THE 150TH ANNIVERSARY OF *MINOR V. HAPPERSETT*: THE PAST AND FUTURE OF WOMEN'S RIGHTS

FOREWORD: THE CURIOUSLY MINOR ROLE OF *MINOR V. HAPPERSETT*

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This symposium marks the 150th anniversary of *Minor v. Happersett*,[1] a Supreme Court decision unanimously holding that the Fourteenth Amendment's Privileges or Immunities Clause did not enfranchise women.[2]

On October 15, 1872, Virginia Minor, "a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years," attempted to register to vote in the November 1872 election.[3] Because Missouri's Constitution limited the "entitle[ment] to vote" to "male citizen[s]," Reese Happersett, the registrar of voters, denied Minor's request.[4] Represented by her husband Francis Minor, Virginia Minor sued unsuccessfully in state court.[5]

Minor's suit did not fare better at the U.S. Supreme Court. Even the atmospherics were foreboding. Missouri declined to send a lawyer to argue the case.[6] Meanwhile, the United States Reports describe Francis Minor's oral argument as "partially based on what he deemed true political views, and partially resting on legal and constitutional grounds."[7]

After establishing that Minor was a citizen and that citizenship was not dependent on a person's sex,[8] the Court turned to the Privileges or

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1. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875). *Minor*'s year is sometimes erroneously listed as 1874 because the Supreme Court decided it during the October 1874 Term. The case was argued on February 9, 1875, and the decision was issued on March 29, 1875. *See* Anne Ashmore*, Date of Supreme Court Decisions and Arguments*, SUP. CT. OF THE U.S. 119 (Dec. 26, 2018), https://www.supremecourt.gov/opinions/datesofdecisions.pdf [https://perma.cc/8KQ8-927V].
2. *Minor*, 88 U.S. at 178.
3. *Id.* at 163.
4. *Id.* (quoting MO. CONST.).
5. *See id.* at 163–64; *cf.* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) (rejecting a Privileges or Immunities Clause challenge to state laws that denied women the right to practice law).
6. *See Minor*, 88 U.S. at 164 (noting "[n]o opposing counsel").
7. *Id.*
8. *See id.* at 165–69.

Immunities Clause. Echoing its reasoning in the *Slaughter-House Cases*,[9] the Court observed that the Fourteenth Amendment "did not add to the privileges and immunities of a citizen."[10] As such, "[n]o new voters were necessarily made by it."[11] The question thus became "whether all citizens are necessarily voters."[12] An affirmative answer would make suffrage one of the "privileges or immunities of citizens of the United States" that Missouri could not "abridge."[13] But, as the Court pointed out, "[f]or nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage."[14] And with language that eerily mirrors today's major questions doctrine,[15] the Court concluded that "[s]o important a change in the condition of citizenship . . . would have been expressly declared."[16]

We note at the outset that it is especially appropriate for the *Washington University Law Review* to host this symposium. Virginia Minor filed her case in St. Louis, Missouri, and prior to reaching the U.S. Supreme Court, it was litigated in St. Louis's Old Courthouse, the same building where the trial in *Dred Scott v. Sandford* took place.[17] Although a statue of Dred and Harriet Scott stands outside the Old Courthouse, no similar monument honors Virginia and Francis Minor, notwithstanding the building's recent multi-year renovation.

This connection and comparison to *Dred Scott* raise key questions. Why is *Dred Scott* so infamous while *Minor* is largely forgotten? Why does *Minor* still matter given that the Nineteenth Amendment enfranchised women nationwide in 1920? Why hold a symposium on an old case that is unknown—or, pun intended, considered minor—by many law students and lawyers?

The simplest answer to the first question is that *Dred Scott* is the one—and hopefully only—Supreme Court decision to spark a civil war. *Dred*

9. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) (defining a narrow list of rights of national citizenship protected by the Privileges or Immunities Clause, including "[t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus* . . . [and] [t]he right to use the navigable waters of the United States").

10. *Minor*, 88 U.S. at 171.

11. *Id.*

12. *Id.* at 170.

13. U.S. CONST. amend. XIV, § 1.

14. *Minor*, 88 U.S. at 177.

15. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (internal quotations omitted)); *see also* Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024) (critiquing the major questions doctrine).

16. *Minor*, 88 U.S. at 173.

17. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party); *see also* National Park Service, *Virginia Minor and Women's Right to Vote*, NAT'L PARK SERV. (Sept. 30, 2022), https://www.nps.gov/jeff/learn/historyculture/the-virginia-minor-case.htm [https://perma.cc/VG24-VZBW].

Scott was overturned not only on the battlefield but also by the Fourteenth Amendment's Citizenship Clause. It remains a staple of constitutional law classes. In an informal survey of twelve constitutional law casebooks, all but one of them excerpted the case, oftentimes quite substantially.[18] The Justices continue to invoke it as the ultimate insult.[19] It stands out as one of the handful of Supreme Court decisions to be broadly known by the public.[20] *Dred Scott* thus "occup[ies] the lowest circle of constitutional hell."[21]

By contrast, *Minor* plays a minor role in today's constitutional law, theory, and discourse. Consider *Minor*'s treatment in constitutional law casebooks. Some casebooks excerpt it,[22] others relegate it to a passing comment,[23] while a few omit it entirely.[24] The same pattern is true for

18. The following casebooks excerpt *Dred Scott*. *See* NIKOLAS BOWIE, FEDERAL CONSTITUTIONAL LAW 431–43 (2022); STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 934–54 (2020); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 714–17 (6th ed. 2020); JESSE H. CHOPER, MICHAEL C. DORF, RICHARD H. FALLON, JR. & FREDERICK SCHAUER, CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 1370–77 (13th ed. 2019); NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 463–67 (21st ed. 2022); RICHARD D. FRIEDMAN & JULIAN DAVIS MORTENSON, CONSTITUTIONAL LAW: AN INTEGRATED APPROACH 109–27 (2021); SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, REVA B. SIEGEL & CRISTINA M. RODRÍGUEZ, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 266–92 (8th ed. 2022); GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 768–71 (5th ed. 2021); MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, THE CONSTITUTION OF THE UNITED STATES 728–54, 1365–68 (5th ed. 2023); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 470–74 (8th ed. 2018); ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTION 196–217 (2017); *see also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 395 tbl.C (2011) (finding that *Dred Scott* is a "principal case" in six out of ten surveyed casebooks).

The outlier casebook merely discusses *Dred Scott* but does not excerpt it. *See* JONATHAN D. VARAT, VIKRAM D. AMAR & EVAN H. CAMINKER, CONSTITUTIONAL LAW: CASES AND MATERIALS, at xxxix (16th ed. 2021) (table of cases indicating *Dred Scott* is not excerpted).

19. *See* Obergefell v. Hodges, 576 U.S. 644, 695–96 (2015) (Roberts, C.J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1001–02 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

20. *See* Greene, *supra* note 18, at 394 tbl.B (noting disavowals by four Justices during their confirmation hearings); RAGE AGAINST THE MACHINE, VOICE OF THE VOICELESS (Epic Records 1999) ("Watch the decision of *Dred Scott* as it reverses.").

21. Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011).

22. *See* BOWIE, *supra* note 18, at 1041–44; CALABRESI & LAWSON, *supra* note 18, at 1374–81; LEVINSON ET AL., *supra* note 18, at 405–08; PAULSEN ET AL., *supra* note 18, at 1546–52.

23. *See* CHEMERINSKY, *supra* note 18, at 838 (one paragraph); FELDMAN & SULLIVAN, *supra* note 18, at 789 (one paragraph); STONE ET AL., *supra* note 18, at 638 (one paragraph); VARAT ET AL., *supra* note 18, at 941–42 (one paragraph).

24. *See, e.g.*, CHOPER ET AL., *supra* note 18, at xliv (omitted from table of cases); FRIEDMAN & MORTENSON, *supra* note 18, at xxxv (same); MAGGS & SMITH, *supra* note 18, at xxx (same); YOUNG, *supra* note 18, at xxiv (same).

casebooks focused on gender and law.[25] For their part, election law casebooks generally give *Minor* more attention.[26]

And then there are lists of the "worst" Supreme Court decisions. When Professor Jamal Greene published his influential article on the "anti-canon" in 2011, only one law review article had listed *Minor* as an anti-canonical case.[27] To be sure, scholars have condemned *Minor* without the anti-canon moniker.[28] Greene's survey further demonstrates that racist cases are more likely to be deemed anti-canonical than sexist ones.[29] Accordingly, as another explanation for *Minor*'s relative obscurity, it has been siloed off as a women's rights case, rather than a constitutional law or voting rights case, with a predictable gendered effect—diminished significance.

Minor also has the rare (dis)honor of being *effectively* overturned by constitutional amendment, even while technically remaining good law.[30] Of course, women can now vote nationwide. But the Fourteenth Amendment's

25. *See* KATHARINE T. BARTLETT, DEBORAH L. RHODE, JOANNA L. GROSSMAN, DEBORAH L. BRAKE & FRANK RUDY COOPER, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (9th ed. 2023) (no mention in the table of cases); CYNTHIA GRANT BOWMAN, LAURA A. ROSENBURY, DEBORAH TUERKHEIMER, & KIMBERLY A. YURACKO, FEMINIST JURISPRUDENCE: CASES AND MATERIALS 11 (5th ed. 2018) (summarized in one paragraph); WILLIAM N. ESKRIDGE, JR., NAN D. HUNTER & COURTNEY G. JOSLIN, SEXUALITY, GENDER, AND THE LAW (5th ed. 2023) (no mention in the table of cases); HERMA HILL KAY & TRISTIN K. GREEN, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 15–16 (7th ed. 2012) (summarized in one paragraph); *see also* KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 8–9 (1974) (summarized in one paragraph).

26. *See* JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 114–18 (3d ed. 2023) (excerpt); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 48–60 (6th ed. 2022) (lengthy excerpt and several discussion questions); DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS O. STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS 43–44 (7th ed. 2022) (brief discussion of *Minor* in context of the Nineteenth Amendment).

27. Greene, *supra* note 18, at 391 tbl.A; *see also* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1344 (2011) ("In light of the repudiation of this central pillar of its reasoning in addition to its result, *Minor* is best read today as an anticanonical case.").

As of June 2025, one additional law review article lists *Minor* as an anti-canonical case. *See* Charlie Martel, *Power for the People: Recognizing the Constitutional Right to Vote for President*, 45 CARDOZO L. REV. 1789, 1830 (2024) (observing that *Minor* "ha[s] been ranked in the 'anticanon' of the worst Supreme Court decisions of all time" and arguing that this "sexist" decision "ha[s] no place in governing voting rights in the twenty-first century").

28. *See, e.g.*, RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 83 (2003) (criticizing "the Court's failure in *Minor v. Happersett* to hold that the denial of the right to vote to women violated the Fourteenth Amendment's Privileges [or] Immunities Clause").

29. Three of the four anti-canonical cases—*Dred Scott*, *Plessy*, and *Korematsu*—are race cases. The exception is *Lochner*. *See* Greene, *supra* note 18, at 404; *see also* Jill Elaine Hasday, *Phyllis Schlafly and How Forgetting Women's Struggles for Equality Perpetuates Inequality*, 102 WASH. U. L. REV. 1801 (2025) (observing that sex discrimination cases are under-represented in lists of the most important and worst Supreme Court decisions).

30. *See* Ellen D. Katz, Minor v. Happersett *and the Repudiation of Universal Suffrage*, 102 WASH. U. L. REV. 1909 (2025).

Privileges or Immunities Clause does not protect the right to vote—nor, under the oft-maligned *Slaughter-House Cases*, does it protect many rights at all.[31] The Nineteenth Amendment did not overturn *Minor*'s doctrinal holding; rather, it reversed *Minor*'s result by imposing an anti-discrimination rule against "deni[al] or abridge[ment]" of the "right . . . to vote . . . on account of sex."[32] And to the extent the right to vote now receives protection under the Fourteenth Amendment, the Equal Protection Clause, rather than the Privileges or Immunities Clause,[33] achieves that result.

Thus, *Minor* persists as an uncomfortable case because it pairs a morally repugnant result with legalistic reasoning.[34] Here, we expand on the *Minor* Court's reasoning.

In finding that the privileges and immunities of citizenship did not include suffrage, the Court surveyed state voting qualifications from the Founding to Reconstruction. That survey revealed that "in no State were all citizens permitted to vote."[35] At the Founding, restrictions on the franchise included not only sex but also race, property holding, tax-paying status, and age.[36] To be sure, the Court noted that women once could vote in New Jersey, but "the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it."[37] Moreover, Congress had admitted several new States to the Union—including re-admitting the

31. *See supra* note 9 and accompanying text. *But see* Saenz v. Roe, 526 U.S. 489, 503 (1999) (grounding the right to travel, in part, in the Privileges or Immunities Clause).

32. U.S. CONST. amend. XIX, § 1.

33. *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1557–64 (2020) (canvassing how the Equal Protection Clause is the modern doctrinal font for voting rights). Scholars have identified other potential sources of the right to vote in the Constitution. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 367–68 (2021) (Privileges or Immunities Clause); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA ST. U. L. REV. 587, 593–99 (2001) (substantive due process); Bertrall L. Ross II, *Fundamental: How the Vote Became a Constitutional Right*, 109 IOWA L. REV. 1703, 1707 (2024) (Republican Form of Government Clause); Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015) (arguing that reading Sections 2 and 5 of the Fourteenth Amendment in tandem provides evidence of "the Reconstruction Congress's attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage"); *see also* Brandon J. Johnson, *History, Tradition, and the Franchise*, 102 WASH. U. L. REV. 1879 (2025) (arguing that a historically bounded interpretation of the Fourteenth Amendment would have a regressive impact on election law).

34. For similar claims about *Minor*'s moral failings but legal correctness, see Amar, *supra* note 21, at 79, and Jim Chen, *Totally Mistaken, Never in Doubt*, JURISDYNAMICS (July 19, 2006, 3:16 AM), https://jurisdynamics.blogspot.com/2006/07/totally-mistaken-never-in-doubt.html [https://perma.cc/R84Y-JQTZ].

35. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172 (1875).

36. *See id.* at 172–73.

37. *Id.* at 177.

"insurgent States"—and had not required women's enfranchisement to satisfy the Republican Form of Government Clause.[38] On the flip side, the Court remarked that several States—including Missouri—extended voting rights to so-called declarant aliens, "persons of foreign birth, who have declared their intention to become citizens of the United States."[39] Put simply, citizenship and suffrage were not co-extensive during Reconstruction.

The Court also examined whether Minor's argument was consistent with the text, history, and purpose of other constitutional provisions. Looking at Article IV's Privileges and Immunities Clause, which limits a state's discrimination against citizens of other states, the Court reasoned that Minor's argument would entitle "citizens of each State . . . to vote in the several States precisely as their citizens are."[40] That result, according to the Court, "ha[d] never been claimed."[41] Turning to Section Two of the Fourteenth Amendment, the Court highlighted that all inhabitants—men, women, and children, excluding Indians not taxed—were counted for apportionment purposes but that Congress could strip House seats from States that disenfranchised adult "male citizens."[42] The implication, as the Court saw it, was that suffrage could not be "one of the absolute rights of citizenship."[43] Finally, the Court pointed to the "necess[ity]" of the Fifteenth Amendment to ban racial discrimination in voting.[44] If correct, Minor's argument would have eliminated the need to "go through with the form of amending the Constitution" to enfranchise Black men nationwide.[45]

These arguments fall well within the zone of lawyerly and conventional constitutional claims. To be sure, the Court's constitutional arguments dovetailed with its misogyny. But in assigning blame, consider the possibility that the fault lies *primarily* with the Constitution and its ratifiers—not the Court. A counterfactual best illustrates this point: What if *Minor v. Happersett* had come out the other way?

On the doctrinal front, the Court would have effectively overturned the then-recently decided *Slaughter-House Cases*. The Fifteenth Amendment

38. *Id.*
39. *Id.*
40. *Id.* at 174.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 175.
45. *Id.* The Reconstruction Framers debated whether Congress had the power under the Fourteenth Amendment to enfranchise Black men nationwide via statute. For a mix of constitutional and political reasons, they opted against the statutory route. *See* Crum, *supra* note 33, at 1602–17.

would have been rendered largely superfluous.[46] But even casting aside *Slaughter-House*'s narrow configuration of the Privileges or Immunities Clause as applying to rights of national citizenship, claiming that it encompassed *voting* rights strains credulity.

At the time of *Minor*, women had only recently gained the right to vote in two territories: Wyoming in 1869 and Utah in 1870.[47] Curiously, the *Minor* Court omitted these recent developments, maybe because they involved territories, not States. Regardless, a counterfactual Court would have overturned the voting qualifications of *every* State. The Reconstruction-era Court did not wield its power so aggressively. Even by today's standards, this outcome would be a remarkable, headline-grabbing event. Indeed, a frequent criticism of *Roe v. Wade* points out that it effectively overturned the abortion laws of every State.[48]

Even if a counterfactual Court had *de jure* enfranchised women, would their *de facto* enfranchisement have followed? The political climate in 1875 would have been especially hostile to a pro-women's suffrage decision from the Supreme Court. To the extent women's suffrage enjoyed establishment support, it resided in the Radical wing of the Republican Party. That support, however, was politically weak. When Congress drafted the Fifteenth Amendment in early 1869, not a single proposal that would have enfranchised women even came to a vote.[49] And by 1875, Republicans had lost unified control of Congress. In the 1874 midterm elections, Democrats won the House of Representatives for the first time since the Civil War "[i]n the greatest reversal of partisan alignments in the entire nineteenth century."[50]

A counterfactual *Minor* decision would have provoked intense resistance on the ground. Persistent and widespread violence, harassment, coercion, and intimidation targeted Black male voters in the South during Reconstruction. As another marginalized group, women could have

46. To the extent the Fifteenth Amendment applies to redistricting, *see* Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1904–08 (2024), it would have still had independent force notwithstanding this counterfactual *Minor*.

47. *See* Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Office*, 33 YALE J. L. & FEMINISM 110, 137 n.203 (2022).

48. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1797 (2012); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (asking whether *Roe* would have sparked less resistance if the Court had simply invalidated "the most extreme brand of law in the nation, and had not gone on . . . to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force").

49. *See* Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1077–78 (2024).

50. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 523 (1988).

encountered private violence as well. The public casting of votes—before the introduction of secret ballots in the United States in 1888—would have amplified this problem.[51]

And just as the Fifteenth Amendment did not prevent circumvention by facially neutral voting qualifications, so too could a counterfactual *Minor* ruling invite flagrant disregard. Under the law of coverture, "a married man and woman were treated by the State as a single, male-dominated legal entity."[52] As such, even relatively small property qualifications could have disenfranchised married women. We can also easily imagine how the discriminatory enforcement of literacy tests could result in women's widespread disenfranchisement.[53]

All this is *not* to say that the Court should decline to stand up for constitutional rights against popular backlash. The specter of Southern resistance did not—and should not—have dissuaded the *Brown* Court from overturning *Plessy*.[54] But as scholars have observed, the Supreme Court is an institution that, in the absence of an army or a treasury, frequently acts strategically and needs to win over the political branches to effectuate social change.[55] And therefore, it helps to have ironclad constitutional arguments if one is asking the Court to enfranchise half the population.[56]

Against this background, the Court's decision in *Minor* was not surprising. To expect anything more from the *Minor* Court would require anachronistic thinking.

Perhaps, then, one should view *Minor* as a provocation: a suit doomed to lose that could then spur a political response. But of course, a fatal flaw in that approach lies in the necessarily muted political response, given that those most directly affected by it lacked the right to vote. Indeed, as Professor Pam Karlan recently remarked, "Minor's suit . . . was considered frivolous even in [contemporary] progressive circles."[57] As another

51. *See* Doe v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment) (discussing adoption of the secret ballot).

52. Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

53. *Cf.* South Carolina v. Katzenbach, 383 U.S. 301, 333–34 (1966) (discussing the discriminatory enforcement of literacy tests against Black voters in the Jim Crow South).

54. *See generally* Brown v. Board of Education, 347 U.S. 483 (1954).

55. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

56. Adam Winkler describes the constitutional arguments advanced by the women's suffrage movement during Reconstruction as an early form of living constitutionalism. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution*,*"* 76 N.Y.U. L. REV. 1456, 1457 (2001); *see also id.* at 1515 (claiming that, at the Supreme Court, Minor made "a watered-down version of the evolutionary, living Constitution argument"). Even if one embraces a living constitutionalist perspective, not much time had past between the Fourteenth Amendment's ratification in 1868 and the *Minor* Court's decision in 1875.

57. Pamela S. Karlan, *Election Law and Gender*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 153, 158 (Eugene D. Mazo ed., 2024).

downside, performative provocation in the courtroom can produce damaging precedent that is not only difficult to overturn but may also justify curbing other rights in future cases. Unfortunately, it would take fifty years for the political backlash to *Minor* to finally prevail, and *Minor*'s holding meant that a constitutional amendment was the best option for nationwide women's suffrage.[58]

In light of this history, why does *Minor* merit attention today? What justifies commemorating its 150th anniversary with a symposium? Several reasons inspired this choice when we began the planning in Spring 2024, and additional grounds emerged later.

First, both voting rights and citizenship, the principal elements of *Minor*'s analysis, remain sites of controversy. When our speakers gathered at Washington University for our symposium in September 2024, the presidential election was fast approaching, and concerns about possible disenfranchisement, disinformation, "rigging," and even violence had begun to percolate.[59] Then, just a few months after the symposium, Donald Trump launched his second term as President with a blitz of executive orders, including one aimed at revoking the longstanding interpretation of the Fourteenth Amendment as conferring birthright citizenship.[60] Lower courts had uniformly rejected Trump's attempt to rewrite the Fourteenth Amendment, but the Supreme Court, as this Foreword went to print, radically curtailed the power of district courts to issue nationwide injunctions—without addressing the underying constitutionality of Trump's birthright citizenship Executive Order.[61]

Second, we sought to highlight the connection between *Minor*'s rejection of a right to vote for women with the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, which withdrew

58. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 974 (2002) ("It was only after the [*Minor*] Court definitively rejected the claim that women had a constitutionally protected right to vote under the Fourteenth Amendment that the suffrage movement began concertedly to pursue a new constitutional amendment as its principal strategy for enfranchising women.").

59. *See, e.g.*, Lisa Lerer & Katie Glueck, *How Americans Feel About the Election: Anxious and Scared*, N.Y. TIMES (Nov. 4, 2024), https://www.nytimes.com/2024/11/04/us/politics/election-anxiety.html [https://perma.cc/A36A-TPHS]; Nick Corasaniti, *Could the Vote Be Contested Again? 5 Threats to a Smooth Election*, N.Y. TIMES (Oct. 29, 2024), https://www.nytimes.com/2024/10/29/us/elections/election-results-worries.html [https://perma.cc/F4ZY-54LB]; Mariana Alfaro, *Johnson Won't Say Biden Won in 2020, Raising Worries on 2024's Process*, WASH. POST (Oct. 6, 2024), https://www.washingtonpost.com/politics/2024/10/06/mike-johnson-donald-trump-election/ [https://perma.cc/P8KH-AUWC].

60. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) ("Protecting the Meaning and Value of American Citizenship").

61. *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2548–49 (2025) (granting the Trump Administration's stay application against three nationwide injunctions); *id.* at 2573–77 (Sotomayor, J., dissenting) (defending the traditional and expansive understanding of birthright citizenship); *see also* Alexandra Fay, *Citizenship and Empire in* Elk v. Wilkins, 102 WASH. U. L. REV. 1839 (2025).

protection under the Due Process Clause from the limited right to choose abortion, despite almost fifty years of precedent.[62] Many scholars and, over the years, several of the Justices themselves, had identified reproductive freedom, including abortion rights, as an essential ingredient of equal citizenship regardless of sex.[63] *Dobbs* not only renounced this position,[64] but also rejected the Equal Protection Clause as an alternative safeguard for abortion rights,[65] resuscitating *Geduldig v. Aiello*,[66] a long-criticized precedent about biological differences that some scholars had concluded was no longer good law.[67]

In a more oblique fashion, *Dobbs* prompts a second look at the Privileges or Immunities Clause, which the Court used to decide *Minor*.[68] *Dobbs* includes a footnote opining that arguments for constitutional abortion rights would fare no better under the Privileges or Immunities Clause than they do under the Due Process Clause.[69] This reference recalls past suggestions by Justice Thomas that the Privileges or Immunities Clause might offer a tool for a "do-over" of substantive due process jurisprudence, with the potential to constrict previously recognized individual rights.[70] As Professor Marc Spindelman has written: "Footnote 22 [in *Dobbs*] suggests the Court is holding space for itself to continue to weigh in on, and perhaps even to lead charges involving, ongoing American culture war disputes in non-neutral ways."[71] Of course, many of these "culture war disputes" center on gender and sexuality.

At the same time, the unsupported allusion to "the constitutional right to interstate travel" in Justice Kavanaugh's concurring opinion in *Dobbs*[72]—promising that abortion seekers in restrictive states can obtain such health care by traveling to permissive states—implicitly evokes the Privileges or

62. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

63. *E.g.*, *Casey*, 505 U.S. at 856 (joint opinion); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–58 (1977).

64. *Dobbs*, 597 U.S. at 287–89.

65. *Id.* at 236–37.

66. Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that pregnancy-based discrimination is not sex-based discrimination for purposes of equal protection analysis).

67. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 982–84 (1984); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 208–09 (2020).

68. Minor v. Happersett, 88 U.S. 162, 171 (1875); *see supra* notes 8–14 and accompanying text.

69. *Dobbs*, 597 U.S. at 240 n.22.

70. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting).

71. Marc Spindelman, Dobbs*' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 142 (2023).

72. *Dobbs*, 597 U.S. at 346 (Kavanaugh, J., concurring).

Immunities Clause, given precedent identifying at least some aspects of the right to travel as a privilege of national citizenship guaranteed by that provision.[73] Yet, how likely is the Court that decided *Dobbs* to recognize a robust right to travel?[74] Indeed, the absence of any reassurance from the Court or from any other Justice suggests that the issue remains live and contentious.

Juxtaposing *Minor* and *Dobbs* uncovers additional links. Doing so brings to the fore the importance of including previously silenced voices in public debates and the democratic process. *Dobbs*'s reliance, for purposes of the Due Process Clause, on history and tradition from 1868 uses a reference point that predates *Minor* and the Nineteenth Amendment. This approach perpetuates past inequalities and bakes in the consequences of disenfranchisement,[75] despite the vital importance of the issue to women's autonomy.[76] In claiming to return abortion matters to the states, *Dobbs* cedes the question to women voters, sending them to the ballot box to shape the

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73. *Saenz v. Roe* identified "at least" three components of a constitutional right to travel:

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Dobbs, 526 U.S. at 500. The majority opinion went on to say that it did not need to identify the constitutional home of the first component. Instead:

> The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."

Id. at 501 (footnote omitted) (quoting United States v. Guest, 383 U.S. 745, 758 (1966)). According to *Saenz*, the second component of the right to travel derives from the Privileges and Immunities Clause of Article IV, *id*. at 501–02, while the third derives from the Privileges or Immunities Clause of the Fourteenth Amendment, *id*. at 502–04. In sidestepping the question of the constitutional source of the first component (the component apparently invoked by Justice Kavanaugh in *Dobbs*), *Saenz* left room for the Privileges or Immunities Clause to play a role here as well. Further, *Saenz*'s reference to "at least three components," *id*. at 500, also leaves room for more. *See* Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress*, 35 J. AM. ACAD. MATRIM. LAW. 461, 494 (2023).

74. *But see* Noah Smith-Drelich, *The Forgotten Fundamental Right to Free Movement*, 119 NW. U. L. REV. 811, 815–17 (2025) (arguing that the Constitution protects several different "rights to travel").

75. Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUSTON L. REV. 901, 906 (2023). Nor did any women serve as judges in 1868. *See* Elizabeth D. Katz, *"May It Please Her Honor": The United States' First Women Judges, 1870–1930*, 102 WASH. U. L. REV. 1729 (2025) (recounting the stories of the earliest women to hold judicial positions, a practice that did not begin until 1870).

76. *See* Henry L. Chambers, Jr., Minor v. Happersett*,* Dobbs v. Jackson Women's Health Organization*, and the Supreme Court's Refusal to Reconstruct America*, 102 WASH. U. L. REV. 1691, 1717 (2025) (noting how both *Minor* and *Dobbs* "examined history to determine whether rights especially relevant to women that had been denied to women could be exercised by women in the future," "ignored the Thirteenth Amendment," and "used an incremental approach to the Reconstruction Amendments"); Paula A. Monopoli, *A "New" New Departure*, 102 WASH. U. L. REV. 1961 (2025) (exploring feminist constitutional methods from *Minor* to *Dobbs* and beyond).

regulatory regime.[77] In fact, *Dobbs* sparked a spate of state abortion-rights ballot initiatives, including seven out of ten that passed in 2024.[78] Missouri—Virginia Minor's domicile—was one such state, where a slim majority voted to add a "right to reproductive freedom" to the state constitution just over a month after our symposium.[79]

Dobbs's impact extends beyond reproductive justice. In reviving *Geduldig* with its reliance on biological differences to erase sex-based classifications,[80] *Dobbs* paved the way for *United States v. Skrmetti*, in which the Court upheld bans on gender-affirming care for minors diagnosed with gender dysphoria, including minors whose parents and physicians support such treatment.[81] Unlike the lower court[82] and some of the concurring opinions,[83] which cited *Dobbs* directly, the majority used *Geduldig* as a stand-in even while parroting *Dobbs*'s conclusion that restricting a medical procedure only one sex can undergo does not discriminate on the basis of sex and thus does not merit heightened scrutiny.[84] In dissent, Justice Sotomayor condemned the majority's approach as running "counter to decades of equal protection precedents."[85]

In addition, the executive orders that President Trump signed within hours of taking office included one entitled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal

77. The majority wrote:

> Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

Dobbs, 597 U.S. at 289 (footnotes omitted).

78. *See* Isabel Guarnieri & Krystal Leaphart, *Abortion Rights Ballot Measures Win in 7 out of 10 US States*, GUTTMACHER INST. (Nov. 6, 2024), https://www.guttmacher.org/2024/11/abortion-rights-state-ballot-measures-2024 [https://perma.cc/BH3L-D7F9].

79. MO. CONST. art. I, § 36; *see* Kathryn Abrams, *Democratic Change, Fast and Slow: Navigating Tensions in Pro-Abortion Organizing*, 102 WASH. U. L. REV. 1927 (2025) (examining the conflicting values among those who sought to restore legalized abortion in Missouri after *Dobbs*).

80. *See supra* note 66 and accompanying text.

81. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

82. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 481–82 (6th Cir. 2023) (citing *Dobbs* to reject equal protection argument), *aff'd*, 145 S. Ct. 1815 (2025); *see* Scott Skinner-Thompson, *Transgender Disenfranchisement*, 102 WASH. U. L. REV. 1999 (2025).

83. *See Skrmetti*, 145 S. Ct. at 1839 (Thomas, J., concurring); *id.* at 1857 (Alito, J., concurring in part).

84. *Id.* at 1833 (majority opinion).

85. *Id.* at 1879 (Sotomayor, J., dissenting).

Government."[86] Reaching federal programs, agencies, and facilities as well as recipients of federal funds, the executive order asserts a female/male binary, insists that each person's biological sex is unalterably determined at the time of conception, and identifies among its objectives protecting women and their privacy in intimate spaces.

This executive order signals that women are its primary beneficiaries. Yet, for decades feminist legal theorists have advanced women's equality by exposing gender as a social construction (not the inevitable consequence of a "biological truth")[87] and one that intersects with other attributes such as race, class, and disability.[88] How will delegitimizing such analyses help women?

The combination of a women-protective claim and the rejection of feminist insights recalls the arguments that Phyllis Schlafly made in the 1970s in her successful campaign to defeat the proposed Equal Rights Amendment to the United States Constitution. Like Virginia Minor, Schlafly had local connections, including the J.D. degree that she earned at Washington University after enrolling as a 1L in the Fall of 1975, during the height of her anti-ERA efforts.[89] The two make for interesting "bookends": Minor started the women's suffrage movement in Missouri, founding a local organization said to be "the first organization in America dedicated solely to gaining the vote for women,"[90] while Schlafly, although attending the law school that might well have been the first in the nation to

86. Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025). This order has prompted various challenges. *See, e.g.*, Orr v. Trump, No. 25-cv-10313 (D. Mass. Feb. 7, 2025), *appeal docketed*, No. 25-1579 (1st Cir. June 13, 2025) (challenging requirement of passport gender markers based on sex at birth); R.I. Latino Arts v. Nat'l Endowment for the Arts, No. 25-cv-00079 (D.R.I. Mar. 6, 2025) (challenging loss of federal funding for promoting "gender ideology"); S.F. AIDS Found. v. Trump, No. 25-cv-1824 (N.D. Cal. Feb. 20, 2025) (bringing free speech, due process, scope of presidential authority, equal protection challenges); Nat'l Urb. League v. Trump, No. 25-CV-00471 (D.D.C. Feb. 19, 2025) (challenging executive orders for violating free speech, vagueness, equal protection, scope of presidential authority, and Administrative Procedures Act); Drs. for Am. v. Off. of Pers. Mgmt., No. 25-cv-00322 (D.D.C. Feb. 4, 2025) (challenging removal of health-related data from federal websites); Moe v. Trump, No. 25-cv-10195 (D. Mass Jan. 26, 2025) (challenging denial of denial of rights and medical care to transgender prisoners).

87. *See, e.g.*, Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

88. *See, e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

89. *See* Hasday, *supra* note 29.

90. KATHARINE T. CORBETT ET AL., IN HER PLACE: A GUIDE TO ST. LOUIS WOMEN'S HISTORY 106 (Katharine T. Corbett ed., 1999).

welcome women law students beginning in 1869,[91] became famous for her work against gender equality.

With all of these stars aligned—from timing to location to contemporary jurisprudential developments—we hope to raise *Minor*'s profile on its 150th anniversary. *Minor* is also well-suited for a symposium because it invites examination of diverse areas of law. Indeed, the papers and panels for this symposium reflect *Minor*'s multifaceted significance. The following snapshots offer a brief summary of the conference and the articles published in this issue:

The first panel of the symposium, entitled "History," focused on how we remember Reconstruction, particularly in relation to women's rights, today. Professor Henry Chambers's article, *Minor v. Happersett, Dobbs v. Jackson Women's Health Organization, and the Supreme Court's Refusal to Reconstruct America*, compares the Court's treatment of the Fourteenth Amendment as it relates to women's equal citizenship, across *Minor* and *Dobbs*, examining how both cases missed an opportunity to consider what the promise of the Reconstruction Amendments could mean for women's rights. He contrasts incremental constitutional interpretation—revealing the problems in a solely historical inquiry—with a forward-looking, transformative approach to the Reconstruction Amendments that asks: "What rights do people need to exercise to thrive in American society?"[92] Professor Elizabeth Katz's *"May It Please Her Honor": The United States' First Woman Judges, 1870–1930*, tells the stories of women who served as judges before and immediately after the ratification of the Nineteenth Amendment. Katz catalogues these women's attainment of positions in courts of broad jurisdiction as well as the limited and gendered judicial opportunities many of these women experienced in serving on courts focused on children, women, and families. She examines the obstacles these early judges faced, from questions about their eligibility to beliefs about their competency, as well as the strategies they employed to gain access to judicial positions. Professor Martha Jones also spoke on this panel. In discussing *Hall v. DeCuir*, she recounted Black women's travels during the fight for women's suffrage and into Jim Crow, detailing the unique dehumanization and dangers they faced in their journeys.[93] She analyzed how the "right to ride" and access public spaces connected to the right to vote, as well as to broader claims to dignity and equality for all women.

91. *See* Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millenium: 130 Years of Family Law*, 6 WASH. U. J.L. & POL'Y 189, 189–90 (2001).

92. Chambers, *supra* note 76, at 1710.

93. *See generally* Hall v. DeCuir, 95 U.S. 485 (1878).

Following the panel on history, Professor Jill Hasday led a keynote conversation about *Phyllis Schlafly and How Forgetting Women's Struggles for Equality Perpetuates Inequality*. Her article reflects on two ways that "forgetting about women predominate in America's stories about itself,"[94] and the harm that this forgetfulness perpetuates. In particular, her analysis details the ways in which many (1) fail to honor the fights feminists have won in the past, helping to shape our laws today, and (2) overstate the successes women's rights activists have achieved, thus obscuring the work that remains to be done. This amnesia, Hasday argues, maintains the status quo and impedes further progress.

The next panel centered on "Voting Rights." Professor Ellen Katz's piece, *Minor v. Happersett and the Repudiation of Universal Suffrage*, explores the competing theories of political participation put forth by advocates for the Nineteenth Amendment and the enduring impact of turning away from Virginia Minor's universalist claim to the vote as a privilege of citizenship. She argues the reasoning put forth by Nineteenth Amendment advocates—that not only allowed for, but actively intended to uphold, existing racially exclusionary electoral practices—best explains why that Amendment's effects on American law and society proved so limited. Professor Alexandra Fay's article *Citizenship and Empire in Elk v. Wilkins*, considers another plaintiff—John Elk—who "tested the radical potential of the [Fourteenth] Amendment's text"[95] and attempted to secure voting rights for Native men. Fay's article explores the Court's rejection of birthright citizenship for Native people born into tribal membership and closely examines *Elk*'s competing legacies, along with the implications of each narrative for modern understandings of birthright citizenship. Professor Brandon Johnson's article, *History, Tradition, and the Franchise*, employs a close reading of the Supreme Court's Fourteenth Amendment cases to inquire whether rollbacks in substantive due process jurisprudence could erode voting rights protections under the Equal Protection Clause. He argues that "a historically bound interpretation" of the Fourteenth Amendment, as embraced by the current Supreme Court, "would likely result in a regression of voting rights."[96]

The last panel featured perspectives on "*Dobbs*'s Aftermath and Future Questions." In *Democratic Change, Fast and Slow: Navigating Tensions in Pro-Abortion Organizing*, Professor Kathryn Abrams evaluates differing approaches to democratic change in response to *Dobbs*, as proponents of reproductive rights put abortion on the ballot. Highlighting disagreements

94. Hasday, *supra* note 29, at 1803.
95. Fay, *supra* note 61, at 1841. *See generally* Elk v. Wilkins, 112 U.S. 94 (1884).
96. Johnson, *supra* note 33, at 1908.

that have divided these abortion proponents, she goes on to identify potential areas of common ground among the camps and to propose collaborative strategies they can take up together. Professor Paula Monopoli's article, *A "New" New Departure*, traces the trajectory of feminist constitutional strategies, beginning with the activities of women's rights activists following the enactment of the Fourteenth and Fifteenth Amendments known as "the New Departure," moving through the Progressive Era, and ending with the current, post-*Dobbs* world. Taking lessons from the political and social moves of past women's rights activists, she examines their potential application to the post-*Dobbs* political landscape, as well as to constitutional interpretation today. Finally, in *Transgender Disenfranchisement*, Professor Scott Skinner-Thompson seeks to create a comprehensive account of the practice of political and economic disenfranchisement—beyond merely registering to vote and casting a ballot—designed to silence and subordinate transgender Americans. He argues this "exclusion from public participation is at its core anti-democratic"[97] and calls for major change to secure political access and representation for transgender individuals.

* * *

Minor's sesquicentennial prompts us to take stock of the past and future of women's rights and gender equality. As in many other areas of law, the Court has played a role, but not always at the vanguard. That was true during Reconstruction, and it remains true today. Yet, as *Minor*'s legacy shows, the Court's actions, even when regressive, can occasionally spur progress in the long run. We hope this symposium challenges the obscurity of this oft-overlooked case and helps give *Minor* the attention that it deserves.

97. Skinner-Thompson, *supra* note 82, at 2010.