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Equal Protection of the Laws

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The above phrase, which furnishes the title for this paper, occurs in section 1 of the Fourteenth Amendment to the United States constitution. The Amendment is long, divided into five sections; only the first two, however, will be of immediate concern. Section 1 defines who shall be regarded as citizens, and then proceeds to say that "No State shall . . . abridge the privileges or immunities of citizens . . ., nor . . . deprive any person of life, liberty or property without due process of law, nor deny to any person . . . the equal protection of the laws." One election day, a few years after adoption of the Amendment, a Missouri woman appeared at the polls to vote. Her vote being refused by the local election officials, she brought suit which she carried through the United States Supreme Court [Minor vs. Happersett (1875): 21 Wall. (88 U.S.) 162.]. Section 1 of the Fourteenth Amendment, she argued, had made her a citizen and a voter. Obviously her victory in the case would have established woman's suffrage at one bound as law throughout the country, making any later enactment of the Nineteenth Amendment needless. But the Court denied her entire contention *in toto*. The Amendment had not made Mrs. Minor a citizen, said the Court; because she was a citizen already, and remained so. The amendment had made negroes citizens, specifically in order to overrule Chief Justice Taney's pronouncement in the Dred Scott Case [(1857): 19 Howard, 393], that no negro could be a citizen of the United States, not even a free negro. But while the Fourteenth Amendment did make the negroes citizens, it did not make them voters. That required the later enactment of the Fifteenth Amendment. Moreover, section 2 of the

Fourteenth Amendment provides for reducing the representation in Congress of any state that disfranchises any part of its adult male citizens. That plainly indicates a state's right to do that very thing if it cares to pay the price. And section 2 makes it still clearer that section 1 did not intend to make women voters; for it required reduction of representation only of states that should disfranchise part of their adult male citizens.

So in 1892 Chief Justice Fuller, speaking for the unanimous bench of the United States Supreme Court, laid it down again that section 1 of the Fourteenth Amendment "does not refer to the elective franchise" [McPherson vs. Blacker 146 U. S. 1] There is indeed a profound difference in the underlying ideology of the Constitution regarding the right to vote (and hold office) on the one hand, and what we think of as the "civil rights" of personal liberty. The latter the Constitution looks upon as rights which it did not confer upon us, because we already had them. The Constitution simply recognized and confirmed them. Note the wording of the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The key word here is "retained". But the right to vote is a "political" right, a right conferred by law. Thus when section 1 of the Fourteenth Amendment refers to citizens, it means their "privileges or immunities." A privilege precisely is a right conferred upon some, but not upon all. Everybody knows that at the time the Constitution was adopted and for quite a while afterwards the right to vote in general (and speaking a bit loosely) was confined to landowners and other taxpayers. It was not until the "Jacksonian Era" that what is thought of as "universal suffrage" swept the country. And then it was not, and is not, truly universal, neither in terms of citizens nor of persons. Children are citizens and persons, but they are not qualified voters. Nobody—adult or child, man or woman, white or black, Christian or atheist, citizen or alien—is a voter unless he has been made so by affirmative provision of law.

A book recently published on the Congressional history of the formulation of the Fourteenth Amendment shows that in the debates it was well understood that the "equal protection" provision would not qualify anyone as a voter, a fact which made section 2 of the

Amendment seem needful.[1] In the Amendment the "equal protection" guaranty is closely coupled with the more famous "due process" provision. The background of this latter is easily traced. It stands in the English Petition of Right (1628), and in different wording it is expressed in Chapter 39 of Magna Carta. But none of the great constitutional documents of English history contains a guaranty of "equal protection," nor was it put into our own original Constitution, although, of course, a general notion of equality before the law is nothing new. It goes back at least to the Stoic thinkers of antiquity, and aside from the glaring exception of slavery, it became a general principle of the positive law in the later Roman Empire. Later in the ringing phrases of the Declaration of Independence Jefferson affirmed his faith that it was a "self-evident truth" that "men are created equal".

The writer has not undertaken to explore the historical development of the locution "equal protection of the laws", for this paper is not intended as a comprehensive inquiry into the whole scope and ramifications of the provision, but is confined to the question of its bearing—or lack of bearing—upon the right to vote. 35 years after the decision of McPherson vs. Blacker, Mr. Justice Holmes, speaking also for the unanimous bench of the Supreme Court in the case of Nixon vs. Herndon (273 U. S. 536), held that a Texas statute to exclude negroes from voting in the Democratic Party primaries was unconstitutional precisely because it denied to negroes the equal protection of the laws. Exegetically and historically the statement is certainly wrong. How then did a man of Holmes' profound scholarship come to make it? Justice Holmes in general did not favor broad or loose interpretation of the Fourteenth Amendment. One of his most-quoted statements stands in his dissenting opinion in the case of Baldwin vs. Missouri [(1930): 281 U. S. 586]. "I have not yet adequately expressed the more than anxiety that I feel at the increasing scope given to the 14th Amendment. As the decisions now stand I see hardly any limit but the sky to the invalidating of state statutes if they happen to strike a majority of this Court as for any reason undesirable."

[1]James, Joseph B. 1956. *The framing of the fourteenth amendment.* University of Illinois Press. Champaign-Urbana. (Especially Chapter 6:)

It is believed the explanation may not be far to seek. In earlier cases the Supreme Court had held that the control over elections which the Constitution gives to Congress (in Article I, section 4) did not apply to the process of nominating candidates even when conducted through "direct" primary elections, because political parties were not agencies of the states to which the legal and constitutional requirements for the general elections could apply, but were merely voluntary private associations which had every right to pick and choose their members for themselves. So on the face of the precedents Holmes was not in a position to say that the Texas primary statute violated the Fifteenth Amendment. That he would have liked to say that is more than a merely plausible conjecture; in fact, about 15 years later the Court did overrule those earlier precedents and held explicitly that the Fifteenth Amendment does apply to primary elections [U. S. vs. Classic (1941), 313. U. S. 299; cf. Smith vs. Allwright (1944): 321 U. S. 649]. But in 1927 Holmes likely found the time not yet ripe for converting his colleagues to that point of view; yet beyond doubt he felt very deeply that the voting rights of negroes should not be restricted. It may be remembered he had been a Union soldier and was an intensely patriotic nationalist. Dying a childless widower he left most of his estate to The United States of America.[2] And so in Nixon vs. Herndon he seized on the Fourteenth Amendment. "We find it unnecessary to consider the Fifteenth Amendment, because it seems hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment denied to any state the power to withhold from negroes the equal protection of the laws". It may be remarked that Holmes therein did exactly what he had excoriated in Baldwin vs. Missouri—he stretched the Fourteenth Amendment out of shape in order to avoid a result he deemed undesirable.

In a few later dissenting opinions Justice Holmes' aberration has been echoed. Michigan had been electing its 14 Presidential Electors "at large"; that is, all on a single state-wide ticket, so that each voter had the right to vote for all the state's Presidential Electors. But in the 1880's Michigan passed a statute by which the state

[2]Bowen, Catherine Drinker. 1943. *Yankee from Olympus.* Atlantic Monthly Press. Boston.

was to be districted so that each voter would be able to vote for only two of the state's Presidential Electors. The case of McPherson vs. Blacker was brought "to contest the validity of that revision. The plaintiffs argued that it denied to Michigan voters the equal protection of the laws by denying to each a right to vote for the whole body of the state's Presidential Electors. It was to rebut that contention that Chief Justice Fuller ruled that section 1 of the Fourteenth Amendment "does not refer to the elective franchise." He added the reminder that the Constitution does not require even that the Presidential Electors shall be elected by popular vote at all. The Constitution's word is "appoint"—"each State shall appoint" its Presidential Electors "in such manner as the Legislature thereof may direct." And the Legislature, noted Chief Justice Fuller, "might itself exercise the power of appointment", as in fact most state legislatures did during the first quarter of the Nineteenth Century and as South Carolina's legislature continued to do till the Civil War. Nor could the fact that public opinion had gradually brought all the States to a uniform system of popular election by single statewide ticket "weaken the constitutional autonomy of each State." There was, as noted above, no dissent expressed. For Congressional representation Illinois had redistricted itself following the 1900 Census, never since then. After the 1940 Census voters in overpopulated, hence underrepresented districts brought suit to forbid the governor and other state officials to continue to hold Congressional elections according to the old, unreconstructed districts. But the United States Supreme Court refused to interfere [Colegrove vs. Green (1946), 328 U. S. 549]. The question, said Mr. Justice Frankfurter for the Court, counts on a "wrong by Illinois as a polity," and is not for the courts. "Congress," he continued, "can deal effectively with the situation if it cares to. It has exclusive authority to secure fair representation by the States in the House of Representatives." But in this case Mr. Justice Black, together with Justices Douglas and Murphy dissented, insisting that the old, out-of-date and now out of proportion districting denied equal protection of the laws to the underrepresented voters of Illinois and also abridged the privileges and immunities of citizens, a point of view lifted directly from Mr. Justice Holmes' pronouncement in Nixon vs. Herndon. What does "equal protection of the laws" mean, he had inquired rhetorically in that opinion, except

that "the law shall be the same for the black as well as for the white?" This was a still more egregious fallacy, for whatever the phrase under our microscope here may be taken to mean, it does not and cannot mean that every person's legal rights and obligations must be the same as every other person's. Childrens' rights and obligations are not those of an adult; children, for example, have not the right to control their own conduct as an adult has. On the other hand, children do have one right that adults do not enjoy, to wit, the right to break their promises; a childs' promise cannot be enforced against him in court. The law in very truth is stuffed full of statements of rights and obligations differently applied to particular groups of persons. Nor does the "equal protection" clause of the Fourteenth Amendment run at all in terms simply of persons of different races or colors, but in the universal terms of "any person."

So by *per curiam* opinion the Supreme Court has lately held that a state law may provide that a newly-formed political party shall be entitled to a place on the official ballot only pursuant to a petition signed by at least 25,000 voters, of whom at least 200 must live in each of 50 named counties of the State, which contains 102 counties in all. But here too Justices Douglas, Black and Murphy dissented again, explicitly on the ground that such inequality amongst voters denied them the equal protection of the laws [McDougal vs. Green (1948): 335 U. S. 281].

Minnesota readers will appreciate the timely relevance of this paper to our own legislative reapportionment problem. If Justice Douglas, Black and Murphy—and Holmes—are to be believed, the membership of our present Minnesota Legislature denies to our voters their constitutional right to equal protection of the laws—but then so does the United States Senate itself, and so does the Presidential Electoral College.

Chief Justice Fuller was right—section 1 of the Fourteenth Amendment does not refer to the elective franchise.