

1956

## Preston Allen v. Porter L. Merrell : Reply Brief of Plaintiff

Utah Supreme Court

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**Supreme Court of the State of Utah**

PRESTON ALLEN, suing for himself and other American  
Indians similarly situated,

*Plaintiff,*

v.

PORTER L. MERRELL, individually and as County Clerk,  
Duchesne County, Utah,

*Defendant.*

**REPLY BRIEF OF PLAINTIFF**

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**REPLY BRIEF OF PLAINTIFF**

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Most of defendant's argument is met by plaintiff's main brief, and no effort is made herein to respond to all of defendant's argument. As will be hereinafter demonstrated, the four basic contentions of defendant have been destroyed by existing decisions to the contrary.

1. *Even the cases cited by defendant recognize that state action in granting or withholding suffrage is subject to the restrictions of the Constitution of the United States.* We can agree with defendant that the question is whether par. 11, section 20-2-14 is either unreasonable or in violation of some provision of federal law. The cases have made it manifestly certain that the states are restricted in granting or withholding suffrage, particularly when involved is the right to vote for federal officers, such as

United States Senator and Congressman in the present case. In one of the most recent voting cases, *Smith v. Allwright*, 321 U. S. 649 (1944), the Supreme Court of the United States stated with respect to this question:

"Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to votes on account of color . . . . (p. 657)

\* \* \*

"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U. S. at 314; *Myers v. Anderson*, 238 U. S. 368; *Ex parte Yarbrough*, 110 U. S. 651, 663 *et seq.*" (p. 661)

There is nothing in any of the cases cited by defendant which purports to rule out the guarantees of the federal Constitution. *Evans v. Reiser*, 78 U. 253, 2 P 2d 615 (1931) relied on by defendant, does not exclude the operation of the federal Constitution. It merely upholds a statute making provision for marking of secret ballots. Furthermore, there is nothing in that case which approves action of the legislature in contracting the class of voters established by the Constitution of Utah, Article IV, Section 2 as "Every citizen of the United States, of the age of twenty-one years" possessing the necessary residence time in the State, County and precinct (which plaintiff does), and with certain exceptions not applicable to plaintiff. Section 20-2-14 purports to limit the class beyond the standard established by the Utah Constitution and is, therefore, not

only in conflict with the federal Constitution but with that of the State of Utah.

2. *The equal protection clause applies to Indians as well as to other citizens and persons within the jurisdiction of the states.* The core of defendant's failure to respect rights guaranteed plaintiff by the Constitution of the United States is its argument that "Indians patently are neither equally protected by state laws, nor equally responsible under them." This argument fails to comprehend the real significance of the equal protection clause. The cases demonstrate to purposes in that clause: (1) to assure the colored and other races the enjoyment of civil rights that under the law are enjoyed by white persons and to give those races the protection of the federal government when those rights are denied by the states (*Strauder v. West Virginia*, 100 U. S. 303, 306 (1879)) and (2) to assure that all persons similarly situated would be treated alike, and that no special groups or classes would be singled out for favorable or discriminatory treatment (*Maxwell v. Bugbee*, 250 U. S. 525 (1919); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910); *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540 (1902)). Nor does the fact that certain Indian citizens have some obligations and privileges under federal law, not shared by all others, eliminate them from the scope of the Fourteenth Amendment. This necessarily follows from the opinion of Chief Judge Phillips in *Trujillo v. Garley* (DCNM. 1948, unreported; Appendix C to Plaintiff's Brief) that the New Mexico Constitutional provision excluding from voting "Indians not taxed" was invalid in face of the Fourteenth Amendment. The same conclusion is also compelled by *Bradley v. Arizona Corp. Commission*, 60 Ariz. 508, 141 P 2d 524 (1943), holding that the denial of a motor carrier's certificate of convenience and necessity because the applicant was an Indian residing on a reservation was contrary to and prohibited by the Fourteenth Amendment, which requires equal protection of the laws to all persons.

3. *Concurrent jurisdiction by the United States over Indian reservations is not a valid basis for denial of the right to vote to Indians residing thereon.* Defendant relies on an analysis of soldier voting cases and the fact that military reservations are also embraced in par. 11, section 20-2-14, but this is no answer. Where the United States has *exclusive jurisdiction* and a reservation is, therefore, not within a state, it may well be that those residing thereon may not vote. *Johnson v. Morrill*, 20 Cal. 2d 446, 126 P.2d 873 (1942). But as stated by the Supreme Court of California in *Johnson v. Morrill*, *supra*, at p. 877:

“Certainly where the Congress has declined exclusive jurisdiction and has expressly preserved to the citizens their civil rights, we should not labor to find an inference which would deprive them of the right of suffrage.”

This statement is particularly applicable to defendant's argument on the Utah enabling act. In the landmark case of *United States v. McBratney*, 104 U. S. 621 (1881) the Supreme Court of the United States studied the Colorado enabling act, which is substantially the same as the Utah act, and held that the Ute reservation was within the state of Colorado and not subject to the exclusive jurisdiction of the federal government. Apparently defendant would re-examine the holding of this highest tribunal.

See 34 A.L.R. 2d 1193 for a discussion of cases concerning the right of soldiers and other residents of federal land to vote. The general rule is there stated:

“The right of residents in such an area to vote depends primarily upon whether the federal government has acquired and exercises *exclusive jurisdiction* over the area, in which case the right to vote is lost, or whether the state still retains some elements of jurisdiction, in which case residents may under some circumstances have the right to vote.”  
(emphasis supplied)



In this connection the attention of the court is directed again to *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948) holding that Indian reservations in Arizona were within the jurisdiction of the state and that Indians residing thereon may vote. Also see *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P. 2d 92 (1954) holding that residents of Indian reservations in California are entitled to welfare relief as residents of the state.

4. *The presumption of constitutionality does not extend to this case.* The presumption of which defendant speaks is merely:

“ . . . a presumption of fact of the existence of a factual conditions supporting the legislation. As such, it is a rebuttable presumption. . . . It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. . . .” Chief Justice Hughes in *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

In recent years the Supreme Court of the United States has emphasized that governmental action affecting certain classes of personal rights fundamental to a democratic order must be subjected to rigid scrutiny. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1937); *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942); *United States v. C.I.O.*, 335 U.S. 106, 140, (1947). Where basic fundamental personal and civil rights protected by the Fourteenth Amendment are involved, the so-called presumption plays little part and doubtful intrusions into the purpose of the amendment cannot be allowed to stand on the strength of the alleged presumption. As stated by the Supreme Court of the United States in *Korematsu v. United States*, 323 U.S. 214, 216 (1944):

“All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are un-

constitutional. It is to say that courts must subject them to the most rigid scrutiny.”

Respectfully submitted,

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