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Lessons from the Constitution: Thinking Through the Fifteenth and Nineteenth Amendments

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"The colored citizens of Baltimore yesterday celebrated in an imposing and hearty manner the ratification of the fifteenth amendment to the constitution of the United States, under which they acquire the same right of suffrage as is possessed by white citizens," *The Baltimore Sun* reported on May 19, 1870. With seven brass bands, multiple drum corps, a mass parade, bright colors, crowded sidewalks, and people hanging out of windows, the assembly of roughly 20,000 presented "a lively scene." Frederick Douglass, the great African American statesman, spoke triumphantly to the throngs clogging the streets. Similar scenes unfolded across the nation. The United States, another headline declared, had miraculously given "freed slaves the right to vote."

Fifty years later, in 1920, another amendment, modeled exactly on the Fifteenth, made its way through Congress and won ratification. For every state that had ratified, the women's suffrage leader Alice Paul had stitched a yellow star onto her National Woman's Party flag, three bold stripes of purple, cream, and gold. Quickly states had fallen in line, then stopped—one short. It would come down to one man, Harry T. Burn, the youngest member of the Tennessee legislature. His surprise vote in favor broke a tie in that state and pushed the amendment over to victory. Paul hastily affixed her final gold star and rushed outside to unfurl the banner amidst celebrations erupting across the nation. "SUFFRAGE WINS!" trumpeted the *Lowell Sun*, "Giving Women of the Entire Nation Vote."

These two tightly connected, historic amendments are about to celebrate a significant milestone—their 150th and 100th anniversaries. More festivities are brewing as celebrants across the nation organize to commemorate these important landmarks in the evolution of American democracy.

On this anniversary, it behooves us to take a look back at these moments, partly because they are so widely misunderstood. Despite the incredible optimism and expectations surrounding them, neither amendment did what it promised to do: secure a citizen's right to vote. What each failed to resolve—the guarantee of a right to vote—continues to be the unfinished work of the American democratic project.

The Right to Vote and the U.S. Constitution

To frame this history, a few basic constitutional lessons are necessary. First, contrary to popular presumption, the original Constitution contains no mention of a citizen's right to vote. The Fifteenth and Nineteenth Amendments, then, did not extend an (unjustly stolen) "right to vote." Yet, like contemporary headlines did, we still routinely speak of them this way, as positively conferring voting rights. But neither did that, in reality, because there is no federally defined right to vote. The Constitution is mute on this question, and these twin amendments did nothing to change that.

Second, the Constitution leaves voting up to the states. Although talk of constitutional amendments lures us into thinking that voting is federally governed, it is not. In divvying up the powers between the federal and state governments (federalism), our Constitution gives individual states authority over this matter. Who can vote depends largely—at the founding, and still now—upon state law.

States, in other words, define who can (and can't) vote within their boundaries, through clauses in their state constitutions, where voter qualifications are spelled out, and through state laws governing eligibility. For most of American history, states have severely limited who could vote. They have been free to do this, because voting is, in point of fact, not a federal citizenship right. Thus, it may be abridged.

One of many ways states abridged voting was on grounds of race and sex. By the 1820s and 30s, requirements that voters be "white" and "male" had become fairly uniform across all states. The Fifteenth and Nineteenth Amendments worked to remove those words from state voter qualifications. That was their operation. Neither federalized or conferred a non-existent "right to vote." Instead, both effectively demanded the removal, in the case of the Fifteenth Amendment, of the word "white," and in the case of the Nineteenth Amendment, the word "male," from state voter qualifications.

Photographer: Carol M. Highsmith/Courtesy of the Library of Congress

A sculpture of women's suffrage pioneer Susan B. Anthony with abolitionist and statesman Frederick Douglass, in Rochester, New York's Susan B. Anthony Square Park, by artist Pepsy M. Kettavong.

After their ratification it became unconstitutional to explicitly discriminate on those two grounds. States could no longer do this, or they stood in violation of the Constitution and could be sanctioned by the federal government.

So why didn't these amendments secure a right to vote for black men and all women, as is so commonly claimed? To understand this requires a deeper dive into the history—and language—of each amendment.

The Fifteenth Amendment (1870)

That the Civil War (1861–65) would end with a remaking of the Constitution was no given. Many call the era after the war, known as Reconstruction (1865–1877), the "second founding" to underscore how the constitutional revisions of the time birthed a brand new nation. To this point in U.S. history, there had been little tinkering with the Constitution. But the three Reconstruction amendments—the Thirteenth, Fourteenth, and Fifteenth—announced a greatly emboldened federal state and a new national project.

The first of the Reconstruction amendments, the Thirteenth (1865), permanently abolished slavery. Next came tangled questions about what laws governed the lives of the roughly four million freed people. The Supreme Court's 1857 *Dred Scott* decision had said that freed blacks were not citizens. So did U.S. law apply to them? Did they enjoy its rights and protections? No one knew.

The Fourteenth and Fifteenth Amendments (along with a whole host of legislation) strove to settle these questions. The Fourteenth (1868) established black citizenship, by instituting birthright citizenship, meaning if you were born in the U.S., you were a citizen—no matter the color of your skin. It also stated that all citizens enjoyed "equal protection" before the law, and that citizens could not be deprived of their rights without the "due process of law," challenging the vigilante white supremacist mobs that acted outside of the law and were daily destroying the lives of freed people.

Then came the Fifteenth Amendment (1870), the last of the Reconstruction amendments, which was meant to resolve black male voting rights. Congress had tentatively extended this right in a number of different ways, but it remained an incomplete, vulnerable patchwork. That the Republican-controlled Congress evolved into embracing voting rights was itself a surprise.

At the war's end, the enfranchising of black men was a distant fantasy, inconceivable among whites, North and South. Among freed people, however, it was an absolutely central demand, one they forced into national debate again and again. Leaders like Frederick Douglass channeled this groundswell into orations and lobbying, insisting that the vote was central to freed people's dignity and survival. A number of complicated events quickly moved congressional Republicans to agree, and they opened debate on the matter at the end of 1868 and into the early months of 1869. Thus began the first sustained discussions of voting rights at the national level.

Congressional debate was wide ranging, with public opinion continually chiming in, though there was little agreement about what the amendment should

look like. The choices broke down along two lines: (1) affirming that federal citizens had an inalienable right to vote and, thus, spelling out national voting standards that would protect this right from state interference, meaning a "positive" assertion of rights; or (2) a "negative" assertion of rights, prohibiting states from using certain criteria, such as race, to bar voters, but leaving voting otherwise within state control. Within that continuum, there were endless options.

Those arguing that the franchise needed an overhaul to more evenly distribute and enshrine it as an inherent right, locked horns with those who saw this as a bridge too far, a federal overreach into what was a constitutionally-sanctioned state prerogative. The question, they argued, needed to be confined to freedmen in the South (where the vast majority of African Americans resided), who had to be enfranchised, as an emergency measure, to protect their own lives, to prevent secessionists from regaining state political power, and to help keep the northern Republican party in power. Constitutional issues aside, many white Congressmen from the North and West simply weren't interested in giving up the ability to disenfranchise within their home states.

The eventual wording of the amendment was a messy compromise that defied the normal operations of congressional process. It was hastily written, partly in back channels, and it passed largely out of many lawmakers' despair at being able to settle upon any other agreeable language, as well as the urgent demand for action.

In the end, they cooked up a negative assertion, not technically (or, positively) conferring suffrage upon anyone. "The right of citizens of the United States to vote," the amendment began, "shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." In other words, states could not discriminate on the basis of race, thus striking down "white" in state voter requirements.

Yet many viewed this historic victory as securing voting rights for black men. And for a time, with this obstruction removed, black men did, indeed, begin voting in massive numbers.

For the next several decades, the United States undertook its first experiment in bi-racial democracy. Although white supremacists tried to stop black men from voting, the second and final section of the amendment had given Congress the right to enforce the article. And enforce it, they did (at least until 1877, when the last federal troops vacated the South). Black men, in turn, showed up en masse at the polls.

They elected black local officials, black justices of the peace, and black state legislators. In South Carolina, one branch of the state legislature was now majority black, a stark reversal of a seamless history of all-white control. These eager democratic citizens even sent the

first black Congressmen to Washington, D.C. What followed in the wake of the Fifteenth Amendment was nothing short of a revolution in the practice of American democracy.

But the narrow, negative wording of that amendment—which worked at cross purposes by extending voting, while simultaneously affirming the possibility of discrimination on other grounds—would soon come back to haunt this ground breaking episode in democracy's expansion.

The Nineteenth Amendment (1920)

However, women (who had been advocating for suffrage since at least the 1840s) now demanded to know why they were being left out of this constitutional and democratic remaking.

When Congress passed the Fifteenth Amendment—omitting women, by not banning the word "male," something women suffragists and their allies had advocated for—two of that century's most prominent suffragists, Elizabeth Cady Stanton and Susan B. Anthony, refused to support it. A large contingent of suffragists, however, championed ratification, having spent years in the anti-slavery fight. Ugly fights within this coalition ensued. Stanton, using the derogatory term "Sambo" in reference to black men, argued that if one class were to vote first, it should be educated white women. Douglass countered that black men needed the vote to protect themselves against white vigilante violence. It was, he intoned, an urgent matter of life and death.

Unyielding, Stanton and Anthony broke from the coalition and formed the National Woman Suffrage Association. Stunned, their former allies regrouped and formed the American Woman Suffrage Association, led loosely by another prominent suffragist, Lucy Stone.

From Stanton and Anthony's point of view, the Fifteenth Amendment had only one redeeming feature: it had federalized suffrage. This long-held prerogative of the states was now within federal power, they argued. And they birthed a brand new idea, a federal amendment for women's suffrage.

An antebellum women's rights movement had already fought for women's suffrage for several decades, but they had worked at the state level, trying to remove the word "male" from each individual state constitution. Concluding this method was now moot, Stanton and Anthony launched a massive campaign for a Sixteenth Amendment.

While they stormed the congressional citadel, Lucy Stone and the American Association claimed the Fifteenth Amendment had done no such thing. It had not reversed constitutional prerogatives around voter regulation. It was a war measure only, setting no new precedent.

The fight for women's suffrage, therefore, still had to be won at the state level, which was the only branch of government properly in charge of the question.

This strategy scored all the early successes. Wyoming enfranchised women in 1869. Utah followed a year later. From 1893 forward, a quick succession of western states fully enfranchised women. By 1917, New York had surrendered the ballot to women. Then Michigan. By 1919, women were already voting on equal terms with men in 18 states.

As this state campaign proceeded apace, the Sixteenth Amendment stalled out. Along the way, women in this camp began arguing that they already possessed the right to vote. Nothing was a more basic right of citizenship, they argued, than the right to vote. Surely as citizens, therefore, they were also voters. Women would go to the polls, cast their ballots, get arrested, and try this argument in court—doing an end run around the cumbersome legislative process.

One woman quite famously pushed her case all the way to the Supreme Court. But in its 1875 decision, *Minor v. Happersett*, the Court rejected this idea, affirming that voting was not a right of citizenship. Voting was merely a "privilege," and could therefore be restricted. With that, the so-called New Departure strategy died, and this camp went back to advocating a federal amendment.

The Sixteenth Amendment (as it was then known) got several hearings in Congress, but it never got anywhere. During the first hearing, in 1878, the text that Senator Aaron Sargent introduced became the text of the eventual amendment, which passed as the Nineteenth Amendment 41 years later, in 1919. But, amazingly, we don't know who wrote it.

That text was modeled on the Fifteenth; and like that amendment, it was a considerable retreat from an earlier positive assertion of a citizen's right to vote. "The right of citizens of the United States to vote," it read, "shall not be denied or abridged by the United States or by any state on account of sex." This was an exact mirror of the Fifteenth Amendment, substituting "sex" for "race." And while it too referenced a right to vote, it did not establish one. That referent was, at least constitutionally, a mirage.

But as suffragists championed this amendment, the vulnerabilities in its framing began to ring clear. As the federal government increasingly turned a blind eye toward violence in the South, eventually ignoring it altogether, white supremacists had overthrown the bi-racial governments and regained control of state politics. By the 1890s, white supremacists were determined to formally disenfranchise black men, through legal means. With no federal government looking over their shoulder, they quickly realized they could now exploit the gaping loopholes in the Fifteenth Amendment's language.

Whites understood they could legally disenfranchise black men, as long as they did not openly cite race as their reason. So starting in 1890, Southern states

began adding new provisions to their list of voter qualifications: poll taxes, literacy tests, understanding clauses, and more. Had the original amendment said black men had a right to vote, any infringement upon that right would have been illegal. As it stood, however, these infringements were perfectly legal, because they did not mention race.

Many were ensnared by these new restrictions, including some poor whites, but these provisions were mostly targeted at black men. These requirements had the veneer of plausibility (shouldn't voters demonstrate an understanding of government before casting a vote, for example?), but whites made it impossible to pass such tests (picking arcane minutiae, like demanding the applicant name all 65 county judges). This innovation swept the South. By 1913, the region's experiment in black voting was over.

Over the 1890s, then, while women's voting was expanding across the West, black men's voting was being simultaneously eliminated across the South. These infringements drew little commentary from white suffragists, however. Whereas black women insisted that voting rights be extended to black women and now, once again, to black men, white women generally remained silent.

From Stanton and Anthony's point of view, the Fifteenth Amendment had only one redeeming feature: it had federalized suffrage.

Notably, white suffragists also did nothing to shore up their own amendment against similar abuses, the possibilities for which were now exceedingly evident. White suffragists stuck to the text of their amendment, likely because it allowed for discrimination in voting. This is hard to wrap our heads around: how and why white suffragists could have advocated for an expansion in voting, while also tacitly condoning sweeping denials.

The answer lies in both realism and racism. A positive assertion of voting was unlikely to ever pass, as it would have much larger reverberations (including re-enfranchising all the black men that the South had just finished disenfranchising). The minimal appetite in Congress for radically remaking voting had collapsed back in 1870, and the Supreme Court had consistently pushed back against citizens' attempts to expand it. Suffragists also needed white Southern votes to get the amendment through Congress. This narrow wording assured those men that a vote for women's suffrage would not be a vote for black suffrage. Those white supremacists could still prevent black

women from voting, just as they were now preventing black men. This, white suffragists hoped, would bring white men's votes around. At the same time, many white suffragists held racist notions about supposedly "unfit" voters. The language of their amendment was also a concession to their own racist beliefs that perhaps not all women should vote.

The years leading up to the passage of the amendment, in 1919, were wild. The old National and American Associations had united in 1890, forming the National American Woman Suffrage Association (NAWSA), which then splintered in turn. A new generation took over. Their organizations launched a full-scale assault upon the federal government, replete with skillful political lobbying, brazen street theater, imprisonment, and from inside jail cells, brutal hunger strikes.

When that amendment was finally ratified in 1920, newspapers around the country celebrated by erroneously declaring that women had won the right to vote. And as the *Lowell Sun* further affirmed, this new provision applied to "women of the Entire Nation," a common misconception then and now.

For the majority of black women, who continued to reside in the South, however, voting was still blocked by literacy tests, understanding clauses, and poll taxes. The Nineteenth Amendment had struck down "male," and brought about one of the largest expansions in the voting populace in U.S. history, but it had not brought all women along.

Continued voting restrictions also ensnared Latina women across the Southwest, and women of color more generally around the nation, who faced a host of barriers (including citizenship bans)—things not generally visited upon white women. Many of these women, numbering in the millions, would not be able to vote until the passage of the Voting Rights Act in 1965.

The Still Elusive Right to Vote

The passage of the Voting Rights Act, an outgrowth of the civil rights movement, signaled Congress's willingness to once again launch a sweeping intervention into the discriminatory actions of individual states. African Americans had, since the passage of the Fifteenth Amendment, been demanding federal protection against state voter discrimination—legal and extralegal. It took Congress almost a century to once again take decisive action.

The 1965 Voting Rights Act barred states from enacting voting restrictions that were racially discriminatory in their *effect*, even if those restrictions didn't explicitly mention race. Moreover, it gave the federal govern-

ment enforcement power, signaling the return of direct federal oversight in the South. This law has been one of the most successful pieces of federal legislation ever enacted, restoring or extending voting to millions upon millions. The Voting Rights Act, however, was quite vulnerable—a temporary piece of legislation that Congress has had to periodically reauthorize. Then, in 2013, the Supreme Court invalidated some of its most important provisions.

We are now in the midst of a massive wave of state voter suppression, a movement that disproportionately targets voters of color. The failure of our Constitution to establish and protect an inalienable "right to vote"—the unfinished work of both the Fifteenth and Nineteenth amendments—means that once again, with the current restrictions on the Voting Rights Act, states are able to disenfranchise voters within their borders. And just as the South did in the 1890s, states—North and South—are dreaming up new plausible sounding barriers to voting (voter ID laws in the name of fraud prevention, voter roll purges in the name of "efficiency," and more) that are, in fact, devastating in their effect.

In the past decade, tens of millions of people have lost the ability to vote. Although estimates vary, the number is far larger than the margin deciding elections. International entities that track democratic indicators, recently downgraded the United States from a "functioning" to a "flawed" democracy. Today, the United States does not even make it into the list of the top 25 best functioning democracies around the world.

Situating these amendments into this longer history, and into their constitutional framework, reminds us that as triumphal as these anniversaries are liable to be—this story is far from over and the long pursuit of an elusive "right to vote" remains an unfinished project.

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Educational resources for commemorating the centennial of the 19th Amendment to the U.S. Constitution are available at **www.ambar.org/19thamendment.**

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