MINOR V. HAPPERSETT AND THE REPUDIATION OF UNIVERSAL SUFFRAGE

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TABLE OF CONTENTS

INTRODUCTION

Nearly 150 years ago, *Minor v. Happersett* rejected a constitutional challenge to a Missouri law that excluded women from the electorate.[1] Ratification of the Nineteenth Amendment forty-five years later is often said to have "overturned" *Minor*.[2] In fact, the Amendment did no such thing. *Minor* held that voting is not among the privileges of citizenship protected by the Fourteenth Amendment. The Nineteenth Amendment says nothing to the contrary, and instead bars laws and practices that deny or abridge the right to vote "on account of sex."[3] *Minor* remains good law today.

It was not happenstance that the Nineteenth Amendment failed to overrule *Minor*. It was never intended to do so. The expansion of the male-only electorate following ratification of the Fourteenth and Fifteenth Amendments changed the meaning of women's disenfranchisement. What advocates of women's suffrage had previously seen as a harm experienced by all women based on their collective exclusion from the male-only electorate morphed for many into a distinct injury inflicted on specific women by the inclusion of specific men in the electorate. The universalist claim to inclusion based on equal citizenship—the argument Virginia Minor pressed—was relegated to the periphery, and, for many advocates,

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1. 88 U.S. (21 Wall.) 162 (1875).

2. *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 58 (6th ed. 2022) ("*Minor* was overturned by the Nineteenth Amendment."); *see also* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1997 n.68 (1990) (stating that *Minor* "was overruled by political process through enactment of nineteenth amendment"); Ivan L.R. Lemelle, *Amending the Constitution: If Not Now, When?*, 69 LOY. L. REV. 367, 378–79, 379 n.49 (2023) (citing Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 684–89 (1989–90)) (finding Justice Ginsburg to have argued that "the Nineteenth Amendment overruled *Minor v. Happersett*").

3. U.S. CONST. amend. XIX.

abandoned entirely. In its place, a zero-sum project emerged and gained traction, and it demanded the enfranchisement of some women, and the exclusion of others—along with a host of men—who lacked what were deemed necessary credentials for membership in the electorate.

This Article describes and contrasts the theory of political participation Virginia Minor advanced and the Supreme Court rejected in 1875 with the one it will argue propelled ratification of the Nineteenth Amendment in 1920. It offers an explanation for why leading advocates of the Amendment did not push to overrule *Minor* and, indeed, all but repudiated the vision of the right to vote that Virginia Minor espoused. Finally, the Article explores why the Nineteenth Amendment's preservation of *Minor*, far from a technical oversight, matters.

We cannot know whether recognition of voting as a privilege of citizenship back in *Minor* would have disrupted the vast array of race-based vote suppression tactics so many supporters of the Nineteenth Amendment pledged to preserve and promote. It is nevertheless evident that the arguments and commitments that would have been needed to press for and ultimately ratify an amendment that recognized voting to be a substantive privilege of citizenship required acknowledgement of an equality among citizens that was incompatible with the core arguments that so many Nineteenth Amendment supporters advanced in support of the measure.

As I argue elsewhere, the arguments these advocates pressed best explain why the Amendment did not have the transformative impact on American law and society that many contemporary scholars argue should have followed ratification.[4] We can only speculate what would have happened had the Nineteenth Amendment's most vocal proponents chosen instead to vindicate Virginia Minor's claim and work to constitutionalize the principles of equal citizenship she had endorsed. What we know, however, is what they actually said and did, and the events that followed.

I. *MINOR V. HAPPERSETT* AND THE IDEA OF EQUAL CITIZENSHIP[5]

At its inception, the women's suffrage movement in the United States viewed the male-only electorate as an affront that marked all women as second-class citizens ineligible to participate equally with men in governing the polity. Those seeking women's inclusion in the electorate invoked the

4. *See* Ellen D. Katz, *Mary Lou Graves, Nolen Breedlove, and the Nineteenth Amendment*, 20 GEO. J.L. & PUB. POL'Y 59 (2022) [hereinafter Katz, *Mary Lou Graves*]; *see also* Ellen D. Katz, Compromised: Women's Suffrage and the Debate over Constitutional Meaning [hereinafter Katz, Compromised] (unpublished manuscript) (on file with author).

5. Portions of Part I are drawn from Katz, Compromised, *supra* note 4.

dictates of equal citizenship. Wont to rely on language from the Declaration of Independence, these advocates posited that men and women were created equal, and that, as citizens, women were entitled to political equality and to consent to the laws that governed them. The professed goal was universal suffrage.[6] Capturing this stance, Ernestine Rose invoked the Republic's founding principles when she addressed the 1851 National Woman's Rights Conference in Worcester, Massachusetts: "[F]or what is life without liberty, and what is liberty without equality of rights?"[7] Among the demands for reform Rose lodged was her call to "[c]arry out the republican principle of universal suffrage, or strike it from your banners . . . . Give woman the elective franchise."[8]

Following the Civil War, momentum to enfranchise Black men increased, in part to recognize the military service many had provided, but mostly to secure Republican control over the exercise of federal power in the former Confederacy and beyond. Congress passed the Military Reconstruction Acts which required, among other things, that former Confederate States adopt new constitutions providing race-neutral access to the electorate as a condition for re-entry into the Union.[9] Proposals to amend the Constitution to extend these protections followed, first by imposing penalties on States that disenfranchised "male" inhabitants in certain circumstances, and later by barring race- based voter qualifications entirely.[10]

When these measures were proposed without corresponding proscriptions on gender-based barriers to the electorate, prominent women's suffrage advocates pushed back. Arguing for the addition of gender-inclusive terms, they linked the case for enfranchising Black men with the cause of universal suffrage more generally. In late 1865, thus, Elizabeth Cady Stanton announced an intent "to avail ourselves of the strong arm and the blue uniform of the black soldier to walk in by his side."[11] The following year, she asked the newly constituted American Equal Rights Association, "Has not the time come to bury the [B]lack man and the woman in the

6. AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920, at 44 (1965).

7. MISTRESS OF HERSELF: SPEECHES AND LETTERS OF ERNESTINE L. ROSE, EARLY WOMEN'S RIGHTS LEADER 92 (Paula Doress-Worters ed., 2008).

8. *Id.* at 95.

9. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of Mar. 11, 1868, ch. 25, 15 Stat. 41; *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 276–277, 329–33 (1988).

10. FONER, *supra* note 9, at 255–56, 447–49.

11. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 143 (rev. ed. 2009).

citizen?"[12] Susan B. Anthony, likewise, wrote to the New York State Colored Men's Convention, insisting that governance must be based "on the *one Democratic Republican principle*—the *consent of the whole people* . . . [and that] [B]lack women, and white as well as [B]lack men must now be brought within the body politic."[13]

Stanton, Anthony, and other prominent advocates of women's suffrage expressed their disgust at the prospect that men they deemed inferior would be accorded constitutionally protected access to the electorate while they, and other women like them, might remain excluded. Indeed, even as Stanton sought to enlist the "strong arm . . . of the [B]lack soldier" in service of her mission,[14] she made clear what she thought of him. Stanton wrote: "[A]s the celestial gate to civil rights is slowly moving on its hinges, it becomes a serious question whether we had better stand aside and see 'Sambo' walk into the kingdom first."[15] Stanton rejected that notion, and argued that Black women in the South were in distinct need of the vote lest their "emancipation [become] but another form of slavery."[16] Stanton went so far as to posit that "[i]n fact, it is better to be the slave of an educated white man, than of a degraded, ignorant [B]lack one."[17] Three years later, Stanton invited readers to "[t]hink of Patrick and Sambo and Hans and Yung Tung who do not know the difference between a Monarchy and a Republic, who never read the Declaration of Independence or Webster's spelling book, making laws for Lydia Maria Child, Lucretia Mott, or Fanny Kemble."[18]

Notably, Stanton, at this time, was still arguing for universal suffrage. Her plan was to open that "celestial gate" and "make the gap so wide that no privileged class could ever again close it against the humblest citizen of the Republic[.]"[19] Sardonically noting that "it would be cruel to tax 'white male citizens' with even two simple questions at a time," she emphasized that women's inclusion in the electorate required no independent justification.[20] There was no need for "a new set of measures, or a new train of thought . . . [because] the disenfranchised all make the same demand, and

12. THE ELIZABETH CADY STANTON–SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES 90 (Ellen Carol DuBois ed., Ne. Univ. Press rev. ed. 1992) (1981).

13. Letter from Susan B. Anthony to the New York State Colored Men's Convention (Oct. 1, 1868), *in* 2 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 183, 184 (Ann D. Gordon ed., 2000); *see* E. Cady Stanton, Letter to the Editor, "*This Is the Negro's Hour*," NAT'L ANTI-SLAVERY STANDARD (N.Y.), Dec. 30, 1865, at 3.

14. KEYSSAR, *supra* note 11, at 143.

15. Stanton, *supra* note 13.

16. *Id.*

17. *Id.*

18. Elizabeth Cady Stanton, *Manhood Suffrage*, 2 THE REVOLUTION 392, 392 (1868).

19. Stanton, *supra* note 13.

20. *Id.*

the same logic and justice that secures Suffrage to one class gives it to all."[21] Stanton's goal was the concurrent elimination of both race- and gender-based barriers.[22]

This effort failed. Sanctions for gender-based electoral barriers were not included among the post- Civil War constitutional changes. The word "male" remained in the text of Section 2 of the Fourteenth Amendment, defining the scope of disenfranchising conduct deemed sufficient to invite congressional sanction.[23] The Fifteenth Amendment followed, prohibiting the denial or abridgment of the right to vote only "on account of race, color, or previous condition of servitude" while making no mention of gender-based barriers.[24]

Congress's decision to limit the Fifteenth Amendment's prohibition to race-based voting discrimination split the women's suffrage movement. One faction, led by Lucy Stone and Henry Ward Beecher, organized as the American Woman Suffrage Association (AWSA), which supported ratification of the Fifteenth Amendment while pledging to push separately for women's enfranchisement. The other, led by Stanton and Anthony, operated as the National Woman Suffrage Association (NWSA), and refused to support ratification of the Fifteenth Amendment so long as women were not included in its ambit.[25]

Explaining NWSA's position, Stanton penned a column in which she posited that the Fifteenth Amendment, if ratified, would cause "woman [to] touch[] the lowest depths of her political degradation."[26] Stanton urged "American women of wealth, education, virtue and refinement" to "awake to the danger" she insisted they would confront should "the lower orders of Chinese, Africans, Germans[,] and Irish, with their low ideas of womanhood" become their "rulers[,] judges, jurors—[and] dictate not only the civil, but moral codes by which you shall be governed."[27]

Anthony concurred, writing that "It is that by the Fifteenth Amendment the Republican Party has elevated the very last of the most ignorant and

21. *Id.*
22. KEYSSAR, *supra* note 11, at 143.
23. U.S. CONST. amend. XIV, § 2.
24. *Id.* amend. XV, § 1.
25. *See* ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920, at 8 (1998); *see also* KRADITOR, *supra* note 6, at 163–68 (describing the origins of the split between the suffragists who supported Black enfranchisement and those who did not); KEYSSAR, *supra* note 11, at 143–145 (observing that the Fourteenth Amendment "disheartened suffragists" and that after ratification of the Fifteenth Amendment, "the causes of [B]lack (male) and women's suffrage were decisively severed"); ELLEN CAROL DUBOIS, WOMAN SUFFRAGE & WOMEN'S RIGHTS 116 (1998).
26. Elizabeth Cady Stanton, *The Sixteenth Amendment*, 3 THE REVOLUTION 266, 266 (1869).
27. *Id.*

degraded classes of men to the position of master over the very first and most educated and elevated classes of women."[28]

Even here at this point, Anthony and Stanton continued to profess a commitment to universal suffrage. They deployed racist and xenophobic rhetoric to advance their claim that women should be admitted to an electorate populated by men they deemed less deserving. Stanton called on "American women of . . . refinement" to "demand that woman, too, shall be represented in the government!"[29] Defending Stanton's opposition to the Fifteenth Amendment, Anthony wrote, "It isn't that Mrs. Stanton objects to the voting of ignorant men *per se*, but that she most strenuously protests against the principle and the practice that gives them civil and political superiority over the women by their side, not only, but over the educated and cultivated as well."[30]

In October 1869, Virginia Minor presented a new mechanism to challenge the "principle and practice" that kept women disenfranchised. Speaking at a suffrage convention in St. Louis, Minor argued that a new additional constitutional amendment was not needed to enfranchise women because, in her view, state laws mandating a male-only electorate were already unconstitutional. She explained that women, as citizens, were entitled to the privileges and immunities of citizenship that Section 1 of the Fourteenth Amendment protected from state abridgment.[31] The Constitution, she noted, "gives me every right and privilege to which every other citizen is entitled."[32] Minor then professed her belief that voting was such a privilege. Acknowledging that this view "has yet to be tested," she proposed a litigation strategy to vindicate her claim: "[W]e must . . . turn to the Supreme Court of our land and ask it to decide what are our rights as citizens, or, at least, not doing that, give us the privilege of the Indian, and exempt us from the burden of taxation to support so unjust a Government."[33]

Minor, of course, was not seeking an exemption from taxation. Invoking a basic tenet of women's suffrage advocacy at the time, Minor emphasized the injustice of taxation without representation to highlight the distinct injury disenfranchisement inflicted on women like her. The issue that should be pressed, Minor noted, was "whether a free, moral, intelligent

28. Susan B. Anthony, Letter to the Editor, *The Aristocracy of Sex*, N.Y. TIMES, June 5, 1869, at 5.

29. Stanton, *supra* note 26, at 266.

30. Anthony, *supra* note 28.

31. 2 HISTORY OF WOMAN SUFFRAGE 409–10 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881).

32. *Id.* at 409.

33. *Id.* at 410; *see also* DUBOIS, *supra* note 25, at 117–19 (noting formative role of Virginia and Francis Minor in New Departure argument); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1475–77 (2001).

woman, highly cultivated, every dollar of whose income and property are taxed equally with that of all men, shall be placed by our laws on a level with the savage."[34] For Minor, the injury was disenfranchisement and the remedy was to expand inclusion.[35] "Disguise it as you may, the disfranchised class is ever a degraded class. Let us lend all our energies to have the stigma removed from us."[36]

Minor's argument challenged the prevailing assumption that the Fourteenth Amendment had preserved state power to exclude women from the electorate.[37] The idea, moreover, that the Fourteenth Amendment, standing alone, outlawed women's disenfranchisement introduced and invited recourse to the courts as a forum in which women might secure their rights. Anthony and Stanton were intrigued. They republished Minor's speech in *The Revolution*, and printed thousands of extra copies to amplify Minor's idea.[38]

The idea propelled scores of women to go to the polls in 1872 and present themselves as eligible voters. A few—including Anthony—successfully cast ballots despite state law prohibitions on their participation. Most, however, were turned away.[39] Among them was Virginia Minor. On October 15, 1872, she went to the local voter registration office at 2004 Market Street in St. Louis, asking to take the oath required by Missouri law and be registered as a voter. Reese Happersett, the appointed registrar for the locality, refused on the ground that the Missouri Constitution limited the electorate "male citizens."[40]

Minor sued, as she had pledged to do back in 1869. Represented by her husband Francis, Minor claimed that Happersett's refusal to let her vote denied her a privilege of citizenship and thus violated the Fourteenth Amendment.[41] Counsel for Happersett responded tersely that the Fourteenth Amendment had no application to the case.[42] After the St. Louis Circuit Court and the Missouri Supreme Court agreed with him, Happersett's

34. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 31, at 410.

35. *See also Admirably Stated*, 6 WOMAN'S J. (Bos., Chi. & St. Louis) 219 (1875) (quoting Minor's plea for women's suffrage before a committee of the Constitutional Convention of Missouri that "[i]n making this demand we do not by it ask you to disfranchise any citizen who now has the ballot").

36. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 31, at 410.

37. Winkler, *supra* note 33, at 1498 (calling Minor's argument "ingenious").

38. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 31, at 411; Winkler, *supra* note 33, at 1476–77.

39. *See* Winkler, *supra* note 33, at 1492–93.

40. A Petition in the Circuit Court of Saint Louis County at 20–21, Minor v. Happersett, 53 Mo. 58 (1873) (on file with author), *aff'd*, 88 U.S. (21 Wall.) 162 (1875).

41. *Id.* at 20–22.

42. Brief of Defendant in Error at 2, Minor v. Happersett, 53 Mo. 58 (1873).

lawyer chose not to participate further when Minor "turn[ed] to the Supreme Court of our land," as she had pledged to do three years earlier.[43]

It was thus without contradiction from opposing counsel that Minor made her case before the Justices. Her brief to the Court posited that "[t]here can be no division of citizenship, either of its rights or its duties. There can be no *half-way* citizenship. Woman, as a citizen of the United States, is entitled to *all* the benefits of that position, and liable to all its obligations, *or to none*."[44] Minor maintained further that voting was, in fact, "the highest and greatest" privilege of citizenship, and thus that States could not wholly "prohibit the franchise to citizens of the United States."[45]

In a unanimous opinion, Chief Justice Morrison Waite flatly rejected these claims. The Chief Justice readily acknowledged that women were indeed citizens entitled to constitutionally grounded privileges and immunities, including those protected by the new amendment.[46] He nevertheless thought it clear that voting was simply not among the privileges encompassed by the term. Waite relied in large part on Section 2 of the Fourteenth Amendment, which authorizes imposition of the penalty of reduced apportionment for those States that disenfranchise specified "male" inhabitants. Waite wrote: "Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants?"[47]

The Chief Justice noted that the longstanding exclusion of women from state electorates further discredited the idea that voting was a privilege of citizenship. After all, the Constitution as originally ratified guaranteed those privileges, albeit not from the interference of one's own State, and the widespread disenfranchisement of women had never been deemed incompatible with that guarantee. For Waite, the Fifteenth Amendment only confirmed the Court's conclusion: no need to ban race-based vote denials if any denial of a citizen's right to vote would violate the Fourteenth Amendment's Privileges or Immunities clause. "Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?"[48] In closing, the Chief Justice allowed that denying women the vote might be the cause of "hardship," but insisted the Court was institutionally

43. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 31; *see* text accompanying *supra* note 33.
44. Argument and Brief for Petitioner at 13, Minor v. Happersett, 88 U.S. 162 (1875) (No. 182).
45. *Id.* at 14, 26.
46. *Minor*, 88 U.S. at 170.
47. *Id.* at 174.
48. *Id.* at 175.

incapable of fixing it.[49] "If the law is wrong, it ought to be changed; but the power for that is not with us."[50]

II. AFTER *MINOR*

Three years after *Minor*, Senator Aaron Sargent of California proposed adding a Sixteenth Amendment to the U.S. Constitution. Spurred by heavy lobbying from Stanton, Anthony and other NWSA leaders, the new amendment provided that the right to vote "shall not be denied or abridged . . . on account of sex."[51] The measure failed to advance in Senate during the 45th Congress, and would fail repeatedly after being introduced and considered in years that followed. Finally, in 1919, the language Senator Sargent proposed was approved[52] and, in 1920, ratified as the Nineteenth Amendment.[53]

This new Amendment rendered inoperable provisions like the one in the Missouri Constitution that had blocked Virginia Minor from voting. Still, the Amendment's text, unchanged from when it was first proposed in 1878, made no attempt to vindicate Minor's legal theory or overrule the decision that rejected it. The Amendment, thus, did not proclaim the ability to vote to be among the privileges of citizenship that the Fourteenth Amendment protects, much less support the idea that voting was among a citizen's most essential privileges. Nor, for that matter, did it resurrect an earlier proposal to enfranchise women via constitutional amendment that, much like Minor's legal theory, tied suffrage with citizenship and thus embraced a participatory right that extended to women and other groups.[54] Instead, the Amendment, as proposed and ultimately ratified, simply removed one reason from the panoply of legitimate reasons a State might invoke to deny a citizen the ability to vote. Like the Fifteenth Amendment on which it was

49. *Id.* at 178.
50. *Id.*
51. ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 165 (enlarged ed. 1996) (1959); 7 CONG. REC. 252, 255 (1878).
52. H.R.J. Res. 1, 66th Cong., 41 Stat. 362 (1919).
53. U.S. CONST. amend. XIX.
54. *See* H.R.J. Res. 371, 40th Cong. (1868) (Rep. George Julian proposing a constitutional amendment stating that "[t]he right of suffrage in the United States shall be based upon citizenship, and shall be regulated by Congress," and that "all citizens of the United States, whether native or naturalized, shall enjoy this right equally, without any distinction or discrimination whatever founded on . . . sex"), *described in* GEORGE W. JULIAN, POLITICAL RECOLLECTIONS: 1840 TO 1872, at 324 (1884); *see also* LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848–1898, at 32–33, 225 n.165 (2014) (arguing that Julian's proposal "was more than a woman suffrage measure. It nationalized suffrage, making it the province of the federal government," and, thereby, advanced "a radical revision in how the nation regulated suffrage").

modelled,[55] it established congressional power to enforce the circumscribed limitation on state power it imposed, without constitutionalizing the right to vote itself or recognizing federal power to protect such a right.

Many felt this approach would be more successful than a proposed amendment that embraced a theory of the sort Virginia Minor had pressed.[56] Still, the text selected was more than simply a strategic choice. The language proposed in 1878 and ultimately ratified in 1920 was also better calibrated to remedy the harm the measure's advocates had come to understand women's disenfranchisement to inflict. More precisely, for many, Minor's theory and the ideas of equal citizenship on which it rested had become largely nonresponsive to the injury they had come to see the male-only electorate to impose. For these supporters of women's suffrage, the Fifteenth Amendment offered a more promising template for addressing that injury, particularly as political and legal developments steadily narrowed that amendment's reach.

The Fifteenth Amendment, of course, was part of a series of post-Civil War legal developments that enabled many Black men to cast ballots for the first time. Their participation as voters, along with that an increasing number of foreign-born men, changed the meaning of women's disenfranchisement. For many in the women's suffrage movement, the stigma this electorate imposed no longer stemmed from its categorical exclusion of women but instead from the continued exclusion of a particular class of women as particular groups of men gained entry. The offense was enfranchising men they deemed ignorant or otherwise unworthy, while excluding women who were educated, wealthy, or otherwise seemed to be virtuous.[57] For many, the resulting insult was palpable and rectifying it became a rallying call within the women's suffrage movement. As Aileen Kraditor explained nearly sixty years ago, the argument for suffrage "had reversed itself completely."[58] Advocates who once "claimed the vote because all human beings, men and women, were equal . . . [became] willing to claim the vote because all human beings, native and foreign born, were *not* equal, and the inferior ought not to rule the superior."[59]

55. *Compare* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."), *with id.* amend. XV, § 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.").

56. *See, e.g.*, KEYSSAR, *supra* note 11, at 149 (noting that "in the increasingly conservative and pro-states' rights political climate of the 1870s, . . . [Rep. Julian's] initial version of the Sixteenth Amendment—which tacitly would have nationalized suffrage . . .—made little headway" and that Anthony "consequently drafted a new and narrower version").

57. *See* supra notes 15–18, 27–28 and accompanying text.

58. KRADITOR, *supra* note 6, at 126.

59. *Id.* at 126–27.

Removing the stigma many advocates now perceived required changing the electorate. Simply expanding it, however, would no longer suffice, as doing so suggested an equality between the women who would gain entry and the men already eligible. Instead, a meaningful remedy required rules that would elevate a select group of women above the men the electorate had been expanded to include. Far from seeking universal suffrage based on the equal entitlement of citizens to participate in the electoral process, the goal became the selective inclusion of those women who were seen to possess a superior entitlement to membership. This meant embracing existing barriers to participation like literacy tests, poll taxes, and other devices that could be relied on to screen out those thought undeserving of inclusion. As such, erasing the stigma of the expanded male-only electorate translated into support for measures that would allow in the women they deemed worthy of membership, and thus preserving, rather than disrupting, prevailing hierarchies to keep out the men and women they believed less deserving.[60]

It is no small irony that the Fifteenth Amendment provided the template for this project. This Amendment, after all, helped fuel the very changes in the male-only electorate that, for many, altered the meaning of women's disenfranchisement. Over a relatively short period of time, however, relentless opposition to the Amendment had radically constricted its reach. Supreme Court decisions handed down shortly after *Minor v. Happersett* launched this contraction,[61] followed by a deluge of voting requirements designed and adopted in southern states explicitly to block Black men from registering and casting ballots.[62] By 1903, the Justices made clear that the Fifteenth Amendment posed no obstacle to such requirements, when they refused to block the open refusal of state officials to register Black voters in Alabama.[63]

The relentless effort to rid southern electorates of Black voters was animated by the belief that white supremacy was incompatible with meaningful Black access to the electorate. On this view, a Black voter's very ability to cast a ballot, regardless of its impact on electoral outcomes, degraded the standing of white voters doing the same. Indeed, voting was

60. *See* Katz, Compromised, *supra* note 4.

61. *See* United States v. Reese, 92 U.S. 214 (1876) (finding that the Fifteenth Amendment only protects against certain discrimination and does not grant a substantive right to vote); United States v. Cruikshank, 92 U.S. 542 (1876) (same).

62. *See, e.g.*, MISS. CONST., art. XII, §§ 243–44 (repealed 1975) (instituting a poll tax and literacy requirement); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 4, 39 (1989); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301–02 (2000).

63. Giles v. Harris, 189 U.S. 475 (1903).

understood to be a singularly dangerous act, for it was at the polling place that white and Black voters cast ballots as equals.[64]

Vocal supporters of Black disenfranchisement tended to resist women's suffrage as well, for fear it would bring Black women in the electorate.[65] Supporters of women's suffrage might have responded by welcoming this prospect, and denouncing white supremacy in the process. Some, indeed, did just that, embracing an inclusive, multi-racial electorate and thus affirming the principles of equal citizenship that had long constituted a foundational argument for women's suffrage.[66] But most—including the most prominent leaders of the movement—did not.

It turned out that the evisceration of the Fifteenth Amendment dovetailed perfectly with what many so many women's suffrage advocates were hoping to achieve. Implementation of the Fifteenth Amendment offered a model and a mechanism to eradicate the stigma these advocates understood the male-only electorate to inflict. That is, it offered a pathway to enable some, but, critically, not all, women to vote, while also guaranteeing that men thought to be undeserving of the ballot would be kept out.

For these reasons, prominent advocates of women's suffrage—including National American Woman Suffrage Association (NAWSA) presidents Susan B. Anthony, Anna Howard Shaw, and Carrie Chapman Catt—readily agreed that the electorate had been improperly expanded to include men unfit and ill-equipped to vote and that the inclusion of such men had damaged a racial hierarchy that should properly prevail. They insisted, moreover, that this damage required a specific remedy. Emphasizing the distinct injury that the expanded male-only electorate had inflicted on white women, these advocates insisted that any fully satisfactory resolution to present inequities required both the inclusion of educated women—who were overwhelmingly white and native born—and the exclusion of others—men and women alike—whom they deemed ill-equipped to participate.

Thus, at the 1901 NAWSA convention in Minneapolis, NAWSA President Carrie Chapman Catt lamented "the aggressive movements that, with possibly ill-advised haste, enfranchised the foreigner, the negro, and

64. *See, e.g.*, LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 219 (1998) ("The Fifteenth Amendment, in making this possible, violated the overriding assumption of Negro inferiority and threatened whites by inflating [B]lack ambitions."); MCMILLEN, *supra* note 62, at 37, 71 ("The first imperative of white supremacy . . . was disenfranchisement. . . . [T]he white minority's control of the ballot assured the subordination of Mississippi's [B]lack majority.").

65. *See New York Paper Gives Interesting Account St. Louis Suffrage Fight*, CARSON CITY DAILY APPEAL, June 27, 1916, at 1 (quoting Texas Governor James Ferguson stating that he opposed women's suffrage "because it may enfranchise negro women"); *see also Vote Against Wilson. Vote for Hughes.*, DENVER STAR, Oct. 28, 1916, at 4 ("President Wilson opposes the granting of woman suffrage because Negro women might benefit by it.").

66. *See* Katz, Compromised, *supra*, note 4, at 65–90.

the Indian" and thereby "introduc[ed] into the body politic . . . vast numbers of irresponsible citizens."[67] At that same convention, NAWSA officer Kate Gordon declared that "the question of white supremacy is one that will only be decided by giving the right of the ballot to the educated, intelligent white women of the South. Their vote will eliminate the question of the negro vote in politics."[68]

At the 1903 New Orleans Convention, NAWSA Vice President—and future President—Anna Howard Shaw stated that, "You have put the ballot into the hands of your [B]lack men, thus making them the political superiors of your white women. Never before in the history of the world have men made former slaves the political masters of their former mistresses[.]"[69] Shaw posited that white, native-born women outside the South faced similar humiliation. Contrasting disenfranchised German and French women, who were at least "governed" by German and French men, "American women are governed by every race of men under the light of the sun. There is not a color from white to [B]lack, from red to yellow, there is not a nation from pole to pole, that does not send its contingent to govern American women."[70] It was this theme Shaw would invoke repeatedly in subsequent years, making clear that her goal was not the enfranchisement all women but instead a particular class of them. These were women who, at minimum, were "able to read and write," and, as important, whose enfranchisement would "redeem the nation from the stigma of the most ungrateful and unjust act ever perpetrated by a Republic upon a class of citizens."[71]

At that same 1903 convention, Belle Kearney celebrated measures like literacy tests and other disenfranchising devices as "pioneer statecraft" necessary "to maintain the political supremacy of Anglo-Saxonism."[72] Women's enfranchisement, she argued, was the most promising way to "insure immediate and durable white supremacy, honestly attained" and predicted that "Anglo-Saxon women [would provide] the medium through which to retain the supremacy of the white race over the African." [73] Kearney's speech, we are told, was "received with great applause."[74]

Thereafter, Henry Blackwell penned a column in *The Woman's Journal* that praised the fact that "suffrage has been wrested from the negro

67. *Mrs. Chapman Catt's Annual Address*, 32 WOMAN'S J. 177, 178 (1901).

68. *See* ELNA C. GREEN, SOUTHERN STRATEGIES: SOUTHERN WOMEN AND THE WOMAN SUFFRAGE QUESTION 131 & 237 n.11 (1997).

69. ANNA HOWARD SHAW, THE STORY OF A PIONEER 310–12 (1915).

70. *Id.* at 313.

71. Wilmer Albert Linkugel, The Speeches of Anna Howard Shaw, Volume II 153, 363, 509, 739 (1960) (Ph.D dissertation, University of Wisconsin).

72. Belle Kearney, *The South and Woman Suffrage*, 34 WOMAN'S J. 106, 107 (1903).

73. *Id.*

74. *The National Convention*, 34 WOMAN'S J. 133 (1903) (noting applause).

population" in the South.[75] Doing so, he argued, "eliminat[ed] much of the dominant illiteracy and corruption, and [gave] an impulse in the direction of honest and responsible government."[76] A separate column from Alice Stone Blackwell presented voter qualifications—whether based on education, intelligence, character, and property ownership—as legitimate and, many even advisable, so long as they were "impartially applied." On this account, universal suffrage was an ill-advised practice to be avoided. Alice Blackwell explained that "the ignorant vote [in] the South had led to such misgovernment that some steps were absolutely necessary in order to reduce it" given that "most" Black people and "many" white ones in the region were "below a certain point in intelligence and character" and thus made "democratic government . . . impossible."[77] Blackwell posited that "indiscriminate Negro suffrage is a failure . . . [and] [i]ndiscriminate white suffrage has proved just as complete a failure in many of our large cities."[78]

Gertrude Weil, president of a North Carolina NAWSA chapter, insisted that "'[e]qual suffrage' does not necessarily imply *universal* suffrage," and endorsed "higher qualifications for voting than at present . . . [as] the only way to cope fairly and effectively with the negro problem, which is a difficult problem with or without the negro woman."[79] From Alabama, Pattie Ruffner Jacobs described as "a fallacy" the contention "that the prohibition of discrimination on account of sex would involve the race problem or any other complication. Both sexes [would] be obliged to meet all [the] requirements of citizenship imposed by the State."[80] In Kentucky, Madeline McDowell Breckinridge supported coupling "woman suffrage with an educational qualification" in order to "insure an immense preponderance of the Anglo-Saxon over the African" in the South.[81]

In 1918, Helen Townsend Scott told the House Committee on Woman Suffrage that the new federal amendment would leave in place "heavy educational qualifications" of the sort instituted in various southern States, such that the concern women's suffrage might threaten white supremacy

75. Henry Browne Blackwell, *Woman Suffrage in the South*, 34 WOMAN'S J. 116 (1903).

76. *Id.*; *see also* Henry B. Blackwell, Letter to the Editor, *Woman's Suffrage in the South*, TIMES-DEMOCRAT (New Orleans), Mar. 19, 1903, at 11 ("The South is at present taking steps to reform politics by eliminating the grossly incompetent and corrupt. In this effort to elevate the voting constituency women ought not to be overlooked.").

77. Alice Stone Blackwell, *Mr. Garrison's Protest*, 34 WOMAN'S J. 140 (1903).

78. *Id.*

79. GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920, at 209 (2d. ed. 2019) (1996).

80. KRADITOR, *supra* note 6, at 195–96.

81. MARJORIE SPRUILL WHEELER, NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES 126–27 (1993).

was "a bugaboo."[82] Anna Dallas Dudley likewise pressed the claim that poll taxes, literacy tests, and other educational requirements would blunt any increase in Black voter participation some feared would result from women's suffrage.[83]

When the Senate took up debate on the Nineteenth Amendment in 1918, South Carolina Senator William Pollock offered the assurance that "[w]hite men and white women would continue control over Negro men and Negro women."[84] Colorado Senator Charles Thomas emphasized: "[T]his proposed amendment provides that the right to vote shall not be withheld from an individual on account of sex; that is all."[85] Senator Thomas explained that the Amendment would not alter states' "power to impose other disqualifications and to resort to other bases for limiting the right of suffrage in all respects."[86] Texas Senator Morris Sheppard insisted that the participation of women in primary elections in his state had not "accentuated the race problem," and, instead, that "we feel that we are enormously benefited in having the added intelligence of white women to help us handle that problem."[87]

The message was clear and explicit: ending the male-only electorate was not just compatible with a desired racial hierarchy but necessary for its preservation. For many supporters of the Nineteenth Amendment, thus, the goal was not to level up. They did not seek a more inclusive electorate, and aspired to neither universal suffrage nor equality, political or otherwise, between white women and Black and foreign-born men. Instead, the project was a differently constituted electorate not a more inclusive one, achieved through the inclusion of *some* women, who would help bolster and sustain a racial hierarchy.

Without doubt, the pledge that the Nineteenth Amendment would bolster white supremacy was a tactic, strategically deployed to increase support for the Amendment. But it also captured what so many advocates hoped the Amendment would accomplish. These advocates promoted the measure as means to restore the stature of and erase the stigma they said was inflicted on white women by the inclusion of Black and immigrant men in the electorate. More than mere tactics, their intention was to entrench a specific racial order.

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82. *Scoffs at Negro Scare*, THE SUN (Balt.), Jan. 6, 1918, at 2.

83. *Extending the Right of Suffrage to Women*: *Hearings on H.R.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 19–20 (1918) (statement of Anna Dallas Dudley).

84. *Vote of Senate Defeats Suffrage*, CHRISTIAN SCI. MONITOR (Bos.), Feb. 11, 1919, at 1.

85. 56 CONG. REC. 10900 (1918) (statement of Sen. Charles Thomas).

86. *Id.*

87. *Id.* at 10903 (statement of Sen. Morris Sheppard).

CONCLUSION

The Nineteenth Amendment's failure to overrule *Minor v. Happersett* was far from a technical oversight. Rather than vindicating Virginia Minor's belief that voting was a privilege of citizenship, those who crafted the Nineteenth Amendment opted to model it on the eviscerated Fifteenth. By so doing, they made clear that universal suffrage was not their goal. Time and again, supporters of the Amendment confirmed this intention with their insistence that the measure would both preserve existing exclusionary electoral practices and bolster their operation. Such practices, after all, would be needed if the new Amendment was to remedy the stigmatic injury they had come to understand women's disenfranchisement to inflict.

Ratification of the Nineteenth Amendment enabled many women to register and vote for the first time, but, as so many of its supporters promised, many women remained excluded from the electorate. Literacy tests, poll taxes, and an array of other constraints prevented significant numbers of women nationwide from registering and voting. Meanwhile, women who managed to become voters tended to align themselves politically with their husbands and fathers, such that their entry into the electorate initiated little notable change in policy or politics.[88] Contemporary scholarship on the Nineteenth Amendment laments the measure's circumscribed impact, positing that it should have done more to promote equality on numerous fronts.[89]

Would an amendment overruling *Minor v. Happersett* have had a broader impact? Might it, perhaps, have been more effective in expanding women's participation as voters or equality norms more widely? On one view, of course, the answer is no. The tactical concerns that spurred crafting the Nineteenth Amendment as it was written were hardly unfounded, such that there is good reason to think that a broader amendment based on Minor's theory would not have been adopted and ratified—at least not in 1920, and perhaps for a long thereafter. Even if, moreover, such a measure had managed to pass, significant opposition would likely have thwarted its implementation. (Notably, the Nineteenth Amendment, as crafted, generated little resistance due largely to the fact that its implementation aligned with the dominant arguments made in support of it.)

It is also improbable that an amendment overruling *Minor* would have displaced literacy tests, poll taxes, and many other exclusionary practices

88. *See* GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 60–62 (2006).

89. For a discussion of this scholarship and a competing view, see Katz, *Mary Lou Graves*, *supra* note 4, at 82–85; Katz, Compromised, *supra* note 4, at 20–23.

that restricted participation in the electorate. To be sure, back when Minor first pressed her claim, critics charged that it would enable all citizens to vote without restriction.[90] And yet, Minor's brief to the Court was explicit that recognition of voting as a privilege of citizenship would not interfere with State power to "prescribe the qualifications of the electors . . . [including] that they shall be of a certain age, be of sane mind, be free from crime, etc., because these are conditions for the good of the whole, and to which all citizens, sooner or later, may attain."[91] While this distinction between permissible prohibitions and impermissible gender-based disqualifications was undoubtedly undertheorized,[92] the brief promise that competency-based criteria to restrict participation would persist was all but certain, had Minor in fact prevailed.

And yet, the prospect of continued reliance on varied exclusionary voting practices does not mean a constitutional amendment overruling *Minor* would have been without consequence. In particular, Minor's claim, had it been constitutionalized, held promise as a means to shift the nature of argumentation about existing and proposed restrictions on access to the electorate. More substantial justifications would likely have been required to support measures that excluded citizens from the electorate, if voting had become a privilege of citizenship and thus something to which all citizens could claim equal entitlement. Such justifications would, arguably, need to be weightier than the flimsy or indeed non-existent policies that were deemed sufficient when literacy tests and property requirements were challenged under the Fifteenth or Nineteenth Amendments.[93]

In more modern parlance, then, constitutionalizing Minor's claim held promise as a means to subject a range of voting restrictions to more exacting judicial scrutiny. In place of the presumption of legitimacy that attached to so many of these restrictions, they would instead need—again, arguably—

90. *See, e.g.*, Brief of Defendant in Error at 2, Minor v. Happersett, 53 Mo. 58 (1873) (calling Minor's argument absurd and stating that it would allow "children and . . . infants in their nurses arms [to] vote"); *The Question in the Supreme Court of the United States—The Case of Mrs. Minor Against a Register of Voters in Missouri*, N.Y. TIMES, Feb. 10, 1875, at 8 (reporting that Francis Minor agreed when Justice Field asked him whether his argument meant "children [have] the right to vote"); *Female Suffrage at the Bar*, THE SUN (Balt.), Feb. 10, 1875, at 1 (relaying the same exchange and noting that "[a]fter this declaration the court did not pay much attention to the remainder of Mr. Minor's harangue").

91. Argument and Brief for Petitioner at 14, Minor v. Happersett, 88 U.S. 162 (1874) (No. 182).

92. For instance, supporters of women's disenfranchisement maintained the exclusion of women from the electorate was "for the good of the whole"; so too, while the brief suggested immutability mattered, it still included among the traits that could be required attributes like being "free from crime," that not all citizens would "sooner or later . . . attain." *Id.*

93. *See, e.g.*, Breedlove v. Suttles, 302 U.S. 277 (1937) (rejecting Nineteenth Amendment challenge to gender-based poll tax requirements); Guinn v. United States, 238 U.S. 347 (1915) (striking down grandfather clause as violating Fifteenth Amendment while upholding concurrently enacted literacy requirements).

to be shown to advance substantial policies commensurate to the burdens they imposed on a citizen's ability to vote. Under this framework, restrictions premised on the idea that some groups of citizens are categorically unworthy of membership in the electorate should get less traction, and, perhaps, fewer of these restrictions would survive scrutiny.

Speculation, to be sure, with a fair dose of wishful thinking mixed in. Still, it is worth recalling that when Virginia Minor attempted to register to vote in 1872, the most prominent supporters of women's suffrage were still arguing for universal suffrage. In the years that followed, the proliferation of voting restrictions that narrowed membership in the male-only electorate, were, for a time at least, deeply contested. Indeed, Justice Oliver Wendell Holmes's 1903 declaration that "the great mass of the white population [wanted] to keep the [B]lacks from voting" was simply not true, at least, not yet.[94]

Supporters of what became the Nineteenth Amendment might have objected to the tactics that informed Holmes's claim and the blatant racism that propelled them. Some did, of course, but the vast majority did not. Nor did these advocates opt to remain silent about the exclusionary campaign that was underway. Instead, they embraced the project, and did so with vigor, defining its success as integral to their own. They thus crafted and endorsed an Amendment that would advance their shared mission. Doing so meant repudiating the core commitments on which their campaign was originally founded and the commitments that propelled Virginia Minor to the Supreme Court. It was a choice they were willing to make.

94. Giles v. Harris, 189 U.S. 475, 488 (1903); *see* Pildes, *supra* note 62, at 306, 316.