on transgender and gender-nonconforming voters by the layering of voter ID laws on top of strict identity document laws. Specifically, there is a fundamentally different relationship— and a much closer tie—between the burden on voting rights imposed by these laws and a voter’s identity within a suspect class. The effects of the law challenged in *Crawford* were felt disproportionately by certain voters, yet the law was, at least in one sense, “even-handed”: The law did not specifically require voters of a suspect or non-suspect class to obtain or update an ID because of their identity. According to the Court, it merely “incidentally” burdened some voters more than others. In advocating for *Anderson-Burdick* review, Justice Scalia’s concurring opinion stressed this element of the voter ID scheme, writing:

> [W]hat petitioners view as the law’s several light and heavy burdens are no more than the different impacts of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones . . . .

By contrast, laws that jointly require voters to both (1) obtain a form of voter ID that has a gender marker that accurately conveys a voter’s gender identity and (2) to pay a hefty expense and/or undergo gender confirmation surgery to update their gender marker operate differently. While in *Crawford* the voter ID law—at least in theory—burdened all voters (with some “incidentally” more burdened than others), laws that at once require an up-to-date gender marker on an ID to vote and charge voters to change their identity documents—either directly or indirectly via a proof-of-surgery requirement—uniquely burden voters on one half of a gender classification because the only voters who will encounter the burden erected by these laws are those whose gender identity differs from that on their current identification documents. In other words, unlike in *Crawford*, the burden is triggered by a voter’s identity within a quasi-suspect class: their transgender or gender-nonconforming identity. That gender identity places voters on one side of a quasi-suspect classification, triggering the gender-based

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112 *Crawford*, 553 U.S. at 189–90 (quoting *Anderson*, 460 U.S. at 788).
113 *Id.*
114 See *id.* at 205 (Scalia, J. concurring).
115 See *id.* at 221 n.25 (Ginsburg, J. dissenting) (recognizing that “the burdens of an ID requirement may . . . fall disproportionately upon racial minorities”).
116 See *id.* at 205 (Scalia, J. concurring). Separate from this classification issue, the plurality and concurrence also decided to apply a lower standard of review because the law did not *severely* burden voting rights. *Id.* at 204.
protections of the Equal Protection Clause. Unlike in *Crawford*, there is thus a direct tie between a voter’s identity within a protected class and the burden experienced by that voter under the laws.

So while laws like these, as in *Crawford*, are “generally applicable” in the narrow sense that all voters are potentially subject to the requirements and, as in *Crawford*, the operation of the laws will have a disproportionate impact on certain voters, the joint operation of these laws goes a step further by impacting *solely*—not just disproportionately—voters on one side of a suspect classification. Laws like these implicate an identity-based classification more strongly than a generally applicable and even-handed law that has a disproportionate impact on an identifiable group. That classification is a quasi-suspect classification, deserving of intermediate scrutiny.

Thus, although we believe the Nineteenth Amendment should principally apply to gender-identity-based barriers to the franchise, we recognize the gravity of *Crawford* may pull courts away from evaluating voter ID schemes under the Nineteenth Amendment and towards the Fourteenth Amendment. Nevertheless, voter ID laws and other election administration laws that uniquely burden transgender and gender-nonconforming individuals should not be evaluated using *Anderson-Burdick* review in as-applied Fourteenth Amendment challenges. Rather, given the now judicially cognizable gender classification between cisgender and transgender and gender-nonconforming individuals and the ways in which the combination of strict voter ID laws and strict identity document requirements burden voters because of their gender identity, such laws should receive at least intermediate scrutiny under the Fourteenth Amendment.118

We acknowledge that the analysis above would potentially put the Court’s equal protection gender jurisprudence in tension with the Nineteenth Amendment, since a voting regulation with a gender classification might get intermediate scrutiny under the Fourteenth Amendment and also be treated as per se unconstitutional under the Nineteenth Amendment. In such a case, the demands of the Nineteenth Amendment should take precedent because in constitutional theory “the specific governs the general”119—that is, where both a general constitutional protection and a specific constitutional protection overlap, the specific should govern. The Nineteenth Amendment was passed specifically for the purpose of ensuring that all voters, regardless of sex can participate as equals in the political process. Therefore, when voting regulations could be analyzed under either the Fourteenth Amendment or the Nineteenth Amendment, they should principally be assessed under the Nineteenth Amendment.

Beyond the specific governing the general, there are other important reasons for the

118 There is also a good argument that on the basis of the severity of the burden alone, such regulations should be evaluated using a higher level of scrutiny than *Anderson-Burdick* review. In *Crawford* the court recognized that generally applicable laws that imposed severe burdens on the right to vote or that imposed “excessively burdensome requirements” on any class of voters” should be subject to higher scrutiny. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202, 204 (2008) (citing Storer v. Brown, 415 U.S. 724, 738 (1974)). As laid out in Part IV, in some states transgender and gender-nonconforming voters must pay considerable expenses and/or undergo gender confirmation surgery to change the gender marker on their ID required to vote. *See infra* Part IV. Since courts have been less tolerant of voter ID laws under which voters cannot obtain a free voter ID, there are good reasons to think that courts would regard laws placing financial burdens between a voter and their free ID with similar suspicion. *See Karen Shanton & Wendy Underhill, Costs of Voter Identification, NAT’L CONF. OF STATE LEGISLATURES, June 2014, at 1-2, https://www.ncsl.org/documents/legismgt/elect/Voter_ID_Costs_June2014.pdf [https://perma.cc/99NY-G962] (last visited June 30, 2021).

119 *See Travis Crum, The Superfluous Fifteenth Amendment?, 114 NW. UNIV. L. REV. 1549, 1566 (2020) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)) (arguing that Congress’ enforcement powers under the Fifteenth Amendment should be understood to be distinct and broader than its enforcement powers under the Fourteenth Amendment).
Nineteenth Amendment to take precedence over the Fourteenth Amendment in constitutional challenges to election laws. In equal protection jurisprudence, regulations using gender classifications receive only intermediate scrutiny, rather than strict scrutiny, because according to courts, unlike racial classifications, there are certain situations in which it is normatively superior for courts to probe a gender classification with less scrutiny than a racial classification. This is because, unlike racial classifications, which according to the courts are inherently suspect, gender classifications can sometimes be benign and beneficial to women.\textsuperscript{120}

Such a rationale simply does not apply to the voting context. As with any racial classification in the voting context, there are no benign reasons for a state to impose a gender-based regulation in the voting context. Any such regulation would only restrict or pose obstacles to the exercise of the right to vote by a certain class of voters on the basis of an aspect of identity that has no bearing on the capacity to participate in a democracy. As with race-based regulations, we should view any such regulations with suspicion, and, accordingly, courts should regard them principally as per se unconstitutional under the Nineteenth Amendment.

IV. ASSESSING A POTENTIAL NINETEENTH AMENDMENT CHALLENGE: VOTER ID

For the reasons laid out in Part I, we believe that the textual analysis offered in \textit{Bostock} has clarified those who fall under the protections of the Nineteenth Amendment and expanded the types of classifications that should receive intermediate scrutiny under the Fourteenth Amendment. The consequences of such a reading of the Nineteenth and Fourteenth Amendments are momentous, given both the substantive protections potentially afforded to voters under the Nineteenth and Fourteenth Amendments as well as the significant challenges that voter ID schemes and restrictive identity document laws pose to transgender and gender-nonconforming voters. We conclude this article by providing just one example of the ways in which our two novel constitutional theories could serve as an important font for the voting rights of transgender and gender-nonconforming voters.

Below, we argue that laws requiring identification documents containing a gender marker in order to vote and those requiring that voters pay significant economic sums and/or undergo surgery to change a gender marker on their ID abridge the right to vote. Specifically, when acting together, these laws create a gender classification that imposes burdens on transgender and gender-nonconforming voters not imposed on cisgender voters solely because of their gender identity. “[B]ut-for”\textsuperscript{121} the gender identity of the voters, their right to vote would not be “abridged.”\textsuperscript{122} The joint operation of voter ID laws and restrictive identity document laws is thus suitable for challenge, following \textit{Bostock}, under the expansive view of the Nineteenth Amendment outlined in Part II and, if challenged under the Fourteenth Amendment, should be reviewed under intermediate scrutiny as

\textsuperscript{120} See Kim Shayo Buchanan, \textit{The Sex Discount}, 57 UCLA L. REV. 1149, 1169 (2010) (“By choosing intermediate scrutiny of gender classifications over the strict scrutiny advocated by Justice Brennan’s plurality in \textit{Frontiero v. Richardson}, the Court presumes that, while some gender classifications are invidious, others are likely benign.”). See also Melissa Murray, \textit{The Equal Rights Amendment: A Century in the Making} Symposium Foreword, 43 N.Y.U. REV. OF L. & SOC. CHANGE HARBINGER 91, 97 (2019) (noting cases in which the Court has upheld benign gender legal classifications under intermediate scrutiny, including “laws that make it easier for mothers to transmit citizenship to children born out of wedlock in foreign countries, as well as laws that preclude women from the draft”).

\textsuperscript{121} Jones v. Governor of Fla., 975 F.3d 1016, 1042 (11th Cir. 2020).

\textsuperscript{122} U.S. CONST. amend. XIX.
argued in Part III.

Voter identification schemes across the country pose a significant threat to the voting rights of transgender and gender-nonconforming individuals. To cast a ballot once registered to vote—a hurdle in itself—transgender and gender-nonconforming people must first identify their state’s voter ID laws and determine whether any of the acceptable forms of identification they have list the correct gender marker. If none of the voter’s identification documents list the correct gender or name (in this case, the gender or name other than that assigned to the voter at birth), the voter must then embark on a lengthy and costly process to update their documents. If the state’s procedures for updating identification documents are too cumbersome for the voter, the voter risks having to cast a provisional ballot at the polls, which grants wide discretion to local officials to confirm the validity of a person’s vote. Voters may also face harassment and humiliation at the hands of election workers and judges at both steps of the process.

A recent study by the Williams Institute estimated that 965,350 transgender people were eligible to vote in the November 2020 general election and that, of that group, over 378,000 voting-eligible transgender people may have faced barriers to voting due to voter registration requirements and voter ID laws.

Accounts of harassment and disenfranchisement are likely to emerge over the coming months.

Thirty-five states had some form of voter ID requirement in place for the 2020 election.


125 Id. at 4–5.


Most states require only non-photo identification, like bank statements or lease documents.\textsuperscript{131} Eighteen states require photo identification but offer an avenue for those without acceptable identification to cast a ballot that will be counted, either by a poll worker’s voucher or provisional ballot.\textsuperscript{132} Twelve of these states have “non-strict” voter ID schemes, so called because they do not require voters lacking acceptable ID to take additional action after election day in order to have their ballot counted.\textsuperscript{133} The six “strict” voter ID states require either government-issued photo or non-photo identification, and they require voters to take additional steps after the election to have a provisional ballot counted should they not show the required identification when they cast their ballot in person.\textsuperscript{134}

Outside of the voting context, identification requirements for a range of activities pose obstacles for transgender and gender-nonconforming individuals. In many states, it is difficult and expensive to obtain identification documents that reflect a person’s gender if that gender is different than the one assigned to them at birth.\textsuperscript{135} In fact, in a 2015 report by the National Center for Transgender Equality, sixty-eight percent of transgender respondents said that none of their identification documents listed their correct name and gender.\textsuperscript{136} The legal gender and name change process can cost up to $2,000 in certain cases, which may make the process inaccessible for many.\textsuperscript{137} In nine states, including Georgia, gender confirmation surgery—a costly, intensive procedure that many transgender and gender-nonconforming people choose not to pursue\textsuperscript{138}—is required in order to change the gender marker on a state ID or birth certificate.\textsuperscript{139} In many states, the process involves paying court fees, undergoing a background check, and collecting and submitting medical documentation.\textsuperscript{140}

In the voting context, transgender and gender-nonconforming voters are subjected to harassment and stigmatic harms when casting a ballot. Identification requirements often result in transgender and gender-nonconforming people being turned away at the polls.\textsuperscript{141} When poll workers examine the voter registration rolls and match voters’ information to the information on the

\textsuperscript{131}Id.
\textsuperscript{132}Id.
\textsuperscript{133}Id.
\textsuperscript{134}Id.
\textsuperscript{135}ONeill & Herman, supra note 128, at 5.
\textsuperscript{136}James, Herman, Rankin, Keisling, Mottet, & Anafi, supra note 234, at 82.
\textsuperscript{137}Id. at 84.
\textsuperscript{138}Brown & Herman, supra note 124, at 3 (noting that not every transgender person undertakes the same steps to transition from their sex assigned at birth to their gender). In addition, not every transgender or gender-nonconforming person wishes to undergo surgical transition.
\textsuperscript{139}Georgia, Kansas, and Wisconsin permit court orders of gender change in lieu of a physician letter confirming gender confirmation surgery. Id. at 14. However, in some states, including Georgia, obtaining such a court order of gender change requires proof of gender confirmation surgery. See infra note 134.
\textsuperscript{142}See O'Neill & Herman, supra note 128, at 2.
identification they present, poll workers may—and often do—find that a transgender or gender-nonconforming voter’s name, gender marker, and appearance do not match, providing a reason to turn away the voter. Even in the least restrictive voter ID states, poll workers have asked for ID and subsequently turned away voters because their faces have not “matched” their names on voter rolls. In some states, poll workers have been actively encouraged to turn away transgender and gender-nonconforming voters. Although poll workers are not statutorily required to turn voters away on this basis, and may not even be permitted to do so, in practice they do so with some frequency. In strict voter ID states, turning away these voters leaves them with no recourse: if a denied voter does not have identification that presents a name and gender marker determined by a county registrar to match their appearance—likely because of the obstacles associated with obtaining that identification—they will not be able to take the required steps to have a provisional vote counted.

The combination of strict voter ID laws and identity document laws in many states accordingly poses a severe threat to the voting rights of many transgender and gender-nonconforming individuals. One such state is Georgia, where government-issued photo identification is required—all of which, except military or governmental employer identification cards, require a voter to indicate their sex or gender—provisional ballots are not accepted without demonstration of ID within three days of the election, and the state requires that individuals show proof of gender confirmation surgery in order to update the gender marker on their birth certificate or state identification.


See O’Neill & Herman, supra note 128, at 6.

See Fielding, supra note 137 (reporting that a precinct judge requested ID from a woman in North Carolina, a state that does not require ID to vote, because “[her] face didn’t match [her] name.”).


See Fielding, supra note 143.

Legal gender and name changes can cost up to $500. JAMES, HERMAN, RANKIN, KEISLING, MOTTE, & ANAFI, supra note 123, at 82 (reporting thirty-five percent of trans people surveyed who did not try to change their legal name cited the cost as their primary barrier). People looking to effectuate a gender and name change must, in most states, file paperwork with the court. Often, the paperwork is not easy to complete on one’s own and may require attorney representation. Trans Legal Services Network, NAT’L CTR. FOR TRANSGENDER EQUALITY (Aug. 26, 2019), https://transequality.org/issues/resources/trans-legal-services-network-directory [https://perma.cc/CD22-QWWJ]. In some states, gender confirmation surgery is a prerequisite for obtaining a gender marker change. NAT’L CTR. FOR TRANSGENDER EQUALITY, supra note 140. As a result of the ongoing COVID-19 pandemic, many courts nationwide are temporarily closed and are not accepting name or gender change petitions. Id.

NAT’L CONF. OF STATE LEGISLATURES, supra note 136.

See id. Georgia law requires voters to present a state-issued photo ID, a Georgia drivers’ license, a state- or county-issued voter ID card, a U.S. passport, federal government employee ID card, or a military or tribal ID. Id.

Id.

Identity Document Laws and Policies, MOVEMENT ADVANCEMENT PROJECT,
We believe that statutory schemes like those in Georgia are vulnerable under the Nineteenth Amendment and Fourteenth Amendment. A challenge to the combined effect of two or more statutory regulations is appropriate when the “joint operation” of the laws in question, but not the operation of each law on its own, results in an unconstitutional set of circumstances. Here, the joint operation of Georgia’s strict voter ID laws and highly restrictive identity document requirements places a significant financial, logistical, and emotional burden on certain categories of voters solely because of their gender identity. From the perspective of the Court’s current voter ID jurisprudence, considering strict voter ID laws in isolation, anyone who can obtain a photo or non-photo identification document in the state where they are registered to vote is presumed by the Court to be able to overcome the burden imposed by these laws. For the purposes of the argument here, the requirement that voters present identification is not, by itself, unconstitutional, and was upheld by the Court in *Crawford*. But layering strict voter ID regimes atop strict state statutory requirements for altering the gender marker on one’s identity documents presents the constitutional problem.

Operating in tandem, voter ID laws and laws restricting changes to gender markers construct a fine mesh through which only cisgender voters can pass unburdened. Transgender and gender-nonconforming voters, in order to comply with both laws’ requirements, must choose whether to undergo the time, expense, and emotional cost of gender confirmation surgery in order to obtain an ID that accurately reflects their gender identity or use an ID that does not reflect their gender identity and risk being turned away at the polls on that basis. The result is a *de facto* gender classification scheme that operates, in practice, to burden any voter whose gender identity differs from that listed on their requisite ID. Other similarly situated voters are not similarly burdened—in fact they are not burdened at all. Thus, *but-for* their gender identity, these voters would not be subject to this abridgement of their right to vote. In this sense, as laid out in Part III, the operation of laws like Georgia’s as applied to transgender and gender-nonconforming voters are distinguishable from that of the Indiana law in *Crawford*.

Strange as it may sound at first blush, we believe the best analogy may be *Guinn v. United States*. Recall from Part II that, in *Guinn*, the Supreme Court struck down an Oklahoma constitutional scheme, excepting voters enfranchised prior to the passage of the Fifteenth Amendment from having to pass an otherwise generally applicable literacy test. The court struck down the provision as a violation of the Fifteenth Amendment because the “neutral” law inherently and uniquely burdened newly enfranchised Black men.

Over one hundred years later, transgender and gender-nonconforming voters face an analogous problem. In *Guinn*, a generally applicable law created a “generally applicable” burden: all


154 See, e.g., Kane v. Fortson, 369 F. Supp. 1342, 1343 (N.D. Ga. 1973) (recognizing plaintiff’s Nineteenth Amendment claim that “[t]he joint operation of [several provisions of the] Georgia [Code] . . . , in so far as it establishes an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the [Nineteenth] Amendment of the Constitution of the United States.”).

155 Of course, contrary to the Court’s understanding in *Crawford*, strict voter ID laws do present severe obstacles and adverse consequences for a number of eligible voters. See, e.g., John Kuk, Zoltan Hajnal & Nazita Lajevardi, *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, POLITICS, GROUPS, AND IDENTITIES (2020). These obstacles are well-documented and are outside the scope of this paper.

voters were required to pass a literacy test, but those eligible to vote on January 1, 1866 were exempt from the test because they were grandfathered in.\textsuperscript{157} Yet because of the timing of the grandfather clause, the only voters actually subject to the burden of a literacy test were Black male voters newly enfranchised by the Fifteenth Amendment.\textsuperscript{158} Similarly, under Georgia’s scheme, a set of generally applicable laws creates a “generally applicable” burden: all voters must have a requisite voter ID with an up-to-date gender marker, and in order to update their ID with a different gender identity, they must submit proof of gender confirmation surgery. Yet, like in \textit{Guinn}, in practice the only voters actually subject to this obstacle are voters of a protected class: here transgender and gender-nonconforming voters. Thus, in both cases, laws are structured in facially neutral ways that not only disproportionately burden members of suspect classes, but—crucially—\textit{uniquely} burden members of suspect classes. In this way, just as in \textit{Guinn} the grandfather clause “‘contain[ed] no express words’ limiting the franchise ‘on account of race, color, or previous condition of servitude,’”\textsuperscript{159} yet “‘inherently [brought] that result into existence,’” violating the Fifteenth Amendment, schemes like Georgia’s “‘contain no express words’ limiting the franchise ‘on account of [sex],’” yet “‘inherently [bring] that result into existence,’”\textsuperscript{160} violating the Nineteenth Amendment.

The analogy remains just as clearer if one flips the presumption of the grandfather clause, as the panel did in \textit{Jones}. In \textit{Jones}, the panel noted that \textit{Guinn} stood for the proposition that “‘the Fifteenth Amendment forbid[s] the state from [discriminat[ing]] within [a] class of illiterate non-voters by exempting only white citizens from literacy tests.’”\textsuperscript{161} From this point of view, the proper way to view the grandfather clause is not as an additional burden on Black voters. Instead, one should view the grandfather clause as an exemption of white voters from a requirement. Georgia’s scheme arguably operates in the same way: cisgender voters are exempted from paying a kind of “gender fee” that transgender and gender-nonconforming voters must pay solely by virtue of their gender identity.

As presented in Part II, laws that uniquely burden voters on one side of a gender classification trigger the Nineteenth Amendment’s protections. The regulatory scheme outlined above thus should be regarded as \textit{per se} unconstitutional under the Nineteenth Amendment.

If evaluated under the Fourteenth Amendment, the result is the same by way of a different analysis. While election security is plausibly an important government interest, it would be unreasonable for a court to hold that the expenses associated with changing identity documents—and, where mandated by law, requiring voters to undergo surgery—are substantially related to election security. In-person voter fraud is extraordinarily rare—in-person fraud somehow enabled by placing fewer economic and stigmatic burdens between gender-transitioning voters and the ballot box is ludicrous. Thus, under either of our theories, the laws should be held unconstitutional.

\textsuperscript{157} Guinn v. United States, 238 U.S. 347, 357 (1913).
\textsuperscript{158} \textit{Id} at 365.
\textsuperscript{159} Jones v. Governor of Fla., 975 F.3d 1016, 1042 (11th Cir. 2020) (quoting \textit{Guinn}, 238 U.S. at 364–65).
\textsuperscript{160} \textit{Id} (quoting \textit{Guinn}, 238 U.S. at 364–65).
\textsuperscript{161} \textit{Id} at 1040.
CONCLUSION

Transgender and gender-nonconforming voting rights are an urgent matter. It is long past time for transgender and gender-nonconforming voters to be accorded equal dignity and respect as equal participants in the political process. The joint operation of voter ID laws and restrictive laws on changing identity documents reifies unjust gender norms, subjects voters to harassment and intimidation by bigots, and disenfranchises thousands of voters every year, who either cannot jump through the hoops necessary to obtain an acceptable form of voter ID with an accurate gender marker or, in view of these barriers to voting, discourage transgender and gender-nonconforming voters from participating in the political process at all. This article has tried to use the holding and analysis of Bostock as an opportunity to forge a path to tear down these unjust laws.