Suffrage conferred by the Fourteenth amendment. Woman's suffrage in the Supreme court of the District of Columbia, in general term, October, 1871. Sara J. Spencer vs. The Board of registration, and Sarah E. Webster vs. The judges of election. Argument of the counsel for the plaintiffs. With the opinions of the court. Reported by J. O. Clephane

Mr. Sargeant 1871 No 6

Argument of Counsel AND OPINION OF THE Supreme Court of the District of Columbia, ON THE Woman's Suffrage Question.

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SUFFRAGE CONFERRED BY THE FOURTEENTH AMENDMENT.

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Sara J. Spencer vs. The Board of Registration, AND Sarah E. Webster vs. The Judges of Election.

ARGUMENT OF THE COUNSEL FOR THE PLAINTIFFS.

WITH THE OPINIONS OF THE COURT.

REPORTED BY J. O. CLEPHANE.

WASHINGTON, D. C.: JUDD & DETWEILER, PRINTERS AND PUBLISHERS. 1871.

ARGUMENT OF MR. RIDDLE.

May it please the Court: Although my learned friend, Mr. Cook, who appears for the defense, is the demurrant, it has been arranged that in the argument we shall be regarded as having the affirmative. And, at my own request, I am to open it, and shall bring fully to the notice of the court the matter which I wish to submit for its consideration.

In doing this, my purpose is, without comment upon the gravity of the case, and avoiding everything like speech-making, to deal with the cases in their purely legal aspects. Nor do I mean to step from the line of dry argument—the narrow stoney way of the law.

These plaintiffs, describing themselves as women, claim to be citizens of the United States, and of this District, with the right of the elective franchise, which they attempted to exercise at the election of April 20, last past, and were prevented. They say, that as registration was a prerequisite of the right to vote, they tendered themselves in due form, and demanded it, under the second section of the act of May 31, 1870, (16th U.S. Stats., 140.) That is the "act to enforce the right of citizens of the United States to vote," &c., and authorizes a suit for refusing registration.

They say, that being refused registration, they tendered their votes to the proper inspectors of said election, with proof of their attempt to register, citizenship, &c., as authorized by the third section of said act, and their votes were refused; and, thereupon, Spencer brings her suit under said second section, against the registering officers, and Webster her's under the third section, which authorizes it, for rejecting her vote. The questions in both cases are identical and presented together.

To the declarations the defendants demur, and thereby raise the only questions we desire to have adjusted.

The defendants, by their demurrer, admit all the allegations 4 of the plaintiffs, severally, but say, that as they are women they are not entitled to vote in the District of Columbia. That the seventh section of the organic act, the Constitution of the District, provides, "That all *male citizens,* " &c., "shall be entitled to vote," &c., and that this word *male* excludes women, of course.

To this the plaintiffs reply, that the language of the statute does exclude women, but they say that in the presence of the first section of the Fourteenth Amendment, which confers the elective franchise upon "all persons," this word "male" is as if unwritten, and that the statute, constitutionally, reads, "That all citizens shall be entitled to vote."

For we contend, your honors, that although the Congress "has exclusive legislation in all cases over District," it can legislate only, as could the States, from which it was taken. It must legislate in accordance with American ideas, and can exercise no power not granted by the Constitution; and that that instrument certainly confers no power to limit the right of suffrage. And so we are at issue.

The language of the Fourteenth Amendment is:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Our labor is to determine the meaning of these words as they stand. You observe that the controlling word is “citizens.” What does it mean? It is a mere matter of the definition of a word, and thus the field is seemingly narrowed to the smallest limits. All we have to do, apparently, is to consult the dictionaries and bring into court common usage.

I wish it might be so decided; and so it could, if these plaintiffs were not women, or were not seeking some clementary rights of human beings. We know that whenever they or their claims of rights are involved, words mean nothing. No matter how broad a principle is, no matter how comprehensively it may be stated, the moment a woman claims its benefit she is told that she is a woman, that she is not meant, 5 and that ends the argument. And so I must go below words to things. These twin dragons of prejudice and proscription must be thrust by, and the foundations under the ground on which they stand must be examined. We will go back to the genesis of things, and see, if we may, how, when, and where women were walled out from the scope and spirit of the great original laws—laws that protect the rights of “all persons.”

We are told, that to construe “citizens” so as to embrace the right of suffrage, and thus thrust it upon woman, and thrust her into government and politics, is a war against nature; it is upsetting the primal foundations of society, and supplanting the preordained order of things. I may not here discuss the moral and social, not even the political aspect of these questions; but when I must contend for the ordinary use of a word, and so claim as right, and when that right is to enure to a woman, I may show, if I can, that it would confer no new right upon her, that the right was always her's, and thus prove that the word was used in its ordinary sense.

For if it should really appear that my use of the word did violate natural law and contravene natural right, that would be a strong argument show that it was not used in that sense.

I.

Then, as the first proposition of my brief, I contend, *that under our system the right to vote is a natural right.*

Obviously, government is of right or it is an usurpation. If of right, it sprang from some right older than itself; and this older right must have existed in persons, (people), in each ad all alike, male and

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female. And having this right, they used it to form for themselves a government. Of course, this supposes that all joined in and consented to the government, having the power to dissent; for to just the extent that a government got itself agoing without the free consent of its people, it is without right. The right of self-government, 6 and from that springs our right to govern others, is a natural right. This is the primary idea of American politics and the foundation of our Government. This was formulated in the second clause of our great declaration, and no man has dared to deny it.

Take up the latest edition of the American Constitutions, open to the first in the volume—"All power is inherent in the people," says Maine. And this is repeated and re-echoed by the thirty-three or four States which follow. If this power is inherent in the people, it must inhere in each and all alike.

This right of government, natural and inherent, is merely the motive power of the various governmental machines of the different States, so framed and adjusted that it, or some part of it, propels them. No one of them is a perpetual motion, creating and utilizing the power, they merely provide the means of its employment.

Of course no power does or can exist anywhere to create and confer the right of self-government, nor is, nor can that right be conferred as a grace or favor, nor can its exercise be denied to any one without wrong.

The means authorized for its exercise is the ballot, and the times and circumstances under which that may be employed is properly a matter to be agreed upon by the people, and no complaint can be made when its use is permitted to all.

It follows, then, if the right of government is a natural right, and to be exercised alone by the ballot, that the right to vote is a natural right. This never has and never can be successfully controverted.

Look again into this book of Constitutions. Not only do they declare the right of government inherent in the people, but they explicitly show that in the absence of obstacles the people, and all of them, would exercise the right practically, and hence nearly all use terms of careful exclusion.

This is the formula: "White male citizens, of the age of twenty-one years, being inhabitants," &c. (Here Mr. R. read from the Constitutions, showing the uniformity of the words, or their equivalents, from nearly all of the Constitutions.)

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The court thus sees this language was used by the most careful and scrupulous design. Having declared that all power is inherent in the people, words had to be used to limit its exercise or all

would vote, and the world *white* was employed to exclude colored persons, and the word "male" for the manly purpose of excluding women.

I will now, with the permission of the court, read from the highest American authority upon our politico-constitutional questions, partly in support of my proposition that the right to vote is a natural right, and also to show that the assumed claim of one part of the people to exclude another from all share in the Government has the most doubtful and shadowy foundation in right, and to an American it needs no evidence to show that a portion of the people thus excluded are in a state of vassalage, in which no American ever did, or ever will, develope and grow to their just proportions.

I read from Story on the Constitution, volume 1st, commencing at—

Sec. 578. The most strenuous advocate for universal suffrage has never yet contended that the right should be absolutely universal. No one has ever been sufficiently visionary to hold that all persons of every age, degree, and character, should be entitled to vote in all elections of all public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right as not having the sound judgment and discretion fit for its exercise. In many countries, persons guilty of crimes have also been denied the right as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy and the harmony of social life. * * * * And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle upon which the one-half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not at the same time apply to and justify many other exclusions. If it be said that all men have a natural, equal, and inalienable right to vote, because they are all born free and equal; that they all have common rights and interests entitled to protection, and, therefore, have an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations which shall control, measure, and sustain those rights and interests; that they cannot be compelled to surrender, except by their free consent, what by the bounty and order of Providence belongs to them in common with all their race. What is there in these considerations which is not equally applicable to females, as free, intelligent moral, responsible beings, entitled to equal rights, and interests, and protection, and having a vital stake in all 8 the regulations and laws of society? And, if an exception, from the nature of the case, could be felt in regard to persons who are idiots, infants, and insane, how can this apply to persons who are of more mature growth, and are yet deemed minors by the municipal law?

And this from—

Sec. 580. If, then, every well-organized society has the right to consult for the common good of the whole; and, if upon the principle of natural law, this right is conceded by the very union of society, it seems difficult to assign any limit to this right which is compatible with the due attainment of the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted under the particular circumstances in which it is placed by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority. At least, if any society has a clear right to deprive females, constituting one-half of the whole population, of the right of suffrage, (which, with scarcely an exception, has been uniformly maintained,) it will require some astuteness to find upon what ground this exclusion can be vindicated, which does justify, or at least excuse, many other exclusions.

And further, from—

Sec. 581. Without laying any stress upon this theoretical reasoning which is brought before the reader, not so much because it solves all doubts and objections, as because it presents a view of the serious difficulties attendant upon the assumption of an original and inalienable right of suffrage, as originating in natural law, and independent of civil law, it may be proper to state that every civilized society has uniformly fixed, modified, and regulated the right of suffrage for itself according to its own free will and pleasure. Every constitution of government in these United States has assumed, as a fundamental principle, the right of the people of the State to alter, abolish, and modify the form of its own government according to the sovereign pleasure of the people. In fact, the people of each State have gone much further, and settled a far more critical question, by deciding who shall be the votes entitled to approve and reject the constitution framed by a delegated body under their direction. In the adoption of no State constitution had the assent been asked of any but the qualified voters; and women, and minors, and other persons not recognized as voters by existing laws, have been studiously excluded. And yet the constitution has been deemed entirely obligatory upon them as well as upon the minority, who voted against it. From this, it will be seen how little, even in the most free of republican governments, any abstract right of suffrage, or any original and indefeasible privilege, has been recognized in practice.

This, remember, was written thirty years ago. Where would Story be now, if living?

I beg also to read a single paragraph from the “Spirit of Laws,” London edition, vol. 1, p. 220. “All the inhabitants 9 of the several districts ought to have the right to vote at the election of the representatives,” &c. All of the inhabitants, says Montesquieu, ought to have the right to vote. Under such a rule I suppose my learned opponent would contend that a woman could not be an inhabitant, of course.

I feel that I ought to apologize for presenting this point to this extent; it is so obvious, and rests on such broad and ample ground, that argument for it is without excuse, and I rest it here. So that if you consider this fourteenth amendment as a grant from the sovereign, then, like all such grants, you must take it most strongly against the grantor, and most favorable to the subject. And if, as I have shown, it is in favor of natural right, then must you construe it most strongly to extend that right. No court needs authority for these propositions.

II.

The second proposition of my brief is, *that by the old common law of our English ancestors, the old storehouse of our rights and liberties, as well as the arsenal where we find weapons for their defence, woman always possessed this right of suffrage.*

I will show by several English cases, by long usage, and general understanding, by principle and precedent, that the English woman both voted and held office; and I will show that not a single case, that not a single resolution of the House of Commons exists to the contrary; and that in all the now innumerable tomes of the common law, of judicial decision, commentary, or essay, but a single dictum exists to the contrary. And if I thus establish that the construction of the Fourteenth Amendment, for which I this day contend, is in favor of a common law right, is in accordance with its scope and spirit, every lawyer understand by how much I strengthen my position.

And for the satisfaction of the court I am glad to state that this part of my argument will consist entirely of extracts from recent English text-writers, and a reference to two or three old cases.

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I read first from Mr. Anstey's Notes upon the Reform Act of Great Britain of 1867. The writer in his comment upon the words of the act, “every man of full age,” &c., commences by showing that the term man in the act, as in Magna Charta and other statutes, is epicene—means both men and women. And he then goes on to show that to construe this phrase, “every man,” to include every woman also, is in strict accordance with the common law from old times to the present. I read form p. 87:

That the rights in question (the right of suffrage) are not incompatable with the legal status of the woman, the following authorities seem to show. On the other hand, there cannot be adduced any one authority against the position that the franchise of the shire and the borough were enjoyed by the female “resiants” equally with those of the male sex in times when “resiants,” as such, and not as “tenants,” had the franchise. The statutes by which the parliamentary franchise in counties

was taken away from the "resiants" and vested in the "tenants," and at length restricted to those of freehold tenure, (8 Hen., 6, c. 7; 18 Geo., 2, c. 18; 31 Geo,. 2, c. 14,) did not in any manner create or recognize any such distinction as that of the male and the female freeholders. Those acts had relation to tenure, not to sex. For the same reason, in all those boroughs where the "common right" prevailed, the suffrage would naturally be exerciseable by the female no less than by the male "inhabitants" or "residants." It is believed that in not one of the boroughs where the suffrage was said to be regulated by "charter," or by "custom," or by "prescription," or even where it was regulated by a local act of Parliament, there can be found one instance of any provision or usage whatsoever whereby any voter was excluded from the enjoyment of the suffrage by reason of sex. That a woman may be a householder, or freeholder, or burgage tenant, parishioner, is plain enough. That she may answer the description of "a person paying scot and lot" within the "city of London," has been solemnly decided by the Court of King's Bench, (Olives *vs.* Ingram, 7 Mod. 264, 267, 270, 271,) and that determination was expressly grounded by their Lordships "singly upon the foot of the common law, without regard to the usages of the parishes in London," which usage, nevertheless, had been also shown to be in favor of the same construction. In all cases, whether of statutory, of customary, or of common law qualification for the suffrage, the genera rule is that which was laid down by the Court of King's Bench with respect to the choice of parochial officers under the first "Act for the Relief of the Poor," which directed them to be made from among the "substantial householders" of the place. The court held Rex *vs.* Stubbs, 2 T. R., 395)—overruling a dictum in Viner's Abridgment to the contrary—that a woman, being a "substantial householder," was properly chosen under that act to the office of overseer of the poor, notwithstanding the objections raised at the bar that it was a burthensome office and one of which, being once appointed to it, she would be called upon to perform duties some of which were above 11 the bodily and mental powers, and others were inconsistent with the morality, or, at least, the decency of that sex.—(Id. 400.)

And so again on pages 90 and 91:

That there are some offices as to which it is the practice, by "the custom of England," to exclude them, is undoubtedly the fact. But it has been well said, as to these, that "there is a different between being exempted and being incapacitated," and that "and excuse from acting, &c., is different from an incapacity of doing so. For it must not be forgotten that it is upon the footing, not of disability, but of exemption, that those exclusions are vested, by the authorities which declare them." Thus, Whitelocke: "By the custom of England, women are not returned of juries, nor put into offices or commissions, nor eligible to serve in Parliament, or admitted to be members of the House of Peers; but, by reason of their sex, they are exempted from such employment. The omission of the *electoral franchise* from that enumeration [of exemption] is remarkable. If women were, at that time, considered to be excluded by any "custom of England" from the Parliamentary franchise, as

well as from Parliament, it is scarcely conceivable that Whitelocke would have omitted to mention so important a fact. Singular to say, there is no trace of any such custom or usage in the reports or amongst the records; not even, so far as the author's researches have been successful, in the Journals of the House of Commons itself; and yet the right of the returning officer to reject the vote of a female elector when tendered at the polling-booth is always *assumed* to be an adjudged point. Mr. Oldfield appears to have been under the impressions that the resolution of the House of Commons upon the occasion of the Westminster election, asserting the incapacity of an alien to vote in elections of member to serve in Parliament, extended to “women” also. If it were so, the incident would have no weight, for the enactment, which, according to a second resolution of the same date, was to be prepared for carrying into effect that intention, never received the sanction even of that House. But in truth, no mention of “women” appears in either resolution. Nor was there, in that year, or at any other period, any resolution or determination of the House, so far as the author's information goes, directly impeaching the capacity of any female, in respect of her sex, to vote at an election to Parliament. He is aware that the House of Commons did, upon one remarkable occasion, deny the capacity of a female to be heard even as a witness at their bar; and that this extraordinary vote was obtained through the influence of Sir Edward Coke, the only text-writer who can be vouched for the position, that a woman's vote ought not to be received at a parliamentary election.

Further on, pages 94 and 95:

On the other hand, there are extant many parliamentary returns for counties and boroughs from the earliest times, which were made by *female electors,* and yet were received. Some of them are enumerated in Prynne's Collection of Parliamentary Writs. Some of later dates are mentioned in the Common's Journals themselves. Others are to be found in the repositories of the learned or the curious.

Three of the returns in question which related to one and the same 12 borough, were, at a period long subsequent, produced before a “Committee of Privileged and Election,” presided over by the great parliamentary lawyer, Mr. Hakewell, as evidence for and against the respective parties to an election trial then pending. The question was whether the borough was close or open; that is to say, whether amongst the former returns so produced, those by “Mrs. Copley, as sole inhabitant,” showed the suffrage to be limited to the Lord or Lady of Gatton for the time, being, or whether those by “Mrs. Copley, *et omnes inhabitantes,”* showed the suffrage to be of a more popular character. No question of sex was raised on either side, and neither the report of the committee which found for the popular right, nor the resolution of the house for giving effect thereto, and for taking the Lord of the Manor's return off the file, contain any allusion to the question of sex.

At that time the House of Commons was not prepared to enter into conflict with the courts of law, and "privilege" had not attained to the height which, amid the excitement of the era of 1688, it was doomed to reach. It was impossible for the Committee of Privileges, in the Gatton case, to deny the female suffrage without coming into collision with the law, which had been declared but a few years previously by the judges. (Holt *vs.* Lyle and Coates *vs.* Lyle, 14 Jac., 1, and Catherine *vs.* Surrey, (Hakewell MSS.,) Append., 7 Mod., 264-5.) "The opinion of the judges," it was said by Sir William Lee, a chief justice of the King's Bench in 1739, "was that a *feme-sole,* if she has a freehold," in a county (as it seems) "may vote for members of Parliament," and that women when *sole* had a power to vote. * * * In Lady Packington's case, (she) returns to Parliament; that the sheriff made a precept to her, as lady of the manor, to return two members to Parliament. * * * In the case of Holt *vs.* Lyle it is determined that a *feme-sole* freeholder, in counties, may claim a voice for Parliament men, but, if married, her husband must vote for her. * * * I only mention what I found in a manuscript by the famous Hakewell.

Ch. J. Coverture then incapacitated a woman from voting?

Mr. R.No, your honor; the right to vote attached to the freehold, and by the old law that by marriage vested in the husband.

In the case of Olive *vs.* Ingram, 7th Mod. Reps., already recited by the author, it was urged that the rights of woman suffrage was lost by *nonuser,* which is thus disposed of. I quote from page 97:

The same cannot be said of the learned Soliciter General's objection of *nonuser.* "As their claim," he argued, "is at common law, and usage is the only evidence of right at common law, they ought to show it, or else *non user* shall be evidence of a waiver of the right, it they ever had any." The reply was conclusive enough. "There was a difference between being exempted and being incapacitated." But there was another and a not less conclusive reply. The franchise was a public, not a private right — *omnis libertas regia est, et ad coronam pertinet* —[every liberty is royal and pertinent to the crown] —and of such there can be no waiver, for 13 the right implies a duty, and the duty is co-equal and co-extensive with the right.

The author quotes from Chief Justice Lee in Olive *vs.* Ingram, where he comments upon some very interesting cases. Pages 100 and 101:

In the case of Holt *vs.* Lyle it is determined that a *feme-sole* freeholder may claim a voice for Parliament, but, if married, her husband must vote for her. * * * I would not be understood to declare it to be my opinion that women may vote for members of Parliament. I only mention what

I found in a manuscript by the famous Hakewell, but give no opinion at present, because I would further consider of this matter.

On the final argument he did declare that women could vote for Parliament men, as we shall see:

To the same effect were the opinions of some of the other members of the court.

Page, J. "I am of the same opinion as to the principal case. But I see no disability in a woman from voting for Parliament men. * * The votes are good votes, and she is capable of the office."

Probyn, J. "The best rule seems to be that they who pay have a right to nominate whom they will pay to. * * An excuse from acting, &c., is different from an incapacity of doing so. The case of Holt *vs.* Lyle, mentioned by my Lord Chief Justice, is a very strong case. They who pay ought to choose whom they will pay."

The only adverse *dictum* that can be found is this from Lord Coke. Coke's 4 Inst., f. 5 a:

And in many cases multitudes are bound by acts of Parliament which are not parties to the elections of knight,s citizens, and burgesses. As all they that have no freehold, or have freehold in antient *demesne,* and all women having freehold or no freehold, and men within the age of twenty-one years, &c.

Upon which, in connection with the authorities, Mr. Anstey remarks. Page 103:

It is at least certain that, in the face of these authorities, the *dictum* in question is quite unreliable as an exposition of the law relating to the suffrage of females, which must, therefore, be looked for elsewhere. The principles of that law, it is submitted, will be found in the cases of Coates *vs.* Lyle, Holt *vs.* Lyle, Olive *vs.* Ingram, and the King *vs.* Stubbs. It is unnecessary to add that all these cases were decided under the strict rules for construction of statutes, as they were before Lord Romilly's act enlarged them.

I now ask your attention to the case of Jane Allen, which came before Mr. Anstey, in the Revising Court, a tribunal 14 created by the parliamentary elector's trial bill of 1868, and which sits to revise the registration of voters, under the act of 1867, and from whom appeals lie to the court of common pleas. The case came up in 1868, and was fully and ably argued, and the Revising Barrister went luminously over the whole ground in an exhaustive opinion when he rendered judgment. I find the case in the Eng. Law Mag. and Law Rev. for 1868, at p. 121:

In re Jane Allen, (Paris of St. Giles-in-the-Fields.) September 23 *d,* 1868.

This was a claim to be entered on the St. Giles' list of occupiers for the borough, under the "Representation of the People Act, 1867," s. 3; the claimant's name, in common with those of all female occupiers, having been omitted by the overseers.

Page 126, the Revising Barrister says:

And as to what has been said of their being no such adjudged cases, I must say that it is perfectly clear that not, perhaps, in either of the cases quoted by M. Shaen, (for the claimant,) but in those of Catherine *vs.* Surrey, Coates *vs.* Lyle, and Holt *vs.* Lyle, three cases of somewhat greater antiquity, the rights of women freeholders was allowed by the courts. These three cases were decided by the judges in the reign of James I. Although no printed report of them exists, I find that in the case cited by Mr. Shaen, of Olive *vs.* Ingram, they were repeatedly cited by the Lord Chief Justice of the King's Bench in the course of four great arguments, (for there were no less than four, three further arguments in succession having been required by the court after the first was finished,) in that case of Olive *vs.* Ingram, (7 Mod., 264); that neither the accuracy of the citation nor the authority of the learned Mr. Hakewell, in whose manuscripts the reports were found by Lord Chief Justice Lee, was questioned at the bar or on the bench, and that the greatest respect was manifested by the whole court for those precedents. Their importance is all the greater when we consider what the matter was upon which King James' judges, sitting in Westminster Hall, had to decide. It was not simply the case of a mere occupier, inhabitant, or "scot and lot" voter. Therefore the question did not turn upon the purport of a special custom, or of a charter, or of a local act of Parliament, or even of the common right in this or that borough. But it was that very matter and question which has been mooted in the *dictum* of Lord Coke, the freeholder's franchise in the shire; and upon that the decision in each case expressly was that a *feme-sole* shall vote if she hath a freehold, and that if she be not a *feme-sole* but a *feme-coverte* having freehold, then her husband, during coverture, shall vote in her right.

These, then, are so many express decisions which at once displace Lord Coke's unsupported assertion, and declare the law so as to constrain my judgment. Now these three case—Catherine *vs.* Surrey, Holt *vs.* Lyle, and Coates *vs.* Lyle—must have been decided within a very few years after Lord Coke's "4th Institute" was 15 written in the reign of James I., and some years before it was published, and yet no reference to them is made in any one of the editions of the "4th Institute." Nor is this all. It is sometimes said, when reference is made to precedents of that kind, that they have never been approved by the bar. But that cannot be said of these. Hakewell, the contemporary of Lord Coke, and one of the greatest of all parliamentary lawyers then living—for even Selden and Glanvil were

not greater than Hakewell—left behind him the manuscript to which I have already referred, and which contained his own comments upon these three cases. Sir William Lee C. J., in his judgement in the case of Olive *vs.* Ingram, expressly says that he had perused them, and that they contained the expression of Hakewell's own approval of the principles upon which they decided, and of the results deduced.

And on page 129:

It is said, however, that there has been no practice shown in conformity with the claim, [woman suffrage.] If that were so, it would be no answer. Capacity is imprescriptible, and qualification, which is too often confounded with capacity, has been determined, by the best authorities, to be not affected by *laches* or *non-user,* either in respect to the person or the constituency. But the matter does not rest here. It is true that this question of this claim of the female to a vote was not raised in any of the revision courts, first established in 1832, until few days ago. It is also true that the right itself has not been openly asserted in any court of law for upwards of a century. It is even true that no cases calling for a direct decision of the point, and the last cases seem to have been the two to which I have alluded, have been submitted to any court since the three cases of Coates *vs.* Lyle, and Colt *vs.* Lyle, and Catherine *vs.* Surrey, which were decided in the reign of James I. But, it must be remembered, what difficulties the House of Commons had, in the meantime, created; what obstructions they had, in the meantime, offered to the lawful action of the courts and the rights of the suitors. That the feeling of the House was become hostile there was no doubt, (although to this hour no resolution has been passed against the female claim.) In the meantime, however, the House did pass the famous resolutions of the 20th January, 1703-4, whereby, in effect, all suitors soever for the franchise, were, under heavy pains and penalties, commanded to withdraw their claims from the cognizances of all tribunals but that of the House itself. These resolutions, howsoever, much against law, have been repeatedly acted upon by the House, and they were treated by the House as being in force so recently as a few days before the close of the last session of Parliament.

These resolutions, or standing orders, for such they must now be considered to have been, were so comprehensive in their prohibitions, and so formidable in their comminatory clauses, that I cannot wonder at the disuse into which not only this question, but all questions of the jurisdiction of the courts of law over the franchise, and matters relating thereunto, had fallen, at the time when the act of the Queen for making the Court of Common Pleas a Court of Appeal from the Revision Courts received the royal assent. The case of Ashley *vs.* White was decided first in the Court of Queen's Bench, by Lord Holt and his brethren, and afterwards, in error, by the House of Lords, and it was for the express of preventing 16 suit of that kind from coming before the courts of this country in future, that the resolutions in question became the standing orders of the House of Commons.

It was thereby declared, in effect, that any suitor, his counsel, his attorney or agent, who should presume to bring before any court of law or any other jurisdiction, except the House of Commons alone, any claim whatever to the franchise, should be deemed guilty of a high crime and misdemeanor against the privileges of that House of Parliament, and should be dealt with as an offender against the same. These standing orders have never to this day been formally rescinded, and there were, during one of the last discussions on the "Parliamentary Electors' Trial Bill, 1868," not only relied upon by the gentleman of the long robe who opposed the bill, but were made the subject of a formal notice of motion on his part in order to prevent the passing of that bill, on the ground that once passed it would effect a constructive but total repeal of these orders. The bill, however, passed into a law. So that, in point of fact, it was not until August, 1868, and after an interval of 170 years that the lieges of this land have been in a condition fairly to bring to issue before any court of justice this or any other question of the franchise, except by permission of the House of Commons. I am, therefore, of opinion that one can found no argument whatever upon the *nonuser* of any claim or right of franchise during the eighteenth and nineteenth centuries, whilst I have before me those highly comminatory standing orders or resolutions, declaring that, however illegal the interference might be, the House would interfere in any case in which an attempt might be made to seek the deliberate judgment of any of the courts of law upon any claim or right of franchise, and that every such attempt should be met immediately, summarily, and sorely to the disadvantage of the claimant. I think, on the contrary, that a *nonuser* of that kind exactly comes within the description, which the clear mind of Lord Camden, the chief justice of the common pleas, perceived in the famous case of Entick *vs.* Carrington, where a similar long course of *nonuser* having been relied upon as an argument in favor of what has ever since been deemed the illegal practice of general warrants. That great judge said that he saw nothing in such a *nonuser* as that, beyond "a submission of the weak to power and to the terror of punishment," that it would be strange doctrine to assert that to be universal law which a few had been afraid to dispute, and that as no objection was taken upon the returns and the matter had passed *sub-silentio,* the precedents against the claim were of no weight. But now that the Parliamentary electors' trial act, 1868, has been fully voted by the House of Commons itself and passed into a law, there is put a stop to the long interference on the part of that house with the course of justice. And it is under these altered circumstances that the matter of the particular claim now before me comes for the first time, for two centuries, to be dealt with as a matter of law and in a court of law.

On Page 132, he continues:

In the meantime and dealing with the case according to my own opinion of what the law is, I hold, in the first place, that this incapacity of mere sex, as it is called, did not exist at common law in any constituency; and (on the authority of the cases cited already of Catherine *vs.* Surrey, Holt *vs.*

Lyle, and Coates *vs.* Lyle, which show that there is in counties no such incapacity even as to the 17 freehold franchise, even under the acts passed before 1832, greatly narrowing the basis of that suffrage there,) that, à *fortiori,* there was no such incapacity in boroughs of the common right at least, and also of many, perhaps all, of those by custom also, as appears by the valuable records preserved from the time of the Conquest down to our own time, including the Damesday and the Doom Books of the various boroughs. For I find that (although in some boroughs, a later charter or special act of Parliament was to the contrary,) where the common right obtained, the woman burgess took her place, and her name was inscribed on the burgess roll with the male burgesses, enjoying the same rights and liable to the same heavy duties, such as watch and ward, scot and lot, and the like, as the burgesses of the male sex. Curiously enough, I see that it has been objected to the right of female suffrage within the last few days, that there is this analogy between the right of franchise and the liability to watch and ward. It is because that analogy exits, that I think that the claim of franchise must surely prevail, it being clear that, under the common law, a woman was liable to the former burthen, as she is still liable to serve as a constable, as an overseer of the poor, and the like offices, and, therefore, was rightfully put upon the burgess roll, and voted in the borough court equally with the male burgess.

But the matter does not rest there. The Rolls of Parliament, which end with the reign of Queen Mary, certainly contain no notice of the right of women to vote a common law, because they contain no entries relating to the right of suffrage at all, and I, therefore, pass them by. But I make this observation upon them, that they do contain not unfrequent notices of the presence of women in Parliament itself. But the returns to the parliamentary writs of the period are more to the purpose. Take, for instance, those relating to the county of York, collected by Prynne for quite another purpose than the present. He had to show that the lords and esquires of that great county, and not the freeholders at large, had for the long period of time, which began with the reign of Henry the IVth and ended with that of Edward the IVth, alone returned the knights of that shire to Parliament, and among those lords and esquires not a few clearly appear to have been of the female sex. But now I pass to the period of the journal.

It was said by Mr. Bennett, [who argued against woman's suffrage,] that if a single instance could be shown in which a woman had voted, and not simply claimed the right to vote, then *cadit questio.* But two such cases, Lady Packington's case and Mrs. Copley's case, were admitted by Mr. Bennett himself. I do not think that he explained away the effect of that admission. It was certainly not, as a mere returning officer, that either of those ladies signed and returned the indenture. It was as a person having, or claiming to have, the sole property in the soil of the whole of the populous borough of Aylesbury, that Lady Packington made her return; and during two or three generations the Packington family had, or had claimed to have, precisely that right.

Further on, p. 134:

There is not a single decision of a court of law, nor of the High Court of Parliament, nor of either of the two houses composing the high court, which, in any way, denied, or prejudicially affected the use by females of the common-law right of voting at elections, whether for counties or for boroughs, always excepting the case of 18 freeholders being in a state of coverture. With regard to coverture, it appears to be not generally known, that in the very case which was quoted by Mr. Shaen, that of Olive *vs.* Ingram, it was expressly determined that, where nothing appears on the face of a woman's claim to show whether she is *covert* or *sole,* the court must assume that she is *sole* and not *covert.* I shall have, therefore, in all cases, where the claimant is not described or proved to be a married woman, to assume, as the court there did, that she is *sole* and not *covert.*

On page 135:

I have mentioned the authority of the courts, the authority of Parliament, and the authority of the Commons' Committee of Privileges. Now, a common error appears to prevail that the House of Commons have declared the incapacity of women by resolution. They have never done so. They have threatened to do so, as appeared in one of the cases alluded to by Mr. Shaen, that of Mrs. Newdigate, where, I may add, Lord Coke in person suggested the objection, but that was all.

Pursuant to this opinion, the court gave judgment, ordering the name of Jane Allen and a number of other women to be placed on the roll of voters; and from this decision an appeal was taken to the court of common pleas, which has not yet, so far as I can learn, decided the case.

The case of Olive *vs.* Ingram, in King's Bench, decided in the twelfth of George II, (7th Mod. Reps. 262,) which we have here, has been already brought to the notice of the court.

It was a case made up to try the right to the office of sexton in the parish of St. Botolph. Upon an election, the plaintiff and Sarah Bly were rival candidates. Sarah was declared elected, she having received forty votes from women.

Two questions were made and four times solemnly argued. Was a woman eligible to the office of sexton? Were women competent voters for that office? And both were decided in favor of woman.

Thus, may it please the court, have I, with the help of these books, brought fully to aid your judgment the luminous researches of Mr. Anstey; and it is made broad and clear that the right of woman to the elective franchise was one of the best acknowledged and clearest of common-law rights; and that in

the whole circle of English 19 authority the ghost of a dictum can alone be raised to question it. So that if the force of its language compels you to construe the Fourteenth Amendment as authorizing woman to vote, you will have the satisfaction of knowing that it but restores her to her old common-law right in the persons of her American daughters.

III.

I am now to deal directly with the amendments, and first with the 14th:

First.

The first clause of section 1st of the Fourteenth Amendment I now read:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Until this was promulgated there was no absolute standard or rule of citizenship in the United States. Each State made a rule for itself, and its rule was not always clearly expressed, as you will see by these conditions. Some of them say that the male citizens of the State, being inhabitants, &c., shall vote, yet do not declare in what citizenship shall consist. Others, that citizens of the United States, &c., shall vote, while no person was a citizen of the United States except as he had become a citizen of a State. Many States permitted aliens, on a short residence, to vote, without naturalization, and they, in that indirect way, became citizens of such State, and hence of the United States.

This amendment puts an end to doubt and cavil, and broadly declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, &c. And yet this language, so solemn and imposing, was not employed for the mere purpose of announcing a comparatively 20 unimportant rule, to correct a mere confusion of words which worked no grave harm, as is contended for.

We know exactly what was the real wrong and injustice intended to be cured by it.

Historically, we know that a great revolution had changed innumerable things—chattels—to persons. Had developed them, by a sort of political Darwinism, from a simple to a more complex from; and the purpose to work another change, produce a higher development from persons to citizens, from

a natural person to an artificial political being, was intended to be accomplished by the formula just read. My learned friend on the other side is here to contend that, after all, this thing was not accomplished, and that these are meaningless words. And this is really the issue—does this language mean and do anything?

By an unwritten article of the American Constitution—for whoever looks to the written text will not find the whole of the Constitution—persons, no matter where born, or however unnatural they may be, are permitted to become domiciled, gain settlements, hold lands, bring suits, and acquired and enjoy every possible right, privilege, and immunity of native born persons. Nor has Congress, nor has any State, ever attempted, by law or ordinance, to discriminate against them, nor will either ever dare to do so, nor could or would such a law be enforced. The unwritten Constitution, by the name of public policy, or without any name, would prevent it. The only possible things which a resident alien may not do, are, he cannot vote or hold office. There need be no mistake about this, and it can be reduced to an absolute certainty. What, pray, does the resident alien acquire by the transmuting process of naturalization! What is the sum of his citizenship? He acquires the right of suffrage, and the right to hold office, and no other thing under the heavens and the Star Spangled Banner. Does he acquire these rights by virtue of any word or special provision of our naturalization laws, which annexes suffrage to naturalization as its special perquisite? Not a word of it. 21 Nor is there a word in any act of Congress or law of a State that confers suffrage upon the naturalized American as a thing incident to or consequent upon his act of naturalization. He thereby becomes a citizen, and takes up and enjoys its peculiar and distinguishing right. He gets naturalized for that and for no other purpose. Naturalization confers suffrage then, because suffrage is a property of citizenship.

This first section is not a meaningless, empty, powerless, dishonoring sham. It was the solemn exercise of the inherent reserved power of the people, and in it, and by it, with a word, they change persons to citizens. They invest the natural person with the political office and power of citizenship, and place its sword and buckler in his hands. He has become a corporator; is invested with the freedom of the city. He is a citizen. and hence a just owner of the political power.

This property of citizenship is the declaration of all history. The citizen of Athens, of all of the Grecian States, possessed a share of the political power, as did the citizen of Rome, when Greece and Rome were free.

This was the rule of the Middle Ages, and of the municipalities of Europe since. It is the unbroken usage of our own country, as we know, under our naturalization laws, and accords with the American idea.

Let me call your attention to the books upon this matter. This word citizen has been often defined, and let us see what our common sources of definition say of it. And first, however, I will read from Vattel's Laws of Nations, Book 1st, c. 19, 101:

The citizens are the members of the civil society; bound to this society by certain duties, and, subject to its authority, they equally participate in its advantages. The natives, or natural born citizens, are those born in the country of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it.

The inhabitant, as distinguished from citizens, are foreigners, 22 who are permitted to settle and stay in the country. Bound to the society by their residence, they are subject to the laws of the State while they reside in it; and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the law or custom gives them. The perpetual inhabitants are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united to the society without participating in all its advantages. Their children follow the condition of their fathers; and, as the State has given to these the rights of perpetual residence, their right passes to their posterity.

A nation, or the sovereign who represents it, may grant to a foreigner the quality of citizen, by admitting him into the body of the political society. This is called naturalization. There are some States in which the sovereign cannot grant to a foreigner all the rights of citizens. For example, that of holding public offices; and, where, consequently, he has the power of granting only an imperfect naturalization.

I read that for the purpose of showing that, among the qualities of citizenship is the right of holding public office, and that the citizen is he who is entitled to the highest and fullest and completest measure of the political rights, and subjected to the political disabilities of a given political society.

From other sources we have these:

The essential properties of Athenian citizenship consisted in the share possessed by every citizen in the Legislature, in the election of magistrates, and in the courts of justice. (See Smith's Dictionary of Greek Antiquities, p. 289.)

The possession of the *jus suffragii,* at least, if not also of the *jus honorum,* is the principle which governs at this day in defining citizenship in the countries deriving their jurisprudence from the civil law. (Wheaton's International Law, p. 982.)

The Dutch publicist, Thorbecke, says:

What constitutes the distinctive character of our epoch is the development of the right of citizenship. In its most extended as well as its most restricted sense, it includes a great many properties.

The right of citizenship is the right of voting in the government of the local, provincial, or national community of which one is a member. In this last sense the right of citizenship signifies a participation in the right of voting in the general government as member of the State. (Rev. & Fr. Etr., tom. v, p. 383).

A writer, Richard Grant White, says:

That a citizen is a person who has certain political rights, and the word is properly used only to imply or suggest the possession of those rights. (Words and their Uses, p. 100.)

Webster:

"Citizen—a person," [in the United States,] for he inserts in 23 brackets the expressive "U.S," to indicate what he means—"native or naturalized, who has the privilege of voting for public officers, and who is qualified to fill offices in the gift of the people."

Worcester:

Citizen—an inhabitant of a republic who enjoys the rights of a citizen or freeman, and who has a right to vote for public officers, as a citizen of the United States.

Turn to Bouvier's Law Dictionary; he says:

A Citizen is one who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and other public offices, and who is qualified to fill offices in the gift of the people. (4th ed., vol. 1, p. 231.)

The latest writer says:

The exercise of the right of suffrage in a State has been said to be conclusive of the subject—(Citizenship,) 1st Abbott,) U. S. Prac., 211.)

I turn from dictionaries to the Supreme Court of the United States, and read from Scott *vs.* Sandford, "the Dred Scott case," 19 Howard.

I perceive a smile your honors, at my citing this case. Well, whatever I may think of some of the law of that case, as a Radical, I highly approve of its definitions, especially of the word citizen.

I quote from the Chief Justice, on p. 404:

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing; they both describe the political body, who, according to our republican institutions, from the sovereignty, and who hold the power, and conduct the Government through their representatives. They are what we familiarly call the sovereign people, and every citizen is one of this people, and a constituent member of this sovereignty.

And this from Mr. Justice Daniels, p. 476:

For who it may be asked is a citizen? What do the character and *status* of citizens import? Without fear of contradiction, it does not import the condition of being private properly, the subject of individual power and ownership. Upon the principle of etymology alone, the term citizen, as derived from *civitas,* conveys the idea of connection or identification with the State or Government, and a participation in its functions. But, beyond this, there is not, it is believed, to be found in the theories of writers on government, or in any actual experiment heretofore tried, an exposition of the term citizen which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

What a pity Judge Daniels had not been as accurate in his law as happy in his definitions.

In quote from the dissenting opinion of Justice Curtis, on p. 581:

Though I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American constitution; and the just and constitutional possession of this right is decisive evidence of citizenship.

I give you this from the first, and, with one exception, the greatest of the Chief Justices. In Chisholm *vs.* Georgia, John Jay said:

At the Revolution the sovereignty devolved on the people, and they are truly the sovereigns of the country, but they are sovereigns without subjects, (unless the African slaves may be so called,) and have none to govern but themselves. The citizens of America are equal as fellow-citizens, and joint tenants of the sovereignty. (2 Dall., 470.)

Mr. Attorney General Wirt, in his analysis of what goes to make up citizenship, expressly includes the elective franchise. (1st Opinions Atty. Gens., p. 508.)

The supreme court of Kentucky said:

No one can, therefore, in the correct sense of the term, be a citizen of a State who is not entitled upon the terms prescribed by the institutions of the State to all the rights and privileges conferred by these institutions upon the highest class of society. (1st Little Rep., p. 333.)

And in Georgia the supreme court held this language:

Free persons of color have never been recognized as citizens of Georgia; they are not entitled to bear arms, vote for members of the Legislature, or hold any civil office; they have no political rights, but have personal rights, one of which is personal liberty. (Cooper *vs.* The Major, &c., 4 Ga., 72.)

Now, I need not be told that in none of these cases was the question made and decided, whether the right of suffrage was a right of citizenship, and that all this is but a impotent mass of *obiter dicta,* and not authority. When such a mass of exposition (call it *obiter,* if you will) is accumulated from such a variety of independent sources, and such sources, no court will be found to disregard it. Indeed, the reasons that 25 have compelled these learned courts and judges to so pronounce, and which enter into the definitions of the lexicographers, which gleam from the pages of political writers and historians, will constrain every court to pronounce the same.

To the contra is a case in Pennsylvania, the opinion of Attorney General Bates, and that of Judge Paschal, in his admirable Notes to the Constitution, and for whose learning I have the highest respect.

This, then, is the all but universal use of the word citizen in all time. It means a person with the right of suffrage. And in this sense, and in no other, was it used in this section.

Justice Wylie. Mr. Riddle, the Supreme Court has decided that women were so far citizens that they could bring a suit in the circuit court.

Mr. Riddle. I am aware of that, under the second section of the third article, which uses the word citizen as somewhat the equivalent of inhabitant, for judicial purposes, although that distinguishes between foreign citizens and subjects. That was before the great change of all persons into citizens.

I now ask your attention to other significant declarations of this section, which place the meaning of the word “citizens” beyond cavil.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The Chief Justice, (Cartter.) What do you do with the qualification that follows, in the second section?

Mr. Riddle. I will deal with that second section in due time. I know that a very distinguished lawyer, (Mr. Carpenter,) for whom I have the highest respect, finds in that section an unanswerable argument against my construction of the first. With all respect, I think it will be found that the languages of the second section coincides and strengthens, if strength can be added, our construction of the clause already discussed.

It must be claimed by those who maintain that citizens merely as such, cannot vote, that the right of suffrage is neither a political privilege or immunity. Pray, then, under what head of political rights does it constitutionally fall?

I am reminded, that in the so-called fatal second section, as also in the Fifteenth Amendment, that it is ranked as a right, and not as a privilege or immunity. It is spoken of as a right, as a right of the *citizen,* purely and simply a *citizen right;* and thus the Constitution itself defines the citizen as a person who has the right to vote—and I might well rest the argument here. I am anticipating. I go back to privileges and immunities.

They occur in the Constitution before, and were copied into it from the old Articles of Confederation, and whatever they were supposed to cover; whatever they do surround, has always been held of the highest and most exalted esteem, until, on their third promulgation, it is solemnly declared that they shall forever remain out of the reach of the abridging hand of the States, thus marking that they must be the highest and dearest of the possessions of the citizens. They undoubtedly cover and fence around all his rights, privileges, and franchises, and that none can be found falling outside,

and, last of all, the right of suffrage, which crowns a citizen as one of "the sovereign people" of Judge Taney and John Jay.

These words, as they stand in the second section of the Fourth Article, have received abundant judicial construction, (*obiter,* as our opponent would say,) a construction never questioned until a woman claimed her rights.

In Corfield *vs.* Coryell, 4th Wash. C. C. Rep., p. 380, Justice Washington, of the old Supreme Court, said:

The inquiry is what are the privileges and immunities of citizens in the several State? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign.

The court then proceded to enumerate a schedule of rights, 27 and says, "to which may be added the elective franchise as regulated and established by the laws and constitution of the State in which it is to be exercised."

And the great Chancellor Kent, quoting this case, thus approvingly incorporates its very language into his text, where it stands unchallenged, unquestioned, and uncontradicted:

It was declared in Corfield *vs.* Coryell, that the privileges and immunities conceded by the Constitution of the United States to citizens in the several States, were to be confined to those which were, in their nature fundamental, and belonged of right to the citizens of all free governments. Such are the rights of protection of life and liberty, and to acquire and enjoy property, and to pay no higher impositions than other citizens, and to pass through or reside in the State at pleasure, and *to enjoy the elective franchise accordingly* to the regulations of the law of the State. (2 Kent Com., p. 71.)

It is thus seen that these, two of the most eminent of our jurists, place the elective franchise under the heads of "privileges or immunities."

Justice Wylie. You don't mean to say that a citizen of New Jersey could vote in Pennsylvania?

Mr. Riddle. No, sir; but he has the right of voting in Pennsylvania upon the same terms the her own citizens can—residence. &c.

Chief Justice. He becomes a citizen of Pennsylvania.

Mr. Riddle. He can become such.

Justice Wylie. Then he has not the same right.

Mr. Riddle. He has the power to acquire the same right, and Pennsylvania cannot, under the Constitution, prevent it; no State can, by law, prevent the citizen of any State from acquiring citizenship in it, and without naturalization.

Justice Wylie. A citizen of one State, removing to another, must comply with the law of his new domicil, requiring residence, &c.

Mr. Riddle. Undoubtedly.

Justice Wylie. The State can prescribe residence as a condition of voting; but can't the man, before he votes, bring a suit as a citizen of the State?

Mr. Riddle. As soon as domiciled, undoubtedly.

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Justice Wylie. Then "citizen" does not, necessarily, imply the right to vote.

Mr. Riddle. A citizen, or a man with the right to vote, may, undoubtedly, undergo a suspension of that right—when absent from his domicil—or when he has lost it, and before he has acquired a new one. But there is in him the power to resume this suspended right—or to re-acquire it, and this cannot be taken from him. The supreme court of Massachusetts passed upon these "privileges or immunities," in Abbot *vs.* Bailey, (6 Pick, 92,) the court said:

"The privileges and immunities" secured to the people of each State, in every other State, can be applied only to the case of a removal from one State into another. By such removal they become citizens of the adopted State without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or eligibility to office without such *term of residence* as shall be prescribed by the constitution and laws of the State into which they shall remove.

This fully sustains Washington and Kent, and solves the question of Mr. Justice Wylie. Citizenship carries the right of suffrage, and when the citizen removes to another State he can re-acquire the suspended right, as a privilege of citizenship.

It is thus, then, with the completest knowledge of this use of this phrase, “privileges or immunities,” and that it was never used in any other sense; the people use it in this first section of the Fourteenth Amendment, and with no intimation that it means other or less than these learned jurists have thus declared.

As used in this section, these words have been passed upon by one of the ablest of the justices of the present Supreme Court, who declares that they are broader, strike deeper, and reach further than when used before.

In the case of the Live Stock Dealers *eat all. vs.* The Crescent City Live Stock Company, in the circuit court of the United States, at New Orleans, Judge Bradley said of the Fourteenth Amendment:

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It is possible that those who framed the article were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong, which they desired to redress. Yet, if the amendment, as framed and expressed, does, in fact, bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach such social evils which were never before prohibited by constitutional amendment, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree, what has, in fact, been done.

It embraces much more. The “privileges and immunities” secured by the original constitution were only such as each State gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other State.

But the 14th amendment prohibits any State from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.—(1st Abbott, U.S. Rep., 397.)

Thus stands the argument. All persons born or naturalized in the United States, and its subjects, are citizens of the United States, and the States where they reside.

We know that the intent was to transmute certain persons into citizens, and we find that proper language, in its usual acceptation, was used for that purpose; and we find further, that all the privileges and immunities of citizens are made inviolable. The section vests valuable rights and then secures them—the most valuable of which is this right of suffrage.

These plaintiffs are a part of these "all persons." They were born in the United States, and have, all their lives, been subject to its jurisdiction, and hence they must have received, and are entitled to exercise, the elective franchise.

It has been said, and the Chief Justice has reminded me, that we know as matter of fact that women were not at all in the minds of the framers and adopters of this amendment; and, therefore, can they be within its scope? I refer you to Judge Bradley's decision, just quoted. I also quote from Mr. Anstey's Notes the following, with cases there cited, (p. 75:)

It is undoubtedly the more modern doctrine, and it has been so determined, both at law and in equity, of late, that what either 30 those who framed the bill, or who proposed the measure in Parliament intended, is, for the purpose of construing the act, immaterial; for the words must speak for themselves. That the courts can know nothing of the intentions of the act, except from the words in which it is expressed, and by the general rules of construction; and more especially, that they cannot travel out of its language in search of any supposed intention, or into a history of its passage through Parliament; for "of such facts, if capable of being ascertained, we," said Lord Denham, in one of the cases cited, "are not permitted, judicially, to take notice."

By Lord Lyndhurst, C., (overruling Lord Brougham's decision in the same case,) in Cameron *vs.* Cameron, 2 M. and H, 291, 292; by Lord Langdale, in Logan *vs.* the Earl of Courtown, 13 Beav., 29, and by Lord Denman and the Court of Queen's Bench, in Regina *vs.* The Archbishop of York, 6 Jurist, 420; and in Regina *vs.* Capel, 12 A. and E., 411.

To these my associate may add the American authorities. To a modern lawyer authorities are needless on this point when he reflects for a moment.

Second.

I come now to the consideration of the second section of this amendment, to which your honors have referred me. I am well aware that this is supposed to be an impassable strait, where my argument must perish, and which, it was said, I prudently avoided when before the committee of

the House. I believe I am not noted for attempting to huddle over a difficulty or to shy vaguely and wordily around one.

The obstacles presented by this section have been most forcibly stated by Senator Carpenter in his letter to Mr. Tilton, and while the answer of the latter is most satisfactory, I am aware that this court may wish some other.

Let us examined this matter for a moment, and see whether one of the inferior members of this Fourteenth Amendment does discrown and dishonor its head.

The twenty-six first words declared an apportionment of representatives among the States which the abolition of slavery had rendered needless, for it is identical with the apportionment of the 3d clause of section 2d, articles 1st, and is thrown in here as introductory to what follows, which declares that, "when the right to vote is denied to any male inhabitants of 31 a State, and citizens of the United States, being twenty-one years of age, or in any way abridged, 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 said State."

This provides a shifting basis of representation in an apprehended contingency, from the whole number of persons to the whole number of male citizens permitted to vote. And it is alleged that in doing this, such words were used, and so used, as to clearly show that whatever is meant by the first section, it must, in connection with this, be so construed as to exclude the right to vote from the definition of the term "citizen," and to exclude it from the phrase "privileges or immunities." That when it says, "when the right to vote is denied to a male citizen of the United States twenty-one years of age," or when his right to vote is in any way abridged, it is equal to a declaration of constitutional power on the part of the States to deny or abridge the right. And also showing that the right to vote is not embraced by the words privileges or immunities. That, indeed, the whole subject of control over suffrage is wholly, with the States, as before. This construction and conclusion I utterly deny.

I have shown, as broadly as we ever shown, both on principle and authority, and that not by ballancing probabilities and weighing authorities, for there is no other side, that the first section confers the suffrage, or, rather, removes all hindrance to its exercise; and it necessarily follows, that this second section must be construed in harmony with that. Indeed, the high authority already referred to (Mr. Carpenter) concedes that the first section, standing alone, does confer suffrage.

Does this second section recognize a constitutional right to control suffrage? If so, in whom does it rest? "If the right to vote is denied or in any way abridged"—denied or abridged, by whom, pray? "By

the State," answer our opponents. But it does not say, if denied or abridged by the States or a State, nor yet by whom or what. Look at this language 32 more closely. "If the right of the male citizen of the United States to vote is denied." See how it helps us to define the words "citizens of the United States," in the first section. It unequivocally recognizes that he has the right to vote. If the *right of the citizen to vote* is denied, *his right to vote,* and his right solely and purely because he is a citizen, and for no other reason under the heavens. And I am to be told, am I, that this American Constitution, which thus solemnly recognizes this right to vote, also recognizes the right to deny this right? Think of this atrocious absurdity. This section declares this right for the sole purpose of providing for its denial —does it? Look, also, at these words, "or in any way abridged." Using "abridged" in connection with the right of voting, just as it is used in connection with "privileges or immunities" of the preceding section, thus demonstrating that the framers of this Amendment used "privileges or immunities" as the equivalents or rights, meaning the same things. And will any man show, under American law, a shadow of difference? Privileges and immunities, which cover all rights, are made inviolable by the first section, and all States are prohibited from abridging any of them, while the second explicitly recognizes ample power to abridge the only one which controls all others and renders their security possible! Can absurdity go further? Or, are we to be told that there is a difference between privileges and rights, and that while the former are placed sacredly beyond harm, the latter are left without protection? Whatever this language may mean, this section is liable to no such vile comment as this.

The matter and mischief palpably in the view of the farmers of this section were, they desired that the colored males of full age of the rebel States should vote. They had declared that they were voters, for they had declared that they were citizens of the United States, clothed with all the "privileges and immunities" of citizenship; and further, in express words, that citizens of the United States had the right to vote, and yet they could plainly see that there was great danger that 33 they would not be permitted to vote, notwithstanding. The other citizens would hinder their voting, would intimidate them, drive them away from the polls, and the State authorities might be unable or unwilling to enforce their rights, and it was thought at that time unsafe or inexpedient to declare that they should vote in direct terms, and they sought to bring it about indirectly; and so they said if these colored citizens of the United States are not permitted to exercise their right of voting, if that right is denied or in any way abridged, no matter by whom or how, then the State that permits this injustice shall suffer by a proportionate diminution of its representation in Congress.

This language, addressed to the peoples of these States, was a pure threat, denouncing a penalty. "These colored males, twenty-one years of age, are citizens of the United States, just as are the rest of you, with the same right to vote; deny or abridge that right, and take the consequence of diminished representation."

Suffrage conferred by the Fourteenth amendment. Woman's suffrage in the Supreme court of the District of Columbia, in general term, October, 1871. Sara J. Spencer vs. The Board of registration, and Sarah E. Webster vs. The judges of election. Argument of the counsel for the plaintiffs. With the opinions of the court. Reported by J. O. Clephane http://www.loc.gov/resource/rbnawsa.n3154

How can this be said to confer a constitutional right to deny or abridge the right to vote, of these colored citizens!

Under this rule many Southern districts could not have a representation at all. You say to a brawling bully, if you prevent your neighbor from voting you shall not vote yourself. How can this confer upon him the legal right to drive his neighbor from the poll? Can any man tell?

The law says to a man, if he steals a horse he shall go to the penitentiary. What a defence it would be to hear him quote that law as conferring upon him the right to thus abridge another man's right of property. It might be constitutional as times go.

But your honors, the peoples of these States did not heed the admonition of this section, or profit by its exhortation, but they went on denying and abridging the right of these citizens of the United States, as was their wont; and, thereupon, the people of the United States, instead of enforcing the first section of this amendment, as would have been manly and direct, patched another amendment to the Constitution; they 34 arose and declared to these obstinate rebels, you shall stop denying and abridging the right of these colored citizens to vote and make an end of it, and if you don't Congress shall make you; and they stopped it.

And thus this Fifteenth has repealed, or made obsolete, that discreditable 2d section of the Fourteenth Amendment, and it is as if unwritten. No word of it has any effect, as was so forcibly shown by Mr. Tilton.

Now, I admit, as broadly and fully as words can express, that the framers, adopters, and promulgators and these amendments, man-like, went through it all and never thought of women. Never thought that they were in existence—were persons, or human, even. It was the product of an unspent, blind, revolutionary force; as the blind forces of nature, under her laws, change the configuration of a continent, unaware of the mighty result.

And so we have this first section, not a mere sounding sham, but a crowned principle of sovereign right, which this halting and belittleing second section, in its poor way, seeks, not to deny or abridge, but to guard and protect, and thus you find harmony between them.

I am admonished by the lapse of time to pass through with what I must still say, and remit the argument to other hands, and to minds to whom this subject is fresher than it is to me, who cannot give it the interest of a first discussion.

Third.

Colored male citizens now vote constitutionally and rightfully, although the word “white” stands as before in most of the State constitutions; and yet he votes in spite of it. Some potent alembic has destroyed the force of this word, although the text remains as of old.

We are at once referred to the Fifteenth Amendment for a solution. That has conferred the power of voting upon them, and it is superior to the State constitutions and statute, and executes itself, as is claimed.

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Now, I concede your honors, that if the Fifteenth Amendment does confer suffrage, or remove the exclusion so that colored citizens can vote; if they have derived the franchise from that, then the argument is against me. But, if it does not confer it, then judgment must go for me.

Let us read it:

ARTICLE XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation. (15 Stat., p. 316.)

You see in a moment this does not confer anything. It uses no words of grant or grace, apt or otherwise, nor does it profess to. It expressly recognizes, as an already existing fact, that the citizens of the United States have the right to vote. The right which shall thus be respected is a right peculiar to the citizen—it is not a personal right, but a political right, and a right to vote, the same one mentioned in the second section of the Fourteenth Amendment—a right not created or conferred by the Fifteenth Amendment. It could not be, for it existed, and, as I have just said, was spoken of in the Fourteenth Amendment; so that it must be as old as that at the least. This amendment is a solemn mandate to all concerned not to deny this right, because it existed, and because it was of the highest value.

Justice Wylie. It is not to be denied for either of the three reasons mentioned.

Mr. R. Yes, your honor, I have not reached that; I am now only showing that it is a right—a citizen right—and older than the Fifteenth Amendment; but, if your honor intends to infer, that because the right cannot be denied in any one of those cases, that, therefore, it may be in all others, then you have another instance of a constitutional right to deny a constitutional right; and, without vanity, I have already pulverized that assumption.

It is thus absolutely certain that colored male citizens do not claim their admitted right to vote from this Fifteenth 36 Amendment. They had it before, and this came in to protect and secure them in its enjoyment.

Whence did they derive it? From the Fourteenth Amendment? If so, then did women acquire it by the same amendment? Was it an inherent right in them as a part of "the people?" So women are a much larger and more important part of "the people."

The right to vote shall not be denied on account of race, color, or previous condition of servitude, was not used to make the right sacred in male negroes alone, while the rights of all others were left to political caprice, or to be controlled hereafter by these same colored males mayhap; but this amendment was aimed fully at the mischief remedied by the second section of the Fourteenth Amendment, and there its force is expended. It fossilizes the second section of that amendment. While the broad language of its first section secures, beyond the abridging hand of the States, the great rights it secures—rights which Congress cannot abridge on any pretext, for it can exercise no power not granted, and the Constitution confers on it no power to abridge the "privileges or immunities of the citizen" in any instance.

And here I rest this solemn argument. I have brought this cause of woman, and of man as well—of the race—into the presence of the court, surrounded by the severe atmosphere of the law, beyond the reach of chronic ribaldry, and into the region of argument, where it must be estimated by its legal merits. I have applied to it the rules of law. I have pushed away the dead exfoliations that cumber the path; and have gone to the foundations, to the ever fresh and preserving spirit of the rules of the common law, and have sought to apply them with candor.

I see here before you these ladies, who have come with their friends to listen to the argument of their case, which is to decide whether, as citizens and subjects of this great Government, they are to bear the citizens' voice in its management. A Government which, spite of its burthens, its neglects, its scorn and contumely, they love with the passionate, 37 self-sacrificing devotion of woman; to which they gave their soul's offspring, their loves, and their lives; or, whether they are for a time longer to continue its vassals and serfs. That citizen is a vassal and a serf who must remain dumb in

the presence of power, and who must owe to grace, ever capricious, that which can belong alone to right.

And I see behind them, in shadowy and endless prospective, not the matrons and daughters of rich and luxurious homes; not the petted, flattered, courted, loved idols of society and fashion, but the long array of the pale, woe-worn, toiling, homeless, helpless wives and mothers and daughters of care and want, the prey of vice, the victims of abnormal society, who cannot be heard, but who mutely and unknowingly extend their weak hands for the instrument of political power for their own protection; who, when they strike for bread, when they strike for shelter and for raiment, and warmth and life, may have that power which will command what they have yet never had—a hearing. And never, till you give woman this power, and through it, give her to herself, can you redeem her, and through her, elevate the race.

Give her the ballot, and she will grow to the strength and wisdom to wield it more purely and unselfishly than it has ever yet been used.

I see your sensibilities are awakened. I only invoke your unprejudiced judgment. I will not have emotion and sympathy. I demand the severe voice of the law.

ARGUMENT OF FRANCIS MILLER.

May it please your honors: I rise under embarrassment in view of what fell from the Court, at the commencement of the argument, in regard to the near approach of the close of the term and the great amount of business demanding your attention. But if I were discussing a question involving a very moderate amount of property, or the most unimportant right of the humblest citizen in this District, and felt convinced that the law and justice were as clearly with me, as I feel that they are in the case that I am now to present, I should feel bound to give my client the benefit of whatever effort I could make in his or her behalf; and standing here, as I do on this occasion, as the humble representative of a great cause, representing not alone the two ladies whose names appear here as plaintiffs, but all their sisters throughout this land—twenty millions of human beings—whose rights are dependent upon the ultimate decision of this question, whether it be decided by this court or by the legislative tribunals of the land; and deeply feelings the responsibility that is on me, I am compelled to do what I may to urge upon the mind of the court the view that we hold in regard to this case, which we sincerely believe to be the true view of the law applicable to it. It is a great cause, for it concerns the rights of twenty millions of human beings. It is a cause that cannot be sneered away or frowned down. It is a cause that will come up again and again, and demand to be decided, and that will be finally decided in accordance with right and justice, so surely as time

goes on; and although it may, with some, be the subject of sneers, of satire, or unmeaning laughter, it stands in such a position as to demand the respect of the world, and has this day advocates such as would do honor to any cause. Florence Nightingale, Mrs. Somerville, Frances Power Cobb, and others of their sisters, in England, demand their rights, while such men as Bright, Stuart Mill, Newman, 39 and Disraeli advocate the granting of their demand, and Gladstone acquiesces; and, in our country, when Harriet Beecher Stowe, Elizabeth Cady Stanton, Lucretia Mott, and others, among the foremost women of this land, demand this right; and when it is declared by such men as Summer, as Trumbull, and as Loughridge, that they are entitled to the enjoyment of it; it is a demand that cannot be answered by a sneer. And it is as the advocates of this great cause—to fight this, its first battle—that we stand here to-day. It may be, your honors, that we will fail here, although I do think that if it were any other cause brought before a legal tribunal with the same strength, it would carry conviction to every mind and command the unanimous judgment of the bench in its favor;but if we fail it will be in consequence of the darkness that has surrounded this subject for so many ages through which we are just beginning to peer into the light; and just so surely as we are defeated in this court, we will carry it to the higher tribunal of the people, and that higher tribunal must and will decide it in accordance with the laws of God and justice.

This is a question of such magnitude that, although it may be decided, it cannot be considered, entirely upon technical grounds. We must recur to first principles, because the first principles of government are involved in it. We are contending here for the right of self-government, the right preservative of all rights, the right without which the right to property, the right to liberty, may be utterly useless; without which, they cannot, in any way, be effectuated. We are bound to consider, then, the very first principles of government, those principles upon which our Government and all free governments must and will forever rest.

Government arises, as has already been shown here, out of the people—derives all its powers from the consent of the people. And why? We are all creatures of the same great Creator—children of the same great Father—and standing here upon His footstool, we stand in absolute equality before Him. That being the case, we cannot in any way, any one of us, 40 assume to have a right that our fellow-human beings have not, unless we can show a charter for that right. If any man says to another man, or to a woman, I have the right to rule, and you are bound to submit, that man or that woman who is thus claimed to be a subject of his or her fellow-man, has a right to say, “where is your charter from the Almighty, by which you undertake to control and govern me, a creature of his power and goodness equally with yourself.” It follows necessarily then, that, being thus created all equal, there is no earthly tribunal which can decide a question involving the fundamental rights of human nature. There is, also, another great principle which it is necessary we should consider in this case. Acquiescence in a wrong can never sanctify it; and whenever the parties deprived of

any essential inherent right, come before a tribunal and demand that right, it cannot be said that, because by the stress of circumstances, by the very force of necessity, they have submitted to the wrong, that, therefore, they have lost the right of which they may have been deprived. Acquiescence in wrong—necessary acquiescence—is no foundation upon which can be built a right to continue and to perpetuate that wrong. The only way in which any human being can properly be denied the rights growing out of these great original, fundamental principles, that go beyond constitutions—that are above them—that pre-existed all constitutions, is by a voluntary surrender. That surrender must not be a submission to some necessity imposed by brute force, but it must be free, intelligent acquiescence.

It was in accordance with these ideas that our fathers acted in the convulsion of the Revolution, when everything was resolved, as it were, into its original elements, and they gave utterance to the principles which were to justify them in their action, in the Declaration of Independence. In that Declaration were laid down the fundamental rules by which all American governments have been controlled to a greater or less extent—rules which, however imperfectly they may have been carried out, have been recognized by all American 41 governments as just and true. One of these fundamentals principles is, that all men (and "men" here is, of course, generic, including women) —all men are created equal and endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness. They further declare, that to secure these rights governments are instituted among men, deriving all their just powers from the consent of the governed.

In addition to these, not so far reaching, not giving back, perhaps, so deeply into original principles, but still founded upon all correct political reasoning, was the other principle for which they contended, that taxation and representation were inseparable. In the words of the decision that was quoted yesterday, rendered in 1612, more than two hundred and fifty years ago, "they who pay ought to choose whom they will pay." To maintain these principles, our fathers engaged in the war of the Revolution, and, carrying it through, successfully established them, at least, so far a the white people of this country were concerned.

Within the past ten years, through the great struggle of the rebellion, these ideas have been more thoroughly and fully carried out. They were just as true in 1776 as they are now, but their full effect had not been given them; but within this period they have been enacted into law, and now the same law that applies to white men applies to black men; and, further, we believe—and it is the object of this suit to show—that, under the laws as they now exist, since the adoption of the Fourteenth and Fifteenth Amendments, the fullest and most perfect operation of these great principles has been made possible, and that the Fourteenth Amendments places in the hands of woman the ballot,

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Suffrage conferred by the Fourteenth amendment. Woman's suffrage in the Supreme court of the District of Columbia, in general term, October, 1871. Sara J. Spencer vs. The Board of registration, and Sarah E. Webster vs. The judges of election. Argument of the counsel for the plaintiffs. With the opinions of the court. Reported by J. O. Clephane http://www.loc.gov/resource/rbnawsa.n3154

by which she may protect and defend her life and liberty, give the sanction of her consent to the government to which she submits, and justify the taxes which she is called upon to pay, by exercising her choice in selecting the representatives by whom they are imposed, and the officers by whom they are collected and expended.

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Now, we admit in this argument, or may admit, that this right, existing in woman as a natural right, just as much as in man, has not been exercised in this country to any considerable extent. It is true, as was shown to the court yesterday, that in the State of New Jersey women had a right to vote. But, still the general truth has been otherwise; and it is now an object to consider whether the new amendments to the Constitution have changed what was the legal condition of things prior to their adoption. I am not here to contend that prior to the adoption of the Fourteenth Amendment of the Constitution women were legally entitled to vote; but I do contend, and I shall endeavor to show, that by its operation women have been enfranchised.

Prior to the adoption of the Fourteenth Amendment, the United States admitted in their Constitution that they had no right to control the question of suffrage in the States. This must be admitted by any one who will examine section 2d of article I of the Constitution, which defines the qualifications of voters, for its says:

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

The power of the United States to define the qualifications of voters, then, was entirely relinquished by that section of the Constitution. The subject was remanded to the States. They were entirely uncontrolled in regard to it. There was no provision of the Constitution that I have been able to discover, that in any way hampered the States in dealing with this question of suffrage, except that article IV, section 2d, forbade any discrimination by one State against the citizens of another State.

Justice Wylie. Here is a point, Mr. Miller, to which I would like to invite your attention. The District of Columbia is not a State, at all; but it is under the exclusive legislation of Congress, and the Constitution of the United States, 43 except so far as it affects fundamental rights, is not the Constitution of the District of Columbia. Congress legislates for this District, under its exclusive power; and this Amendment, does not, it strikes me, apply to the District of Columbia, because the District of Columbia is erected into a corporation. Why, Congress might erect a corporation without any votes at all—male or female. Suppose it should put a commission in charge here, to rule us. They have the power to do it. Suppose they should say, that the commission shall be appointed by

the President, and he appoints the commission, and puts us under the charge of this commission. Well, then, nobody would vote. If they have the power to prohibit everybody from voting, why cannot they prevent a certain class?

Mr. Miller. I would say in regard to this matter that I am discussing it on general principles rather than as applying to this particular district.

Justice Wylie. It is a case that arises here in the District of Columbia, and we must decide it according to the law of the District.

Mr. Miller. I agree entirely with that, and, I contend, that, while the States formerly had this power of regulating suffrage under the Constitution, and might do as they pleased about it, there is nowhere in that instrument any clause or section that authorizes Congress to deprive one of our citizens of any fundamental right. It is not necessary for me to show in the Constitution a clause positively prohibiting Congress from denying to the women of the District of Columbia the right to vote; but when it undertakes to do so I have the right to demand whence it gets the authority for so denying it. The burden of proof is on the other side to show an *express* grant of power; but such grant is not to be found in the Constitution, and there must be some better reason for it than an arbitrary discretion. There is in Congress no arbitrary discretion by which a citizen can be deprived of the right of self-government. That right is 44 far above the reach of discretion, and I will yield nothing to its prejudice by implication. It must be some direct and positive provision of the Constitution that will authorize the Congress of the United States to disfranchise citizens.

Prior to the adoption of the Fourteenth Amendment, there was no attempt made to define the words “citizen of the United States,” and that is the great office and effect of that amendment. It defines who are, and who shall be hereafter, citizens of the United States, by this language, “All persons born, or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside.” And it further says: “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.” “All persons”—we will not discuss the question whether women are persons. If they are persons, they are citizens. If citizens, no State can make or enforce any law by which their privileges and immunities as citizens shall be abridged. That brings us, then, to two questions; the only questions to be considered in this case.

First. What is the legal effect of making women citizens?

Second. Is the right of suffrage one of those privileges and immunities which the amendment forbids the States to abridge? I think those two questions are the hinges upon which this whole discussion turns.

In the first place, in considering the effect of the word "citizen," we recur to the well-established rule, that in the use use of all technical terms, they must be construed as if used in their technical signification, unless there is something in the act to show that they are not so used. Now, this word "citizen," is a technical word. It is a word that has been used since the very foundation of free government. Its definitions were given to you yesterday. I have no disposition to go over those definitions, but I wish to add one or two to them. The first use of that word, so far as I know, was in the free Republics of Greece, and the great Republic of Rome, in which citizenship was the great controlling idea of all their 45 policy. I read the Greek and Latin definitions of citizenship from Smith's Dictionary of Greek and Roman Antiquities, page 289.

In the third work of the Politics, Aristotle commences his inquiry into the nature of States, with the question; "What constitutes a citizen? *(polites.)* He defines citizens to be one who is a partner in the legislative and judicial power. No definition will apply equally to all the different States of Greece at different times; the above seems to comprehend, more or less, properly, *all those whom the common use of language entitled to the name.*

And the author says, on page 290:

Recurring, then, to Aristotle's definition, we find the *essential properties* of Athenian citizenship to have consisted in the *share possessed by every citizen in the legislature,* the *election of magistrates* in the *dokimasia,* and in the courts of justice.

In Greece, therefore, suffrage was the essential principle of citizenship. In the author's treatise in regard to Roman citizenship, he gives, what is, to my mind, a very good test to distinguish the attributes of citizenship, (page 291.)

If we attempt to distinguish the members of any given *civitas* from all other people in the world we can only do it by enumerating all the rights and duties of a member of this *civitas,* which are not rights and duties of a person who is not a member of this *civitas.* If any rights and duties which belong to a member of this *civitas,* and do not belong to any person who is not a member of this *civitas* are omitted in the enumeration, it is an incomplete enumeration, for the rights and duties not *expressly* included must be assumed to be common to the members of this *civitas* and to all the world; or, to use a Roman expression, they exist *jure gentium.*

Apply this test to suffrage, and see how imperfect any enumeration of the rights of a citizen would be with it omitted! It is almost the only right that *cannot* be left out without destroying all proper conception of the meaning of the word. On the same page, (291,) is quoted the following paragraph, from Savigny's History of the Roman Law in the Middle Ages:

In the free Republic there were two classes of Roman citizens; one that had, and another that had not, a share in the sovereign power, *(optimo jure, non optimo jure, cives.) That which particularly distinguished the higher class was the right to vote* in a tribe, and the capacity of enjoying magistracies, *(suffragium et honores.)*

* * * Those who had the *jus suffragiorum* and the *jus honorum* 46 had the *complete citizenship,* or, in other words, were *optimo jure cives.*

In the Roman Republic, therefore, the distinction between citizens *optimo jure* (of the highest right) and citizens *non optimo jure* (those who had not the highest right) was that the former were entitled to vote and the latter were not. If we read this Fourteenth Amendment, we find that all of our citizens are *optimo jure,* for it says *all persons* shall be citizens, and the rights of citizens shall not be abridged.

Adding, then this definition, drawn from the free Republican governments of antiquity, to those from Webster, Worcester, and Bouvier, and from the highest judicial tribunals, cited by Mr. Riddle in his argument yesterday, (see pp. 21 to 24,) we come, inevitably, as it seems to me, to the conclusion that among the attributes of citizenship is the right of suffrage, and the citizen can only be denied the exercise of that right, in any government, by express law. But, in this country, such denial or abridgement of the right of the citizen has recently been prohibited by the adoption of the Fourteenth Amendment.

There is some discrepancy in the recent definitions of citizenship in this country, arising from the fact that persons who have undertaken to define it have been compelled by some emergency, existing at the time, to suit their definitions to its demands.

For instance; Mr. Wirt was called upon, as Attorney General, to decide whether a colored man in Virginia was a citizen of the United States, and as it would not do, under the circumstances then existing, to declare that the colored man was a citizen, he gravely concludes, that as a colored man cannot vote, therefore, he is not a citizen.

Again; Mr. Bates, after the war of the rebellion commenced, was called upon to give his opinion on a similar question. The emergency then required that the colored man should be a citizen, and Mr.

Bates very elaborately shows, that citizenship and suffrage have no necessary connection at all. Therefore, these two opinions just offset and balance each 47 other, each of them having been given under an exigency that controlled the judgment of its author. But in the "Dred-Scott" case, where the whole court comes to give the opinion, we have the decision of the majority, which says, that citizenship and suffrage have never been separated; and we have, on the other side, the opinion of the minority, given by Justice Curtis, in which he says, that suffrage is the chiefest attribute of citizenship. The whole Court, freed from the emergency under which the two Attorneys General acted, united in saying that suffrage and citizenship are intimately connected. I know that Justice Curtis says, in that opinion, that they did not necessarily go together. I assent to that proposition under the Constitution as it stood before the adoption of the Fourteenth Amendment, because that question was left entirely to the States, and they could strip the citizen of his right. They were at liberty to make any restriction that they pleased, and the United States could not interfere. But if suffrage is the chief attribute of citizenship, and if the United States has, in the Fourteenth Amendment, declared that the privileges and immunities of citizens shall not be denied or abridged, how can you say that any State or the United States has a right to deny the citizen that which is the chiefest attribute of citizenship?

Justice Humphreys. Was it in the opinion of the Chief Justice, given as the opinion of the court, that that idea was thrown out?

Mr. Miller. Yes, sir; the idea was that citizenship and suffrage were inseparable.

Justice Humphreys. Was that in his opinion, delivered as the opinion of the court?

Mr. Miller. Yes, sir.

Justice Humphreys. That, then, is an adjudicated point, if it was.

Mr. Miller. Provided that point was before the Court; but I do not think it was before the Court for judicial decision. The opinion was *obiter* certainly; but, although *obiter,* it was 48 the opinion of the highest tribunal of this land, and there was no dissent from it.

Mr. Cook. There was only a man in that case; not a woman at all.

The Chief Justice. And the decision was adverse to the man.

Mr. Miller. But this arises in the argument of the opinion.

Justice Olin. I do not think that Judge Taney said that suffrage was indispensably connected with citizenship, at all, as I remember that case.

Mr. Miller. He did not say it in express terms. That was the expression of Justice Daniels, but he said what was entirely equivalent to it.

Justice Olin. One of the incidents, but not a necessary incident to citizenship.

Mr. Miller. Justice Daniels says expressly, there is no definition of citizenship that does not include the right of suffrage, in so many words.

Justice Olin. That is very extraordinary, if he said so.

Mr. Miller. Here is what the Chief Justice said: (19 How., p. 404.)

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the *sovereignty,* and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and *every citizen* is one of this people and a constituent member of this sovereignty.

Justice Daniel says: (p. 476.)

Upon a principle of etymology alone, the term *citizen,* as derived from *civitas,* conveys the idea of connection or identification with the State or Government, and a participation in its functions. But, beyond this, there is not, it is believed, to be found in the theories of writers on government, or in any actual experiment heretofore tried, an exposition of the term *citizen* which has not been understood as conferring the actual possession and enjoyment or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and *political.*

Also, Judge Curtis says: (p. 581.)

Though I do not think the enjoyment of the elective franchise 49 essential to citizenship, (under the Constitution as it then existed,) there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitution. The just and constitutional possession of this right is *decisive evidence* of citizenship.

The whole stress of the decisions on both sides in that case is, that citizenship carries with it the right of suffrage.

Justice Olin. Then they deny the right of a pauper to vote, and then they deprive him of citizenship, make him an alien.

Mr. Miller. I do not know that the suspension of the right by the operation of the law, provided it is such a suspension as applies to all the individuals in the State, is a denial of that right. We do not undertake to say, that because minors cannot control their own property, therefore, they have no right to property. The right of property exists, but the power of society to regulate itself, implies that it shall fix the time and the circumstances under which these rights shall be enjoyed. What society has no right to do is this: It has no right to say to any of its members, you have not this right, and you never shall have it. It is the "actual possession and enjoyment, or the perfect right of acquisition and enjoyment," that constitutes the test in regard to these rights.

This view of the Fourteenth Amendment is entirely confirmed by the Fifteenth Amendment, as I understand the language of that Amendment. It says, the right of citizens of the United States to vote shall not be denied or abridged on account of certain circumstances. Now, what does that mean? I ask your honors to consider this question just as if it were something connected with the traditional John Doe or Richard Roe, and ask yourselves, what do these words mean? "The right of citizens of the United States to vote shall not be denied." Is not that absolutely an expression of the opinion of the Congress of the United States, supported by the Legislatures of thirty-six States, that the citizen of the United States has a right to vote? It says, "shall not be denied or abridged." Abridge what? Abridge the thing that does not exist. The very word abridged necessarily denotes 50 that the right of suffrage pre-existed, because you cannot abridge a non-existing thing. I shall come to the effect of the conditions of this amendment subsequently.

But I do not propose to repeat the argument that was made yesterday in regard to the effect of that amendment. Clearly it does not confer any right of suffrage. Clearly, prior to the Fourteenth Amendment, colored men had no right to vote. The Thirteenth Amendment, which emancipated them, did not give them the right of suffrage, because the States had the constitutional power to say that they should not vote. But between the Thirteenth and Fifteenth Amendments, in some way or other, the colored man came into the possession of this right of suffrage; and the question is, where did he get it? If he did not get it under the Fourteenth Amendment, by what possible authority are they voting by hundreds of thousands throughout this country. The legislative and constitutional provisions that prohibit their voting still remain unrepealed upon the statute books of many of the States, but yet they do vote. There is no possible, no conceivable, means by which they legally can

vote, except by the operation of the Fourteenth Amendment. It may be said that if that is the case the Fifteenth Amendment was not necessary. Well, admit it was not. It was very well said by Justice Swayne, in the case of the United States *vs.* Rhodes, in answer to the argument that if the Thirteenth Amendment conferred certain rights upon the colored man it was unnecessary to pass the Civil Rights bill; "that it was not necessary, but it was well to do it to prevent doubts and differences of opinion." It is not well to leave any man's rights and liberties subject even to a doubt, and the Congress of the United States had better adopt amendment after amendment than to allow the slightest cloud to rest upon the tenure of the rights of the American citizen.

Let us now consider the second question: " *Is the right if suffrage one of the privileges of the citizen that shall not be abridged?* Here, I may say, we are very apt to be misled by the improper use of the word "qualification"—the "qualifications of voters." Remember that on all the principles of 51 American liberty the qualification of voting is manhood or womanhood. The mere fact of being a human being, the creature of the Almighty, is the qualification. And you do not take that human being and superadd certain things in order to make a voter, but you take human beings and strike from them certain rights, or subject them to certain restrictions and thus make out a privileged class of voters, and it is these restrictions that prevent those that do not enjoy the elective franchise from voting. We do not undertake to say, here is a citizen and we will add to him so much property and let him vote; but we say, "her is a human being, and because he has not a certain amount of property we will deprive him of his right to govern himself." It is not qualification, it is restriction, and I desire that this distinction be clearly borne in mind, because upon it rests a great deal of the force of this argument.

There was nothing whatever, so far as appears upon the statute books of this country, prior to the 14th Amendment, to prevent the States from restricting suffrage. Nothing at all. They had the right, I mean the legal right—I am not speaking of the moral right—they had the legal right to say that suffrage should be restricted in this, that, or the other manner, because the Constitution of the United States had recognized that right as existing in them. But that has been changed. The whole status of that matter has been altered by the adoption of the Fourteenth Amendment, which forbids these States from denying or abridging the rights of citizens of the United States.

Mr. Cook. I have the Dred Scott decision in my hand. The opinion of the court is on page 422:

Undoubtedly a person may be a citizen, that is a member of the community who form a sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office those who have not the necessary qualifications cannot vote or hold office, yet they are citizens.

Mr. Miller. I know that the Supreme Court, when it 52 comes to speak about women there, makes a very wide distinction between women and negroes.

Mr. Riddle. That was the restriction of State constitutions, which prohibited it, which ar abolished in the Fourteenth Amendment,

Mr. Miller. They say in their decision that the citizen is a part of the sovereignty, and Justice Daniels says that citizenship and suffrage never have been separate, but when they come to this question of women, as most men do, they lose all their discrimination. [Laughter.] They go in opposition to logic and reason, contradict themselves over and over again. It must be remembered too that this was before the passage of the Fourteenth Amendment had prohibited the abridgement of the rights of citizens.

Justice Wylie. I do not know as there is anything in it, but what do you make out of that declaration by the Almighty to Eve, as a punishment, that her desires should be to her husband, who should rule over her?

Mr. Miller. Your Honor, I am discussing now merely a political, and not a theological question.

Mr. Riddle. I am not aware that that extended to all her children.

Mr. Cook. I have it here. Unto the woman he said: “I will greatly multiply thy sorrow, and through thy conception in sorrow thou shalt bring forth children, and thy desires shall be to thy husband, and he shall rule over thee.”

The Chief Justice. Was not that dispensation legislated away with the new?

Mr. Cook. No, sir; intensified by the new.

Mr Riddle. Your Honor will bear in mind it was restricted to one generation. I know no rule of construction that imposes it upon her daughters.

Justice MacArthur. It was confined to that particular instance?

Mr. Riddle. Yes, your Honor, they disposed of the case before them. [Laughter.]

Mr. Miller. I am inclined to think, from the expressions 53 that have fallen from members of the court, that they regard the question of what is meant by the words “privileges and immunities” in the fourth section of the second article of the Constitution, and in the Fourteenth Amendment, as an

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Suffrage conferred by the Fourteenth amendment. Woman's suffrage in the Supreme court of the District of Columbia, in general term, October, 1871. Sara J. Spencer vs. The Board of registration, and Sarah E. Webster vs. The judges of election. Argument of the counsel for the plaintiffs. With the opinions of the court. Reported by J. O. Clephane http://www.loc.gov/resource/rbnawsa.n3154

important one. Since that amendment declares that the privileges and immunities of citizens of the United States shall not be abridged by any States. If among these privileges and immunities the right of suffrage is included, I think our case is established.

Justice Wylie. I think so too.

Mr. Miller. It has been my idea that the court were inclined to that view of the case. I have, therefore, been in search of the crucial test by which to try whether or not these privileges and immunities do include the right of suffrage, and I think I have found it. Some twelve or thirteen years ago it suited my convenience to move from the State of Virginia to the State of Maryland. Suppose, in moving there, I had found existing on the statute-book of the State a law declaring that citizens of Virginia should not be allowed to vote in the State of Maryland?

Mr. Riddle. Or acquire the right of voting.

Mr. Miller. Or acquire the right of voting. Suppose I had found such a law on the statute-book of the State of Maryland, what would I have done? I would have offered my vote at the polls, and, if it had been refused, I would have brought the question before the courts of that State. I would have said that by Art. IV, Sec. 2, of the Constitution:

The citizens of each State are entitled to all the privileges and immunities of citizens in the several States.

And the court would have referred to the case of Corfield *vs.* Coryell, and found it there laid down by one of the best judges we have ever had, that, among the privileges and immunities spoken of in the section above cited, is the right to vote.

I ask your honors whether there ever was a court in existence in this country that, if any such case as I have supposed 54 had been presented to it, would have thought of denying that among the privileges and immunities of citizens of the United States thus protected was that of voting?

Now, I ask your honors to consider this question, as I said before, as if it were a question about John Doe and Richard Roe. Examine the language as if it were any ordinary statute. If this right of suffrage is not one of the privileges and immunities intended to be protected and preserved by the second section of the fourth article of the Constitution, then the State of Maryland would have had a perfect right to say that citizens of Virginia coming there shall not vote, or acquire the right to vote; and yet your honors would not for a moment undertake to sustain that position. If this be so, then the privileges and immunities include this right of suffrage; and, when the Fourteenth Amendment

of the Constitution adopts and uses that same language, we are compelled, *ex necessitate rei,* to conclude that it means that no State shall deny this right of suffrage.

Why your honors, suppose, before this question of woman suffrage had arisen, this case of Corfield *vs.* Coryell had been before any court of the United States, would it not have met with the assent of every court? Has it not met with the approval of every court that has ever passed upon it?

See Conner *vs.* Elliott, 18 Howard, 593. Abbott *vs.* Bailey, 6 Pickering, 92. Also, 2 Kent's Com., 71.

But these are not the only authorities bearing upon this point. Story, in the second volume of his work on the Constitution, (sec. 187,) says: "The intention of this clause" (Art. IV,Sec 2,) was to confer on them, as one may say, *general citizenship,* and to communicate *all* the privileges and immunities which citizens of the same State would be entitled to under the same circumstances."

And Chancellor Kent says: "If citizens remove from one State to another they are entitled to the privileges that persons 55 of the same description are entitled in the State to which the removal is made, and none other."—(2 Kent's Com. 36.)

Would it not be absurd to say that the right to vote was not included in these general terms? I admit, again, that, till the Fourteenth Amendment, citizens might have had their rights denied or abridged, and so have been deprived of suffrage; but still that right could not have been given to the citizens of one State and denied to those of another possessing the same prerequisites, which proves that it was one of the privileges, intended to be protected by the section referred to. And, *now,* none of these privileges can be denied or abridged.

In connection with this branch of the argument, I will read a part of the opinion of Justice Bradley of the Supreme Court of the United States in the case of Live Stock, &c., Company *vs.* Crescent City, &c., 1 Abbott's United States Reports, page 397:

The new prohibition that "no State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States," is not identical with the clause in the Constitution which declared that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" it embraces much more.

It is possible that those who framed the art'cle were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does, in fact, bear a broader meaning, and does extend its protecting shield over those who were never thought

of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their *imprimatur,* understood what they were doing, and meant to decide what has, in fact, been decided.

The "privileges and immunities" secured by the original Constitution, were only such as each State gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other States.

I think that the great difficulty in this case arises from the fact that the minds of all men have been accustomed to consider citizenship as it existed prior to the Fourteenth Amendment, and they cannot relieve themselves from the bondage of the habit of mind that has become confirmed by their 56 long continuance in that state of things. They have been accustomed to see each State regulate suffrage at its will; deny the right to some, and allow others to enjoy it; change it; take it away from some, and give it to others.

But we must remember that all these things that could be denied in regard to suffrage prior to the Fourteenth Amendment cannot now be denied. You cannot say to the colored man in South Carolina you shall not vote. Why; because the Constitution of the United States, by its Fourteenth Amendment, says, that no State shall abridge the privileges and immunities of citizens. Take away from all these States this power, as it is taken away by that act, and we have left what? We have left the full, unabridged rights of citizenship to be enjoyed by every citizen.

I do not mean to say that, legally, citizens were not disqualified from voting prior to the Fourteenth Amendment, but I say that no citizen can be deprived of his right to vote except by some restriction. That is all. Express restriction alone can take away from the citizen the right to vote.

The Chief Justice. Now, here it is restricted to the male portion of the population.

Mr. Miller. Where?

The Chief Justice. Why, in the District of Columbia—in the organic act—and the question is, whether the lawmaker, under the Fourteenth Amendment of the Constitution, that declares all persons citizens have a right to discriminate between one person and another. That is the only question here. That they have a right to determine the terms of franchise there can be no doubt, and they may put it upon the qualification of property, or upon intelligence; but the question is, whether they can distinguish between one person and another having the same qualification.

Mr. Miller. Exactly. I think that the whole theory of this right of suffrage in relation to citizenship is expressly and admirably stated by Justice Daniels. It is either “the actual possession and enjoyment, or the perfect right of acquisition and enjoyment of suffrage.”

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The Chief Justice. Do you claim this right of suffrage is such a natural right that it can be abridged in nobody?

Mr. Miller. No, sir, not at all. I admit the right of society to regulate this right as al other rights for the good of society. What I do deny is this, that any portion of society can deny it to any other portion. That the white man, for example, can deny it to the black man; that men can say to women, “you shall not vote.”

The Chief Justice. You claim that the law-maker has o constitutional power to say to one man, you may vote, and to another man, having the same qualification, you shall not vote. You contend that the Constitution has established a common plane upon which all citizens stand?

Mr. Miller. That is my view of it. The Constitution has formulated into law the Declaration of Independence. We were one hundred years coming to it; but we have reached it at last—certainly by recognizing the political rights of the black man—and, as I believe, those of woman; and that is all this Court is called upon here to declare, to wit: that the Declaration of Independence has been enacted into law, and that you will see that that law is enforced.

I wish now to show that the spirit of the Constitution is utterly adverse to any power on the part of the Congress to discriminate between men and women, and I state here—and I state it certainly solely on my own authority, because I never investigated the question until this morning—but I state here there is not in the Constitution one word that forbids Susan Anthony from being elected President of the United States at the next election if the people so will it. If you read over every section of the Constitution you will find there is nothing to prevent a woman from being elected to the Congress of the United States, either to the Senate or House of Representatives. There is nothing to prevent a woman from sitting in the chair of the Chief Justice of the United States, this day, by any fair construction of the Constitution.

Examine the various provisions of that instrument in 58 regard to these officers. The second section of Article I says:

No *person* shall be a representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which *he* shall be chosen.

I will call attention to the effect of that world "he" hereafter. So, in the third section, the provision in regard to Senators is in precisely similar terms.

Article II, section 1, provides as follows:

The executive power shall be vested in a President of the United States of America. *He* shall hold *his* office, &c.

No *person* except a natural born *citizen,* or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President, &c.

Article III, section 1, says:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

In this last clause there is not even a "he" to exclude a woman from holding any judicial position under the Government of the United States.

Now, if the words "he" and "his," as used in these passages, preclude a woman from being President, or a member of Congress, or a judge of the Supreme Court, let us see what the effect of that interpretation would be upon other articles of the Constitution.

Article V, of the amendments, reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war, or public danger; nor shall any person be subjected for the same offence to be put twice in jeopardy of life or limb; nor shall *he* be compelled in any criminal case to be a witness against *himself,* nor deprived of life, liberty, or property, without due process of law.

Now, I wish to know if that masculine word "himself," with the usual male selfishness, excludes women from the benefit of all the guarantees of personal liberty and personal rights contained in this section. Can she be "held to answer for a capital crime," without "presentment or indictment by a grand jury?" Can she be "put twice in jeopardy of life or limb for the same offence?" Can she be compelled "to be a witness against herself?"

The Chief Justice. She cannot be tried for treason either according to the phraseology.

Mr. Miller. And so Article VI, of the amendments, provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against *him;* to have compulsory process for obtaining witnesses in *his* favor, and to have assistance of counsel for *his* defence.

Now, I am speaking of this thing on the interpretation of the Constitution as it stands, and I ask if you can distinguish between the use of the words *"him"* and *"his"* in the sections referring to officers of the United States, and in those that enumerate the guaranties of the personal liberties and personal rights of the citizen? Certainly not.

I assert, therefore, that the Constitution, this day, does not forbid the election of Miss Anthony to the Presidency of the United States if the people choose to do it. I hold that the latter part of this discussion is pertinent to the issue in regard to suffrage in this District, because it shows that the whole spirit of the Constitution is against the discrimination which in undertaken to be made by this organic act of February 21, 1871; that it has no foundation either in law or justice; that Congress has no power to make it; and moreover it is condemned by all the great principles on which our free government rests. The Fourteenth Amendment has been before the court only once, as I believe. I have read what Justice Bradley said in regard to these terms, privileges and immunities. 60 I wish to cite further from that opinion. Because Justice Bradley, in himself, is high authority, and his official position gives dignity and power to what he says:

But the Fourteenth Amendment prohibits any State from abridging the privileges and immunities of citizens of the United States, whether in its own citizens or any others. It not merely requires equality of privileges.

That is the old dispensation that existed prior to the adoption of the Fourteenth Amendments.

Suffrage conferred by the Fourteenth amendment. Woman's suffrage in the Supreme court of the District of Columbia, in general term, October, 1871. Sara J. Spencer vs. The Board of registration, and Sarah E. Webster vs. The judges of election. Argument of the counsel for the plaintiffs. With the opinions of the court. Reported by J. O. Clephane http://www.loc.gov/resource/rbnawsa.n3154

It not only requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.—1 Abbott's U. S. Rep., 597.

Now, can you say that citizens who have not the right to vote have their privileges, " *absolutely* unimpaired?" Why, with citizens such as these we would have a whole mass of citizens *non optimo jure* here, which the Constitution of the United States in this Fourteenth Amendment says, they shall all be citizens *optimo jure.*

It is said, and it was said in the argument yesterday, that the word "right" was used in regard to suffrage in the Fourteenth and Fifteenth Amendments, while the Fourteenth Amendment only declares that privileges and immunities shall not be abridged. I cannot see the force of the argument deduced from this fact. I can see that the "privileges and immunities" of a person might be impaired —that there might be some fairness in that. A peculiar right, a special privilege given to an individual, or class of individuals, by the mass of the community, I can see, might be resumed by the power that originally granted it without doing anybody any great injustice. But how a *right* can be *rightfully* impaired is more than I can understand. If the privileges and immunities of citizens are not to be impaired, what shall we do with *the rights* of citizens? A right is far above a privilege or an immunity, if these words are to be used with any reference to their real signification. I believe, however, the difficulty in the settlement of this question is, that as soon as the word 61 "woman" comes in, all other words must take a different acceptation and interpretation.

Justice Bradley says, on page 402 of the same report:

The more we have reflected on the subject the more we are satisfied that the Fourteenth Amendment of the Constitution was intended to protect citizens of the United States in some fundamental privileges and immunities of an *absolute* and not merely of a relative character. * * * It was very ably contended on the part of the defendants that the Fourteenth Amendments was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read. The language is: "No State shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights ?

Judge Bradley's examination of the question of what are the essential privileges intended to be protected by the Fourteenth Amendment is able and instructive, and at the risk of wearying the court I will cite it at length. (See page 398.)

What, then, are the essential privileges which belong to a citizen of the United States as such, and which a State cannot by its laws invade? It may be difficult to enumerate or define them. The

Supreme Court, on one occasion, thought it unwise to do so. [18 How., 591.] But so far as relates to the question in hand, we may safely say it is one of the privileges of every American citizen, to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive and odious monopolies or exclusive privileges which have been condemned by all free governments; it is also his privilege to be protected in the possession and enjoyment of his property, so long as such possession and enjoyment are not injurious to the community; and not to be deprived thereof without due process of law. It is also his privilege to have, with all other citizens, the equal protection of the laws. Indeed, the latter privileges are specified by the words of the amendment.

These privileges cannot be invaded without sapping the very foundations of republican government. A republican government is not merely a government of the people, but it is a *free* government. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose, is tyrannical and unrepublican. And, if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.

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Is there not a more sacred right than that of labor? I know there is a great deal of talk about this thing of property, and we are apt to consider property as the only thing to be regarded in our laws. Thus, when the friends of a property qualification come to advocate it, they say people must have some stake in society in order to vote. What stake? They must own some property, forsooth! As if property was the only thing on God's earth that required to be protected. As if the right of liberty, all the personal rights, were not far above the right of property. And this is the same tale that runs through the whole argument in favor of restrictive suffrage. There is, Justice Bradley says, no more sacred right of the citizen than the right “to pursue unmolested a lawful employment, in a lawful manner.” I am prepared to deny that statement. I assert that the right of personal liberty is far above any right of property, and that the right of self-government is the highest of all rights, because it is preservative of all rights.

Justice Wylie. The judge was reversed in that case, was he not?

Mr. Miller. Not that I know of. I do not think the case has come to the Supreme Court of the United States upon its merits.

Mr. Riddle. The case has come up to the Supreme Court of the United States. The preliminary question has been settled, but the merits of the question have not been passed upon.

Mr. Miller. It has been said from the Bench, that the Supreme Court had declared that women were citizens, and that there is a law by which foreign women are allowed to be naturalized. I admit all that. And the fact of their citizenship, before the Fourteenth Amendment, did not prevent their being deprived of the right of suffrage by the States. There was, then, no prohibition against depriving citizens of their right to vote. I do not mean to say there was any moral right to do it, or that it was in accordance with political truth, but the legal right did then exist. So there was 63 no moral right to deprive the slave of his liberty. There was no political principle that would in any way countenance or support it. But the fact existed till 1865; and then the Thirteenth Amendment destroyed that state of things, and slavery passed away. So the Fourteenth Amendment destroyed the power of the States to abridge or deny the right of suffrage, and the state of things that existed antecedent to its adoption should pass away.

Some attempt is made, in discussing this question, by Attorney General Bates, in his opinion in regard to citizenship, to draw a distinction between political *rights* and political *powers.* I confess I do not see how such distinction can possibly be drawn in the matter of suffrage. There is no legitimate power but what is based upon a right; and there is no just power in free governments that is not derived from the consent of the governed, which consent can only be expressed by the ballot.

Again, it is urged that Congress never contemplated the possibility of women voting under the action of the Fourteenth Amendment. I presume that we would all be willing to admit that Congress did not expect, by virtue of this Fourteenth Amendment, to give to women the right of suffrage. But, if that be the case, it is far from being the first time that men have “builded better than they knew.” So far as the intent of Congress comes before this court, it is laid down in the words of the Fourteenth Amendment. There they are. You are to consider and construe them, and you cannot depart from them.

Justice Humphreys. It is the intent of the people in accepting of the amendment—for that constitutional amendment goes far beyond Congress;—it is what the people meant in accepting it, that we have to consider.

Mr. Miller. Yes, sir. The Congress of the United States has sanctioned it by its proposal, and the people of the United States have sanctified it by its adoption. And whether or not the Congress of

the United States or the people of the United States may have included therein certain words that 64 have greater effect than they intended, is not a question that can be tested in this court nor can the intent of Congress be ascertained in any other way than by reference to the words of the Amendment itself; and upon that point I wish briefly to refer to some authorities, if your honors think it is all necessary.

Justice Humphreys. The rule is, that you must presume that the legislative body means what the words import.

Mr. Miller. Certainly. I will briefly run over some few authorities on this subject.

Sedgwick, in his work on Statutory and Constitutional Law, (p. 243,) says:

The tendency of all our modern decisions is to the effect, *that the intention of the legislature is to be found in the statute itself,* and that there *only* are the judges to look for the mischief intended to be obviated and the remedy meant to be provided.

In a case on the embargo laws, the Supreme Court of the United States said:

In construing these laws, it has been truly stated to be the duty of the Court, to effect the intention of the legislature, but this intention is to be searched for in the words which the legislature has employed to convey it. (Schooner Paulina's Cargo *vs.* The United States, 7 Cranch, 52, 60.)

In a case on the English Bankrupt Act, Lord Tenterden said:

The words (of the act) may, probably, go beyond the intention; but if they do, it rests with the legislature to make an alteration; the *duty of the court is only to construe and give effect to the provision.* (Notley *vs.* Buck, 8 Barn. & Cros., 160-4.)

And in the case of Everett *vs.* Wells, 2 Scott's N. C., 531, Tindal, C. J., said:

It is the duty of all courts to confine themselves to the words of the legislature— *nothing adding thereto, nothing diminishing.*

And so the authorities all are. Your honors are, therefore, not at liberty to go beyond the meaning of the words of this Amendment, but are to take them as they are, examine them by their ordinary definitions and uses, and, without regard to the consequences, to declare, on the solemn responsibility resting upon you: *Thus is the written law!*

Now, a word in regard to the second section of the Fourteenth Amendment. If I have established, as I believe I have, that under the first section of the Fourteenth Amendment women have the right to vote, and there is any particular limitation in the second section that contradicts it, that part of the amendment falls void and useless, so far as its effect upon woman is concerned. There is the declaration of the general principles expressly stated; and, if there is anything contradictory, "the particular and inferior cannot defeat the general and superior." Lieber's Hermeneutics, p. 120.

The great object of that Fourteenth Amendment, so far as it can be deduced from the words in which it is expressed, is this: that the rights of the citizens of the United States shall not be abridged. If there is anything contradictory of that in the subsequent sections, those sections must fall. But if the second section affects this argument at all, it is because it seems, by implication, to admit that the rights of certain male citizens of the United States can be denied. That is the whole force and effect of it—I mean so far as this argument is concerned. All that can be claimed for it is, that by implication, perhaps, it would permit that to be done. The Fifteenth Amendment comes in and says, in express terms, that that which the second section by implication permits, shall not be done; and by this declaration it strikes out that section, and it is no more in the Constitution now than is that clause of the second section of the first article of the Constitution which permitted States to deny suffrage to any of their citizens—black or white. That section is gone. It is no more a part of the Constitution, because it has been absolutely repealed by the adoption of the Fourteenth Amendment. Just so this second section of the Fourteenth Amendment disappeared by the operation of the Fifteenth Amendment.

The Chief Justice. Will you please read the Fifteenth Amendment again.

Mr. Miller then read, as follows:

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Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation. (15 Stat., p. 346)

The Chief Justice. There is a very strong implication, is there not, in that amendment, that you may deny the right of suffrage for other causes.

Mr. Miller. I do not think there can be any implication by which a citizen may be robbed of a fundamental right. It must be something expressed. I do not believe in any power of taking away

the rights of citizens by construction. No human being can be robbed of his God-given rights by implication. You cannot take away his property by implication. You cannot take away his liberty. I think it is equally true that you cannot take away his right of self-government by implication.

Finally, in regard to the construction of this Fourteenth Amendment, it must be observed that it is remedial in its character, and it must be "construed liberally to carry out the beneficent principles it was intended to embody," (Dwarris on Statutory Law, p. 632.,) and that "its construction must be extended to other cases within the reason and rule of it." (Lord Mansfield in Atcheson *vs.* Everett, Cowper, 382, 391.)

Lieber's fourteenth rule of construction is, "Let the weak have the benefit of a doubt without defeating the general object of a law. Let mercy prevail, if there be real doubt." (Lieber's Hermeneutics, p. 144.) Now, if *mercy* must prevail when there is real doubt, still more should *justice* prevail if these is any doubt. If your honors have any doubt in regard to this decision, I call upon you, not in the name of mercy, but in the name of justice, to give us the benefit of that doubt, and to recognise the right of all human beings to govern themselves.

This concludes the arguments so far as I have been able to present it to your Honors. It just about one hundred years ago that the case of Somersett was brought before Lord Mansfield, and he was called to pass upon the question whether 67 slavery could exist in England or not; whether the slaves that were brought from foreign countries, or from the colonies, to England, should be free or not. That question came up before him and was elaborately discussed. It was a question without precedent, and he decided it upon great general principles, and decided it in interests of right and justice. By that decision he gained for himself more true glory than by any other act of his life. He freed England. He justified the old boast that the air of England was too pure for a slave to breathe, and gave it practical effect. Your Honors stand in exactly that position to-day. You have a great question brought up before your judgement. It is for you to give the key note to the decisions in this country. It is for you to say whether this contest shall be brought to a triumphant conclusion by our decision, or whether we shall be compelled to struggle on for one, two, three, of four years longer in order to secure to our sisters in this country, and perhaps in all countries, the enjoyment of the inestimable right of self government. See to it that your judgment be guided by the plain rules of law, and governed by the clear dictates of justice, without regard to the prejudices of the past. See to it that it be such that when the cause which is now before you shall be triumphant it will be your pride and pleasure to recall it to memory.

OPINION OF THE COURT.

Chief Justice Cartter then delivered the opinion of the court, sustaining the demurrer, which is as follows:

These cases, involving the same questions, are presented together.

As shown by the plaintiffs' brief, the plaintiffs claim the elective franchise under the first section of the fourteenth amendment of the Constitution.

The fourth paragraph of the regulations of the Governor and Judges of the District, made registration a condition precedent to the right of voting at the election of April 20th, 1871.

The plaintiffs, being otherwise qualified, offered to register, and were refused. They then tendered their ballots at the polls, with evidence of qualification and offer to register, &c., when their ballots were rejected under the seventh section of the act providing a government for the District of Columbia.

Mrs. Spencer brings her suit for this refusal of registration, and Mrs. Webster for the rejection of her vote, under the second and third sections of the act of May 31, 1870.

The seventh section of the organic act above referred to, limits the right to vote to “all male citizens,” but it is contended that in the presence of the Fourteenth Amendment, the word *male* is without effect, and the act authorizes “all citizens” to exercise the elective franchise.

The question involved in the two actions which have been argued, and which, for the purposes of judgment, may be regarded as one, is, whether the plaintiffs have a right to exercise within this jurisdiction, the elective franchise. The letter of the law controlling the subject, is to be found in the seventh section of the act of February 21, 1971, entitled, “An act to provide a government for the District of Columbia,” as follows:

And be it further enacted, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the 69 passage of this act, except such as are *non compos mentis,* and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said district, and for all subsequent elections, twelve months prior residence shall be required to constitute a voter; but the Legislative Assembly shall have no right to abridge or limit the right of suffrage.

It will be seen by the terms of this act that females are not included within its privileges. On the contrary, by implication, they are excluded. We do not understand that it is even insisted in argument that authority for the exercise of the franchise is to be derived from law. The position taken is, that the plaintiffs have a right to vote, independent of the law; even in defiance of the terms of the law. The claim, as we understand it, is, that they have an inherent right, resting in nature, and guaranteed by the Constitution in such wise that it may not be defeated by legislation. In virtue of this natural and constitutional right, the plaintiffs ask the court to overrule the law, and give effect to rights lying behind it, and rising superior to its authority.

The Court has listened patiently and with interest to ingenious argument in support of the claim, but have failed to be convinced of the correctness of the position, whether on authority or in reason. In all periods, and in all countries, it may be safely assumed that no privilege has been held to be more exclusively within the control of conventional power than the privilege of voting, each State in turn regulating the subject by the sovereign political will. The nearest approach to the natural right to vote, or govern—two words in this connection signifying the same thing—is to be found in those countries and governments that assert the hereditary right to rule. The assumption of Divine right would be a full vindication of the natural right contended for here, provided it did not involve the hereditary obligation to obey.

Again, in other States, embracing the Republics, and especially 70 our own, including the States which make up the United States, this right has been made to rest upon the authority of political power, defining who may be an elector, and what shall constitute his qualification; most States in the past period declaring property as the familiar basis of a right to vote; others, intelligence; others, more numerous, extending the right to all male persons who have attained the age of majority.

While the conditions of the right have varied in several States, and from time to time been modified in the same State, the right has uniformly rested upon the express authority of the political power, and been made to revolve within the limitations of express law.

Passing from this brief allusion to the political history of the question to the consideration of its inherent merits, we do not hesitate to believe that the legal vindication of the natural right of all citizens to vote, would, at this stage of popular intelligence, involve the destruction of civil government. There is nothing in the history of the past that teaches us otherwise. There is little in current history that promises a better result. The right of all men to vote is as fully recognized in the population of our large centres and cities as can well be done, short of an absolute declaration that all men shall vote, irrespective of qualifications. The result in these centres is political profligacy and violence verging upon anarchy. The influences working out this result are apparent in the

utter neglect of all agencies to conserve the virtue, integrity and wisdom of government, and the appropriation of all agencies calculated to demoralize and debase the integrity of the elector. Institutions of learning, calculated to bring them up to their state of political citizenship, and indispensable to the qualifications of the mind and morals of the responsible voter, are postponed to the agency of the dramshop and gambling hell; and men of conscience and capacity are discarded, to the promotion of vagabonds to power.

This condition demonstrates that the right to vote ought not to be, and is not, an absolute right. The fact that the practical 71 working of the assumed right would destructive of civilization is decisive that the right does not exist.

Has it become a constitutional right, under the provisions of the Fourteenth and Fifteenth Amendments of the Constitution, which provide as follows:

Fourteenth Amendment, section 1.—"All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State."

Fifteenth amendment, section 1.—"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

Section 2.—"The Congress shall have power to enforce this article by appropriate legislation."

It will be seen by the first clause of the Fourteenth Amendment, that the plaintiffs, in common with all other persons born in the United States, are citizens thereof, and, if to make them citizens is to make them voters, the plaintiffs may, of right, vote. It will be inferred from what has already been said, that to make a person a citizen is not to make him or her a voter. All that has been accomplished by this Amendment to the Constitution, or by its previous provisions, is to distinguish them from aliens, and make them capable of becoming voters.

In giving expression to my own judgment, this clause does advance them to full citizenship, and clothes them with the capacity to become voters. The provision ends with the declaration of their citizenship. It is a constitutional provision that does not execute itself. It is the creation of a constitutional condition that requires the supervision of legislative power in the exercise of legislative discretion to give it effect. The constitutional capability of becoming a voter created this Amendment lies dormant, as in the case of an infant, until made effective by legislature action. Congress, the

legislative power of this jurisdiction, as yet, has not seen fit to carry the inchoate right 72 into effect, as is apparent in the law regulating the franchise of this District. When that shall have been done it will be the pleasure of this court to administer the law as they find it. Until this shall be done, the consideration of fitness and unfitness, merit and demerit, are considerations for the law-making power. The demurrer in these cases is sustained.

After the reading of the opinion of the court by Chief Justice Cartter, Mr. Riddle, counsel for the plaintiffs, in open court, prayed an appeal to the Supreme Court of the United States.