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THE UNTOLD HISTORY OF WOMEN'S SUFFRAGE: VOTING RIGHTS PRE-RATIFICATION

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*In 1874, the question of women's suffrage was presented to the electors via a statewide referendum. As Susan B. Anthony stood beside a polling booth on election day, . . . an unkempt man carrying a ballot sheet approached her and asked, "What kind of ticket is that?" Susan B. Anthony replied, "Why, you can see for yourself," and pointed to his ballot sheet. "But I can't read," he responded. "What? Can't you read the ballot you have there in your hand—which you are about to vote?" "No, I can't read at all," he answered. "Well," she explained, "the ballot means that you are willing to let the women, as well as the men, vote." The man shook his head. "Is that so? Then I don't want it. The women don't know enough to vote."***

I

INTRODUCTION

On August 26, 2020,¹ we celebrated the Nineteenth Amendment's centennial. The Nineteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged

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** Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 664 (1996) (referencing OLIVIA COOLIDGE, *WOMEN'S RIGHTS* 9 (1975)).

¹ The Nineteenth Amendment was ratified August 26, 1920. 41 Stat. 1823 (1920) (Secretary of State certifying that the Nineteenth Amendment had been ratified).

by the United States or by any State on account of sex.”² One hundred years ago, the United States Constitution gave women—well, practically speaking, *white* women—the right to vote. Women of color gained equal suffrage in name only: they would be starved of the right to vote until 1965, with the passage of the Voting Rights Act. Though tainted by this nation’s history of deep-seated racism and misogyny, the Nineteenth Amendment’s ratification remains worth celebrating. A mere one hundred years ago, women were entitled to participate equally in the political process for the first time in U.S. history. Or so we’re told.

Over the past century, volumes have been written about the Women’s Suffrage movement.³ The common narrative focuses on the battle for Tennessee, which would become the thirty-sixth state to ratify the Nineteenth Amendment, as the seminal moment: that which federally codified women’s right to vote. These chronicles fit well within the traditional narrative of women’s suffrage: that white women gained the right to vote in 1920 and women of color in 1965; that the women’s suffrage movement was primarily a creature of the twentieth century. But that narrative ignores a significant and illuminating history of state and local practices granting women the right to vote before the federal amendment was ratified. The fight for equal suffrage began long before Susan B. Anthony, Elizabeth Cady Stanton, Lucy Stone, and their legions of suffragettes arrived on the scene.

Of course, groups like the National Woman Suffrage Association (NWSA) and American Woman Suffrage Association (AWSA) were

² U.S. CONST. amend. XIX, cl. 1. The second clause empowers Congress to “enforce this article by appropriate legislation.”

³ See, e.g., *THE WOMEN’S SUFFRAGE MOVEMENT* (Sally Roesch Wagner, ed., 2019); SUSAN L. POULSON, *SUFFRAGE: THE EPIC STRUGGLE FOR WOMEN’S RIGHT TO VOTE* (2019); ELAINE WEISS, *THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE* (2018); *VOTES FOR WOMEN!* (Marjorie Spruill Wheeler, ed., 1995); LES GARNER, *STEPPING STONES TO WOMEN’S LIBERTY: FEMINIST IDEAS IN THE WOMEN’S SUFFRAGE MOVEMENT, 1900–1918* (1984); OLIVIA E. COOLIDGE, *WOMEN’S RIGHTS: THE SUFFRAGE MOVEMENT IN AMERICA, 1848–1920* (1966).

instrumental in drumming up support for the national movement and a constitutional amendment, even after numerous failed attempts and monumental setbacks.⁴ But the path to women's suffrage would not have been possible without early steppingstones: states' allowing women to vote—either partially or entirely, formally or informally—*before* the federal amendment. From the colonial era to the early twentieth century, states acted as laboratories for experimentation: women exercised the right to vote as early as 1636,⁵ continued to do so through the early colonial era, and in the late nineteenth century, women were enfranchised at least partially in over half of the states in the union. All of this before the federal amendment stood a real chance. It was this experimentation, made possible by our federal system and coupled with the will of steadfast and tenacious women around the country, that gave rise to a federal amendment.

This article aims to deepen popular understanding of the women's suffrage movement by reframing the narrative, focusing on the role of federalism as a driving force behind the movement, and detailing a long, often undiscussed, history of state practice. Although much has been said about women's path to the ballot box in the United States, that story is incomplete. Here, I seek to change that. The Centennial of Nineteenth Amendment provides an exceptional occasion to do so.

In Section II, this article chronicles women's voting rights before the ratification of the Nineteenth Amendment, which were a product of constitutional design: the Constitution delegates to states the authority to define voter qualifications.⁶ The analysis begins with the Colonial and Revolutionary Eras (1600s–1807) and then turns to the nineteenth and early twentieth centuries (1808–1920), detailing and

⁴ In 1874, the United States Supreme Court ruled that although women were citizens, the Constitution did not guarantee them a right to vote. *Minor v. Happersett*, 88 U.S. (21 Wallace) 162, 178 (1874).

⁵ See *infra* note 12–14 and accompanying text.

⁶ U.S. CONST. art. I, § 4, cl. 1 (though reserving to Congress the authority to supersede state regulations).

examining state statutes, constitutions, and practices enfranchising women partially or fully long before the Nineteenth Amendment was ratified. Section III examines how this long history of state practice exemplifies states as “laboratories of experimentation.” Without states’ experimentation, and thus the federal structure more generally, the ratification of the Nineteenth Amendment would not have been possible.

II

VOTING RIGHTS PRE-RATIFICATION

A. The Colonial & Revolutionary Eras: 1600s–1807

Prior to the Revolutionary War and the Constitutional Convention of 1787, white women exercised the right to vote in certain Colonies, going as far back as 1636.⁷ Before the Revolutionary War, only Pennsylvania, Delaware, Georgia, Virginia, and South Carolina “used the word ‘male’ in their election *statutes* or otherwise specifically excluded women.”⁸ And only five of the first state *constitutions*—Georgia, Massachusetts, New York, South Carolina, and Pennsylvania—explicitly barred women from voting.⁹ Around the time of the Revolution, those colonies that had permitted women to vote rolled back that right and established sex as a qualification for voting. The Articles of Confederation, the new nation’s first attempt at a cohesive legal system, made no mention of voting rights. Article II provides that “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in

⁷ See *infra* notes 12–15 and accompanying text.

⁸ ROSEMARIE ZAGARRI, *REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC* 28 (2008).

⁹ *Id.* at 31. These constitutions limited the franchise to men by using the word “male” or by referencing “sons” when prescribing the requisite voting qualifications. *Id.*

Congress assembled.”¹⁰ States thus retained the power to regulate elections and prescribe election qualifications. And though women’s right to vote was not enshrined in the U.S. Constitution at the Constitutional Convention in 1787, those colonies that had already embraced female suffrage laid important groundwork for the push for equal franchise over one hundred years later.

1. Massachusetts

The Pilgrims established the first Colony of New Plymouth in 1632, for which they created a legal code in 1636. The 1636 code was the first modern code of laws in America and would influence the laws of the colonies writ large, and ultimately, the laws of the United States of America.¹¹ Under the laws of the New Plymouth Colony, freemen and those who were “masters of [their] families and Inhabitants” of the towns of the colony and had “taken an oath of fidelitie” could vote.¹² Because it was admitted that women were persons and qualified as inhabitants,¹³ female heads of families and the rare single female property owner could vote in the New Plymouth Colony.¹⁴

¹⁰ ARTICLES OF CONFEDERATION of 1781, art. II.

¹¹ George L. Haskins, *The Legal Heritage of Plymouth Colony*, 110 U. PA. L. REV. 847, 847 (1962).

¹² THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 63 (Brigham ed. 1836) (“[S]uch as are not freemen but have taken the oath of fidelitie and are masters of families and Inhabitants of the said Townes as they are to bear their [part] in the charges of their Committees so to have a vote in the choyce of [freemen]” The freemen were eligible for election “to be Committees or deputies to joyne with the Bench to enact and make all such lawes and ordinances as shall be to be good and wholesome for the whole.”), <https://babel.hathitrust.org/cgi/pt?id=coo1.ark:/13960/t1jh44373&view=1up&seq=9>.

¹³ “Persons”: shocking, I know. See COMPACT, *supra* note 12, at 73 (“That every person that liveth and is quietly settled in any Towneship and not excepted against within the compasse of three months after his comeing, in this case shalbe reputed an Inhabitant of that place.”).

¹⁴ Such, at any rate, is the logic of the nineteenth-century historian Charles Waite: “Were women ‘inhabitants?’ Unless it be denied that a woman was a

From 1691 to 1780, under Massachusetts' Old Province Charter, "women were not excluded from voting," for elected offices,¹⁵ but whether women generally in fact exercised the right to vote is unclear and concrete proof, elusive.

But 1780 marked a dramatic shift: that women could not vote for the Governor, Council, or Legislature was made explicit. Though some articles of the Massachusetts Constitution of 1780 seemed to provide otherwise, retaining the gender-neutral language consistent with previous voting laws in Massachusetts,¹⁶ the catch was in "qualifications" to vote, set out in subsequent provisions: "Every *male* person being twenty-one years of age, . . . resident in any particular

'person,' it must be admitted that by being quietly settled in a township and not excepted against within three months, she became an inhabitant, and if an inhabitant and head of family, she had a vote, whether she was a freeholder or not." Charles B. Waite, *Who Were Voters in the Early History of this Country?* 2 CHI. L. TIMES, 398 (1888). The extent of such female suffrage appears, though to have been restricted to wealthy widows. See ALEXANDAR KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 6 (2000) ("[Although] "women were barred expressly in several colonies, . . . statutes elsewhere made no reference to gender, and in at least a few Massachusetts towns . . . propertied widows did legally vote.")

¹⁵ 1 ELIZABETH STADY CANTON ET AL., *HISTORY OF WOMAN SUFFRAGE* 283 (2d ed., 1889) ("In the early history of Massachusetts, when the new colony was governed by laws set down in the Province charter (1691, third year of William and Mary) women were not excluded from voting. The clause in the charter relating to this matter says: 'The great and general court shall consist of the governor and council (or assistants for the time being) and of such freeholders as shall be from time to time elected or deputed by the major part of the freeholders and other inhabitants of the respective towns or places, who shall be present at such elections.'"), http://www.gutenberg.org/files/28556/28556-h/28556-h.htm#FNanchor_142_142.

¹⁶ For example, Article V provided, "All power residing originally in the *people*, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are the substitutes and agents, and are at all times accountable to them." And Article IX read, "All elections ought to be free; and *all the inhabitants* of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers . . .") MASS. CONST. of 1780, arts. V, IX (emphases added).

town in this commonwealth," freeholder with "the annual income of three pounds, or any estate of the value of sixty pounds, shall have the right to vote" for representatives.¹⁷ Likewise, male inhabitants at least twenty-one years old and possessing a freehold estate worth sixty pounds had the right to vote for senators from his district.¹⁸ Thus, women could no longer vote in any state-wide election. Any voting rights women did retain were not constitutional guarantees.

2. New York

In New York, prior to 1777, women were permitted to vote if they satisfied the property requirement.¹⁹ For example, beginning in 1654, Lady Deborah Moody, a resident of Long Island, participated in local elections for town officers, taxes, and other local positions.²⁰ The Charters of New York City granted equal suffrage.²¹ The Colonial Laws of New York provided that Constables and Overseers in each town would be chosen by "the vote of the Major part of the [town's] *Inhabitants*," imposing no property requirement at all.²² For General Assembly elections as of 1683, suffrage was limited to freeholders and

¹⁷ MASS. CONST. of 1780, ch. I, § 3, art. IV.

¹⁸ MASS. CONST. of 1780, ch. I, § 2, art. II ("[E]very male inhabitant of twenty-one year of age and upwards, having a freehold estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant.").

¹⁹ HAMILTON WILLCOX, *WOMEN'S COMMON LAW: RIGHT TO VOTE FROM THE EARLIEST TO THE PRESENT TIME* 359 (1885).

²⁰ Waite, *supra* note 14, at 400.

²¹ WILLCOX, *supra* note 19, at 359.

²² 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION, INCLUDING THE CHARTERS TO THE DUKE OF YORK, THE COMMISSIONS AND INSTRUCTIONS TO COLONIAL GOVERNORS, THE DUKE'S LAWS, THE LAWS OF THE DONGAN AND LEISLER ASSEMBLIES, THE CHARTERS OF ALBANY AND NEW YORK AND THE ACTS OF THE COLONIAL LEGISLATURES FROM 1691 TO 1775 INCLUSIVE 91 (James B. Lyon, ed., 1896) [hereinafter THE COLONIAL LAWS OF NEW YORK].

freemen in any corporation.²³ In 1701, the Colony amended its voting laws, extending the right to vote to "all and every *person* . . . having in his or their possession an Estate of freehold, during his Life, or for and during the Life of his Wife . . . shall be qualified to give his & their . . . Votes for Representatives . . ." ²⁴ Though the term freeholder imposes a property requirement, it implies no distinction on the basis of sex.²⁵ Women *per se* were not banned from voting.²⁶ However, the property requirement eliminated a majority of the female electorate because, under coverture laws, married women could not own property. The franchised females were primarily propertied widows who had inherited land upon the deaths of their husbands.²⁷ A few propertied single women probably satisfied the property requirement as well, but that would have been rare.²⁸

In 1777, New York ratified a constitution that effectively foreclosed women's participation in the elective franchise. That Constitution eliminated the gender neutral language of previous voting laws, instead providing explicitly that "every *male* inhabitant of full age, who shall have personally resided within one of the counties of this State for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives

²³ *Id.* at 112 (First General Assembly Session at Fort James, 1683).

²⁴ *Id.* at 453 (Eighth General Assembly, First Session, 1701) (emphasis added).

²⁵ WILLCOX, *supra* note 19, at 359. *Blackstone's Commentaries* defines a freehold as "the possession of the soil by a freeman." 1 BLACKSTONE'S COMMENTARIES 129 (William C. Sprague, ed., 1893). *Cf.* "freeman," which "can be interpreted to exclude females." ROBERT J. DINKIN, VOTING IN PROVINCIAL AMERICA 30 (1977).

²⁶ WILLCOX, *supra* note 19, at 359.

²⁷ *Id.*; THE COLONIAL LAWS OF NEW YORK, *supra* note 25, at 69 (First General Assembly Session at Fort James, 1683 providing that a married woman inherited marital property upon her husband's death).

²⁸ ZAGARRI, *supra* note 8, at 28–29.

of the said county in assembly.”²⁹ The qualifications to vote for Senators, Governor, and Lieutenant Governor, though making no such express, facial distinction on the basis of sex, did so by reference.³⁰

3. New Hampshire

New Hampshire women participated in the franchise before 1784. New Hampshire enacted a temporary constitution in 1776 that contained no provisions about voter qualifications, and referred only to “people” as comprising the electorate.³¹ In 1783, the legislature adopted a new, more robust constitution that ultimately disenfranchised women, effective in 1784. Only male inhabitants, who paid a poll tax and were at least twenty-one years-old, were permitted to vote.³² Quite unlike the other New England colonies, New Hampshire did not impose property requirements, but it did follow the general trend with respect to sex: maleness was required to be able to vote.

4. The South & the Mid-Atlantic

Perhaps unsurprisingly, New England and the South differed drastically with respect to voting rights. Virginia was the earliest

²⁹ N.Y. CONST. of 1777, § VII (emphasis added), https://avalon.law.yale.edu/18th_century/ny01.asp.

³⁰ *Id.* at § 12 (senators to be elected by “freeholders . . . qualified as aforesaid”), § 17 (governor to be elected “by the freeholders of this State, qualified, as before described, to elect senators”), § 20 (lieutenant governor to “be elected in the same manner with the governor”).

³¹ N.H. CONST. of 1776 (“the Council be chosen by the people of each respective county in such manner as the Council and house of Representatives shall order.”).

³² N.H. CONST. of 1783, part II. The Constitution provides that “Every male inhabitant of each town and parish with town privileges in the several counties of this State, of twenty-one years of age and upwards, paying for himself a poll tax, shall have a right . . . to vote in the town or parish wherein he dwells, for the senators in the county or district whereof he is a member.” *Id.* The same requirements applied to the election of representatives and the President of New Hampshire. *Id.*; see also *id.* at part III.

colony to restrict voting to males only.³³ The Virginia legislature disenfranchised women by statute in 1699.³⁴ Seventeen years later, South Carolina used gender-neutral language, providing in the Election Law of 1704 that any *person*, at least twenty-one years old who owned at least fifty acres of land or ten pounds' worth of money, goods, chattels within the district could vote.³⁵ Sex would not become a qualification to vote in South Carolina for another twelve years: In 1716, voter qualifications were amended, precluding women, non-Christians and people of color from voting.³⁶ The Act provided "*every white man*, and no other, professing the Christian religion" at least twenty-one years old and owning property worth at least thirty pounds "shall be deemed a person qualified to vote."³⁷ In 1801, the Maryland legislature amended the state's constitution, restricting the franchise to "every free white male citizen of this state" at least twenty-one years-old "shall vote by ballot."³⁸ North Carolina and Georgia did not add the male qualification until much later.³⁹

³³ *Women Voted Before the United States Was Formed*, in THE WOMEN'S SUFFRAGE MOVEMENT *supra* note 3, at 2, 8.

³⁴ *Id.*; See also WAITE, *supra* note 14, at 405.

³⁵ 2 THE STATUTES AT LARGE OF SOUTH CAROLINA: ACTS FROM 1682 TO 1716 at 249 (Thomas Cooper, ed., 1837) (Statute No. 227).

³⁶ *Id.* at 688, § XX. The Act was entitled, "An Act to keep inviolate and preserve the freedom of Elections, and appoint who shall be deemed and adjudged capable of choosing or being chosen Members of the Commons House of Assembly."

³⁷ *Id.*

³⁸ An Act to alter such parts of the constitution and form of government as relate to voters, and qualification of voters, ch. XC, 1801 Md. Laws, <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000380/pdf/am380--8.pdf>.

³⁹ WAITE, *supra* note 14, at 406 (North Carolina inserted "male" into their requisite voter qualifications in 1868; Georgia in 1861).

5. New Jersey

The most interesting suffrage experiment in the colonial era comes from New Jersey. Much like its compatriots in the northeastern colonies, New Jersey's voting laws (and ultimately, its Constitution) framed voter qualifications in gender-neutral terms. Beginning in 1672, "freeholders" were entitled to vote, according to the Declaration of the Lords Proprietors.⁴⁰ The term freeholders was used through 1701, when the law provided that householder inhabitants were eligible to elect members of the General Assembly.⁴¹ Records show that at least one woman, Elizabeth Miller, voted as an "inhabitant, householder."⁴² During the Revolutionary War period, New Jersey adopted a constitution. The New Jersey Constitution of 1776 stated that

all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the county at large.⁴³

⁴⁰ A Declaration of the True Intent and Meaning of us the Lords Proprietors, and Explanation of There Concessions Made to the Adventurers and Planters of New Caesarea or New Jersey—1672 ("[N]o person or persons whatsoever shall be counted a freeholder of the said Province, nor have any vote in electing . . . until he doth actually hold his or their lands by patent from us, the Lords proprietors."), https://avalon.law.yale.edu/17th_century/nj03.asp. See also WAITE, *supra* note 14, at 401.

⁴¹ WAITE, *supra* note 14, at 401–02.

⁴² *Id.* at 402.

⁴³ N.J. CONST. of 1776, para. IV.

So, as of 1776, qualified women, usually wealthy widows, voted in both state and federal elections.⁴⁴ Indeed, the names of at least two women appeared on the 1787 Burlington County poll roster.⁴⁵

But what's most novel about women's suffrage in New Jersey is what happened a mere fourteen years later. In 1790, the New Jersey Assembly enacted a statute that expressly enfranchised single, propertied women in seven counties.⁴⁶ The statute even employed the ever-elusive "she" pronoun.⁴⁷ With that change, propertied widows and single women were statutorily guaranteed access to the elective franchise.⁴⁸ What's significant about this law is not that it gave women the right to vote for the first time—the 1776 Constitution, though not expressly, permitted them to do so. Rather, the significance is that for the first time, women were explicitly included as members of the electorate. Seven years later, the New Jersey legislature extended the franchise to all propertied women in the state.⁴⁹ The 1797 statute provided, "[E]very voter shall openly and in full view deliver his or *her* ballot, which shall be a single written ticket, containing the names of

⁴⁴ ZAGARRI, *supra* note 8, at 4.

⁴⁵ Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776–1807*, 63 RUTGERS L. REV. 1017, 1020 (2011).

⁴⁶ ZAGARRI, *supra* note 8, at 31; Lewis, *supra* note 45, at 1021. The state had thirteen counties at the time. ZAGARRI, *supra* note 8, at 31.

⁴⁷ See An Act to Regulate the Election of Members of the Legislative-Council and General Assembly, Sheriffs and Coroners, in the Counties of Bergen, Monmouth, Burlington, Gloucester, Salem, Hunterdon and Sussex, ch. CCCXXII, 1790 N.J. Laws 669 ("No Person shall be entitled to Vote in any other Township or precinct, than that in which he or *she* doth actually reside at the time of the Election." (emphasis added)).

⁴⁸ ZAGARRI, *supra* note 8, at 31.

⁴⁹ Lewis, *supra* note 45, at 1021. See also ZAGARRI, *supra* note 8, at 31 ("[W]idows who had inherited their deceased husbands' estates were the women most likely to vote.").

the person or persons for whom he or *she* votes.”⁵⁰ Under the new law, anyone that satisfied the property requirement—black men, women, single or widowed, black or white, and even aliens—became members of the electorate.⁵¹ Those qualified women voted in state and federal elections for the next decade.⁵²

In 1807, the New Jersey Legislature repealed women’s and black men’s right to vote, replacing the previously gender- and race-neutral voting qualifications with “free, white, male citizens.”⁵³ According to legislative history, the legislature disenfranchised women and black men over concerns of voter fraud in an 1807 referendum.⁵⁴ Allegedly, in that referendum vote, more votes were cast than there were eligible voters in the district because men dressed up as women to vote twice and avoid detection, though there is a dearth of evidence supporting those allegations.⁵⁵ After ten years of relatively widespread female voting, the New Jersey experiment was over.

In actuality, this nearly twenty-year expansion affected relatively few New Jersey women.⁵⁶ Though New Jersey’s property requirement was one of the least onerous of the time,⁵⁷ a woman still had to *own property*. Because all marital property became the husband’s under coverture law, married women were excluded from the franchise entirely.⁵⁸ Widows who had inherited their husband’s estate were the women most likely to vote; it would have been

⁵⁰ An Act to Regulate the Election of Members of the Legislative-Council and General Assembly, Sheriffs and Coroners, in this State, ch. DCXXXIV, 1796 N.J. Laws 171 (emphasis added).

⁵¹ Lewis, *supra* note 45, at 1022–23.

⁵² ZAGARRI, *supra* note 8, at 31.

⁵³ 1807 N.J. Laws 14. See also ZAGARRI, *supra* note 8, at 36.

⁵⁴ ZAGARRI, *supra* note 8, at 36.

⁵⁵ *Id.*

⁵⁶ *Id.* at 31.

⁵⁷ Lewis, *supra* note 45, at 1022.

⁵⁸ ZAGARRI, *supra* note 8, at 31.

difficult for single women to amass the requisite amount of wealth or property.⁵⁹ As a result, only about a few hundred votes were cast by women each election.⁶⁰ But that they voted *at all* remains an extraordinary bit of history.

B. 19th Century and Early 20th: 1808–1920

In 1848, supporters of women's suffrage gathered in Seneca Falls, New York, for a conference led by Lucretia Mott and Elizabeth Cady Stanton. They gathered in response to New York's Constitutional Convention, which had mocked the notion of women's suffrage and denied it outright.⁶¹ Convention leaders drafted the Declaration of Sentiments, modeled after the U.S. Declaration of Independence, which declared that "all men and women are created equal," that man "has never permitted her to exercise her inalienable right to the elective franchise" and in doing so, he has "deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides."⁶² The Convention at Seneca Falls was a seminal moment in the movement for women's suffrage and sparked similar gatherings in Ohio and Massachusetts.⁶³ But the ideals and goals espoused at Seneca Falls would not find sufficient support to effectuate them for approximately another thirty years.⁶⁴

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ KEYSSAR, *supra* note 14, at 176.

⁶² *Report of the Women's Rights Convention*, NAT'L PARK SERV. (Feb. 26, 2015) <http://www.nps.gov/wori/learn/historyculture/report-of-the-womans-rights-convention.htm> [<https://perma.cc/WLR8-7AKN>].

⁶³ KEYSSAR, *supra* note 14, at 176.

⁶⁴ *See id.* at 180 (describing how support for women's suffrage waned after Seneca Falls, and noting that although "[e]qual rights" was a powerful slogan, it remained a "minority view," as men did not perceive women as endangered by their inability to represent themselves at the ballot box). *See*

1. Losses

From the beginning of the 19th Century until around the end of the Civil War, women's voting rights waned, and many states amended voting laws to expressly disenfranchise women. For example, in 1831, Delaware amended its constitution, providing that only "free white male citizen[s]" at least twenty-one years old shall be entitled to vote.⁶⁵ Similarly, Tennessee amended its constitution in 1834, providing that "every free white man" over twenty-one shall have the right to vote.⁶⁶ Texas, upon being admitted to the Union in 1845, added "male" to its elector qualifications.⁶⁷ In 1861, Georgia limited suffrage to "free white male citizens" who were taxpayers and at least twenty-one years old.⁶⁸ In New York, women petitioned the Constitutional Convention of 1867 for a universal suffrage amendment.⁶⁹ The petition was defeated 125 votes to 19.⁷⁰ In 1868, North Carolina restricted voting rights to males.⁷¹ Elsewhere, in the late nineteenth century, state legislatures in Minnesota and Nebraska amended their state constitutions to require a super majority for any referenda on women's suffrage.⁷² In the mid-1890's, state courts in

also infra note 75 and accompanying text (describing the divergent views on suffrage for women and people of color).

⁶⁵ DE. CONST. of 1831, art. IV, § 1. *See also* WAITE, *supra* note 14, at 403 (describing the history of elector qualifications in the state of Delaware).

⁶⁶ TN. CONST. of 1834, art. IV, § 1. *See also* WAITE, *supra* note 14, at 407 (describing the history of elector qualifications in the state of Tennessee).

⁶⁷ TEX. CONST. of 1845, art. III, § 1. *See also* WAITE, *supra* note 14, at 407-08 (describing the history of elector qualifications in the state of Texas).

⁶⁸ GA. CONST. of 1861, art. V, § 1. *See also* WAITE, *supra* note 14, at 406 (describing the history of elector qualifications in the state of Georgia).

⁶⁹ *The 1860s: In Full Stride, the War's Setback, and Regrouping After*, in WOMEN'S SUFFRAGE MOVEMENT, *supra* note 3, at 146.

⁷⁰ *Id.*

⁷¹ N.C. CONST. of 1868, art. VI, § 1.

⁷² VOTES FOR WOMEN!, *supra* note 3, at 17.

New Jersey and Michigan declared women's school and municipal franchise laws unconstitutional.⁷³

And perhaps most significant of all, the Fourteenth Amendment was ratified in 1866. In relevant part, it provided that states were subject to penalties only if they deprived *male* citizens over twenty-one of the right to vote.⁷⁴ In the wake of the Civil War and the abolition of slavery, the Fourteenth Amendment sought to enfranchise all men—but most notably, men of color.⁷⁵ The Fourteenth Amendment

⁷³ *Id.* at 18.

⁷⁴ U.S. Const., amend. XIV, § 2.

[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such State. (emphasis added).

⁷⁵ See KEYSSAR, *supra* note 14, at 177 (quoting Wendell Phillips' noting that political leaders wanted to answer just "[o]ne question at a time. This hour belongs to the negro."). The divergence of views on suffrage for men of color created a grave rift in the women's suffrage movement and serious hostility toward black men as voters. A group of suffragists, including Susan B. Anthony and Elizabeth Cady Stanton, tainted their cause with racist vitriol, further severing the two movements for enfranchisement. Stanton herself said, "I would not trust [the colored man] with all my rights; degraded, oppressed himself, he would be more despotic with the governing power than even our Saxon rulers are." *Id.* at 178. They questioned why uneducated former slaves should be guaranteed the right to vote when "educated, patriotic women" would be denied that right? In 1867, this divide played out in Kansas, to the downfall of both women and people of color. The Kansas legislature was considering two referenda: one to enfranchise women and one to enfranchise people of color. Many Republicans campaigned in favor of both. But advocates like Susan B. Anthony sided with the racist Democrats who vocally opposed black enfranchisement. The outcome: both measures were defeated. No one won. *Id.*

is the only part of the U.S. Constitution in which the word "male" appears.⁷⁶ Specifying that only *male* voters were constitutionally protected meant that women were not. By reason of negative inference, or *expressio unius*, the Fourteenth Amendment denied women the right to vote.

The final blow came in 1874 with the Supreme Court's decision in *Minor v. Happersett*.⁷⁷ In 1872, Virginia Minor attempted to register to vote in Missouri, her native state.⁷⁸ After being denied, Minor challenged the Missouri laws prohibiting women from voting as violating the Privileges and Immunities Clause of Art. IV, as incorporated by the Fourteenth Amendment.⁷⁹ In a unanimous opinion, the Supreme Court held that although women could be citizens, the right to suffrage is not a right inherent in citizenship.⁸⁰ In reaching this conclusion, the Court relied heavily on the history of voter qualifications from the colonial era,⁸¹ holding that because suffrage was not a privilege guaranteed by the Constitution at the time of ratification, as evidenced by the states' various, stringent elector requirements, it was not protected by Article IV.⁸² And because the Fourteenth Amendment did not create a new right to suffrage, Minor had no legal claim to assert.⁸³

⁷⁶ "Male" appears just three times in the entire U.S. Constitution, all in Amend. XIV, § 2, cl. 2.

⁷⁷ 88 U.S. 162 (1874).

⁷⁸ KEYSSAR, *supra* note 14, at 181.

⁷⁹ *Minor*, 88 U.S. at 165.

⁸⁰ *Id.* at 178.

⁸¹ *Id.* at 172–73, 176–77 (referencing voter qualification laws in the thirteen colonies); *see also* 177–78 ("If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here.").

⁸² *Id.* at 177 ("[T]he Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.").

⁸³ *See id.* at 178 ("No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist.").

2. Victories: Partial Suffrage

Despite the onslaught of losses after Seneca Falls and in *Minor v. Happersett*, the suffragettes picked up ground elsewhere. In the latter half of the nineteenth century, women gained partial suffrage rights—rights to vote on some matters but not on others—in more than half of the states.⁸⁴ Particularly in the North, the newly admitted states, and the territories, women “took matters into their own hands and resisted.”⁸⁵ In 1868, women voted in local elections in eleven cities across the country.⁸⁶ In Passaic, New Jersey, women voted in a contest for commissioner of streets and sidewalks.⁸⁷ Women voted on a water-works project in Schenectady, New York.⁸⁸ Between fifty and eighty women voted in a local election in Topeka, Kansas.⁸⁹ In Sturgis, Michigan, 120 women voted in a prohibition referendum and a contest for school board.⁹⁰ New Jersey, again the outlier, saw 172 African American and white women vote in a federal election in Vineland.⁹¹

Partial suffrage commonly took four forms: voting in municipal and schoolboard elections, and on issues involving liquor licenses and education.⁹² Each example of partial suffrage was a logical extension of the traditional woman’s realm: “[I]iquor votes to protect the home, school votes to protect the children, and, in time, municipal votes to

⁸⁴ KEYSSAR, *supra* note 14, at 186 (“Nearly all state legislatures considered adopting laws of this type, and by 1890, more than twenty states had done so.”), 399 (Table A.17).

⁸⁵ *The 1860s: In Full Stride, the War’s Setback, and Regrouping After*, in WOMEN’S SUFFRAGE MOVEMENT, *supra* note 3, at 152.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² KEYSSAR, *supra* note 14, at 186.

clean up the cities."⁹³ Typically, these were statutory, not state-constitutional law guarantees.⁹⁴ They could thus be given, modified, or taken away at will by legislative act, rather than by more cumbersome constitutional amendment.⁹⁵ The structural differences were consistent with legislators' views that school and family matters were distinct from politics.⁹⁶ Though it is disputed whether these partial suffrage laws were the result of a conscious effort for equal citizenship and full suffrage,⁹⁷ they were nevertheless an important development on the road to full enfranchisement. Even small forward progress is still forward progress.

The most common limited voting scheme was school suffrage:⁹⁸ "any revision of law that gave women a vote on matters of public education."⁹⁹ The first state to grant women school suffrage was Kentucky, which permitted unmarried women and propertied widows to vote in school elections as early as 1838.¹⁰⁰ By the end of

⁹³ VOTES FOR WOMEN!, *supra* note 3, at 14.

⁹⁴ See KEYSSAR, *supra* note 14, at 399–400 (Tables A.17, A.18) (Before 1900, only Colorado, Idaho, Louisiana, Minnesota, Montana, and North Dakota granted partial suffrage by constitutional provision.).

⁹⁵ *Id.* at 186.

⁹⁶ *Id.*

⁹⁷ See Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 AM. HIST. R. 620, 637–38 (1984) (arguing that the movement for partial suffrage on issues pertaining to women, the family, and the community were not a conscious effort to ultimately achieve full suffrage, but rather the protect the traditional sphere of the woman and her family); *But see* KEYSSAR, *supra* note 14, at 186 ("[A]ctivists generally viewed school suffrage as a stepping-stone, an entering wedge for broader electoral participation . . .").

⁹⁸ KEYSSAR, *supra* note 14, at 186.

⁹⁹ VOTES FOR WOMEN!, *supra* note 3, at 14.

¹⁰⁰ KEYSSAR, *supra* note 14, at 175. In 1912, Kentucky restricted the franchise to literate women, presumably in an attempt to disenfranchise women of color, as many literacy requirements were. *Id.* at 399 (Table A.17).

the nineteenth century, twenty-eight states and territories endowed women with the right to vote in school elections, most of them by statute.¹⁰¹ Some states limited the school franchise to certain groups, including taxpayers,¹⁰² “patrons” of schools,¹⁰³ heads of families,¹⁰⁴ or women with school-age children.¹⁰⁵

School suffrage, unlike the general franchise, appealed to traditional gender roles: women reared children and took care of the home, while men handled politics, commerce, law.¹⁰⁶ Arguably, school suffrage was so successful and widespread because it did not threaten to upend gender norms or stability of the family.¹⁰⁷ It easily withstood women’s suffrage opponents whose arguments relied heavily on moralism, religion, and fearmongering of social upheaval and familial turmoil.¹⁰⁸ If women were confined to voting on issues within their typical sphere, their exercise of the franchise would not imperil the status quo.

Franchise tied to women’s traditional roles in society led, in 1887, to certain states and territories enfranchising women for

¹⁰¹ *Id.* at 399 (Twenty-three of them extended the franchise by statute; five by constitutional amendment).

¹⁰² *Id.* (Michigan, 1855; Iowa, 1895; Delaware, 1898).

¹⁰³ *Id.* (Mississippi, 1878).

¹⁰⁴ *Id.* (Mississippi, 1880).

¹⁰⁵ *Id.* (Kentucky, 1893).

¹⁰⁶ *Id.* at 174 (“Although women were regarded as intelligent adults, they were viewed as having capacities different from those of men, capacities appropriate to private life and the domestic sphere rather than the public world of politics.”).

¹⁰⁷ *See id.* at 186 (suffrage involving schools was “the most common form of partial enfranchisement, recognizing women’s responsibility for childrearing, as well as their education experience”).

¹⁰⁸ *Id.*; *see also id.* at 192 (cataloguing the common arguments that allowing women into the public arena would “utterly destroy[]” the family, “encourage promiscuity, undermine the purity of women, and expose them to the irresistible predations of men”).

municipal elections (as a form of “housekeeping”) or tax and bond issues.¹⁰⁹ Only five states had granted partial suffrage for non-school issues before the turn of the century.¹¹⁰ By 1917, that number reached fourteen.¹¹¹ The vast majority of those states enacted voting rights by statute, but Montana and Louisiana provided women with a constitutional right to vote for all tax issues, in 1889 and 1898 respectively.¹¹² The justification for expanding voting rights on municipal issues and tax issues differed from rationales underpinning school suffrage. Advocates for partial municipal or tax suffrage relied not on notions of the woman’s appropriate role in the social fabric, but instead on her identity as a taxpayer and citizen.¹¹³ Though some argued that keeping an eye on municipal governance was a form of proverbial housekeeping, more emphasized the inseparable tie between taxation and representation.¹¹⁴ The age-old phrase “no taxation without representation” was again repurposed, this time in support of women’s suffrage.¹¹⁵

The expansion of partial suffrage is also interesting from a geographic perspective: the only southern state to extend school suffrage to women was Mississippi;¹¹⁶ Louisiana was the only state to

¹⁰⁹ *Id.* at 187.

¹¹⁰ *Id.* at 400 (Table A.18).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 187.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 182. Suffragists also “promoted tax rebellions among female property owners in the late 1860s and early 1870s.” During these rebellions, women refused to pay their taxes as long as they were denied access to the elective franchise. *Id.*

¹¹⁶ See *supra* notes 101, 104, and accompanying text. I define “southern states” as those members of the Confederacy during the Civil War. As such, Florida, Kentucky and other states that might be deemed “southern” today are excluded from my method of categorization.

grant partial suffrage on tax issues.¹¹⁷ This reflected a general trend that southern states were particularly resistant to women's suffrage, and progress in this region was correspondingly slow.¹¹⁸ The South's reluctance to grant equal suffrage to women, consistent with suffrage patterns in the days of the early republic and post-Revolutionary War, dragged into the twentieth century.¹¹⁹ At that time, Virginia, Louisiana, Georgia, and others rejected bills and amendments that would have partially or fully enfranchised women.¹²⁰ When, in the mid-1880s, the United States Congress considered a constitutional amendment to enfranchise women (using the exact language the Nineteenth Amendment would ultimately use),¹²¹ twenty-two of the thirty-four votes against were cast by southern senators; no southern senator voted in favor.¹²² Given the South's longstanding resistance to women's suffrage, it became clear that until such resistance could be overcome, the only route to equal voting rights was by waging a war for equality, state-by-state.

Women's steps forward in the march toward equal suffrage were but incremental. But even if these micro-progressions were mostly restricted to issues within the woman's realm, they still served

¹¹⁷ KEYSSAR, *supra* note 14, at 400 (Table A.18).

¹¹⁸ *Id.* at 194.

¹¹⁹ See *supra* notes 33–39, and accompanying text.

¹²⁰ See KEYSSAR, *supra* note 14, at 210. In 1912, the Virginia House of Delegates opposed a constitutional amendment 88–12. The Virginia Senate refused to consider the measure altogether. Both branches of the Louisiana legislature rejected a bill that would have permitted white women to vote in Democratic primaries. Louisiana's voting citizens defeated a popular referendum for women's school suffrage. Proposals in Alabama and Arkansas also failed. In 1916, Georgia legislators scheduled hearings on women's suffrage for the day after they adjourned. *Id.*

¹²¹ "[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." This wording had been crafted by Susan Anthony, compressing a more verbose amendment first introduced to Congress in 1869. *Id.* at 185.

¹²² *Id.*

as proof that women could vote and participate in the political questions of the day. The sky would not fall; the social fabric would not fray. Consciously made as such or not, the partial-suffrage strategy was a critical step in the path toward a federal amendment.

3. Victories: Suffrage in Presidential Elections

In the decade before the Nineteenth Amendment's ratification, seventeen states enacted statutes enfranchising women for presidential elections.¹²³ Illinois was the earliest state to do so, granting women the right to vote in presidential contests in 1913.¹²⁴ Only Arkansas and Texas limited the franchise: Arkansas to primary elections, and Texas to primary elections and nominating conventions.¹²⁵ Texan women were still subject to a poll tax as of 1919.¹²⁶ Ohio's initial grant of the franchise was short-lived: voters defeated the statute by popular referendum in November 1917, mere months after its enactment.¹²⁷ Undeterred, the Ohio legislature reenacted the statute in 1919.¹²⁸ The vast majority of states that granted women the right to vote in presidential elections did so between 1917 and 1919, presumably in light of the upcoming 1920 election.¹²⁹

The piecemeal approach to suffrage—from what women could vote on and in which states—was a kind of experiment, though

¹²³ *Id.* at 401 (Table A.19).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (Arkansas: 1917; Indiana: 1917, later deemed unconstitutional by *Bd. of Election Comm'rs of Indianapolis v. Knight*, 117 N.E. 656 (Ind. 1917); Michigan: 1917; Nebraska: 1917; North Dakota: 1917; Rhode Island: 1917; Ohio: 1917; Texas: 1918; Indiana: 1919; Iowa: 1919; Maine: 1919; Minnesota: 1919; Missouri: 1919; Ohio: 1919; Tennessee: 1919; and Wisconsin: 1919).

perhaps not intended as one. There was no hypothesis to be proved (except in the minds of the suffragettes) and no control to the experimenting. But that these states extended women's suffrage to federal elections, and to arguably the most significant contest among them, is extraordinary evidence that the state experimentation model had continued to evolve and expand. Each of the states that had enfranchised women for presidential elections before the federal amendment was also, unsurprisingly, among the first states to ratify the Nineteenth Amendment in 1919.¹³⁰ Tennessee, which allowed women to vote in presidential elections beginning in 1919, would be the crucial thirty-sixth state to ratify the federal amendment. Granted, women in the eight states that gave them the full franchise in 1919¹³¹ would not have had the opportunity to exercise that right before the federal amendment was enacted. In those states, there had been no opportunity for trial and error, no opportunity for experimentation. The incremental expansion of the franchise elsewhere, bit by bit, state by state, had been significant, nevertheless: each state statute granting suffrage of one kind or another demonstrated that the women's suffrage movement had gained sufficient popular support among male legislators and the electorate. Each statute evinced a changed perception about women's suffrage: legislators and the public no longer feared women's suffrage and concomitant societal impacts. State experimentation in partial suffrage rights had been critical in transforming this perception and ultimately paved the way for the ratification of the federal amendment.

¹³⁰ See *19th Amendment By State*, NAT'L PARK SERV. (July 18, 2019), <https://www.nps.gov/subjects/womenshistory/19th-amendment-by-state.htm> [permalink: <https://perma.cc/PM47-YQ4B>] (cataloguing each state's date of ratification, in chronological order).

¹³¹ KEYSSAR, *supra* note 14, at 401 (Table A.19) (Indiana, Iowa, Maine, Minnesota, Missouri, Ohio, Tennessee, and Wisconsin).

4. Victories: Full Suffrage

Women's right to vote in presidential elections was noteworthy, but full suffrage—the unqualified right to vote—was momentous. Most significant in readying the country as a whole for women's suffrage, some states and territories had granted women full franchise rights prior to the Nineteenth Amendment's ratification. The first to do so in the late nineteenth century was the Territory of Wyoming in 1869.¹³² Wyoming was admitted to the union as a state in 1890, with a constitution that fully preserved female suffrage.¹³³ The territory of Utah granted full suffrage to women in 1870.¹³⁴ Utah won statehood in 1896, and its constitution expressly enfranchised women.¹³⁵ During Utah's constitutional convention, delegates debated women's suffrage at length and even referenced the success of equal suffrage in other states and territories, including Wyoming, as evidence that Utah should follow suit.¹³⁶ The proposal from delegates of Ogden City and Weber County argued,

Woman has been denied her rights in the past, but toward the close of the nineteenth century, her rights, her merits and worth are being better understood and appreciated, which is evidenced by the fact of the suffrage being

¹³² KEYSSAR, *supra* note 14, at 402 (Table A.20).

¹³³ *Id.*; see also VOTES FOR WOMEN!, *supra* note 3, at 18.

¹³⁴ KEYSSAR, *supra* note 14, at 402 (Table A.20). The statute would be annulled by the United States Congress in 1887, eight years before Utah would become a state.

¹³⁵ *Id.*; see also UTAH CONST. of 1896, art. IV, § 1, which provided, "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."

¹³⁶ 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION 431 *et seq.* (1898), <https://hdl.handle.net/2027/uc1.b2889694>.

granted her in many states of the Union as well as in many parts of Europe.¹³⁷

Utah legislators looked outside of their state's borders for guidance on "the woman question," and embraced the experimentation of other nations and states as evidence that, like them, Utah could and should incorporate female suffrage. Indeed, when Utah legislators crafted their equal suffrage provision, they "adopted literally the language of the Wyoming constitution," noting that "after twenty-five years' experience" in Wyoming, woman suffrage "has been demonstrated to be a pronounced success."¹³⁸

The movement was catching hold: the territories of Washington and Montana fully enfranchised women in 1883 and 1887, respectively.¹³⁹ Colorado was the first state to grant women full voting rights by popular referendum.¹⁴⁰ Coloradoans approved a constitutional amendment for equal suffrage in 1893.¹⁴¹ Idaho would be the final state to enfranchise women in the nineteenth century.¹⁴² The Idaho constitution, as amended in 1896 by referendum, provided,

¹³⁷ *Id.* As of 1888, women in England, Scotland, Wales, Ireland, Ontario, British Columbia, Sweden, Russia, Austria-Hungary, Croatia, Dalmatia (region of current-day Croatia), Italy, Finland, Burma (current-day Thailand), the Colony of Bombay (current day India), the Colony of Good Hope (current-day South Africa), New Zealand, and Australia had all been granted at least partial suffrage rights. Charles B. Waite, 3 CHI. L. TIMES, *Where Women Vote*, 205–06 (1889), https://books.google.com/books?id=lnAtAAAAIAAJ&pg=PP13&source=gbs_selected_pages&cad=3#v=onepage&q=vote&f=false.

¹³⁸ UTAH CONSTITUTIONAL CONVENTION, *Nineteenth Day*, Mar. 22, 1895, <https://le.utah.gov/documents/conconv/19.htm> (quote from File No. 109, introduced by Delegate Stover).

¹³⁹ KEYSSAR, *supra* note 14, at 402.

¹⁴⁰ VOTES FOR WOMEN!, *supra* note 3, at 13.

¹⁴¹ *Id.*

¹⁴² KEYSSAR, *supra* note 14, at 402 (Table A.20) (Idaho enfranchised women in 1896.).

"Every male or *female* citizen of the United States, eighteen years old, who has resided in this state, and in the county w[h]ere he or *she* offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector."¹⁴³ The remaining twelve states and territories that would fully enfranchise women would do so in the 1910s.¹⁴⁴ New York was the only state east of the Mississippi and the only member of the original thirteen colonies to grant equal suffrage before the federal amendment.¹⁴⁵

Again, geography tells an intriguing story. The South was particularly reluctant to expand the elective franchise whatsoever, let alone to women.¹⁴⁶ Unsurprisingly, no southern state granted women full suffrage pre-Nineteenth Amendment.¹⁴⁷ On the other hand, the West was quite progressive: in fact, all of the states and territories that endowed women with full franchise rights in the nineteenth century sat west of the Mississippi.¹⁴⁸ The first four places to grant women full suffrage rights were territories.¹⁴⁹ Unlike states with preexisting or longstanding voting laws, territories could be more responsive to changes in public opinion. By contrast, the inertia of the South's hundreds of years of entrenched voting restrictions—was nearly insurmountable. Even the North, which had pioneered women's suffrage in the colonies (as compared to the South) and extended the

¹⁴³ *Id.* S. J. Res. 2 (1896) (emphasis added).

¹⁴⁴ KEYSSAR, *supra* note 14, at 402 (Table A.20) (Territory of Arizona: 1910; Washington: 1910; California: 1911; Arizona (upon statehood): 1912; Kansas: 1912; Oregon: 1912; Territory of Alaska: 1913; Montana: 1914; Nevada: 1914; New York: 1917; Michigan: 1918; Oklahoma: 1918; South Dakota: 1918).

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* text accompanying notes 116–22.

¹⁴⁷ See KEYSSAR, *supra* note 14, at 402 (Table A.20) (listing states fully franchising women before the Nineteenth Amendment).

¹⁴⁸ *Id.* at 195.

¹⁴⁹ *Id.* at 402 (Table A.20) (Territories of Wyoming (1869), Utah (1870), Washington (1883), and Montana (1887)).

franchise into the early years of the republic, lagged behind the West. Though the northern states had much more active suffrage groups and extended partial franchise at a higher rate than the South, they remained reluctant to grant the full franchise.¹⁵⁰ Perhaps the most surprising absence from the gradual and spotty northern pattern is New Jersey—the only state that had fully enfranchised propertied women and openly embraced their suffrage for nearly a decade in the early nineteenth century—who did not extend full or partial suffrage to women on a statewide basis until the federal amendment.

Without federalism, the variance among regional systems and in the extent of the franchise would have been impossible. The federal system allowed states and their constituents to develop voting laws in accordance with their localized views on women's suffrage. The campaign for universal women's suffrage operated like a grassroots movement, largely a product of our constitutional design.

III DISCUSSION

The popular narrative of the women's suffrage movement in the United States focuses almost exclusively on the federal amendment as the seminal moment: it is commonly believed that women did not have any electoral rights whatsoever until 1920. It marked the first time that women had a *federal* right to vote, but women had been engaging with the franchise long before 1920. Considering the actual extensive and complex history of women's voting rights in states and territories, this narrative omits a significant part of the story.

Most importantly, it fails to account for the impact of our constitutional system's structural design on the success of the movement. Having a state-based voting system gave rise to a wide variety of state practices based on local attitudes and preferences. In colonial Massachusetts, New Jersey in the early nineteenth century, or the western territories in the late nineteenth, a system providing

¹⁵⁰ Except for New York: *see supra* text accompanying note 145.

states with discretion allowed “progressive” states and territories to forge ahead, unencumbered by their reluctant counterparts. States that had experimented would serve as exemplars to other states, leading to the gradual expansion of the franchise, and the long history of varying state practice would legitimize the women’s suffrage movement as a whole.

A. Structural Constitutionalism: The Role of the Federal System in Women’s Suffrage

The Constitution provides that states, *not* the federal government, are responsible for prescribing the “Times, Places and Manner of holding Elections” within their respective state.¹⁵¹ This provision has long been interpreted to endow the state with the power to define elector qualifications, subject to constitutional limits.¹⁵² In delegating to the states the authority to set voting requirements, the Framers envisioned variation in state practice with respect to electoral rights. They made a conscious, structural choice to prioritize experimentation and variety over uniformity.

In the nearly 300-year history of women’s suffrage in America, that is exactly what happened. States acted like “laboratories of democracy”—a phrase famously coined by Justice Brandeis in 1932. He remarked, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a

¹⁵¹ U.S. CONST. art. I, § 4, cl. 1 (though reserving to Congress the authority to supersede state regulations).

¹⁵² See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (upholding Indiana’s voter ID law as a legitimate exercise of the state’s power to regulate elections and prescribe voter qualifications); *Bullock v. Carter*, 405 U.S. 134, 140–41 (1972) (“Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (noting “the interest of the State, when it comes to voting, is limited to the power to fix qualifications” while striking down poll taxes as violating the Fourteenth Amendment equal protection clause).

laboratory . . . [to] try novel social and economic experiments without risk to the rest of the country.”¹⁵³ In the case of women’s suffrage, state experimentation was no “happy accident,” but rather a conscious choice. Of course, the Framers would not have envisioned female suffrage as a natural consequence of this structural choice. They “forgot the ladies,” despite Abigail Adams’ admonition,¹⁵⁴ excluding women from the electoral franchise in the nation’s founding period. But their choices of constitutional design would nevertheless give way to equal suffrage nearly 150 years later.

The Nineteenth Amendment was the natural consequence of a federal system that endows states with such wide authority to define voting qualifications. This enabled the efforts of the dedicated suffragettes who drove the individual grassroots movements in each state. They adjusted their approaches to work within the state-based power structure, and their efforts to do so were essential to achieving universal suffrage. But those efforts alone would not have been enough to bring about national social and political change of such magnitude. The widespread support for equal suffrage was made possible by the suffragettes’ politicking and a state-based model of experimentation working in tandem.

B. The Significance of the Federal Model in Achieving Equal Suffrage

State experimentation made the federal amendment possible for three primary reasons: first, states that enfranchised women “normalized” women’s suffrage. Second, the state-based system appealed to existing power brokers—legislators looked to other moneyed, propertied, white, male legislators to legitimize support for

¹⁵³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁵⁴ In a letter from 1776, Abigail Smith Adams, future First Lady and wife of founding father John Adams, implored him to “remember the ladies,” and to refrain from “put[ting] such unlimited power in the hands of husbands,” for “all men would be tyrants if they could.” Matilda Joselyn Gage, *Preceding Causes*, in *THE WOMEN’S SUFFRAGE MOVEMENT*, *supra* note 3 at 65 (originally published in 1 *HISTORY OF WOMAN SUFFRAGE* (1881)).

women's suffrage. And third, state and local support for women's suffrage lent the movement greater democratic legitimacy. For these reasons, the independent, grassroots movement alone was not enough. The success of the movement for a federal amendment depended in large part on the success of state experimentation.

1. Normalizing Effect

Over the course of U.S. history, the scope of women's suffrage rights waxed and waned across the country until the federal amendment. During that time, states experimented by partially or fully enfranchising women. In doing so, those states that forged ahead "normalized" women's suffrage. This "normalizing effect" was crucial to drumming up support in other states or localities and, ultimately, to expand women's suffrage and enact the federal amendment.

States that enfranchised women influenced public perception and political decisions in other states. State experimentation transcended geographic borders in a variety of ways. First, states that enfranchised women received attention in the media and expanded public awareness. Take, for example, New Jersey in the late eighteenth and early nineteenth centuries. The New Jersey experiment was relatively short-lived: women were expressly enfranchised for only a decade.¹⁵⁵ But the fact remains: they drew a great deal of attention from their contemporaries¹⁵⁶ and from suffragettes agitating nearly one hundred years later in the national movement for women's suffrage.¹⁵⁷ Artists chronicled New Jersey women casting their votes

¹⁵⁵ See *supra* text accompanying notes 50–52.

¹⁵⁶ ZAGARRI, *supra* note 8, at 33 (discussing the attention devoted in contemporary newspapers and the public discourse to the New Jersey suffrage laws permitting women to vote).

¹⁵⁷ One telling example:

By 1880, Elizabeth Cady Stanton was living in New Jersey, and since she had to pay taxes there, decided she would attempt to vote. She went to the polling place donned in her "Sunday attire," she recounted, with her friend Susan B. Anthony, who was "always ready to make an escapade on the ballot-box."

at the ballot box.¹⁵⁸ In 1800, a Boston newspaper reported on women's suffrage in New Jersey, stating, "Single Females in the State of New Jersey, possessed of a certain property, and having paid taxes, are entitled to vote at elections." The writer observed "that at a late election, there were many [who] exercised this privilege."¹⁵⁹ The western territories like Wyoming and Utah received similar attention in the media,¹⁶⁰ and of course, the coverage was not always positive.¹⁶¹ But it remains that states like New Jersey, Wyoming, and Utah demonstrated that enfranchising women was "neither unthinkable nor catastrophically disruptive of the political order."¹⁶² The federal system permitted "progressive" states to blaze a trail ahead of their dissident counterparts, all while showing that fearmongering, anti-suffrage arguments were ill-conceived and that women could participate as political equals to men.

Second, this normalizing effect also affected legislators confronted with the "woman question." They relied on success stories

The inspector refused to give her a ballot, explaining there was no precedent for a woman to vote.

On the contrary, she told him, "On the sacred soil of New Jersey, where we now stand, women voted thirty-one years, from 1776 to 1807."

Gillian Brockwell, *More Than a Century Before the Nineteenth Amendment, Women Were Voting in New Jersey*, WASH. POST (Aug. 4, 2020), <https://www.washingtonpost.com/graphics/2020/local/history/new-jersey-women-vote-1776-suffrage/>.

¹⁵⁸ See ZAGARRI, *supra* note 8, at 32 (Figure 3) (citing the Library of Congress).

¹⁵⁹ *Id.* at 33 (alteration in original).

¹⁶⁰ *Woman Suffrage*, HARPER'S WEEKLY, May 15, 1869, <https://lccn.loc.gov/2002723262> (Illustration).

¹⁶¹ Artists also caricatured women participating in politics to capture the perceived drawbacks or consequences of women's suffrage. See, e.g., Joseph Ferdinand Keppler, *A female suffrage fancy*, UNITED STATES LIBRARY OF CONGRESS, (July 14, 1880) <https://lccn.loc.gov/98502830> (photograph).

¹⁶² KEYSSAR, *supra* note 14, at 141.

from other states as support for extending the franchise to women in theirs. For example, a petition addressing legislators at the Utah Constitutional Convention referenced and relied heavily on Wyoming's success in enfranchising women as evidence that Utah should do so as well.¹⁶³ When the House of Representatives voted on the Nineteenth Amendment in 1918, the amendment passed by one vote, and most of the representatives who had voted in favor "came from states that had recently adopted some form of women's suffrage."¹⁶⁴ Notably, when considering ratification of the Nineteenth Amendment, legislators referenced preexisting practices allowing women to vote.¹⁶⁵ And even if the influence of other states was not explicitly mentioned by legislators, the watershed effects were significant: "Passage of a woman suffrage amendment grew more likely every time a state adopted woman suffrage."¹⁶⁶

Relatedly, school suffrage and other partial voting schemes normalized women's political participation, albeit in a different way. Instead of breaking down traditional gender barriers, school suffrage, municipal and liquor votes appealed to longstanding notions about the proper role of woman. Though these suffrage rights were much more restrictive than the general franchise and kept women in a position inferior to men, these voting regimes nonetheless expanded and normalized women's participation in public life, even if only for "domestic" matters. This would lead to the expansion of partial suffrage rights across more than half of the states in the Union and lend credence to women as reasoned political actors capable of independent decisionmaking. In short, keeping women in their "domestic sphere" would nevertheless influence the movement for national enfranchisement.

¹⁶³ See *supra* text accompanying notes 136–38.

¹⁶⁴ KEYSSAR, *supra* note 14, at 174.

¹⁶⁵ See *supra* text accompanying note 138.

¹⁶⁶ *A Piecemeal Path to Women's Voting Rights*, NAT'L ARCHIVES: RIGHTFULLY HERS, <https://museum.archives.gov/rightfully-hers> ("The Political Power of Women" pamphlet).

2. Power Structures

Legislators confronted with the “woman question” looked to other state practice, particularly success stories, in forming their own views of the issue. But what’s important to note is *whom* they were looking to for support. They were not looking to women for legitimacy, but instead to powerful, propertied white men like themselves. They looked to sources of traditional authority. This was the case for states that enacted women’s suffrage provisions through legislative acts or popular referendum: in both instances, the vast majority of those political participants would have been white men. In other states, too, the situation would have been the same. In a country deeply divided by racism, classism, and sexism, wealthy, twentieth century politicians would have perceived the opinions of wealthy white men as more legitimate than those of women or people of color.¹⁶⁷

Women had long been viewed as the weaker sex, too fragile for politics and too dependent on their fathers or husbands, and consequently too susceptible to undue influence, to “independent[ly]” cast their ballots.¹⁶⁸ Those traditional power structures relied heavily on virtual representation: that a woman’s husband or father could adequately represent her interests at the ballot box.¹⁶⁹ By looking to other male sources of political power and legal authority, legislators of the day reflect this misogynistic skepticism. It was not enough to “believe women”; they also relied, in large part, on the political support of existing powerbrokers. The federal system allowed them to do so. Obviously, this notion of men as “more trustworthy” sources

¹⁶⁷ Unfortunately, this still remains the case. For a modern example, see generally the “#BelieveWomen” movement, which advocates that we should believe women when make allegations of sexual assault against powerful men, no matter how socially or politically inconvenient. See Sherry Colb, *What Does #BelieveWomen Mean?*, JUSTIA, Nov. 7, 2018, <https://verdict.justia.com/2018/11/07/what-does-believewomen-mean>.

¹⁶⁸ KEYSSAR, *supra* note 14, at 174.

¹⁶⁹ *Id.*

of authority than women would, these days, be deeply troubling. Even so, it arguably still worked in the favor of the women's suffrage movement because it allowed more-skeptical male decisionmakers to hedge their bets by looking to the decisions of other male authority figures and thus to increase political support for the movement as a whole.

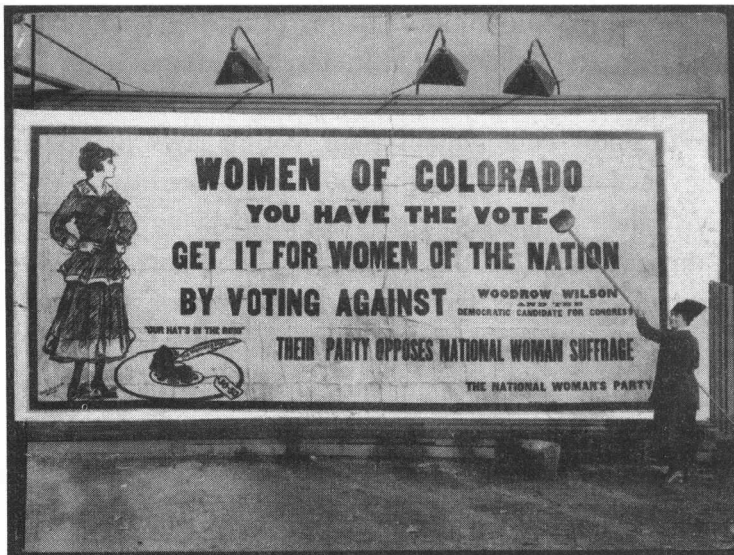
3. Democratic Legitimacy

The Women's Suffrage Movement was a social, as well as a political, movement. The Nineteenth Amendment enfranchised the single largest population of previously unenfranchised people in United States history: women, who comprised one-half of the populace.¹⁷⁰ Such momentous change required enormous political capital, especially considering male voters, and politicians did not stand to gain much from women voting. So instead of going for the purely political strategy, the women's suffrage movement mobilized support as a social revolution, and it did so state-by-state. The state-based voting-rights model allowed for each chapter of the women's suffrage movement to tailor its demands, proposals, and politicking to individual legislators and local attitudes. The campaign for women's suffrage operated, and succeeded, foremost as a grassroots social movement. States could adapt their voting laws in response to changing social attitudes, and the suffragettes used this distribution of power to their advantage. They built on growing popular support across the nation, and this widespread support increased the movement's democratic legitimacy. Without such legitimacy, the federal amendment would not have been possible.

¹⁷⁰ Though this date is technically correct, women of color would not be able to *exercise* that right until the Voting Rights Act was passed in 1965.

IV CONCLUSION

The common narrative about the women's suffrage movement omits an illuminating history of state practice and fails to account for the influence of a federal separation of powers on the path to the Nineteenth Amendment. To obtain a deeper understanding of the history of women's voting rights in America, it is critical to analyze how states influenced one another and public perception, how the movement was forced to rely on existing patriarchal power structures to succeed, and how experimentation at the state level endowed the movement with greater democratic legitimacy. The long and colorful history of women's voting rights in America tells a much more nuanced story than the common narrative would have you believe. Without experimentation at the state level for hundreds of years made possible by the federal distribution of power, coupled with the unrelenting will of our suffragettes, a federal amendment might not have been possible.



Part of the Vast Billboard Campaign of the Woman's Party. Putting up billboard in Denver 1916. Photograph retrieved from the Library of Congress, <http://hdl.loc.gov/loc.mss/mnwp.159016>.