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CITATIONS

Cases:

Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 618

THE UNITED STATES OF AMERICA, APPELLANT

v.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 18–22) is reported in 35 F. Supp. 66.

JURISDICTION

The judgment of the District Court sustaining a demurrer to the first four counts of the indictment was entered on October 14, 1940 (R. 22). The order allowing an appeal from the judgment sustaining the demurrer to the first two counts was entered on November 7, 1940 (R. 25). Probable jurisdiction was noted by this Court on January 6,

1941. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

An indictment under Sections 19 and 20 of the Criminal Code alleges that the defendant Commissioners of Election, conducting a primary election under Louisiana law to designate the candidate of the Democratic Party for a seat in the House of Representatives, conspired to alter the ballots cast by qualified voters and falsely to certify the number of votes cast for the respective candidates, and did alter such ballots and make such false certification. It is alleged that in Louisiana designation as the candidate of the Democratic Party is equivalent to election. The sufficiency of the indictment to charge violations of the statute turns upon the following questions:

1. Whether the right of a qualified voter to vote in the Louisiana primary election and to have his vote counted as cast by the Commissioners of Election is a right secured or protected by Article I of the Constitution of the United States.

2. Whether the acts of the Commissioners of Election discriminating against the qualified voters whose votes were altered and counted for a

candidate not of their choice, deprived those voters of the equal protection of the laws, secured or protected by the Fourteenth Amendment.

3. Whether the right of a qualified voter to have his ballot counted as cast in a Louisiana Congressional primary election is among the constitutional rights which Sections 19 and 20 of the Criminal Code protect; and whether the sections are otherwise applicable to the acts alleged in the indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 2 and 4 of Article I of the Constitution, the pertinent provisions of the Fourteenth Amendment, Sections 19 and 20 of the Criminal Code, and the material provisions of the Louisiana statutes regulating primary and general elections are set forth in the Appendix.

Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51), in so far as material, provides:

> 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 * * * 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.

Section 20 of the Criminal Code (U. S. C., Title 18, Sec. 52) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully 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, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

STATEMENT

The appellees were indicted in six counts on September 25, 1940, in the United States District Court for the Eastern District of Louisiana, New Orleans Division (R. 1–17). Their demurrer to the indictment (R. 17–18) was sustained as to the first four counts (R. 22–23) which charged violations of Sections 19 and 20 of the Criminal Code (U. S. C., Title 18, Sections 51, 52). The Government appealed from the judgment in so far as it sustained the demurrer to the first two counts (R. 23, 25).

The first count (R 1–4) alleged that an election of a Representative in Congress for the Second Congressional District of Louisiana was to be held on November 5, 1940. On September 10, a primary

election was held in accordance with Louisiana law, for the purpose of nominating a candidate of the Democratic Party for that office. In the Second Congressional District of Louisiana, nomination as the candidate of the Democratic Party is and always has been equivalent to election; without exception the Democratic nominee has been elected since the adoption of the first Louisiana primary election law in 1900.

There were three candidates in the primary, T. Hale Boggs, Paul H. Maloney, and Jacob Young. The defendants were Commissioners of Election, selected in accordance with the Louisiana statute to conduct the primary in the Second Precinct of the Tenth Ward of the City of New Orleans. Five hundred and thirty-seven citizens and qualified voters voted in this precinct.

The charge was that the defendants, who were affiliated with a faction supporting T. Hale Boggs, conspired with each other and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, namely, (1) the right of qualified voters who cast their ballots in this primary election to vote and to have their votes counted as cast for the candidate of their choice; and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the defendants

changed eighty-three ballots cast for Paul H. Maloney and fourteen cast for Jacob Young, marking and counting them as votes for T. Hale Boggs, and that they falsely certified the number of votes cast for the respective candidates to the Chairman of the Second Congressional District Committee.

The second count (R. 4–6) charged that the defendants as Commissioners of Election, wilfully and under color of law subjected registered voters at the primary, who were inhabitants of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, namely, their right to cast their votes for the candidates of their choice and to have their votes counted as cast. Repeating the allegations of the first count, it is charged that this deprivation was effected by the wilful failure and refusal of the defendants to count votes as cast, by their alteration of ballots and by their false certification of the number of votes cast for the respective candidates.

The District Court, in sustaining the demurrer, held that the facts alleged do not constitute an offense under Section 19 or Section 20 of the Criminal Code (U. S. C., Title 18, Secs. 51, 52). Relying upon the opinion of Mr. Justice McReynolds in *Newberry* v. *United States,* 256 U. S. 232, in which three of the Justices concurred, the District Court concluded that Congress has no authority under Article I, Section 4 of the Constitution to

regulate primary elections; that the right of a qualified voter to vote at a primary election held to nominate a candidate for a seat in the House of Representatives is not a right "secured" or "protected" by the Constitution or laws of the United States; and, finally, that the application of Sections 19 and 20 of the Criminal Code to primary elections, which came into existence long after the statute was first enacted, would result, in the language of *United States* v. *Gradwell,* 243 U. S. 476, 488–489, in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

SPECIFICATION OF ERRORS TO BE URGED

The Court erred:

1. In sustaining as to Counts 1 and 2 the demurrer to the indictment and in quashing and dismissing those counts.

2. In its interpretation and construction of U. S. C., Title 18, Sections 51 and 52.

3. In holding that a conspiracy to deprive citizens of their rights to have their votes counted as cast for the candidate of their choice at a Congressional primary is not punishable under U. S. C., Title 18, Section 51.

4. In holding that the conduct of election officials, acting under color of state law, in depriving voters, who were inhabitants of the State of Louisiana, of their right to have their votes counted as cast for the candidate of their choice at a Con-

gressional primary is not punishable under U. S. C., Title 18, Section 52.

5. In holding that the right of a voter at a Congressional primary to have his vote counted as cast for the candidate of his choice is not a right, privilege, or immunity secured and protected by the Constitution of the United States.

SUMMARY OF ARGUMENT

Section 19 of the Criminal Code makes criminal any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 provides punishment for anyone who, acting under color of law, deprives any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States". The Government contends that the right of a qualified voter in a Louisiana Congressional primary election to have his vote counted as cast is secured by Article I of the Constitution; that voters are deprived of the equal protection of the laws if state election officials wilfully count their votes cast for two of the contending candidates in favor of the third; and that Sections 19 and 20 apply to the deprivation of these rights alleged in the indictment.

I

The right of a qualified voter to have his vote counted as cast in a Democratic Congressional pri-

mary in Louisiana is secured and protected by Article I of the Consitution of the United States. Section 2 of Article I confers the right to choose representatives upon qualified electors of the most numerous branch of the several state legislatures. The members of the class are determined by state law but as this Court has frequently held, the right of those members to choose is granted by the federal Constitution. The right thus granted is protected against interference by private individuals as well as by the States and Sections 19 and 20 are designed to afford protection against both types of interference. *Ex parte Yarbrough,* 110 U. S. 651, and *United States* v. *Mosley,* 238 U. S. 383, involved interference with voting at general Congressional elections. The Government contends that the constitutional right to *choose* is likewise impaired by interference with the voting at a Democratic Congressional primary in Louisiana.

Under the laws of Louisiana, the primary is a part of the election machinery of the State. Conducted by State officers at public expense, its function is not confined to the designation of party nominees; it also eliminates candidates from the general election. A candidate defeated in a primary is legally precluded from running as an independent in the final election; and those who voted for him in the primary have no way of expressing their choice of him at the general election. Moreover, in the practical exercise of the right to choose,

in Louisiana, the Democratic primary is not only an integral part of the process of choice; it is the determinative part.

In securing the right to choose Congressmen, Article I, Section 2, is concerned with realities, not with forms. If a state prefers to conduct Congressional elections in two steps rather than in one, the protection of the section reaches to both. Where, as in Louisiana, the first step is not only important but is actually decisive, both in law and in fact, the Constitutional guarantee necessarily applies.

Neither *United States* v. *Gradwell,* 243 U. S. 476, nor *Newberry* v. *United States,* 256 U. S. 232, nor *Grovey* v. *Townsend,* 295 U. S. 45, prevents such a realistic analysis. In *Gradwell* the question of whether a primary should be treated generally as a part of the election was expressly reserved. The division of the Court in *Newberry* leaves the decision an authority of limited scope and force. The case involved a Senatorial rather than a Congressional primary; the indictment was based upon a statute enacted prior to the adoption of the Seventeenth Amendment, and the deciding Justice indicated that he regarded this fact as determinative. Thus a majority of the Court accepted the view that a primary is not a part of the election of Senators, within the meaning of Article I, Section 4, only as long as the choice of Senators was vested in the State legislatures. The status of the primary as

an integral part of the process of popular choice was not involved. Moreover, the issue was not as to the source of the right to vote but as to the power to regulate the campaign; and the primary election involved did not eliminate candidates from the general election. The Texas primary election in the *Grovey* case differed significantly from that involved in the instant case and the voters were not there as here deprived of an opportunity to express their choice in any other way.

Finally, Congress both before and after the *Newberry* case, has recognized the vital influence of the primary upon the final choice, by inquiring into the conduct of primary, as well as general election campaigns in determining the qualification of its members and passing on contested elections.

II

Qualified voters are also deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment if state officers count the votes cast for one candidate and wilfully refuse to count those cast for the others. In receiving and counting ballots, and certifying the results in a primary election, the Commissioners of Election are state officers, and their action, under color of their office, even though contrary to state law, constitutes "state action" within the meaning of the equal protection clause of the Fourteenth Amendment. *Ex parte Virginia,* 100 U. S. 339, 347; *Iowa-Des Moines*

Bank v. *Bennett,* 284 U. S. 239, 245–246; *Mosher* v. *City of Phoenix,* 287 U. S. 29. It is also clear that Congress may make criminal the acts of state officials which effect a denial of equal protection (*Ex parte Virginia, supra*), and that the equal protection clause prohibits unjustifiable discrimination by the State with respect to voting at primary elections (*Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73). It is without significance that the arbitrary discrimination was not based upon race or color, since the equal protection clause affords a far broader guarantee. Nor need the denial of equal protection be habitual. It is true that inadvertent inequalities produced by the administrators of state laws do not violate the Fourteenth Amendment. But when arbitrary inequality is designedly produced by state officials, the discrimination constitutes a denial of equal protection. While in cases involving administrative inequalities, the unjustifiable discrimination which works a deprivation of equal protection has been characterized as "systematic" (*Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245), we take this to mean that the inequality must be produced by conscious and deliberate discrimination, not that it must be repetitious.

III

Assuming that the right of a voter to have his vote counted as cast in a Congressional primary is

a right "secured" and "protected" by the Constitution of the United States, the question remains whether Sections 19 and 20 are otherwise applicable to the acts alleged in the indictment. We contend that they are.

(1) The District Court emphasized the fact that primary elections were not in existence in 1870, when Sections 19 and 20 were first enacted, and, quoting *United States* v. *Gradwell,* 243 U. S. 476, 488–489, it concluded that the application of the statutes was unwarranted as "stretching old statutes to new uses." But the statutes are addressed in "sweeping general words" to conspiracies against and deprivations of federal rights. *United States* v. *Mosley,* 238 U. S. 383, 387–388. Section 19 has been applied in the past to such diverse rights as that to inform of a federal crime and that to stand by a federal homestead. Both sections employ general words which extend their guarantee to any right secured or protected by the Constitution. Nor is it significant that in 1894 Congress repealed the companion provisions of the statute dealing with specific irregularities in elections, since *United States* v. *Mosley, supra,* definitively held that the right to vote still falls within the general protection which the statute "most reasonably affords."

(2) The first count of the indictment rests upon Section 19, which is in terms applicable to the acts of individuals. The count may nevertheless be sus-

tained on the theory that the voters were deprived of rights secured against state action by the Fourteenth Amendment. Nothing in the language or legislative history of the statute requires the interpretation that it is inapplicable to conspiracies to use state power to deprive citizens of rights which are constitutionally safeguarded against state action. Nor does the enabling clause of the Fourteenth Amendment suggest that "appropriate legislation" must be confined to that which deals exclusively with rights guaranteed by that Amendment and with state action which infringes them. In any event, the point was settled *sub silentio* in *Guinn* v. *United States,* 238 U. S. 347, 368.

(3) The acts of the defendants alleged in the indictment were done "under color" of "law" or "statute", within the meaning of Section 20. The Section was originally enacted to enforce the Fourteenth Amendment. There is nothing to require that it be afforded a narrower scope than the Amendment itself, and it is clear that the acts alleged constitute "state action" forbidden by the Amendment, even though they were contrary to State law. The Congressional purpose to provide a broad protection is apparent on the face of the statute. The purpose would be frustrated if the statute applied only when the forbidden discrimination is articulately ordained by an invalid State law. It is enough that it is made possible by the defendant's official power.

(4) That Section 20 is not limited to the deprivation of federal rights on account of color, race, or alienage is demonstrable as a matter of grammar. The only sensible construction of the statute is that it forbids the subjection of inhabitants (1) to the deprivation of federal rights; and (2) to different punishments, on account of alienage, color, or race, "than are prescribed for the punishment of citizens".

ARGUMENT

Section 19 of the Criminal Code makes criminal any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 provides punishment for anyone who, acting under color of law, deprives any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States". The District Court held that qualified voters in a Louisiana Congressional primary election are not deprived of a right secured or protected by the Constitution[1] when state election officials deliberately refuse to count their votes as cast and count them in favor of an opposing candidate. We contend that the right thus infringed is protected both by Article I of the Constitution and by the Fourteenth Amendment, and that the statutes apply to the acts alleged in the indictment.

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[1] There are no "laws of the United States" other than Sections 19 and 20 themselves which secure or protect this right. Cf. *United States* v. *Waddell*, 112 U. S. 76.

I

THE RIGHT OF A QUALIFIED VOTER TO HAVE HIS VOTE COUNTED AS CAST IN A DEMOCRATIC CONGRESSIONAL PRIMARY IN LOUISIANA IS SECURED AND PROTECTED BY ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES

1. *The Constitutional Basis of the Right to Choose United States Representatives.*—The right to choose members of Congress is secured and protected by Section 2 of Article I of the Constitution of the United States:

> 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.

By the terms of this section, those qualified to vote for the larger house of the state legislature are entitled to choose United States Representatives: the members of the class are determined by state law, but the right of the members to choose is granted by the Federal Constitution.[2] In a series

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[2] The frequent statement that the right to vote derives from the states (see, *e. g.*, *Minor* v. *Happersett*, 21 Wall. 162, 178; *United States* v. *Reese*, 92 U. S. 214, 217–218; *McPherson* v. *Blacker*, 146 U. S. 1, 38–39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283) applies to the right to vote for members of Congress only in the sense that the states may thus indirectly determine the qualifications of the electors, subject, of course, to the Fourteenth, Fifteenth, and Nineteenth Amendments (see *Pope* v. *Williams*, 193 U. S. 621, 632–634; *Guinn* v.

of historic decisions this Court has recognized the Constitutional origin of this right. *Ex parte Yarbrough,* 110 U. S. 651; *Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487; *United States* v. *Mosley,* 238 U. S. 383. See also *Ex parte Siebold,* 100 U. S. 371; *In re Coy,* 127 U. S. 731. As the Court said in *Ex parte Yarbrough,* 110 U. S. at 663:

> * * * they [the States] define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for members of Congress.

Unlike the rights guaranteed by the Fourteenth and Fifteenth Amendments,[3] the right to choose members of Congress is secured against interference by private individuals, as well as against interference by action of the states. Congress may

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United States, 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368) and any other limitations which may be found in the Constitution itself. That Congress regards the right to vote as a "right of citizens of the United States," is indicated by subdivisions (13) and (15) of Section 24 of the Judicial Code (U. S. C., Title 28, Sec. 41 (11) and Sec. 41 (15)).

[3] See, *e. g.*, *United States* v. *Cruikshank,* 92 U. S. 542, 554–555; *United States* v. *Harris,* 106 U. S. 629; *Civil Rights Cases,* 109 U. S. 3; *Hodges* v. *United States,* 203 U. S. 1; *United States* v. *Powell,* 151 Fed. 648 (C. C. N. D. Ala.), affirmed, 212 U. S. 564; *Grovey* v. *Townsend,* 295 U. S. 45. Cf. *United States* v. *Wheeler,* 254 U. S. 281.

protect the right by providing for the punishment of both types of interference and has done so by Sections 19 and 20 of the Criminal Code. In both *Ex parte Yarbrough, supra* and *United States* v. *Mosley, supra,* the right to choose members of the House of Representatives was impaired by interference with voting at general Congressional elections.[4] The Government contends that interference with the voting at a Louisiana Congressional primary likewise impairs the right to choose, and, therefore, constitutes an injury to the "free exercise or enjoyment" of a right "secured by the Constitution of the United States" and a "deprivation" of such a right, within the meaning of the statute.

2. *The Louisiana Law.*—Under the law of Louisiana, "beyond all question, the primary is a part of the election machinery of the State."[5] Its function is not confined to the designation of party

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[4] In *Yarbrough* the interference alleged was the prevention of voting; in *Mosely*, the failure to count votes as cast. In *United States* v. *Buck*, 18 F. Supp. 213 (W. D. Mo.), affirmed *sub. nom. Walker* v. *United States*, 93 F. (2d) 383 (C. C. A. 8th), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668, the interference was counting and recording ballots in favor of one Congressional candidate which had been cast in favor of another. See also *United States* v. *Pleva*, 66 F. (2d) 529, 530–531 (C. C. A. 2d), *Diulius* v. *United States*, 79 F. (2d) 371 (C. C. A. 3d); *Connelly* v. *United States*, 79 F. (2d) 373 (C. C. A. 3d). Only Section 19 was involved in each of these cases but Sections 19 and 20 may fairly be regarded as identical for this purpose.

[5] *State* v. *Michel*, 121 La. 374, 382, 389.

nominees; it eliminates from candidacy at the general election all those who are defeated in the primary.

All political parties [6] are required by statute to nominate their candidates for the Senate and House of Representatives by direct primary elections, and "the Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this Act." La. Act No. 46, Section 1, Regular Session, 1940. One who does not seek nomination in a primary may seek office in either of two ways, (a) by filing nomination papers with the requisite number of signatures (La. Act No. 224, Section 50, Regular Session, 1940), or (b) by having his name "written in" at the final election (La. Act No. 224, Section 73, Regular Session). But neither of these possibilities is open to a candidate who has been defeated in a primary. An explicit statute provides:

> No one who participates in the primary election of any political party shall have the right to participate in any primary election of any other political party, with a view of

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[6] "Political party" is defined "to be one that shall have cast at least five per centum of the entire vote cast in the last preceding gubernatorial election, or five per centum of the entire vote cast for presidential electors at the last preceding election, or at either of said elections." La. Act No. 46, Section 3, Regular Session, 1940.

The Louisiana statutes referred to in this discussion are set forth in the Appendix, *infra*, pp. 50–58.

> nominating opposing candidates, nor shall he be permitted to sign any nomination papers for any opposing candidate or candates; nor shall he be permitted to be himself a candidate in opposition to any one nominated at or through a primary election in which he took part.[7]

That this section prevents a "write in" vote for a candidate defeated at a primary is beyond question in view of the statutory rule that a "write in" vote is ineffective unless the individual voted for

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[7] La. Act No. 46, Section 87, Regular Session, 1940. For similar "anti-sore head" laws, see Cal. Elections Code (Deering, 1939), § 3001; Colo. Stat. Ann. (1935), c. 59, § 32; Ky. Stat. Ann. (Baldwin's Ed. 1936), § 1550–5a; Md. Ann. Code (Flack, 1939), Art. 33, § 85; Minn. Stat. (Mason, Supp. 1940), § 601–3 (3); Neb. Comp. Stat. (Supp. 1939), § 32–1108; Ohio Code Ann. (Throckmorton, 1940), § 4785–69; Ore. Code Ann. (1930), Tit. 36, § 701; Wyo. Rev. Stat. Ann. (1931), c. 36, § 642. Compare Miss. Code Ann. (1930), § 6231 and (Supp. 1938) § 2030; and see *Ruhr* v. *Cowan*, 146 Miss. 870. In Texas the primary ballots contain a pledge to support the party nominee. Tex. Civ. Stat. (1936), Art. 3110. Similar pledges are required of candidates in North Carolina and Oklahoma (N. C. Code Ann. (1939), § 6022; Okla. Stat. Ann. (1937), Tit. 26, § 162), and of voters in Indiana and Missouri (Ind. Stat. Ann. (Burns, 1933), § 29–510; Mo. Stat. Ann. (1932), § 10269). In Indiana and Oklahoma independent candidates must file their petitions prior to the date of the primary. Ind. Stat. Ann. (Burns, 1933), § 29–1006; Okla. Stat. Ann. (1937), Tit. 26, § 163. See Brooks, *Political Parties and Electoral Problems* (3d ed. 1933), 273; Merriam and Overacker, *Primary Elections* (1928), 130; Sait, *American Parties and Elections* (1939), 475–476; Sargent, *The Law of Primary Elections*, 2 Minn. L. Rev. 97, 192, 201.

has declared his willingness to have his name "written in" before the election.[8] He is thus required "to be himself a candidate", within the meaning of the quoted statute. Nomination as an independent candidate would be barred, apart from the prohibition of candidacy, by the rule that one may not secure a place on the ballot unless his nomination papers are filed with the Secretary of State on or before the date of the primary election. La. Act No. 224, Section 51, Regular Session 1940.

Thus a candidate defeated in the primary is legally precluded from running as an independent

[8] La. Act No. 160, Section 1 (1932); La. Act No. 224, Section 73, Regular Session, 1940. It is true that in *Lacombe* v. *Laborde*, 132 La. 435 (1913), a blanket provision similar to that set out in the text, *supra*, was held not to prevent the election of a person who had been defeated in a Democratic primary for police juror, when his name was "written in" on a majority of the ballots in the final election. The court drew a distinction between the interest of the individual elected in promoting his candidacy, and the interest of the voters in electing him without solicitation. In the opinion of the court, the statute would have been more explicit had the Legislature intended to deprive the voters of their interest. A similar view was later taken by a lower Louisiana court in *Seal* v. *Knight*, 10 La. App. 563 (Ct. of App., 1st Circuit, 1929). But cf. *Payne* v. *Gentry*, 149 La. 707 (1921). It is reasonable, however, to assume that the enactment, within three years of the *Seal* case (Acts of 1932, No. 160, § 1), of the statutory requirement of a declaration of willingness was an answer to the *Lacombe* and *Seal* decisions. An affirmative act of "candidacy" is now necessary, and the legislative intention to prevent the election of an individual defeated at the primary seems clear.

in the final election, and those who voted for him in the primary have no way of expressing their choice of him in the general election. As a matter of law, then, the Louisiana primary is an integral part of the process of choosing Representatives and the exercise of the constitutional right to choose is dependent upon an opportunity effectively to register a choice at the primary election. If deprived of the right at the primary, the voter loses even the legal possibility of vindicating his choice at the general election.

3. *The Practical Significance of the Primary.*— In the practical exercise of the Louisiana citizen's right to choose his Representative in Congress, the Democratic primary is not only an integral part of the process; it is the determinative part.

This indictment alleges that "since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected" (R. 2, 5). What the demurrer thus admits to be true in the particular case is judicially known to be true generally in a large part of the country. One political party, in those regions, commands the allegiance of an overwhelming majority of the electorate; its candidates are elected invariably, if not perfunctorily (cf. White, C. J., in *Newberry* v. *United States,* 256 U. S. 232, 267) and the real contest occurs in the election by which

its nominees are chosen.[9] Indeed, one of the major reasons for the development of the primary election was that in "the South, where nomination by the dominant party meant election, it was obvious that the will of the electorate would not be expressed at all, unless it was expressed at the primary." Charles Evans Hughes, *The Fate of the Direct Primary,* 10 National Municipal Review 23, 24. Even in those parts of the country where success in the primary is not, as a matter of fact, determinative of success at the general election, defeat in the primary almost invariably spells eventual failure to attain office because of the handicaps assumed in challenging the party organization. As Mr. Justice Pitney said in *Newberry* v. *United States,* 256 U. S. 232, at 286: "As a practical matter, the ultimate choice of the mass of voters

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[9] Statistics compiled in 1927 showed that more than 60% of the members of Congress come from "stand-pat" districts. Based on seven elections from 1914 to 1926, the rate of change in the political affiliation of the successful Congressional candidate was only 1.6% in the South, 12% for the entire country. See Hasbrouck, *Party Government in the House of Representatives* (1927) 172, 176, 177. See also Merriam and Overacker, *Primary Elections* (1928) 267–269.

On the great decrease in the vote cast in the general election from that cast at the primary in the "one-party" areas of the country, see George C. Stoney, *Suffrage in the South,* 29 Survey Graphic 163, 164 (1940). In Louisiana there were 540,370 ballots cast in the 1936 Congressional primaries, as against 329,685 in the general election. In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

is predetermined when the nominations have been made."[10]

As a matter of law, then, the Louisiana primary elections determine the candidates at the general election. As a matter of unbroken practice, the Democratic primary election determines the victor at the general election. Either of these considerations, we believe, demonstrates that the right to choose Representatives, secured by Section 2 of Article I of the Constitution, reaches to the Louisiana primary.

4. *The Process of Choosing Representatives.*— Section 2 of Article I gives to the qualified "People of the several States" the right to choose their Representatives in Congress. Under Section 4 of Article I the machinery by which this right is to be exercised is left to the states and to Congress: the states "shall" prescribe the "Times, Places and Manner of Holding elections for Senators and Representatives" and Congress "may at any time by Law make or alter such Regulations". Pursuant to this authorization, the states and the Congress undoubtedly have wide discretion in the formulation of a practical system to ascertain the will of the electorate. This discretion, of course, permits the conduct of a preliminary contest in which the adherents of political parties may determine which of their number shall be a candi-

[10] See also George W. Norris, *Why I Believe in the Direct Primary*, 106 Ann. Amer. Acad., No. 195, p. 21.

date in the final test of strength. But we insist that the right to choose, secured by the Constitution, is neither lost nor diluted because the state prefers to conduct its electoral process in two steps rather than in one.

The constitutional provision speaks neither of general nor of primary elections. Section 2 of Article I uses the cover-all verb "chosen * * * by the People of the several States". The correlative right which it secures is equally general: it is the right to participate in the choice of Representatives. If the machinery of choice involves two elections, primary and general, rather than one, the right to participate in the choice must include both steps.

This being the case, we think it clear that the right of a qualified person to vote in the Louisiana Congressional primary is an essential part of the constitutionally protected right to choose. The Louisiana primary is conducted by the State at public expense,[11] it is the subject of minute stat-

[11] La. Act No. 46, Section 35, Regular Session, 1940. The cost of the ballots and stationery and other supplies, and the "expenses necessary to the transmission and promulgation of the returns" are met by the state government. The respective parish and municipal units of government bear the necessary expenses "incidental to the holding and conducting" of the primaries, "such as payment of commissioners of election, rent of polling places, expense of delivery of the ballot boxes and supplies to and from the polling places." "Any other actual expenses necessary and incidental to the calling and holding of the said primary election shall be borne by the candidates participating therein."

utory regulation,[12] and it irrevocably eliminates candidates for office who enter the primary but fail to obtain the party nomination.[13] The right to vote in the general election for persons who have participated in a primary is limited to a selection among the candidates whose names are on the ballot; and the range of choice is, therefore, inescapably narrowed by the primary which determines what those names shall be. Thus the primary election under Louisiana law is an integral part of the process of popular choice, and the right of a qualified person to participate in it effectively is protected by the constitutional provision which calls for popular choice. But we do not rest alone on the legal nature of the primary; as a matter of fact, the Democratic primary in Louisiana is decisive of the election of Representatives. Interference with the right to vote in the primary deprives the voter of an opportunity to express a choice at the only stage in the process when the expression is of genuine significance.

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[12] La. Act No. 46, Regular Session, 1940. This act embodies an over-all scheme for the organization of political parties in Louisiana (prescribing their committee structure and the manner in which the members of these committees are to be elected), the form of the primary ballot, the location of polling places, and the hours of voting, the selection and compensation of commissioners, the deposit of the ballots with the state courts, and the mailing of the recorded vote to the Secretary of State, the manner of contesting the results in the state courts, and the punishment of such offenses as bribery and tampering with the votes. Cf. *Grovey* v. *Townsend*, 295 U. S. 45, 50.

[13] See pp. 18–22, *supra*.

We think that Article I, Section 2 is concerned with realities, not with forms; and that it necessarily applies to the decisive phase of the process by which Representatives are chosen. Cf. *United States* v. *Wood,* 299 U. S. 123, 143, and the cases there cited. The Constitution provides an enduring framework of government, not a code of laws applicable only to the procedures of a particular day. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 415. The framers may not have anticipated the primary. But they gave to the qualified electors of the states the right to choose their Representatives in Congress. It is unthinkable that they intended to secure the shadow and not the substance of the right to choose, by leaving unprotected the machinery by which the constitutional choice would in reality be exercised.[14]

Nothing in the history of the Constitution prior to its adoption suggests that the right to choose was envisaged in a limited or artificial sense. The chief source of serious disagreement at the Constitutional Convention, so far as the suffrage was concerned, had to do with the qualifications of voters.

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[14] The difficulty of a purely historical application of Article I, Section 2 is graphically shown by the adoption in Nebraska of the unicameral legislature, rendering strictly inapplicable the constitutional reference to "the most numerous Branch of the State Legislature." The qualifications of the electors of United States Representatives from Nebraska have subsequently been something other than those precisely contemplated by the framers. See Orfield, *The Unicameral Legislature in Nebraska*, 34 Mich. L. Rev. 26.

United States Documents Illustrative of the Union of the American States (1927) 487, 488, 489, 492. It was to avoid any obstacles to ratification which might have arisen from this controversy that the Convention accepted the compromise embodied in Article I, Section 2. Story, *Commentaries on the Constitution of the United States* (Bigelow, 5th ed. 1891). § 584. In the state ratifying conventions the debate shifted to the grant of Congressional power to regulate national elections which is contained in Article I, Section 4. It is true that six states included in their resolutions of ratification the recommendation that a Constitutional amendment be adopted to deny Congressional authority to regulate elections unless the states should refuse to provide for them or should be unable to do so because of invasion or for any other reason.[15] But no such amendment was ever adopted and any lingering doubt as to the unconditional power of Congress to regulate the conduct of national elections was removed in *Ex parte Siebold,* 100 U. S. 371. Clearly neither of these disputes is relevant to the nature and bounds of the constitutionally protected right to choose. Indeed, the word "elected" in a draft of the proposal which became Article I,

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[15] *United States Documents Illustrative of the Union of the American States* (1927): 1018–1019 (Massachusetts); 1023 (South Carolina); 1024–1025 (New Hampshire); 1028, 1033 (Virginia); 1039–1040 (New York); 1056–1057 (Rhode Island). The North Carolina Convention incorporated a similar recommendation in its resolution of August 1, 1788 (*id.* at 1050), but that State did not ratify the Constitution until November 21, 1789 (*id.* at 1051).

Section 2, was eliminated by the Committee of Detail in favor of the seemingly broader word "chosen". 1 Farrand, *Records of the Federal Convention* (1911) 20, 46, 48–50; 2 *id.* 129, 151, 178, 216, 565, 590, 651. Thus, the available historical *indicia* are certainly not incompatible with our view of the scope and implications of the Constitutional right to choose Representatives.

5. *The Gradwell, Newberry, and Grovey Cases.* The District Court thought (R. 20–21) that the analysis advanced above is refuted by the decisions of this Court in *United States* v. *Gradwell,* 243 U. S. 476, and *Newberry* v. *United States,* 256 U. S. 232. We believe that neither of these decisions, nor that in *Grovey* v. *Townsend,* 295 U. S. 45, weakens the view for which we contend.

(a) In the *Gradwell* case it was held that the right of candidates in a Republican Senatorial primary in West Virginia to have only qualified Republican voters cast ballots and to have them vote only once was not protected by the federal Constitution and laws; and that an indictment charging a conspiracy to procure persons to vote illegally for one of the four candidates did not allege a violation of Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51). But whether "in general a primary should be treated as an election within the meaning of the Constitution" was expressly left undecided. The decision was squarely rested upon "some strikingly unusual features of the West Virginia law under which the primary was held" including the

fact "that after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than five per cent. of the entire vote polled at the last preceding election" (243 U. S. 487, 488). Thus the *Gradwell* decision dealt with the rights of candidates and not the rights of voters, and even then turned on a feature of the primary in question which is absent in the present case. The West Virginia primary did not as a matter of law eliminate candidates at the general election; nor are the Republican primaries as a matter of fact decisive of elections in West Virginia.[16]

(b) The *Newberry* case involved the constitutionality of the Federal Corrupt Practices Act of 1910 in so far as it regulated the expenditures of a candidate for Representative or Senator in his campaign for nomination. Four of the Justices thought the statute unconstitutional on the broad

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[16]A Republican candidate, Sutherland, was elected in the 1916 Senatorial contest which was involved in the *Gradwell* case. His predecessor, Chilton, was a Democrat. His colleague, at the time he took office, was Goff, a Republican. In the seven Senatorial elections in West Virginia from 1919, when Goff's term expired, to 1937, the Democratic candidate was elected four times, the Republican three. Cong. Directory: 65th Cong., 1st Sess., 1st ed. 1917, p. 119; 64th Cong., 2d Sess., 2d ed. 1917, p. 118; 65th Cong., 1st Sess., 1st ed. 1917, p. 118; 66th Cong., 1st Sess., July, 1919, p. 122; 68th Cong., 1st Sess., 1st ed. 1923, p. 120; 69th Cong., 1st Sess., 1st ed. 1925, p. 125; 71st Cong., 1st Sess., 1st ed. 1929, p. 124; 72d Cong., 1st Sess., 1st ed. 1931, p. 122; 74th Cong., 1st Sess., 1st ed. 1934, p. 124; 76th Cong., 1st Sess., 1st ed. 1939, p. 124.

ground stated in the opinion of Mr. Justice McReynolds that the power of Congress under Article I, Section 4, "to make or alter" regulations as to the times, places, and manner of holding elections for Senators and Representatives did not extend to the regulation of party primaries. Chief Justice White, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke, though they agreed that the conviction should be reversed for errors in the charge, held that the primary is an election within the meaning of the express grant of Congressional power; and that, even if it is not, Congress was authorized to conclude that the regulation of primary campaigns for federal offices was necessary and proper to safeguard the representative government for which the Constitution provides. On the issue of constitutionality Mr. Justice McKenna thus cast the decisive vote. He concurred in the opinion of Mr. Justice McReynolds "as applied to the statute under consideration which was enacted prior to the Seventeenth Amendment,"[17] but he specifically reserved "the question of the power of Congress under that Amendment" (256 U. S. at 258).

[17] The opinion of Mr. Justice McReynolds observed that the statute "antedates the Seventeenth Amendment and must be tested by powers possessed at the time of its enactment" and that a "concession that the Seventeenth Amendment might be applicable in this controversy if assisted by appropriate legislation would be unimportant since there is none" (256 U. S. at 254–255). But the opinion as a whole does not limit the conclusion stated to the situation prior to the Amendment.

Thus a majority of the Court accepted the view that a primary is not a part of the election of Senators, within the meaning of Article I, Section 4, only so long as the choice of Senators was vested in the state legislatures by the Constitution; and even then four of the Justices took the contrary view.

We think the reasoning of the minority of the Court in the *Newberry* case is correct: "Election," within the meaning of Article I, Section 4, includes such preliminary steps in the process as the primary. If this were not so, neither the United States nor the states would have authority to regulate primaries for federal offices. Their power over this federal function, in the same manner and to the same degree as that of Congress, is derived from Article I, Section 4; this is not one of the powers reserved to them by the Tenth Amendment.[18] And, in any event, under Article I, Section 8, the regulation of primaries is within the power of Congress

[18] "If the preliminary processes of such an election are to be treated as something so separate from the final choice that they are not within the power of Congress under this provision, they are for the same reason not within the power of the States, and, if there is no other grant of power, they must perforce remain wholly unregulated. * * * For the election of Senators and Representatives in Congress is a federal function; whatever the States do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the Tenth Amendment cannot properly operate upon this subject in favor of the state governments * * *." (Mr. Justice Pitney in *Newberry* v. *United States*, 256 U. S. 232, at 280–281.)

to devise measures which are necessary and proper to safeguard the final election and the institution of representative government.[19]

But even if these views of the minority were rejected, we think it clear that the decision of the majority of the Court was no determination of the status of a Congressional primary—or even of a Senatorial primary since the adoption of the Seventeenth Amendment. The Court did not have before it the question of whether a primary is an integral part either of a *Congressional* election, within the meaning of Article I, Section 4, or of the process by which Representatives are chosen by the *people,* within the meaning of Article I, Section 2. Moreover, the primary involved in the *Newberry* case differed from the Louisiana primary in the same way as did the West Virginia primary involved in the *Gradwell* case. Newberry's brief in this Court emphasized the point that "Electors are free to go to the polls and cast their votes for anyone they please and the election would be complete

[19] In *Burroughs and Cannon* v. *United States*, 290 U. S. 534, this Court sustained the power of Congress to regulate by the Corrupt Practices Act of 1925 the expenditures of national committees for the purpose of influencing the selection of Presidential electors in two or more states. But the selection of Presidential electors is, in form at least, only a prelude to the election of the President and Vice President. Indeed, in *Walker* v. *United States*, 93 F. (2d) 383, 389 (C. C. A. 8th), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668, it was held that Section 19 is inapplicable to the alteration of ballots for presidential electors, on the ground that they "are officers of the state and not federal officers."

without any 'nominations' " (*Newberry* v. *United States,* No. 559, October Term, 1920, Brief for Plaintiffs in Error, p. 54). In Louisiana, as we have said, electors are not "free to cast their votes for anyone they please"; candidates eliminated at the primary are eliminated once and for all. Finally, it may be observed that the issue in the *Newberry* case was the power of Congress to regulate the campaign for nomination, and not the source of the right to vote for members of the House of Representatives in the primary itself. The denial of Congressional power over the campaign preceding the primary would not necessarily involve a denial that the right to vote in the primary is a part of the process of popular choice; and it is for that reason that we contend that the right is secured by Article I, Section 2.

(c) The present problem is unaffected by the decision of this Court in *Grovey* v. *Townsend,* 295 U. S. 45. It is true that in that case the rule of the Democratic party excluding negroes was held not to infringe rights secured by the Constitution of the United States. But it was not true in Texas as it is in Louisiana that the state had made the primary a part of the electoral process.[20] Moreover, what Article I, Section 2 secures is the right to choose. The implicit premise of the *Grovey* decision is that the negroes excluded from the Democratic primary were legally free to record

[20] See p. 18, note 22, and pp. 25, 26, notes 11, 12, *supra.*

their choice by joining an opposition party or by organizing themselves. In the present case the voters exercised the right to choose in accordance with the contemplated method; and the wrong alleged deprived them of an opportunity to express their choice in any other way.

6. *The Congressional Practice.*—That Congress regards the primary as an integral part of the process of election is demonstrated not only by the enactment of the statute involved in the *Newberry* case but, more significantly, by the fact that both before and after the *Newberry* decision, it has inquired into frauds at primaries as well as at the general elections in judging the "Elections, Returns and Qualifications of its own Members" under Article I, Section 5.[21]

In none of the cases decided after *Newberry* v. *United States* has Congress doubted its jurisdiction to investigate and determine the existence of frauds in primaries. The Senate continued, after the decision, to consider Henry Ford's challenge to Senator Newberry's seat and inquired into Newberry's conduct in the primary election. See S. Rep. No. 277, 67th Cong., 1st Sess. Based upon that conduct, a minority report, submitted by Sen-

[21] *Grace* v. *Whaley*, H. Rep. No. 158, 63d Cong., 2d Sess.; *Peddy* v. *Mayfield*, S. Rep. No. 973, 68th Cong., 2d Sess.; *Wilson* v. *Vare*, S. Rep. No. 1858, 70th Cong., 2d Sess., S. Rep. No. 47, 71st Cong., 2d Sess., and S. Res. 111, 71st Cong., 2d Sess. Cf. opinion of Mr. Justice McReynolds in *Newberry* v. *United States*, 256 U. S. 232, 258; and the opinion of Mr. Justice Pitney, 256 U. S. at 284–285.

ators Pomerene, King, and Ashurst, recommended that Newberry should not be seated. Moreover, in February, 1923, the Law Committee of the National Republican Congressional Committee reported to Congress its belief that despite the *Newberry* decision, the Corrupt Practices Act was still in force as to Representatives and that candidates were required to file sworn statements of campaign expenditures in primaries (64 Cong. Rec. 4567, 67th Cong., 4th Sess.). In conformity with this theory, candidates for Congress continued to file reports of expenditures until the repeal of the Corrupt Practices Act in 1925. Cannon's *Precedents of the House of Representatives* (1936), Sec. 69.

Congressional practice has weight in determining the meaning of constitutional provisions. But it is especially significant where the practice involves a Congressional interpretation of the Constitution in a field in which Congress has an autonomous power. *Cf. Smiley* v. *Holm,* 285 U. S. 355, 369; see also Mr. Justice Pitney in *Newberry* v. *United States,* 256 U. S. 232, 284–285.

II

VOTERS IN A PRIMARY ELECTION ARE DENIED THE EQUAL PROTECTION OF THE LAWS BY STATE OFFICERS WHO REFUSE TO COUNT THEIR VOTES AS CAST AND COUNT THEM IN FAVOR OF AN OPPOSING CANDIDATE

Even if the right of a qualified person to have his vote in the Louisiana Congressional primary

counted as cast is not secured and protected by Article I, Section 2, we think the voter is protected by the Fourteenth Amendment against the injury and deprivation alleged in the indictment.

In receiving and counting ballots and certifying the results of the primary election, the Commissioners of Election are state officers exercising state power in connection with a function which the state has assumed to conduct.[22] Their action under color of their office, even though contrary to state law, constitutes state action within the meaning of the Fourteenth Amendment. The point was settled as long ago as *Ex parte Virginia,* 100 U. S. 339, 347, that whoever "by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the state." See also *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245–246; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 343; *Mosher* v. *City of Phoenix,* 287 U. S. 29; *Chicago, Burlington Ry.* v. *Chicago,* 166 U. S. 226, 233–234.

It is also clear that Congress may make criminal the acts of state officials which effect a denial of

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[22] The method of their selection is prescribed by statute and their compensation is provided by the local units of the state government. Act No. 46, Sections 35 and 61, Regular Session, 1940. See also notes 11, 12, *supra,* pp. 25, 26.

equal protection (*Ex parte Virginia, supra,* 100 U. S. at 348; *Guinn* v. *United States,* 238 U. S. 347; and cf. *Nixon* v. *Herndon,* 273 U. S. 536), and that the equal protection clause prohibits unjustifiable discrimination by the state with respect to voting at primary elections (*Nixon* v. *Herndon, supra; Nixon* v. *Condon,* 286 U. S. 73).

In the light of these settled principles, we think it plain that state officials in charge of a primary election who wilfully alter the ballots cast for two of the candidates and count them as cast for the third, deprive the voters whose ballots are thus nullified of the equal protection of the laws. They are discriminatorily denied the right to have their choice recorded, by reason of the nature of the choice they have made. No argument is needed to show that a state statute which provided for such discrimination in the counting of ballots would be a denial of equal protection. The discrimination is no less forbidden where it is wilfully practiced by administrative officers clothed with the power of the state. The Election Commissioners are in no different position than was the judge selecting jurors in *Ex parte Virginia* or the tax collector in *Iowa-Des Moines Bank* v. *Bennett.*

It is obviously without significance that the arbitrary discrimination was not based upon race or color (cf. *United States* v. *Reese,* 92 U. S. 214), for the day is long past when such discriminations measure the scope of the equal protection clause

(*Iowa-Des Moines Bank* v. *Bennett, supra; Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison,* 301 U. S. 459; cf. *Buchanan* v. *Warley,* 245 U. S. 60, 76).

It is equally immaterial that the arbitrary discrimination was practiced on the single occasion alleged; the denial of equality need not be habitual (cf. *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 161; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351). While in cases involving administrative inequalities, the unjustifiable discrimination which deprives of equal protection has been characterized as "systematic" (see *e. g. Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245) or "adopted as a practice" (*Chicago G. W. Ry.* v. *Kendall,* 266 U. S. 94, 99), we take this to mean that the inequality must be produced by conscious and deliberate discrimination, not that it must be repetitious. The inadvertent inequalities produced by state officials in the administration of state laws are inherent in the legal process and, however unjustifiable, do not deprive of equal protection (cf. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 25). But when inequality is designedly produced by state officials in the exercise of state administrative power, the discrimination must meet the same constitutional test as a statute by which the particular inequality is articulately ordained.

It is of no consequence that the indictment does not count in terms upon the Fourteenth Amendment and the right of the voters to equal protection of the laws. The charge is laid in the language of the statute and specifies as the right "secured" and "protected" by the Constitution the right of the voters whose ballots were altered to have their votes counted as cast. If, as we contend, the infringement of that right by the alleged acts of the defendants constitutes a denial of equal protection, it seems clear that the District Court erred in holding that the right is not "secured" and "protected" by the Constitution of the United States.

III

SECTIONS 19 AND 20 OF THE CRIMINAL CODE ARE OTHERWISE APPLICABLE TO THE ACTS ALLEGED IN THE INDICTMENT

We have shown that the right of the voters to have their votes counted as cast is "secured" and "protected" by the Constitution of the United States. The remaining question is whether Sections 19 and 20 of the Criminal Code are otherwise applicable to the acts alleged in the indictment. We contend that they are.

1. *The Generality of the Statutory Words.*— The District Court emphasized the fact that primary elections were not in existence in 1870 when Sections 19 and 20 were first enacted. It concluded, quoting *United States* v. *Gradwell,* 243

U. S. 476, 488–489, that the application of the statute would result in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

But the statute is addressed in "sweeping general words" to conspiracies against and deprivations of federal rights. *United States* v. *Mosley,* 238 U. S. 383, 387–388. Section 19 has been applied in the past to rights as diverse as the right to inform of a federal crime (*In re Quarles and Butler, Petitioners,* 158 U. S. 532; *Motes* v. *United States,* 178 U. S. 458) to be secure in federal custody (*Logan* v. *United States,* 144 U. S. 263), to stand by a federal homestead (*United States* v. *Waddell,* 112 U. S. 76), to vote for a member of the House of Representatives (*United States* v. *Mosley,* 238 U. S. 383) and, where the denial violates the Fifteenth Amendment, to vote for state officers (*Guinn* v. *United States,* 238 U. S. 347). The only general limitation on the scope of the statute recognized by this Court is that the federal right be "definite" and "personal" as distinguished from a right "common to all that the public shall be protected against harmful acts" (*United States* v. *Bathgate,* 246 U. S. 220, 226). The "definite" and "personal" character of the right to vote has, however, been most emphatically upheld (*United States* v. *Mosley, supra;* see *United States* v. *Bathgate,* 246 U. S. at 227; cf. *Nixon* v. *Herndon,* 273 U. S. 536; and the opinion of Mr. Justice Frank-

furter in *Coleman* v. *Miller,* 307 U. S. 433, 460, at 469).

Accordingly, we think the fact that primary elections were unknown in 1870 is without significance. The applicable principle was recently stated by this Court: "Old crimes * * * may be committed under new conditions * * *. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope" (*Browder* v. *United States,* No. 287, present Term, p. 4). See also *Hague* v. *C. I. O.,* 307 U. S. 496, especially the opinion of Mr. Justice Stone at pp. 526–527. It is no more material that primary elections were unknown when the statute was passed than it would be that a city ordinance which worked a deprivation of federal rights was enacted after 1870 or, indeed, that the city which enacted the ordinance was not established until after that time. Nor is there significance in the fact that in 1894 Congress repealed the companion provisions of the statute dealing with specific irregularities in elections. *United States* v. *Mosley, supra,* definitely held that the repeal did not place the right to vote outside of the general protection which the statute "most reasonably affords." See also *Nixon* v. *Herndon,* 273 U. S. 536.

In short, Sections 19 and 20 of the Criminal Code protect generally the exercise of rights secured or

protected by the Constitution, whether the particular occasion for their exercise or the method by which they are infringed existed in 1870 or not.

2. *Section 19 is Applicable to the Denial of Equal Protection by State Officers.*—The first count of the indictment rests upon Section 19 of the Criminal Code (U. S. C., Title 18, Section 51), which is in terms applicable to the acts of individuals. It may be argued that the first count cannot be sustained, therefore, solely on the basis of the theory that the voters were deprived of rights secured by the Fourteenth Amendment, since the Amendment applies only to the acts of state officers. The District Court did not place this interpretation upon Section 19, but the issue is doubtless open on this appeal. *United States* v. *Gilliland,* No. 245, decided February 3, 1941.

One Circuit Court of Appeals has held that Section 19 is inapplicable to a conspiracy by election officials to deprive negroes of the right to vote at a state election on the ground that the statute is not confined to cases of state action and consequently is not "appropriate" legislation to enforce a constitutional limitation on state action alone. *Karem* v. *United States,* 121 Fed. 250 (C. C. A. 6th); cf. *United States* v. *Reese,* 92 U. S. 214. We find no basis for this interpretation in the language of the statute or in its legislative history.[23] The prohibi-

[23] See 91 Cong. Globe 3611–3612, 3679; Flack, *The Adoption of the Fourteenth Amendment* (1908), 219 *et seq.*

tion of a conspiracy to injure a citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution" of the United States includes a conspiracy by persons to use state power to injure rights which are safeguarded against state action. Nothing in the enabling clause of the Fourteenth Amendment suggests that legislation is not "appropriate" to enforce the Amendment if it deals not only with rights guaranteed by the Amendment against state action but, also with rights protected by other constitutional provisions against individual action as well.

The point, in any event, was necessarily settled *sub silentio* in *Guinn* v. *United States,* 238 U. S. 347, 368, which sustained the applicability of Section 19 of the Criminal Code to state election officials who conspired to deprive negroes of rights guaranteed by the Fifteenth Amendment, which, of course, is also directed against state action alone.

3. *The Alleged Acts of the Defendants Were Done Under "Color of Law," Within the Meaning of Section 20.*—Section 20 protects "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" against willful deprivation "under color of any law, statute, ordinance, regulation, or custom". It was

enacted initially to enforce the Fourteenth Amendment.[24] We see no reason why it should be held to have a narrower scope than the Amendment itself. Accordingly, we think that any conduct which would constitute "state action," within the meaning of the Amendment, is action "under color of law," within the meaning of the statute; that "color of authority" and "color of law" are equivalent terms. That the alleged conduct of the defendants was state action for purposes of the Amendment has already been demonstrated (*supra,* pp. 36–40). In two of the four cases in which, so far as we know, Section 20 has been invoked, it has been held that the acts of the officials alleged were performed "under color of law, statute, ordinance, regulation, or custom" even though they were contrary to the laws of the state.[25] Section 20 does not require

[24] 89 Cong. Globe 1536; 91 Cong. Globe 3480, 3658, 3690; 92 Cong. Globe 3807–3808, 3879; Flack, *The Adoption of the Fourteenth Amendment* (1908), 219, 223.

[25] *United States* v. *Sutherland* (N. D. Ga.), demurrer to indictment overruled, July 31, 1940 (unreported) (police officer extorting confession by torture); *United States* v. *Cowan* (E. D. La.), demurrer to indictment overruled, August 14, 1940 (unreported) (police officer assaulting person taking photographs of proceedings at a polling place). See Report of the Attorney General (1940), 77. See also *United States* v. *Buntin*, 10 Fed. 730 (C. C. S. D. Ohio), and *United States* v. *Stone*, 188 Fed. 836 (D. Md.). And compare *Hague* v. *Committee for Industrial Organization*, 101 F. (2d) 774, 781, 788, 789, 790 (C. C. A. 3d), affirmed, 307 U. S. 496, where the same conclusion was reached with respect to similarly worded statutes.

that the defendant's conduct be sanctioned by a particular law or statute; it is enough that his acts are done in reliance upon his official power. In the present case, on the facts alleged, the defendants acted in reliance upon their official position in conducting the election, counting the votes, and certifying the returns. Moreover, the statute applies only to willful violations. Where action is based upon the express mandate of state law, it might be exceedingly difficult to establish willfulness against a defense of mistake of law. If the statute were limited to such cases, it would, therefore, have only the most trivial scope. We see no justification for thus limiting the ambit of a statute which, on its face, is designed to confer broad protection upon the enjoyment of federal rights. Cf. Holmes, J., in *United States* v. *Mosley*, 238 U. S. 383, 388.

4. *Section 20 is not Limited to Deprivations on account of Race, Color, or Alienage.*—That Section 20 is not limited to the deprivation of federal rights on account of color or race is demonstrable as a matter of grammar. The statute [26] can be sensibly

[26] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully 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, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

construed only as forbidding the subjection of inhabitants (1) "to the depriviation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"; or (2) "to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens". The reference to color and race is limited to the prohibition of "different punishments, pains, or penalties," as the final words of the clause make clear. To read "than are prescribed for the punishment of citizens" as a part of the initial prohibition of deprivation of federal rights, would render Section 20 nonsensical. This can be avoided only by reading the latter part of the section, relating to punishments, as independent of the former, relating to federal rights.[27]

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court's construction of Sections 19 and 20 of the Criminal Code was erroneous; that the first and second counts of the indictment allege violations of the statutes; and that the judgment sustaining the demurrer should be re-

[27] On demurrer to the indictment in *United States* v. *Cowan*, *supra*, p. 45, note 25, this objection was raised and the interpretation which we urge was sustained.

versed and the cause remanded for further proceedings.

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