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### Mary Lou Graves, Nolen Breedlove, and the Nineteenth Amendment

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#### Recommended Citation

Katz, Ellen D. "Mary Lou Graves, Nolen Breedlove, and the Nineteenth Amendment." *Georgetown Journal of Law & Public Policy* 20, no. 2 (2022): 59-89.

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# Mary Lou Graves, Nolen Breedlove, and the Nineteenth Amendment

ELLEN D. KATZ\*

## ABSTRACT

*This close examination of two cases is part of a larger ongoing project to provide a distinct account of the Nineteenth Amendment. In 1921, the Alabama Supreme Court held the Nineteenth Amendment required that any poll tax be imposed equally on men and women. Sixteen years later, the Supreme Court disagreed. Juxtaposing these two cases, and telling their story in rich context, captures my larger claim that—contrary to the general understanding in the scholarly literature—the Nineteenth Amendment was deliberately crafted as a highly circumscribed measure that would eliminate only the exclusively male franchise while serving steadfastly to preserve and promote social hierarchies more generally, specifically those based on race and gender.*

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## INTRODUCTION

Ratified in 1920, the Nineteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”<sup>1</sup> At the time, laws in thirty-three States explicitly restricted the right to vote to men in some or all types of elections.<sup>2</sup> The

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1. U.S. CONST. amend. XIX, cl. 1.

2. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 365–68 (rev. ed. 2009) (listing states with such electoral restrictions).

Nineteenth Amendment easily dispensed with these laws,<sup>3</sup> thereby eliminating an obstacle that had blocked roughly twenty-seven million women from casting ballots.<sup>4</sup> Numerous barriers to participation nevertheless remained, and questions quickly arose as to whether the new Amendment undermined other gender-based distinctions within the electoral process and, indeed, well beyond it.

The assessment of poll taxes was one arena in which this issue emerged. In 1920, eleven States required voters to pay a poll, or capitation, tax as a prerequisite to voting.<sup>5</sup> States assessed these taxes well in advance of an election and required voters to present proof that they paid the tax in order to cast a ballot.<sup>6</sup> Several States made this requirement even more stringent by imposing cumulative obligations, such that would-be voters needed to pay not only the tax assessed for the given year but all taxes past due in order to vote.<sup>7</sup> Ratification of the Nineteenth Amendment gave rise to disputes as to whether States now needed to set identical poll tax obligations for men and women.

This Essay examines two rulings that addressed this question. In the 1921 decision *Graves v. Eubank*, the Alabama Supreme Court held that the Nineteenth Amendment “placed all women in the state upon the same footing with men” and thus prohibited Alabama from “placing conditions or burdens upon one [sex] not placed upon the other as a condition precedent to the right to vote.”<sup>8</sup> Sixteen years later, the United States Supreme Court overruled *Graves* in *Breedlove v. Suttles* and held that nothing in the Nineteenth Amendment limited Georgia’s power to discriminate between men and women when setting poll tax requirements.<sup>9</sup> Where *Graves* suggested the Nineteenth Amendment set forth a broad principle of gender equality that extended throughout the electoral process, *Breedlove* saw a narrow prohibition targeting only those state laws that explicitly limited the

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3. See, e.g., *Brown v. City of Atlanta*, 109 S.E. 666, 672 (Ga. 1921) (calling the Nineteenth Amendment “self-executing” and stating “that under it females are not now disqualified on account of their sex to register and to vote, but on the contrary they are qualified” (citations omitted)).

4. See ELAINE WEISS, *THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE* 1 (2018).

5. Thirteen states assessed a poll tax at the time, but Nevada and New Hampshire did not make payment a prerequisite to voting. See KEYSSAR, *supra* note 2, at 334–35 (listing Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, Texas, and Virginia as requiring a poll tax at this time); Steve George, *Campaigning, Voter Registration, and Casting Ballots in Nevada*, in *POLITICAL HISTORY OF NEVADA* 168 (Barbara K. Cegavske, ed.); NEV. CONST. art. II, § 7 (repealed 1966); *New Hampshire Unaffected*, N.Y. TIMES, Jan. 18, 1964, at 12, <https://www.nytimes.com/1964/01/18/archives/new-hampshire-unaffected.html> [<https://perma.cc/LJM6-7N4E>]; Marcus Hurn, *State Constitutional Limits on New Hampshire’s Taxing Power: Historical Development and Modern State*, 7 PIERCE L. REV. 251, 253 (2008).

6. See FREDERIC D. OGDEN, *THE POLL TAX IN THE SOUTH* 44–54 (1958) (describing variations among States in timing of poll tax assessment and proof of payment).

7. See *id.* at 32–38 (describing operation of cumulative poll taxes in Alabama, Georgia, Mississippi, and Virginia); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 65 (1974) (discussing Florida as well); see also RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 50, 157 (2004) (noting that Florida abolished its poll tax in 1936; Georgia adopted a cumulative tax in 1877).

8. 87 So. 587, 588 (Ala. 1921).

9. 302 U.S. 277, 284 (1937).

electorate to men. *Graves* and *Breedlove* thus adopted facially incompatible views of the Nineteenth Amendment's reach.

Read together, *Graves* and *Breedlove* are fodder for the narrative, pressed by assorted scholars for decades, that judges, legislators, and other public officials have long read the Nineteenth Amendment too narrowly. These scholars claim that the Amendment is best read to set forth a robust equality norm or, even more broadly, an anti-subordination principle that should have displaced a broad swath of regulations that made or promoted gender-based distinctions.<sup>10</sup> On this view, decisions like *Breedlove* failed to implement the Amendment as intended because the Court read it to allow a gender-specific poll tax. By contrast, claims of the sort found in cases like *Graves*—that, for instance, the Nineteenth Amendment “placed all women . . . upon the same footing with men”—are viewed more favorably. Language of this sort is seen to suggest the possibility of a different storyline, one in which the Nineteenth Amendment was understood to embrace broad equality and anti-subordination principles. This interpretation insists that the Amendment should have occupied a more central place in the fight for gender equality and that it might yet be deployed productively in ongoing disputes.<sup>11</sup>

This Essay relies on a close examination of *Graves* and *Breedlove* to introduce a competing account of the Nineteenth Amendment. The underlying claim, which I develop elsewhere in more detail,<sup>12</sup> is that the Nineteenth Amendment was never meant to promote a broad equality principle, much less an anti-subordination norm. Instead, it was crafted as a deliberately circumscribed measure that would eliminate the male-only electorate while preserving and promoting existing social hierarchies. More specifically, advocates of the Nineteenth Amendment repeatedly promised that women could be included in the electorate without destabilizing either the traditional family or white supremacy. Indeed, these advocates promised that women voters would bolster both hierarchies. These promises, while not universally endorsed, dominated discussion of the Amendment, particularly in the years closest to ratification, and were the ones that shaped how the Amendment was read and applied.<sup>13</sup>

On this understanding of the Amendment, cases like *Graves* and *Breedlove* look more harmonious than their seemingly conflicting holdings might otherwise suggest. In particular, this Essay seeks to show that both *Graves* and *Breedlove* manifested a determination to preserve existing social hierarchies and read the Nineteenth Amendment to mandate such preservation.

For its part, *Graves* made sure that newly enfranchised women voters would not threaten the existing racial hierarchy. *Graves* did so by holding that the Nineteenth Amendment barred Alabama from exempting women voters from the

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10. See *infra* notes 127–128 and accompanying text.

11. See Ellen D. Katz, *Compromised: The Real Failure of the Nineteenth Amendment* (unpublished manuscript) (on file with author) (discussing this scholarship); see also *infra* note 130 and accompanying text.

12. See Katz, *supra* note 11.

13. See Katz, *supra* note 11.

poll tax that it collected from men. So ruling guaranteed that women in Alabama would need to pay the tax in order to vote. Because, as was expected and, indeed, intended, many more white women than Black women were able to do so, *Graves*'s reading of the Nineteenth Amendment bolstered Alabama's white electorate and the racial order it embraced.<sup>14</sup>

*Breedlove*, meanwhile, helped ensure that the inclusion of women in the electorate would not compromise their traditional roles as wives and as mothers. *Breedlove* advanced this interest by reading the Nineteenth Amendment to allow Georgia to exempt women from the poll tax so long as they did not vote. In the Court's view, the exemption, which plainly discouraged women from voting,<sup>15</sup> helped them remain focused on their maternal obligations while also easing the tax burden their husbands bore as household heads.<sup>16</sup>

Read together, *Graves* and *Breedlove* suggest—and, in my view, show—that the Amendment's reach rested primarily on contextual judgments as to whether or not deploying it would bolster the racial hierarchy, the traditional family, or both. *Graves* and *Breedlove*, moreover, had good reason to read the Nineteenth Amendment in this manner. Time and again, the Amendment's supporters promised that it would be deployed to preserve and protect existing racial and gender hierarchies.<sup>17</sup> *Graves* and *Breedlove* are best read to have followed this instruction.

This Essay proceeds as follows. Part I unpacks the *Graves* decision, showing how its expansive language and seemingly “thick” reading of the Nineteenth Amendment helped bolster the racial order, and why there is good reason to think the Court adopted this reading for this very purpose.<sup>18</sup> Part II examines how *Breedlove* used an ostensibly “thin” reading of the Amendment to protect the traditional family and the gender hierarchy it embodied. Part III explores how *Graves* and *Breedlove* inform the ongoing project to expand the Nineteenth Amendment's reach. It argues not for categorical abandonment of that project, but instead for a fuller accounting of the dominant arguments that propelled the Amendment's ratification and recognition of how those arguments shaped its deployment. A short conclusion follows.

## I. SUSTAINING ALABAMA'S RACIAL ORDER

Decided in 1921, *Graves v. Eubank* was one of the first rulings to construe the Nineteenth Amendment. The case arose when Montgomery resident Mary Lou

14. See *infra* Part I.

15. See *infra* note 79 and accompanying text.

16. See *infra* Part II.

17. See Katz, *supra* note 11.

18. See generally Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27, 33 (2020) (“The thick reading is gender-conscious (not gender-neutral), and it recognizes that the main purpose of the Amendment was originally and should continue to be read as protective against the subordination of women in U.S. politics.”).

Graves attempted to pay Alabama's poll tax in the fall of 1920. A prominent member of various Montgomery organizations<sup>19</sup> and a longstanding supporter of women's suffrage,<sup>20</sup> Graves was eager to cast a ballot for the first time. Eyeing the upcoming November election as her opportunity, Graves set out to pay the poll tax Alabama required as a qualification to vote. But A.H. Eubank, the local tax collector, refused to accept her \$1.50 payment. Eubank said that only men were required to pay tax under Alabama law and that the recently ratified Nineteenth Amendment did nothing to alter that obligation.<sup>21</sup>

Graves challenged Eubank's refusal to accept her poll tax payment. The Circuit Court of Montgomery County sided with Eubank,<sup>22</sup> but Graves ultimately prevailed in the Alabama Supreme Court. Chief Justice John C. Anderson's majority opinion held that the Nineteenth Amendment required Alabama to accept poll tax payments from women since it required men to pay such taxes as a prerequisite to voting. The opinion explained that the new Amendment "placed all women in the state upon the same footing with men," "automatically strik[ing] from the state laws, organic and statutory, all discriminatory features authorizing one sex to vote and excluding the other, or placing conditions or burdens upon one not placed upon the other as a condition precedent to the right to vote."<sup>23</sup>

*Graves* would prove to be an aberration, with subsequent decisions and ultimately a U.S. Supreme Court ruling holding that gender-specific poll taxes were compatible with the Nineteenth Amendment.<sup>24</sup> *Graves* adopted what appears to be an expansive reading of the Nineteenth Amendment, in which it displaces not only gender-based rules that explicitly limited the electorate to men but also

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19. See *W.C.T.U. Has Important Business Meeting*, MONTGOMERY ADVERTISER, Jan. 25, 1929, at 11 (listing Mrs. E.M. Graves as participant); *Chataqua Circle Celebrates Reciprocity Day*, MONTGOMERY DAILY TIMES, Mar. 16, 1916 (same); *Mother's Circle Will Give Tree*, MONTGOMERY ADVERTISER, Dec. 22, 1918, at 24 (listing Mrs. E.M. Graves as member of the Christmas committee).

20. See *Committee for Alabama's Suffrage Association*, MONTGOMERY TIMES, Apr. 8, 1920 (listing Mrs. E.M. Graves as among the attendees at annual meeting and a member of the luncheon committee); *Local Suffragettes to Hold Meeting*, MONTGOMERY TIMES, Apr. 11, 1913, at 3 (listing Mrs. E.M. Graves among the scheduled speakers); *Ladies' Amendment Club Organized*, MONTGOMERY TIMES, Nov. 17, 1909, at 8 (listing Mrs. E.M. Graves among the founding officers).

21. See *Graves v. Eubank*, 87 So. 587 (Ala. 1921).

22. See Judgment, *Graves v. Eubank*, Circuit Court of Montgomery County, undated (on file, Montgomery County Archives, Montgomery, Alabama).

23. *Graves*, 87 So. at 174, 175 ("[A] burden cannot be placed upon one sex that is not put upon the other, nor can a privilege, benefit, or exemption be given one to the exclusion of the other.")

24. See *infra* Part II. See also *Breedlove v. Suttles*, 302 U.S. 277, 284 (1937); *Hawthorne v. Turkey Creek Sch. Dist.*, 134 S.E. 103, 107 (Ga. 1926) ("It is our opinion that the females who voted in the bond election now under review were eligible to vote in the election without paying [the poll] tax."); *Davis v. Warde*, 118 S.E. 378, 395 (Ga. 1923) (holding that the Nineteenth Amendment did not automatically render women subject to a poll tax Georgia imposed only on men and that women became subject to that tax only as a result of a subsequent statutory amendment that imposed the tax on equal terms).

gender-specific “conditions precedent” to voting.<sup>25</sup> *Graves*, notably, viewed the assessment of a tax, payment of which constituted a prerequisite for voting, to be such a condition precedent.

*Graves*’s claim that the Nineteenth Amendment “placed all women in the state upon the same footing with men” resembled language the United States Supreme Court would use two years later when discussing the Amendment in *Adkins v. Children’s Hospital*.<sup>26</sup> That decision, which struck down a gender-specific minimum wage law, viewed the Nineteenth Amendment as the “culminati[on]” of “great—not to say revolutionary—changes . . . in the contractual, political, and civil status of women,” and posited that these changes effectively “accorded [women] emancipation” “from the old doctrine that [they] must be given special protection or be subjected to special restraint in [their] contractual and civil relationships.”<sup>27</sup> Like *Graves*, *Adkins* appeared to read the Nineteenth Amendment broadly to embrace an expansive equality norm. Indeed, various scholars have read *Adkins* in this manner, arguing further that this capacious view of the Amendment best captures the intent of the Amendment’s advocates.<sup>28</sup> Using

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25. *Graves* was not wholly alone in reaching this conclusion. See, e.g., *Prewitt v. Wilson*, 46 S.W.2d 90, 92 (Ky. 1932) (holding that the Nineteenth Amendment bars literacy requirements imposed only on women as prerequisite to voting when “male voters are not required to meet the same test . . . [because] [i]lliterate women, no less than illiterate men, may exercise the right of suffrage in Kentucky”).

26. 261 U.S. 525, 553 (1923).

27. *Id.*

28. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex, Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1012–13, 1015–16 (2002) (highlighting that *Adkins* offered “an alternative path of reception—one that . . . approached the Nineteenth Amendment as embodying a sex equality norm that had implications for constitutional questions other than voting;” “demonstrate[d] that in the immediate aftermath of ratification, the Court interpreted the Amendment in light of the woman suffrage debates;” and “understood the Amendment to confer equality on women by breaking with traditional ways of reasoning about women’s roles rooted in the family relationship”); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. LAW REV. 86, 95 (2011) (stating that *Adkins* “embraced the congressional understanding that the Amendment would end sex discrimination” and calling this “assessment of the Nineteenth Amendment’s effect . . . cogent” and “premised on the idea that after 1920, sex discrimination was, as a constitutional matter, a form of caste”); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert’s Social Statics*, 88 MICH. L. REV. 1366, 1403 (1990) (agreeing that “[*Adkins*’s] reliance . . . on the nineteenth amendment is well placed. . . . [The Amendment] symbolically confirms the view that at least one historical understanding of equality under the law is inconsistent with statutes that routinely sort individuals on the basis of their sex.”); Ben Glassman, *Dialogic Fidelity: The Fourteenth Amendment, Historical Meaning, and Appropriate Scrutiny for Sex Discrimination*, 18 HARV. BLACKLETTER L.J. 139, 181 (2002) (claiming *Adkins* can be read to support the idea that “a law that discriminates on the basis of sex deserves strict scrutiny”); Jennifer K. Brown, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2193, 2202 (1993) (noting *Adkins*’s “tantalizing hint that the Nineteenth Amendment represented more for women than simply the right to vote” and suggesting that *Adkins* read in the Nineteenth Amendment a virtual declaration of “women’s constitutional equality”); Gretchen Ritter, *Jury Service and Women’s Citizenship before and after the Nineteenth Amendment*, 20 LAW. & HIST. R. 479, 504 (2002) (asserting *Adkins*’s reading of the Nineteenth Amendment “was precisely what the advocates of the Nineteenth Amendment from the time of Elizabeth Cady Stanton and Susan B. Anthony onward had hoped for. . . . The opinion may be read as signaling a further erosion of the common law regime that governed women’s civic standing in the

similar language, *Graves* may be similarly understood.<sup>29</sup>

This understanding of *Graves*, however, is misleading.<sup>30</sup> Specifically, it obscures the way in which the decision's ostensible commitment to gender equality intersected with—and bolstered—the prevailing racial hierarchy. The Nineteenth Amendment's elimination of the male-only electorate abolished one obstacle that had kept women in Alabama from voting. In particular, the Amendment scrapped a portion of Section 177 of the state constitution that mandated that voters in the state needed to be “male citizen[s].”<sup>31</sup> At the time the Amendment was ratified in 1920, Section 177 operated to exclude more than 550,000 women from Alabama's electorate.<sup>32</sup> Proponents of the Nineteenth Amendment had nevertheless promised that ratification would not require States to let all of these women vote. Specifically, they made clear that States would remain free to impose voter qualifications designed to deal with what suffrage advocate Patti Ruffner Jacobs labeled “the race problem.” Ruffner Jacobs insisted that States like Alabama—where Black women comprised roughly forty percent of the women otherwise poised to enter the electorate<sup>33</sup>—“can still protect the exercise of the franchise to the fullest[sic] extent of its power.” Indeed, Ruffner Jacobs was confident that specific voter qualifications “in the South, [would] enfranchise a very large number of white women and the same sort of negro women as there are now negro men permitted to exercise the privilege.”<sup>34</sup>

Careful inspection shows that *Graves* advanced just this vision of how the Amendment would play out. Reading the Nineteenth Amendment to prohibit a male-only poll tax, as the state supreme court did in *Graves*, left room, of course, for Alabama to eliminate the tax entirely. But the Court in *Graves* knew full well that the State would do no such thing. Instead, the ruling would require women in

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nineteenth century.”); Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 73, 100 (2020) (calling *Adkins* “the only major judicial acknowledgment of the Nineteenth Amendment as recognition of revolutionary change in women's legal status”).

29. See, e.g., PAULA A. MONOPOLI, *CONSTITUTIONAL ORPHAN: EQUALITY AND THE NINETEENTH AMENDMENT 77* (2020) (discussing how the *Graves* court held that “the Nineteenth Amendment extend [s] . . . beyond voting” and viewed the “nexus between voting and the mechanism by which the government condition[s] that right” as “capacious”).

30. As is any similar suggestion about *Adkins*. See Katz, *supra* note 11, at 56–61 (discussing *Adkins*).

31. See ALA. CONST. of 1901, § 177.

32. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES 13* (1925) (reporting Alabama population in 1920 to include 1,447,032 white people; 900,652 Black people; 337,918 non-foreign-born white women over 21; and 225,215 Black women over 21).

33. See *id.*

34. See *Hearings before the Committee on Woman Suffrage, United States Senate*, 64th Cong. 9 (1916); see also AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, 195–96* (1965) (quoting Pattie Ruffner Jacobs' statement); GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920*, at 445 (1992) (quoting North Carolina NAWSA chapter president Gertrude Weil's endorsement of “higher qualifications for voting than at present . . . [as] the only way to cope fairly and effectively with the [N]egro problem, which is a difficult problem with or without the [N]egro woman”).

Alabama to pay the poll tax in order to vote.<sup>35</sup> As was easily predicted and quickly borne out, far more white women than Black women were able to pay, and, thus, able to vote.<sup>36</sup> This was by explicit design. Alabama had adopted the poll tax in question at a constitutional convention convened in 1901 expressly to entrench the racial order. Convention president John B. Knox famously declared the assembly's purpose: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."<sup>37</sup>

The constitution that emerged from that convention embraced numerous techniques to disenfranchise would-be voters. Prominent among them was the requirement that a person was eligible to vote only if, among other things, "he . . . shall have paid . . . all poll taxes due from him."<sup>38</sup> Making clear the convention's goal was disenfranchisement rather than raising revenue, the new constitution specified that "no legal process, nor any fee or commission shall be allowed for the collection" of unpaid poll taxes. Instead, the constitution barred any effort to secure payment of the poll tax apart from denying a ballot to those who failed to pay.<sup>39</sup>

The 1901 constitution imposed the poll tax on "male" inhabitants and used the pronouns "he" and "him" in making payment of the tax a precondition to

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35. While Alabama might have responded to *Graves* by eliminating the tax entirely, there is no evidence to suggest this option was ever seriously considered. See *infra* notes 42–45 and accompanying text.

36. See, e.g., *60,000 Women in State Registered, 5,400 in District, Books Closed Last Night, About 100 Negroes Will Vote; Two Negroes in Seventh*, GADSDEN DAILY TIMES-NEWS, Oct. 26, 1920 (reporting that 60,000 women in Alabama had "taken advantage of the opportunity to register" and that "the registration of negro women was light, about 100 having enrolled here"); see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 119 (1998) (calling suffrage an "empty victory" for Black women given barriers like the poll tax); KOUSSER, *supra* note 7, at 68–69, 241–42 (discussing impact of the poll tax on Black voter turnout).

37. See JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, HELD IN THE CITY OF MONTGOMERY, COMMENCING MAY 21ST 9 (1901); see also Hunter v. Underwood, 471 U.S. 222, 229 (1985); SHELDON HACKNEY, POPULISM TO PROGRESSIVISM IN ALABAMA 190–91 (2009).

38. See ALA. CONST. OF 1901, § 178. For discussions of the racial purpose behind the poll tax, see, e.g., Harman v. Forsennius, 380 U.S. 528, 543 (noting that the "Virginia poll tax was born of a desire to disenfranchise the Negro"); KOUSSER, *supra* note 7, at 68–70 (noting that the purpose and effect of the poll tax was to disenfranchise African-American voters); OGDEN, *supra* note 6, at 4–7 (same).

39. ALA. CONST. OF 1901, § 194. See generally Franita Tolson, *Offering a New Vision for Equal Protection: The Story of Harper v. Virginia State Board of Elections*, in ELECTION LAW STORIES 65 (Joshua A. Douglas & Eugene D. Mazo, eds., 2016) (noting "there is no record of anyone ever being prosecuted for failing to pay a poll tax because most states went out of their way to avoid collecting it from individuals deemed politically or racially undesirable voters"); KOUSSER, *supra* note 7, at 63 (noting that "after 1870 . . . those in power made every effort not to collect the tax from men they deemed undesirable voters. There is no record of prosecution of a poll tax delinquent."); cf. Stuard v. Thompson, 251 S.W. 277, 279–81 (Tex. Civ. App. 1923) (holding that the State may require payment of poll tax from citizens who do not intend to vote).

voting.<sup>40</sup> As such, the constitution left open the prospect that women seeking to vote after the Nineteenth Amendment's ratification might be exempt from the tax.<sup>41</sup> Seeking to foreclose that possibility, Alabama Governor Thomas Kilby convened an special session of the state legislature to address what he described as "the emergency created by the ratification . . . of the 19th Amendment." His September 14, 1920, address explained that "[p]rompt action" was needed both to remove "discrimination against citizens of state on account of sex" and to ensure that "the women of Alabama *who are qualified* under our Constitution may be granted the privilege of voting in the November elections."<sup>42</sup> The Alabama legislature, which had refused to ratify the Nineteenth Amendment and would not do so until 1953, responded to Governor Kilby's request by passing a new law that assessed a poll tax "from every inhabitant" of specified age; this law was designed to ensure that only those who paid the tax—men and women alike—would be considered "qualified" to vote and hence granted "the privilege of voting."<sup>43</sup> The new statute repeated the constitutional bar on efforts to secure collection of the tax, thus making clear that denial of a ballot remained the sole penalty for nonpayment.<sup>44</sup> To monitor the impact of the tax—and presumably to check that it was achieving its intended purpose of racial exclusion—the new law instructed tax collectors to maintain separate lists documenting the race and gender of those who paid the tax.<sup>45</sup>

It was against this backdrop that, weeks later, Mary Lou Graves brought suit challenging A.H. Eubank's refusal to accept the \$1.50 poll tax payment she had offered. Her lawsuit, like the poll tax it sought to enforce, was crafted to prevent women—and specifically Black women—from voting without paying the tax. True, Graves herself might have also been concerned that she would be unable to

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40. ALA. CONST. OF 1901, §§ 178, 194 (authorizing a person to vote, if, among other things, "he . . . shall have paid . . . all poll taxes due from him" and specifying "[t]he poll tax . . . shall be one dollar and fifty cents upon each male inhabitant").

41. This question arose elsewhere. *See, e.g.*, Mary Sumner Boyd, *The Poll Tax*, in *THE WOMAN SUFFRAGE YEAR BOOK: 1917*, at 130–31 (Martha G. Stapler ed., 1917) (stating that despite poll tax schemes in ten states that taxed women, "not one woman is to-day paying a poll tax as a voter"); *What Is Primary Suffrage?*, *WOMAN CITIZEN*, Mar. 15, 1919, at 870 ("[I]t should be remembered . . . that the constitution [in various states] requires the poll tax only of *male inhabitants*, so women, whether voting or not, are exempted by the constitution.").

42. *See Governor's Message to the Legislature of Alabama*, Special Session Ala. Leg. 1 (Sept. 14, 1920) (emphasis added).

43. Act of Sept. 27, 1920, No. 3, § 1, 1920 Ala. Laws 1 (providing that "there may be collected from every inhabitant in this State over the age of twenty-one years, and under the age of forty-five years, not hereinafter exempted, the sum of one dollar and fifty cents, as poll tax"), *invalidated by Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

44. Act of Sept. 27, 1920, No. 3, § 3, 1920 Ala. Laws 2, *invalidated by Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

45. Act of Sept. 27, 1920, No. 3, § 9 1920 Ala. Laws 3 ("Such list shall be prepared as follows, to-wit: It shall be in two divisions; the first division shall contain first an alphabetical list of the female white persons, and second, an alphabetical list of the colored females; the second division shall contain first an alphabetical list of the white males, and second, an alphabetical list of the colored males."), *invalidated by Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

vote absent possession of the poll tax receipt Eubank refused to give her. But Eubank said only that Graves was exempt from the tax, not that she was ineligible to vote.<sup>46</sup> As was voiced widely (and as *Graves v. Eubank* would confirm) Eubank's view of state law technically left women free to vote without paying the tax, as some briefly did.<sup>47</sup> It is, of course, also possible that Graves positioned herself as the unusual litigant seeking to expand her tax liability in order to vindicate a commitment to formal equality that she understood the Nineteenth Amendment to mandate and a male-only poll tax to contravene. Graves, after all, had supported women's suffrage for many years,<sup>48</sup> and might have situated herself within the faction that linked the bare right to vote with a broader conception of equality.<sup>49</sup> Graves, moreover, would go on to lead a local chapter of the National Women's Party as it pressed for formal "equal rights" at the state level and for a federal constitutional amendment mandating the same.<sup>50</sup>

Still, a driving force behind Graves's lawsuit—and, almost certainly, its primary goal—was to keep Black women from voting. The evidence, to be sure, is circumstantial, but it also strongly suggests that the litigation Graves pursued was animated by a commitment to the racial hierarchy and its preservation. At the time of her lawsuit, newspapers statewide were reporting that Black women were registering to vote in significant numbers. Indeed, it was said that voter registration among Black women was outpacing that of white women, and that their numbers threatened to be sufficiently large to tip upcoming elections to the Republicans.<sup>51</sup> *The Daily Mountain Eagle*, for instance, shared a letter saying that Black women were registering to "show[] their appreciation" to "the Republicans

46. See *Graves v. Eubank*, 87 So. 587 (Ala. 1921) (noting defendant's argument that the new statute had yet to go into effect and that even if it had, the state legislature lacked power to alter the state constitution which imposed the tax only on men; and that the Nineteenth Amendment had not altered state law).

47. See *Graves v. Eubank*, 87 So. 587, 589 (Ala. 1921) (stating that Court's holding does not "intimate that any vote heretofore cast in the November election or any other election held prior to the 1st day of February, 1921, is invalid when cast by those who acquired the right to vote by virtue of the Nineteenth Amendment"); see also *id.* at 589–90 (McClellan, J., dissenting) (stating that "the women of Alabama . . . enfranchised as the result of the ratification of the Nineteenth (Suffrage) Amendment . . . are not required, as a condition to qualification to vote in this state, to pay a poll tax between October 1, 1920, and February 1, 1921"); *To the Citizens of Elmore County*, WEEKLY HERALD (Wetumpka, Alabama), Oct. 21, 1920, at 1 (message from G.H. Howar urging white women to vote and advising they need not pay the poll tax to do so).

48. See *supra* note 20.

49. See Katz, *supra* note 11, at 27–29.

50. See *Montgomery Women Form Organization*, MONTGOMERY ADVERTISER, Nov. 1, 1921, at 3 (noting this agenda and the election of Mrs. E.M. Graves as chairman of local congressional district of the National Women's Party). See also *supra* note 20.

51. See *Interesting Letter From Walker County Boy*, DAILY MOUNTAIN EAGLE, Oct. 20, 1920, at 6 (noting "negro women . . . are crowding the registrar's office in every city and town . . . saying that the Republicans freed their grandfathers and are now showing their appreciation"); *Go and Register Right Now, All Women Are Urged to Register Without Delay, It Is Important*, UNION SPRINGS HERALD, Oct. 21, 1920, at 1 (noting concern that the Nineteenth Amendment would "plac[e] the ballot in the hands of negro women indiscriminately" and reporting "negro women being registered in large numbers" that exceeded registrations by white women); *To the Citizens of Elmore County*, *supra* note 47 (detailing a

[who] freed their grandfathers.”<sup>52</sup> *The Union Springs Herald* added that “the word is being sent forth from all quarters to the negro women to register. Their pastors are advising it. They are accepting the advice, too.”<sup>53</sup> White women, it was urged, needed to register “without delay” and vote “to successfully offset this apparent menace.”<sup>54</sup>

Mary Lou Graves was no doubt receptive to this message. She was a long-standing member of the Sophia Bibb Chapter of United Daughters of the Confederacy (UDC). The Chapter was founded in 1896 to promote the UDC’s mission of memorializing the Confederacy. In 1900, it funded the placement of a six-pointed brass star on the steps of Alabama’s Capitol building to mark the spot where Jefferson Davis stood when inaugurated as president of the Confederate States of America.<sup>55</sup> Thereafter, Sophia Bibb members engaged in a variety of projects, including providing assistance to needy Confederate veterans, helping to fund the Jefferson Faulkner Soldiers’ Home, decorating Confederate graves, and supporting a number of UDC’s memorial projects. Mary Lou served as the chapter’s recording secretary from 1905 to 1907,<sup>56</sup> and continued thereafter to play notable roles in numerous chapter events, helping to organize various parties, dances, and other fundraisers.<sup>57</sup>

Mary Lou’s husband, Edgar Marshall Graves, was a furniture salesman in Montgomery and amateur anthropologist prone to looting Native American burial sites. He periodically donated relics that he “found” or “secured” during “exploration work into Indian mounds and graves,” and gave regular public lectures on

report from G.H. Howar stating “You have noticed that in some Southern States negro women are registering in greater number than white women”).

52. *Interesting Letter*, *supra* note 51 (noting “negro women . . . are saying that the Republicans freed their grandfathers and are now showing their appreciation”).

53. *Go and Register Right Now*, *supra* note 51.

54. *Id.*; see also *To the Citizens of Elmore County*, *supra* note 51 (urging white women to register and vote, noting that “[w]e must purify our politics”); *Interesting Letter*, *supra* note 51 (noting “it is going to take every intelligent white women’s vote to overcome these ignorant, thoughtless negro women . . .”).

55. See KIRKPATRICK ET. AL., HISTORY OF THE SOPHIE BIBB CHAPTER, DAUGHTERS OF THE CONFEDERACY 4, 5–6, available at <https://www.kyhistory.com/digital/collection/RB/id/3056> [<https://perma.cc/3VMT-RHC6>].

56. See *id.* at 15 (listing Mrs. E.M. Graves as recording secretary, 1905–1907).

57. See *Sophia Bibb Birthday Party*, MONTGOMERY ADVERTISER, May 8, 1913, at 6 (listing Mrs. E. M. Graves’s participation in 17th anniversary party for the chapter, an event that “was a success in every particular and was greatly enjoyed.”); *Committees From Sophia Bibb Chapter*, MONTGOMERY TIMES, Oct. 22, 1907, at 5 (noting that “Confederate colors will be used in decorations” for chapter booth at the upcoming fair, and that Mrs. E.M. Graves would be among those serving lunch); *Dance for U.D.C. Benefit*, MONTGOMERY ADVERTISER, June 13, 1907, at 9 (noting role of Mrs. E.M. Graves in dance at Pickett Springs that raised “good sum . . . to add to the [chapter’s] treasury”); *Notice Sophie Bibb Chapter, U.D.C.*, MONTGOMERY ADVERTISER, Jan. 1, 1907, at 9 (noting scheduled meeting, with Mrs. E. M. Graves as secretary); *Sophia Bibb Chapter*, MONTGOMERY TIMES, Apr. 30, 1906, at 7 (noting chapter meeting and listing Mrs. E.M. Graves as Secretary); see also *Hostesses Announced for Sophia Bibb Chapter*, MONTGOMERY ADVERTISER, May 10, 1931, at 20 (listing Mrs. E.M. Graves as hostess at event to be held at the Jefferson Davis Hotel); *Benefit Bridge at Hotel is Planned*, MONTGOMERY ADVERTISER, Oct. 8, 1930, at 3 (listing Mrs. E.M. Graves’s participation in planning for an event at Jefferson Davis Hotel).

this work. In 1921, the *Troy Messenger* noted one such lecture, observing that Edgar “has something like 15,000 bead and shell specimens, taken from Indian burial places” and that he personally had “taken out a great many Indian skeletons and made special studies of the skeletons and the objects found with them.”<sup>58</sup>

Apart from this “hobby,” Edgar found time to lead an initiative to connect white Montgomery families with “white domestic help.” Back in 1906, he started and maintained a registry at his Dexter Avenue furniture store for families to place requests for such workers and for eligible workers to indicate their interest in providing this service. The endeavor, however, proved unsuccessful. While Edgar gathered multiple entries from families willing to pay for white help, he reported being unable to find “a single applicant for this kind of employment.”<sup>59</sup> The mismatch led Edgar to dispense with the registry, concluding “that white domestic servants will have to be imported from Sweden and elsewhere.”<sup>60</sup> Mary Lou no doubt supported the registry endeavor, as she was active at the time in the Home Mission Society of the Court Street Methodist Church, which itself had endorsed the initiative.<sup>61</sup> Indeed, Mary Lou and Edgar Graves long retained an apparent fascination with white household employees. Edgar was reportedly fond of recounting the time Mary Lou mistook their new neighbor for a hired worker and suggested the new family “must be quite prosperous; they have a white yard man.”<sup>62</sup>

Mary Lou Graves’s lawsuit, moreover, looks like a test case, designed to get the male-only poll tax question to the state supreme court in short order. A.H. Eubank may have cooperated and denied Graves’s payment with this in mind. His wife Georgia was a fellow member of the UDC’s Sophia Bibb Chapter and

58. See *Interesting Program By Anthropological Society*, TROY MESSENGER, June 29, 1921, at 1; see also *Many Interests at Museum are Reported*, MONTGOMERY ADVERTISER, Mar. 19, 1933, at 15 (noting that Graves recently provided “two pearls” to the museum’s “Indian room” that he had “found . . . in a burial in a cemetery at Taskagi in Elmore County”); *Two Unique Indian Relics are Unearthed*, GREENVILLE ADVOCATE, Apr. 28, 1922, at 1 (noting “two very valuable relics . . . [Graves] secured in his exploration work into Indian mounds and graves” including he found “in Lowndes county in an Indian graveyard . . . beside an urn in which there was deposited the remain of an Indian baby”); see also C.M. Stanley, *An Ardent Explorer of Indian Villages*, MONTGOMERY ADVERTISER, Sept. 12, 1948, at 3 (remembrance noting “[w]e shall not soon see a more ardent searcher for Indian relics than was Edgar M. Graves”).

59. *Many Want White Help But Servants Are Shy*, MONTGOMERY TIMES, Aug. 22, 1906, at 1.

60. *Id.*

61. See *Court Street Mission Society*, MONTGOMERY ADVERTISER Apr. 12, 1908, at 8 (listing Mrs. E. M. Graves as recording secretary); *To Visit Tuberculosis Exhibit*, MONTGOMERY ADVERTISER, Apr. 30, 1908, at 9 (listing Mrs. E.M. Graves as secretary); *Social Affairs, Home Mission Society*, MONTGOMERY ADVERTISER, Mar. 14, 1905, at 9 (listing Mrs. E.M. Graves as committee member); see also *Many Want White Help*, *supra* note 59 (noting efforts by Home Mission Boards in city to secure employment for white domestic help).

62. See C.M. Stanley, *An Ardent Explorer of Indian Villages*, MONTGOMERY ADVERTISER, Sept. 12, 1948, at 3 (neighbor’s remembrance written after Edgar’s death notes that one of Edgar’s “favorite stories had to do with the occasion when I became his neighbor. When Mrs. Graves saw me in work clothes digging around the yard she remarked to Mr. Graves: ‘Our new neighbors must be quite prosperous; they have a white yard man.’”)

joined Mary Lou Graves at various chapter functions.<sup>63</sup> Trial Judge (and future federal judge) Leon McCord may have been similarly motivated when he upheld Eubank's decision so as to propel the case upward fast. McCord would elsewhere explicitly endorse "the supremacy of the white race."<sup>64</sup> Most notably, Graves's attorney was future Alabama Governor David Bibb Graves, possibly a distant relation who happened also to head the local chapter of the Ku Klux Klan.<sup>65</sup> Bibb Graves's wife Dixie was a fellow member and office-holder in the Sophia Bibb Chapter, whom Bibb Graves would later appoint to fill Hugo Black's Senate seat.<sup>66</sup>

In *Graves v. Eubank*, the Alabama Supreme Court provided the ruling Graves sought, holding that Alabama needed to employ a gender-neutral poll tax, or none at all. The Court might have ruled that the recent poll tax legislation independently mandated this result, but opinions differed as to whether that statutory change had gone into effect at the time Graves attempted to pay the tax, as well as to whether the legislature was empowered to extend a requirement the state constitution had limited to men.<sup>67</sup> Rather than rest its holding on these issues, the Court instead relied on the Nineteenth Amendment, and found within it the broad mandate that "a burden cannot be placed upon one sex that is not put upon the other, nor can a privilege, benefit, or exemption be given one to the exclusion of the other."<sup>68</sup> Reading the Amendment to "place[] all women . . . upon the same footing with men," *Graves* deemed the constitutional prohibition applicable both to "conditions precedent to voting" and the state's power to tax.<sup>69</sup>

So holding meant women in Alabama would need to satisfy a pre-condition to voting that had been crafted explicitly to disenfranchise Black voters. Reading the Nineteenth Amendment to require this result all but guaranteed that many white women would pay to exercise the franchise while most Black women would remain financially unable to vote. The Alabama Supreme Court no doubt needed little prodding to see or embrace this outcome. What is more, the commitment, voiced time and again, that the Nineteenth Amendment would bolster the racial hierarchy validated any such pre-existing inclination to restrict participation by Black voters. It provided the Court both a license and a road-map to deploy the language of gender equality to service white supremacy.

63. See, e.g., *Committees From Sophia Bibb Chapter*, *supra* note 57 (listing Mrs. A.H. Eubank among those scheduled to serve lunch at fair); KIRKPATRICK ET AL., *supra* note 55 (listing Mrs. A.H. Eubank as a member).

64. See, e.g., *Rural Letter Carrier Guests of the Advertisers*, MONTGOMERY ADVERTISER, Sept. 6, 1921, at 3 (reporting on Judge McCord's speech praising the Montgomery Advertiser as "the bulwark of the South—a big, stalwart newspaper that stands for the supremacy of the white race").

65. See, e.g., MICHAEL NEWTON, WHITE ROBES AND BURNING CROSSES: A HISTORY OF THE KU KLUX KLAN FROM 1866 (2016); GLENN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915–1949, at 66 (1999).

66. NEWTON, *supra* note 65, at 82; KIRKPATRICK ET AL., *supra* note 55 (listing Mrs. Bibb Graves as holding multiple offices).

67. *Graves v. Eubank*, 87 So. 587, 589 (1921); *id.* at 589–92 (McClellan, J., dissenting).

68. *Id.* at 175.

69. *Id.*

## II. MAINTAINING GEORGIA'S GENDER HIERARCHY

Sixteen years after *Graves*, the Supreme Court of the United States found no constitutional obstacle to a poll tax regime that imposed different requirements on men and women. *Breedlove v. Suttles* flatly rejected *Graves*'s holding that the Nineteenth Amendment barred a gender-specific poll tax, and, along the way, dismissed as “fanciful” the suggestion that the Amendment barred Georgia from imposing higher obligations on men than on women.<sup>70</sup> Still, closer examination shows that *Breedlove*'s departure from *Graves* was more limited than it might initially appear. In contrast to the Alabama poll tax at issue in *Graves*, the Court in *Breedlove* did not view Georgia's gender-specific poll as a threat to the racial order. Indeed, the Court may have thought that reading the Amendment to prohibit such a tax threatened to destabilize the racial hierarchy.<sup>71</sup> As important, the Court in *Breedlove* understood Georgia's gender-specific poll tax to bolster the traditional family order and the gender hierarchy it embodied. This belief fueled *Breedlove*'s holding that such a tax was permissible under both the Nineteenth Amendment and the Constitution more generally.<sup>72</sup> In short, *Breedlove*'s seemingly narrow reading of the Nineteenth Amendment helped preserve existing racial and gender hierarchies, and, in this sense, aligned with *Graves*'s more expansive reading of the Amendment.

The poll tax regime challenged in *Breedlove v. Suttles* employed two gender-specific distinctions. First, Georgia law levied a poll tax of one dollar “upon every inhabitant of the State between the ages of 21 and 60 years” but stipulated that the tax “shall not be demanded of . . . female inhabitants of the State who do not register for voting.”<sup>73</sup> Second, Georgia limited the poll tax liability of women who chose to register to vote to the tax assessment for that specific tax year, even though it imposed a cumulative requirement on men to pay all unpaid poll taxes due from the time they first became eligible to vote to the date they registered to vote.<sup>74</sup>

It was the latter requirement that Nolen R. Breedlove challenged as a violation of the Nineteenth Amendment.<sup>75</sup> On March 16, 1936, Breedlove presented

70. See *Breedlove v. Suttles*, 302 U.S. 277, 283–84 (1937).

71. See *infra* notes 99–106 and accompanying text.

72. See *infra* notes 91–98 and accompanying text.

73. See *Breedlove*, 302 U.S. at 279–80; GA. CODE § 92–108 (Park & Strozier 1935) (levying “upon every inhabitant of the State between the ages of 21 and 60 years . . . a poll tax of one dollar . . . Provided, that this tax shall not be demanded of . . . female inhabitants of the State who do not register for voting.”).

74. See *Breedlove*, 302 U.S. at 282 (describing Georgia law that required women registering to vote to pay only the tax for the current year and not taxes for previous years); see also *The Poll Tax Decision*, SAVANNAH MORNING NEWS, Dec. 8, 1937, at 6 (noting that “women were required to pay the poll tax only for the year in which they desired to vote, while men were required to pay all accumulated poll tax . . . does seem at first glance to be unfair”); *Hawthorne v. Turkey Creek Sch. Dist.*, 134 S.E. 103, 107 (Ga. 1926) (finding that “females who register at any time are not required to pay poll tax for the years prior to such registration”).

75. Breedlove's lawsuit challenged the poll tax on multiple grounds. See Appellant's Brief at \*10–16, *Breedlove v. Suttles*, 302 U.S. 277 (1937) (arguing that the use of a poll tax as a prerequisite to

himself at the voter registration window at the Fulton County courthouse demanding that he “be privileged to the take the oath” Georgia law required of registrants, but with “the poll tax provision eliminated therefrom.”<sup>76</sup> As a “white male citizen 28 years of age,” Breedlove insisted he was qualified to register and vote.<sup>77</sup> While he had never paid the poll tax during the years that he had been liable for it, Breedlove claimed that Georgia could not constitutionally demand the cumulative poll tax payment it required from him as a precondition to register and vote. Fulton County tax collector T.E. Suttles disagreed, insisting that Breedlove needed to pay the eight dollars he owed in cumulative taxes before he could register. Breedlove challenged that decision, noting, *inter alia*, that had he been a woman, a \$1.00 payment would have sufficed.<sup>78</sup> His lawsuit charged that Georgia’s poll tax regime “does precisely that very thing” the Nineteenth Amendment prohibits: “It limits the right of male citizens, without imposing the same limitation upon females.” Invoking *Graves v. Eubank*, Breedlove described the Georgia tax as a “discriminatory prerequisite to registration” that constituted “an abridgement of the right to vote within the meaning of the [Nineteenth A]mendment.”<sup>79</sup>

Breedlove’s lawsuit did not separately challenge the poll tax exemption Georgia provided for women who declined to register. But that exemption, too, was vulnerable under the arguments Breedlove raised and *Graves v. Eubank* appeared to endorse. Making women liable for the tax only if they registered to vote plainly discouraged them from registering.<sup>80</sup> The exemption, moreover,

voting infringed the privileges and immunities of citizens, Georgia’s exemption of men over sixty and women who did not register constituted a denial of equal treatment, and the cumulative tax Georgia assessed only from men violated the Nineteenth Amendment); *see also* KERBER, *supra* note 36, at 119 (discussing the ACLU’s involvement in the case); Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 73, 74 n.49 (2009) (providing background on the case).

76. *See Breedlove*, 188 S.E. 140 (1936) (noting Breedlove’s refusal to pay the cumulative tax and to attest, as Georgia law required, “that I have paid all poll-taxes which I have had an opportunity of paying agreeably to law”); Nolen R. Breedlove, Exhibit “B” to Petition (Mar. 16, 1936), <https://perma.cc/Y3KX-P6AF> (noting Breedlove’s demand to take the oath without attesting to paying the tax).

77. *Breedlove*, 302 U.S. at 280.

78. *See Breedlove*, 188 S.E. 140 (1936); Exhibit “B” to Petition, *supra* note 76. Cf. KERBER, *supra* note 36, at 119 (reporting that Breedlove owed \$13.50); Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women’s Poll Tax Repeal Movement After the Nineteenth Amendment*, 76 COLUM. J. GENDER & L. 185, 191 (1998) (same).

79. Appellant’s Brief at \*7, \*9–10, *Breedlove v. Suttles*, 302 U.S. 277 (1937) (No. 9); *see also Hawthorne*, 134 S.E. at 107 (upholding the legitimacy of votes cast by women voters without paying the back taxes required of men).

80. *See* Rogers M. Smith, “One United People”: *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 280 (1989) (“The law obviously rewarded women for not voting and gave husbands an incentive to discourage their wives’ political interests.”); Podolefsky, *supra* note 78, at 195 (stating that “the law in effect encouraged women to opt out of civic duties”); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 106 (1994) (highlighting that “Georgia provided an economic incentive for women not to vote” and noting “the possibility that giving the husband an economic incentive to discourage his wife from voting might foreclose her access to the ballot”); KERBER, *supra* note 36, at 119 (“Georgia effectively discouraged white women from voting by providing that any

meant that voter registration was a liability-triggering event for women but not for men and, in this sense, established a gender-specific condition precedent to voting. This facet of Georgia's poll tax regime thus seemed to infringe the Nineteenth Amendment, at least under analysis of the sort facially employed in *Graves*.<sup>81</sup>

In a curt but sweeping ruling, the Supreme Court of the United States disagreed.<sup>82</sup> Dispensing both with Breedlove's argument and any Nineteenth Amendment objection women in Georgia might have raised, Justice Butler's unanimous opinion dismissed as "fanciful" the claim that the Nineteenth Amendment barred Georgia from imposing higher poll tax obligations on men and women. The opinion posited that the Amendment's "purpose" was "not to regulate the levy or collection of taxes,"<sup>83</sup> that the payment of poll taxes as a prerequisite to voting was a "familiar and reasonable regulation long enforced in many states," and that the tax as structured "reasonably may be deemed essential to that form of levy."<sup>84</sup>

As others have observed, this explanation was notably thin.<sup>85</sup> The opinion cited the Amendment's "purpose," but offered no discussion of its text or history, and thus said nothing to support the contention that the Amendment was not meant to reach use of a gender-specific tax as a prerequisite to voting.<sup>86</sup> Nor did the opinion explain why the fact the poll tax was "familiar" and "long enforced" should matter for purposes of the Nineteenth Amendment. After all, the Amendment eliminated the "familiar" and "long enforced" practice of limiting the electorate to

woman who did not choose to register to vote did not have to pay the poll tax," and thereby "encouraged white women—and their husbands—to see voting as an expensive extravagance . . ."); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1040 (1984) (noting that the Georgia statute "alleviated the tax burden by discouraging women from participating in the political process). *But cf.* Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 539 (2016) (stating that the Georgia law "operated equally to deny both nonpaying men's and nonpaying women's rights to vote" and that the poll tax at issue was not one that "in some way impacts voters of one sex differently from voters of another sex").

81. See *supra* notes 25–29 and accompanying text.

82. *Breedlove v. Suttles*, 302 U.S. 277 (1937). Both a state trial court and the Georgia Supreme Court had done so as well. See *Breedlove v. Suttles*, 188 S.E. 140 (1936).

83. *Breedlove*, 302 U.S. at 283 (to adopt Breedlove's argument "would make the amendment a limitation upon the power to tax").

84. *Id.* at 283–84.

85. See, e.g., Hasen & Litman, *supra* note 18, at 35–37; Ackerman & Nou, *supra* note 75 (calling *Breedlove* a "cursory opinion"); Kolbert, *supra* note 80, at 539 (stating that "*Breedlove* . . . offers little in the way of interpretive guidance").

86. On this point, *Breedlove* offered the citations "Cf. *Minor v. Happersett*, *supra*, 21 Wall. 162, 173 . . . ; *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 173–174." Neither decision, however, addressed the Nineteenth Amendment or a gender-specific prerequisite to voting. The cited passage from *Minor* observed that states had long imposed property restrictions on the right to vote. The cited pages from *Bowers* noted that the Sixteenth Amendment did not "bring any new subject within the taxing power" and instead was meant simply to clarify that Congress's existing power to tax income included income "from whatever source derived." *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 173–74 (1926).

men.<sup>87</sup> So too, the opinion never explained why making a poll tax payment a prerequisite for voting was “essential” to the viability of the tax, much less why, even if it was, such necessity should matter for purposes of the Nineteenth Amendment. True, Georgia, like Alabama and other states using the poll tax, enforced it solely by refusing to register those who failed to pay it.<sup>88</sup> This enforcement mechanism, however, was hardly the only way to secure payment of the tax. In fact, as the Court no doubt knew,<sup>89</sup> making payment of the tax a prerequisite to voting was a particularly ineffective way to collect revenue. It was, however, a very reliable way to block voters—specifically, Black voters—from registering, and was long used for this reason.<sup>90</sup>

While *Breedlove*’s Nineteenth Amendment analysis was cursory and incomplete, it nevertheless comported with the repeated promise that the Amendment would preserve existing gender and racial hierarchies.<sup>91</sup> Most directly, the opinion, while sparse, still made clear that the Court thought Georgia’s gender-specific poll tax bolstered traditional gender roles within the family. Justice Butler observed that Georgia’s decision to “exempt”<sup>92</sup> women from the poll tax reflected the “special considerations to which they are naturally entitled.” Specifically, it eased “burdens necessarily borne by [women] for the preservation of the race.”<sup>93</sup> He might have said more about the nature of these “burdens,” the role of women played in “preserv[ing] . . . the race,” and, critically, the relevance of Georgia’s gender-specific tax to any of this. No doubt, though, the animating thought was that women “preserv[ed] . . . the race”—used here to mean the human race rather than a socially constructed racial group<sup>94</sup>—by becoming mothers and raising their children. Georgia’s differential poll tax may have been thought to ease the

87. *Breedlove*, 302 U.S. at 283–84.

88. See *supra* note 39 and accompanying text.

89. See, e.g., *Guinn v. United States*, 238 U.S. 347 (1915); *Giles v. Harris*, 189 U.S. 475 (1903); Brief for Petitioner at 10, *Giles v. Harris*, 189 U.S. 475 (1903) (No. 493) (noting that one of the main purposes for the 1901 Alabama Constitution Conventional was to figure out ways to disenfranchise Black voters without losing any white male voters); KATHARINE DUPRE LUMPKIN, *THE SOUTH IN PROGRESS* 216 (1940) (“No merit lies in the argument often put forward by the poll taxers that the law is needed to bring in school revenue.”).

90. See Tolson, *supra* note 39, at 65 n.12 (observing that “many states with poll taxes refused to set up any penalty for the failure to pay the tax, an indication that the states wanted to disenfranchise those who could not pay rather than raise revenue”); Cf. KOUSSER, *supra* note 7, at 63 (contrasting poll taxes used prior to the Civil War as devices that expanded the white male electorate beyond property holders, with those adopted in the late nineteenth century explicitly to disenfranchise Black men and poor white men).

91. See Katz, *supra* note 11, at 14–26.

92. *Breedlove*, 302 U.S. at 282. As noted, Georgia did not fully “exempt” women from the poll tax, but instead limited liability to those women who chose to register to vote, and then exempted those who did from the cumulative requirement. See *supra* note 74 and accompanying text.

93. *Breedlove*, 302 U.S. at 282. The opinion also cites an additional burden imposed on men as fathers, noting that Georgia used poll taxes to support education, and that “it is the father’s duty to provide for education of the children.” *Id.*

94. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396 (1937); *Muller v. Oregon*, 208 U.S. 412, 421 (1908); Brief for Defendant at 48, 53, 61, 62, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107). But see Hasen & Litman, *supra* note 18, at 36 n.56 (suggesting that *Breedlove*’s reference to “the race”

“burdens” women bear in this regard by tying women’s poll tax liability to voter registration. Doing so discouraged women from registering which, in turn, made them less likely to be distracted by the political causes they might pursue as voters and thus more likely to focus on familial obligations.<sup>95</sup> So understood, Georgia’s poll tax regime seemingly fell well within the capacious state power—just recently reaffirmed by the Court—to protect women’s ability to “perform[] . . . maternal functions” and to treat women as “object[s] of public interest and care in order to preserve the strength and vigor of the race.”<sup>96</sup>

*Breedlove* suggested further that exempting nonvoting women from the poll tax meaningfully enhanced the power of men within the family.<sup>97</sup> On this view, Georgia’s differential poll tax aided men, who, as the legal heads of the household, bore ultimate responsibility for paying any taxes for which household members were liable. Justice Butler noted this explicitly: “The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him,” such that “subject[ing] her to the levy would be to add to his burden.”<sup>98</sup> Justice Butler did not have to say more. Exempting nonvoting women from the poll tax discouraged women from voting and it also incentivized men to block their wives from registering so as to limit the household’s tax burden.

The belief that Georgia’s poll tax bolstered the traditional family order confirmed and, in my view, fueled *Breedlove*’s ruling that the Nineteenth Amendment was inapplicable. Simply put, *Breedlove* understood the Amendment in light of the commitments that shaped it. Time and again, advocates of the Amendment promised that including women in the electorate would not disrupt the traditional family.<sup>99</sup> *Breedlove* accordingly rejected a reading of the Amendment that would have prohibited Georgia from protecting and preserving precisely what advocates of the Amendment said it would protect and preserve.

reflects implicit racism by the Court in promoting white women’s fertility); Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 UCLA WOMEN’S L.J. 201, 246–47 n.188 (1997).

95. See Smith, *supra* note 80, at 280–81 (“Butler left unclear just how the tax made racial preservation more difficult” but suggesting he “may well have had in mind the ‘burdens’ of political causes that women might have pursued more readily in the absence of the law.”). See also *supra* note 80 and accompanying text.

96. See *West Coast Hotel*, 300 U.S. at 394 (quoting *Muller v. Oregon*, 208 U.S. 412 (1908)). See also *Breedlove*, 302 U.S. at 282 (citing *Muller v. Oregon*). See also *infra* notes 26–28 and accompanying text (discussing *Adkins*).

97. *Breedlove*, 302 U.S. at 282. The opinion also cited an additional burden imposed on men as fathers, noting that Georgia used poll taxes to support education, and that “it is the father’s duty to provide for education of the children.” *Id.*

98. *Breedlove*, 302 U.S. at 282. See also KERBER, *supra* note 36, at 119 (noting that “where married men controlled the earnings of their wives, husbands understood themselves to have the burden of paying their wives’ poll taxes.”); Podolefsky, *supra* note 78, at 847 (noting that this argument “reinforced the position of the man as controller of family wealth.”).

99. See Katz, *supra* note 11, at 14–20. Cf. GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 53 (2006) (stating *Breedlove* shows that “[t]he Nineteenth Amendment did not displace a constitutional order in which . . . women’s domestic roles shaped the terms of their civic membership”).

*Breedlove* also aligned with a second promise, long pressed by advocates of the Nineteenth Amendment, that enfranchising women would serve to bolster white supremacy.<sup>100</sup> True, the Court in *Breedlove* did not advance this interest explicitly, and, indeed, said little about race at all, apart from identifying *Breedlove* as a “white, male citizen.”<sup>101</sup> And yet, *Breedlove*, like *Graves v. Eubank* before it, was keenly aware of the relationship between the poll tax and the racial order when it evaluated the Nineteenth Amendment challenge the case presented. *Breedlove*, unlike *Graves*, rejected that challenge, most likely because the racial hierarchy had become less dependent on the poll tax in the years since the Alabama ruling. In fact, the *Breedlove* Court may have thought reading the Amendment to bar Georgia’s gender-specific poll tax posed a greater threat to white supremacy than reading it to allow the tax. In this sense, *Breedlove*’s departure from *Graves* is less dramatic than its formal holding might suggest. That is, *Breedlove* rejected *Graves*’s legal holding but not its animating commitment.

*Graves* was decided in the wake of the Nineteenth Amendment’s ratification, when Alabama law, as it was understood in the case,<sup>102</sup> assessed a poll tax only from men. In that context, reading the Nineteenth Amendment in a way that would extend Alabama’s poll tax to women helped prevent an influx of Black women into the electorate.<sup>103</sup> In 1937, by contrast, equalizing Georgia’s poll tax burden was no longer seen as necessary to keep Black women from voting. Without doubt, Georgia’s poll tax, like Alabama’s, had been designed and long used as a device to disenfranchise Black voters.<sup>104</sup> But Georgia’s gender-specific tax provision, which demanded a smaller payment from women than from men, was sufficient to keep most Black women out of the electorate.<sup>105</sup> And were the tax to fall short in this regard, Georgia’s other electoral restrictions—from the white primary to a literacy and understanding test—guaranteed that Black disenfranchisement would remain fully entrenched.<sup>106</sup> Nearby North Carolina proved

100. See Katz, *supra* note 11, at 3, 20–26.

101. *Breedlove*, 302 U.S. at 280 (describing the plaintiff as a “white male citizen 28 years old”).

102. See *supra* note 67 accompanying text.

103. See *supra* note 69 and accompanying text.

104. See Laughlin McDonald et al., *Georgia*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, at 68 (Chandler Davidson & Bernard Grossman eds., 1994); KOUSSER, *supra* note 7, at 210; Ralph Wardlaw, *Negro Suffrage in Georgia, 1867–1930*, BULL. U. GA., Sept. 1932, at 44–45, 58.

105. See, e.g., Podolefsky, *supra* note 78, at 851 (noting that poll taxes had more of an impact on Black women than white women given that white women “averaged \$10 in Georgia and black women averaged \$6 a week.”); McDonald et al., *supra* note 104, at 68; Wardlaw, *supra* note 104, at 81 (discussing Black voter participation in Clarke County, Georgia between 1916 and 1928, and finding “a yearly average of only 121 negroes voting in the county for these elections, while in 1920 there were 6,212 negroes, who were twenty-one years of age or over,” and further that “[t]he negro women do not participate in elections in Clarke County”).

106. See generally McDonald, *supra* note 104; Sarah Wilkerson-Freeman, *The Second Battle for Woman Suffrage: Alabama White Women, the Poll Tax, and V.O. Key’s Master Narrative of Southern Politics*, 68 J. S. HIST. 333, 342, 360 (2002) (noting sentiment that “white supremacy, protected by other racially discriminatory disfranchising devices, especially literacy tests, was still secure in the non-poll tax southern states” and that mid-century poll tax reform “did not have a dramatic impact on black

the point, as it fully exempted women from its poll tax, but still kept Black voters out of the electorate as effectively as did Georgia.<sup>107</sup>

By the time *Breedlove* was decided, moreover, the poll tax itself was falling out of favor. Opposition to the tax was mounting as overwhelming evidence documented its exclusionary impact on white voters, and white women in particular.<sup>108</sup> Louisiana dropped its poll tax in 1932, Florida did so months before *Breedlove* was decided, and Georgia would scrap its version in 1945. As was expected, and indeed, intended, eliminating the tax significantly increased turnout among white voters without notably altering participation by Black voters.<sup>109</sup> To the Court in *Breedlove*, these political developments likely suggested that a constitutional ruling striking down Georgia's gender-specific tax was not necessary to protect white voters, and that Georgia's racial order remained secure, even absent a gender-neutral poll tax.

Fueling this sentiment further was the prospect that finding a Nineteenth Amendment violation in *Breedlove* might, itself, destabilize the racial hierarchy.

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voters at the time"); Ackerman & Nou, *supra* note 75, at 73 (stating that “[w]hile abolition of the tax helped break down the class barrier, its impact on blacks was less dramatic” due to discriminatory literacy tests and “violent retribution” directed at Black voters).

107. See, e.g., Wilkerson-Freeman, *supra* note 106, at 342; William R. Keech & Michael P. Sstrom, *North Carolina, in QUIET REVOLUTION IN THE SOUTH*, *supra* note 103, at 157–58.

108. See, e.g., *Pirtle v. Brown*, 118 F.2d 218, 220 (6th Cir. 1941) (noting the impact of a poll tax on “poor people,” and that “the property taxpayer is not permitted to pay his tax without paying his poll tax at the same time and by the same section every tax collector who permits a violation thereof is held liable for all poll taxes which thus become delinquent”); Katharine Cater, *Women in Alabama*, ALA. COLL. BULL., July 1951, at 9 (attributing low turnout among women voters to Alabama’s poll tax, which “very clearly discriminates against women” by exempting military veterans, a class that “includes many men . . . [while] leav[ing] most women with a tax to pay”); Minnie L. Steckel, *The Alabama Business Woman As Citizen*, 30 ALA. COLL. BULL. 24 (July 1937) (observing that the poll tax “limit[s] women, more than men,” and that when money is limited in a family “mindful of the need for voting, in most cases the poll tax will be paid for the man, but not for the woman”). See also Wilkerson-Freeman, *supra* note 106, at 337–38 (noting that “the relationship between gender and economics meant that the poll tax would disfranchise an even greater portion of southern white women than white men”); OGDEN, *supra* note 6, at 232 (noting the view among women that the poll tax “fell most heavily upon them” due to the veteran exemption); Podolefsky, *supra* note 78, at 850 (arguing that the poll tax was the primary reason women did not vote); John Lackey, *The Poll Tax: Its Impact on Racial Suffrage*, 54 KY. L. J. 423, 427 (1966) (noting the poll tax “disenfranchised poor whites as well as poor Negroes”); LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 58 (highlighting strong white southern support for repealing the poll tax in order to expand the white electorate and “topple entrenched political machine”); Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 433 (2020) (“[D]ebate surrounding the poll tax took up a great deal of political oxygen during the New Deal period, with many more liberal Democrats framing the issue of repeal as a class issue, as opposed to a race-based civil rights issue.”)

109. See, e.g., Wilkerson-Freeman, *supra* note 106, at 340, 342–43 (noting the argument pressed by poll tax opponents that abolishing the tax would expand turnout among white voters and thereby protect white supremacy, and that “[w]hen Louisiana . . . abolished the poll tax (but kept literacy requirements in place), . . . the number of white women registered to vote increased by 123,000”); Podolefsky, *supra* note 78, at 877 (“[R]emoval of the poll tax would help white women and not increase the Black vote.”); DUPRE LUMPKIN, *supra* note 89, at 222 (noting that eliminating the poll tax increased the number of white women who voted, while allowing the continued disenfranchisement of Black women voters due to the other restrictions, such as literacy tests).

If Nolen Breedlove was correct that Georgia's gender-specific poll tax violated the Nineteenth Amendment, other gender-specific voting prerequisites presumably did this as well. *Graves v. Eubank* had so held, making clear its view that the Amendment not only displaced state laws mandating a male-only electorate, but that it also barred States from "placing conditions or burdens upon one [sex] not placed upon the other as a condition precedent to the right to vote."<sup>110</sup> This view, accordingly, invited inquiry into the way these "condition[s] precedent" arise and operate. At a minimum, it raised the question whether the Amendment not only prohibited facial discrimination of the sort at issue in *Breedlove*, but might also outlaw seemingly gender-neutral voting prerequisites adopted for discriminatory reasons or implemented in discriminatory ways.

This point made Breedlove's challenge potentially threatening to the racial order. Little imagination was needed to envision how the specific inquiry it encouraged—regarding voting prerequisites that distinguished "on the basis of sex"—might easily expand to encompass those used "on account of race." After all, insofar as the right to vote protected by the Nineteenth Amendment may be compromised by voting prerequisites that make gender-based distinctions, the right to vote protected by the similarly structured Fifteenth Amendment might be thought infringed by voting preconditions that make distinctions "on account of race."

Breedlove's Nineteenth Amendment claim thus had potentially broad ramifications. Poll taxes—including those, unlike Georgia's, that facially imposed the same obligations on men and women—had long been implemented in ways designed to facilitate payment by white men.<sup>111</sup> Such state-sanctioned assistance might have been expected to survive constitutional scrutiny under the inquiry Breedlove's Nineteenth Amendment claim invited. But other voting prerequisites—most notably, literacy and understanding tests—appeared more vulnerable. Blatant racial discrimination in the administration of such tests was an exceptionally

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110. *Graves v. Eubank*, 87 So. 587, 588 (1921) (emphasis added).

111. See, e.g., Podolefsky, *supra* note 78, at 847–48, 854 (noting that property owners were invited to pay the poll tax when they paid property taxes; the tax was also routinely collected at saloons); OGDEN, *supra* note 6, at 85 (noting practice of "[b]eer and liquor interests" paying customers' poll taxes); V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 591, 597 (1949) (noting that liquor stores and taverns accepted poll tax payments, with some advertising that poll-tax receipts were available for purchase; union officials "either collect[ed] the tax from its members, or loan[ed] them money, and act[ed] as their agent in the payment of the tax"); Lind, *supra* note 80, at 206 ("Moreover, the Court relied on the notion that to extract a poll tax from women was tantamount to burdening their husbands . . ."); cf. *Campbell v. Goode*, 2 S.E.2d 456, 458 (1939) (voiding a state law requiring poll tax payment as a prerequisite to obtaining hunting, fishing, driving and professional licenses violates the "letter, spirit and purpose" of the state constitutional provision barring enforcement of a poll tax "by legal process" unless three years past due).

effective tactic used to disenfranchise Black voters.<sup>112</sup> By 1937, moreover, use of these tests had increased as white political mobilization against the poll tax grew and reliance on the white primary appeared increasingly vulnerable.<sup>113</sup>

Even a relatively narrow ruling scrapping the tax in *Breedlove* threatened to have potentially broad implications. The Court, for instance, might have held that Georgia's facially gender-specific poll tax violated the Nineteenth Amendment and still affirmed state power to rely more generally on gender-neutral poll taxes.<sup>114</sup> Such a ruling, however, would have necessarily required the Court to recognize that Georgia's gender-specific tax infringed the right to vote as protected by that Amendment. That bare recognition, in turn, would have suggested that States infringe the right to vote when they impose "conditions precedent" to voting that differentiate would-be voters based on impermissible categories.<sup>115</sup> As such, striking down Georgia's gender-specific poll tax would have invited claims that racially discriminatory prerequisites to voting similarly infringe the right to vote protected by the Fifteenth Amendment.<sup>116</sup> Unsurprisingly, *Breedlove* opted instead to hold the Nineteenth Amendment wholly inapplicable to the poll tax, thereby rejecting a construction that "would make the amendment a limitation upon the power to tax."<sup>117</sup> Rather than nurture efforts to displace racially discriminatory electoral practices, the *Breedlove* Court made clear, in the case before it, that "by the exaction of payment [of the tax] before registration, the right to vote is neither denied nor abridged on account of sex."<sup>118</sup>

By placing the poll tax outside the reach of the Nineteenth Amendment, *Breedlove* confirmed the long-voiced commitment that the Nineteenth Amendment would not disrupt the existing racial hierarchy.<sup>119</sup> Here, too, Justice Butler's reference to the Amendment's "purpose" was not necessarily alluding to this often-repeated pledge,<sup>120</sup> and yet *Breedlove*'s analysis aligned with the dominant understanding of the Amendment's anticipated effect on this point. Just as *Breedlove* read the Nineteenth Amendment in a manner that the Justices unanimously thought would help preserve the traditional family order, the decision's rejection of that Amendment's application to the poll tax helped maintain white supremacy.

112. See, e.g., DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 106 (1991) (discussing impact of literacy tests "applied by partisan white officials who were bitterly opposed to black suffrage").

113. See, e.g., *Grove v. Townsend*, 295 U.S. 45, 48 (1935) (distinguishing precedent striking down prior versions of the white primary), *overruled* by *Smith v. Allwright*, 321 U.S. 649, 661 (1944) (deeming *Grove*'s distinctions unpersuasive).

114. *Breedlove* had raised separate constitutional challenges that implicated not only Georgia's poll tax but gender-neutral ones as well. See *supra* note 75.

115. See *supra* note 25 and accompanying text.

116. See KEYSSAR, *supra* note 2, at 188–89.

117. *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937).

118. *Id.* at 283–84.

119. See Katz, *supra* note 11; cf. Ritter, *supra* note 28, at 53 (*Breedlove* shows that "the link between voting and civic membership in the American constitutional order was severely attenuated by the rise of Jim Crow and the Court's acquiescence to the rise of racial segregation in the South" (citations omitted)).

120. See Katz, *supra* note 11, at 20–26.

### III. THE NINETEENTH AMENDMENT AND OCCAM'S RAZOR

Disputes over the poll tax continued long after *Breedlove*. In the years that followed, Georgia, Tennessee, and South Carolina scrapped the tax entirely while Alabama and Arkansas tempered theirs.<sup>121</sup> In 1962, Congress approved a constitutional amendment abolishing use of the poll tax in federal elections, which the States ratified in 1964.<sup>122</sup> In 1966, a Supreme Court ruling held unconstitutional residual usage of the tax as a prerequisite to voting in state elections.<sup>123</sup> Throughout, the merits of the poll tax and its impact, including the burdens it imposed on women, were extensively discussed.<sup>124</sup> And yet, during these debates, the Nineteenth Amendment was notable only for its absence. Advocates seeking to displace the poll tax did not invoke the Amendment as support for their cause,<sup>125</sup> even as they pursued other constitutional claims *Breedlove* itself had rejected.<sup>126</sup> Courts and legislatures likewise took no notice of the Amendment as they acted to limit and ultimately abolish its use.<sup>127</sup>

For decades, various scholars have argued that the Nineteenth Amendment should have figured more prominently in debates of this sort. The arguments vary in detail, but in the main both decry and lament the absence of the Amendment in modern disputes over gender equality. This view is critical of the way cases like *Breedlove* deemed the Nineteenth Amendment inapplicable and prefers the sort of analysis set forth in decisions like *Graves*. Supplemented with important work issued on the Amendment's one hundredth anniversary, this now-large body of scholarship emphasizes claims by advocates of women's suffrage said to endorse broad conceptions of gender equality and repudiate the idea that women were adequately represented by their fathers and husbands.<sup>128</sup> The suggestion is that the Amendment was meant to emancipate women from a wide swath of gender-

121. See, e.g., Wilkerson-Freeman, *supra* note 106, at 340–60 (discussing repeal efforts and their mixed success).

122. U.S. Const. amend. XXIV (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”) (ratified Jan. 23, 1964).

123. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (overruling *Breedlove*'s Equal Protection Clause holding “that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”).

124. See *supra* note 104 and accompanying text.

125. Notably, many proponents of poll tax repeal “lifted from the playbook of woman suffragists of an earlier era,” and argued that preservation of the racial hierarchy hinged on freeing southern whites from the “obstacle of the poll tax.” Wilkerson-Freeman, *supra* note 106, at 342–43. As such, they might have invoked the Nineteenth Amendment as supporting their claim.

126. See, e.g., Brief for the Appellants, *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (No. 48) (challenging the poll tax under the First and Fourteenth Amendments).

127. See Wilkerson-Freeman, *supra* note 106, at 340–60.

128. See, e.g., Calabresi & Rickert, *supra* note 28, at 93.

(“Clearly many who contemplated the Nineteenth Amendment understood it to put women on equal constitutional footing with men.”); Siegel, *supra* note 28, at 981 (“Every time woman suffragists invoked American traditions of individualism, ‘self-government,’ and ‘self-representation’ in defense of

based regulations nominally designed to “protect” them. This scholarship accordingly posits that the Nineteenth Amendment was crafted, and is best read, to promote a broadly conceived anti-subordination norm. As such, the Amendment should have not only displaced the male-only electorate, but also undermined other gender-based rules governing voting and, more broadly, things like jury service, employment, and family relations.<sup>129</sup>

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the right to vote . . . they were challenging a centuries-old conception of the household that gave men authority to represent women in public and private law.”).

129. See, e.g., MONOPOLI, *supra* note 29, at 154 (2020) (promoting “a thicker, more robust reading of the Nineteenth Amendment . . . to make substantive gender equality a constitutional reality” in order to vindicate the Amendment’s mission on ratification); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. 450, 450–51 (2020) (promoting “an historical and intersectional understanding of suffrage struggle [that] could change the way courts approach cases concerning the regulation of pregnancy, contraception, sexual violence, and federalism”); Reva B. Siegel, *The Pregnant Citizen, From Suffrage to Present*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 167, 214–15 (2020) (offering synthetic reading of Fourteenth and Nineteenth Amendments to better accommodate pregnancy in the workplace); Hasen & Litman, *supra* note 18, at 27 (promoting a “thick conception of the Nineteenth Amendment”); Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL’Y 235, 252 (2020) (asserting the Nineteenth Amendment can be viewed more expansively as “a crucial means of combatting the social subordination of women to men in the family and in public life” rather than “merely setting forth a decision rule regarding voting”); Tracy A. Thomas, *More than the Vote: The Nineteenth Amendment as a Proxy for Gender Equality*, 15 STAN. J. C.R. & C.L. 349, 354–55 (2020) (claiming the Nineteenth Amendment was “never only about the vote; rather, the vote stood as a shorthand for a complete revolution of the interlocking systems supporting women’s oppression and denying women equal rights”); Elizabeth Katz, “A Woman Stumps Her State”: *Nellie G. Robinson and Women’s Right to Hold Public Office in Ohio*, AKRON L. REV. 314, 356 (2019) (arguing an overly narrow reading of the Nineteenth Amendment has “constrained our ability to imagine and argue for the full panoply of women’s rights and gender equality for which the Amendment could have stood”); Calabresi & Rickert, *supra* note 28, at 67 (arguing that ratification of the Nineteenth Amendment rendered “discrimination on the basis of sex with respect to civil rights” to be “implausible” and “arbitrary and improper[.]”); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1343–44 (2011) (claiming the Nineteenth Amendment embraced early suffragist arguments and overturned the “hollow conception of the political meaning of citizenship” and replaced it with a full system of “actual self-government”); Siegel, *She the People*, *supra* note 28, at 1012 (Nineteenth Amendment has “normative implications for diverse bodies of law,” but that “[s]oon after ratification, the judiciary moved to repress the structural significance of women’s enfranchisement by reading the Nineteenth Amendment as a rule concerning voting that had no normative significance for matters other than the franchise”); Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 786 (2000) (asserting the Nineteenth Amendment extends beyond voting to “forbid[] the state from interfering with women’s political citizenship and full political participation”); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 471, 472–74 (1995) (arguing that the Nineteenth Amendment “extends beyond voting for legislatures to voting in juries, and to voting in legislatures.” Thus, the Nineteenth should be “understood as protecting more generally full rights of political participation” and even to mandate that women have equal civil rights.); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 241–42 (1995) (noting the view that “jury service would flow inexorably from the vote” but that most courts rejected the linkage following the Nineteenth Amendment’s ratification); Lind, *supra* note 80, at 204 (“By 1920 when the Nineteenth Amendment became a reality, it might have been given a broad emancipatory meaning that women were no longer to be subordinated.”); Jennifer K. Brown, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2175–76 (1993) (“[T]he Nineteenth Amendment can and should be recognized as an affirmation of women’s constitutional equality” and “is most appropriately comprehended as a statement about women’s equality beyond the voting booth.”);

These arguments are presented largely—albeit not exclusively<sup>130</sup>—as a restorative project. That is, much of the project seeks to correct what are understood to be fundamental errors in how the Amendment was received, understood, and applied. Put differently, the argument posits that the Nineteenth Amendment was crafted to promote gender equality and anti-subordination norms and should have been so read from the start.<sup>131</sup>

On this view, a decision like *Graves* looks spot on.<sup>132</sup> The Alabama court’s insistence that the Nineteenth Amendment “placed all women . . . upon the same footing with men” suggested the new Amendment embraced a broad equality norm that reached well beyond eliminating the male-only electorate. Sure, the ruling also ensured expanded use of the poll tax, thereby—in intent and effect—bolstering the racial order. But this result might be dismissed as happenstance,

Yudof, *supra* note 28, at 1403 (arguing that the Nineteenth Amendment “symbolically confirms the view” that statutes sorting individuals by sex are “inconsistent” with “one historical understanding of equality under law,” and that “*Adkins* . . . could have provided the starting point for modern fourteenth amendment analysis of sex discrimination”); W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 26, 49 (1970) (arguing that the Nineteenth Amendment should “be interpreted as an emancipation proclamation which extends the guarantees of all three Civil War Amendments to all women” and that it should have established “a new national right not to be discriminated against on the basis of sex in any area”).

130. See, e.g., Amar, *Women and the Constitution*, *supra* note 128, at 471–74; Amar, *Jury Service*, *supra* note 128, at 241–42.

131. See *supra* note 128; see, e.g., Siegel, *Democratization*, *supra* note 129, at 453 (“This history shows that the movement’s long quest for the vote generated wide-ranging conversation about the law reforms that would enable members of the polity to participate in the family, market, and politics as equal citizens.”); Calabresi & Rickert, *supra* note 28, at 86 (“The legislative history of the Nineteenth Amendment reveals important things about its original public meaning in 1920: supporters of the Nineteenth Amendment believed and said that it would make women equal to men under the law.”); Siegel, *She the People*, *supra* note 28, at 951 (stating that “[w]hen Americans finally voted to ratify the Nineteenth Amendment, they were breaking with understandings of the family that had organized public and private law and defined the position of the sexes since the founding of the republic”); *id.* at 953 (stating “when Americans adopted the Nineteenth Amendment, they were breaking with common law traditions that subordinated women to men in the family”); *id.* at 1042 (advocating “drawing on the ratification history of the Nineteenth Amendment much as the Court presently draws on the ratification history of the Fourteenth Amendment”); Hasen & Litman, *supra* note 18, at 33 (stating that “the main purpose of the Amendment was originally and should continue to be read as protective against the subordination of women in U.S. politics”); MONOPOLI, *supra* note 29, at 13 (discussing post-ratification forces that “blunted the potential impact the Nineteenth Amendment might have had on constitutional doctrines like federalism, women’s citizenship, and equality norms”); see also *supra* note 28 and accompanying text.

132. See MONOPOLI, *supra* note 29, at 75–77 (stating that *Graves* held that the Nineteenth Amendment extends beyond voting and viewed the “nexus between voting and the mechanism by which the government condition that right” to be “capacious”); see also Claude Treece, *The ERA and Texas Marital Law*, 54 TEX. L. REV. 590, 614 n.120 (1976) (reading *Graves* to hold that the Nineteenth Amendment “renders” electoral rules “equally applicable to both sexes, and imposes duty on women to pay same poll tax as men”).

unfortunate no doubt, but not something the Nineteenth Amendment, properly construed, directly promoted.<sup>133</sup>

A decision like *Breedlove*, meanwhile, is seen to exemplify the way in which the Amendment has been misread.<sup>134</sup> *Breedlove*, after all, dismissed the Amendment as wholly inapplicable to a gender-specific poll tax that the Court understood to ease both the “burdens necessarily borne by [women] for the preservation of the race” and those experienced by men as household heads.<sup>135</sup> That is, *Breedlove* read the Amendment to allow Georgia to use a gender-specific poll tax to bolster the traditional family order and thus to allow—and foster—precisely what many scholars insist the Amendment was designed to disrupt.

There is, however, a competing account of *Graves* and *Breedlove*, one in which the decisions are more compatible with one another and better aligned with the historical record underlying the Nineteenth Amendment. As I explain in detail elsewhere,<sup>136</sup> an examination of the arguments pressed in support of the Nineteenth Amendment shows that advocates, time and again, disavowed the notion that allowing women into the electorate would be accompanied by radical or even significant societal changes. Particularly during the years closest to the Amendment’s ratification, these advocates insisted that women voters posed no threat to existing gender and racial hierarchies and that, instead, the Amendment would bolster those very hierarchies. To be sure, not everyone who supported the Nineteenth Amendment subscribed to these commitments. These promises nevertheless dominated discussion of the Amendment. Indeed, among advocates, they drowned out any contrary suggestion that the Amendment would disrupt existing social hierarchies.<sup>137</sup> Both ordinary and influential proponents of women’s suffrage promoted these commitments in speeches, essays, and letters. Legislators and other public officials voiced support for them when endorsing the Nineteenth

133. See *infra* note 144 and accompanying text.

134. See, e.g., Reva B. Siegel, *The Pregnant Citizen*, *supra* note 129, at 190 (discussing *Breedlove* and noting that “nearly two decades after the Constitution was amended to give women the right to vote, the Court still understood citizenship through the family and authorized sex discrimination by invoking women’s capacity to bear children as well as the old rules of the common law of marital status”); Lind, *supra* note 80, at 206 (arguing that *Breedlove* depicted “women’s separate and dependent condition . . . as just and natural, in spite of the almost one hundred year fight for women’s emancipation that had led to the enactment of the Nineteenth Amendment”); Cf. Gretchen Ritter, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 53 (2006) (claiming *Breedlove* shows that “[t]he Nineteenth Amendment did not displace a constitutional order in which . . . women’s domestic roles shaped the terms of their civic membership”).

135. *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937) (noting that “[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him,” such that “subject[ing] her to the levy would be to add to his burden”).

136. See Katz, *supra* note 11, at 14–26.

137. See, e.g., Calabresi & Rickert, *supra* note 28, at 91 (suggesting that Senator James E. Vardaman’s speech endorsing “treating women fairly” “should really have stopped there” and not proceeded to call for “the complete[] elimination of the negroes . . . from the politics of America. And I expect the white women of America to help me in that great undertaking.”).

Amendment's proposal and ratification. Newspapers took note of them in their coverage of suffrage meetings and debates.<sup>138</sup>

In light of this history, several improbable assumptions must be deemed credible if *Graves* correctly read the Nineteenth Amendment to embrace a broad principle of gender equality, and *Breedlove* misread the Amendment's intended scope. On this view, *Graves* needed to dismiss as irrelevant repeated promises made by the Amendment's advocates regarding its intended reach, and then go on to conclude that the Amendment was best read to promote precisely what those advocates said it would not. *Graves*, moreover, also needed to think that the Amendment's text, while closely tracking that of the Fifteenth Amendment,<sup>139</sup> was nevertheless best read far more capaciously. Meanwhile, *Breedlove* must be understood to have misconstrued the Amendment even though the Court read it in a manner that aligned both with the commitments its advocates voiced and with governing precedent on the similarly worded Fifteenth Amendment.

It is, of course, possible to read both decisions in this manner. Without doubt, promises about the Nineteenth Amendment's impact were made strategically, with the expectation that they would both defuse opposition to and help gin up support for the Amendment.<sup>140</sup> It is possible, moreover, that these promises were purely strategic. That is, it is possible, albeit unlikely,<sup>141</sup> that advocates promising

138. See Katz, *supra* note 11, at 3.

139. Compare U.S. Const., amend. XV, cl. 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."), with U.S. Const., amend. XIX, cl. 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

140. See, e.g., Mary Martha Thomas, *White and Black Alabama Women during the Progressive Era, 1890–1920*, in STEPPING OUT OF THE SHADOWS 75, 88 (Mary Martha Thomas ed., 1995) (noting that advocates of women's suffrage "hoped to take advantage of the growing political movement to guarantee white supremacy" and that NAWSA leaders in particular "hoped that the South would actually lead the nation" in implementing women's suffrage); MONOPOLI, *supra* note 29, at 15 (calling racism in suffrage movement "not only a moral failing but a strategic one as well"); CORRINE M. MCCONNAUGHY, THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 176–77 (2013) (describing "a strategic enfranchisement appeal" in which white suffrage advocates "asked that they be granted suffrage on the same terms as men while stressing the contributions educated, white women could make to the state's electorate"); LAURA E. FREE, SUFFRAGE RECONSTRUCTED 156 (2015) (noting that "Stanton and Anthony strategically used racism to advance white women's claims to the ballot"); Zornitsa Keremidchieva, *The Congressional Debates on the 19th Amendment: Jurisdictional Rhetoric and the Assemblage of the US Body Politic*, 99 Q.J. SPEECH 51, 57 (2013) ("To guard against a replication of the bruising battles and memories of the Reconstruction period, woman suffrage would pass only if it could be agreed that it would aid local governments in asserting white supremacy as a fundamental feature of the US political system."); see also Kathryn Kish Sklar & Jill Dias, *How Did the National Woman's Party Address the Issue of the Enfranchisement of Black Women, 1919–1924* (1997) (quoting March 1919 letter from Walter White to Mary Church Terrell suggesting that "all of them are mortally afraid of the South and if they could get the suffrage amendment without enfranchising colored women, they would do it in a moment").

141. See, e.g., *Negro Women of the Country Not To Get Chance to Cast Vote*, ABBEVILLE HERALD, Sept. 23, 1920, at 8 (noting the "foregone conclusion" that "the negro women of the south will find themselves disfranchised in spite of the 19th amendment;" that northern Republican statesmen "are not at all surprised to find a determination on the part of Southern whites" to press this disfranchisement, and that the Republicans "knowing the mind of the South as well as the political fate of negro men in the

that the Nineteenth Amendment would preserve gender and racial hierarchies did not genuinely expect that the Amendment would provide the protection they promised. It is also possible, albeit even more unlikely, that these advocates made these promises with the expectation that the Amendment might or, perhaps, should accomplish precisely the opposite of what they promised. On this point, the expectation needed to be that an Amendment crafted with the same language used in the Fifteenth Amendment would be deployed to disrupt existing hierarchies, notwithstanding the fact that, by 1920, precedent and practice had all but gutted the Fifteenth Amendment.<sup>142</sup> The expectation, moreover, needed to be that the similarly worded Nineteenth Amendment would reach more broadly than the Fifteenth, despite the fact that gender, in contrast to race, had yet to find protection under the Fourteenth Amendment.<sup>143</sup>

All of this was possible, however improbable it sounds. There is, nevertheless, a much more straightforward way to understand both decisions. Simply put, both interpreted the Amendment in light of the commitments that shaped it. *Graves* read the Amendment to ensure that the entry of women into the electorate would not destabilize the prevailing racial order. *Breedlove* read the Amendment to preserve the traditional family order and state power to promote it. Both rulings aligned with the commitments that propelled the Amendment to ratification, and, indeed, did so because they understood those commitments to define the Amendment's reach. Had there been any doubt on these points, the

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South express[ed] neither indignation, protest or surprise" about this prospect); *see generally* MONOPOLI, *supra* note 29, at 15; MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 158 (2020) ("Racism ran through organizations like the National American Woman Suffrage Association (NAWSA)."); Siegel, *Why the Nineteenth Amendment Matters*, *supra* note 129, at 267–68 (noting "the racism, xenophobia, and elitism of some white suffragists"); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 57 (1991) (noting "deep racism" among "disenfranchised [white] women . . . [that] grew worse as they began to seek the support of Southern [white] women"); KRADITOR, *supra* note 34, at 106–13 (pointing out white suffragists' usage of expediency rhetoric to advance nativist, racist arguments about white women's superiority to uneducated, immigrant men to promote the Nineteenth Amendment); Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 366 (2008) (noting nativist arguments made by NAWSA encouraging white women to vote to "counterbalance the influx of uneducated, illiterate, foreign men"); ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 297–299, 308 (1996) (highlighting efforts by white suffragists to advance a vision of the suffrage amendment that preserved state power to keep Black women disenfranchised).

142. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347 (1915); *Giles v. Harris*, 189 U.S. 475 (1903). *See also* *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (stating that the Nineteenth Amendment "is in character and phraseology precisely similar to the Fifteenth"); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1043 (11th Cir. 2020) (noting that "the Nineteenth Amendment operates just like the Fifteenth Amendment"); Michael C. Dorf, *Federal Governmental Power: The Voting Rights Act*, 26 *TOURO L. REV.* 505, 505 (2010) ("The Fifteenth Amendment would remain all but a dead letter until the civil rights movement of the mid-twentieth century."); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 *WASH. U. L. REV.* 917, 940, 944 (2009) (contending the Reconstruction Amendments were largely toothless in the south throughout the early twentieth century).

143. *See* Katz, *supra* note 11.

Amendment's text offered ample confirmation for this approach, given then-prevailing precedent construing the similarly worded Fifteenth Amendment.<sup>144</sup>

More broadly, then, the Nineteenth Amendment was shaped by a conservative impulse to preserve gender and racial hierarchies, and judges and legislators read it in light of these preservationist commitments. The Amendment was not crafted to promote a robust equality norm or anti-subordination principle, despite the sentimental wish that the Nineteenth Amendment's history should be something worth celebrating. It is, moreover, simply wrong to believe that the less egalitarian and undeniably ugly aspects of that history can be cabined as moral failings or strategic choices made without consequential effect.<sup>145</sup> Instead, the promises made to advance the Nineteenth Amendment were deeply consequential ideas. As *Graves* and *Breedlove* demonstrate, they were remembered and used to define the Amendment's trajectory.

Unquestionably, this account of *Graves* and *Breedlove* complicates efforts that seek to use the Nineteenth Amendment prospectively to promote gender equality. Most directly, it undermines the claim, endorsed by a good deal of Nineteenth Amendment scholarship, that this project is rectifying fundamental errors in how the Amendment has long been understood and applied and restoring its intended purpose to promote gender equality and anti-subordination norms.<sup>146</sup> Whatever its merit, this effort to deploy the Nineteenth Amendment prospectively cannot soundly rely on arguments from intent. Nor can it soundly adhere to the account it presently offers of cases like *Graves* and *Breedlove*. Instead, this project needs to grapple more seriously than it presently does with the implications of cases like *Graves* that endorsed principles the project embraces but in service of ideas it repudiates. It also needs to confront the fact that *Breedlove* had good reason to read the Nineteenth Amendment as it did and that its analysis of the Amendment has never been overruled.<sup>147</sup>

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144. *See id.*

145. For related views on this point, *see* Siegel, *Why the Nineteenth Amendment Matters*, *supra* note 129, at 267–68 (“Although the dark parts of the suffrage movement should not be whitewashed today, it also does not seem appropriate to focus on the racism, xenophobia, and elitism of some white suffragists to the exclusion of all the good things that they fought for—especially given the America in which they were socialized and that they were struggling to change in the face of relentless backlash.”); ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE* 4 (2020) (“[I]t must be said that every other white-dominated popular political movement of that era similarly accommodated to insurgent white supremacy . . . [a]nd yet only the woman suffrage movement . . . has been so fiercely criticized for the fatal flaw of racism.”); MONOPOLI, *supra* note 29, at 15 (calling racism in suffrage movement “not only a moral failing but a strategic one as well” and arguing that the Amendment nevertheless is best read to promote a broad anti-subordination norm); *see also* Hasen & Litman, *supra* note 18, at 40 (noting racism endemic in various social movements, but arguing that “[t]hose movements produced principles that have been divorced from their racist underpinnings and racist limitations, and the movement that agitated for the passage of the Nineteenth Amendment can do the same”); Kyle C. Velte, *The Nineteenth Amendment As A Generative Tool for Defeating LGBT Religious Exemptions*, 105 MINN. L. REV. 2659, 2662 (2006).

146. *See supra* notes 128–130 and accompanying text.

147. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966), rejected *Breedlove's* ruling upholding the poll tax against a Fourteenth Amendment challenge. Subsequent landmark rulings struck

Still, understanding that both *Graves* and *Breedlove* interpreted the Nineteenth Amendment in light of—rather than in opposition to—the commitments that shaped it does not preclude using the Amendment to promote gender equality today. Rather, properly understanding *Graves* and *Breedlove* appropriately shifts the inquiry forward. The Nineteenth Amendment may be read like other constitutional provisions to protect rights not previously understood to be within its ambit, and even to support applications that its framers sought to exclude.<sup>148</sup> Just as a series of foundational decisions in the 1960s and 1970s located within the Fourteenth Amendment authority to protect the right to vote and promote gender equality in ways that departed from the intent of those who crafted it,<sup>149</sup> the Nineteenth Amendment might be read to do more than outlaw the male-only electorate. Indeed, these very Fourteenth Amendment decisions bolster the case for doing so, precisely because they embraced such capacious understandings of the right to vote and gender equality and thus offer a foundation for reading the terms of the Nineteenth Amendment in similarly expansive ways. Of course, such an approach would, advisably, also account for doctrinal developments that postdated these expansive rulings and clarify how they, too, affect the Nineteenth Amendment’s scope.<sup>150</sup>

Whether or not the Nineteenth Amendment might yet be deployed effectively to combat contemporary gender discrimination remains to be seen. What is clear is that the path forward must be informed by a fair accounting of the past. To be sure, every account, including this one, is open to dispute. The significance of the various twists and turns may be contested even as support for projects of assorted

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down state reliance on gender stereotypes of the sort underlying Georgia’s gender-specific poll tax and *Breedlove*’s endorsement of it. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973). But *Breedlove*’s holding that such a tax was permissible under the Nineteenth Amendment has never been formally displaced. *See* Hasen & Litman, *supra* note 18, at 32; Podolefsky *supra* note 78, at 887.

148. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *United States v. Virginia*, 518 U.S. 515, 532 (1996); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976); *Harper*, 383 U.S. at 669; *see also* Susan J. Becker, *The Evolution Toward Judicial Independence in the Continuing Quest for LGBT Equality*, 64 CASE W. L. REV. 863, 895 (2014) (“Surely the framers of the U.S. Constitution and the authors of the Fourteenth Amendment could not imagine the concept of ‘equal protection’ being applied to women, much less to lesbians, gay men, and transgender individuals.”); Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1220 (2009) (arguing that “women’s equality was hardly the goal of the framers of the Fourteenth Amendment” while noting precedent recognizing the “now apparently unchallengeable position that the Fourteenth Amendment does cover discrimination against women”).

149. *See, e.g.*, *Craig*, 429 U.S. at 198–99; *Harper*, 383 U.S. at 669; *see also* Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 496–97 (1991) (“The chair of the Joint Committee on Reconstruction, Senator Fessenden, observed that the fourteenth amendment had nothing to do with the right to vote or any other political rights.”); Earl Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL’Y 451, 451 (1996) (“[The Fourteenth Amendment] included basic economic rights and the rights guaranteed by the first eight amendments of the Constitution, but did not include such political rights as the right to vote, the right to hold office, and the right to serve on juries.”).

150. *See, e.g.*, *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020); *Crawford v. Marion Cnty.*, 553 U.S. 181 (2008).

types remains capable of extraction. All the while, it is worth keeping in mind that the most straightforward explanation may also be the best one.

#### CONCLUSION

Ratification of the Nineteenth Amendment was followed by a period of notable stasis.<sup>151</sup> Many women remained unable to vote due to a host of disenfranchising devices, and those who did failed to disrupt the pre-existing partisan balance and the substantive policies it produced.<sup>152</sup> Women continued to confront overt discrimination in a host of realms like jury service, education, employment, and family life. When, decades later, new opportunities opened for women in these arenas, the Nineteenth Amendment had become wholly peripheral, playing no meaningful role as advancements in the struggle for equality were achieved.

This record has long supported the view of the Amendment as a missed opportunity. Many observers have, understandably, wished it had done more to promote gender equality. That wish, in turn, has fueled an inclination to find a culprit to blame for the Amendment's limited reach. Various candidates have been identified, from the women who entered the electorate in the wake of the Amendment's ratification to the judges and legislators charged with its implementation.<sup>153</sup> Along the way, cases like *Breedlove* have offered easy targets for the claim the Amendment has been misinterpreted, while more lofty statements of the sort found in cases like *Graves* are readily embraced as evidence of the road we should have taken.

The critique is a misguided one. The understandable wish that the Nineteenth Amendment had done more to promote gender equality has too often morphed into the assumption that it was crafted to advance contemporary conceptions of equal treatment. It was not. Appealing language in cases like *Graves* should not obscure the undeniable fact that the case does not warrant celebration. So too, justifiable distaste for *Breedlove*'s biases does not itself establish the holding as interpretive error. To be sure, the Nineteenth Amendment's trajectory may yet be reset. But to do so, its history must be squarely confronted. The story we tell must be accurate, even if it is not the story we wish to be telling.

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151. See, e.g., KEYSSAR, *supra* note 2, at 175–76 (“[P]olitics did not change very dramatically after women were enfranchised. . . . [R]eforms were few during the first decade that women could vote.”); SHKLAR, *supra* note 141, at 60–61 (“[Enfranchising women] led to no noticeable political change at all . . . [and] turned out to be the biggest non-event in our electoral history.”).

152. See KEYSSAR, *supra* note 2, at 176 (“Sex, thus, did not prove to be a significant dividing line in the American electorate . . . .”); SHKLAR, *supra* note 141, at 61 (“[Women were] neither an ascriptive social group nor a distinct political class.”); see also Charles Edward Russell, *Is Woman Suffrage a Failure?*, CENTURY MAG., 1924, at 727 (“American women vote as their husbands, brothers, or fathers indicate.”); Sara Alpern & Dale Baum, *Female Ballots: The Impact of the Nineteenth Amendment*, 16 J. INTERDISC. HIST. 43, 64 (1985) (“[P]arty leaders could ignore females as a group to be influenced and feared.”).

153. See Katz, *supra* note 11.