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Constitutional Law - Elections - Power of Congress to Regulate Primary Elections

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Notes

CONSTITUTIONAL LAW—ELECTIONS—POWER OF CONGRESS TO REGULATE PRIMARY ELECTIONS—Defendants were accused of altering ballots and falsely certifying the number of votes cast for the various candidates in a primary election for a congressional representative from the state of Louisiana. They were indicted under federal statutes declaring it criminal to wilfully deprive any state inhabitant, under color of state law, of rights or privileges secured by the Constitution or to conspire to injure any citizen in the exercise of the same.¹ Defendants demurred on the grounds that the sections of the Criminal Code under which the indictments were drawn did not apply to the state of facts disclosed by the indictment and that, if applied to those facts, the sections were unconstitutional. *Held*, when, as in this case, the state law has made the primary an integral part of the procedure of choice of federal officers, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted in the primary is included in the right of the elector to select his representatives protected by Article I, Section 2. The authority of Congress to regulate the manner of elections includes the power to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. The acts charged constitute a violation of the sections of the Criminal Code under which the indictment is drawn. *United States v. Classic*, 61 S.Ct. 1031, 85 L.Ed. 867 (1941).

The Supreme Court with this opinion ripped another page from the book of precedent. Although three justices dissented

1. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . they shall be fined not more than \$5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." 35 Stat. 1092 (1909), 18 U.S.C.A. § 51 (1927).

"Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both." 35 Stat. 1092 (1909), 18 U.S.C.A. § 52 (1927).

from the conclusion reached,² all agreed that it is within the power of Congress to regulate primary elections. *Newberry v. United States*,³ widely criticized⁴ for holding that the regulation of primary elections was not within the scope of Congress' authority, was unanimously overruled.⁵ This conclusion seems entirely sound. Congressional authority to regulate the manner of holding elections is entirely ineffective in a large number of states if it does not extend to the primary election. In the Democratic "solid south" the general election is a mere formality; in other states the election laws may so restrict candidacy in the general election, that, if corrupt elements are given free rein in the primary election, the voter will be left with the meaningless choice of the lesser of several evils.

The practical conclusion that Congress should have the power to control primary elections, if for no other reason than to make its control over general elections effective, may be strengthened by respectable legal considerations. Many state courts have reached the conclusion that the word "election" includes primary elections.⁶ Regulation of primaries should be considered a "neces-

2. The dissenting justices agreed that Congress has the power to regulate primary elections but thought that the right to vote at a primary was not "a right or privilege secured by the Constitution" within the meaning of the statutes under which the indictment was drawn. See *United States v. Classic*, 61 S.Ct. 1031, 1044, 85 L.Ed. 867, 881 (1941).

3. 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913 (1921). The court had previously refused to state an answer to the problem in *United States v. Gradwell*, 243 U.S. 476, 37 S.Ct. 407, 61 L.Ed. 857 (1917); *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

4. See Corwin, *Constitutional Law in 1920-21* (1922) 16 *Am. Pol. Sci. Rev.* 22, 25; Harris, *Primary Elections and the Constitution* (1934) 32 *Mich. L. Rev.* 451, 464; Schweinhaut, *The Civil Liberties Section of the Department of Justice* (1941) 1 *Bill of Rights Rev.* 606, 608; Comment (1921) 31 *Yale L. J.* 90, 91; Notes (1921) 19 *Mich. L. Rev.* 860, 863; (1922) 22 *Col. L. Rev.* 54, 56; (1929) 378, 379; (1933) 47 *Harv. L. Rev.* 527, 528; (1941) 1 *Bill of Rights Rev.* 316, 317.

5. It was stated in the opinion of the *Classic* case, 61 S.Ct. 1031, 1038, 85 L.Ed. 867, 874 (1941) that in the *Newberry* case, which involved a senatorial election, a majority of the court did not actually hold opinions contrary to the one voiced in the later case because, in a five-four decision, one of majority reserved opinion as to the effect of the adoption of the Sixteenth Amendment (popular election of senators) on the problem. It is to be noted, however, that, where, as here, election of *representatives* is involved the reservation in the *Newberry* case indicates no doubt on the issue.

6. Analyses of the cases are to be found in Harris, *supra* note 4; Sargeant, *The Law of Primary Elections* (1918) 2 *Minn. L. Rev.* 97. A nose-count finds a majority of the state courts holding primaries not to be "elections" within the meaning of constitutional and statutory provisions. See Harris, *supra*, at 463; Sargeant, *supra*, at 102.

"One must not overlook the fact, however, that the state courts were constrained to take this view in order to permit the legislature to regulate primaries without being hampered by restraints which applied to their regulation of elections. They did not distinguish elections and primaries in order

sary and proper" step in effective control over the final choice of federal officers.⁷ Any other result may be considered contrary to the idea of federal supremacy since it would subordinate the federal government to state regulation of affairs of national concern.⁸ It would, it has been said, violate the fundamental tenet that every government should contain in itself the means of its own preservation.⁹ A corrupt primary election is no more remote an influence on the final choice of representatives than are other acts which have been held within the power of Congress to prohibit.¹⁰ And it has been argued that if Congress has no power to

to make the latter impossible, but in order to make them more flexible. When a grant of power over elections is concerned, as it is in the case of Article I, section 4 of the Constitution, and not a limitation on governmental powers to interfere with suffrage rights, a different view is not only advisable, but is perfectly consistent with reasonable principles of constitutional interpretation. . . . There would seem to be no necessary inconsistency in construing 'elections' in the suffrage provisions of state constitutions so as not to include primaries and in construing 'manner of elections' in Article I, section 4 of the federal Constitution so as to include manner of holding primaries." Harris, *supra* note 4, at 476-477.

7. See *Classic v. United States*, 61 S.Ct. 1031, 1040, 85 L.Ed. 867, 876 (1941); *Newberry v. United States*, 256 U.S. 232, 258, 41 S.Ct. 469, 475, 65 L.Ed. 913, 922 (1921) (dissent). See Harris, *supra* note 4, at 470; Notes (1921) 19 Mich. L. Rev. 860; (1922) 22 Col. L. Rev. 54.

8. See dissent in *Newberry v. United States*, 256 U.S. 232, 281, 41 S.Ct. 469, 482, 65 L.Ed. 913, 930 (1921). Harris, *supra* note 4, at 465.

9. See dissent in *Newberry v. United States*, 256 U.S. 232, 283, 41 S.Ct. 469, 483, 65 L.Ed. 913, 932 (1921) citing Hamilton, *The Federalist*, No. 59. Note (1922) 22 Col. L. Rev. 54. See also *In re Debs*, 158 U.S. 564, 599, 15 S.Ct. 900, 912, 39 L.Ed. 1092, 1108 (1895).

10. The basic premise has been that the right to vote for representatives is one secured by the Constitution. *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); *Felix v. United States*, 186 Fed. 685 (C.C.A. 5th, 1911). See *Wiley v. Sinkler*, 179 U.S. 58, 62, 21 S.Ct. 17, 19, 45 L.Ed. 84, 88 (1899); *Swafford v. Templeton*, 185 U.S. 487, 492, 22 S.Ct. 783, 785, 56 L.Ed. 1005, 1007 (1902). A statute including within its purview provisions to insure the honesty of the registration of voters was held constitutional in *Ex parte Siebold*, 100 U.S. 37, 25 L.Ed. 717 (1879). Violation of state laws by failing to properly convey the poll books to the proper state official can be punished by the federal government. *Ex parte Clarke*, 100 U.S. 399, 25 L.Ed. 715 (1879); *In re Coy*, 127 U.S. 731, 751, 8 S.Ct. 1263, 1268, 32 L.Ed. 274, 278 (1888). Intimidation of voters is a violation of the constitutional right. *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); *Aczel v. United States*, 232 Fed. 652 (C.C.A. 7th, 1916). The right to have one's vote counted is included in the constitutional right, and therefore the making of false returns is a violation of the right. *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); *United States v. Pleva*, 66 F. (2d) 529 (C.C.A. 2d, 1933); *Lutran v. United States* 93 F. (2d) 395 (C.C.A. 8th, 1937). But bribery of voters is not a violation. *United States v. Bathgate*, 246 U.S. 220, 38 S.Ct. 269, 62 L.Ed. 676 (1917). Nor is the inclusion of the votes of disqualified voters. *United States v. Kantor*, 78 F. (2d) 710 (C.C.A. 2d, 1935). Nor is an agreement to change the votes cast in recounting them a conspiracy to deprive voters of the right, since it occurs only after the right has been freely exercised. *Steedle v. United States*, 85 F. (2d) 867 (C.C.A. 3rd, 1936). But a conspiracy to deprive illiterate negroes of their right to vote by preparing ballots in such a manner as to

regulate congressional elections neither have the states.¹¹

However, the majority opinion sets up what is apt to become a troublesome criterion for determining when the right to vote at a primary is one secured by the Constitution.¹² How much state legislation with regard to primaries is necessary to make the primary an "integral part" of the election procedure? How nearly invariable must be the victory of a particular party at the general election before it can be said that the primary "effectively controls the choice" of representatives? Since the power of Congress to regulate the manner of holding such primary elections is, apparently, plenary, and not governed by these limitations, one escape from the difficulty would lie in the substitution of clear congressional legislation for the general terms of the sections of the Criminal Code under which the indictment was drawn in the present case.

The decision in the *Classic* case will probably raise again the question of the negro's right to vote in primary elections. In *Grove v. Townsend*¹³ it was held that the Fourteenth and Fifteenth Amendments did not prevent a Texas political party, a

make it difficult for them to vote for the candidates for whom they wished to vote violates the right. *United States v. Stone*, 188 Fed. 836 (D.C. Md. 1911). As does a conspiracy to destroy and change ballots. *United States v. Clark*, 19 F. Supp. 981 (W.D. Mo. 1937). Accord, as to election of presidential electors, *Walker v. United States*, 93 F. (2d) 383 (C.C.A. 8th, 1937). And a conspiracy to prevent a public meeting for discussion of election issues and support of certain candidates was held punishable by federal statute in *United States v. Goldman*, 3 Woods 187, Fed. Cas. No. 15,225 (C.C. La. 1878).

11. It was argued that the power of the states to regulate congressional elections stems from Article I, Section 4. The word "election" in that article could have no broader meaning as a grant of power to the states than it had in connection with the congressional authority set forth. See dissent in *Newberry v. United States*, 256 U.S. 232, 262, 41 S.Ct. 469, 476, 65 L.Ed. 913, 923 (1921). *Harris*, supra note 4, at 465; Note (1922) 22 Col. L. Rev. 54. Nor could the states possess such a power among their reserved powers. Control of the selection of federal officers could not have been reserved by implication to the states and withheld from the national government. See *Harris*, supra note 4, at 465. The Tenth Amendment reserved only those powers which the states had before the adoption of the Constitution, it was said. They obviously did not have the power to regulate nominations for federal office before the adoption of the Constitution, for there was no federal government. See Note (1922) 22 Col. L. Rev. 54, 56. The Tenth Amendment today has, of course, little value as a basis for arguments concerning constitutionality since the declaration in *United States v. F. W. Darby Lumber Co.*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 395, 405 (1941) that it "states but a truism," was merely "declaratory of the relationship between the national and state governments as it had been established by the Constitution"; and was adopted merely "to allay fears." The problem discussed above was recognized in the opinion. See *United States v. Classic*, 61 S.Ct. 1031, 1042, 85 L.Ed. 867, 878 (1941).

12. See *United States v. Classic*, 61 S.Ct. 1031, 1042, 85 L.Ed. 867, 868 (1941).

13. 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935).

“voluntary association,” from determining qualifications for its members, and from thereby excluding unwanted persons on any basis whatever where the primary election was conducted by the party. In the *Classic* case, however, the right of all persons to vote in primary elections was said to be protected by the Constitution from abridgment by individual action where the primary in practical operation governs the final selection of officers, even though, apparently, it is not made by state law an “integral part” of the state election machinery.¹⁴ It is certainly logical to conclude that a political party is no more free to deprive the negro of this constitutional right than is the corrupt vote counter.

The decision in the *Classic* case should be welcomed as a step forward toward insuring honest elections for congressional offices. It will permit extension of such present election laws as the Hatch Act,¹⁵ the failure of which to embrace primary elections was due at least in part to fear that such a step would be held unconstitutional.¹⁶ But it seems certain to provoke further litigation in the primary election field.

A. B. R.

IMPEACHMENT—JUDGES—MISCONDUCT IN PERSONAL CAPACITY—MISCONDUCT DURING PRIOR TERM—In a suit to determine whether or not a district judge should be suspended from office pending his impeachment proceedings for alleged malfeasance the defendant excepts to evidence of misconduct in his personal capacity and in a prior term. *Held*, a public official may be removed for (1) misconduct in his personal as well as official capacity and (2) misconduct in a prior term. *Stanley v. Jones*, 2 So. (2d) 45 (La. 1941).

Whether impeachment¹ proceedings are civil or criminal in

14. See 61 S.Ct. at 1039, 85 L.Ed. at 875.

15. 53 Stat. 1147 (1939), 18 U.S.C.A. § 61 (Supp. 1940).

16. See *United States v. Classic*, 61 S.Ct. 1031, 1041, n. 5, 85 L.Ed. 867, 877, n. 5 (1941).

1. The word “impeachment” in its original sense—derived from the Latin *impedicare* (*pedica*, fetter, and *pes*, *pedem*, foot)—meant “to hinder” or “to prevent” but in parliamentary usage its meaning of an accusation or charge was acquired. Later, possibly in the sixteenth century, this word began to assume its present meaning, a proceeding to remove a public official upon an accusation of a crime or of some official misconduct or neglect. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution* (1937) 26 *Geo. L. J.* 849; *Ballentine's Law Dictionary* (1931) 610.