Does the Woman Suffrage Amendment Protect the Voting Rights of Men?

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The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

—U.S. CONST. amend. XIX

CONTENTS

INTRODUCTION 1149
I. BACKGROUND: BARRIERS TO THE BALLOT 1151
A. Felon Disenfranchisement 1151
B. Military Voting 1158
II. "ON ACCOUNT OF SEX": WHY AND HOW THE NINETEENTH AMENDMENT PROTECTS THE VOTING RIGHTS OF MEN 1166
A. Why: The Gender-Neutral Nineteenth Amendment 1166
B. How: The Nineteenth Amendment Enforcement Power 1168
1. Scope of the Enforcement Power 1168
2. Appropriate Enforcement Targets 1170
III. NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION TO

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PROTECT THE VOTING RIGHTS OF MEN 1173
A. Legislation Concerning Felon Disenfranchisement 1173
1. Burden on Men vs. Women 1173
2. Political Impact of Felon Disenfranchisement 1174
3. Reintegration into Society 1176
4. Felons, Fatherhood, and the Family 1178
5. Potential Legislative Remedies 1179
B. Legislation to Protect Military Voters 1181
1. Burden on Men vs. Women 1181
2. Political Impact of Military Voters 1181
3. War Effort 1185
4. Dads on Deployment and Fatherhood in the Field: Military Families 1185
5. Potential and Existing Legislative Remedies 1186
IV. POSSIBLE OBJECTIONS 1195
A. Scope: Purposeful Discrimination vs. Disparate Impact 1195
1. Intratextualist Analysis 1196
2. Legislative and Judicial history 1198
B. Standard of Review: "Congruence and Proportionality" Versus "Reasonable Relation" 1202
1. Intratextualist Analysis 1203
2. Legislative and Judicial history 1207
C. Federalism: State Power vs. Congressional Authority 1209
1. Elections Clause 1210
i. Non-Federal Elections 1211
ii. Voter Qualifications Clauses 1214
2. War Powers 1220
i. Continuity of Government 1220
ii. Voter Qualifications Clauses 1221
iii. Non-Federal Elections 1224
3. Fourteenth Amendment Enforcement Power 1226
4. Twenty-sixth Amendment Enforcement Power 1230
D. Caselaw: Howard v. Gilmore 1231
E. Politics: The Unlikelihood of Restrictive State Action 1233
CONCLUSION 1235

INTRODUCTION

Courts, legislators, and scholars alike have essentially forgotten the Woman Suffrage Amendment.[1] The prevailing view is that the provision merely requires that states extend the franchise to women on equal terms with men: because states long ago complied with the Nineteenth Amendment's mandate, the prevailing view holds, the provision possesses only historical significance, with little or no modern relevance.2 Most court decisions concerning the Nineteenth Amendment consist of mere perfunctory rejections of undeveloped, unsupported arguments by *pro se* litigants.3 Those few legal scholars who discuss the Nineteenth Amendment focus on its impact in areas other than voting.[4]

Several years ago, I offered a (surprisingly) novel take on the Nineteenth Amendment: that a provision protecting "[t]he right . . . to vote"[5] can and should play a role in protecting the right to vote.[6] Noting that "[i]n recent years, states across the country have engaged in an extraordinary effort to make it harder to register to vote, to cast a ballot, and to have that vote counted," I observed that "the extent to which these restrictions on voting may disproportionately affect *women* had gone

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1. *See* Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 508–09 (2016). In fact, I settled on the "Which One?" subtitle when I noticed that it was everyone's first question when I discussed the article with others. Known at the time of ratification as the "Woman Suffrage Amendment," the provision became the Nineteenth Amendment to the Constitution. *See* Ratification of the Nineteenth Amendment, 41 Stat. 1823, 1823 (1920). Although today's terminology refers to "women's suffrage" using a plural possessive noun, the language of the era used a singular, non-possessive noun: "woman suffrage." *See, e.g.*, H.R. REP. NO. 66-1, at 1 (1919).

2. *See* Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 451 (2020).

3. *See, e.g.*, Muhammad v. Newark Hous. Auth., 515 F. App'x 122, 125 (3d Cir. 2013); Chapman v. Baker, 430 F. App'x 731, 731 (10th Cir. 2011); New v. Pelosi, 374 F. App'x 158, 159 (2d Cir. 2010); Kohnke v. Reed, 18 F.3d 936, 1994 WL 83724, at *1 (5th Cir. Feb. 25, 1994) (unpublished table decision).

4. *See* Kolbert, *supra* note 1, at 509 n.7. The literature criticizes this focus of scholarly attention away from the Nineteenth Amendment's application to voting. *See* Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, so Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1420–25 (2014) (book review). The Nineteenth Amendment has received more scholarly attention due to the 2020 centennial celebration of the provision's 1920 ratification, but not all of the new literature considers the provision's impact on voting. *Compare* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL'Y 235, 252 (2020), *with* 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. (19TH AMEND. SPECIAL EDITION) 27, 55–59 (2020).

5. U.S. CONST. amend. XIX, para. 1.

6. *See* Kolbert, *supra* note 1, at 572. Discussions in this Article of the Nineteenth Amendment's legislative history and background legal principles stemming from the Fifteenth and Eighteenth Amendments draw heavily from this earlier work. *See infra* Sections II.B, IV.A.2, IV.B.2, and IV.C.1.ii.

largely unnoticed."[7] To combat these barriers to the ballot, I defended a robust interpretation of the Nineteenth Amendment's Enforcement Clause as a bulwark against efforts to restrict access to the franchise disproportionately impacting women.[8] Importantly, I left open "the possibility that the Nineteenth Amendment could protect the voting rights of *men*."[9]

This Article—part of the Seattle University Law Review's symposium on the centennial of the ratification of the Woman Suffrage Amendment—examines that open possibility. Concluding that the Nineteenth Amendment *does* protect men's voting rights, this Article explores why and how that protection empowers Congress to address felon disenfranchisement and military voting. This Article also examines the advantages of using Nineteenth Amendment enforcement legislation compared to legislation enacted under other constitutional provisions.

Part I discusses the unique barriers to voting faced by voters with criminal convictions (Section I.A) and voters in the armed forces (Section I.B). This Part also explains how existing efforts to address the voting rights of these two populations have fallen short.

Part II covers the Nineteenth Amendment itself. This Part explains why the Woman Suffrage Amendment protects men's voting rights (Section II.A). It also examines the congressional power to enforce those rights (Section II.B.1), including how Congress is most justified in targeting voting barriers which impact electoral outcomes, full participation in society (especially in a war effort), or caregiving and the family (Section II.B.2).

Part III demonstrates that the Nineteenth Amendment empowers Congress to tackle the barriers to voting posed by felon disenfranchisement (Section III.A) and military service (Section III.B).[10] This part shows that men make up the overwhelming majority of both

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7. *Id.* at 510–11. For a discussion of specific barriers and their disproportionate impact on women, see *id.* at 510–29.

8. *See generally id.* The thirty-nine words of the Nineteenth Amendment are spread across two unnumbered paragraphs each consisting of a single sentence; the second unnumbered paragraph is the Enforcement Clause. *See* U.S. CONST. amend. XIX, para. 2. This is unique among the constitutional amendments with enforcement clauses: the Thirteenth, Fourteenth, Fifteenth, Eighteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments each subdivide into numbered sections, with each provision's Enforcement Clause constituting its own numbered section. *See id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* XVIII, § 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

9. *Id.* at 529 n.125.

10. This Article's thesis—that the Nineteenth Amendment protects men as well as women and that it therefore empowers Congress to address both felon disenfranchisement and military voting—should not be confused with a policy argument that Congress *should* take any particular action. To that end, this Article does not endorse or oppose any particular policy proposal concerning felon disenfranchisement or military voting.

military servicemembers and disenfranchised felons, and that the barriers attendant to both criminal convictions and military service correspond to all three areas of legitimate Nineteenth Amendment enforcement action.

Part IV addresses possible objections. First, this part establishes that, whether or not the Nineteenth Amendment (like its Fifteenth Amendment constitutional counterpart) prohibits only purposeful discrimination, such a requirement poses no barrier to Nineteenth Amendment enforcement legislation (Section IV.A). Second, this Part demonstrates that courts may subject Nineteenth Amendment enforcement legislation to only deferential "reasonable relation" review, not the more stringent "congruence-and-proportionality" review courts apply to Fourteenth Amendment enforcement legislation (Section IV.B). Third, this Part discusses the disadvantages of relying on other constitutional authorities to address felon disenfranchisement and military voting and examines how the Nineteenth Amendment fills the gaps left by these other provisions' shortcomings (Section IV.C). Fourth, this Part explains why the sparse though potentially adverse Nineteenth Amendment caselaw does not impact the analysis in this Article (Section IV.D). Finally, this Part contests the theory that the decreasing political popularity of felon disenfranchisement and the sustained popular support for military voters preclude the need for Nineteenth Amendment enforcement legislation (Section IV.E).

I. BACKGROUND: BARRIERS TO THE BALLOT

A. Felon Disenfranchisement

As of 2019, forty-eight states plus the District of Columbia bar at least some individuals from voting on the basis of a felony conviction.[11] Some states disenfranchise only current or recently released prisoners, while other states also disenfranchise parolees and still others also exclude probationers.[12] The remaining states disenfranchise some offenders even after the completion of their sentence.[13] Sometimes the disqualification turns on the nature of the felony, the passage of time, the number of convictions, or the payment of financial obligations associated with the

11. *See* JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER, 1–2 tbl.1 & fig.A (2019).

12. *See, e.g.*, 25 PA. CONS. STAT. § 1301(a) (2020) (prisoners); CAL. ELEC. CODE § 2101(a) (2020) (parolees); TEX. ELEC. CODE. ANN. § 11.002(a)(4) (2020) (probationers).

13. *See* CHUNG, *supra* note 11.

conviction.[14] Some states bar all felons from voting.[15] Many states offer a clemency process which can restore a disenfranchised person's voting rights,[16] although these procedures may not provide a realistic path to the ballot box.[17] Even among those states where the restoration of voting rights is automatic, bureaucratic misunderstandings may, as a practical matter, preclude felons from registering to vote.[18]

The result is that an estimated 6.1 million Americans were not eligible to vote in 2016 as a result of a felony conviction—up slightly from 5.85 million in 2010 and up substantially from 3.34 million in 1996 and 1.17 million in 1976.[19] The current figure represents approximately 2.5% of the total U.S. voting age population, or 1 in 40 adults.[20] The felony disenfranchisement rate also varied significantly from state to state: from a low of 0.21% (Massachusetts) to a high of 10.43% (Florida), while Vermont and Maine do not disenfranchise anyone on account of a felony conviction.[21] Popular support for felon disenfranchisement is mixed.[22]

Legal attacks on felon disenfranchisement laws have generally not succeeded.[23] Absent unique circumstances,[24] courts generally hold that

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14. *See, e.g.*, ALA. CODE § 17-3-30.1(c) (2020) (nature); NEB. REV. STAT. § 32-313(1) (2020) (time); ARIZ. REV. STAT. ANN. §§ 13-907(A) (2020), 16-101(A)(5) (2020) (number); FLA. STAT. § 98.0751(2)(a)(5) (2020) (payment).

15. For instance, the Iowa Constitution disenfranchises any "person convicted of an infamous crime." *See* IOWA CONST., art. II, § 5. The Iowa Supreme Court held that the term "infamous crime" included all felonies. *See* Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016).

16. *See, e.g.*, VA. CONST., art. II, § 1.

17. *See, e.g.*, Hand v. Scott, 285 F. Supp. 3d 1289, 1299–1300 (N.D. Fla. 2018), *vacated as moot*, 946 F.3d 1272, 1275 (11th Cir. 2020); Nora V. Demleitner, *Felon Disenfranchisement*, 49 U. MEM. L. REV. 1275, 1286–87 (2019); Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1035 (2019); Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 MO. L. REV. 1037, 1046–47 (2019).

18. *See* Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 417–424 (2011).

19. *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3, 9 (2016).

20. *See id.* at 3.

21. *See id.* at 15 tbl.3.

22. Bruce E. Cain & Brett Parker, *The Uncertain Future of Felon Disenfranchisement*, 84 MO. L. REV. 935, 942–47 (2019); Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004); Brian Pinaire et al., *Barred From the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1540–44 (2003).

23. *See* Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th 31 § 2 (2006).

24. For instance, a felon disenfranchisement provision violates the Equal Protection Clause when the state enacted the provision with the intent to discriminate against a particular racial group. *See* Hunter v. Underwood, 471 U.S. 222, 226–33 (1985); Thompson v. Alabama, 293 F. Supp. 3d 1313, 1321–24 (M.D. Ala. 2017). In certain circumstances, the Equal Protection Clause bars a state from disenfranchising a voter for conviction of a misdemeanor. *See* McLaughlin v. City of Canton, 947 F. Supp. 954, 973–76 (S.D. Miss. 1995); Hobson v. Pow, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977).

felon disenfranchisement provisions do not violate the Equal Protection Clause.[25] Procedural due process claims generally fall flat.[26] Most Fifteenth Amendment litigation meets a similar fate.[27] Because courts often characterize felon disenfranchisement provisions as non-punitive voter qualifications rather than as a form of punishment for the underlying felony, challenges under the Bill of Attainder Clause,[28] the Ex Post Facto Clause,[29] and the Eighth Amendment[30] rarely succeed. Neither the Privileges or Immunities Clause,[31] the First Amendment,[32] nor the Twenty-Fourth Amendment[33] poses a significant hurdle. Felon disenfranchisement

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Lower courts split on whether a felon disenfranchisement provision violates the Equal Protection Clause if it disenfranchises some, but not all, felons on the basis of their ability to pay the legal financial obligations associated with their criminal convictions. *Compare* Jones v. Gov. of Fla., 975 F.3d 1016, 1028–37 (11th Cir. 2020) (en banc), *with* Jones v. Gov. of Fla., 950 F.3d 795, 825–28 (11th Cir. 2020) (per curiam), *and Thompson*, 293 F. Supp. 3d at 1331–32.

25. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974); *see also Jones*, 975 F.3d at 1028-37; Wilkins v. County of Alameda, 571 F. App'x 621, 632 (9th Cir. 2014); Johnson v. Bredesen, 624 F.3d 742, 746–50 (9th Cir. 2010); Hayden v. Paterson, 594 F.3d 150, 172 (2d Cir. 2010); Johnson v. Bush, 405 F.3d 1214, 1223–27 (11th Cir. 2005) (en banc); Woodruff v. Wyoming, 49 F. App'x 199, 202–03 (10th Cir. 2002); Cotton v. Fordice, 157 F.3d 388, 391–92 (5th Cir. 1998); Perry v. Beamer, 99 F.3d 1130, 1996 WL 614688, at *1 (4th Cir. Oct. 25, 1996) (unpublished table decision); Buckner v. Schaefer, 36 F.3d 1091, 1994 WL 521012, at *1 (4th Cir. Sept. 23, 1994) (unpublished table decision); Wesley v. Collins, 791 F.2d 1255, 1262–63 (6th Cir. 1986); Owens v. Barnes, 711 F.2d 25, 27–28 (3d Cir. 1983); Shepherd v. Trevino, 575 F.2d 1110, 1114–15 (5th Cir. 1978).

26. *See Jones*, 975 F.3d at 1048–49; Williams v. Taylor, 677 F.2d 510, 514–15 (5th Cir. 1982). *But see* Thompson v. Alabama, 428 F. Supp. 3d 1296, 1305–06 (M.D. Ala. 2019).

27. *See* Malnes v. Arizona, 705 F. App'x 499, 500–01 (9th Cir. 2017); Baker v. Cuomo, 58 F.3d 814, 822 (2d Cir. 1995), *vacated on reh'g*, 85 F.3d 919 (2d Cir. 1996); *Wesley*, 791 F.2d at 1262–63. *But see* Thompson v. Alabama, 293 F. Supp. 3d 1313, 1321–24 (M.D. Ala. 2017).

28. *See* Trop v. Dulles, 356 U.S. 86, 96–97 (1958) (plurality opinion) (dicta); Green v. Bd. of Elections of N.Y., 380 F.2d 445, 449–50 (2d Cir. 1967). *But see Thompson*, 293 F. Supp. 3d at 1328–30.

29. *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 42–45 (1st Cir. 2009). *But see Thompson*, 293 F. Supp. 3d at 1328–30.

30. *See, e.g.*, *Green*, 380 F.2d at 450–51; Fincher v. Scott, 352 F. Supp. 117, 119–20 (M.D.N.C. 1972) (three-judge court), *aff'd mem.*, 411 U.S. 961 (1973). *But see Thompson*, 293 F. Supp. 3d at 1313.

31. *See* Johnson v. Bredesen, 624 F.3d 742, 751–52 (6th Cir. 2010).

32. *See, e.g.*, Hand v. Scott, 888 F.3d 1206, 1210–13 (11th Cir. 2018); Hayden v. Pataki, No. 00 Civ. 8586 (LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004), *aff'd on other grounds*, 449 F.3d 305 (2d Cir. 2006), *and* 594 F.3d 150 (2d Cir. 2010); Johnson v. Bush, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd on other grounds*, 405 F.3d 1214 (11th Cir. 2005).

33. *See, e.g.*, Jones v. Gov. of Fla., 975 F.3d 1016, 1037-39 (11th Cir. 2020) (en banc); *Johnson*, 624 F.3d at 751–52; Harvey v. Brewer, 605 F.3d 1067, 1080 (9th Cir. 2010); Johnson v. Bush, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc).

laws generally withstand Voting Rights Act challenges.[34] With limited exceptions,[35] litigation under state law has not succeeded.[36]

Beyond the judiciary, other branches of government have taken only limited action to address felon disenfranchisement. Despite committee hearings,[37] floor consideration,[38] and even passage of a bill in one chamber,[39] Congress has not enacted legislation that would prohibit states

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34. *See, e.g.*, Farrakhan v. Gregoire, 623 F.3d 990, 993–94 (9th Cir. 2010) (en banc); *Simmons*, 575 F.3d at 42; Hayden v. Pataki, 449 F.3d 305, 328–29 (2d Cir. 2006) (en banc); *Johnson*, 405 F.3d at 1234; Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004), *vacated for lack of standing*, 449 F.3d 371, 376–77 (2d Cir. 2006) (en banc); Baker v. Pataki, 85 F.3d 919, 921 (2d Cir. 1996) (per curiam); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986); United States v. Ward, 352 F.2d 329, 331 n.1 (5th Cir. 1965). A fact-specific claim under the National Voter Registration Act, 52 U.S.C. § 20501 *et seq.*—concerning a state voter registration form's language relating to felon eligibility—survived a motion to dismiss. *See* Thompson v. Alabama, 428 F. Supp. 3d 1296, 1309–10 (M.D. Ala. 2019).

35. *See* Sterling v. Archambault, 332 P.2d 994, 995 (Colo. 1958) (en banc); Crothers v. Jones, 120 So.2d 248, 254–56 (La. 1960); State v. Rappaport, 128 A.2d 270, 273 (Md. 1957); Mixon v. Commonwealth, 783 A.2d 763, 763 (Pa. 2001) (mem.); Gaskin v. Collins, 661 S.W.2d 865, 868 (Tenn. 1983).

36. *See* Young v. Hosemann, 598 F.3d 184, 192 (5th Cir. 2010); *Johnson*, 624 F.3d at 752–54; *Harvey*, 605 F.3d at 1080–81; Cotton v. Fordice, 157 F.3d 388, 390–91 (5th Cir. 1998); Williams v. Lide, 628 So.2d 531, 533–34 (Ala. 1993) (per curiam); Merritt v. Jones, 533 S.W.2d 497, 502 (Ark. 1976); Jarrard v. Clayton Cnty. Bd. of Registrars, 425 S.E.2d 874, 875 (Ga. 1993), *overruled on unrelated grounds*, Cook v. Bd. of Registrars of Randolph Cnty., 727 S.E.2d 478, 483 (Ga. 2012); Snyder v. King, 958 N.E.2d 764, 788 (Ind. 2011); Griffin v. Pate, 884 N.W.2d 182, 198–205 (Iowa 2016); Dane v. Bd. of Registrars of Voters of Concord, 371 N.E.2d 1358, 1372 (Mass. 1978); Middleton v. Evers, 515 So.2d 940, 944 (Miss. 1987); Emery v. State, 580 P.2d 445, 449 (Mont. 1978); Fischer v. Governor, 749 A.2d 321, 330 (N.H. 2000); State *ex rel.* Chavez v. Evans, 446 P.2d 445, 450 (N.M. 1968); Hughes v. Okla. State Election Bd., 413 P.2d 543, 545–46 (Okla. 1966); Bailey v. Baronian, 394 A.2d 1338, 1344 (R.I. 1978); Madison v. State, 163 P.3d 757, 763–66 (Wash. 2007); Mills v. Campbell Cnty. Canvassing Bd., 707 P.2d 747, 750–51 (Wyo. 1985).

37. In 1999, a House of Representatives subcommittee held hearings on bills to abrogate certain state felon disenfranchisement provisions. *See Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Const. of the H.R. Comm. on the Judiciary*, 106th Cong. 1 (1999). The renamed subcommittee held a hearing on a successor bill in 2010. *See Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H.R. Comm. on the Judiciary*, 111th Cong. 1 (2010). In 2014, a Senate subcommittee held a hearing on several bills, including a bill concerning felon disenfranchisement. *See The State of Civil and Human Rights in the United States: Hearing Before the Subcomm. on the Const., Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 23 (2014).

38. During the 2002 debate on an election reform bill, the Senate voted by a two-to-one ratio to reject an amendment which would abrogate state felon disenfranchisement provisions in federal elections except for voters serving a felony sentence of incarceration, probation, or parole. *See* 148 CONG. REC. 1501 (2002) (recording a 31–63 vote to reject the amendment); *see also id.* at 1489 (text of amendment).

39. In 2019, the House of Representatives passed an omnibus election reform bill which, among other things, provided that a U.S. citizen's right "to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election." H.R. 1, 116th Cong. § 1402 (as passed by the House, Mar. 8, 2019); *see also* 165 CONG. REC. H2602 (daily ed. Mar. 8, 2019) (recording a 234–193 vote for passage of H.R. 1). The Senate has precluded further action on the bill. *See* 165 CONG. REC. S1855 (daily ed. Mar. 14, 2019) (statement of Sen. Mitch McConnell); *see also* S. DOC. 101-28, at 244 (1992).

from barring individuals from voting on the basis of a criminal conviction.[40] Felon disenfranchisement is an increasingly visible issue in state legislatures, but reform efforts have had mixed results.[41] Unilateral action by state executives was more successful.[42] However, unilateral executive action can be vulnerable to litigation or reversal by the successor state executive.[43] Even popular referenda can fall victim to judicial or legislative interference.[44]

Felon disenfranchisement has spawned a vast literature.[45] Most of the discussion has concerned constitutional claims—the First,[46] Eighth,[47]

40. Neither chamber in the present 116th Congress has taken action on stand-alone legislation. *See* Democracy Restoration Act of 2019, H.R. 196 § 3 (2019); Democracy Restoration Act of 2019, S. 1068 § 3 (2019).

41. *See* Jason Belmont Conn, Note, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 516–36 (2005). *Compare* An Act Concerning the Voting Rights of Persons Serving a Sentence of Parole, ch. 283, sec. 5, § 1-2-101(3), 2019 Colo. Laws 2642, 2644, *and* An Act Relative to Registration and Voting, ch. 636, sec. 1, § 18:102(A)(1)(b), 2018 La. Acts 1970, 1970, *and* Felony Voter Disqualification Act, ch. 2017–378, sec. 1, § 17-3-30.1(e), 2017 Ala. Laws 1204, 1208, *with* James Drew, *Bill to Restore Felons' Voting Rights Faster Dies*, OLYMPIAN (Olympia, Wash.), Feb. 21–22, 2020, at 3A, *and* Stephen Gruber-Miller, *Senate GOP Denies Passage of Voting Rights Amendment*, DES MOINES REGISTER, June 15, 2020, at 2A.

42. *See, e.g.*, Exec. Order No. 7, at 2 (Iowa Aug. 5, 2020); Exec. Order No. 181 (N.Y. Apr. 2, 2018). Unilateral state executive action has its critics. *See* Amanda J. Wong, Note, *Locked Up, Then Locked Out: The Case for Legislative—Rather Than Executive—Felon Disenfranchisement Reform*, 104 CORNELL L. REV. 1679, 1701–13 (2019).

43. *See* Howell v. McAuliffe, 788 S.E.2d 706, 724–25 (Va. 2016); Exec Order No. 2015-052 § 1 (Ky. Dec. 22, 2015), *repealed*, Exec. Order No. 2019-003 § 11 (Ky. Dec. 12, 2019); Exec. Order No. 70 § I (Iowa Jan. 14, 2011). *But see* Lindsey Turok, Comment, Howell v. McAuliffe*: Felon Disenfranchisement in Virginia and the "Cautious and Incremental Approach" to Voting Equality*, 28 GEO. MASON U. C.R. L.J. 341, 342–43 (2018).

44. *See* FLA. STAT. § 98.0751(2)(a)(5) (2019); Adv. Op. re: Voting Restor'n Amend., 288 So. 3d 1070, 1084 (Fla. 2020).

45. *See, e.g.*, ELIZABETH HULL, THE DISENFRANCHISEMENT OF EX-FELONS 17 (2006); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 7–9 (2006); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA 8 (2d ed. 2013).

46. *See, e.g.*, Erika Stern, *"The Only Thing We Have to Fear is Fear Itself": The Constitutional Infirmities With Felon Disenfranchisement and Citing Fear as the Rational For Depriving Felons of Their Right to Vote*, 48 LOYOLA L.A. L. REV. 703, 752–54 (2015); Anthony Gray, *Securing Felons' Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 3, 28–30 (2014); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 171–72 (2013).

47. *See, e.g.*, Rebecca Harrison Stevens et al., *Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement*; 21 ST. MARY'S L. REV. ON RACE & SOC. JUST. 195, 216–23 (2019); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 136–42 (2005); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1164–69 (2004).

Thirteenth,[48] Fourteenth,[49] Fifteenth,[50] or Twenty-Fourth[51] Amendments, both the Fourteenth and Fifteenth Amendments combined,[52] the Privileges or Immunities Clause,[53] the Elections Clause,[54] the Bill of Attainder Clause,[55] or the One-Person-One-Vote[56] principle. Other commentators have debated claims under the Voting Rights Act.[57] Some of the literature has even touched on the applicability of international law.[58] The role of

48. *See, e.g.*, Alec Ewald, *Escape From the "Devonian Amber": A Reply to Voting and Vice*, 122 YALE L.J. ONLINE 319, 337–39 (2013); Shadman Zaman, Note, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 277 (2015).

49. *See, e.g.*, Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 783–89 (1998).

50. *See, e.g.*, Kyrstal J. Williams, *Criminal Disenfranchisement: Taking a Closer Look at Fifteenth Amendment Remediation*, 2 HUM. RTS. & GLOBALIZATION L. REV. 73, 111 (2009); Marc Edwards Rivera & Shimica D. Gaskins, Note, *Previous Conditions of Servitude: A Fifteenth Amendment Challenge to Ex-Felon Disenfranchisement Laws*, 1 GEO. J.L. & MOD. CRIT. RACE PERSP. 153, 162 (2008).

51. *See, e.g.*, David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 423–26 (2011); Allison R. Hayward, *What Is an Unconstitutional "Other Tax" on Voting? Construing the Twenty-fourth Amendment*, 8 ELECTION L.J. 103, 103–04 (2009); Ryan A. Partelow, *The Twenty-first Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 465 (2020).

52. *See, e.g.*, John Crain, *How Congress Can Pass a Felon Enfranchisement Law That Will Survive Supreme Court Review*, 29 B.U. PUB. INT. L.J. 1, 60–63 (2019); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1656–62 (2012); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 316 (2004).

53. *See* John Benjamin Schrader, Note, *Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285, 1311–14 (2009).

54. *See, e.g.*, Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 166–68 (2001); Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 783 (2006); Daniel M. Katz, *Article I, Section 4 of the Constitution, the Voting Rights Act, and Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon Disenfranchisement Jurisprudence?*, 10 J.L. & SOC. CHANGE 47, 64–78 (2007); Hans A. von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, 85 MISS. L.J. 1373, 1379–83 (2017).

55. *See* George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1904–06 (1999).

56. *See* Katherine Shaw, Comment, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What to Do About It*, 100 NW. U. L. REV. 1439, 1476–77 (2006).

57. *See, e.g.*, Matthew E. Feinberg, *Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61, 79–103 (2011); Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 141–42 (2008); Bertrall L. Ross II, *Not a Mere Omission: Reconciling the Clear Statement Rule and the Voting Rights Act*, 7 LOY. J. PUB. INT. L. 200–02 (2006).

58. *See, e.g.*, John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, HASTINGS CONST. L.Q. 757, 789–96 (2013); John Reuven "Ruvi" Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 239–264 (2011).

legal financial obligations receives some attention.[59] Commentators have explored both state-level activity and potential federal legislation.[60] Scholars have also discussed the theoretical justifications and policy consequences of felon disenfranchisement.[61] So much scholarship exists on this subject that one experienced voting rights litigator wrote an entire article—"not about the policy or wisdom of such disenfranchisement laws, nor even about whether such laws would pass muster if measured against the Constitution and federal law—just about how courts have ducked these issues."[62]

Scant Nineteenth Amendment literature addresses felon disenfranchisement. One commentator contends that the Nineteenth Amendment operates to *sub silentio* repeal section 2 of the Fourteenth Amendment, on which the Supreme Court had relied to prohibit an attack against felon disenfranchisement under the Equal Protection Clause of section 1 of the Fourteenth Amendment.[63] Another scholar argues that "the history of debate over women's suffrage sheds light upon the flaws in felony disenfranchisement legislation, both as a matter of public policy and constitutional rhetoric," and that "[m]any of the same retorts used to defeat paternalistic anti-suffragist arguments and usher in the [Woman Suffrage] Amendment can be similarly deployed to undermine paternalistic arguments to disenfranchise felons."[64] A footnote by one commentator suggests in passing that, in light of a Supreme Court decision

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59. *See, e.g.*, Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 143–48 (2019); Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 6 J.L. STUDIES 309, 334 (2017); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349, 405 (2012).

60. *Compare* L. Michael Berman, Comment, Howell v. McAuliffe, 52 U. RICH. L. REV. 251, 270–71 (2017), *and* Conn, *supra* note 41, at 516–36, *and* Lynn Eisenberg, Note, *States As Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 582–83 (2012), *and* Brian McWalters, Note, *A Vote for Those Who Can't: Strategies for Felon Voting Rights Reform*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 145, 151 (2018), *with* Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1099–1102 (2019), *and* Otis H. King & Jonathan A. Weiss, *The Courts' Failure to Re-Enfranchise "Felons" Requires Congressional Remediation*, 27 PACE L. REV. 407, 426–30 (2007), *and* von Spakovsky & Clegg, *supra* note 54, at 1375–76.

61. *See, e.g.*, Cammett, *supra* note 59, at 405; Roger Clegg et al., *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 17–19 (2008); Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 142–43 (2004); Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 93 (2006).

62. Armand Derfner, *How the Courts Keep Ex-Felons Disenfranchised*, 85 MISS. L.J. 1179, 1179 (2017).

63. *See* John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felon Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 192–96 (2004); Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974).

64. Michael Gentithes, *Felony Disenfranchisement and the Nineteenth Amendment*, 53 AKRON L. REV. 431, 441 (2019).

"stating that the Nineteenth Amendment 'applies to men and women alike,'" federal legislation abrogating state felon disenfranchisement laws "could potentially . . . be upheld under the Nineteenth Amendment, given that the overwhelming majority of felons are male."[65] No other scholarship discusses whether Congress may exercise its power under the Nineteenth Amendment's Enforcement Clause to abrogate state felon disenfranchisement provisions.

B. Military Voting

Unlike individuals with felony convictions, the country's approximately 1.3 million active duty military personnel[66] enjoy constitutional protection from outright disenfranchisement because of their military service.[67] However, servicemembers nonetheless face both logistical barriers and legal hurdles when registering to vote or casting a ballot.[68] "With frequent deployments to war zones, constant moves between duty stations, and confusing state absentee voting laws, military members face an uphill battle trying to register and request an absentee ballot."[69] Military voters' "geographic distance from local election officials often magnifies the challenges of registering, receiving ballots, returning them, and having them counted."[70] State law, too, can create

65. *See* Eric S. Fish, Note, *The Twenty-sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1230 n.274 (2012) (quoting Breedlove v. Suttles, 302 U.S. 277, 283 (1937)).

66. DEFENSE MANPOWER DATA CENTER, U.S. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE 1 (Jan. 31, 2020) [hereinafter DMDC, TOTAL MIL. PERS. JAN. 2020] (on file with Seattle University Law Review).

67. *See* Carrington v. Rash, 380 U.S. 89, 93–97 (1965).

68. *See Military and Overseas Voting in 2012: Hearing Before the Comm. on H. Admin.*, 113th Cong. 39 (2013) (testimony of Matt Boehmer, Director, Federal Voting Assistance Program, U.S. Department of Defense); DAVID MERMIN ET AL., FED. VOTING ASS'T PRGM., UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT VOTING: SUCCESSES AND CHALLENGES 73–77 (Nov. 2014); Donald S. Inbody, *Voting by Overseas Citizens and Military Personnel*, 14 ELECTION L.J. 54, 59 (2015).

69. HANS VON SPAKOVSKY & M. ERIC EVERSOLE, HERITAGE FOUND., LEGAL MEMO NO. 71, A PRESIDENT'S OPPORTUNITY: MAKING MILITARY VOTERS A PRIORITY 2 (July 19, 2011); *see also* Obama for America v. Husted, 697 F.3d 423, 434 (6th Cir. 2012).

70. PRES. COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATION OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 59 (Jan. 2014) [hereinafter PCEA REPORT].

problems for military voters.[71] Taken as a whole, the combined "result is that those barriers restrict practical access to a ballot."[72]

Even just the delivery of election materials to military voters or the return of those materials to election administrators can pose challenges.[73] For decades, policymakers have struggled to ensure that servicemembers can request, receive, and return ballots with enough time to ensure they arrive in election officials' possession on or before the deadline to count.[74] The problem persists today. The Government Accountability Office identified the "unpredictable postal delivery of absentee ballots to and from [military] voters" as one of the primary election-related challenges facing servicemembers, especially for military voters without access to the military postal system or for U.S. Navy voters stationed at sea with limited technological connectivity.[75] Transport issues often cause military voters' ballots or registration applications to miss statutory deadlines, a major reason why election administrators rejected approximately 2.8% of military voters' registration applications and 5.7% of military voters' absentee ballots in the 2018 election.[76] In fact, sometimes servicemembers do not receive their ballots at all: 4.3% of ballots transmitted to military

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71. *See Military and Overseas Voting in 2012: Hearing Before the Comm. on H. Admin.*, 113th Cong. 39 (2013) (testimony of Matt Boehmer, Director, Federal Voting Assistance Program); *Federal Voting Assistance Program: Hearing Before the Subcomm. on Military Personnel of the H.R. Comm. on Armed Services*, 112th Cong. 12, 67 (2012); (testimony of Pamela S. Mitchell, Director, Federal Voting Assistance Program); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 27–28, 39 (2009) (testimony of Rokey W. Suleman, II, General Registrar, Fairfax County Office of Elections); Inbody, *Voting*, *supra* note 68, at 59; Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 761 (2016).

72. DONALD S. INBODY, THE SOLDIER VOTE: WAR, POLITICS, AND THE BALLOT IN AMERICA 89 (1st ed. 2016); CLAIRE M. SMITH, CONVENIENCE VOTING AND TECHNOLOGY: THE CASE OF MILITARY AND OVERSEAS VOTERS 128–29 (1st ed. 2014).

73. *See* Paul S. Herrnson et al., *Message, Milieu, Technology, and Turnout Among Military and Overseas Voters*, 39 ELECTORAL STUD. 142, 143 (2015). The analysis leading to this conclusion includes overseas civilians. *Id.*

74. *See Voting in the Armed Forces: Hearings on H.R. 7571 and S. 3061 Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 82d Cong. 34 (1952) (testimony of Col. Thomas B. Blocker, Office of Armed Forces Information and Education).

75. BRENDA S. FARRELL, U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-16-378, DOD NEEDS MORE COMPREHENSIVE PLANNING TO ADDRESS MILITARY AND OVERSEAS ABSENTEE VOTING CHALLENGES 18–19 (Apr. 2016); *see also* INBODY, SOLDIER VOTE, *supra* note 72, at 94, 230–31 n.16.

76. U.S. ELECTION ASS'T COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY: 2018 COMPREHENSIVE REPORT 92, 97 (June 2019) [hereinafter EAVS 2018 REPORT]. These figures can vary widely by election jurisdiction. *See, e.g.*, R. Michael Alvarez et al., *Whose Absentee Votes are Returned and Counted: The Variety and Use of Absentee Ballots in California*, 27 ELECTORAL STUD. 673, 679 (2008); *Thad E. Hall, Voting From Abroad: Evaluating UOCAVA Voting*, *in* THE MEASURE OF AMERICAN ELECTIONS 141, 163 (Barry C. Burden & Charles Stewart III, eds. 2014); Kosuke Imai & Gary King, *Did Illegally Counted Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?*, 2 PERSP. ON POL. 537, 538 (2004).

voters in connection with the 2018 election were undeliverable.[77] "Compared with a traditional absentee voter, [a military] voter is much less likely to return his or her absentee ballot and is much more likely to have a successfully returned ballot rejected and not included in the final tabulation."[78]

Beyond the practical challenges, servicemembers also face legal hurdles. For instance, social science evidence demonstrates that "state-level procedural barriers also seem to hinder" military voters.[79]

One major legal hurdle is determining a servicemember's legal residence, also known as domicile.[80] The Constitution permits states to restrict the franchise to *bona fide* residents of the state.[81] "Unlike many of their civilian counterparts, military service members are in the unique position of having ties to many states."[82] "After all, service members frequently change homes pursuant to assignment orders," and "have little predictability as to when they will receive military orders to a new duty location."[83] State law defining residence or domicile for voting purposes sometimes excludes those—like military personnel—who lack an intention to remain in the state indefinitely.[84] Restrictive state domicile law could pose problems for servicemembers seeking to legally register to vote.[85]

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77. EAVS 2018 REPORT, *supra* note 76, at 96. This figure also covers overseas civilian voters. *Id.*

78. Hall, *supra* note 76, at 163. The analysis leading to this conclusion includes overseas civilians. *See id.*

79. *Id.* at 142. The analysis leading to this conclusion includes overseas civilians. *See id.*

80. "Domicile" means "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Domicile*, BLACK'S LAW DICTIONARY (11th ed. 2019). "The words 'domicile,' 'legal residence,' 'permanent home,' and the like, are essentially interchangeable terms." Thomas R. Sanftner, *The Serviceman's Legal Residence: Some Practical Suggestions*, 26 JAG J. 87, 87–88 (1971). For purposes of state election laws, the use of the term "residence" usually means "domicile." Mack Borgen, *The Determination of Domicile*, 65 MIL. L. REV. 133, 137 (1974).

81. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978). For arguments that the Constitution *requires* states to restrict the franchise to *bona fide* residents, see Brian C. Kalt, *Unconstitutional But Entrenched: Putting UOCAVA and Voting Rights for Expatriates on a Sound Constitutional Footing*, 81 BROOK L. REV. 441, 457–462 (2016); Alan Gura, *Ex-Patriates and Patriots: A Constitutional Examination of the Uniformed and Overseas Citizens Absentee Voting Act*, 6 TEX. REV. L. & POL. 179, 185–87 (2001).

82. Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49, 50 (2003).

83. *Id.* at 54 ("frequently change homes"); Dean W. Korsak, *The Hunt for Home: Every Military Family's Battle with Domicile Law*, 69 A.F. L. REV. 251, 307 (2013) ("little predictability").

84. *See* Carrington v. Rash, 380 U.S. 89, 89–90 (1965); John M. Greabe, *A Federal Baseline for the Right to Vote*, 112 COLUM. L. REV. SIDEBAR 62, 64-67 (2012).

85. Military voters do have some constitutional protections. For instance, states may not deny the vote to servicemembers because the state fears how servicemembers will vote nor because the state

The difficulties facing military voters are not new: throughout the nation's history, the realities of military service have burdened voters in the armed forces, especially during wartime.[86] Although Congress eventually enacted legislation to combat many of these barriers, the law has only recently come to support military voters. In fact, most military voters serving away from their home generally could not vote at all before the mid-Nineteenth Century because states conducted elections at in-person polling places with no provision for absentee balloting.[87]

Servicemember voting first saw wide-spread adoption during the Civil War when a host of states enacted laws authorizing voters serving in the military to vote from their duty station.[88] As was typical of mid-Nineteenth Century voting, election irregularities abounded.[89] These experiments were short-lived: state courts invalidated many military voting statutes while others were repealed or expired.[90]

By World War I, military voting laws existed in eighteen states.[91] However, military voting suffered even in these jurisdictions because the War Department refused to facilitate absentee voting in combat theaters, ensuring few soldiers in Europe's trenches could participate in the 1918 wartime midterm elections.[92] For example, when New York assembled a

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faces the administrative difficulty of determining whether servicemembers qualify as *bona fide* residents. *See Carrington*, 380 U.S. at 93–97.

86. *See, e.g.*, SEC'Y HENRY L. STIMSON, U.S. WAR DEP'T, REPORT BY THE SECRETARY OF WAR TO THE UNITED STATES WAR BALLOT COMMISSION ¶¶ 32–33 (1944), *reprinted in* H.R. DOC. NO. 79-6, at 55–58 (1945); *Voting in the Armed Forces: Hearings on H.R. 7571 and S. 3061 Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 82d Cong. 25 (1952) (testimony of Hon. Thad Eure, North Carolina Secretary of State).

87. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 2–3; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 121 (rev. ed. 2009); SMITH, *supra* note 72, at 40–41.

88. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 4; KEYSSAR, *supra* note 87, at 83; *id.* at 121; SMITH, *supra* note 72, at 40–42. For a more complete look at absentee voting during the Civil War, see JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 3–26, 306–22 (1915); INBODY, SOLDIER VOTE, *supra* note 72, at 13–44; Jonathan W. White, *Canvassing the Troops: The Federal Government and the Soldiers' Right to Vote*, 50 CIVIL WAR HIST. 291, 298–303, 309–11 (2004).

89. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 41–43; JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 804–05 & n.69 (1988); White, *supra* note 88, at 303–09, 312–15, Oscar Osburn Winther, *The Soldier Vote in the Election of 1864*, 25 N.Y. HIST. 440, 449–53 (1944).

90. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 47–49 & tbl.4.1; SMITH, *supra* note 72, at 41–42; John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483, 496–99, 501 (2003); Pamela Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CINCINNATI L. REV. 1345, 1351 (2003).

91. *See* P. Orman Ray, *Military Absent-Voting Laws*, 12 AM. POL. SCI. REV. 461, 461 (1918). Contemporary scholarship challenges this figure, arguing that "by 1918, nearly all states had made provisions for men serving in the military to cast their ballots, at least in time of war." KEYSSAR, *supra* note 87, at 121.

92. *See* Letter from Adjutant Gen. H.P. McCain, U.S. War Dep't, to Sen. James K. Vardaman, U.S. Senate (Apr. 22, 1918), *reprinted in* 56 CONG. REC. 5886 (1918); Thomas F. Logan,

six-member Overseas Election Commission to administer the state's election for its voters stationed overseas, the War Department blocked the six commissioners from traveling to Europe to do so.[93]

Following America's entry into World War II, forty-five states permitted absentee balloting by military personnel, but the patchwork of state rules often presented considerable barriers to servicemembers hoping to cast a ballot.[94] Congress attempted to standardize the process of military voting by enacting legislation in 1942, wartime amendments in 1944, and postwar amendments in 1946.[95] Unfortunately, all three proved inadequate.[96]

Following the war, military voters faced increasingly greater burdens when states repealed or allowed to expire many of the flexible registration and voting laws aimed at servicemembers.[97] However, nearly a decade passed after World War II without any new military voting legislation.[98] Congress eventually took action with the Federal Voting Assistance Act of 1955 and subsequent amendments in 1968.[99] These enactments issued

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Correspondence, *Soldier Vote in War*, 62 AM. ECON. 122, 122 (1918); *see also* INBODY, SOLDIER VOTE, *supra* note 72, at 52–53; SMITH, *supra* note 72, at 43.

93. *Compare To Take Ballots to Men in France*, N.Y. TIMES, Sept. 29, 1918, at 10, *with Guns the Best Ballots*, N.Y. TIMES, Oct. 1, 1918, at 12. The War Department may have taken a more lenient view of states like Mississippi that chose to poll their deployed voters by mail-in absentee ballot. *See* 56 CONG. REC. 5952–53 (1918) (statement of Rep. Pat Harrison).

94. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 56; SMITH, *supra* note 72, at 44; Boyd A. Martin, *The Service Vote in the Elections of 1944*, 39 AM. POL. SCI. REV. 720, 724–25 (1945).

95. *See* 50 U.S.C. §§ 301–15 (Supp. II 1942), *amended by* 50 U.S.C. §§ 301–03, 321–354 (Supp. IV 1944), *amended by* 50 U.S.C. §§ 301–03, 321–31, 341–42, 351–55 (1946) (repealed 1955). For an overview of each enactment, see PAUL T. DAVID ET AL., SPECIAL COMM. ON SERV. VOTING, AM. POL. SCI. ASS'N, VOTING IN THE ARMED FORCES (1952), *reprinted in* H.R. DOC. NO. 82-407, at 15–18, 20–21 (1952).

96. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 62–64, 68–71, 73–74; SMITH, *supra* note 72, at 45–46; Molly Guptill Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 335, 353–54, 368–71 (2016).

97. *See Voting in the Armed Forces: Hearings on H.R. 7571 and S. 3061 Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 82d Cong. 75–76 (1952) (testimony of Paul T. David, staff member, Brookings Institution & member, American Political Science Association); DAVID ET AL., *supra* note 95, *reprinted in* H.R. DOC. NO. 82-407, at 21–22. The outbreak of conflict on the Korean Peninsula lead a minority of states to reverse course. *See id.* at 22–23.

98. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 75–78; SMITH, *supra* note 72, at 46–47. Congress did enact minor amendments in 1950. *See* 50 U.S.C. §§ 324(d), 329(a), 352 (Supp. IV 1950) (repealed 1955).

99. *See* 5 U.S.C. §§ 2171–73, 2181–85, 2191–96 (Supp. III 1955), *amended by* 50 U.S.C. §§ 1451–54, 1461–65, 1471–76 (Supp. IV 1968) (repealed 1986); *see also* DAVID ET AL., *supra* note 95, *reprinted in* H.R. DOC. NO. 82-407, at 5–8.

a series of non-binding recommendations regarding military voting that states were free to ignore—and many did.[100]

Congress began flexing its constitutional muscle in the Overseas Citizens Voting Rights Act of 1975 and its 1978 amendments.[101] This statute obligated states to grant each otherwise-qualified voter residing outside the United States the right to vote in federal elections and to afford these voters absentee registration procedures and absentee ballots.[102] In 1978, Congress amended the Federal Voting Assistance Act to expressly require states to offer absentee registration procedures and absentee ballots to active duty servicemembers, whether stationed domestically or internationally.[103] However, both the Federal Voting Assistance Act and the Overseas Citizens Voting Rights Act still left states to implement the laws as they saw fit.

In 1986, Congress consolidated and updated the statutes concerning military and overseas civilian voting into the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which governs military voting today.[104] In contrast to the hands-off approach of earlier decades, federal law (including UOCAVA) now imposes a host of obligations on states, resulting in a wide range of legal protections for military voters.[105]

These legal protections for military voters spawn some litigation. While litigants file fewer cases to protect military voters than to challenge felon disenfranchisement provisions, military voting lawsuits succeed more often than felon disenfranchisement challenges.[106] Litigation seeking to ensure that election officials dispatch absentee ballots to military voters on or before the forty-fifth day prior to the election—the deadline set by federal law—invariably succeeds.[107] Sometimes, litigation seeks to enjoin

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100. *See also* INBODY, SOLDIER VOTE, *supra* note 72, at 79–83; SMITH, *supra* note 72, at 47–49. Congress achieved at least some voluntary compliance. *See* H.R. REP. NO. 90-1385, at 2 (1968); S. REP. NO. 90-397, at 2 (1967).

101. *See* 42 U.S.C. §§ 1973dd to 1973dd-5 (Supp. V 1975), *amended by* 42 U.S.C. §§ 1973dd to 1973dd-5 (Supp. II 1978) (repealed 1986).

102. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 83–85; SMITH, *supra* note 72, at 49. Although the statute applied to military voters stationed overseas, "[v]irtually all States [already] ha[d] statutes expressly allowing military personnel . . . to register and vote absentee from outside the country." H.R. REP. NO. 94-649, pt. 1, at 3 (1975); S. REP. NO. 94-121, at 3 (1975).

103. *See* 42 U.S.C. § 1973cc(b)(1) (Supp. II 1978) (repealed 1986).

104. *See* 52 U.S.C. § 20301–11; *see also* INBODY, SOLDIER VOTE, *supra* note 72, at 86–87; SMITH, *supra* note 72, at 50.

105. *See infra* Section III.B.5.

106. *See Military and Overseas Voting: Effectiveness of the MOVE Act in the 2010 Elections: Hearing Before the Comm. on H. Admin.*, 112th Cong. 36–37 (2011) (statement of Thomas E. Perez, Assistant Att'y Gen. for C.R.); Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C.A. §§ 1973ff et seq.*, 1 A.L.R. Fed. 2d 251 § 2 (2005).

107. *See, e.g.*, United States v. Georgia, 778 F.3d 1202, 1204–05 (11th Cir. 2015); United States v. Alabama, 778 F.3d 926, 929 (11th Cir. 2015); United States v. New York, No. 1:10-cv-1214

election officials from rejecting a service member's ballot; these cases also usually succeed.[108] Conversely, litigation to invalidate military ballots usually fails.[109] One high-profile lawsuit, taking advantage of a complex history of legislative and administrative activity, succeeded in obtaining for all voters a special dispensation previously afforded to only military voters.[110]

As one scholar put it, "difficulties persist for military and overseas voters."[111] Election professionals across the political spectrum agree that, while recent federal enactments have dramatically enhanced the voting experience for members of the armed forces, more work remains to protect servicemembers' votes.[112] Although the Uniform Law Commission proposed uniform state legislation to protect a state's military voters, only a handful of jurisdictions have adopted some version of it.[113] Even the adopting states do not always enact the proposed uniform legislation in its entirety.[114] Despite several hearings,[115] and even the passage by one

(GLS/RFT), 2012 WL 254263, at *3–5 (N.D.N.Y. Jan. 27, 2012). *But see* Doe v. Walker, 746 F. Supp. 2d 667, 674 (D. Md. 2010).

108. *See* United States v. West Virginia, Civil Action No. 2:14-27456, 2014 WL 7338867, at *8 (S.D.W.V. Dec. 22, 2014); Bush v. Hillsborough Cnty. Canvassing Bd., 123 F. Supp. 2d 1305, 1317–18 (N.D. Fla. 2000).

109. *See* Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1325 (N.D. Fla.), *aff'd*, 235 F.3d 578 (11th Cir. 2000) (per curiam); Casarez v. Val Verde County, 16 F. Supp. 2d 727, 732 (W.D. Tex. 1998); *aff'd mem.*, 194 F.3d 1308 (5th Cir. 1999).

110. *See* Obama for Am. v. Husted, 697 F.3d 423, 437 (6th Cir. 2012). For a detailed look at the complex circumstances in which this case arose, see Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1879–87 (2013).

111. Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 878 (2013).

112. *See, e.g.*, *Examining the Voting Process—How States Can Build on the Recommendations From the Bauer-Ginsburg Commission: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 113th Cong. 148–49 (2014) (statement of Robert Bauer, Co-Chair, Pres. Comm'n on Election Admin.); *id.* at 149 (statement of Benjamin Ginsburg, Co-Chair, Pres. Comm'n on Election Admin.).

113. *See* UNIFORM MILITARY AND OVERSEAS VOTERS ACT §§ 1–22 (UNIF. LAW COMM'N 2010). For the uniform legislation as enacted, see CAL. ELEC. CODE §§ 3101–23 (2020); COLO. REV. STAT. §§ 1-8.3-101 to -119 (2020); D.C. CODE §§ 1-1061.01 to .20 (2020); HAW. REV. STAT. §§ 15D-1 to -18 (2020); KY. REV. STAT. ANN. §§ 117A.005 to .190 (2020); MO. REV. STAT. §§ 115.900 to .936 (2020); MONT. CODE ANN. §§ 13-21-101 to -228 (2020); NEV. REV. STAT. §§ 293D.101 to .540 (2020); N.M. STAT. ANN. §§ 1-6B-1 to -17 (2020); N.C. GEN. STAT. §§ 163-258.1 to .25 (2020); N.D. CENT. CODE §§ 16.1-07-18 to -33 (2020); OKLA. STAT. tit. 26 §§ 14-136 to -155 (2020); 25 PA. CONS. STAT. §§ 3501–19 (2020); S.C. CODE ANN. §§ 7-15-600 to -760 (2020); UTAH CODE ANN. §§ 20A-16-101 to -506 (2020); VA. CODE ANN. §§ 24.2-451 to -470 (2020).

114. *See* Huefner, *Lessons*, *supra* note 111, at 844 n.75.

115. *See Compilations of Hearings and Markups: Hearings and Markups Before the S. Comm. on Rules & Admin.*, 113th Cong. 123 (2015) (statement of Sen. Angus King); *Military and Overseas Voting in 2012: Hearing Before the Comm. on H. Admin.*, 113th Cong. 1 (2013) (statement of Rep. Candice S. Miller, Chair, Comm. on H. Admin.); *Military and Overseas Voting: Effectiveness of the MOVE Act in the 2010 Election: Hearing Before the Comm. on H. Admin.*, 112th Cong. 1 (2011) (statement of Rep. Daniel E. Lungren, Chair, Comm. on H,. Admin.)

chamber of two omnibus bills with updates to military voting law,[116] Congress has not enacted substantial military voting legislation in over a decade.[117] Oversight agencies have determined that even the military's own internal procedures need some degree of improvement.[118]

Military voting has attracted little attention from legal scholars. Some of the literature takes a theoretical approach: one scholar considers the history of military enfranchisement and its ramifications for modern-day voting restrictions;[119] another argues that "UOCAVA created a voter qualification standard for federal elections, illustrating that the states' authority [to set the qualifications of voters] under Article I, Section 2 cannot be completely segregated from federal power."[120] Some scholars focus on more concrete policy proposals to improve servicemembers' voting experience.[121] Other scholarship explores the way in which military voting procedures impact election administration for all voters.[122] One scholar conducted a case study on the role of military ballots in the Florida's contested 2000 presidential election.[123] The literature also

116. In 2019, the House of Representatives passed an omnibus election reform bill which, among other things, contained a host of updates to UOCAVA. *See* H.R. 1, 116th Cong. §§ 1701–05 (as passed by the House, Mar. 8, 2019); H.R. REP. NO. 116-15, pt. 1, at 163–64 (2019); *see also* 165 CONG. REC. H2602 (daily ed. Mar. 8, 2019) (recording a 234–193 vote for passage of H.R. 1). The Senate has precluded further action on the bill. *See* 165 CONG. REC. S1855 (daily ed. Mar. 14, 2019) (statement of Sen. Mitch McConnell); *see also* S. DOC. 101-28, at 244 (1992). In 2017, the House passed a defense authorization bill which, among other things, included language providing that a servicemember does not gain or lose a domicile by virtue of registering to vote in a state where the servicemember is present by virtue of military orders. *See* H.R. 2810, 115th Cong. § 573 (as passed by the House, July 14, 2017); *see also* 163 CONG. REC. H5867–68 (July 14, 2017) (recording a 344–81 vote for passage of H.R. 2810). The Senate amended the bill without including similar language, and the conference committee did not insist that the final bill contain the provision. *See* H.R. REP. NO. 115-404, at 831 (2017).

117. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, secs. 575–89, §§ 101–05A, 123 Stat. 2190, 2318–35 (2009) (codified as amended at 52 U.S.C. §§ 20301–11). Congress has enacted more recent military voting legislation, but these enactments contained only minor, technical, or clerical amendments. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 580C, 580D, 133 Stat. 1198, 1409 (2019); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, sec. 1075(d)(3)–(6), §§ 581–89, 124 Stat. 4137, 4372–73 (2011).

118. *See* FARRELL, *supra* note 75, at 37; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., NO. DODIG-2019-065, EVALUATION OF DOD VOTING ASSISTANCE PROGRAMS FOR 2018, at 13–14, 17–20 (2019).

119. *See* Karlan, *Ballots and Bullets*, *supra* note 90, at 1346–62.

120. *See* Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 372 (2019).

121. *See* R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 FORDHAM URB. L.J. 935, 990–96 (2007); Hall, *supra* note 76, at 142; Inbody, *Voting*, *supra* note 68, at 58–59.

122. *See* Huefner, *Lessons*, *supra* note 111, at 880.

123. *See* Diane H. Mazur, *The Bullying of America: A Cautionary Tale About Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105, 105 (2005).

addresses the constitutionality of UOCAVA's guarantee of voting rights to civilians indefinitely residing outside the United States.[124] No scholarship addresses the Nineteenth Amendment's application to military voting.

II. "ON ACCOUNT OF SEX": WHY AND HOW THE NINETEENTH AMENDMENT PROTECTS THE VOTING RIGHTS OF MEN

As the above discussion illustrates, felon disenfranchisement and military service both pose severe yet unique barriers to the ballot. As the below discussion will illustrate, those barriers impact significantly more men than women. "The question then is what, if anything, can the Nineteenth Amendment do to help?"[125]

Prior scholarship demonstrates how the Nineteenth Amendment's Enforcement Clause conferred on Congress "extraordinary power to combat the voting restrictions that proliferate today" in light of the restrictions' disproportionate impact on *women*.[126] But the Nineteenth Amendment also endows Congress with similar authority to protect the voting rights of *men*. Given the manner in which felon disenfranchisement and military service impacts the voting rights of significantly more men than women, the Nineteenth Amendment's congressional enforcement power enables Congress to tackle these obstacles.

A. Why: The Gender-Neutral Nineteenth Amendment

The Woman Suffrage Amendment concerns sex-based barriers to the ballot irrespective of whether those barriers harm men as opposed to women because the Nineteenth Amendment provides gender-neutral protection. Its operative clause contains a gender-neutral prohibition, barring restrictions on the franchise "on account of *sex*"[127] without limiting its protection to women. One of the only things the Supreme Court has said about the Nineteenth Amendment is that it "applies to men and women alike."[128]

Other constitutional provisions are similarly neutral in their application. The Fourteenth Amendment, originally intended to protect

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124. *See* Kalt, *supra* note 81, at 516; Gura, *supra* note 81, at 204.

125. Kolbert, *supra* note 1, at 529.

126. *Id.* at 551.

127. U.S. CONST. amend XIX, para. 1 (emphasis added).

128. Breedlove v. Suttles, 302 U.S. 277, 283 (1937), *overruled in part by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (overruling only the Fourteenth Amendment holding). Multiple scholars have questioned *Breedlove*'s continuing viability. *See* Hasen & Litman, *supra* note 4, at 35–38; Kolbert, *supra* note 1, at 539. Whatever other aspects of the decision warrant scrutiny, the literature generally does not criticize the decision's endorsement of a constitutional protection that extends to both sexes.

black former slaves, nonetheless protects white voters.[129] The Fifteenth Amendment, originally intended to protect black voters, nonetheless protects white voters.[130] The Twenty-sixth Amendment, originally intended to protect young voters, nonetheless protects older voters.[131] The Fifteenth and Twenty-sixth Amendments contain language nearly identical to the Nineteenth Amendment, and if read *in pari materia*[132] with one another, suggest that the Nineteenth Amendment applies in a gender-neutral fashion.[133]

Of course, the presumption that similar constitutional provisions should be interpreted to have similar meanings can be overcome.[134] But no serious evidence exists to challenge the presumption that the Nineteenth Amendment shares the neutral application of its constitutional counterparts. Although the Sixty-sixth Congress that proposed the Woman Suffrage Amendment to the states originally intended the new constitutional provision to benefit women,[135] nothing in the legislative history of the Nineteenth Amendment suggests that the drafters intended to deny men this new constitutional protection. The legislative record is similarly devoid of floor statements, committee reports, hearing testimony, or other legislative material that would otherwise cast doubt on the gender-neutral nature of the Nineteenth Amendment. Accordingly, the Nineteenth Amendment protects the voting rights of men as well as women.

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129. *See* Shaw v. Reno, 509 U.S. 630, 657–58 (1993); KEYSSAR, *supra* note 87, at 71–72.

130. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 521–22 (2d Cir. 1975), *aff'd*, 430 U.S. 144 (1977); KEYSSAR, *supra* note 87, at 74–83. Courts have acknowledged that Fifteenth Amendment enforcement legislation also protects non-Black voters. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 436–42 (2006) (Latinx voters); DNC v. Hobbs, 948 F.3d 989, 1032 (9th Cir. 2020) (American Indian voters); United States v. Brown, 561 F.3d 420, 433–35 (5th Cir. 2009) (white voters); Favors v. Cuomo, 881 F. Supp. 2d 356, 366 (E.D.N.Y. 2012) (Asian American voters).

131. *See* KEYSSAR, *supra* note 87, at 225–28; Fish, *supra* note 65, at 1222–24.

132. The "rule of *in pari materia* provides that legal texts should be interpreted in ways that preserve consistency among closely related laws and constitutional provisions dealing with the same subject matter." David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181, 1192 (2015).

133. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999); Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life Into the Twenty-sixth Amendment*, 67 SYRACUSE L. REV. 653, 674–75 (2017); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1198 n.12 (2012).

134. *See, e.g.*, Amar, *Intratextualism*, *supra* note 133, at 800 n.202; Cheng, *supra* note 133, at 668, 673.

135. *See, e.g.*, KEYSSAR, *supra* note 87, at 139–78.

B. How: The Nineteenth Amendment Enforcement Power[136]

The Nineteenth Amendment does more than merely protect men's voting rights: it also provides Congress with a robust authority to enforce those rights.[137] The legislative history of the Nineteenth Amendment offers guidance on the appropriate use of that authority.

1. Scope of the Enforcement Power

When the Sixty-sixth Congress proposed the Nineteenth Amendment to the states for ratification, it engrafted onto the Woman Suffrage Amendment an Enforcement Clause that provided Congress with substantial, expansive authority to protect voting rights from sex-based barriers to the ballot as Congress, in its discretion, saw fit. This fact is confirmed by the legislative history of House Joint Resolution 1[138]—the legislative vehicle for proposing the Nineteenth Amendment to the states—as well as other period legal sources that shed light on the intent of the Sixty-sixth Congress.

That Congress recognized the extraordinary power the Enforcement Clause would confer on the legislative branch. Debate over House Joint Resolution 1 frequently discussed its enormous shift of power over elections from states to the federal government.[139] Yet this shift did not bother Congress: the Senate rejected an amendment to weaken the Enforcement Clause by greater than a three-to-one margin.[140] Both chambers took similar action when debating the Woman Suffrage Amendment in the Sixty-fifth Congress just a year earlier.[141] Legal scholars of the era agreed that the Woman Suffrage Amendment endowed Congress with substantial enforcement power.[142]

Strengthening this point is the legal environment of 1919: the Sixty-sixth Congress adopted House Joint Resolution 1 against a constitutional

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136. For a more complete survey of the scope of the Enforcement Clause, see Kolbert, *supra* note 1, at 543–59.

137. *See* Kolbert, *supra* note 1, at 543–51.

138. *See* H.R.J. Res. 1, 66th. Cong. (1919). This legislative history includes material from prior Congresses considering a Woman Suffrage Amendment because the Sixty-sixth Congress explicitly relied on the vast record built by its legislative predecessors when considering House Joint Resolution 1. *See* Kolbert, *supra* note 1, at 534–38.

139. *See* H.R. REP. NO. 66-1, pt. 2, at 1–3 (1919) (minority views); 58 CONG. REC. 563 (1919) (statement of Sen. William Borah); *id.* at 90 (statement of Rep. Frank Clark); *id.* at 81–82 (statement of Rep. Rufus Hardy).

140. *See* 58 CONG. REC. 634 (1919).

141. *See* 56 CONG. REC. 10,986–87 (1918) (Senate); *id.* at 810 (House).

142. *See* Emmet O'Neal, *The Susan B. Anthony Amendment. Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections*, 6 VA. L. REV. 338, 355 (1920); Charles Hall Davis, Note, *Shall Virginia Ratify the Federal Suffrage Amendment?*, 5 VA. L. REG. 354, 363 (1919); Raeburn Green, Book Review, 30 HARV. L. REV. 406, 406–07 (1917) (reviewing HENRY ST. GEORGE TUCKER, WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT (1916)).

backdrop which included nearly identical Enforcement Clauses in the Fifteenth and Eighteenth Amendments.[143] This identical language suggests the clauses should be read *in pari materia* with one another,[144] absent evidence to rebut this presumption.

By 1919, a host of Fifteenth Amendment decisions construed that provision's Enforcement Clause.[145] Taken as a whole, the lessons of these Fifteenth Amendment decisions are two-fold. First, these decisions imposed limits on the Fifteenth Amendment's congressional enforcement power: the Fifteenth Amendment "required some connection, some hook, into race- or color-based discrimination" to justify congressional action.[146] Second, the Court acknowledged that once Congress satisfied this race-or-color prerequisite, the Fifteenth Amendment empowered Congress with significant authority to take the actions Congress deemed necessary to protect voting rights—without judicial interference.[147] If the Sixty-sixth Congress intended to incorporate these Fifteenth Amendment decisions into the Nineteenth Amendment, this jurisprudence supports a powerful congressional enforcement authority with only minor limits.

Eighteenth Amendment jurisprudence had yet to develop by 1919, but the Eighteenth Amendment informs the interpretation of the Nineteenth Amendment in other ways. When Congress proposes to the states a constitutional amendment with an enforcement clause, later legislative activity by members of the proposing Congress aids the understanding of the scope of that enforcement clause.[148] In the case of the Sixty-sixth Congress, both proposed Nineteenth Amendment enforcement legislation and enacted Eighteenth Amendment enforcement legislation provide interpretive assistance and suggest a broad reading of the Nineteenth Amendment's Enforcement Clause.

Following ratification of the Nineteenth Amendment, members of the Sixty-sixth Congress proposed enforcement legislation which would exercise a significant level of authority—at the expense of states—over

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143. *Compare* U.S. CONST. amend XV, § 2; *and id.* amend XVIII, § 2, *repealed by id.* amend. XXI, § 1, *with id.* amend. XIX, para. 2.

144. *See* Amar, *Intratextualism*, *supra* note 133, at 789; Cheng, *supra* note 133, at 674–75; Tolson, *Reinventing Sovereignty?*, *supra* note 133, at 1198 n.12.

145. *See* James v. Bowman, 190 U.S. 127, 139 (1903); *Ex parte* Yarbrough, 110 U.S. 651, 664–67 (1884); United States v. Harris, 106 U.S. 629, 637 (1883); United States v. Cruikshank, 92 U.S. 542, 551–56 (1875); United States v. Reese, 92 U.S. 214, 217–22 (1875).

146. Kolbert, *supra* note 1, at 551.

147. *See id.*

148. *See* Christopher W. Schmidt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. ONLINE 33, 41 (2018); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 422–25 (2014).

the election process.[149] Although insufficient time remained to enact this proposed enforcement legislation before the expiration of the Sixty-sixth Congress,[150] that same Congress did enact legislation pursuant to its Eighteenth Amendment enforcement power. The National Prohibition Act targeted a much larger swath of activity than the Eighteenth Amendment and created a sweeping regulatory regime, complete with a private right of action and criminal penalties—both to be enforced in federal court.[151] The committee reports accompanying the legislation (1) outlined why this sweeping proposal constituted "appropriate legislation" despite the more narrow scope of the Eighteenth Amendment itself, (2) emphasized that the authority to determine the appropriateness of legislation rested with Congress (and not the courts), and (3) explained congressional expectations that a deferential judiciary would uphold any enforcement legislation reasonably related to the enforcement of Prohibition.[152] A few years later, the Supreme Court agreed on largely the same grounds, upholding the National Prohibition Act and other similar legislation against a variety of constitutional challenges.[153]

In short, the Sixty-sixth Congress proposed Nineteenth Amendment enforcement legislation and enacted Eighteenth Amendment enforcement legislation which both assumed a great deal of congressional authority. This proposed and enacted legislation, together with the legislative history of House Joint Resolution 1 and the backdrop of Fifteenth Amendment enforcement jurisprudence, demonstrate the extraordinary power the Sixty-sixth Congress understood itself to possess under the Woman Suffrage Amendment.

2. Appropriate Enforcement Targets

The legislative history of House Joint Resolution 1 demonstrates more than the scope of congressional power under the Enforcement

149. *See* S. 4739, 66th Cong. §§ 1–5 (1920); H.R. 15018, 66th Cong. §§ 1–5 (1920); S. 4323, 66th Cong. §§ 1–5 (1920). Two scholars observe that this proposed legislation could be viewed as "consistent with a narrow conception of Congress's enforcement power that allows Congress only to remedy constitutional violations," because the legislation, despite its extensive reach into state election administration, generally tracked the language of the Nineteenth Amendment's operative prohibition. *See* Hasen & Litman, *supra* note 4, at 68. However, as these scholars point out, this "does not prove that supplying a remedy against unconstitutional conduct exhausts the full scope of Congress's enforcement power under the Nineteenth Amendment." *Id.*

150. *See* Kolbert, *supra* note 1, at 545 n.213.

151. National Prohibition Act, Pub. L. No. 66-66, tit. II, §§ 1—39, 41 Stat. 305, 307–319 (1919) (repealed 1935); *id.* tit. III, §§ 1–21, 41 Stat. at 319–21.

152. H.R. REP. NO. 66-91, at 4–6 (1919); S. REP. NO. 66-151, at 12 (1919).

153. *See Nat'l Prohibition Cases*, 253 U.S. 350, 387–88 (1920); *see also* Lambert v. Yellowley, 272 U.S. 581, 593–97 (1926); James Everard's Breweries v. Day, 265 U.S. 545, 559–60 (1924); Selzman v. United States, 268 U.S. 466, 468–69 (1925); Vigliotti v. Pennsylvania, 258 U.S. 403, 408–09 (1922).

Clause; it also guides subsequent Congresses as to what types of voting restrictions Congress should target: those with a political impact, those that cut against full participation in society (especially participation in a war effort), and those that burden caretakers (especially caretakers of children) and the family.[154]

First, the legislative history demonstrates that Congress may appropriately direct Nineteenth Amendment enforcement legislation at restrictions with a political or ideological impact. All elected policy makers care deeply about the legislative success of their policy vision. Likewise, politicians universally share an almost primal concern for their own electoral success and that of their allies. The Sixty-sixth Congress was no exception.[155] In the debate over House Joint Resolution 1, members spoke often of the electoral impact of women voters in states with woman suffrage and the expected impact of women voters in the remaining states.[156] Members made similar statements in the woman suffrage debates in the Sixty-fifth Congress.[157] Committees in earlier Congresses heard testimony concerning the expected electoral impact of newly enfranchised women.[158] Other testimony focused on how women's political participation impacted public policy, as did a House committee report and floor debate.[159]

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154. *See* Kolbert, *supra* note 1, at 552–59.

155. The political self-interest motivating members of the Sixty-sixth Congress to propose the Woman Suffrage Amendment to the states thus resembled the political self-interest motivating Reconstruction-era members of Congress to propose the Fifteenth Amendment to the states. *Cf.* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. (forthcoming 2020) (manuscript at pt. III).

156. *See* 58 CONG. REC. 627 (1919) (statement of Sen. James Reed); *id.* at 564 (statement of Sen. William Borah); *id.* at 8834 (statement of Rep. Rufus Hardy); *id.* at 91 (statement of Rep. Frank Clark); *id.* at 87 (statement of Rep. William Vaile).

157. *See* 56 CONG. REC. 10,979 (1918) (statement of Sen. Irvine Lenroot); *id.* at 764 (statement of Rep. James Cantrill).

158. *See Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200, Before the H. Comm. on Woman Suffrage*, 65th Cong. 51 (1918) (testimony of Maude Wood Park); *Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 47 (1917) (testimony of Rheta Childe Dorr); *id.* at 14, 29 (testimony of Sen. John B. Kendrick); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 5, 65th Cong. 184–85 (1917) (testimony of Anne Martin, Chairman, Nat'l Woman's Party); *Woman Suffrage: Hearings on S.J. Res. 1 and S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 64th Cong. 66 (1916) (testimony of A.J. George, Exec. Sec'y of the Cong. Comm., Nat'l Ass'n Opposed to Woman Suffrage); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pts. 2 & 3, 64th Cong. 48 (1916) (testimony of Helen Todd); *Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage*, 63d Cong. 84 (1913) (testimony of Helen H. Gardener); *id.* at 44 (statement of Rep. Burton L. French).

159. *See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 51 (1917) (testimony of Madeline Z. Doty, Correspondent of the *New York Tribune*); *id.* at 13 (testimony of Sen. John B. Kendrick); *Extending the Right of Suffrage to Women: Hearings on H.R.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 327 (1918) (reprinting Seward A.

Second, restrictions that burden a voter's participation in society (especially participation in a war effort) also constitute appropriate targets for Nineteenth Amendment enforcement legislation. Congressional concerns extended beyond mere partisan or political self-interest: the recently concluded "Great War" weighed heavily on members' minds. During the war, President Woodrow Wilson appealed directly to Congress with a speech from the Senate floor, arguing that woman suffrage was necessary to the war effort.[160] Committees of both chambers heard witness after witness testify to their support of woman suffrage in light of women's contributions to the military campaign.[161] Supporters of woman suffrage in both the Sixty-sixth Congress and its predecessors repeatedly praised women's work in support of the military effort in World War I, citing that work as additional justification for the Woman Suffrage Amendment.[162] Members of Congress also recognized that women's service in the war effort portended a larger role in society—a role members sought to protect.[163] "Congress was proud of women's new role in society—especially, but not limited to, women's role in the war effort—and sought to reward them with the franchise."[164]

Finally, Nineteenth Amendment enforcement legislation reflects the will of the Sixty-sixth Congress when that legislation takes aim at burdens on caretakers and their families. Members of Congress valued women's roles as caretakers—especially caretakers of children—believing that their contributions to the institution of family warranted enfranchisement.[165] For years, congressional committees considering woman suffrage heard witnesses testify about the positive role women played as mothers and how

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Simons, *A Survey of the Results of Woman Suffrage in California* (1917)); H.R. REP. NO. 65-234, at 2 (1918); 58 CONG. REC. 8832 (1919) (statement of Rep. Henry Osborne).

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

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

162. *See* H.R. REP. NO. 65-234, at 2 (1918); S. REP. NO. 64-35, at 2 (1916); 58 CONG. REC. 8833–34 (1919) (statement of Rep. Rufus Hardy); *id.* at 8829 (statement of Rep. James C. Cantrill); *id.* at 84 (statement of Rep. John MacCrate); *id.* at 83 (statement of Rep. Adolphus Nelson); 57 CONG. REC. 3061 (1919) (statement of Sen. Gay); *id.* at 3055–56 (statement of Sen. William Calder); 56 CONG. REC. 10,979 (1918) (statement of Sen. Irvine Lenroot); *id.* at 10,977 (statement of Sen. Albert Cummins).

163. *See* 58 CONG. REC. 8834 (1919) (statement of Rep. Rufus Hardy); *id.* at 8832 (statement of Rep. Israel Foster); *id.* at 87 (statement of Rep. William Vaile).

164. Kolbert, *supra* note 1, at 556; *see also* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 967–70 (1998).

165. *See* Amar & Brownstein, *supra* note 164, at 963–67.

suffrage for women would improve their care of children.[166] Reflecting on this testimony, committee reports on woman suffrage in both chambers reflected a concern for mothers and caretakers.[167] Members made similar arguments in floor debate over woman suffrage.[168]

In short, the concerns of the Sixty-sixth Congress centered on three points: (1) elections and public policy, (2) participation in society and the war effort, and (3) caregiving for children and family. Enforcement legislation therefore enjoys heightened legitimacy when targeting voting restrictions that touch on one or more of these concerns.

III. NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION TO PROTECT THE VOTING RIGHTS OF MEN

A. Legislation Concerning Felon Disenfranchisement

Felon disenfranchisement represents one area for legitimate congressional action under the Nineteenth Amendment. Not only does the burden of felon disenfranchisement fall disproportionately on men, but felon disenfranchisement raises all three of the concerns the Sixty-sixth Congress discussed when proposing the Woman Suffrage Amendment to the states.

1. Burden on Men vs. Women

First, states disqualify substantially more men than women from voting as a consequence of felony convictions. While the racially disparate impact of felony disenfranchisement receives the bulk of the attention,[169] the gender gap is likewise substantial: in 2000, states disenfranchised 4,686,539 individuals with felony convictions, of which only 676,730 (14%) were women; in 2004, the number rose to 5,266,207

166. *See Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 100 (1918) (letter from Mrs. H.C. Davis); *id.* at 26 (testimony of Mrs. Henry Ware Allen); *Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage*, 65th Cong. 50–51 (1917) (testimony of Madeline Z. Doty, Correspondent of the *New York Tribune*); *id.* at 40–45 (testimony of Mary Ritter Beard, Member, Nat'l Advisory Council of Woman's Party Last Year); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 5, 65th Cong. 178–79 (1917) (testimony of Mrs. Donald R. Hooker); *Woman Suffrage: Hearings Before the H. Comm. on the Judiciary*, Serial No. 11, pt. 2, 64th Cong. 23 (1915) (testimony of Mrs. Harriet Stokes Thompson); *Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage*, 63d Cong. 72 (1913) (testimony of Elizabeth Kent).

167. *See* H.R. REP. NO. 65-234, at 2 (1918); S. REP. NO. 63-64, at 8 (1913).

168. *See* 58 CONG. REC. 8834 (1919) (statement of Rep. Rufus Hardy); *id.* at 8832 (statement of Rep. Henry Osborne); *id.* at 79–80 (statement of Rep. Edward Little); 56 CONG. REC. 10,945 (1918) (statement of Sen. James Phelan); *id.* at 10,785 (statement of Sen. Kenneth McKellar).

169. *See, e.g.*, Aman McLeod, Ismail K. White & Amelia R. Gavin, *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66 (2003).

disenfranchised individuals with felony convictions, of which 792,197 (15%) were women.[170] In other words, felon disenfranchisement bars substantially more men than women from the polls.

2. Political Impact of Felon Disenfranchisement

Second, felon disenfranchisement laws today have exactly the political effect with which the Sixty-sixth Congress concerned itself. Debate over felon disenfranchisement tends to break down along partisan lines.[171] Social science evidence suggests the impact of felony disqualification rules may have a similar partisan slant.

One widely-cited analysis estimates that permitting disqualified felons to vote would have reversed party control of the U.S. Senate between 1986 and 2002 by altering the result of up to seven U.S. Senate contests and would also have reversed the outcome of the hotly disputed 2000 presidential election.[172] Subsequent research suggests that limiting the re-enfranchised population to non-incarcerated felons, or even to non-incarcerated felons no longer on probation or parole, creates a lesser but still pronounced impact on election results.[173]

A more recent study found that between 1998 and 2012, "in states that replaced a full post-sentence ban with a partial ban, and thus allowed some ex-felons to vote," candidates of one major political party "saw a statistically significant increase in general election vote share of 4.1 percentage points, relative to" candidates of the opposing major party—an effect that "increase[d] to 6.49" percentage points "[w]hen district fixed effects [we]re added and the sample [wa]s restricted to 2002–2010."[174] The same study estimated that one major party would have gained additional seats in the U.S. House of Representatives at the expense of the opposing party in five of the eight election years between 2002–2010: a generous

170. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT RATES FOR WOMEN 2 (2008).

171. *See* Cain & Parker, *supra* note 22, at 946 tbl.3 & n.37.

172. *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 794 (2002). The authors offer a number of important caveats to their work, suggesting caution against reading their findings too broadly. *See id.* at 795–96.

173. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 497–99 (2004). The authors recognized that their "analysis is subject to qualifications," requiring "appropriate caution in interpreting [these] results." *Id.* at 499.

174. *See* Tilman Klumpp et al., *The Voting Rights of Ex-Felons and Election Outcomes in the United States*, 59 INT'L REV. L. & ECON. 40, 47 (2019). Further analysis in the study suggests exercising caution concerning these results. *See id.*

model estimated changed results for between four and ten seats, enough to switch party control of the chamber for the 1998 and 2000 elections.[175]

Some scholars believe the social science literature may overstate the political impact of felon voting.[176] Nonetheless, supporters of felon disenfranchisement fear the prospect of voters with criminal convictions "dilut[ing] the vote of law-abiding citizens," and raise the specter of "'jailhouse blocs' banding together to oust sheriffs and government officials who are tough on crime."[177]

Beyond election outcomes, the addition of disenfranchised felons to the voting population introduces different views into the political discourse. A poll conducted for a nonprofit journalism outfit found that incarcerated felons hold substantially different views than the population at large on a host of political issues, including assault weapons, marijuana legalization, the minimum wage, immigration, and (perhaps obviously) criminal justice reform.[178] Interviews with prison inmates suggest that experience with the criminal justice system made them more likely to engage with public policy and the political process, but the loss of the right to vote dampened that enthusiasm.[179]

The potential impact of disenfranchised felons on election outcomes and their contributions to political discourse parallels the impact and contributions expected from newly enfranchised women in 1919. For that reason, felon disenfranchisement hits squarely on the concern of the Sixty-sixth Congress about the political and public policy impact of the disenfranchised population.

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175. *Id.* at 50. The authors cautioned that these results benefited from the use of the study's most generous model, which the authors considered implausible. *Id.* A less generous model predicted that party control of the chamber would not have switched in any of the election years considered. *Id.*

176. *See* Traci Burch, *Did Disenfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons*, 34 POL. BEHAV. 1, 21 (2012); Traci Burch, *Turnout and Party Registration Among Criminal Offenders in the 2008 General Election*, 45 L. & SOC'Y REV. 699, 725 (2011); Randi Hjalmarsson & Mark Lopez, *The Voting Behavior of Young Disenfranchised Felons: Would They Vote if They Could?*, 12 AM. L. & ECON. REV. 356, 391 (2010); Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 122 (2004).

177. 148 CONG. REC. 1495 (2002) (statement of Sen. Mitch McConnell). Social scientists caution that "no empirical evidence supports" the proposition that newly enfranchised offenders "would band together to vote a certain way that would produce an improper outcome of some kind." Christopher Uggen et al., *Criminal Disenfranchisement*, 1 ANN. REV. OF L. & SOC. SCI. 307, 313 (2005).

178. *See* Nicole Lewis et al., *What Do We Really Know About the Politics of People Behind Bars?*, THE MARSHALL PROJECT (Mar. 11, 2020), https://www.themarshallproject.org/2020/03/11/what-do-we-really-know-about-the-politics-of-people-behind-bars [https://perma.cc/BR73-7VZY].

179. *See* Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons*, *in* IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 165, 180–83 (Mary Pattillo et al. eds., 2004).

3. Reintegration into Society

Third, the link between voting rights restoration and successful reintegration into society ties directly into one of the primary concerns of the Sixty-sixth Congress: the disenfranchised population's full participation in society. Interviews with disenfranchised felons demonstrate that the loss of voting rights creates feelings of alienation and rejection from society, as well as anger at and distrust of government institutions.[180] These feelings can impede successful reintegration into society.[181] On the macro level, felon disenfranchisement contributes to an "inability to influence political processes [which] weakens leverage and access to important services that can moderate the risks of crime, from educational resources to trash removal and recreation."[182]

Even law enforcement stakeholders understand the burden that felon disenfranchisement imposes on an offender's successful reintegration into society. The American Probation and Parole Association—a trade association for community corrections professionals—found that "disenfranchisement laws work against the successful reentry of offenders."[183] A former Philadelphia District Attorney later elected to the U.S. Senate spoke in favor of federal legislation to extend the franchise to felons, arguing that extending voting rights to offenders assists with their reintegration into society.[184] The then-Attorney General of the United States described felon disenfranchisement as "counterproductive. By perpetuating the stigma and isolation imposed on formerly incarcerated individuals, these laws increase the likelihood they will commit future crimes."[185]

These comments are not empty rhetoric: "some evidence suggests a strong negative association between political participation and

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180. *See* MATTHEW CARDINALE, THE SENTENCING PROJECT, TRIPLE-DECKER DISENFRANCHISEMENT: FIRST-PERSON ACCOUNTS OF LOSING THE RIGHT TO VOTE AMONG POOR, HOMELESS AMERICANS WITH A FELONY CONVICTION 7–11 (2004); Uggen & Manza, *Lost Voices*, *supra* note 179, at 184–88.

181. *See* Christopher Uggen et al., *'Less than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, *in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 258, 277 (Shadd Maruna & Russ Immarigeon eds., 2004); Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 COLUM. HUM. RTS. L. REV. 241, 259–60 (2004).

182. Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 100 (2004).

183. *See* Resolution: Restoration of Voting Rights, Am, Prob'n & Parole Ass'n (Sept. 2007), https://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_Resolution&wps_key=3c8f5612-9e1c-4f60-8e8b-1bf46c00138e [https://perma.cc/6XP5-ZUDU].

184. *See* 148 CONG. REC. 1496–97 (2002) (statement of Sen. Arlen Specter).

185. Eric Holder, *Remarks on Criminal Justice Reform at Georgetown University Law Center*, 26 FED. SENT'G REP. 238, 239 (2014).

recidivism."[186] For instance, the Florida Commission on Offender Review (FCOR) reported that of the 879 offenders granted restoration of their civil rights in 2017 and 2018, only one reoffended with a new felony conviction.[187] The social science literature suggests that FCOR's report is no anomaly. Existing scholarship demonstrates "a robust negative correlation between voting and subsequent recidivism, suggesting that the prosocial nature of voting may contribute to the civic reintegration of current and former felons."[188]

One study analyzed the data from the Youth Development Study, a long-term survey that followed former St. Paul, Minnesota public school students from ninth grade in 1988 into adulthood in 2000.[189] The study's analysis determined that 16% of non-voters but only 5% of voters were arrested between 1997 and 2000.[190] Among individuals with prior arrest records, 27% of the non-voters but only 12% of the voters were arrested again between 1997 and 2000.[191] The result held when considering self-reported criminal behavior: 11% of voters but 18% of non-voters reported committing a property crime, while 27% of voters but 42% of non-voters reported committing a violent crime.[192] The study's authors concluded "that a relationship between voting and subsequent crime and arrest is not only plausible, but also supported by empirical evidence."[193]

A second study analyzed data from a U.S. Department of Justice survey of 272,111 prisoners across fifteen states released from incarceration in 1994, representing two-thirds of all prisoners released in the United States that year.[194] The study found that "individuals who are released in states that permanently disenfranchise are roughly [19%] more likely to be rearrested than those released in states that restore the franchise post-release," suggesting that "disenfranchisement is directly related to recidivism."[195] The study's authors noted that although the "effect of

186. Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 281, 303 (2006).

187. *See* FLA. COMM'N ON OFFENDER REVIEW, RESTORATION OF CIVIL RIGHTS RECIDIVISM REPORT FOR 2017 AND 2018, at 3 tbl.II (2019).

188. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1903–04 (2015).

189. *See* JEYLAN T. MORTIMER, WORKING AND GROWING UP IN AMERICA 32–33, 36 (2003).

190. *See* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 204–05 & fig.1 (2004).

191. *See id.* at 205–06 & fig.2.

192. *See id.* at 207 & fig.3.

193. *Id.* at 213. The authors also cautioned that other factors may contribute to the lower incidents of criminal recidivism. *See id.* at 214.

194. *See* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, NO. NJC 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (June 2002).

195. *See* Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement Laws*, 22 BERKELEY LA RAZA L.J. 407, 426 (2012).

permanent disenfranchisement policy on recidivism was slightly diminished" after considering a released prisoner's "race, gender, criminal history, and the state unemployment rate," state disenfranchisement rules "remained a significant predictor [of recidivism] nonetheless."[196] The study concluded that "states which permanently disenfranchise ex-felons experience significantly higher repeat offense rates than states that do not."[197]

A third study matched voting records and criminal records of individuals on probation or parole in Oregon, which permits these supervised populations to vote.[198] This study found lower recidivism rates among probationers who vote (5.9%) than those who do not (7.8%).[199] The difference in recidivism rates widened among parolees: parolees who vote (19.3%) reoffended at a much lower rate than parolees who did not (26.1%).[200] The study noted that the recidivism difference may be even greater in states with in-person voting at polling places than in states like Oregon which conduct elections entirely by mail.[201]

All of this is to say that ample evidence demonstrates the correlation between the restoration of felon voting rights and the successful re-entry of felons into society. Even supporters of felon disenfranchisement agree that "[r]eintegration of felons into the community is an important goal, and . . . restoration of voting rights can be a part of that process."[202] Felon disenfranchisement, then, hits directly on point with the concern of the Sixty-sixth Congress about disenfranchised voters' full participation in society.

4. Felons, Fatherhood, and the Family

Finally, because many disenfranchised felons are also fathers, felon disenfranchisement impacts voters who serve as caregivers of their families, aligning directly with the concerns of the Sixty-sixth Congress. In 2007, the country's 1,518,535 state and federal prisoners included an estimated 809,500 parents (53.3%) of approximately 1,706,600 children

196. *Id.* at 427.

197. *See id.* at 429. The study also cautioned that "what is borne out by the data is simply an association between disenfranchisement and recidivism, but the nature of that relationship—whether it is simply correlational or causal—remains unclear." *Id.*

198. *See* Christopher Uggen & Michelle Inderbitzen, *The Price and the Promise of Citizenship: Extending the Vote to Non-Incarcerated Felons*, *in* CONTEMPORARY ISSUES IN CRIMINAL JUSTICE POLICY 61, 63–64 (Natasha A. Frost et al. eds., 2010).

199. *See id.* at 64 fig.3.

200. *See id.*

201. *See id.* at 63. The study also cautioned that "it is difficult to make strong causal claims on the basis of available data." *Id.*

202. *See* von Spakovsky & Clegg, *supra* note 54, at 1392. Supporters and opponents differ on the best way for restoration of rights to serve that goal. *See id.* at 1392–93.

under age 18 (2.3% of all such children in the United States).[203] These prisoner-parents included an estimated 744,200 fathers (91.9%) compared to an estimated 65,600 mothers (8.8%).[204] These numbers increase when adding the jail population to the prison population: the nation's 2.3 million prisoners and jail inmates include 1.2 million parents—120,000 mothers and 1.1 million fathers—of 2.7 million children under age 18.[205]

Just over half of the prisoner-parents—52% of mothers and 54% of fathers—provided the primary financial support for their minor children before entering prison.[206] Over 78% of prisoner-parents reported keeping in contact with their children during the period of incarceration.[207] While not every person convicted of a felony receives a sentence of incarceration,[208] these statistics concerning fatherhood among incarcerated felons nonetheless suggest that felon disenfranchisement touches on the concern of the Sixty-sixth Congress about caregivers and the family.

5. Potential Legislative Remedies

Not only does felon disenfranchisement disproportionately burden the voting rights of men, but it directly touches on the all three concerns the Sixty-sixth Congress expressed when proposing the Woman Suffrage Amendment to the states. Accordingly, the Nineteenth Amendment empowers Congress to protect voting rights against state action to disqualify felons from voting. Given the broad enforcement power granted to Congress under the Nineteenth Amendment, Congress may constitutionally choose from a wide array of policy options to combat felon disenfranchisement.

The most commonly discussed option is direct modification or elimination of state felon disenfranchisement provisions. However, proposals vary about which classes of felons to enfranchise. Some propose letting all felons vote, even those currently incarcerated.[209] Other proposals would bar the disenfranchisement of most felons but exempt

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203. *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, NO. NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 tbl.2, 13 app. tbl.1 (rev. 2010).

204. *See id.* at 2.

205. *See* ECON. MOBILITY PROJ. & PUB. SAFETY PERF. PROJ., PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010).

206. *See* GLAZE & MARUSCHAK, *supra* note 203, at 5.

207. *See id.* at 6 tbl.10.

208. n 2006, 69% of state felony convictions and 86% of federal felony convictions resulted in a sentence of either jail or prison. *See* SEAN ROSENMERKEL ET AL., NO. NCJ 226846, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 9 tbl.1.6 (rev. 2010).

209. *See, e.g.*, April McCullum, *Sanders Would Let Felons Vote in Prison*, BURLINGTON FREE PRESS, Apr. 25, 2019, at 10A.

either current inmates or anyone still serving a criminal sentence (including probationers and parolees).[210] Some proposals would condition the restoration of voting rights on the type of crime.[211] Still others would restore a felon's voting rights only after an individualized review of that particular's felon's circumstances.[212]

Congress could also provide for lesser remedies. For instance, Congress might prohibit states from conditioning the restoration of a felon's voting rights on the payment of the financial obligations associated with the felony conviction, such as fines and court costs.[213] Congress might also require state courts, before accepting a plea or proceeding to trial, to instruct defendants about a conviction's impact upon the defendant's voting rights.[214]

Alternatively (or additionally), Congress might require states to designate probation and parole offices and corrections institutions as voter registration agencies under the National Voter Registration Act (NVRA).[215] Following the NVRA's statutory scheme, Congress might also require state probation, parole, and corrections officers to assist their supervised or incarcerated population with determinations of voting eligibility and (for those eligible to vote) with voter registration.[216] Congress might also impose similar requirements on federal criminal justice agencies.

Congress need not limit itself to these ideas. Whatever approach Congress takes,[217] the Nineteenth Amendment's Enforcement Clause authorizes congressional action to address felon disenfranchisement.

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210. *Compare* H.R. 1, 116th Cong. § 1402 (as passed by the House, Mar. 8, 2019), *with* 148 CONG. REC. 1490 (2002).

211. *See, e.g.*, Adv. Op. re: Voting Restor'n Amend., 215 So. 3d 1202, 1204 (Fla. 2017).

212. *See, e.g.*, von Spakovsky & Clegg, *supra* note 54, at 1392.

213. For a taxonomy of the varying types of legal financial obligations that individuals can incur as a result of a criminal conviction, see Cammett, *supra* note 59, at 378–81.

214. *Cf.* Fed. R. Crim. P. 11(b)(1).

215. *See* 52 U.S.C. § 20506(a)(2) (2018). The NVRA requires that a government office designated as a voter registration agency, in addition to its normal duties, also assist visitors to the office with voter registration and transmit completed voter registration applications to appropriate state election officials. *See id.* § 20506(a)(4)(A), (6).

216. *See id.* § 20506(a)(4)(A), (6). There is evidence that efforts to inform eligible felons of their right to vote increases the likelihood that this population will register and vote. *See* Alan S. Gerber et al., *Can Incarcerated Felons Be (Re)Integrated into the Political System? Results from a Field Experiment*, 59 AM. J. POL. SCI. 912, 924–25 (2015).

217. This Article takes no position on the merits of any of these proposals. Given the breadth of policy ideas—consider the wide between, for instance, requiring states to permit prison inmates to vote and requiring state probation officers merely to discuss voting with probationers—policy questions lie beyond this Article's scope. This Article seeks only to establish the bounds of congressional authority, not to attempt a normative defense of any particular idea.

B. Legislation to Protect Military Voters

In addition to felon disenfranchisement, military voting represents another area for legitimate congressional action under the Nineteenth Amendment. As discussed above, military service creates legal and logistical challenges for servicemembers registering to vote, receiving and returning ballots, and having those ballots counted. These challenges fall disproportionately on men, given the gender breakdown of the military population. Military service also touches on all three of the concerns that the Sixty-sixth Congress discussed when proposing the Woman Suffrage Amendment to the states, making military voters prime subjects for Nineteenth Amendment protection.

1. Burden on Men vs. Women

First, the barriers to voting faced by the country's servicemembers fall primarily on men. Women constitute only 17.1% of the nation's active duty military personnel.[218] Women make up a small minority of both officers (18.5% female) and enlisted personnel (16.7% female).[219] Each military service—the Army (15.4% female), Navy (20.1% female), Air Force (21.0% female), and Marines (9.0% female)—features a similar gender disparity.[220] The nation's armed forces—and therefore, the nation's military voters—are overwhelmingly male, causing the burdens of military service to fall disproportionately on male voters.

2. Political Impact of Military Voters

Second, servicemembers play precisely the type of political and electoral role the Sixty-sixth Congress saw as desirable. While a military tradition of political neutrality inhibited voting among the officer corps in the first half of the Twentieth Century, "the American armed forces have become steadily more politically involved since World War II."[221] Anecdotal evidence suggests that military personnel overall tend to lean more in one ideological direction than the other and tend to identify with the corresponding major political party rather than the opposing party.[222]

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218. *See* DEFENSE MANPOWER DATA CENTER, U.S. DEP'T OF DEF., TABLE OF ACTIVE DUTY FEMALES BY RANK/GRADE AND SERVICE 1 (Jan. 31, 2020) (on file with Seattle University Law Review).

219. *See id.*

220. *See id.*; DMDC, TOTAL MIL. PERS. JAN. 2020, *supra* note 66, at 1.

221. Paul P. Van Riper & Darab B. Unwalla, *Voting Patterns of Military Officers*, 80 POL. SCI. Q. 48, 61 (1965).

222. *See* THOMAS E. HICKS, MAKING THE CORPS 279–83 (1st Touchstone ed. 1998); Russell A. Burgos, *An* N *of 1: A Political Scientist in Operation Iraqi Freedom*, 2 PERSP. ON POL. 551, 553–54 (2004); Ole R. Holsti, *Politicization of the United States Military: Crisis or Tempest in a Teapot?*, 57 INT'L. J. 1, 9–14 (2002).

Empirical support exists for this thesis.[223] For instance, surveys between 1976 and 1996 of both military personnel studying at the National War College and senior uniformed Pentagon officers support both the political ideology and party affiliation hypotheses.[224] Multiple scholars have analyzed a 1998–1999 survey of military leadership as well as officers and officer candidates situated to enter leadership, largely confirming the findings of the earlier study.[225] A 2004 survey of both enlisted Army personnel and Army officers found similar results for the Army overall—with more pronounced results for officers than for enlisted personnel.[226] A 2008–2009 survey of both enlisted personnel and officers across all service branches corroborated these findings, including the more pronounced results among officers than among enlisted personnel.[227] The findings of a 2009 survey of Army officers between the ranks of second lieutenant and colonel match the findings of earlier studies.[228] A 2015–2016 survey of military officers attending the National Defense University and cadets attending U.S. Military Academy at West Point shows similar results.[229] This tendency towards one end of the ideological spectrum and one of the two major political parties extends to the highest ranks of military leadership.[230] One scholar posits that the nature of military service makes servicemembers more likely to identify with one of the major

223. Federal law prohibits polling military personnel about their electoral choices or publishing or releasing the results of such a poll. *See* 18 U.S.C. § 695 (2018). As a result, no robust survey data exists concerning servicemember voting choices. *See* Donald S. Inbody, *Partisanship and the Military: Voting Patterns of the American Military*, *in* INSIDE DEFENSE 139, 143 (Derek S. Reveron & Judith Hicks Stiehm eds., 2008). "The law does not, however, prohibit other types of polling, including those seeking information on party preference or political attitudes." *Id.*

224. *See* Ole R. Holsti, *A Widening Gap between the U.S. Military and Civilian Society?: Some Evidence, 1976-96*, INT'L SEC., Winter 1998–99, at 5, 11 tbl.1, 13 tbl.2.

225. *See* THOMAS S. SZAYNA ET AL., RAND ARROYO CTR., PROJ. UNIQUE ID CODE DAPRRW008, THE CIVIL-MILITARY GAP IN THE UNITED STATES: DOES IT EXIST, WHY, AND DOES IT MATTER? 81 tbl.4.2, 83 tbl.4.3 (2007); James A. Davis, *Attitudes and Opinions Among Senior Military Officers and a U.S. Cross-Section, 1998–98*, *in* SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 101, 104–06 & tbl.2.2 (Peter D. Feaver & Richard H. Kohn eds., 2001); Ole R. Holsti, *Identity of the U.S. Military: Comments on "An* N *of One,"* 2 PERSP. ON POL. 557, 558 tbl.1 & tbl.2 (2004); Inbody, *Partisanship and the Military*, *supra* note 223, at 145–46.

226. *See* JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS 75 tbl.5.3, 102 tbl.6.2 (2010).

227. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 138 tbl.10.2, 147 tbl.10.6.

228. Heidi Urben, *Party, Politics, and Deciding What Is Proper: Army Officers' Attitudes After Two Long Wars*, 57 ORBIS 351, 357 tbl.1, 358 tbl.2 (2013).

229. *See* HEIDI A. URBEN, LIKE COMMENT, RETWEET: THE STATE OF THE MILITARY'S NONPARTISAN ETHIC IN THE WORLD OF SOCIAL MEDIA 14 tbl.1, 16 tbl.3 (2017).

230. *See* James J. Dowd, *Connected to Society: The Political Beliefs of U.S. Army Generals*, 27 ARMED FORCES & SOC'Y 343, 352 (2001).

political parties in light of the shared values between that party and the military.[231]

These ideology and party affiliation trends hold even after returning to the civilian world: data show that veterans identify with the same political party and tend to lean toward the same end of the ideological spectrum as active duty servicemembers.[232] This matters for electoral outcomes because research shows that prior military service is correlated with an increased likelihood of voting.[233]

Government data shows that servicemembers would vote if not for the obstacles presented by military service. For the 2018 midterm election, data from the Federal Voting Assistance Program (FVAP), the federal agency responsible for military voting, show that between 61% and 67% of active duty military personnel were registered to vote and between 26% and 31% cast a ballot.[234] For the most recent presidential election in 2016, FVAP data show that 68% of active duty military personnel were registered to vote and 46% cast a ballot.[235] These numbers are particularly noteworthy in the context of the substantial barriers to registration and voting servicemembers face as a consequence of their military service.

The political impact of the military reaches beyond the votes of servicemembers. One scholar describes the military as "a recognizable interest group" which "is larger, more bureaucratically active, more political, more partisan, more purposeful, and more influential than anything similar in American history."[236] A 2009 study of Army officers found that officers engage in a host of political activity beyond casting ballots: the vast majority discussed their political beliefs and opinions with others or encouraged other military personnel to vote, while a substantial minority donated money to a political campaign.[237] The pervasive political activity of high-level military leaders has spawned an entire taxonomy of

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231. *See* Lance Betros, *Political Partisanship and the Military Ethic in America*, 27 ARMED FORCES & SOC'Y 501, 504–12 (2001).

232. *See* PEW RESEARCH CENTER, WAR & SACRIFICE IN THE POST-9/11 ERA 16 (2011); David L. Leal & Jeremy M. Teigen, *Military Service and Political Participation in the United States: Institutional Experience and the Vote*, 53 ELECTORAL STUD. 99, 107 (2018); Mackubin Thomas Owens, *Is Civilian Control of the Military Still an Issue?*, *in* WARRIORS AND CITIZENS: AMERICAN VIEWS OF OUR MILITARY 69, 84 (Kori Schake & Jim Mattis eds., 2016).

233. *See* Jeremy M. Teigen, *Enduring Effects of the Uniform: Previous Military Experience and Voting Turnout*, 59 POL. RESEARCH Q. 601, 606 (2006).

234. *See* FED. VOTING ASS'T PRGM., REFID NO. 3-A67BD81, 2018 REPORT TO CONGRESS 15 fig.1, 16 fig.2 (2019). Figures were dependent on methodology. *See id.* at 13–14.

235. *See* FED. VOTING ASS'T PRGM., REFID D-3BBEADD, 2016 POST-ELECTION REPORT TO CONGRESS 9 fig.2, 10 fig.2 (2017).

236. Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR COLLEGE REV., Summer 2002, at 8, 22.

237. *See* Heidi A. Urben, *Wearing Politics on Their Sleeves? Levels of Political Activism of Active Duty Army Officers*, 40 ARMED SERVICES & SOC'Y 568, 577 tbl.3 (2013).

political tactics—some public, others private—that military brass use to influence public policy.[238] Commentators defend this political activity as necessary to further the military's ability to defend the nation's interests, even suggesting "advanced specialized training and assignments to billets where military members can gain experience in political settings and the opportunity to practice political skills."[239]

To be sure, U.S. Department of Defense policy prohibits partisan political activity by active duty servicemembers.[240] Commentators generally agree that military personnel should eschew direct, public involvement in partisan politics to help protect the armed forces from becoming politicized.[241] To that end, senior military leadership frequently remind servicemembers about their obligation to remain apolitical.[242] However, neither scholars nor senior military leadership consider registering to vote and casting a ballot to raise the types of military professionalism and politicization concerns that attend other forms of political activity.[243] For that reason, military policy expressly permits servicemembers to register and vote.[244] These votes, along with servicemembers' other political activity, ensure military voters play exactly the political and electoral role the Sixty-sixth Congress envisioned when it proposed the Woman Suffrage Amendment to the states.

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238. *See* Risa A. Brooks, *Militaries and Political Activity in Democracies*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 213, 218–24 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

239. Dayne E. Nix, *American Civil-Military Relations: Samuel P. Huntington and the Political Dimensions of Military Professionalism*, NAVAL WAR COLLEGE REV., Spring 2012, at 88, 101; *see also* Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, INT'L SEC., Spring 2020, at 7, 18.

240. *See* Political Activities by Members of the Armed Forces, Directive No. 1344.10 ¶ 4.1.2 (U.S. Dep't of Def. Feb. 19, 2008).

241. *See* Risa A. Brooks, *The Perils of Politics: Why Staying Apolitical Is Good for Both the U.S. Military and the Country*, 57 ORBIS 369, 376–79 (2013); Peter D. Feaver & Richard H. Kohn, *Conclusion: The Gap and What It Means for American National Security*, *in* SOLDIERS AND CIVILIANS, *supra* note 225, at 459, 466; Hugh Liebert & James Golby, *Midlife Crisis? The All-Volunteer Force at 40*, 43 ARMED FORCES & SOC'Y 115, 125–28 (2017); Mackubin Thomas Owens, *Military Officers: Political Without Partisanship*, STRATEGIC STUD. Q., Fall 2015, at 88, 98–99 (2015).

242. *See* Joseph E. Dunford, Jr., *Upholding Our Oath*, JOINT FORCE Q., 3d Qtr. 2016, at 2, 3; Martin E. Dempsey, *Putting Our Nation First*, JOINT FORCE Q., 2d Qtr. 2012, at 4, 4; Michael G. Mullen, *Military Must Stay Apolitical*, JOINT FORCE Q., 3d Qtr. 2008, at 2, 2.

243. *See* Betros, *supra* note 231, at 514–15; Dempsey, *supra* note 242, at 4; Dunford, *supra* note 242, at 3; Feaver & Kohn, *supra* note 241, at 466; Liebert & Golby, *supra* note 241, at 128; Mullen, *supra* note 242, at 2; Nix, *supra* note 239, at 96.

244. *See* Directive No. 1344.10 ¶ 4.1.1.1.

3. War Effort

Third—and almost too obvious to point out—the burdens of military service lie squarely within the concerns of the Sixty-sixth Congress about enfranchising those who help with a war effort. Military voters face challenges precisely because the demands of defending the nation often align poorly with the needs of efficient election administration.[245]

Prior scholarship has noted that "using the Twenty-sixth Amendment to protect the voting rights of soldiers is particularly appropriate given that one of the central purposes of the Amendment was to halt the disenfranchisement of young Americans fighting overseas in Vietnam."[246] Similarly, using the Nineteenth Amendment to protect military voters is particularly appropriate when one of the core objectives of the Woman Suffrage Amendment was to enfranchise women whose service in World War I Congress deemed essential to victory.[247]

4. Dads on Deployment and Fatherhood in the Field: Military Families

Finally, military fatherhood touches on the concern of the Sixty-sixth Congress regarding caregivers and the family. Military records from 2018 show that 486,495 (37.3%) of the country's active duty military servicemembers had dependent children.[248] These records may understate parenthood among those in the military ecosystem: when a nonprofit military family support organization surveyed military families in 2017, 85% of respondents reported having children or stepchildren.[249] Whatever the correct figure, military men are more likely to be parents than their female counterparts.[250] Importantly, servicemembers are more likely than civilians to have children.[251]

Of course, servicemembers care for more than just children: military records from 2018 reveal that 681,570 (52.3%) of active duty servicemembers care for a spouse or other dependent.[252] In fact, those 2018 records reveal that military family members (1,596,169), including

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245. *See, e.g.*, PCEA REPORT, *supra* note 70, at 59; VON SPAKOVSKY & EVERSOLE, *supra* note 69, at 2; *see also* Obama for America v. Husted, 697 F.3d 423, 434 (6th Cir. 2012).

246. Fish, *supra* note 65, at 1219.

247. *Cf. id.*

248. *See* OFFICE OF THE DEP. ASSISTANT SEC'Y OF DEF. FOR MIL. CMTY. & FAM. POL'Y, 2018 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY § 5.22, at 138 (2018) [hereinafter MILITARY DEMOGRAPHICS PROFILE 2018]. "Children include minor dependents age 20 or younger and dependents age 22 or younger enrolled as full-time students." *Id.*

249. *See* MICHELE KIMBALL ET AL., MIL. FAM. ADV. NETWORK, MILITARY FAMILY SUPPORT SURVEY 2017 RESULTS 23 (2017).

250. *See* Molly Clever & David R. Segal, *The Demographics of Military Children and Families*, FUTURE OF CHILD., Fall 2013, at 13, 23.

251. *See id.* at 20.

252. *See* MILITARY DEMOGRAPHICS PROFILE 2018, *supra* note 248, § 5.03, at 128.

spouses, children, and adult dependents, actually outnumber active duty servicemembers (1,304,418).[253] Given the totality of this evidence, military voters fit within the scope of the concern the Sixty-sixth Congress demonstrated for caregivers of children and the family.

5. Potential and Existing Legislative Remedies

Because of the disproportionate burden military service imposes on men and the way military service touches on the three concerns the Sixty-sixth Congress expressed when proposing the Woman Suffrage Amendment to the states, the Nineteenth Amendment empowers Congress to protect voting rights against the burdens of military service. Considering the broad enforcement power granted to Congress under the Nineteenth Amendment, Congress can constitutionally choose from a variety of policy options to protect military voters.

Existing law—including UOCAVA and the Servicemembers Civil Relief Act (SCRA)—provides servicemembers with a host of broad-based legal protections to combat the practical barriers they face when registering to vote and casting a ballot in federal elections.[254] The SCRA contains only one voting-related provision, stating that a servicemember's legal residence or domicile "[f]or the purposes of voting for any Federal office . . . or a State or local office" does not change as a result of military-related absences from the servicemember's home state.[255] UOCAVA

253. *See id.* § 5.01, at 127.

254. *See* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–11 (2018); Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4034. Unless otherwise indicated, the protections of federal law discussed below apply only to federal elections.

255. *See* 50 U.S.C. § 4025(a). Congress first legislated on this subject in 1968 by issuing a non-binding "recommend[ation]" that states "permit any [servicemember] who is otherwise fully qualified to register and vote in the State to acquire legal residence in that State, notwithstanding his residence on a military installation, and to register and vote in local, State, and national elections." 50 U.S.C. § 1454 (Supp. IV 1968) (repealed 1986). The current provision traces its roots to post-election litigation involving two close 1996 contests in Val Verde County, Texas. *See* Casarez v. Val Verde County, 16 F. Supp. 2d 727, 730–31 (W.D. Tex. 1998), *aff'd mem.*, 194 F.3d 1308 (5th Cir. 1999). The two apparent losers asked a state court to invalidate the absentee votes of military personnel registered in Val Verde County but stationed elsewhere, arguing that these servicemembers were not legal residents of Val Verde County for election purposes. *See id.* at 730. A federal court issued a preliminary injunction barring election officials from declaring a winner pending the outcome of the state court litigation. *See id.* Discovery in the state litigation revealed that some challenged voters maintained tenuous (at best) ties to Val Verde County. For instance, one of the challenged voters had not been to Val Verde County in two decades and owned a home in Illinois. *See* Jessie Katz, *Enlisting Absentee Military Voters Triggers Ballot War*, L.A. TIMES, Apr. 13, 1997, at A1. Another challenged voter registered at his wife's grandmother's address in Val Verde County because he had spent three days there during his honeymoon twenty-five years earlier. *See* Kelley Shannon, *Military Absentee Votes Go on Trial in Lawsuit*, AUSTIN AM.-STATESMAN, Feb. 22, 1997, at A1. The state court litigation nonetheless failed to overturn the election result. *See Ruling Upholds Legality of Ballots Mailed in by Members of Military*, FORT WORTH STAR-TELEGRAM, June 20, 1997, at A2. The federal court consequently lifted its preliminary injunction and refused to permit federal litigation over the election.

contains a similar provision, requiring states to permit *otherwise-qualified* servicemembers to vote in *federal* elections notwithstanding their service-related absence from their voting residence.[256] By incorporating state law concerning voting domicile and residency and limiting its application to federal elections, UOCAVA does not sweep as broadly as the SCRA, which both overrides state voting domicile law and extends its application to both federal and non-federal elections.

UOCAVA contains a host of other safeguards for military voters. For instance, the statute requires states to offer both absentee registration and balloting to facilitate the electoral participation of eligible military voters.[257] If a state rejects a servicemember's voter registration application or absentee ballot request, the state must explain its reasons for the

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See Casarez, 16 F. Supp. 2d at 730–31. One of the challenged military voters testified before a congressional committee about having to spend hours completing intrusive interrogatories in connection with the litigation, revealing information about his credit cards, bank accounts, and where his wife sleeps. *See Military Voting Rights Act of 1997: Hearing on H.R. 699 Before the H.R. Comm. on Veterans' Affairs*, Serial No. 105-11, 105th Cong. 5 (1997) (testimony of Col. Bruce A. Brown, U.S. Air Force). This testimony angered members of Congress: two even suggested that the federal judge overseeing the case should be removed from the bench. *See id.* at 9 (statements of Rep. Sam Johnson & Rep. Helen Chenoworth). Although the litigation was ultimately unsuccessful, members of Congress believed that future litigation could threaten the voting rights of servicemembers. *See, e.g.*, 143 CONG. REC. 1222–24 (1997) (statement of Sen. Phil Gramm). A representative from Texas introduced legislation in the House to protect servicemembers from similar voting domicile challenges. *See* Military Voting Rights Act, H.R. 699, 105th Cong. § 2 (1997). The legislation closely tracked existing language in the SCRA's predecessor that protected servicemembers from state domicile challenges for taxation purposes. *See* 50 U.S.C. app. § 574(1) (1994); *see also* H.R. REP. NO. 105-183, pt. 1, at 3–4 (1997). A committee favorably reported the bill, arguing that the frequent moves required by military service ought not be a factor in determining a military voter's legal residence for election purposes. *See id.* at 4. The House took no further action, but the Senate later unanimously passed an identical bill the same day it was introduced. *See* 143 CONG. REC. 26,445 (1997); *see also* Military Voting Rights Act, S. 1566, 105th Cong. § 2 (1997). The legislation did not become law until 2001 when Congress attached similar language to the annual defense authorization bill. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, sec. 1603, § 704(a), 115 Stat. 1012, 1276 (2001) (codified as amended at 50 U.S.C. § 4025(a)).

256. UOCAVA protects the voting rights of each "absent uniformed services voter," defined as a "member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote." 52 U.S.C. §§ 20302(a)(1), 20310(1)(A) (2018). This "otherwise qualified to vote" language derives from the "otherwise eligible to vote" language in the nonbinding Federal Voting Assistance Act of 1955. *See* 5 U.S.C. § 2171 (Supp. III 1955) (repealed 1986). The 1955 language derived from the "is or was eligible to register for and is qualified to vote at any election" language of the World War II-era military voting legislation. *See* 50 U.S.C. § 301 (Supp. II 1942) (repealed 1955).

257. *See* 52 U.S.C. §§ 20302(a)(1) (2018). This language traces its roots to 1975 legislation mandating absentee registration and absentee voting procedures for overseas citizens and to 1978 legislation mandating the same for military voters irrespective of location. *See* 42 U.S.C. § 1973dd-2 (Supp. V 1975) (repealed 1986); 42 U.S.C. § 1973cc(b)(1) (Supp. II 1978) (repealed 1986). Congress first enacted a series of detailed military absentee voting requirements in 1942 but made the provisions optional for states in later years. *Compare* 50 U.S.C. §§ 303–09 (Supp. II 1942) (repealed 1944), *with* 5 U.S.C. §§ 2171–72 (Supp. III 1955) (repealed 1986).

rejection.[258] To help ensure military voters receive their ballots in time to vote, states must (with limited exceptions) send blank ballots to military voters at least forty-five days prior to each election.[259] At a military voter's

258. *See* 52 U.S.C. § 20302(d) (2018). Congress enacted this provision after hearing testimony that election officials were rejecting large numbers of military ballots. *See Voting Technology Hearing: Hearing Before the H.R. Comm. on H. Admin.*, 107th Cong. 28 (2001) (testimony of Hon. Ralph Munro, Washington Secretary of State). Military voting issues also featured prominently in the then-recent controversy over the 2000 presidential election. *See* Mazur, *supra* note 123, at 106–28. Military voting bills introduced in both chambers would have required states to inform each military voter why election officials rejected the voter's registration application, absentee ballot request, or voted absentee ballot. *See* S. 1261, 107th Cong. § 5 (2001); H.R. 1997, 107th Cong. § 5 (2001). The Senate sponsor explained that he introduced his bill in part because military voters "deserve to know that their votes will be counted." 147 CONG. REC. 14,894 (2001) (statement of Sen. Jay Rockefeller). Neither bill received a hearing. During debate on the Senate floor over omnibus election reform legislation, the sponsor of the earlier military voting bill introduced an amendment that would require states to explain their reasons for rejecting a servicemember's voter registration application or absentee ballot request. *See* 148 CONG. REC. 4225–26 (2002). However, the amendment did not include the language from the original military voting bills requiring a similar explanation for rejecting a servicemember's voted ballot. *See id.* The Senate adopted the amendment without discussion. *See id.* at 4226. The language became law with the enactment of the omnibus elections bill. *See* Help America Vote Act, Pub. L. No. 107-252, sec. 707, § 102, 116 Stat. 1666, 1725 (2002).

259. *See* 52 U.S.C. § 20302(a)(8) (2018). The requirement for forty-five days of ballot transit time traces its roots to 1944 military voting legislation, in which Congress "recommended that, in States where the voters' absentee ballot will not be available for mailing to the voter forty-five days prior to any primary, general, or special election, such States cause to be made such changes in the election laws of their States as will lengthen the time." 50 U.S.C. § 327(d) (Supp. IV 1944) (repealed 1955). Over six decades later, nearly half the states failed to comply with this recommendation. *See* SUSAN URAHN, PEW CTR. ON THE STATES, NO TIME TO VOTE: CHALLENGES FACING AMERICA'S OVERSEAS MILITARY VOTERS 28 (2009). At congressional hearings in both chambers, a broad cross-section of stakeholders testified concerning both delays in postal delivery and the need for states to transmit ballots to military voters with enough time for the unmarked ballot to reach the servicemember and return to election officials before the state counting deadline. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 350, 356, 360, 361, 366–67, 367, 371, 468, 471, 495–96, 508, 526–27, 555–562, 568–69, 586–91, 614, 616, 619 (2009); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 111th Cong. 6–7, 28, 40, 47, 69–70, 82, 100–01, 126–33, 139–40, 172–75, 190, 204 (2009). In response to this testimony, Congress considered legislation to require states to send ballots earlier. The first draft of the legislation required states to transmit blank ballots at least forty-five days before election day and required states to count ballots received within fifty-five days after transmission (in other words, ten days after election day). *See* S. 1415, 111th Cong. § 5 (as introduced, July 8, 2009). A committee amendment removed the fifty-five day requirement in light of the consensus at the hearing that forty-five days was sufficient ballot transit time. *See* S. 1415, 111th Cong. § 6 (as reported by S. Comm. on Rules & Admin., July 16, 2009); *see also Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 644, 648–49 (2009). The committee favorably reported the bill as amended. *See id.* at 645. The chief sponsor announced he would propose the text of the reported bill as an amendment to an upcoming defense authorization bill. *See id.* at 639. With only technical changes, the sponsor's amendment largely tracked the language in the reported bill imposing a forty-five day deadline for ballot transmission. *See* 155 CONG. REC. 18,801 (2009). Debate over the amendment on the Senate floor reiterated the need for adequate ballot transit time in light of the postal delays servicemembers routinely faced. *See, e.g.*, *id.* at 18,891 (statement of Sen. Chuck Schumer). The Senate adopted the amendment and passed the underlying defense authorization bill. *See id.* at 18,993, 19,051–52. The conference committee on the defense authorization bill kept the provision for a forty-five day ballot transmission deadline but adopted a technical amendment. *See*

request, states must use electronic means (rather than the postal system) to transmit to the servicemember a voter registration application, an application for an absentee ballot, and even the blank, unmarked ballot itself.260 States must develop a system for servicemembers to track whether the servicemember's local election official has received the servicemember's voted ballot.[261]

H.R. REP. NO. 111-288, at 744 (2009). The provision became law along with the rest of the military voting language attached to the defense authorization bill. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, sec. 579(a)(1), § 102, 123 Stat. 2190, 2322 (2009).

260. *See* 52 U.S.C. § 20302(a)(6)–(7), (e)(1), (f)(1)(A) (2018). Congress enacted these provisions after hearing testimony that electronic transmission of election documents could reduce delays and other difficulties related to registering to vote and casting a ballot. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 353, 355–56, 361–62, 368, 369, 371, 376, 457, 468, 484–86, 492, 529–30, 560–61, 565–68, 598–99, 616–17, 619 (2009); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 6, 27–28, 40, 45–46, 58–60, 66, 103–04, 131–32, 136–39, 157, 167, 181, 193–94, 197, 204 (2009). Omnibus military voting legislation introduced in the Senate required states to use e-mail, fax, or other electronic means to transmit voter registration applications, absentee ballot applications, as well as blank, unmarked ballots, if requested by a servicemember. *See* S. 1415, 111th Cong. §§ 3–4 (as introduced, July 8, 2009). An amendment in committee changed references from "email" and "facsimile" transmission to a more general "electronic" transmission to avoid requiring the use of these technologies if they later became obsolete. *See* S. 1415, 111th Cong. §§ 4–5 (as reported by S. Comm. on Rules & Admin., July 16, 2009); *see also Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 644, 649 (2009). The committee reported the bill favorably. *See id.* at 645. The chief sponsor announced he would propose the text of the reported bill as an amendment to an upcoming defense authorization bill. *See id.* at 639. With minor changes, the sponsor's amendment largely tracked the language in the reported bill requiring electronic transmission of election materials. *See* 155 CONG. REC. 18,800–01 (2009). During floor debate over the amendment, senators expressed their belief that digital transmission of election materials would speed up the voting process and help overcome the delays associated with traditional mail. *See, e.g.*, *id.* at 18,993 (statement of Sen. Ben Nelson). The Senate adopted the amendment and passed the underlying defense authorization bill. *See id.* at 18,993, 19,051–52. A conference committee on the defense authorization bill kept the electronic transmission provisions but adopted technical amendments. *See* H.R. REP. NO. 111-288, at 743–44 (2009) (Conf. Rep.). The provisions became law along with the rest of the military voting language attached to the defense authorization bill. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, secs. 577(a), § 102, 123 Stat. 2190, 2319–20 (2009); *id.* sec. 578(a), § 102, 123 Stat. at 2321.

261. 52 U.S.C. § 20302(h) (2018). Congress enacted this provision after hearing testimony that military voters often wondered whether their voted ballots had reached election officials, given the uncertainties of the military postal system. *Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 362–63, 364–65, 454, 475–76, 526–31, 593, 609–10 (2009); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 34, 41–42, 100–05, 176–77, 197 (2009). In response to this testimony, members of Congress introduced multiple bills creating a ballot tracking system. The bills differed in their approach: two would have applied only to overseas servicemembers and made the federal government responsible for creating and administering the system, while one would have imposed this responsibility on the states and applied regardless of a servicemember's location. *Compare* S. 1026, 111th Cong. § 3(a) (2019), *and* H.R. 2393, 111th Cong. § 3(a) (as reported by Comm. on H. Admin., Oct. 1, 2009), *with* S. 1415, 111th Cong. § 7(d) (as reported by S. Comm. on Rules & Admin., July 16, 2009). The Senate attached the latter language to a defense authorization bill for the upcoming fiscal year. *See* 155 CONG. REC. 18,802 (2009); *id.* at 18,993. The provision

UOCAVA also establishes two federal forms—the Federal Post Card Application (FPCA) and the Federal Write-In Absentee Ballot (FWAB)—that military voters can use in order to register and vote.[262] A single form with two functions, the FPCA entitles a servicemember to both register to vote and request an absentee ballot, irrespective of whether a state requires other forms for these purposes.[263] States may not refuse to process these forms for being submitted too early under state law and must process these forms if election officials receive them at least thirty days in advance of an election, irrespective of any state deadline.[264] For military personnel

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became law following enactment of the bill. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, sec. 580(d), § 102, 123 Stat. 2190, 2325 (2009).

262. *See* Federal Post Card Application, Std. Form No. 76, OMB No. 0704-0503 (Fed. Voting Ass't Prgm. Apr. 2019); Federal Write-In Absentee Ballot, Std. Form No. 186, OMB No. 0704-0502 (Fed. Voting Ass't Prgm. Apr. 2019).

263. *See* 52 U.S.C. § 20302(a)(4) (2018). Congress created the FPCA in the 1942 military voting legislation. *See* 50 U.S.C. § 303 (Supp. II 1942) (repealed 1955). This legislation required states to send ballots to servicemembers who completed and returned an FPCA. *See id.* § 307. Follow-up legislation two years later repealed the mandate and merely recommended that states accept the FPCA as both a request for an absentee ballot and a voter registration application. *See* 50 U.S.C. §§ 322, 324 (Supp. IV 1944) (repealed 1955). By 2001, all states voluntarily accepted the FPCA. *See Federal Election Practices and Procedures: Hearings Before the S. Comm. on Governmental Affairs*, 107th Cong. 113 (2001) (testimony of Samuel F. Wright, Co-Chair, Uniformed Services Voting Rights Committee, Reserve Officers Association). Bills in both chambers of Congress would have cemented the status quo by requiring states to accept the FPCA for both voter registration and absentee ballot requests. *See, e.g.*, S. 1261, 107th Cong. § 3(a)(1)(C) (2001); H.R. 1997, 107th Cong. § 3(a)(1)(C) (2001). Although neither bill received a hearing, a Senate committee later suggested a similar proposal. *See* S. REP. NO. 107-62, at 306 (2001). The committee reported a defense authorization bill which included language mandating use of the FPCA. *See* S. 1416, 107th Cong. § 575 (as reported by S. Comm. on Armed Servs., Sept. 12, 2001). The conference committee on the defense authorization bill combined this language with a related provision. *See* H.R. REP. NO. 107-333, at 734–35 (2001) (Conf. Rep.). The FPCA mandate became law along with the rest of the defense authorization bill. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, sec. 1606, § 102, 115 Stat. 1012, 1278 (2001) (codified as amended at 52 U.S.C. § 20302(a)(4) (2018)).

264. *See* 52 U.S.C. §§ 20302(a)(2), 20306 (2018). Although related, the two provisions date from different eras. The thirty-day deadline for processing is a holdover from the 1975 overseas voting legislation. *See* 42 U.S.C. § 1973dd-2(a) (Supp. V 1975) (repealed 1986). The early submission provision dates from 2001, when members of Congress in both chambers had introduced legislation with this language. *See* S. 731, 107th Cong. § 5(a) (2001); H.R. 1377, 107th Cong. § 5(a) (2001). Neither bill received a committee hearing, but the bills' language appeared the next year in an amendment during Senate debate over an omnibus election reform bill. *See* 148 CONG. REC. 1209 (2002). A co-sponsor of the amendment stated that servicemembers needed to be able to submit early requests for absentee ballots given the "rapid deployments, temporary duties, and unexpected assignment changes" inherent in military service. *Id.* at 1210 (statement of Sen. Wayne Allard). Another co-sponsor considered the amendment necessary for servicemembers who "are out on some bivouac for a week someplace or are out in a combat zone somewhere for a month and don't get back" in time to vote. *Id.* at 1211 (statement of Sen. Bob Smith). A third co-sponsor observed that "[w]ith mail delays, remote deployments and other very real circumstances, it can take literally months [for servicemembers] to complete the multi-step process" of registering to vote and casting a ballot, requiring legislative assistance to enable servicemembers "to plan ahead, especially when they are going to be deployed during an election." *Id.* at 1212 (statement of Sen. Dick Lugar). The Senate adopted the amendment without a recorded vote. *See id.* at 1213. The language eventually became law

who timely request an absentee ballot but do not receive that ballot in time to vote, these voters may cast a ballot on the FWAB even if a state requires votes to be cast on the state's own official ballot.[265] While states may

following enactment of the underlying omnibus election reform legislation. *See* Help America Vote Act, Pub. L. No. 107-252, sec. 706(a), § 104, 116 Stat. 1666, 1725 (2002) (codified as amended at 52 U.S.C. § 20306 (2018)).

265. *See* 52 U.S.C. §§ 20302(a)(3), 20303 (2018). The FWAB traces its roots to the federal "war ballot" created by the 1944 military voting legislation. *See* 50 U.S.C. § 333 (Supp. IV 1944) (repealed 1946). That legislation permitted servicemembers to vote on a "war ballot" printed and distributed by the federal government, but only if permitted by state law and then only under certain additional conditions (which varied based on whether a servicemember was stationed domestically or overseas). *See id.* § 332(b). No state law authorized use of the war ballot for domestic servicemembers, and fewer than half the states authorized its use for servicemembers stationed overseas. *See* ROBERT P. PATTERSON ET AL., U.S. WAR BALLOT COMM'N, REPORT OF THE UNITED STATES WAR BALLOT COMMISSION TO THE CONGRESS OF THE UNITED STATES ¶ 26(c)(3) (1945), *reprinted in* S. DOC. NO. 79-6, at 12 (1945). Congress repealed the provisions for war ballots in 1946 in part because of the war ballot's limited adoption. *See* DAVID ET AL., *supra* note 95, *reprinted in* H.R. DOC. NO. 82-407, at 20 (1952). Four decades later, Congress enacted the FWAB provision in response to testimony from servicemember organizations, election administrators, and the director of the Federal Voting Assistance Program that servicemembers often did not receive ballots in time to return them by the relevant state deadline because of delays in the absentee voting process outside the servicemember's control. *See* H.R. REP. NO. 99-765, at 10–13 (1986); *see also Uniformed and Overseas Citizens Absentee Voting: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 99th Cong. 13–14, 29, 39, 45, 79, 89, 104, 110 (1986). During floor debate over the bill, members of Congress commented that the FWAB was necessary in light of the unreliability of foreign postal systems: "for those Americans overseas—particularly the men and women serving the Nation in the Armed Forces—it has been, at times, not a right but a matter of luck to get one's ballot back in time to be counted," because "[i]n many foreign countries, an absentee ballot is just as likely to disappear forever as it is to get to the polling place on time." 132 CONG. REC. 21,894 (1986) (statement of Sen. Wendell Ford); *see also id.* at 20,976 (statement of Rep. Frank Annunzio). Other debate on the bill noted that many states sent out ballots too late, leaving too little time for servicemembers to receive the ballot, vote, and return the ballot by the relevant state deadline. *See id.* at 20,976 (statement of Rep. Al Swift). The FWAB provision became law with the enactment of the overhaul of military and overseas civilian voting legislation. *See* Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410 § 103, 100 Stat. 924, 925–26 (1986) (codified as amended at 52 U.S.C. § 20303). Congress initially limited use of the FWAB to overseas voters (irrespective of military status) and general elections. *See id.* § 103, 100 Stat. at 925–26. In 2004, a Senate committee proposed allowing domestic servicemembers to use the FWAB because "[o]perational considerations and the mobility of military personnel often make it difficult for them to specify accurately the mailing address they will be using in the period immediately prior to a general election," and "[c]hanges in deployment schedules or receipt of orders with short notice may prevent [servicemembers] from receiving state-provided absentee ballots in the mail in time for the election." S. REP. NO. 108-260, at 334 (2004). The committee reported a defense authorization bill to the Senate which included a provision expanding FWAB use to domestic servicemembers. *See* S. 2400, 108th Cong. § 572(b)(2) (as reported by S. Comm. on Armed Servs., May 11, 2004). The conference committee on the defense authorization bill kept the provision with a technical amendment. *See* H.R. REP. NO. 108-767, at 679–80 (2004) (Conf. Rep.). The provision became law with the rest of the bill. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, sec. 566(c)(2), § 103, 118 Stat. 1811, 1919 (2004) (codified at 52 U.S.C. § 20303 (2018)). In 2009, Congress followed up with omnibus military voting legislation which included a provision requiring states to honor the FWAB in special, primary, and runoff elections in addition to general elections. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, sec. 581(a)(1), § 103, 123 Stat. 2190, 2326 (2009) (codified at 52 U.S.C. § 20303 (2018)).

require an oath or affirmation from military voters as part of the registration and voting process, UOCAVA obligates states to accept the oath drafted by the federal agency charged with overseeing military voting.[266] UOCAVA also prohibits states from requiring notarization of voter registration applications, applications for an absentee ballot, or FWABs.[267]

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266. *See* 52 U.S.C. §§ 20302(a)(5) (2018). This provision traces its roots to the 1942 military voting legislation, which prescribed language for oaths to be included on both the FPCA and the war ballot; the legislation obligated states to accept this oath as sufficient. *See* 50 U.S.C. §§ 303, 306(a) (Supp. II 1942) (repealed 1944). Follow-up legislation also proscribed oath language, but Congress no longer required that states accept it. *See, e.g.*, 50 U.S.C. § 327(c) (Supp. IV 1944) (repealed 1946). In 2001, two bills contained language creating a standard oath for use with military voting materials and requiring states to accept that oath as sufficient to satisfy any oath or affirmation requirement in state law. *See* S. 1261, 107th Cong. § 6(b)(2)(C) (2001); H.R. 1997, 107th Cong. § 6(b)(2)(C) (2001). Neither bill received a hearing, but a House committee reported omnibus election reform legislation containing similar language. *See* H.R. 3295, 107th Cong. § 605(b)(2)(C) (as reported by Comm. on H. Admin., Dec. 10, 2001); H.R. REP. NO. 107-329, pt. 1, at 52–53 (2001). The Senate replaced the mandatory provision with language requiring a federal agency to study the issue. *See* H.R. 3295, 107th Cong. § 409(a)(2) (as passed by the Senate, Apr. 11, 2002). The language calling for a study originated as an amendment during debate on the Senate floor; the Senate adopted the amendment without discussion. *See* 148 CONG. REC. 4226 (2002). The conference committee on the election bill rejected the Senate's proposal for a study and instead kept the mandatory language from the House. *See* H.R. REP. NO. 107-730, at 79 (2002) (Conf. Rep.). The "standard oath" provision became law following enactment of the underlying election bill. *See* Help America Vote Act, Pub. L. No. 107-252, sec. 705(b)(2)(C), § 102(a), 116 Stat. 1666, 1725 (2002) (codified as amended at 52 U.S.C. § 20302(a)(5) (2018)).

267. *See* 52 U.S.C. §§ 20302(i)(1), 20303(f)(1) (2018). These provisions trace their roots to the 1942 military voting legislation: if a commissioned officer attested to a servicemember's oath on the envelope accompanying a war ballot, that would "constitute *prima facie* evidence that the voter is qualified to vote, unless the statements contained in such oath indicate the contrary." 50 U.S.C. § 306(a) (Supp. II 1942) (repealed 1944); *see also id.* § 308. However, Congress later allowed states to choose whether or not to accept commissioned officers' attestations. *See, e.g.*, 50 U.S.C. § 325(b) (1946) (repealed 1955). Congress enacted the current notarization provisions in 2009, after committees in both chambers heard testimony about the burdens of locating a notary while deployed overseas. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 453, 469, 569–70, 608–09 (2009); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 140–41, 168, 190, 197–98 (2009). The notarization provisions originated in a Senate bill introduced that year which would have prohibiting states from rejecting a servicemember's voter registration application, absentee ballot request, marked absentee ballot, or FWAB because the servicemember failed to have the document notarized. *See* S. 1415, 111th Cong. § 8(a)–(b) (as introduced, July 8, 2009). A Senate committee removed language characterizing notarization as a "technical" requirement. *See* S. 1415, 111th Cong. § 9(a)–(b) (as reported by S. Comm. on Rules & Admin., July 16, 2009). The committee favorably reported the bill as amended. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 645 (2009). The bill's chief sponsor announced he would propose the text of the reported bill as an amendment to an upcoming defense authorization bill. *See id.* at 639. The notarization prohibition in the proposed amendment tracked the reported bill's language exactly. *See* 155 CONG. REC. 18,802 (2009). During Senate debate on the amendment, the chief sponsor noted the burden notary requirements impose on servicemembers stationed overseas: "I ask my colleagues, how can a marine in Fallujah find a notary? Why are we making things so hard?" *Id.* at 18,991 (statement of Sen. Chuck Schumer). The Senate adopted the amendment and passed the underlying defense authorization bill. *See id.* at 18,993, 19,051–52. The notarization language became law along with the

Aside from its mandates to states, federal law also requires federal agencies to play a supporting role in military voting. For instance, certain military offices must provide information about and assistance with the registration and voting process.[268] Additionally, federal postal agencies will transport military election materials free of postage.[269] For servicemembers serving outside the United States, the federal government collects marked ballots and delivers them to the appropriate election officials in the United States.[270]

Congress might also enact new legislation. For instance, Congress recently considered an omnibus election reform bill which provides, among other things, an explicit private right of action for violations of UOCAVA.[271] The bill also provides that in a UOCAVA enforcement action, "the only necessary party defendant is the State, and it shall not be a defense to any such action that a local election official or a unit of local government is not named as a defendant,"272 even if the state has delegated election administration duties to a local jurisdiction. Because many military voters submit a FWAB without first registering to vote, a broad array of voices has proposed requiring states to accept the FWAB as a voter registration instrument, potentially reducing the number of rejected military ballots.[273] Congress could also consider ordering the

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rest of the military voting language attached to the defense authorization bill. *See* Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, sec. 582(a), § 102, 123 Stat. 2190, 2327 (2009) (codified at 52 U.S.C. § 20302(i)(1) (2018)); *id.* sec. 582(b), § 103, 123 Stat. at 2327 (codified at 52 U.S.C. § 20303(f)(1) (2018)).

268. *See* 10 U.S.C. §§ 1566–1566a (2018).

269. *See* 39 U.S.C. § 3406 (2018). Congress first provided for free postage in World War II-era military voting legislation and expanded the categories of eligible materials over time. *See* 50 U.S.C. § 303 (Supp. II 1942), *amended by* 50 U.S.C. § 352 (Supp. IV 1944), *amended by* 50 U.S.C. § 352 (1946), *amended by* 50 U.S.C. § 352 (Supp. IV 1950) (current version at 39 U.S.C. § 3406 (2018)).

270. *See* 52 U.S.C. § 20304 (2018).

271. *See* H.R. 1, 116th Cong. § 1702(a) (as passed by the House, Mar. 8, 2019); *see also* H.R. REP. NO. 116-15, pt. 1, at 164 (2019). Testimony before Congress has supported the addition to UOCAVA of a private right of action. *See Military and Overseas Voting: Effectiveness of the MOVE Act in the 2010 Elections: Hearing Before the Comm. on H. Admin.*, 112th Cong. 253, 260, 900 (2011). The Uniform Law Commission recommends that states authorize a private right of action for injunctive relief as a matter of state law. *See* UNIFORM MILITARY AND OVERSEAS VOTERS ACT § 18(a) (UNIF. LAW COMM'N 2010). For a discussion of whether UOCAVA contains an implied private right of action or whether private parties could sue to enforce it under 42 U.S.C. § 1983, see Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 142–46 (2010).

272. H.R. 1 § 1702(a); *see also* H.R. REP. NO. 116-15, pt. 1, at 164. Such a provision would help defeat state arguments that states cannot be held liable under UOCAVA for the noncompliance of their local governments who typically administer elections. *See* Weinstein-Tull, *Election Law Federalism*, *supra* note 71, at 764–71, 796.

273. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 468, 485 (2009); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 59, 167 (2009); PCEA REPORT, *supra* note 70, at 60; Inbody, *Voting*, *supra* note 68, at 57–58.

Department of Defense to automatically update election officials with a military voter's new address every time the servicemember receives orders for a permanent change of station or for a lengthy deployment (or returns from such a deployment).[274]

Additionally, social science evidence suggests that voter-friendly state rules regarding voter registration and ballot transit are positively correlated with rates of military ballot return and negatively correlated with military ballot rejection.[275] This evidence could give credence to proposals both in the literature and among election administration practitioners for Congress to loosen restrictive state election regulations. For instance, scholars, election administrators, blue-ribbon election reform commissions, and even the Uniform Law Commission suggest that states be required to count military ballots voted and dispatched on or before election day but received some time after election day.[276] Testimony before Congress has suggested requiring states to accept electronic transmission of election materials from servicemembers.[277]

Other proposals seek to aid military voters by leveraging existing military infrastructure, such as the Common Access Card (CAC). Issued by the Department of Defense to servicemembers and related civilian personnel, the CAC is an identification card with embedded cryptographic

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274. *See, e.g.*, *Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 612 (2009) (testimony of Gail McGinn, Acting Undersecretary for Personnel and Readiness, U.S. Department of Defense); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 43–44 (2009) (testimony of Tom Bush, Acting Director, Federal Voting Assistance Program); *cf.* 52 U.S.C. § 1566a(a)–(b). A permanent change of station is "[t]he detail, or transfer of a Service member or unit to a different [permanent duty station] under a competent travel order that does not specify the duty as temporary, provide for further assignment to a new [permanent duty station], or direct return to the old [permanent duty station]." Procedures for Military Personnel Assignments, Instruction No. 1315.18, at 68 (U.S. Dep't of Def. June 24, 2019). A deployment is "[t]he movement of forces into and out of an operational area." OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, U.S. DEP'T OF DEF., JOINT PUB. 3-35, DEPLOYMENT AND REDEPLOYMENT OPERATIONS, at GL-7 (2018).

275. *See* Hall, *supra* note 76, at 164. The analysis leading to this conclusion includes overseas civilians. *See id.*

276. *See Hearings and Markups Before the S. Comm. on Rules & Admin.*, 111th Cong. 609 (2009) (testimony of Patricia Hollarn, former Supervisors of Elections, Okaloosa County, Florida); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 42 (2009) (testimony of Rokey W. Suleman, II, General Registrar, Fairfax County Office of Elections); UNIFORM MILITARY AND OVERSEAS VOTERS ACT §§ 10, 12 (UNIF. LAW COMM'N 2010); JIMMY CARTER & JAMES A. BAKER, III ET AL., COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM ¶ 4.4.6, at 39 (2005); GERALD R. FORD & JIMMY CARTER ET AL., NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 43 (2001); INBODY, SOLDIER VOTE, *supra* note 72, at 98; Huefner, *Lessons*, *supra* note 111, at 878; Inbody, *Voting*, *supra* note 68, at 58–59.

277. *See Compilations and Hearings and Markups: Hearings and Markups Before the S. Comm. on Rules & Admin.*, 113th Cong. 130, 159, 168, 169, 170 (2014).

technology containing biometric and other data which enables the user to access a host of secure online military computer systems and networks as well as physical military facilities and installations.[278] Election administrators, veterans, and scholars alike have urged Congress to require states to accept the CAC and its digital authentication procedures as sufficient to identify a military voter for purposes of registration and voting.[279]

To be clear, other sources of constitutional authority may empower Congress to enact some of the existing law and proposed legislation. The important point here is that the Nineteenth Amendment's Enforcement Clause also authorizes congressional action.[280]

IV. POSSIBLE OBJECTIONS

A. Scope: Purposeful Discrimination vs. Disparate Impact

The first possible objection to potential Nineteenth Amendment enforcement legislation to address felon disenfranchisement and military voting concerns discriminatory purpose. Burdens on voting that merely impact men more than women—what might be termed "unconscious or accidental discrimination"[281]—are beyond the reach of Congress, the argument goes, because the creators of those burdens did not intend to deny or abridge men's voting rights. However, the Woman Suffrage Amendment's legislative history and the background legal environment in

278. *See Technology for Secure Identity Documents: Hearing Before the Subcomm. on Government Management, Organization, and Procurement of the Comm. on Oversight and Government Reform*, Serial No. 110-90, 110th Cong. 18, 22 (2007) (testimony of Benjamin Brink, Assistant Public Printer for Security and Intelligent Documents, Government Printing Office); Mathison Hall, Commentary, *Testing the Security of Government Sites*, BALT. SUN, Mar. 10, 2016 (News), at 15; Jon R. Lindsay, *Surviving the Quantum Cryptocalypse*, STRATEGIC STUD. Q., Summer 2020, at 49, 53.

279. *See Military and Overseas Voting in 2012: Hearing Before the Comm. on H. Admin.*, 113th Cong. 11, 21–23, 28, 33, 57–58, 60–61 (2013); *Hearing on Military and Overseas Voting: Obstacles and Potential Solutions: Hearing Before the Subcomm. on Elections of the H.R. Comm. on H. Admin.*, 111th Cong. 33–34 (2009) (testimony of Jessie Jane Duff, retired, U.S. Marine Corps.); INBODY, SOLDIER VOTE, *supra* note 72, at 159.

280. This Article takes no position on the merits of existing statutory protections or proposals for future legislation. Given the breadth of current protections and policy proposals—consider the wide gap between, for instance, requiring states to count military ballots received by mail in the days following election day and requiring states to accept military ballots cast via the Internet using Common Access Card authentication—policy questions lie beyond this Article's scope. This Article seeks only to establish the bounds of congressional authority, not to attempt a normative defense of any particular idea.

281. David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 289 (1998).

1919 demonstrate that the Nineteenth Amendment enforcement power can reach barriers to the ballot lacking a discriminatory purpose.[282]

1. Intratextualist Analysis

Several scholars have argued that the discriminatory purpose requirement of other constitutional provisions limits the ability of Congress to enforce those constitutional provisions. These scholars observe that election rules or procedures violate neither the Fourteenth nor Fifteenth Amendment absent a discriminatory purpose to deny or abridge the right to vote on the basis of race or color.[283] In light of the discriminatory intent requirement, these scholars argue that enforcement legislation which abrogates state felon disenfranchisement laws on the basis of a racially disparate impact alone is constitutionally questionable.[284] Both courts and scholars have used a similar "intent" or "purpose" framework when analyzing the Twenty-sixth Amendment in light of the parallel language in the Fifteenth and Twenty-sixth Amendments.[285] Applying these analyses to the similarly worded Nineteenth Amendment would suggest that the Nineteenth Amendment enforcement power cannot reach felon disenfranchisement laws or the voting difficulties that accompany military service unless states

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282. This Article takes no position on whether the Nineteenth Amendment—of its own force, independently of any enforcement legislation—reaches state conduct lacking a discriminatory purpose. *Cf.* Hasen & Litman, *supra* note 4, at 69 & n.276; Fish, *supra* note 65, at 1216.

283. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62–70 (1980) (plurality opinion), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (1982) (codified as amended at 52 U.S.C. § 10301(a)); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1563–64 (2020). Election regulations may violate the Fourteenth Amendment even in the absence of a racially discriminatory purpose if they fail a balancing test which weighs the burdens on voting against the state's interest in its regulation. *See* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1847–51 (2013); Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 318 (2007). That burdens/interests balancing test is not at issue here.

284. *See* Clegg et al., *Case Against*, *supra* note 61, at 14–16; Roger Clegg *et al.*, *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L. 1, 19–22 (2006); Clegg, *Who Should Vote?*, *supra* note 54, at 168–72; Hasen, *Uncertain Congressional Power*, *supra* note 54, at 780–83; von Spakovsky & Clegg, *supra* note 54, at 1379–83. No scholarship engages in a similar analysis with regard to military voters.

285. *See* Luft v. Evers, 963 F.3d 665, 673 (7th Cir. 2020); League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018); Lee v. Va. State Bd. of Elections, 188 F. Supp. 3d 577, 609–10 (E.D. Va.), *aff'd*, 843 F.3d 592, 607 (4th Cir. 2016); N.C. State Conf. of NAACP v. McCrory, 182 F. Supp. 3d 320, 522–23 (M.D.N.C.), *rev'd on other grounds*, 831 F.3d 204, 242 (4th Cir. 2016); Cheng, *supra* note 133, at 674–77; Fish, *supra* note 65, at 1216; Caitlin Foley, Comment, *A Twenty-sixth Amendment Challenge to State Voter ID Laws*, 2015 U. CHI. LEGAL F. 585, 615–16; Nancy Turner, Comment, *The Young and the Restless: How the Twenty-sixth Amendment Could Play a Role in the Current Debate over Voting Laws*, 64 AM. U. L. REV. 1503, 1515 (2015). *Compare* U.S. CONST. amend. XV, § 1, *with* U.S. CONST. amend. XXVI, § 1.

design these burdens with the intent of denying or abridging the voting rights of men.

These intratextualist analyses do not compel the conclusion that Congress is bound by a discriminatory purpose requirement when enacting Nineteenth Amendment enforcement legislation. Arguments to engraft a discriminatory purpose restriction onto the Nineteenth Amendment enforcement power "simply [due to] the similarity of its text to that of the Fifteenth [and Twenty-sixth] Amendment[s], without further explanation," rest "on thin reasoning."[286] Intratextualist arguments that would limit the reach of enforcement legislation to state conduct bearing a discriminatory purpose ignore the background against which the Sixty-sixth Congress proposed the Woman Suffrage Amendment to the states.[287] Indeed, courts explicitly recognize the possibility that an intentional discrimination requirement similar to that found in the Reconstruction Amendments may not carry over to other similarly worded constitutional provisions.[288]

To be clear, courts and scholars need not jettison the intratextualist principle that "strongly parallel language is a strong (presumptive) argument for parallel interpretation"[289] to reject the contention that Nineteenth Amendment enforcement legislation may reach only purposeful discrimination. Rather, they need only recognize that the presumption for parallel interpretation can be overcome.[290] As to the Nineteenth Amendment, that presumption is particularly weak. The presumption for parallel interpretation may be strongest when the history of a constitutional provision reveals little about original intent: when "advocates and opponents of [a provision] had a range of goals and rationales, many of which shifted over time," turning the "search[] for a

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286. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1161–64 (2019).

287. *Cf.* Fish, *supra* note 65, at 1216.

288. *See Lee*, 843 F.3d at 607; Walgren v. Bd. of Selectmen of Amherst, 519 F.2d 1364, 1367 (1st Cir. 1975); Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015).

289. Amar, *Intratextualism*, *supra* note 133, at 789; *see also* Cheng, *supra* note 133, at 674–75; Tolson, *Reinventing Sovereignty?*, *supra* note 133, at 1198 n.12.

290. Even intratextualism's primary scholarly champion agrees that "perhaps doctrinal rules for implementing the Fifteenth Amendment . . . should [in certain circumstances] diverge from those doctrinal rules implementing the Nineteenth Amendment, despite their textually parallel form." Amar, *Intratextualism*, *supra* note 133, at 800 n.202. This quote preceded language suggesting that if two textually similar constitutional provisions "were initially designed to work together, [but] their underlying problems have evolved in different ways," then constitutional interpreters should "adapt each clause's doctrine to fit the new shape of problems." *Id.* at 800. But good cause to vary the constitutional interpretation of textually similar constitutional provisions can also arise for other reasons. *See infra* section IV.B.1.

dominant 'original intent' behind [the provision into] a quixotic task."[291] But the clarity and consistency of the Woman Suffrage Amendment's historical record and the subsequent (though limited) Nineteenth Amendment jurisprudence easily overcomes the intratextualist presumption to impute a purposeful discrimination requirement from the Reconstruction Amendments into the Nineteenth Amendment's enforcement power.

2. Legislative and Judicial history

The legislative history of House Joint Resolution 1 and its predecessors demonstrates that the Nineteenth Amendment empowers Congress to address barriers to the ballot that fall unequally between the sexes, irrespective of the intent behind those barriers. For instance, one report of the Senate Committee on Woman Suffrage stated that "ballot box . . . regulations [should be] designed to protect the voter and guarantee the freedom of elections," and explained that if women are entitled to vote, "her right is equivalent to man, and like man, she should have [that right] unhampered by any restriction that is not common to both."[292] In other words, the suffrage supporters in Congress concerned themselves with ensuring equal access to the ballot between men and women, not on the motivation for any barriers to equal access.

Supporting this broad read of congressional authority are the major concerns motivating the Sixty-sixth Congress to propose the Woman Suffrage Amendment to the states. Proponents of House Joint Resolution 1 and its predecessors desired to reward women both for their public contributions to society (especially the war effort) and their private contributions as caregivers to the family, but suffrage supporters in Congress also sought to secure for themselves and their allies the political and electoral benefits of enfranchising a new class of voters.[293] To accomplish those ends, the Sixty-sixth Congress sought to extend the ballot to women.[294] If voting restrictions deprived women of the honor the franchise—and therefore also deprived members and their allies of this new source of electoral support—suffrage supporters undoubtedly would have mobilized in Congress to end these barriers, "whether or not [they] intentionally target[ed] women."[295]

291. Cheng, *supra* note 133, at 668 ("ranges of goals and rationales"); *id.* at 673 ("quixotic task").
292. *See* S. REP. NO. 64-35, at 1, 4 (1916).
293. *See* Kolbert, *supra* note 1, at 554–59; *supra* Section II.B.2.
294. *See* H.R.J. Res. 1, 66th Cong., 41 Stat. 362 (1919).
295. Kolbert, *supra* note 1, at 561.

The Fifteenth Amendment jurisprudence in existence during the 1919 passage of House Joint Resolution 1 supports this theory.[296] The Supreme Court's Fifteenth Amendment decisions as of 1919 required only that enforcement legislation bear some connection to the constitutional proscription against voting discrimination on account of race or color.[297] Beyond that, the Court respected the breadth and depth of the congressional enforcement power to protect voting rights.[298] "The Sixty-Sixth Congress understood this; it believed that its power to draft enforcement legislation was broad and that it had discretion to construct long chains connecting enforcement legislation to the constitutional prohibition."[299]

Legislative activity pursuant to the then-recently ratified Eighteenth Amendment further supports the argument that the Nineteenth Amendment enforcement power authorizes Congress to attack restrictions on the franchise even if the Nineteenth Amendment does not itself prohibit those restrictions.[300] The Sixty-sixth Congress enacted Eighteenth Amendment enforcement legislation which prohibited a broader swath of conduct than prohibited by the Eighteenth Amendment itself, suggesting Congress possesses similar authority under its Nineteenth Amendment enforcement power.

The Eighteenth Amendment prohibited only "the *manufacture*, *sale*, or *transportation* of *intoxicating* liquors . . . for beverage purposes."[301] The Sixty-sixth Congress—the same Congress to propose the Woman Suffrage Amendment to the states—enacted Eighteenth Amendment enforcement legislation which exceed the scope of the Eighteenth Amendment's prohibition in two important ways. First, the legislation—formally entitled the National Prohibition Act and commonly called the Volstead Act—prohibited (among other things) the *possession* of intoxicating liquors,[302] even though the Eighteenth Amendment did not. Second, the statute defined "intoxicating liquor" as

> alcohol, brandy, whisky [sic], rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented

296. For additional discussion of the state of Fifteenth Amendment jurisprudence in 1919, see *id.* at 549–51.

297. *See id.* at 549–51.

298. *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884).

299. Kolbert, *supra* note 1, at 551.

300. For additional discussion of the role the Eighteenth Amendment plays in the interpretation of the Nineteenth Amendment, see *id.* at 546–49.

301. U.S. CONST. amend. XVIII, § 1 (emphasis added).

302. National Prohibition Act, Pub. L. No. 66-66, tit. II, § 3, 41 Stat. 305, 308 (1919) (emphasis added) (repealed 1935). The informal title "Volstead Act" came from the statute's chief sponsor, Rep. Andrew Volstead of Minnesota. *See* Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. & POL. 385, 398 (2011).

> liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, *containing one-half of 1 per centum or more of alcohol by volume* which are fit for use for beverage purposes[.][303]

This contrasted with the Eighteenth Amendment itself, which contained but did not define the term "intoxicating liquor." However, "leading physicians, chemists, and toxicologists" of the era believed "that liquids containing less than 2.75 per cent alcohol are not intoxicating" because a human body could not consume a sufficient volume of these liquids quickly enough to introduce alcohol into the bloodstream faster than the body would metabolize the alcohol out of the bloodstream.[304] As a biological matter, these medical and scientific professionals opined, such a "liquid cannot possibly intoxicate."[305] In other words, while the Eighteenth Amendment prohibited only intoxicating liquors, Congress prohibited non-intoxicating fluids, as well.

Courts sanctioned the statute's overbreadth on both counts. Lower courts repeatedly upheld congressional authority to prohibit the possession of alcoholic beverages, notwithstanding that the Eighteenth Amendment did not prohibit possession.[306] In a decision issued three days after the ratification of the Woman Suffrage Amendment, the Supreme Court upheld the National Prohibition Act against claims that its one-half-of-one-percent definition impermissibly broadened the Eighteenth Amendment's scope:

> While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as one-half of 1 per cent. of alcohol by volume and fit for use for beverage purposes are treated as within that power.[307]

Contemporaneous scholarship agreed that Congress could prohibit beverages with only minimal alcohol content and even non-alcoholic

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303. Pub. L. No. 66-66, tit. II, § 1, 41 Stat. at 307–08 (emphasis added).

304. *Defining the Term "Intoxicating Liquors" Under the Wartime Prohibition Act and the Eighteenth Amendment*, 89 CENT. L.J. 57, 58 (1919).

305. *Id.*

306. *See, e.g.*, Riggs v. United States, 14 F.2d 5, 7–9 (4th Cir. 1926); Jordan v. United States, 299 F. 298, 299 (9th Cir. 1924); Massey v. United States, 281 F.3d 293, 294–95 (8th 1922); Page v. United States, 278 F. 41, 43–44 (9th Cir. 1922); Rose v. United States, 274 F. 245, 248–49 (6th Cir. 1921).

307. National Prohibition Cases, 253 U.S. 350, 387–88 (1920); *see also* Vigliotti v. Pennsylvania, 258 U.S. 403, 408–09 (1922).

beverages in its quest to enforce the Eighteenth Amendment's prohibition on intoxicating liquors.[308]

In other words, both the Supreme Court and the literature endorsed the view of the Sixty-sixth Congress that the Eighteenth Amendment enforcement power allowed legislation to sweep more broadly than the Eighteenth Amendment itself.[309] Given the similarly worded enforcement language in the Woman Suffrage Amendment (which, again, was proposed by the same Congress that enacted the National Prohibition Act), the Supreme Court's decision suggests that the Nineteenth Amendment enforcement power reaches barriers to the ballot restricting one sex more heavily than the other, irrespective of the intent or purpose behind the restriction.

Nothing in the limited Nineteenth Amendment jurisprudence contradicts this read of the legislative history and the background jurisprudence of the Fifteenth and Eighteenth Amendment Enforcement Clauses. The Supreme Court has never held that the Woman Suffrage Amendment limits Congress to combating only those voting restrictions intended to keep voters from the voting booth on account of sex.[310] In fact, the Supreme Court has applied the Nineteenth Amendment in only two decisions, the first of which merely decided that the Woman Suffrage Amendment became a valid part of the Constitution.[311]

To be clear, the second decision used language suggesting that state action purposefully designed to depress the vote of one sex over another would violate the Woman Suffrage Amendment. On review of a Nineteenth Amendment challenge to a Georgia state statute, the Supreme Court wrote, "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."[312] But neither the quoted language nor the decision as whole concern the congressional enforcement power and cannot be said to

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308. *See* Wayne B. Wheeler, *The Power of Congress to Define the Term Intoxicating Liquor*, 89 CENT. L.J. 320, 321 (1919); *see also* George Cyrus Thorpe, *Intoxicating Liquor Law*, 14 Geo. L.J. 315, 319–20 (1926). *But see* W.W. Thornton, *Legislative Definition of Constitutional Terms—"Intoxicating Liquors,"* 90 CENT. L.J. 389, 393–94 (1920).

309. The judiciary continued its endorsement of a broad Eighteenth Amendment enforcement power in later years. For instance, the Supreme Court upheld a 1921 statute enacted by the Sixty-Seventh Congress barring the prescription of malt liquors for medical purposes, even though the Eighteenth Amendment itself only prohibited liquor for beverage purposes. *See* James Everard's Breweries v. Day, 265 U.S. 545, 559–63 (1924).

310. Modern scholars even question whether "discriminatory purpose is always required to establish a constitutional violation," independent of any enforcement legislation. Hasen & Litman, *supra* note 4, at 69 n.276.

311. *See* Leser v. Garnett, 258 U.S. 130, 136 (1922).

312. *See* Breedlove v. Suttles, 302 U.S. 277, 284 (1937), *overruled on other grounds*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966).

address the limits of that power.[313] Additionally, scholars have identified a series of objections to the decision—its explicit sexism, implicit racism, intellectual shortcomings, and inconsistency with modern voting rights jurisprudence—suggesting that the decision possesses little precedential value, whatever its holding.[314]

Between the legislative history of House Joint Resolution 1, the state of Fifteenth Amendment jurisprudence in 1919, the enactment by the Sixty-sixth Congress of Eighteenth Amendment enforcement legislation, and the limited Nineteenth Amendment jurisprudence to date, the evidence demonstrates that the congressional power to enforce the Woman Suffrage Amendment sweeps more broadly than the congressional power to enforce the Reconstruction Amendments. Whether or not the Nineteenth Amendment itself—of its own force, independently of any enforcement legislation—reaches beyond intentional voting discrimination, the Woman Suffrage Amendment empowers Congress to combat so-called "unconscious or accidental discrimination"[315] in voting on account of sex.

B. Standard of Review: "Congruence and Proportionality" Versus "Reasonable Relation"

A second possible objection to a robust Nineteenth Amendment enforcement power capable of addressing felon disenfranchisement and military voting relates to the standard of review. This possible objection argues that courts must subject Nineteenth Amendment enforcement legislation to the demanding "congruence and proportionality" standard of review that has become a hallmark of the Supreme Court's recent Fourteenth Amendment jurisprudence, rather than to the deferential "reasonable relation" standard of review the Sixty-sixth Congress expected. Nineteenth Amendment enforcement legislation addressing felon disenfranchisement and military voting, the argument goes, would not meet this heightened level of scrutiny. However, the Woman Suffrage Amendment sufficiently differs from the Fourteenth Amendment such that

313. *See id.* at 283–84. In any event, language suggesting that the Nineteenth Amendment prohibits purposeful discrimination does not negate the possibility that the provision also prohibits the denial or abridgment of the right to vote absent a discriminatory purpose. *Cf.* Bromberg, *supra* note 286, at 1164.

314. Hasen & Litman, *supra* note 4, at 35–38; Kolbert, *supra* note 1, at 539. *But see* Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 73 NOTRE DAME L. REV. 839, 887 (1998). For an account of the legal history leading from *Breedlove* to *Harper*, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 75–123 (2009).

315. Crump, *supra* note 281, at 289.

the Fourteenth Amendment standard of review does not apply to Nineteenth Amendment enforcement legislation.

1. Intratextualist Analysis

Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[316] "For Congress's action to fall within its Section 5 authority, . . . '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[317] This standard is more demanding than the standard previously applied to enforcement legislation under the Reconstruction Amendments.[318]

The question of whether this new Fourteenth Amendment jurisprudence applies to Nineteenth Amendment enforcement legislation has received little attention.[319] However, a robust debate in the literature questions whether Fifteenth Amendment enforcement legislation must meet this heightened standard.[320] Lower courts are divided.[321] To scholars' dismay, the Supreme Court has twice declined to decide the issue.[322]

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316. U.S. CONST. amend. XIV, § 5.

317. Allen v. Cooper, 140 S. Ct. 994, 1004 (2020) (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

318. *See, e.g.*, Edward Cantu, *Normative History and Congress's Enforcement Power Under the Reconstruction Amendments*, 21 TEX. REV. L. & POL. 119, 128–29 (2016); Crum, *Superfluous*, *supra* note 283, at 1627–28; Vik Kanwar, *A Fugitive From the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in* Shelby County v. Holder, 17 BERKELEY J. AFR.-AM. L. & POL'Y 272, 305–306 (2015).

319. *See* Kolbert, *supra* note 1, at 559–60.

320. *Compare* Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act*, 76 LA. L. REV. 43, 46 (2015), *with* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 635 n.273 (2013), *and* Evan Tsen Lee, *The Trouble With* City of Boerne, *and Why It Matters for the Fifteenth Amendment As Well*, 90 DENV. U. L. REV. 483, 503 (2012).

321. *Compare* Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221, 241–46 (D.D.C. 2008) (three-judge court) (rational basis), *rev'd on statutory grounds*, 557 U.S. 193, 204 (2009) (expressing no opinion), *with* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 457–62 (D.D.C. 2011) (congruence and proportionality), *aff'd*, 679 F.3d 848, 859 (D.C. Cir. 2012) (congruence and proportionality), *rev'd*, 570 U.S. 529, 542 n.1 (2013) (noting cryptically that "*Northwest Austin* guides our review under both [the Fourteenth and Fifteenth] Amendments").

322. *See* William D. Araiza, *After the Tiers:* Windsor, *Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 384–85 (2014); Crum, *Superfluous*, *supra* note 283, at 1576; Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *States' Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 484 (2014); Christopher S. Elmendorf, *Advisory Rulemaking and the Future of the Voting Rights Act*, 14 ELECTION L.J. 260, 262 n.19 (2015); Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 727–28 (2014); Franita Tolson, *The Law of Democracy at a Crossroads: Reflecting on Fifty Years of Voting Rights and the Judicial Regulation of the Political Thicket*, 43 FLA. ST. U. L. REV. 345, 348 n.18 (2016). *But see* Calvin Massey, *The Effect of* Shelby County *on Enforcement of the Reconstruction Amendments*, 29 J. L. & POL. 397, 404 (2014).

One set of scholarship argues that the stricter congruence and proportionality standard applies to Fifteenth Amendment enforcement legislation:

> Both Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment have materially identical language, empowering Congress to "enforce" the respective provisions of each Amendment "by appropriate legislation." They were enacted barely a half year apart from each other as part of Reconstruction. The Court has previously interpreted both provisions in an identical manner, analogizing both provisions to the Necessary and Proper Clause. And both provisions raise the same separation-of-powers concerns about the respective roles of Congress and the courts in constitutional interpretation.[323]

Related scholarship analyzes potential Fifteenth Amendment legislation abrogating state felon disenfranchisement laws.[324] This literature generally contends that such enforcement legislation would fail to demonstrate the congruence and proportionality necessary to withstand a constitutional challenge.[325]

Two of the arguments for extending the congruence and proportionality standard from the Fourteenth Amendment to the Fifteenth Amendment rely on the related nature of these Reconstruction Amendments: their shared purpose and their ratification in close temporal proximity.[326] These points plainly do not apply to the Nineteenth Amendment. For instance, while the states may have ratified both the Fourteenth and Fifteenth Amendments within two years of one another, the Nineteenth Amendment became part of the Constitution over a half-

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323. Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2078 (2018) (footnotes omitted); *see also* Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL'Y 561, 569–70 (2007); Mark A. Posner, *Time is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 88–89 (2006); Joshua P. Thompson, *Towards a Post-*Shelby County *Section 5 Where a Constitutional Coverage Formula Does Not Reauthorize the Effects Test*, 34 N. ILL. U. L. REV. 585, 590 (2014); Glenn Kunkes, Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & POL. 357, 365 (2012). Some scholarship merely predicts that the congruence-and-proportionality standard will apply in the Fifteenth Amendment context without defending the proposition. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1191 n.269 (2001); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 725 n.5 (1998).

324. No scholarship discusses whether Fifteenth Amendment enforcement legislation to protect military voting rights would meet the test of congruence and proportionality.

325. *See* Clegg, *Who Should Vote?*, *supra* note 54, at 171–72; Hasen, *Uncertain Congressional Power*, *supra* note 54, at 780–83.

326. *See, e.g.*, Morley, *Prophylactic Redistricting*, *supra* note 323, at 2078.

century after Reconstruction.[327] "When the parallel provisions featured by intratextualist analysis are found in parts of the document enacted at different times, the originalist evidentiary value of the comparison drops off sharply."[328] Additionally, the Nineteenth Amendment lacks the common congressional purpose of the Reconstruction Amendments: while the Fourteenth and Fifteen Amendments were both adopted to protect newly freed slaves, the Nineteenth Amendment was adopted to extend the franchise to women.[329]

The third argument points to the nearly identical text of the enforcement language in both the Fourteenth and Fifteenth Amendments.[330] The Nineteenth Amendment's Enforcement Clause also contains language nearly identical to section 5 of the Fourteenth Amendment.[331] All else being equal, the intratextualist principle that "strongly parallel language is a strong (presumptive) argument for parallel interpretation"[332] would suggest that the congruence and proportionality test applies to Nineteenth Amendment enforcement legislation just as it does to Fourteenth Amendment enforcement legislation.

All else is not equal: key differences between the Fourteenth and Nineteenth Amendments overcome the intratextualist presumption to interpret similar language similarly.[333] Scholars have identified multiple arguments concerning the Fourteenth and Fifteenth Amendments which counsel against applying the congruence and proportionality test to Fifteenth Amendment enforcement legislation.[334] Each applies with equal force to the Nineteenth Amendment.

The first argument might be characterized as an application of the constitutional canon against surplusage: the presumption that no

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327. *Compare* Ratification of the Fourteenth Amendment, 15 Stat. 708, 710–11 (1868), *and* Ratification of the Fifteenth Amendment, 16 Stat. 1131, 1131–32 (1870), *with* Ratification of the Nineteenth Amendment, 41 Stat. 1823, 1823 (1920).

328. Adrian Vermeule and Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble With Intratextualism*, 113 HARV. L. REV. 730, 765 (2000).

329. *Compare* KEYSSAR, *supra* note 87, at 69–83, *with id.* at 139–78.

330. *See, e.g.*, Morley, *Prophylactic Redistricting*, *supra* note 323, at 2078.

331. *Compare* U.S. CONST. amend. XIV, § 5 *with* U.S. CONST. amend. XIX, para. 2.

332. Amar, *Intratextualism*, *supra* note 133, at 789; *see also* Cheng, *supra* note 133, at 674–75; Tolson, *Reinventing Sovereignty?*, *supra* note 133, at 1198 n.12.

333. *Cf.* Amar, *Intratextualism*, *supra* note 133, at 800 n.202.

334. This Article assumes that congruence-and-proportionality review properly applies to Fourteenth Amendment enforcement legislation and seeks to establish why the same is not true of Nineteenth Amendment enforcement legislation. The soundness of that assumption is beyond this Article's scope. For contrary arguments, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 361–63 (1st ed. 2005); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810–15 (2010); Caminker, *supra* note 323, at 1133; Crum, *Superfluous*, *supra* note 283, at 1625; Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 188 (1997). *But see* Cantu, *supra* note 318, at 124.

constitutional provision renders another provision superfluous or redundant.[335] This argument contends that the Fifteenth Amendment's protection of the right to vote against denial and abridgment on account of race or color must have some legal effect distinct from the Fourteenth Amendment's guarantee of equal protection of the laws.[336] Because the two constitutional provisions operate in different spheres, the argument goes, they warrant different standards of review—especially in light of the importance of the right to vote protected by the Fifteenth Amendment.[337]

The second point relates to the "specificity maxim"—that is, the principle that when two statutory or constitutional provisions "arguably cover the same subject, the one more specifically addressing the shared topic governs, displacing whatever authority the more general statute [or constitutional provision] might have provided on the question."[338] Applying the specificity maxim would employ the Fifteenth Amendment's more specific race-based protection in lieu of the Fourteenth Amendment's more general race-neutral voting rights protections when both provisions could conceivably apply.[339] "Giving the Fifteenth Amendment independent meaning for Congress's enforcement authority," this argument goes, "follows the principle that the specific should control over the general."[340]

The third argument concerns checks and balances. Scholars making this point maintain that a tougher standard of review acts to guard against congressional abuse of its broad Fourteenth Amendment powers, while the narrow, voting-focused scope of the Fifteenth Amendment already serves

335. *See* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 654–55 (2016).

336. *See* Crum, *Superfluous*, *supra* note 283, at 1565–66; Jeremy Amar-Dolan, Comment, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1500–01 (2014).

337. *See* Crum, *Superfluous*, *supra* note 283, at 1565–66; Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 as We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265, 287–88 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 274 (2003); Amar-Dolan, *supra* note 336, at 1500–01.

338. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2012 (2011).

339. *See* Crum, *Superfluous*, *supra* note 283, at 1566. For an explanation of the Fourteenth Amendment's race-neutral voting rights protection, see *id.* at 1563–64; Elmendorf, *Structuring Judicial Review*, *supra* note 283, at 318; Foley, *Voting Rules and Constitutional Law*, *supra* note 283, at 1847–51.

340. *See* Crum, *Superfluous*, *supra* not 283, at 1626.

to limit congressional authority.[341] Therefore, the argument goes, courts should apply less scrutiny to Fifteenth Amendment legislation.[342]

Each of these arguments concerning the Fifteenth Amendment applies with equal force to the Nineteenth Amendment.[343] In fact, two scholars have already applied the third argument to the Nineteenth Amendment.[344] But factors unique to the Woman Suffrage Amendment also demonstrate that Nineteenth Amendment enforcement legislation need not demonstrate congruence and proportionality in order to withstand a constitutional challenge. Perhaps most persuasive of all is the legislative history of the Woman Suffrage Amendment and the background legal environment in which the Sixty-sixth Congress adopted House Joint Resolution 1.[345]

2. Legislative and Judicial history

The congruence-and-proportionality doctrine did not exist at the time of the 1919 adoption of House Joint Resolution 1 or the 1920 ratification of the Nineteenth Amendment.[346] However, the Sixty-sixth Congress was very familiar with a less stringent "reasonable relation" standard of review for enforcement legislation, having enacted Eighteenth Amendment enforcement legislation—the National Prohibition Act—on the express assumption that courts would uphold the legislation so long as it was reasonably related to a legitimate congressional purpose.

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341. *See* Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 119–20 (2013); Crum, *Superfluous*, *supra* note 283, at 1626; Kanwar, *supra* note 318, at 306; Pitts, *Once and Future Remedy*, *supra* note 337, at 274–75; Amar-Dolan, *supra* note 336, at 1499–1500; Michael James Burns, Note, Shelby County v. Holder *and the Voting Rights Act: Getting the Right Answer With the Wrong Standard*, 62 CATH. U. L. REV. 227, 251–52 (2012); Rosemarie Unite, Comment, *The Perrymander, Polarization, and Peyote v. Section 2 of the Voting Rights Act*, 46 LOY. L.A. L. REV. 1075, 1118–19 (2013).

342. *See* Amar, *Lawfulness*, *supra* note 341, at 119–20; Kanwar, *supra* note 318, at 306; Amar-Dolan, *supra* note 336, at 1499–1500; Burns, *supra* note 341, at 251–52.

343. A fourth point contends that courts should apply a more deferential standard of review to ease the extraordinary cost required for Congress to develop—and for the executive branch to defend—an evidentiary record sufficient to satisfy the congruence-and-proportionality inquiry. *See* Burns, *supra* note 341, at 250–51. This is more of an argument against congruence-and-proportionality as a general matter than it is an argument to distinguish the Fourteenth and Fifteenth Amendment standards of review. A fifth argument concerns fidelity to existing Supreme Court precedent applying a less stringent standard to Fifteenth Amendment legislation. *See id.* at 247–49; Crum, *Superfluous*, *supra* note 283, at 1568; Pitts, *I Feel Fine*, *supra* note 337, at 287; Pitts, *A Once and Future Remedy*, *supra* note 337, at 273–74. This argument does not apply to the Woman Suffrage Amendment given the absence of Nineteenth Amendment enforcement legislation and the consequent absence of decisions reviewing such legislation's constitutionality.

344. *See* Hasen & Litman, *supra* note 4, at 66.

345. *Cf.* Fish, *supra* note 65, at 1226–27.

346. *See* Balkin, *supra* note 334, at 1810–12; Caminker, *supra* note 323, at 1143.

In the House, the Judiciary Committee's report on the National Prohibition Act stated that Eighteenth Amendment enforcement legislation would withstand constitutional challenge unless "Congress could have no reason to believe that its provisions are either necessary or appropriate for carrying such power into execution."[347] For support, the report cited then-recent Supreme Court decisions describing the inquiry as whether the challenged legislation had "any reasonable relation to the object sought."[348] The Senate's Judiciary Committee claimed Congress had similar authority: that committee's report on the National Prohibition Act claimed the Eighteenth Amendment enforcement power "carries with it the power to enact any law having a reasonable relation to the end sought by the original authorized act."[349]

When the Supreme Court repeatedly upheld congressional Eighteenth Amendment enforcement legislation several years later, it essentially ratified the two committees' views concerning the scope of judicial review.[350] Given that the Eighteenth and Nineteenth Amendments used substantially identical language to vest Congress with enforcement authority,[351] this Eighteenth Amendment legislative activity suggests that Congress expected courts to subject Nineteenth Amendment enforcement legislation to similarly deferential review.

Supporting this conclusion is the Fifteenth Amendment jurisprudence existing in 1919. Those decisions endorsed a robust congressional enforcement power[352]—so long as the legislation maintained the relevant anchor to the voting discrimination on account of race or color.[353]

Finally, the legislative history of House Joint Resolution 1 and its predecessors demonstrates that the Sixty-sixth Congress expected to vest itself with substantial authority to enforce the Woman Suffrage Amendment against the states.[354] Combined with the Eighteenth Amendment legislative activity and the Fifteenth Amendment jurisprudence, this history demonstrates that the Sixty-sixth Congress understood that any enforcement legislation would receive deferential review from the courts. This judicial deference is inconsistent with the

347. H.R. REP. NO. 66-91, at 4 (1919).

348. *Id.* at 6.

349. S. REP. NO. 66-151, at 12 (1919).

350. *See* Lambert v. Yellowley, 272 U.S. 581, 593–97 (1926); Selzman v. United States, 268 U.S. 466, 468–69 (1925); James Everard's Breweries v. Day, 265 U.S. 545, 559–60 (1924).

351. *Compare* U.S. CONST. amend XVIII, § 2, *repealed by* U.S. CONST. amend. XXI, § 1, *with* U.S. CONST. amend. XIX, para. 2.

352. *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884).

353. *See, e.g.*, James v. Bowman, 190 U.S. 127, 142 (1903).

354. *See* Hasen & Litman, *supra* note 4, at 67; Kolbert, *supra* note 1, at 544–46.

congruence-and-proportionality standard applied to Fourteenth Amendment legislation which the Supreme Court first began applying nearly eight decades after the Woman Suffrage Amendment's ratification. Accordingly, Nineteenth Amendment enforcement legislation need not meet such a heightened standard.

C. Federalism: State Power vs. Congressional Authority

A third potential objection argues that other constitutional provisions empower Congress to enact the voting rights legislation discussed in this Article, rendering the Nineteenth Amendment supplementary at best and superfluous at worst.[355] This objection warrants two responses.

The first response is that this objection undervalues complementary sources of congressional power. When multiple constitutional provisions provide authority for Congress to enact a single piece of legislation, this strengthens the constitutionality of that legislation.[356] The existence of multiple sources of authority not only entitles the legislative record supporting enactment to increased judicial deference, but also enlarges the set of tools available to Congress for furthering its legislative aims.[357] Even if other constitutional provisions authorize Congress to enact the existing and proposed voting rights legislation outlined in this Article, the Nineteenth Amendment nonetheless strengthens the constitutional basis for this legislation.

The second response to the "supplementary or superfluous" objection is that other constitutional provisions may not provide Congress sufficient authority to adequately address felon disenfranchisement and military voting. In addition to the standard federalism concerns about federal intrusion into state prerogatives,[358] the states' explicit constitutional authority under the Voter Qualifications Clauses[359] to fix the

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355. For instance, the Postal Clause plainly empowers Congress to permit mailing of military election materials free of postage, irrespective of the Nineteenth Amendment. *See* David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 633–34 (1996). Likewise, Congress does not need the Nineteenth Amendment in order to require federal criminal justice agencies to assist federal probationers, parolees, and inmates with determining whether they are eligible to vote and (if eligible) with voter registration; little doubt exists that Congress may instead rely on its power to create and assign duties to federal agencies arising from the Necessary and Proper Clause. *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 91 (2009).

356. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1086–88 (2016).

357. *See* Tolson, *Spectrum*, *supra* note 120, at 329–37.

358. *See, e.g.*, Richard H. Fallon, Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 971–72 (2017).

359. "[T]he Electors [voting in elections for the U.S. House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. "The electors [voting in elections for the U.S. Senate] in

qualifications of their voters[360] may further limit congressional power under other constitutional provisions. The discussion that follows considers several alternate sources of congressional power to protect voting rights, proceeding in the order in which the provisions appear in the Constitution.

1. Elections Clause[361]

Multiple scholars argue that the Elections Clause should serve as the primary constitutional authority for new voting rights legislation.[362] The Elections Clause certainly empowers Congress to enact at least some of the existing and proposed federal legislation to protect voters with criminal convictions and voters serving in the armed forces. However, the provision is subject to two important limitations: the Elections Clause offers Congress minimal authority over (1) non-federal elections and (2) voter qualifications standards.

To be clear, the Elections Clause offers Congress a broad array of powers to enforce voting rights notwithstanding its limitations. Under the Elections Clause, Congress may regulate virtually all aspects of the election ecosystem.[363] The provision offers Congress plenary authority over federal elections, but also over non-federal elections to the extent that the state uses some part of the federal election machinery to conduct the non-federal election.[364] Under the Elections Clause, Congress may both displace state election law and commandeer state officials to administer the federal election regime.[365]

In fact, the Elections Clause likely justifies much of the existing and proposed legislation to assist voters with felony convictions and voters in

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each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. CONST. amend. XVII, para. 1. Existing scholarship argues that these two provisions should be interpreted identically. *See* Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 10–11 (1996).

360. *See, e.g.*, Husted v. A Philip Randolph Inst., 138 S. Ct. 1833, 1846 (2018).

361. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

362. *See, e.g.*, Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 107–13 (2013); Weinstein-Tull, *Election Law Federalism*, *supra* note 71, at 800.

363. *See, e.g.*, Cook v. Gralike, 5331 U.S. 510, 511–12 (2001); Roudebush v. Hartke, 405 U.S. 15, 24–25 (1972); Smiley v. Holm, 285 U.S. 355, 366 (1932).

364. "So, for example, defendants have been convicted in federal court for vote buying with respect to local offices that appeared on the same ballot as even uncontested primaries for congressional office." Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 19 (2007) (citing United States v. McCranie, 169 F.3d 723, 727 (11th Cir. 1999)).

365. *See, e.g.*, Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2278–83 (2018).

the armed forces. For instance, there appears to be no serious dispute that the Elections Clause justifies most of UOCAVA's procedural rules that pertain to federal elections.[366] The Elections Clause likely also provides constitutional authority, at minimum, for the legislative proposals to support voters with criminal convictions that stop short of directly abrogating state felon disenfranchisement rules.[367]

However, the Elections Clause does not provide Congress with all the power necessary to protect voting rights. Because the Elections Clause does not fully extend to non-federal elections and because states' power to set voter qualifications limits the provision's reach, the Elections Clause represents an imperfect tool for Congress to protect military voters and voters with criminal convictions.

i. Non-Federal Elections

The first challenge facing Elections Clause legislation is that the Elections Clause does not empower Congress with authority over matters relating solely to state or local elections.[368] By its terms, the Elections Clause applies only to "Elections for Senators and Representatives."[369] Given this limitation, the Elections Clause cannot support legislation—like the SCRA's voting provision—which by its terms applies to "voting for . . . a State or local office."[370]

The Elections Clause's restricted scope has not historically proven significant because states—as a matter of administrative convenience—generally use the same systems and processes for both federal and non-federal elections.[371] However, the limitation may soon have more force

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366. *See, e.g.*, Kalt, *supra* note 81, at 463; Tolson, *Spectrum*, *supra* note 120, at 370; Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 864–65 (2017).

367. For instance, the Elections Clause would likely justify federal legislation requiring (1) states to designate probation and parole offices and corrections institutions as voter registration agencies under the NVRA, (2) probation, parole, and corrections officers to assist their supervised or incarcerated population with determinations of voting eligibility and (for those eligible to vote) with voter registration, and (3) judges to make pre-trial or pre-plea disclosure to defendants concerning the impact of a criminal conviction on the right to vote. *Cf.* ACORN v. Miller, 129 F.3d 833, 836–37 (6th Cir. 1997); Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995); ACRON v. Edgar, 56 F.3d 791, 94–96 (7th Cir. 1995).

368. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433 (1992); David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 738 (2020); *Daniel P. Tokaji, Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 106 (2014).

369. U.S. CONST. art. I, § 4, cl. 1. The Supreme Court has held that Congress has similar regulatory authority over presidential elections. *See* Burroughs v. United States, 290 U.S. 534, 544–48 (1934).

370. 50 U.S.C. § 4025(a) (2018); *see also* Louk, *supra* note 368, at 738; Tokaji, *Grand Election Bargain*, *supra* note 368, at 106.

371. *See* Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 779 n.87 (2016); Michael T. Morley, *Dismantling the Unitary Election*

given the recent trend of states seeking to divide their federal and non-federal election machinery.[372] Arizona, Illinois, Kansas, Mississippi, and Virginia have all attempted—so far, mostly without success—to avoid applying certain federally-mandated election rules to state and local elections by creating dual election regimes.[373] Recent scholarship encourages more states to follow suit so they can partially escape the dictates of Elections Clause legislation.[374]

Scholars disagree on the likelihood that states will segregate their federal election systems and processes from their non-federal election systems and processes.[375] To the extent that states do consummate the divorce, the Elections Clause will be a less effective tool for enforcing the voting rights of servicemembers and individuals with criminal convictions. For example, states with dual registration systems might use the FPCA to register servicemembers to vote for only federal elections but not state or local contests. States might send blank absentee ballots to military voters fewer than forty-five days ahead of elections with no federal contests on the ballot—or (in an extreme case) fail to send absentee ballots for these exclusively non-federal elections at all. If future legislation were to require states to count late-arriving military votes, states could refuse to count these votes in state or local contests. States might also refuse to count FWABs in state or local contests. Elections Clause legislation may not be able to reach these burdens because they do not impact federal elections. States might permit voters with felony convictions enfranchised by Elections Clause legislation to vote only for presidential electors and members of Congress, but not state or local offices or ballot initiatives.

The literature suggests one potential solution: that other constitutional provisions may "prohibit[] states from divorcing state and federal [election systems] in order to impose more onerous requirements on those seeking to participate in state elections."[376] Far from giving states

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System? Uncooperative Federalism in State and Local Elections, 111 NW. U. L. REV. ONLINE 103, 103–04 (2017).

372. *See* Samuel R. Bagenstos, *Universalism and Civil Rights (With Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2871 (2014); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 366–68 (2006).

373. *See* Young v. Fordice, 520 U.S. 273, 278–79 (1997) (Mississippi); LULAC v. Reagan, No. CV17-4102 PHX DGC, 2018 WL 5983009, at *1 (D. Ariz. Nov. 14, 2018) (Arizona); Belenky v. Kobach, No. 13-4150-EFM-KMH, 2014 WL 1374048, at *1 (D. Kan. Apr. 8, 2014) (Kansas); Haskins v. Davis, 253 F. Supp. 642, 642 (E.D. Va. 1966) (per curiam) (three-judge court) (Virginia); Orr v. Edgar, 670 N.E.2d 1243, 1246 (Ill. App. Ct. 1996) (Illinois).

374. *See* Morley, *Unitary Election System*, *supra* note 371, at 118–24.

375. *Compare* Tokaji, *Grand Election Bargain*, *supra* note 368, at 106, *with* Louk, *supra* note 368, at 738–39.

376. Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 211 (2015).

carte blanche to burden the right to vote in state or local elections, this scholarship argues that the two Voter Qualifications Clauses "require[] that states aggressively protect political participation."[377] However, even if this argument proves valid, its dependence on judicial enforcement still leaves the Elections Clause at a disadvantage compared to the Nineteenth Amendment.

According to the scholarship originating the theory, the Founders inserted the Voter Qualifications Clause of Article I in order to defend the franchise—well protected under Founding-era state constitutions—from federal government encroachment.[378] To protect against this perceived federal threat, this scholarship argues, the Voter Qualifications Clause barred the disenfranchisement in federal elections of voters already entitled to vote under state law.[379]

The scholarship further contends that Founding-era "alter or abolish" authority[380]—a remarkable democratic mechanism which enabled a state's citizens "to displace state laws with which they disagreed; to hold constitutional conventions independent of the legislature; to revise their state constitutions without official ratification; and to form new states"—best exemplifies the "citizen political participation and state political norms" the Founders expected the Voter Qualifications Clause (of Article I) to protect.[381] During Reconstruction, the argument continues, expanded access to the franchise succeeded the "alter or abolish" authority as the means by which the people would exercise political power.[382] Therefore, the scholarship reasons, the Voter Qualifications Clauses must be read to require protection of the right to vote against state infringement, much as it protected Founding-era forms of political participation over two centuries ago.[383] This state obligation to protect voting rights, the scholarship concludes, manifests itself in the form of heightened judicial scrutiny of restrictive state election regulations.[384] Courts applying this

377. *Id.* at 161. Although focusing mostly on the Voter Qualifications Clause of Article I, the cited piece recognizes the equivalent function of the Seventeenth Amendment's identical Voter Qualifications Clause. *See id.* at 211.

378. *See id.* at 180–86. Unlike today, Founding-era citizens expected "that the states would pose less of a threat to voting rights than the federal government." *Id.* at 180–81. Even in the modern era, state constitutions explicitly protect the right to vote. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 (2014).

379. *See* Tolson, *Voter Qualifications Clause*, *supra* note 376, at 180–86; *see also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 227–28 (1986).

380. The "alter or abolish" power was the Founding-era "right of citizens to 'alter or abolish' their governments, which was similar to the 'right of revolution' exercised by the colonists against the British during the Revolutionary War." Tolson, *Voter Qualifications Clause*, *supra* note 376, at 163.

381. *See id.* at 187–89.

382. *Id.* at 189.

383. *Id.* at 162–63.

384. *See id.* at 205.

heightened scrutiny would bar states from separating their federal and non-federal election machinery in order to impose more burdens on voting in non-federal elections than Elections Clause legislation allows for federal elections.[385]

Assuming it otherwise proves sound, this argument's reliance on judicial enforcement could prove problematic. Courts faced with constitutional arguments for protection of the franchise have both historically and recently proven inconsistent guardians of the right to vote.[386] If the judiciary proves unwilling to strike dual election systems notwithstanding their inconsistency with states' obligation under the Voter Qualifications Clauses to protect voting rights, then states will remain free to shield their non-federal elections from Elections Clause legislation.

This potential vulnerability shows the utility of the Nineteenth Amendment. Because the Woman Suffrage Amendment entrusts Congress rather than courts with enforcement authority, the Nineteenth Amendment does not depend on judges' willingness to strike dual election systems before Congress may legislate with respect to state and local elections. Unlike the Elections Clause, the Nineteenth Amendment enforcement power extends to all elections,[387] allowing Congress to regulate purely state or local elections irrespective of whether a state divides its federal and non-federal election system. The broader reach of the Nineteenth Amendment therefore advantages its enforcement legislation over similar legislation enacted pursuant to the Elections Clause.

ii. Voter Qualifications Clauses

The second challenge facing the Elections Clause is its limited reach into state over voter qualifications.[388] This limitation impedes Elections Clause legislation that attempts to protect the voting rights of servicemembers and individuals with criminal convictions by means which intrude on the state prerogative to determine the bounds of the electorate.

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385. *See id.* at 211–12.

386. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (controlling opinion); Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974); Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50–53 (1959); Colegrove v. Green, 328 U.S. 549, 556 (1946), *abrogated by* Baker v. Carr, 369 U.S. 186, 237 (1962); Breedlove v. Suttles, 302 U.S. 277, 280–83 (1937), *overruled in part by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966); Giles v. Harris, 189 U.S. 475, 488 (1903); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874).

387. Unlike the Elections Clause, the Nineteenth Amendment contains no language limiting its application to certain elections. *Compare* U.S. CONST. art. I, § 4, cl. 1., *with id.* amend. XIX, para. 1.

388. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013); Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 480–98 (2017).

The Supreme Court has long recognized states' authority to set the qualifications of their voters.[389] In a departure from earlier precedent,[390] the Supreme Court recently held that the Voter Qualifications Clauses empower states alone to determine the bounds of their electorate—without interference from Elections Clause legislation.[391] Several scholars argue that Elections Clause legislation cannot abrogate state felon disenfranchisement rules because states, not Congress, possess the power to decide whether a criminal record disqualifies a person from voting.[392] Likewise, the SCRA's voting provision may not constitute valid Elections Clause legislation—even as applied to federal elections—because the statute requires states to include in the electorate certain servicemembers who would, by virtue of their temporary residence in the state, not otherwise be eligible voters.

State authority to set voter qualifications can also pose an obstacle to Elections Clause legislation which regulates the time, place, or manner of federal elections even if that legislation does not purport to define the contours of the electorate. In a recent decision, the Supreme Court suggested that the Voter Qualifications Clauses directly limit congressional Elections Clause authority: "it would raise serious constitutional doubts," the Court explained, "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[393] Scholars caution that this language bolsters state power to resist Elections Clause legislation.[394]

The principle that Elections Clause legislation cannot interfere with a state's ability to determine a voter's qualifications could create an obstacle for Elections Clause legislation to assist military voters. For instance, if Congress were to require states to permit servicemembers to register or vote electronically using their Common Access Card, a state might argue that the Common Access Card does not sufficiently permit the state to determine such a servicemember's identity, interfering with the

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389. *See, e.g.*, Husted v. A Philip Randolph Inst., 138 S. Ct. 1833, 1846 (2018); *Lassiter*, 360 U.S. at 50–51.

390. *Compare Inter Tribal Council*, 570 U.S. at 16 n.8 *with* Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970) (opinion of Black, J., announcing judgments of the Court).

391. *See Inter Tribal Council*, 570 U.S. at 16–17; *see also* Mortellaro, *supra* note 388, at 508–15.

392. *See* Clegg, *Who Should Vote?*, *supra* note 54, at 166–68; Crain, *supra* note 52, at 9–14; Hasen, *Uncertain Congressional Power*, *supra* note 54, at 780–83; von Spakovsky & Clegg, *supra* note 54, at 1379–83. Most contrary scholarship predates *Inter Tribal Council*. *See, e.g.*, Katz, *Final Frontier*, *supra* note 54, at 60–64; King & Weiss, *supra* note 60, at 414.

393. *Inter Tribal Council*, 570 U.S. at 17.

394. *See* Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 WM. & MARY BILL OF RTS. J. 27, 32 (2014); Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 569 n.96, 592 (2015); Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 161.

state's ability to gauge the servicemember's eligibility to vote. A state might likewise argue that the standard oath printed on the FPCA and FWAB are insufficient for the state to determine the eligibility of a servicemember to register or vote, and that UOCAVA's language requiring the state to accept this oath precludes the state from enforcing its voter qualifications. In an extreme case, a state might even object to providing absentee voting at all—notwithstanding UOCAVA's requirement to provide servicemembers with absentee ballots—by arguing that only in-person appearance at a polling place suffices for the state to determine the identity of a servicemember (and therefore, the servicemember's eligibility to vote).

The Elections Clause's limited reach into voter qualifications could also prove problematic for legislation to assist voters with criminal convictions. Consider a state law conditioning the restoration of a felon's voting rights on the payment of financial obligations associated with the conviction. Like many election rules, such a state law defies easy classification as either a time, place, and manner regulation (over which Congress exercises plenary authority) on one hand or a voter qualifications standard (over which states maintain firm control) on the other.[395] If the financial obligations are mere procedural incidents of the voting rights restoration process, Elections Clause legislation could justifiably prohibit the state law. If the payment of these financial obligations constitutes an independent qualification for voting—separate and apart from the conviction itself—then Election Clause legislation would not suffice to bar states from conditioning restoration on payment.

The literature offers two theories to strengthen Elections Clause legislation against state efforts to weaponize their qualifications-setting authority to voters' detriment. As discussed earlier, the first theory posits that the Voter Qualifications Clauses impose an affirmative duty on states to use their qualifications-setting power to protect voting rights rather than burden them.[396] To the extent states fail to do so, this theory argues that courts should apply heightened scrutiny to qualification-based burdens on the franchise.[397] If courts strike states' restrictive qualification standards under the Voter Qualifications Clause, these standards cannot then override Elections Clause legislation protecting voters.

As discussed in the preceding subsection, the weakness in this first theory is that it relies on courts to police restrictive voter qualifications. The judiciary's mixed record of protecting voting rights when faced with

395. *See* Tolson, *Spectrum*, *supra* note 120, at 373–81.
396. *See* Tolson, *Voter Qualifications Clause*, *supra* note 376, at 161–63.
397. *See id.* at 205.

constitutional claims[398] suggests that a theory relying on judicial enforcement may not suffice to combat restrictive state voter qualifications standards. The Nineteenth Amendment's grant of enforcement authority to Congress may give the Nineteenth Amendment an advantage.

The second theory posits that the Elections Clause itself (rather than the Voter Qualifications Clauses) empowers Congress (rather than courts) to override state voter qualifications rules in two limited circumstances "so that states cannot use their power over voter qualifications to undermine the legitimacy and health of federal elections."[399] The first circumstance arises when states enact voter qualification standards in order to reduce participation in federal elections.[400] The second circumstance involves states seeking to indirectly obtain the same result via voter qualifications rules with vague or undefined terms, allowing election administrators or other third parties to interpret the qualifications in a manner hostile to voting rights.[401]

One scholar argues that this second theory might enable Congress to prohibit states from conditioning the restoration of voting rights on the payment of financial obligations associated with a criminal conviction or from disenfranchising voters using an unduly broad list of disqualifying crimes.[402] To the extent that states have used their voter qualifications rules to exclude servicemembers from the political process, this theory might strengthen UOCAVA, the SCRA's voting provision, and several of the legislative proposals concerning military voting against state claims that these federal statutes (and legislative proposals) infringe on a states' right to set and enforce their voter qualifications. However, disenfranchisement of military voters mostly occurs as a result of legislative oversight and administrative inefficiency, rather than a concerted effort to exclude servicemembers from the polls.[403]

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398. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (controlling opinion); Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974); Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50–53 (1959); Colegrove v. Green, 328 U.S. 549, 556 (1946), *abrogated by* Baker v. Carr, 369 U.S. 186, 237 (1962); Breedlove v. Suttles, 302 U.S. 277, 280–83 (1937), *overruled in part by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966); Giles v. Harris, 189 U.S. 475, 488 (1903); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874).

399. *See* Tolson, *Spectrum*, *supra* note 120, at 328. "[T]his approach is analytically similar to the Court's Commerce Clause cases, where it has held that Congress can reach noneconomic, intrastate activity where the failure to do so could undermine a lawful regulation of interstate commerce." *See id.* at 382 n.292.

400. *See id.* at 382–87.

401. *See id.* at 387–92.

402. *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 178–79 (2019).

403. *See supra* Section I.B.

Under either the first theory (states' affirmative obligation under the Voter Qualifications Clauses to protect voting rights) or the second theory (congressional Elections Clause authority to protect federal elections' health and legitimacy), Elections Clause legislation must jump additional hurdles in order to overcome the state's power to set voter qualifications in the event of a conflict. In other words, these two theories limit congressional authority to counteract restrictive state voter qualifications rules to the circumstances described in the theories. The Nineteenth Amendment holds an advantage in this regard because it requires no such showing: so long as the enforcement legislation falls within the ambit of the Woman Suffrage Amendment, state voter qualifications standards must yield to Nineteenth Amendment enforcement legislation.

Unlike the Elections Clause, the Nineteenth Amendment itself alters state voting qualifications to the extent those qualifications impose restrictions on account of sex.[404] Both the legislative history of the Nineteenth Amendment, as well as inferences from the state of analogous Fifteenth Amendment jurisprudence at the time of the Sixty-sixth Congress, confirm that altering state voter qualifications was the Nineteenth Amendment's primary purpose.

The Sixty-sixth Congress repeatedly made clear that it expected the Nineteenth Amendment would override state voter qualifications excluding women from eligibility to vote. For instance, House Joint Resolution 1 contains a descriptive clause, reading, "Proposing an amendment to the Constitution extending the right of suffrage to women."[405] The brief report of the House's Committee on Woman Suffrage—numbering only forty-four words—contains identical language.[406]

The committee reports of earlier Congresses—much lengthier than forty-four words—centrally featured discussion concerning whether, as a policy matter, women ought to be eligible to vote.[407] Those committees

404. *See* U.S. CONST. amend XIX, para. 1; Mortellaro, *supra* note 388, at 475.

405. H.R.J. Res. 1, 66th Cong., 41 Stat. 362 (1919).

406. H.R. REP. NO. 66-1, at 1 (1919)).

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

had for years heard testimony about the issue.[408] This policy question featured prominently in debate in both chambers.[409]

That legislative history is buttressed by the state of Fifteenth Amendment jurisprudence as it stood at the time of the Sixty-sixth Congress. By 1919, the Court had held that the Fifteenth Amendment directly abrogated certain state voter qualifications by automatically excising the word "white" from all state voter eligibility requirements.[410] In two additional decisions, the Court held that the Fifteenth Amendment invalidated even a facially race-neutral state voter qualification, where the qualification effectively abridged the right to vote of only newly freed slaves and their descendants.[411] Indeed, the Court in one of the decisions found that the Fifteenth Amendment invalidated even a second voter qualification that had no race-related effects, because the second qualification was so intertwined with the first as part of the entire voter qualification regime that one part could not stand without the other.[412]

In light of the Woman Suffrage Amendment's legislative history and the state of the jurisprudence of the similarly-worded Fifteenth Amendment at the time of House Joint Resolution 1's adoption, the evidence demonstrates that the Sixty-sixth Congress understood that it was altering state voter qualifications on a nationwide scale. Shortly after ratification, the Supreme Court agreed that the Nineteenth Amendment's reach extended to voter qualifications.[413]

Given the provision's reach into to state voter qualifications, Nineteenth Amendment enforcement legislation affecting state voter qualifications rules stands on a stronger foundation than similar legislation enacted pursuant to the Elections Clause. Unlike the Elections Clause, the Nineteenth Amendment itself alters state voter qualifications regulations to the extent those qualifications impose restrictions on account of sex. Enforcement legislation may therefore reach state voter qualifications requirements—and may do so in ways beyond merely requiring states to

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

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

410. *See* Elk v. Wilkins, 112 U.S. 94, 98–109 (1884); Neal v. Delaware, 103 U.S. 370, 389–90 (1880).

411. *See* Guinn v. United States, 238 U.S. 347, 354–58 (1915); *see also* Myers v. Anderson, 238 U.S. 368, 377–82 (1915).

412. *Guinn*, 238 U.S. at 365–67.

413. Leser v. Garnett, 258 U.S. 130, 135–36 (1922).

abide by the Woman Suffrage Amendment's operative prohibition.[414] This ability advantages the Nineteenth Amendment enforcement power over the Elections Clause's more restricted authority for Congress to abrogate state voter qualifications standards in only limited circumstances.

2. War Powers[415]

The congressional War Powers have traditionally served as the constitutional basis for both pre-UOCAVA and pre-SCRA safeguards for military voting.[416] One might argue that those War Powers also suffice to justify UOCAVA, the SCRA's voting protections, and military voting legislative proposals.[417] At best, the War Powers offer an uncertain basis for some of these provisions, suggesting the necessity of the Nineteenth Amendment as a source of constitutional authority.

i. Continuity of Government

To be clear, Congress possesses substantial authority under its War Powers to legislate concerning domestic policy.[418] The Supreme Court has recently gone so far as to say that the "outer boundaries of [the] war powers [remain] undefined."[419] Scholarship even argues that in unique

414. *See supra* Section IV.A.2.

415. "The Congress shall have Power . . . [¶] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; [¶] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; [¶] To provide and maintain a Navy; [and] [¶] To make Rules for the Government and Regulation of the land and naval Forces . . . ." U.S. CONST. art. I, § 8, cls. 11–14.

416. *See* Manning, *Fighting to Lose the Vote*, *supra* note 96, at 365–66; Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 880 (1993). For background on the use of the War Powers to justify domestic legal protections for servicemembers outside the voting context, see H.R. REP. NO. 108-81, at 33–34 (2003); Dameron v. Brodhead, 345 U.S. 322, 324–25 (1953); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506–07 (1870).

417. There is no immediately apparent argument that the War Powers authorize Congress to legislate concerning state felon disenfranchisement laws.

418. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981); United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141–44 (1948); Hirabayashi v. United States, 320 U.S. 81, 93 (1943); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 163 (1919); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 1000–01 (2008); Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 628–30 (2017). *Hirabayashi* has rightly suffered significant criticism. *See, e.g.*, Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEX. L. REV. 735, 749–53 (2020). Nearly a half-century after his conviction, Hirabayashi obtained a writ of *coram nobis* vacating his convictions in light of the government misconduct that pervaded his prosecution and the racial bias that infected the underlying legal regime. *See* Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987). Nearly a quarter-century after the *coram nobis* proceedings, the Solicitor General publicly confessed error in the case for similar reasons. *See* Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3037 (2013).

419. Boumediene v. Bush, 553 U.S. 723, 797–98 (2008).

circumstances, the War Powers permit Congress to modify constitutional election requirements—or even obviate the requirement to hold elections at all.[420]

However, the literature concedes that this extraordinary authority to modify constitutional election requirements exists only "to ensure continuity of government" and "can be resorted to only when the normal procedures fail" due to a military conflict on domestic soil that frustrates standard democratic processes.[421] This is consistent with early War Powers caselaw, which conditioned the validity of Civil War-era domestic legislation on the statute's necessity during actual wartime.[422] A constitutional authority contingent on the existence of military conflict—especially if the conflict must represent an existential threat to the nation—would not justify UOCAVA's and the SCRA's permanent, peacetime intrusion into state election rules.

ii. Voter Qualifications Clauses

While the War Powers do authorize Congress to protect military personnel even during peacetime, the extent to which this authority covers the right to vote remains an open question. On one hand, the Supreme Court has held that the War Powers authorize Congress to enact the provision in the SCRA's predecessor statute shielding servicemembers against simultaneous taxation by multiple states.[423] The SCRA's current voting language tracks the former statute's taxation language that the Court upheld.[424] Testimony before Congress argued that the voting protection might therefore survive judicial scrutiny.[425] On the other hand, the Court's decision upholding the pre-SCRA tax protection relied on cases authorizing the federal government to protect its operations and functions—including its agents—from state taxation.[426] This principle—known as intergovernmental tax immunity—reaches back over

420. *See* Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1392–95 (2015).

421. *Id.* at 1395.

422. *See* Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506–07 (1870).

423. *See Dameron*, 345 U.S. at 324–25. Many other Supreme Court decisions address the SCRA or its predecessors without deciding any constitutional questions. *See, e.g.*, Boone v. Lightner, 319 U.S. 561, 565 (1943); Ebert v. Poston, 266 U.S. 548, 550 n.1 (1925); *cf.* Conroy v. Aniskoff, 507 U.S. 511, 512–13 (1993).

424. *Compare* 50 U.S.C. § 4025(a) (2018), *with id.* § 4001(a)(1).

425. *See, e.g.*, *Military Voting Rights Act of 1997: Hearing on H.R. 699 Before the H.R. Comm. on Veterans' Affairs*, Serial No. 105-11, 105th Cong. 13, 44–45 (1997) (testimony of John H. Killian, Legislative Attorney, Congressional Research Service).

426. *See Dameron*, 345 U.S. at 324–25.

two centuries.[427] No similar principle exists allowing the federal government to protect the voting domicile of its agents from state voter qualifications rules.

Instead, the Voter Qualifications Clauses bestow on states the power to fix the qualifications of their voters.[428] What happens when this state power faces off against the congressional War Powers? The answer is unclear.

On one hand, congressional authority derived from Article I—like the War Powers—may prove no match for the state's sovereign prerogative to determine the bounds of its electorate. The Supreme Court has never decided whether any provision of Article I empowers Congress to abrogate state voter qualifications standards. However, the Court has developed a substantial jurisprudence concerning congressional abrogation of state sovereign immunity.[429] Both immunity from private lawsuits and the right to set suffrage requirements are important attributes of state sovereignty.[430] Sovereign immunity jurisprudence, therefore, may shed light on congressional authority to override state voter qualifications rules.

The sovereign immunity jurisprudence does not favor Congress. The Supreme Court recently decided that no Article I power enables Congress to abrogate a state's sovereign immunity.[431] In its earlier decisions, the Court held that while Fourteenth Amendment enforcement legislation could subject a state to private suits without the state's consent, neither limited Article I authorities like the patent power nor substantial Article I authorities like the power over American Indian tribes could do so.[432]

The Supreme Court's ruling concerning the Indian Commerce Clause holds particular relevance because that provision "grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and

427. *See* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 700–01 (1976).

428. *See, e.g.*, Husted v. A Philip Randolph Inst., 138 S. Ct. 1833, 1846 (2018).

429. *See, e.g.*, Coleman v. Court of Appeals of Md., 566 U.S. 30, 35 (2011) (plurality opinion).

430. *Compare* N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 193 (2006) (sovereign immunity), *with* Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 17 (2013) (voter qualifications).

431. *See* Allen v. Cooper, 140 S. Ct. 994, 1002–03 (2020). The Bankruptcy Clause is the "good-for-one-clause-only" exception. *Allen*, 140 S. Ct. at 1003; *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 369–79 (2006).

432. *Compare* Tennessee v. Lane, 541 U.S. 509, 518 (2004) (Fourteenth Amendment), *and* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (Fourteenth Amendment), *with* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (Article I: Patent Clause); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) (Article I: Indian Commerce Clause).

exclusive.'"[433] In this regard, the Indian Commerce Clause resembles the War Powers. While the Supreme Court has not addressed the issue, lower courts almost unanimously agree that the War Powers do not authorize Congress to pierce state sovereign immunity for private plaintiffs.[434] If even considerable Article I powers like the "plenary and exclusive" Indian Commerce Clause authority or the substantial War Powers do not allow Congress to invade a state's sovereign prerogative of immunity from suit, these powers may not allow Congress to invade a state's sovereign prerogative to set the qualifications of its voters.

Some scholarship suggests that a "state['s] interest" in "conduct[ing] its own elections"—presumably including the state's right to set voter qualifications rules—"is arguably less weighty than the abrogation of sovereign immunity."[435] This suggestion may undervalue the state's sovereignty interest in determining the bounds of the franchise.[436] If, as the Supreme Court has held, a state's power to determine the qualifications of its governing officers implicates the most fundamental nature of sovereignty,[437] then the same might hold true of a state's power to determine the qualifications of its voters—who, after all, are the ultimate source of state power. Indeed, the Court itself has drawn this comparison.[438] Additionally, the scholarship's suggestion fails to consider the degree to which federal intrusions into state voter qualification regimes impose other federalism costs.[439] Courts may conceivably determine that the states' sovereignty interest in determining the qualifications

433. United States v. Lara, 541 U.S. 193, 200 (2004) (quoting Washington v. Confed. Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979)).

434. *See, e.g.*, Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281, 288 (5th Cir. 2000); Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir.), *vacated on unrelated grounds*, 165 F.3d 593 (7th Cir. 1998) (per curiam); Larkins v. Dep't of Mental Health & Mental Retardation, 806 So. 2d 358, 362–63 (Ala. 2001); Janowski v. Div. of State Police, Dep't of Safety & Homeland Sec., 981 A.2d 1166, 1170 (Del. 2009); Clark v. Va. Dep't of State Police, 793 S.E.2d 1, 5–7 (Va. 2016). *Contra* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 509, 616 (1st Cir. 1996). Commentators—writing before *Allen* in 2020—disagree, arguing that the War Powers do authorize Congress to abrogate state sovereign immunity. *See* Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Actions Is a Valid Exercise of the Congressional War Powers*, 195 MIL. L. REV. 91, 125 (2008); Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 1050 (2004).

435. Developments in the Law, *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1754 (2016). This scholarship makes this argument in the context of justifying voting rights legislation under the Indian Commerce Clause. *See id.*

436. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 17 (2013); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 217 (2009).

437. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); *see also* Ariz. State Leg. v. Ariz. Indep. Redist'g Comm'n, 576 U.S. 787, 816–17 (2015).

438. *See Gregory*, 501 U.S. at 461–62 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

439. *See* Mortellaro, *supra* note 388, at 455–66.

for suffrage meets or even exceeds their sovereignty interest in immunity from suit.

On the other hand, a state's sovereignty interest in determining who qualifies to vote may be weakest when the state uses its authority to restrict, rather than expand, suffrage. As discussed earlier, existing scholarship argues that the Voter Qualifications Clauses may impose an affirmative obligation on states to safeguard the right to vote.[440] If this affirmative obligation limits states' power under the Voter Qualifications Clauses to curtail access to the franchise,[441] then states may possess only a minimal sovereignty interest in setting restrictive voter qualification rules. If the state's sovereignty interest is minimal, the War Powers may suffice to overcome that interest.

In short, whether the War Powers empower Congress to override the states' explicit constitutional authority under the Voter Qualifications Clauses remains unclear.[442] What is clear is that Article I—including the War Powers—does not authorize the same degree of intrusion into state sovereignty as the Reconstruction Amendments. This poses potential problems if the War Powers form the constitutional basis for the SCRA's voting domicile protections or other legislative proposals that could interfere with state voter qualifications. Considering this uncertainty, the War Powers cannot entirely displace the need for other sources of constitutional authority. Because the Nineteenth Amendment empowers Congress to reach state voter qualifications,[443] the Nineteenth Amendment may hold an advantage over the War Powers.

iii. Non-Federal Elections

If the War Powers do not justify the SCRA's modification of state rules governing voter qualifications, Congress may argue that its War Powers at least authorize UOCAVA's time, place, and manner regulations as applied to non-federal elections.[444] However, this argument may also be in doubt: because the Elections Clause explicitly limits congressional authority to "Elections for Senators and Representatives,"[445] that may suggest that other provisions of Article I—including the War

440. *See* Tolson, *Voter Qualifications Clause*, *supra* note 376, at 161–62; *supra* Section IV.C.1.ii.

441. *See* Tolson, *Voter Qualifications Clause*, *supra* note 376, at 205.

442. *See, e.g.*, Romeu v. Cohen, 265 F.3d 118, 130 n.9 (2001) (Leval, J., writing separately); *id.* at 134 n.7 (Walker, C.J., concurring).

443. *See supra* Section IV.C.1.ii.

444. No serious dispute exists over congressional authority under the Elections Clause to apply UOCAVA to federal elections. *See, e.g.*, Kalt, *supra* note 81, at 463; Tolson, *Spectrum*, *supra* note 120, at 370; Weinstein-Tull, *Abdication and Federalism*, *supra* note 366, at 864–65.

445. U.S. CONST. art. I, § 4, cl. 1.

Powers—do not imply an unwritten congressional power over state and local elections.[446]

This argument has arisen in another, similar context: whether the Elections Clause's explicit grant of authority over congressional elections (without mentioning presidential elections) should suggest the absence of an unwritten power over presidential elections.[447] For two reasons, the Supreme Court held that congressional power over congressional elections extends to presidential elections.[448]

First, the Court conditioned its holding on the fact that the specific statute at issue was "confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power."[449] But states do not lack the capacity to administer their own elections.[450] Likewise, the application of UOCAVA to non-federal elections likely intrudes on the states' sovereign prerogatives to administer their own internal elections.[451]

Second, the Court held that power over presidential elections constituted a type of implied "power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[452] But the disenfranchisement of military voters, while obviously repugnant to basic

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446. Put another way, this argument applies the "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019). "For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Id.*

447. *Compare* Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons From the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 899–902 (2002), *with* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 984 (1997), *and* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1749–52 (2002).

448. *See* Burroughs v. United States, 290 U.S. 534, 544–47 (1934).

449. *Id.* at 544–45.

450. *See, e.g.*, STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 5–69 (2011); STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 21–159 (2007); KAREN L. SHANTON, CONG. RESEARCH SERV., NO. R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 3–11 (2019); Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 361–80 (2008).

451. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 217 (2009); William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder*: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31, 31; Bradley W. Joondeph, Bush v. Gore*, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1788 (2001); Tolson, *Constitutional Structure*, *supra* note 148, at 399.

452. *Burroughs*, 290 U.S. at 545.

principles of democracy,[453] does not create an existential threat against the federal government.[454]

Accordingly, while the negative implication of the phrase "Elections for Senators and Representatives" does not prevent Congress from exercising authority over presidential elections,[455] whether it bars Congress from exercising authority over non-federal elections remains unresolved. This open question demonstrates the potential need for other constitutional bases for military voting legislation. Because the Nineteenth Amendment does reach non-federal elections,[456] the provision may provide a stronger constitutional footing for UOCAVA and other time, place, and manner regulations that support military voters.

3. Fourteenth Amendment Enforcement Power[457]

The Fourteenth Amendment enforcement power provides another potential source of congressional authority to combat felon disenfranchisement and protect military voters. However, questions attend the provision's application in either domain.[458] The Nineteenth Amendment provides a better constitutional authority for attacking these two issues.

The Supreme Court has held that felon disenfranchisement generally does not violate the Fourteenth Amendment.[459] Scholars have exhaustively covered both this decision and the broader interplay between the Fourteenth Amendment and felon disenfranchisement.[460] Much of this scholarship specifically contends that Congress could not constitutionally abrogate state felon disenfranchisement via its Fourteenth Amendment

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453. *See, e.g.*, Carrington v. Rash, 380 U.S. 89, 97 (1965); Karlan, *Ballots and Bullets*, *supra* note 90, at 1346.

454. *Cf.* Prakash, *supra* note 420, at 1392–95.

455. *Burroughs*, 290 U.S. at 544–47.

456. Unlike the Elections Clause, the Nineteenth Amendment contains no language limiting its application to federal elections. *Compare* U.S. CONST. art. I, § 4, cl. 1., *with* U.S. CONST. amend. XIX, para. 1.

457. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV § 5.

458. For instance, consider the interplay between sections 2 and 5 of the Fourteenth Amendment: does section 2's extraordinary congressional authority to reduce a state's representation in the House suggest that courts should read the congressional section 5 enforcement power more broadly? *Compare* Tolson, *Constitutional Structure*, *supra* note 148, at 401, *and* Franita Tolson, *What Is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 440 (2015), *with* Crum, *Superfluous*, *supra* note 283, at 1618–19, *and* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*. 2015 U. CHI. LEGAL F. 279, 331. As noted below, a full exposition on the reach of the Fourteenth Amendment enforcement power is beyond the scope of this Article.

459. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

460. *See supra* Section I.A.

enforcement power.[461] While a complete analysis of this enforcement power's reach is beyond the scope of this Article, the existing scholarship demonstrates that, at minimum, constitutional questions would attend Fourteenth Amendment enforcement legislation abrogating state felon disenfranchisement laws. The Nineteenth Amendment may offer a better constitutional tool for Congress to address voting by individuals with criminal convictions.

Fourteenth Amendment enforcement legislation to protect military voters is another matter. No litigation has challenged whether the Fourteenth Amendment could justify the voting protections military voters receive under UOCAVA and the SCRA. The literature has not covered the topic. However, some scholars have argued that the Fourteenth Amendment enforcement power does not justify the enactment of UOCAVA as it pertains to the legislation's non-military constituency: overseas civilians.[462] As one of those scholars notes, "many of the constitutional arguments against [UOCAVA's statutory predecessor] and UOCAVA apply with equal force to [military voters]."[463]

For instance, one argument contends that legislation to enfranchise non-resident overseas civilians does not constitute a constitutionally valid remedy to the problem of residency restrictions on the franchise because *bona fide* residency requirements do not violate the Constitution.[464] As applied to military voters, this argument would contend that the SCRA's protection of servicemembers' voting domicile likewise cannot abrogate state voting domicile rules because *bona fide* residency requirements do not violate the Constitution, even as applied to military voters.[465]

Whether the Fourteenth Amendment could justify the SCRA's voting provision is an open question. Courts subject Fourteenth Amendment enforcement legislation to congruence-and-proportionality review,[466] which proceeds in three stages. First, courts must identify the constitutional right that Congress sought to enforce with its legislation.[467] Second, courts review the legislative record for a history and pattern of

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461. Clegg et al., *Case Against*, *supra* note 61, at 14–16; Clegg et al., *The Bullet and the Ballot?*, *supra* note 284, at 19–22; Hasen, *Uncertain Congressional Power*, *supra* note 54, at 779–83; Re & Re, *supra* note 52, at 1644–45; von Spakovsky & Clegg, *supra* note 54, at 1383–84.

462. *See* Kalt, *supra* note 81, at 462–73, 485–86; Gura, *supra* note 81, at 192–94.

463. Kalt, *supra* note 81, at 502.

464. *Id.* at 486.

465. *See* Carrington v. Rash, 380 U.S. 89, 93–94 (1965); *see also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978); Dunn v. Blumstein, 405 U.S. 330, 343–44 (1972).

466. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 529–36 (1997).

467. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 522 (2004); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001),

recent state violations of that right.[468] Finally, courts review the legislation itself to determine whether Congress chose means appropriately tailored to the targeted constitutional harm.[469] While enforcement legislation may proscribe state conduct that does not itself violate the Fourteenth Amendment in order to more effectively deter and remedy conduct that does, Congress may not redefine the substantive scope of Fourteenth Amendment rights.[470] The range of state conduct affected by the legislation, statutory limits imposed on the legislation, the depth of the legislation's intrusion into state sovereignty, financial cost, and the availability of potential alternative remedies all factor into whether the legislation constitutes a congruent and proportional exercise of the Fourteenth Amendment enforcement power.[471]

With regard to the initial inquiry, Congress might stand a better chance at justifying the SCRA's protection of servicemember voting domicile if it characterized the provision as enforcing the Fourteenth Amendment right of *bona fide* residents to register and vote, notwithstanding the absences occasioned by the obligations of their military service.[472] In other words, Congress would argue that the SCRA attacks only unconstitutionally restrictive residency requirements,[473] but not *bona fide* residency requirements.

Next, Congress would have to discover sufficient evidence of unconstitutionally restrictive residency requirements. This would require canvassing state law and potentially reviewing state election practices and procedures to determine whether military voters face difficulty registering and voting on account of their service-related absences from their voting domiciles.

Assuming Congress develops a sufficient record, the next step in the congruence-and-proportionality analysis would be to determine whether Congress sufficiently tailored the SCRA's remedy to these constitutional violations. Whether the SCRA's voting language would survive this analysis remains unclear.

On one hand, Congress has long possessed authority under its Fourteenth Amendment enforcement power to abrogate state voter

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468. *See, e.g.*, Coleman v. Court of Appeals of Md., 566 U.S. 30, 37 (2012) (plurality opinion); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999).

469. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); United States v. Morrison, 529 U.S. 598, 625–26 (2000).

470. *See, e.g.*, Allen v. Cooper, 140 S. Ct. 994, 1004 (2020); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000). Of course, Congress may proscribe unconstitutional conduct, as well. *See* United States v. Georgia, 546 U.S. 151, 158 (2006).

471. *See* Kolbert, *supra* note 1, at 563–64.

472. *See* Carrington v. Rash, 380 U.S. 89, 96–97 (1965).

473. *See* Dunn v. Blumstein, 405 U.S. 330, 343–60 (1972); Greabe, *supra* note 84, at 71–74.

qualification rules—like states' restriction of the franchise to *bona fide* residents—even if those rules themselves comport with the Constitution.[474] Additionally, testimony before Congress suggested that the SCRA's voting provision would withstand constitutional scrutiny because the voting language merely enforced servicemembers' right to register and vote in their place of domicile, even if military absences took them elsewhere.[475] This strengthens the case for upholding the SCRA's voting provision because existing equal protection jurisprudence forbids states from using residency requirements to disenfranchise servicemembers because of their military service.[476] If the SCRA nonetheless protected some servicemembers lacking *bona fide* residency, Congress could argue this overbreadth was appropriate to preclude challenges to servicemembers who do qualify as *bona fide* residents.

On the other hand, the congressional testimony cited above—which dates from three weeks before the introduction of congruence-and-proportionality jurisprudence[477]—minimizes the scope of the SCRA's voting provision. Congress enacted this voting language in the wake of litigation showing that servicemembers were registering and voting in locations in which the servicemembers had no plausible claim to *bona fide* residency.[478] The legislation imposes its will not only in federal elections, but also state and local elections, and contains no internal limits on its application.[479] Additionally, the SCRA's intrusion into state rules governing voter qualifications may impose substantial sovereignty and other federalism costs.[480] Less intrusive measures may be available to protect *bona fide* residents from losing their voting domicile due to military-connected absences.[481] In short, the question of whether the

474. *See* Katzenbach v. Morgan, 384 U.S. 641, 651–56 (1966).

475. *See Military Voting Rights Act of 1997: Hearing on H.R. 699 Before the H.R. Comm. on Veterans' Affairs*, Serial No. 105-11, 105th Cong. 13–14, 45 (1997) (testimony of John H. Killian, Legislative Attorney, Congressional Research Service).

476. *See Carrington*, 380 U.S. at 96–97.

477. *Compare Military Voting Rights Act of 1997: Hearing on H.R. 699 Before the H.R. Comm. on Veterans' Affairs*, Serial No. 105-11, 105th Cong. 45 (1997) (testimony of John H. Killian, Legislative Attorney, Congressional Research Service), *with* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

478. Discovery in the litigation revealed that a servicemember purporting to have a voting domicile in Texas had not returned to that domicile in two decades and in fact owned a home in Illinois. *See* Katz, *Ballot War*, *supra* note 255, at A27. Another servicemember registered to vote at his grandmother's Texas address because he had spent three days there during his honeymoon twenty-five years earlier. *See* Shannon, *supra* note 255, at A14.

479. *See* 50 U.S.C. § 4025(a).

480. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 217 (2009); Mortellaro, *supra* note 388, at 455–66.

481. For instance, Congress could have shifted the burden to states (and off servicemembers) to establish that a servicemember has gained, lost, or changed his or her voting domicile. *Cf.* Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.–

SCRA's voting provision constitutes a congruent and proportional remedy admits of no clear answer. Given this uncertainty, the Nineteenth Amendment offers a more stable constitutional basis for the SCRA's voting provision.

This same analysis attends UOCAVA's facilitation of absentee voting for military personnel, or the proposed UOCAVA amendment to abrogate state sovereign immunity by permitting a private cause of action. Even if Congress might plausibly justify UOCAVA's application to non-federal elections as legislation to enforce the right to vote as protected by the Equal Protection Clause,[482] the statute must still undergo the demanding Fourteenth Amendment standard of review. The deferential standard of review afforded Nineteenth Amendment enforcement legislation[483] offers a substantial advantage over similar legislation enacted pursuant to the Fourteenth Amendment.

4. Twenty-sixth Amendment Enforcement Power[484]

Congress might also attempt to use its Twenty-sixth Amendment enforcement power to combat felon disenfranchisement or bolster military voting. The Twenty-sixth Amendment enforcement power shares many of the same advantages as the Nineteenth Amendment enforcement power. For instance, like the Nineteenth Amendment, "the Twenty-Sixth Amendment can be used by Congress to prohibit conduct that has a discriminatory effect even absent a discriminatory purpose."[485] Just as the demanding congruence and proportionality test does not apply to Nineteenth Amendment enforcement legislation, a lenient, forgiving standard of review likewise applies to Twenty-sixth Amendment enforcement legislation.[486] Also similar to the Nineteenth Amendment, the Twenty-sixth Amendment's scope directly modifies state voter

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C.L. L. REV. 483, 497 (1988). Congress could also have required states to explain in writing to any military voter why it has determined the servicemember to have gained, lost, or changed his or her voting domicile. *Cf.* Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 94–97 (2008); Issacharoff, *Beyond the Discrimination Model*, *supra* note 362, at 120–25 (2013). Whether or not these measures would be adequate or even desirable is a separate question, though SCRA opponents would surely argue both.

482. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104–05 (2000); Phillip M. Kannan, *A Constitutionally Protected Right to Vote*, 47 U. MEM. L. REV. 747, 774–77 (2017); *cf.* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 200–01 (2008).

483. *See supra* Section part IV.B.

484. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend XXVI, § 1. "The Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2.

485. Fish, *supra* note 65, at 1216.

486. *See id.* at 1224–29.

qualifications rules and permits intrusion into state and local election rules, exceeding the Elections Clause's more limited authority over regulations of the time, place, and manner of federal elections.[487]

The Twenty-sixth Amendment might therefore make a good source of constitutional authority for protecting the voting rights of military personnel. Just as the military is overwhelmingly male, "[a]ctive-duty military personnel are substantially younger than the population at large."[488] The enactment histories of both the Nineteenth and Twenty-sixth Amendments share a common theme: support for the new constitutional provisions in light of the to-be-enfranchised population's contributions to a war effort.[489] Accordingly, the Nineteenth and Twenty-sixth Amendments might serve as equally plausible sources of constitutional authority for enforcement legislation to protect servicemembers' voting rights.

However, the Twenty-sixth Amendment's power to combat felon disenfranchisement is less clear. In order for Congress to constitutionally enact Twenty-sixth Amendment enforcement legislation, the age discrimination in question must be sufficient for Congress to "draw a rational connection between the protections it is enacting and the general goal of combating age discrimination."[490] This may not be the case for felon disenfranchisement: "While felons are slightly younger than the general population, the difference between the average age of a felon and the average age of the general population [may be] too small to draw a rational connection between age discrimination and the abolition of felon disenfranchisement."[491]

D. Caselaw: Howard v. Gilmore

A fourth objection might suggest that *Howard v. Gilmore* forecloses any Nineteenth Amendment enforcement legislation to abrogate state felon disenfranchisement provisions. In an unpublished decision, the U.S. Court of Appeals for the Fourth Circuit rejected a *pro se* litigant's Nineteenth Amendment claim almost in passing, using a mere seventy-three words:

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487. *See id.* at 1174–77.

488. *Id.* at 1219. As of 2004, "41% of active-duty military [were] twenty-four years old or younger, as compared with only 14% of the general population, and 76% [were] thirty-four years old or younger, as compared with only 28% of the general population." *Id.*

489. *See id.*

490. *See id.* at 1229.

491. *Id.* at 1229–30. "In 2006, the median age of felons convicted in state court was thirty-one at the time of sentencing (with a mean sentence length of four years and eleven months), while the median age of the general population [in 2012 was] 36.9." *Id.* at 1230 n.273.

> To the extent that Howard relies upon the Nineteenth Amendment, he fails to state a claim upon which relief can be granted. The Nineteenth Amendment prohibits denying the franchise based upon the basis of sex. Howard makes no attempt to frame his claim in terms of discrimination based upon sex. The Nineteenth Amendment is therefore inapplicable and the district court correctly dismissed the complaint to the extent it relies upon the Nineteenth Amendment.[492]

For three reasons, this decision cannot be a serious bar to Nineteenth Amendment enforcement legislation on felon disenfranchisement.

First, the Fourth Circuit itself treats unpublished decisions as nonprecedential, negating *Howard*'s contribution to Nineteenth Amendment jurisprudence.[493] Second, to the extent the decision has any force, *Howard* concerns only whether a *litigant* may use the Nineteenth Amendment to prohibit states from disenfranchising voters on the basis of a criminal conviction.[494] The Fourth Circuit's decision says nothing about whether the Woman Suffrage Amendment empowers *Congress* to abrogate state felon disenfranchisement provisions by enforcement legislation.

But the most important reason to doubt *Howard*'s impact is its holding: that a Nineteenth Amendment claim which "makes no attempt to frame [the] claim in terms of discrimination based upon sex" cannot succeed.[495] In other words, *Howard* stands for the unremarkable proposition—well-established in the Fourth Circuit and elsewhere—that "perfunctory and undeveloped claim[s]" without sufficient evidence or argument in support will fail.[496] The Fourth Circuit's decision is therefore best understood as a routine application of standard litigation principles rather than a groundbreaking exposition on the contours of the Nineteenth Amendment. This is especially true when considering both the decision's brevity and its nonprecedential status. Accordingly, *Howard* does not limit congressional authority to enforce the Nineteenth Amendment.

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492. Howard v. Gilmore, 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (per curiam) (unpublished table disposition). *Howard* dealt specifically with felon disenfranchisement, making it particularly noteworthy in this Article. But much of this analysis applies to the multitude of other decisions addressing undeveloped, conclusory arguments—generally made by *pro se* litigants—concerning the Nineteenth Amendment. *See, e.g.*, Muhammad v. Newark Hous. Auth., 515 F. App'x 122, 125 (3d Cir. 2013); Chapman v. Baker, 430 F. App'x 731, 731 (10th Cir. 2011); New v. Pelosi, 374 F. App'x 158, 159 (2d Cir. 2010); Kohnke v. Reed, 18 F.3d 936, 1994 WL 83724, at *1 (5th Cir. Feb. 25, 1994) (unpublished table decision).

493. *See, e.g.*, Booker v. S.C. Dep't of Corr., 855 F.3d 533, 543 (4th Cir. 2017); *see also* 4TH CIR. R. 32.1.

494. *See Howard*, 2000 WL 203984, at *1.

495. *Id.*

496. Russell v. Absolute Collect'n Servs., Inc., 763 F.3d 385, 396 n.* (4th Cir. 2014).

E. Politics: The Unlikelihood of Restrictive State Action

Finally, one last objection might argue that Nineteenth Amendment enforcement legislation, even if constitutionally viable, is unnecessary. Given the widespread political support for military voting and the increasing unpopularity of felon disenfranchisement, the argument goes, states will protect the voting rights of these two groups without any need for federal legislation. This argument neglects two realities: first, that political popularity vacillates over time, and second, that state bureaucratic inertia can defeat even politically popular policy initiatives. Federal legislation may still be necessary if Congress wants to ensure felons' and servicemembers' voting rights withstand the ebbs and flows of both popular opinion and competence in public administration.

To be clear, "support for reinstating felons' right to vote appears to be gaining momentum across the political spectrum."[497] But despite the trend, the restoration of voting rights for individuals convicted of crimes remains controversial.[498] Views vary widely based on party affiliation.[499] This matters because "partisan politics drives changes to the state laws governing felon voter eligibility."[500] In other words, the fate of felon disenfranchisement policy may depend on the shifting electoral fortunes of the major political parties. If Congress wants to see action in this area, it cannot rely on the rising unpopularity of felon disenfranchisement to prompt unilateral action by states.

Unlike felon disenfranchisement, military voting enjoys widespread support across the political spectrum.[501] This popularity is unsurprising. Political support for servicemember voting has often peaked during wars involving overseas deployment of large numbers of military personnel.[502] Today, the United States remains mired in "the longest period of hostilities in U.S. history—a period that some have dubbed the Forever Wars."[503] However, the unprecedented support for military voting is a recent

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497. Christian Ketter, *A Jury of Citizens Both Free and Imprisoned: If Voter Rights Are Ensured for the Incarcerated, Is a Prisoner's Right to Serve on a Jury Far-Fetched?*, 51 U. TOL. L. REV. 37, 37 (2019); *see also* Demleitner, *supra* note 17, at 1282.

498. *See* Tolson, *Underenforcement*, *supra* note 402, at 178.

499. *See* Cain & Parker, *supra* note 22, at 946 tbl.3 & n.37.

500. *See* Conn, *supra* note 41, at 499. This effect extends beyond felon disenfranchisement: the restrictiveness *vel non* of a state's voting rules (including but not limited to felon voter eligibility) strongly correlates with partisan control of the state's election policymaking apparatus. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1405 (2015).

501. *See, e.g.*, Alvarez et al., *Military Voting and the Law*, *supra* note 121, at 981; Inbody, *Voting*, *supra* note 68, at 54.

502. *See* INBODY, SOLDIER VOTE, *supra* note 72, at 160.

503. Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J.F. 552, 553 (2020); *see also* Alberto Mora, *The First Thomas J. Romig Lecture in Principled Legal Practice*, 227 MIL. L. REV. 433, 452 (2019).

development, historically speaking. In the early part of American history, states actively sought to disenfranchise military voters.[504] As late as 1965, states burdened servicemembers' right to vote—or even outright barred them from the polling place—because of their service.[505] More recent litigation has challenged military ballots with the hope of tipping a close election result.[506] In short, even the modern consensus in support of military voting has its limits.

Additionally, the political popularity of military voters will not mitigate the challenges military voters face as a consequence of the unique nature of election administration in the United States:

> [Military] voting difficulties persist in part because elections continue to be conducted at the state level, and voting procedures vary widely across states. These state differences have made it harder for various groups and individuals, including the [Federal Voting Assistance Program], military voting assistance offices, voting assistance officers, state department officials, and non-governmental organizations, to help individual voters navigate the particular requirements applicable to them individually. In addition, the federal overlay on state election administration adds complexity and increases the risk of problems . . . .[507]

Even garden-variety state bureaucratic friction—whether between state agencies, between the state political branches, or between state and local governments[508]—can interfere with successful state administration of military voting. No matter how much popular support servicemembers enjoy, election officials may nonetheless fail to effectively execute their duties relating to military voting due to communication breakdowns, explicit conflicts, or even misunderstandings over the proper allocation of responsibilities.[509] If Congress wants to see action in this area, it cannot rely on the consensus support of military voting to prompt unilateral action by states.

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504. INBODY, SOLDIER VOTE, *supra* note 72, at 155.

505. *See* Carrington v. Rash, 380 U.S. 89, 89 (1965).

506. *See* Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1320 (N.D. Fla.), *aff'd*, 235 F.3d 578 (11th Cir. 2000) (per curiam); Casarez v. Val Verde Cnty., 16 F. Supp. 2d 727, 730 (W.D. Tex. 1998); *aff'd mem.*, 194 F.3d 1308 (5th Cir. 1999).

507. Huefner, *Lessons*, *supra* note 111, at 878–79 (footnote omitted). The Federal Voting Assistance Program is the federal agency responsible for military voting. *See* Federal Voting Assistance Program, Instruction No. 1000.04 § G.2, at 19 (U.S. Dep't of Def. Nov. 12, 2019).

508. *See* Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1101–08 (2018).

509. *Cf. id.* at 1108–17.

CONCLUSION

Felons and servicemembers each face unique but serious barriers to the ballot. The Nineteenth Amendment empowers Congress to address those barriers in light of the sex-based burden both groups face.

This may prove to be an unconventional conclusion, given that "[t]he prevailing understanding of the Nineteenth Amendment is that it merely requires that women be permitted to vote—no more, no less."[510] But "the conventional wisdom is wrong."[511] While the Sixty-sixth Congress initially aimed the Woman Suffrage Amendment at women's right to vote, its gender-neutral language establishes (and later Supreme Court precedent confirms) that the Nineteenth Amendment protects men, as well. Because men make up an overwhelming proportion of both voters with criminal convictions and voters serving in the armed forces, the Nineteenth Amendment could serve as a powerful constitutional tool to protect these groups' voting rights. A review of the primary concerns animating the Sixty-sixth Congress to propose the Woman Suffrage Amendment to the states confirms this hypothesis, given how each of the concerns dovetails with the nature of the population burdened by either felon disenfranchisement or military service. Additionally, many of the restrictions attendant to other constitutional provisions—a requirement for intentional discrimination, a heightened standard of review, a limited reach into state voter qualifications or non-federal election procedures—do not apply to Nineteenth Amendment enforcement legislation.

Yet for a century after ratification of the Woman Suffrage Amendment, its Enforcement Clause has remained dormant. Congress has never taken advantage of its "power to enforce this article by appropriate legislation."[512] After 100 years of inaction, this symposium on the centennial of the ratification of the Nineteenth Amendment marks an appropriate time to reexamine the provision. To answer the question in this Article's title—*Does the Woman Suffrage Amendment Protect the Voting Rights of Men?*—yes. If Congress chooses to take action on felon disenfranchisement or military voting, the Nineteenth Amendment offers a potent tool for doing so.

510. Kolbert, *supra* note 1, at 509 (footnote omitted).
511. Fish, *supra* note 65, at 1234.
512. U.S. CONST. amend. XIX, para. 2.