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STATUTES, ETC.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940.

No. 618.

THE UNITED STATES OF AMERICA,
Appellant,

versus

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

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF OF DEFENDANTS AND APPELLEES.

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Louisiana (R. 18) is reported in 35 Fed. Supp. 66.

STATUTES INVOLVED.

Section 51. "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, etc. (R. S. Sec. 5508; Mar. 4, 1909, c. 321, Sec. 19, 35 Stat. 1092.)"

Section 52. "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", etc. (R. S. Sec. 5510; Mar. 4, 1909, c. 321 Sec. 20, 35 Stat. 1092.)

QUESTIONS PRESENTED.

Point 1. Will the Court pass on the constitutional validity of an act of Congress where that is not necessary to a decision of the case?

Point 2. Where the crime charged consists of several conspiracies charged in one count, will that count be upheld where the government announces that it is not seeking to sustain part of the count?

Point 3. Since defendants were acting as officials of a political party, and were not state officers, could they

have violated section 52, which required that they act under color of a law, etc.?

Point 4. Does the indictment charge a federal offense, under Sections 51 and 52, when it alleges the deprivation of a right, privilege or immunity secured or protected by the Constitution or laws of the United States relating to a party nominating primary, and not a general election?

STATEMENT.

This is an appeal by the United States from a judgment sustaining a demurrer to a bill of indictment charging the violation of Sections 51 and 52, Title 18, U. S. C. A. (Criminal Code Sections 19 and 20).

Only Counts 1 and 2 are before the court for decision. The appellant has not appealed from the judgment dismissing Counts 3 and 4. Counts 5 and 6 have to do with the mail fraud statute, and are not before the court as the demurrer was overruled as to those two counts.

It is alleged that the defendants, while acting as commissioners in a primary, fraudulently counted, altered and returned votes in connection with a party nomination of a candidate for the United States House of Representatives, thereby depriving not only the voters, but also the candidates of their rights and privileges under the Constitution and laws of the United States.

SUMMARY OF ARGUMENT.

Point 1. The Supreme Court will not rule upon the constitutionality of an act of Congress, unless such a ruling is necessary for a decision of the case.

Point 2. Appellant has no right to change the nature of the crime charged by an attempt to omit part of a count of an indictment found by a Grand Jury.

Two conspiracies are charged in Count one of the indictment. That count alleges that the defendants did deprive citizens and candidates, of certain rights and privileges involving the elective franchise, to-wit: (1) The citizens' rights to cast their votes for the candidate of their choice, and to have their votes counted as cast; (2) The rights of the unsuccessful candidates, in and to such votes that were cast for them by the voters.

While this court has held that Sec. 51, Title 18, U. S. C. is applicable to conspiracies against the elective franchise insofar as general elections are concerned, those decisions fall far short of making the section applicable to the conduct of a state nominating primary, and do not advance us far toward the claimed conclusion that illegal voting for *one candidate* at such a primary so violates a right secured to the other candidate by the United States Constitution and laws as to constitute an offense within the meaning and purpose of the section.

Where two conspiracies are charged in one count this constitutes but one crime. The appellant concedes that it is not attempting to sustain the validity of one of the con-

spiracies so charged in the count. Therefore, the count of the indictment not being severable without garbling the charge found by the Grand Jury, the demurrer was properly sustained as to that count without regard to the constitutional question of whether the federal courts have jurisdiction in cases involving primary elections.

Point 3. The second count charges that the defendants in acting as election officials (commissioners) acted under color of state law, to-wit: Act 46 of 1940; but that act provides against party officials being considered officers or employeees of the state. Therefore, Sec. 52 has no application to them, as they are merely party officers without regard to the Constitutional question of whether the federal courts have jurisdiction in cases involving primary elections.

The fact that a political party, and its manner of selecting its nominee through a nominating primary, is regulated by state law does not mean that they are creatures of the state.

Point 4. There is no provision of the Constitution or laws of the United States by which such right or privilege of a member of such political party is secured to him.

A nominating primary is in no sense an election within the intendment of Sec. 4 of Art. I of the Constitution of the United States.

ARGUMENT.

POINT 1.

When Will Court Pass On Constitutionality Of Act Of Congress?

This case is presented by appellant in its brief as though the sole question at issue is the application *vel non* of Sections 51 and 52, Title 18, U. S. C. (Sections 19 and 20 of the Criminal Code) to a party nominating primary.

There are substantial questions, arising under the demurrer to the indictment, which should be determined before the serious and far-reaching constitutional question involving the jurisdiction of the federal courts over party nominating primaries is considered.

We understand that it is a well-recognized rule that this court will not pass upon the constitutional validity of an act of Congress unless such a determination is essential to a proper decision of the case.[1]

We do contend that the application which the appellant seeks to make of Sections 51 and 52 in this case is unconstitutional. The Federal Government has no power, either express or implied, to regulate the affairs of political

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[1] Cooley on Constitutional Law, Bruce's Fourth Edition, Page 192, (1931) Ch. XV.

See United States v. Blair, 250 U. S. 273, where the Court said (pp. 278-279):

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an Act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

parties, or their manner of selecting, or nominating the persons they propose to support at an ensuing election. However, this is an alternative argument that need not be decided unless it is found that our contentions, that the two counts appealed herein do not charge an offense cognizable under federal laws, are without merit.

POINT 2.

Count Charging Two Conspiracies Not Severable, If One Conspiracy Invalid Whole Count Falls.

The government has not appealed from the judgment sustaining the demurrer to Counts 3 and 4 of the indictment. Those counts charge that the defendants did subject, and cause to be subjected, the two unsuccessful candidates for the Democratic primary, who were candidates for nomination for Congress, to the deprivation of their rights and privileges and immunities protected by the Constitution and laws of the United States, such voters having been deprived of the right to vote for the candidates of their choice, and each of the two unsuccessful candidates having been deprived of his rights, privileges and immunities to offer himself as a candidate to be legally and properly nominated as a candidate and have counted for him all votes legally cast for him, for said nomination for said office.

Undoubtedly appellant failed to appeal on those two counts because it could not reasonably contend that the Constitution and laws of the United States protected the

candidates to the rights to any votes cast. On the contrary, such civil rights cases as the *Mosley* and *Yarbrough* cases have never gone further than to hold that it is the individual voter whose right to vote and have his vote counted as cast that is protected.

Appellant's appeal, however, covers Count 1. That count, like Counts 3 and 4, charges not only a conspiracy to injure citizens and voters in the free exercise and enjoyment of the right and privilege secured by the Constitution and laws of the United States to vote and have their votes counted, but it also charges,

> (R-2) "That it was also a part of said conspiracy and the purpose of said conspiracy to injure, oppress, threaten and intimidate Paul H. Maloney and Jacob Young, citizens and candidates for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, to-wit: their right and privilege as citizens to run for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana, by preventing each of them from being legally and properly nominated as a candidate for said office; and, to-wit, their right and privilege to have counted for them as cast, all of the votes cast for them in said Democratic primary election;
>
> "That it was further a part of said conspiracy and the purpose of said conspiracy to deprive Paul H. Maloney and Jacob Young of the votes cast for them in said second precinct of the eleventh ward by not counting some of the votes cast for them and by eras-

> ing the marks on the ballots placed by the voters in said precinct behind the names of Paul H. Maloney and Jacob Young indicating votes for Paul H. Maloney and Jacob Young, and placing in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs."

Appellant, realizing at this late date the limitations placed upon the scope of Section 51,[2] now disclaims in the brief filed in this court any intention of seeking to sustain the application of Sections 51 and 52 to the rights of the unsuccessful candidates in and to the votes alleged to be cast for them at the primary elections. Appellant also disclaims any intention of challenging the ruling of the District Court insofar as it applies to that part of the conspiracy charged in the first count, as well as to the third and fourth counts, on which latter counts no appeal has been taken.

We know of no authority that permits the government to divide a count of an indictment brought by a Grand Jury by trying to differentiate the valid from the invalid part, as the government attempts to do in this case. The demurrer was aimed at the count in the indictment as a whole. The government has seen fit to submit to the Grand Jury an indictment, which charged a conspiracy to deprive not only the voters of their rights to have their votes counted, but also the candidates of their rights to the votes cast under the Constitution and laws of the United States. The government now concedes that it is not attempting to sustain that part of the count having to do with the rights and privileges of the candidates.

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[2] U. S. v. Gradwell, 243 U. S. 476; Ex parte Yarbrough, 110 U. S. 652; U. S. v. Mosley, 238 U. S. 383; U. S. v. Bathgate, 246 U. S. 218.

We confess that we have never heard of a demurrer filed in a criminal case having been partially sustained and partially overruled as to a count in an indictment. Either the count is valid as a whole, or invalid as a whole.

It cannot be assumed that the Grand Jury would have returned an indictment against the defendants which charged only a conspiracy to deprive the voters, and not the candidates, because that charges a crime different from the one the Grand Jury found, and they may not have voted it with the part omitted which the appellant now seeks to eliminate. The government cannot sever a count and contend that the count being partially valid that the other well-charged part of the count can be disregarded and the demurrer overruled. It would seem to be but plain logic that the court must either sustain a demurrer or overrule it. It cannot alter the charge found by the Grand Jury. The demurrer should be sustained if any well-pleaded substantial charge contained in the indictment is unconstitutional or otherwise invalid.

The Sixth Amendment of the Constitution requires all crimes to be by indictment found by a Grand Jury, and an indictment once found cannot be altered or changed to suit the exigencies of the prosecution. If such loose pleading were sanctioned by this court, a defendant could be materially prejudiced in his defense in being required to meet matters contained in an indictment which clearly have no place in it, and the government could draw duplicitous counts in indictments to the prejudice of defendants in all cases without fear of having a demurrer sustained on that well-recognized ground. A defendant

should never be required to answer to an indictment containing an unconstitutional or otherwise invalid charge, even if the invalidity strikes at only part of the charge. If he were found guilty on the count a motion in arrest of judgment would have to be sustained because the court would be unable to ascertain whether the jury based their verdict upon the valid or the invalid charge in the count. Therefore, if such a dangerous possibility exists, the count in its entirety should be dismissed on demurrer.

The charge in this first count is a conspiracy not only to deprive the voters of their rights, but also to deprive one candidate of his rights in favor of another candidate, and thus deprive an unsuccessful candidate of a right or privilege under the Constitution and laws of the United States.

A conspiracy to commit two or more crimes, *being itself but a single crime,* may be charged in one count.[3]

> "Words adequately charging a distinct offense cannot be rejected as surplusage." If they could, the vice of duplicity could be practiced with impunity.[4]
>
> "The rule is stated in 31 C. J. 774, Sec. 334, as follows . . . 'Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.' "
>
> "The principle of law which permits unnecessary and harmless allegations in an indictment to be disregarded as surplusage, does not authorize the court to garble the indictment, regardless of its general

[3] Frohwerk v. U. S. 249, U. S. 204; Magon v. U. S., 260 F. 811; Bryant v. U. S., 257 F. 378; Weinstein v. U. S., 11 F. (2d) 505.
[4] Creel v. U. S., 21 F. (2d) 690; U. S. v. Patty (D. C.) 2 F. 664.

tenor and scope, so as to entirely change the meaning."[5]

"And while immaterial averment may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge and this includes those allegations which operate by way of description or limitation on that which is material."[6]

"That which may have been the ground of conviction cannot be rejected as surplusage."[7]

"At common law an indictment, being the finding of a grand jury upon oath and depending upon this fact, among others, for its validity, cannot be amended by the court or the prosecuting officer in any matter of substance without the concurrence of the grand jury which presented it."[8]

The decisions which have held that Section 51 applies to conspiracies to deprive voters of their right to vote, and have their vote counted as cast, are not analogous to the charge that the commissioner defrauded one candidate in favor of his rights under federal laws. The decisions have never gone so far as to hold that fraudulent count-

[5] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Littell v. State, 133 Ind. 577, 33 N. E. 817.

[6] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Fulford v. State, 50 Ga. 591; Hill v. State, 41 Tex. 253; State v. Freeman, 15 Vt. 722. See also, U. S. v. Brown, 3 McLean (U. S.) 233, People v. Myers, 20 Cal. 76; Commonwealth v. Atwood, 11 Mass. 93; Jefferson v. State, 8 Ala. App. 364, 62 So. 315; State v. Flynn, 76 N. J. L. 473, 72 Atl. 296.

[7] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Comm. v. Atwood, 11 Mass. 93; State v. Johnson, 255 Mo. 281, 164 S. W. 209; State v. Wilson, 91 Wash. 136, 157 Pac. 474; Naftzger v. U. S., 200 Fed. 494; State v. Duncan, 40 Mont. 531; 107 Pac. 510.

[8] 31 C. J., Sec. 413. Ex p. Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; Dodge v. U. S., 258 Fed. 300, 169 CCA 316, 7 ALR 1510, [certiorari den. 250 U. S. 660 mem., 40 S. Ct. 10 mem., 63 L. ed. 1194 mem.]; U. S. v. Davis, 6 Fed. 682.

ing of votes in favor of one candidate at such a primary violates any right or privilege as to the other, which are secured by the United States Constitution and laws, as to constitute an offense within the meaning and purposes of the Section.

That count should be construed as a whole and not piece-meal. So we submit that the judge was correct in sustaining the demurrer, not only for the reason that Section 51 does not apply to the affairs of a political party in conducting a party primary, but also because, as the government concedes, Section 51 could not apply to the purely private political rights of a candidate to a vote cast by a citizen. The right to vote and have the vote counted as cast belongs to the citizen according to the *Mosley* case, and not to the candidate.

POINT 3.

Count Two Invalid as it Does Not Adequately Allege That Defendants Acted Under Color of Law—Act 46 of 1940 Discussed.

Under Section 52, it must be adequately alleged that the defendants, in depriving the voters of their rights to vote, and have their vote counted as cast, acted under color of a law.

That count alleges that the defendants acted under color of a State law, to-wit: Act 46 of 1940. That Act provides for the regulation of primaries held by political

parties. There is nothing contained in Act 46 of 1940 which would justify the allegation that the defendants, acting as election commissioners on behalf of their political party in selecting its nominee at its primary, were acting under color of a law.

The principal governing body of the political party is the State Central Committee. Section 10 of the Act makes it clear that the Legislature did not intend that this Act should be so construed as to make the political party merely a creature of the State. It is also clear that the act was never intended to constitute any of its officials or members, officers or employees of the State. On the contrary, Section 10, in part, reads as follows:

> "They [members of the State Central Committee] shall never be considered as officers or employees of the State of Louisiana or any of its subdivisions."

The defendants, who are members of the political party and not officers or employees of the State of Louisiana, were selected as commissioners, pursuant to Section 61 of said act. They were chosen by lot from a list of names furnished by the candidates. It is the candidates, themselves, who name the commissioners. The commissioners do not act for or on behalf of the State of Louisiana. They are not officers or employees of the State of Louisiana. They are officers of a political party. They act for and on behalf of the political party, and not for and on behalf of the State of Louisiana, and therefore do not act under color of any law of the State of Louisiana. In one sense they are the representatives of the candidates, who alone have the right to name them, and the Parish Committee

merely sees that a fair drawing of the names of the commissioners is conducted. The Parish Committee which supervises the drawing is merely an agency of the party and not of the State.

REVIEW OF PARTY PRIMARY ELECTION LAWS OF LOUISIANA.

The Constitution of Louisiana of 1921 which is the present organic law of the State, provides for the enactment of laws to secure fairness in party primaries, conventions, etc.[9]

All State enactments of the legislature on that subject would, of course, be subordinate to that provision. That enactment shows clearly that it was the intention of the framers thereof not to disturb the fundamental concept of the political party system as a self governing voluntary organization. That provision would prohibit the legislature from fixing the qualifications of the voters. That important matter being left to be prescribed by the party, showing that it was recognized by the organic law of the State that a primary is nothing but a voluntary organization for the purpose of expressing party preference.

[9] Sec. 4, Art. 8. "The Legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates. No person shall vote at any primary election or in any convention or other political assembly held for the purpose of nominating any candidate for public office, unless he is at the time a registered voter, and have such other and additional qualifications as may be prescribed by the party of which candidates for public office are to be nominated. And in all political conventions in this State, the apportionment of representation shall be on the basis of population."

Act 46 of 1940 is the existing law which regulates the primaries, and was enacted to insure fairness in any primary called by a political party. It is a comprehensive law consisting of 48 pages of regulatory provisions. It has been adopted in the exercise of the police power of the state, as recognized in the aforesaid constitutional provision.

Its aim has not been to take control of the affairs of the party or to deprive it of any of its rights, but simply to act upon and regulate existing conditions, with a single view to the public interest.

From beginning to end all of the organization and internal operation of the party, as well as the conduct of the nominating primary is left entirely in the hands of the officers and members of the party. In fact, all officers and employees of the State or its subdivisions are prohibited from remaining at or near the polls.

Sec. 1 provides that nominations of all political parties shall be by direct primary elections.

Sec. 2 defines the term "political party" to be one that shall have cast 5% of the entire vote in certain preceding elections.

Sec. 5 provides for the election of the members of the governing body of the party which is known as the "State Central Committee," as well as the subordinate committees of the party.

Sec. 9 provides for the duty of the Chairman of the State Central Committee to appoint *interim* officers of subordinate committees.

Sec. 10 relates to the election of the State Central Committee and provides *that they shall never be considered officers or employees of the State of Louisiana, or any of its subdivisions.*

That provision was placed in the act no doubt by the legislature in an abundance of precaution in order to eliminate any question concerning the status of the party and its officers, members and employees.

Sec. 14 being important as showing that the State Central Committee is the governing body of the party is quoted in full, as follows:

> "The State Central Committee of each party, as defined herein, is hereby vested with full power and authority to make and adopt any and all rules and regulations for its government and for the government of any committee in this Act authorized to be created, which are not inconsistent with the Constitution and laws of the State of Louisiana or the Constitution and laws of the United States. It shall have full and complete authority to provide the conditions under which its members may vote by proxy; to provide for the payment of the expenses of its officers and employees."

Sec. 31-a provides for a cash deposit from candidates and,

Sec. 31-e authorizes the committee to levy, assess and collect from each candidate additional cash to be used for incidental and other expenses in connection with the primary; it further provides for the return of the cash deposit if it shall remain unexpended in said primary election.

Sec. 35 provides for the payment of the expenses of the primary, as follows:

(a) Printing ballots, stationery and supplies and transmission of returns—paid by state;

(b) Holding of elections such as payment of commissioners, rent of polling places, etc.—paid by municipalities, parishes, cities, etc.;

(c) All other expenses paid by candidates.

In the *Grovey*[10] case, one of the reasons stated in the opinion, showing that the action of the officials of the party was not the act of the state, was that the State of Texas did not pay any of the expenses of the primary.

That was only one of many cumulative reasons, and was not the sole test. We do not understand that case to hold that if the State did donate or appropriate money for a public purpose such as the payment of the expenses of a primary, that the organization receiving the benefit would by that fact alone be constituted a creature of the State. The fact that the State did not pay such expenses would be a factor to consider in determining

[10] Grovey v. Townsend, 295 U. S. 45.

whether the acts of the party were state action, but the converse of this would not logically follow.

The Federal Government today subsidizes many public operations; witness, the extensive grants to cities, counties, and states and their subdivisions under the now familiar Works Progress Administration, to cite but one example. It would be just as anomalous to argue that the political party receiving the benefit of the grant in the form of the payment of part of the expense of the primary, became by that fact alone, the creature of the State, as it would be to argue that the cities, counties and states and their subdivisions receiving the benefit of the W. P. A. subsidies became the creatures of the Federal government by reason of such grant or subsidy.

In this case the state pays only a minor part of the expenses, the balance being paid by the municipalities and the candidates.

The criterion should not be the payment of the expense of the primaries. The fundamental concept of the nature of political parties should alone be considered. That concept is that they are voluntary political associations, regulated by the State, but operated by their own officers and members. That is the concept the legislature had in mind in passing the act, and following the intent of the lawmakers is the cardinal principle of statutory construction.

The organic law of this State makes that purpose clear, and the Legislature recognized it as such in providing that the members of the State Central Committee should

not be considered as officers or employees of the State, or any of its political subdivisions. The greater always includes the lesser, and it could not be successfully contended that the subordinate committees under the control and direction of the State Central Committee were officers or employees of the State, or any of its subdivisions. *A fortiori* is that true of any of the lesser officers or employees of the party such as the defendants in this case, who acted as commissioners at the primary. They were merely officers of the party.

They were not paid by the State, but by the City of New Orleans. The fact that they received five dollars for the services they performed that day from the City of New Orleans, would not any more make them officers or employees of the City or State than would some independent contractor, such as a plumber called in by the City to do a single day's work for the sum of $5.00 be considered in law an officer or employee of the City. We have to look to the intent of the law to determine their status.

No doubt in such a broad subject as this, various narrow, technical points such as the aforesaid could be advanced and argued to sustain the position taken by appellant that the conduct of the primary was State action—hence the defendants acted under color of a law.

Such arguments should not be indulged. The intent of the legislature as reflected in the organic law of the State should control, and the legislature could not have made it plainer that they did not intend the conduct of the party

primary to be the action of the State than to specifically provide that the members of the governing body should not be officers or employees of the State or any of its subdivisions.

Sec. 96 indicates that the State intends that the primary be conducted without interference from any officer or employee of any municipality or any subdivision of the State for it prohibits such officer or employees from appointing special police to serve at any polling place, and

Sec. 97 prohibits State police, or any person having the power and authority of making arrests, or carrying arms, or who perform the duties and functions which are usually performed by police officers from going to, or remaining at, or being stationed at, or exercising or attempting to exercise any authority at any polling place or in the immediate vicinity of any polling place in any primary election.

Sec. 94 makes officers or employees of the State or any of its subdivisions ineligible as watchers or special deputies.

The aforesaid provisions, being clearly for the purpose of leaving the conduct of the election to the party, and its officers, without danger of interference on the part of the officers or employees of the State. The other sections throw no light on the subject; they detail the manner of conducting the election, election contests, second primaries, etc.

It is also to be noted that the general elections are governed by an entirely different act,[11] and are provided for by a different Article of the Constitution.[12]

Therefore, it seems that on the face of the indictment, Count 2 fails to set forth an essential element of the crime, that is to say, that these defendants acted under color of a State law.

STATE REGULATION OF POLITICAL PARTY DOES NOT CONSTITUTE IT CREATURE OF STATE.

The fact that a political party, and its nominating primary is regulated by State law, does not by that fact alone make it a creature of the State, nor does it make the party's officials, officers or employees of the State of Louisiana.

To so hold would be equivalent to finding that any business, trade or profession which is regulated by State law constitutes such business, trade or profession the creature of the State which regulates it. In these modern times, and because of the complexity of our economic system, it becomes increasingly necessary for the State to exercise its police power in the interest of the safety, health and well-being of the citizens, by regulating various political, economic and social acitivities.

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[11] Act 130 of 1916.
[12] Art. 8, Sec. 9, et seq.

Many activities have been held the proper subject for regulation.[13]

In origin political parties were purely voluntary associations;[14] had inherent power to determine their own membership and to regulate the participation in their primaries,[15] and were not state instrumentalities.[16] They are so affected with a public interest that they are subject to regulation under the general power of the state to supervise the entire election system,[17] by legislative enactments,[18] which have actually been promulgated in all the states except Connecticut, New Mexico, Rhode Island and Utah.

The question therefore, is one of determining whether the fact that a state has undertaken to regulate political parties and their primaries makes the conduct of primary election officers state action.

The fact that a state has done so should not make such conduct state action,[19] for the primary is still the same

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[13] 12 C. J. Sec. 432. "Particular Subjects of Regulation—a. Occupations. The following named occupations and persons engaged therein are proper subjects of regulation under the police power, namely, agriculture, attorneys at law, auctioneers, banking, barbers, brokers, building and loan associations, carriers, carpet beating by steam power, corporations, dentists, detectives, druggists, employment agencies, factors, ferries, garages and garage keepers, hackmen, hawkers and peddlers, junk dealers, innkeepers, insurance, laundries, livery-stable keepers, mining, pawn-brokers. physicians, pilots, plumbers, railroads, sale of securities, secondhand dealers, slaughterhouses, street railroads, telegraphs and telephones, ticket brokers, warehousemen, and wharfingers."

[14] Merriam American Political Ideas (1920); Ray, An Introduction to Political Parties and Practical Politics (1913).

[15] Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181 (1909).

[16] Kearns v. Hamlett, 188 Pa. 116 Atl. 273 (1892); McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057 (1890).

[17] People v. Board of Election Comm., 221 Del. 9, 77 S. E. 311 (1906).

[18] Lett v. Dennis, 129 So. 33 (Ala. Sup. 1930).

[19] Cunningham v. McDernett, 277 S. W. 218 (Tex. 1925); Kay v. Schneider, 110 Tex. 369.

as and a substitution for the old caucus and convention.[20] If statutory regulation made men public officials, when they were admittedly not exercising a governmental function, though their function did involve the general public interest, then railroad conductors, physicians, and many business and professional men would be public officers.[21]

The medical profession has for many years been the subject of regulation by the state in the interests of the health and public welfare of the communities of this nation. Yet, we do not believe that anyone would argue that because the States have seen fit to regulate that profession by comprehensive systems of law, that the medical profession is a creature of the State, or that any of its members are officers or employees of the State by reason of any such law.

We do not believe that anyone would argue that if the medical profession formed an organization to further its own objects and purposes, and would hold any kind of an election pertaining to its own affairs, that any irregularities of fraud practiced in such election would be the subject of an indictment, under Sections 51 or 52.

So by analogy it seems that if citizens see fit to organize for political purposes instead of professional purposes, and their organization, being affected with a public interest, is regulated by laws of the State, that such a voluntary organization is not any more subject to prosecution under Sections 51 and 52, than would be the voluntary associa-

[20] Hamilton v. Davis. 217 S. W. 431 (Tex. 1920).
[21] People v. Brady, 302 Ill. 576, 135 N. E. 87 (1922); Faxwell v. Beek, 177 Md. 1, 82 Atl. 657 (1912); Greenough v. Lucey, 28 R. I. 230, 66 Atl. 300 (1907).

tion of the medical profession or any other business, trade or profession affected with a public interest.

POINT 4.

Argument Based On Jurisprudence Of This Court As To Whether Primary Is An Election Within Meaning Of Sec. 4 Of Art. 1 Of The Constitution.

It has been held that the right to vote and to have said vote properly counted at a general election, is a right secured to citizens by the Constitution and laws of the United States.[22] The theory of this jurisprudence is that since Section 4 of Article I of the Constitution of the United States provides for the time, place and manner for holding elections for members of Congress that Congress has a right to regulate and control by statute the elective franchise insofar as it pertains to the election of members of Congress.

There is no case that our research has disclosed which has ever held that Section 4 of Article I would extend to, or embrace free and voluntary associations for political action such as the political party which selected its party nominee in this State on September 10, 1940.

On the contrary, this court has held that the only source of power which Congress, prior to the adoption of the Seventeenth Amendment,[23] possesses for election, over

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[22] U. S. v. Mosley, 238 U. S. 383; Ex parte Yarbrough, 110 U. S. 652.

[23] The 17th Amendment has no bearing on this case as it applies only to Senatorial elections, this being a primary for a nomination of a member of the House of Representatives.

senators and representatives was Section 4, of Article I, of the Constitution, which empowers Congress to regulate the manner of holding such elections, and that this did not give Congress the power to regulate primary elections for the purpose of selecting candidates for Congress.

This court has held that primaries are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer to support for ultimate choice by all qualified electors. The court has further held that general provisions affecting elections in Constitutions or statutes are not necessarily applicable to primaries,—the two things being radically different.[24]

The constitutional question came before the Supreme Court in the famous *Newberry* case in 1921.[25] Truman H. Newberry was elected senator from Michigan in 1918. He and sixteen associates or agents were convicted in the federal district court and variously sentenced to fine and imprisonment for conspiring to violate the federal corrupt practices acts. It was shown at the trial that disbursements of at least $195,000 had been made in Newberry's primary campaign, although the Michigan law (applicable under the federal statute) allowed a maximum of only $1,875, that is, 25 per cent of the senatorial salary. Upon appeal, however, the Supreme Court unanimously reversed the conviction.[26]

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[24] Newberry v. U. S., 256 U. S. 232; U. S. v. Gradwell, 243 U. S. 476; Grovey v. Townsend, 295 U. S. 45; Nixon v. Herndon, 273 U. S. 536; Nixon v. Conden, 286 U. S. 73; U. S. v. O'Toole, 236 F. 993.

[25] Newberry v. U. S., 256 U. S. 232.

[26] The Senate, being the sole judge of the qualifications of its members, accepted the decision of this Court by voting to permit Newberry to take his seat as a member of that body.

All of the justices agreed to the decision, but did not concur in the reasons. (1) Justice McReynolds (Justices Day, Holmes, and Van Devanter concurring) held that a primary is not an election within the meaning of Article I, Section 4, of the Constitution, and that therefore the act of 1911 was unconstitutional in its attempted application to primaries. (2) Justice McKenna was of the opinion that the regulation of senatorial primaries exceeded the power of Congress as it stood in 1911, but reserved the question as to whether it would have been constitutional if enacted after the ratification of the Seventeenth Amendment.[27] (3) Chief Justice White (Justices Brandeis, Clark and Pitney concurring) agreed to the results but on the ground of prejudicial error in the trial judge's charge to the jury, upholding however, the authority of Congress to regulate primaries. Thus three different positions were taken: according to four justices, Congress had no power to regulate senatorial primaries before the Seventeenth Amendment and acquired none by its adoption; according to one justice, Congress had no such power before the amendment, but might possibly have acquired it through the adoption of the amendment insofar as senatorial elections are concerned; and, according to four justices, Congress always had such power. As applied to the facts in our case it would simply have been a five to four decision.

In speaking of primaries the majority opinion in that case stated that they,

> "are in no sense elections for an office, but merely methods by which party adherents agree upon candi-

[27] It is to be noted that the 17th Amendment applies only to Senatorial elections, and that amendment could not have troubled Justice McKenna if the election had been for a member of the House of Representatives as in the instant case.

dates whom they intend to offer and support for ultimate choice by the qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. And this view has been declared by many state courts. . . . If it be practically true that under present conditions a designated candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Many things are prerequisite to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. . . . Birth must precede, but it is no part of funeral or apotheosis. We cannot conclude that authority to control party primaries or conventions for designating party candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with the purely domestic affairs of the state and infringe upon liberties reserved to the people."

JURISPRUDENCE OF STATE COURTS DISTINGUISHING BETWEEN PRIMARY AND ELECTION.

The state courts also differentiate in general between a nominating primary and an election, holding the two to be distinct and apart.[28] More particularly, it has been held that primary elections to choose delegates to conventions are not within constitutional or statutory requirements in regard to elections;[29] that primary elections are not a part of the general election because held at the same time as the latter with the same machinery merely for convenience and economy;[30] that primaries are not elections within the common law meaning of the term;[31] that laws providing for the determination of contested elections do not apply to primary elections;[32] that a statute making it a misdemeanor to place any bet or wager on any election did not apply to primaries;[33] that a statute disqualifying a person from holding office when he shall have given a bribe, threat or reward to secure his election did not apply to primaries;[34] and that it is not an offense for officials

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[28] State v. Erickson, 119 Minn. 152, 156, 137 N. W. 385 (1912); State v. Taylor, 220 Mo. 618, 119 S. W. 373 (1909); Ledgerwood v. Pitts, 122 Tenn. 510, 587, 125 S. W. 1036 (1910); Commonwealth v. Wells, 110 Pa. St. 463, 468, (1885); People v. Cavanaugh, 112 Cal. 674, 676, 677, 44 P. 1057 (1896); Martin v. Schulte, 182 N. E. 703 (Ind. 1932); Sawyer v. Frankson, 134 Minn. 258, 159 N. W. (1916); Kay v. Schneider, 110 Tex. 369, 876, 218 S. W. 479, 221 S. W. 880 (1920); Waples v. Marrast, 108 Tex. 511, 184 S. W. 180, L. R. A. 1917 A. 253 (1916).

[29] State v. Woodruff, 68 N. J. L. 89, 56 Atl. 204 (1902).

[30] State ex rel. McCue v. Blaisdeel, 18 N. D. 55, 118 N. W. 141 (1908).

[31] State v. Woodruff, 68 N. J. L. 89, 56 Atl. 204 (1902); Hester v. Brunland, 80 Ark. 145, 95 S. W. 992 (1906); Lowe v. Bd. of Election Canvassers, 154 Mich. 329. 117 N. W. 730 (1908); State v. Johnson, 87 Minn. 221. 91 N. W. 604 (1902); State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728 (1908).

[32] Jones v. Fisher, 156 Iowa 512. 137 N. W. 940 (1912).

[33] Lillard v. Mitchell, 37 S. W. 702 (Tenn. Ch. App. 1896); Commonwealth v. Helm, 9 Kv. L. Rep. 532 (1887); Dooley v. Jackson, 104 Mo. App. 21, 78 S. W. 330 (1904).

[34] Gray v. Seitz, 162 Ind. 1, 69 N. E. 456 (1904).

at primaries to electioneer, when the general election laws forbid it.[35]

MEANING OF WORD ELECTION AS USED IN ART. I, SEC. 4 OF THE CONSTITUTION.

Art. I, Sec. 4 provides:

> "The times, places and manner of holding *elections* for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." (Italics supplied.)

If the word "elections", as used in this section of the Constitution, is by a process of judicial interpretation held to include the manner by which a voluntary association, or political party selects its candidates by direct primary, (a concept unknown by the framers of the Constitution), then we may logically conclude that Congress may pass laws to regulate the internal affairs of political parties, and dictate the time, place and manner of their selection or nomination of the candidate they will support in the ensuing general election, or may prohibit the holding of primaries altogether.

This court has never gone that far in the history of the nation. Even in the celebrated series of Texas primary cases, this court has not adopted the theory that the primary was an election, as witness the case of *Nixon v.*

[35] State v. Simmons, 117 Ark. 159, 174 S. W. 238 (1915).

Herndon, 273 U. S. 536, where the court did not adopt the theory that exclusion from a primary by specific state law *would constitute a denial of the right to vote* within the meaning of the 15th Amendment, which reads in part as follows:

> "The right of citizens of the United States to *vote* shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." (Italics supplied.)

but found the law unconstitutional exclusively under the equal protection clause of the 14th Amendment. This court once again refused to proceed under the 15th Amendment, but proceeded exclusively under the 14th Amendment in the case of *Nixon v. Condon,* 286 U. S. 73, in declaring the Texas statute unconstitutional as being a delegation of legislative authority, hence, state action, when the legislature passed a law giving to the State Executive Committee authority to determine the qualification of the voter who might participate in the primary, when the committee passed a rule that only white persons could vote.

The power conferred upon Congress in Sec. 4 of Art. I is a limited power. It was not intended to deprive the people of the States of their freedom with respect to their political activities.

The Article gives the Congress the right to regulate, "The times, places, and manner of holding elections," and nothing more.

At one time in our constitutional history Congress has seen fit to assert this power in the famous so-called force bills of 1870.

Since Congress asserted its power to the fullest extent, in those enforcements Acts of 1870, the limitation upon their power is illustrated by a consideration of the history of those bills which will be found in *United States v. Gradwell*, 243 U. S. 476, 482-484, as follows:

> "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government, our legislative history upon the subject shows that, except for about twenty-four of the one hundred and twenty-eight years since the Government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are. For more than 50 years no congressional action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by Districts (5 Stat. 491), thus doing away with the practice which had prevailed in some States of electing on a single State ticket all of the Members of Congress to which the State was entitled.
>
> "Then followed twenty-four years more before further action was taken on the subject when Congress provided for the time and mode of electing United States Senators (14 Stat. 243) and it was not until four years later, in 1870, that, for the first time, a comprehensive system for dealing with congressional elections was enacted. This system was comprised in Sections 19, 20, 21 and 22 of the Act approved May 31, 1870, 16 Stat. 144; in Sections 5 and 6 of the Act approved July 14, 1870, 16 Stat. 254; and in the Act

amending and supplementing these acts, approved June 10, 1872, 17 Stat. 347, 348, 349.

"These laws provided extensive regulations for the conduct of congressional elections. They made unlawful, false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election and the neglect by any such officer of any duty required of him by state or federal law; they provided for appointment by Circuit Judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

"These laws were carried into the revision of the United States Statutes of 1873-4, under the title 'Crimes against the Elective Franchise and Civil Rights of Citizens,' Rev. Stats., Sections 5506 to 5532, inclusive.

"It will be seen from this statement of the important features of these enactments that Congress by them committed to federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections and repealed all of these laws with the exception of a few

> sections not relevant here. Act approved February 8, 1894, 28 Stat. 36. This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the eight sections of Chapter 3 of the Criminal Code, Sections 19 to 26, inclusive, which have not been added to or substantially modified during the twenty-three years which have since elapsed."

A distinction is at once apparent between the regulation of the manner of holding elections, in order to protect the right of the voter in casting his vote, and to secure a fair count of the vote; and the attempt to interfere with or control the activities of the people of the States in the conduct of political campaigns and the nominating process.

Alexander Hamilton in The Federalist, in meeting the serious criticism which the proposed provision had evoked, said:

> "As to the Senate, it is impossible that any regulation of 'time and manner', *which is all that is proposed to be submitted to the national government in respect to that body*, can affect the spirit which will direct the choice of its members." (Italics ours.) (The Federalist, No. LX.)

And again Mr. Hamilton said, in answering an objection with respect to the regulation of places for the election of members of the House of Representatives that these might be confined to particular districts so as to promote the interests of classes:

> "The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those

who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the Legislature."

See, also:

Luther Martin's "Genuine Information", in Farrand's Records of Federal Convention, Vol. 3, pp. 194, 195;
Rufus King in Massachusetts Convention, Farrand's Records, Vol. 3, p. 267;
James Madison in Virginia Convention, Farrand's Records, Vol. 3, pp. 311, 319;
William R. Davie in North Carolina Convention, Farrand's Records, Vol. 3, pp. 344, 345;
Roger Sherman in House of Representatives, Farrand's Records, Vol. 3, p. 359.

The Constitution gives to Congress no power to regulate the process of nomination.

The first time the question came before this court was in the *Gradwell* case, *supra.* The Court said (pp. 487-489):

"The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the 'times, places and manner of holding elections (not nominating primaries) for Senators and Representatives.' Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted but they were equally un-

known for many years after the law, now Section 19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development, under a variety of State laws.

"The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States applicable to the election of Senators and Representatives is by no means indisputable. Many state supreme courts have held that similar provisions of state constitutions relating to elections do not include a nominating primary. Ledgerwood v. Pitts, 122 Tennessee, 570; Montgomery v. Chelf, 118 Kentucky, 766; State ex rel. Von Stade v. Taylor, 220 Missouri, 619; State v. Nichols, 50 Washington, 508; Gray v. Seitz, 162 Indiana, 1; State v. Erickson, 119 Minnesota, 152.

"But even if it be admitted that in general a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging to a political party which polled three per cent of the vote of the entire State at the last preceding general election could be voted for at this primary, and thereby it is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were 'regular and

qualified members and voters' of one of the greater parties. Even more notable is the provision of the law 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. Acts West Virginia, 1915, c. 26 pp. 222, 246.

"Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law and nothing of the kind can be found in any federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

"What power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro,

cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia.

"The claim that the Federal Corrupt Practices Act (June 25, 1910, c. 392, 36 Stat. 822, amended August 19, 1911, c. 33, 37 Stat. 25, and August 23, 1912, c. 349, 37 Stat. 360), recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them is, in effect, an adoption by Congress of all state primary laws is too unsubstantial for discussion; and the like claim that the temporary measure (Act of June 4, 1914, 38 Stat. 384), enacted by Congress for the conduct of the nomination and election of Senators until other provision should be made by state legislation cannot be entertained, because this act was superseded by the West Virginia primary election law, passed February 20th, 1914, effective ninety days after its passage."

The question again arose in *United States v. Blair,* 250 U. S. 273, where the Court said (pp. 278-279):

"It is maintained further that, because of the invalidity of these statutes, neither the United States District Court nor the Federal Grand Jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes, and therefore the order committing appellants is null and void.

"The same constitutional question was stirred in United States v. Gradwell, 243 U. S. 476, 487, but its determination was unnecessary for the decision of the case, and for this reason it was left undetermined, as the opinion states. Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an

> Act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.
>
> "We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry."

And, referring to some of the State cases, the District Court in *United States v. O'Toole,* 236 Fed. 993, 996, (heard with *United States v. Gradwell,* 243 U. S. 476 and affirmed), said:

> "We think it may be said both on reason and authority that, where the word 'election' is used without qualification, the reference is to a general election, as distinguished from a primary election. State v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; Montgomery v. Chelf, 118 Ky. 766, 82 S. W. 388; Gray v. Seitz, 162 Ind. 1, 69 N. E. 456. Certainly it cannot be contended that the choosing or election by the qualified electors provided for by Section 2 of Article 1 of the Constitution of the United States includes the selection of party candidates by primary election, for at that time such elections were unknown. We can find no provision of the Constitution of the United States or of an act of Congress which either directly or by implication warrants the Court in holding that the protection of the federal government extends to the right of any citizen to participate in a party endorsement of a candidate through a primary election or otherwise. The right is created by party rules or state legislation, and the remedy, if there be one, must be derived from the same source."

The specific point at issue here is—what did the authors of the Constitution mean by the term "election" which they used in the article?

A so-called nominating primary was unknown at the time the Constitution was adopted. It was born about 100 years after the adoption of the Constitution.

A nominating primary is not an election any more than the nominating convention or its predecessor the caucus is an "election".

What the term "elections" meant at the time of the adoption of the Article it means now.

That distinction is undoubtedly what Mr. Justice McKenna had in his mind, in reserving judgment on cases that came up involving statutes passed to regulate the election of Senators after the passage of 17th Amendment. No doubt Mr. Justice McKenna felt it may be argued that since the nominating primaries were known at the time of the passage of the 17th Amendment that the language used in the 17th Amendment may be sufficiently broad to cover the nomination process in senatorial elections. However, that question has never been decided, and is not before the Court in this case.

In *Hawke v. Smith,* No. 1, 253 U. S. 221, this court said:

> "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by *'Legislatures'?* That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted

> it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. * * *
>
> "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States."

That case is clearly decisive of the fact that the proper method of determining the meaning of a word in the Constitution is to ascertain its meaning at the time of the adoption of the Constitution. Whatever it meant then it means now.

Just as the Court in the *Hawke* case, *supra*, said, that the word "Legislature" was to be construed to have the same meaning at the time that case was decided as it had when the Constitution was adopted; so we say, that direct primaries being unknown at the time of the adoption of the Constitution, that the word "election" should be construed in accordance with its well-defined meaning at the time of the adoption of the Constitution. It cannot be reasonably disputed that the term "election" as used in Sec. 4 of Art. 1 had reference to the taking of the vote for the office of the Congress of the United States.

It might be argued that this contention conflicts with the familiar rule of Constitutional law, to the effect that, when a constitutional provision embodies a certain concept, whatever is properly within the concept is embraced within the words of the Constitution, although it lay far beyond the vision of the framers of the Constitution.

Witness the application of the commerce clause of the Constitution to new instrumentalities of transportation and communication unknown to the framers of the Constitution.

But this is so because those new instrumentalities are in fact interstate commerce, even though the fathers of the Constitution did not ever dream that such instrumentalities or conditions would ever exist. They come within the meaning or definition of interstate commerce; the power exercised must be found within the definition of the power conferred. (See *In re Debs,* 158 U. S. 564, 591):

> "The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

No one could logically say that the nominating process, whether by direct primary, caucus or convention comes within the definition of the power conferred upon Congress by the Constitution to regulate "elections". It seems clear that the nominating process is not embraced within the concept "elections" as that term was understood at the time of the adoption of the Constitution, and as it is presently understood as shown by the weight of authority.[36]

The word "elections" standing alone has a very different meaning from that which it has when qualified by the word "primary". "Primary elections" which evolved from the caucus and convention nominating system stand on no

[36] See appendix, page 53.

different footing with respect to the meaning of this clause of the Constitution than did the old caucus or convention.

Therefore, Congress has no more power to regulate the primaries than it would have to regulate the conventions in the several states which still use that method.

The States have begun to regulate the nominating process only in comparatively recent years. It is a matter of history that this Court could judicially notice, that at the time of the adoption of the Constitution, such regulations were unknown. The States, of course, had laws governing the general elections, and it was such laws that were in the contemplation of the members of the Constitutional conventions when they adopted Sec. 4 of Art. I, and they had no intention of delegating power to regulate the nominating process or otherwise surrender their political freedom or they would have added some clause to that article to so indicate. At the time of the adoption of the constitution, primary elections being unknown, some descriptive clause would have to be added to the words "times, places and manner of holding elections", such as ("caucuses, conventions or other nominating processes") for no one would argue that a caucus or convention was an election, and if it is argued that the nominating process is included in the article, it would be necessary to urge that "elections" included caucuses and conventions because nominating primaries did not exist at that time.

If this Court, in the *Hawke* case, *supra,* would not extend the word "Legislatures", as used in Article V, so as

to include the people themselves when voting in a referendum, but restricted the word to the representative body, because as the Court said the word "Legislatures" was not a term of uncertain meaning when incorporated into the Constitution, and that what it meant when adopted it still means for the purpose of interpretation, *a fortiori* should the word "election" be restricted to the well-defined meaning that it had when incorporated into the Constitution, because the fact that the framers of the Constitution intended it to be so restricted is more easily susceptible of ascertainment than was the case of the meaning of the word "Legislature" as interpreted in the *Hawke* case, *supra.*

In the *Hawke* case, *supra,* this Court in speaking of the word "Legislatures" said,

> "The term is often used in the Constitution with this evident meaning." [As referring to the representative body.]

It might be of assistance to the court in resolving this question for us to examine other articles of the Constitution as was done in the *Hawke* case in an effort to examine the evident meaning of the word "elections", as used in Sec. 4 of Art. I.

It appears that the other articles show that the term "elections" has exclusive reference to elections *for the office itself,* for the following reasons:

No other sort of elections was known at the time;

A nomination is not an election for Senator or Representative, it is merely the selection of the candidate by the party to be supported at the ensuing general election.

Sec. 6, Art. I, Subdivision 2, provides,

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States," etc.

There the word "elected" could not possibly mean "nominated" for the Member of Congress is elected at the "election" and not before.

Sec. 2 of Art. I makes reference to "electors". The "elections" of Members of Congress referred to in Sec. 4 of Art. I, and the manner of holding which may be regulated by Congress, are the "elections" at which the "electors" referred to in Sec. 2 of Art. I vote. Those "electors" do not necessarily vote at the primaries. It is because they vote at the "elections" for Members of the House of Representatives that they are called "electors". But the term "electors" like the term "elections" has no reference to a nominating primary. If the power is vested in Congress to regulate a nominating primary, it likewise is vested with power to regulate a nominating convention and the vote of delegates at a nominating convention. Manifestly, such a vote is not an "election" and the delegates are not "electors" within the meaning of the Constitution.

The term "elections" as used in Sec. 4 of Art. I means clearly the final choice of persons for public office. The

clause itself refers to "elections for Senators and Representatives". The election is the taking of the vote for the persons who are to fill, when chosen, the public office in question. This is clearly shown by the context. The "time" of the election means the time when the choice of the public officer is made. The "place" means the location of the actual casting of the ballots—where the election is held. "The manner of holding" refers to the method of holding the election to determine that choice. The exception as to Senators shows that a nominating process was not intended because the Senators were elected by the Legislature—hence the power to fix the place for holding the "elections" as to Senators was withheld from Congress, thus emphasizing the point.

Insofar as the Federal Constitution is concerned, no nominating process is necessary to the election. The Constitution makes no attempt to control the political activity of the citizens with the exception of the matters concerning the times, places, and manner of holding elections. The political activities with the exceptions just noted were left with the local authorities.

Storey on the Constitution, Sections 815-828, states that Sec. 4 of Art. I was assailed by the opponents of the Constitution "with uncommon zeal and virulence". The opponents were in a measure appeased by the assurance that was given them to the effect that the clause was confined to the regulation of the times, places, and manner of holding elections.

Alexander Hamilton, after reviewing the objection and defending clause in question as against the assertion of a broader power in Congress, thus stated the conclusion:

> "Its authority" (that is, the authority of the National Government) "would be expressly restricted to the regulation of the *times,* the *places,* and manner of elections." (Italics, Hamilton's; The Federalist, LX.)

This argument prevailed only because the opposition were assured and felt satisfied that only a limited power had been delegated to the national government, and it was on that basis that Alexander Hamilton, the great protagonist for the Constitution, was able successfully to defend the clause. He could never have defended the theory that the people were surrendering such rights to the Federal government as would authorize that sovereign power to supervise the methods that should be employed to enlist support of a candidacy.

If Congress has the power which appellant seeks to attribute to it here, it has the power to abolish all primary elections for Senators and Representatives in every State in the Union. It has the power to establish conventions, to overthrow conventions, to provide any sort of a primary that it may desire to provide.

If it has such power then the fears of the people who were opposed to the article that Congress might contrive the manner of holding elections so as to exclude all but their own favorites from office would seem to be justified. (See Storey on the Constitution, Secs. 815-828.)

The fears of the people who opposed that Article were allayed by the assurance of Hamilton that the authority of the National Government would be limited, and that they, the citizens, would retain their political freedom, the surrender of which was never intended by the people. That which is not within the enumerated powers of the national government cannot be brought within the power of regulation merely because of the existence of opinion that it would be advisable that Congress should exercise the power (see *Hammer v. Dagenhart,* 247 U. S. 251).

The people were jealous on all matters affecting their political liberty at the time of the adoption of the Constitution, and on that subject were most careful with respect of any grant of power, and to construe Sec. 4 of Art. I, as though it would embrace a nominating system would be, we think, an unreasonable construction.

As far as our research has gone there is not a word in the Constitution or elsewhere, which could justify the conclusion that the term "elections" in Sec. 4 of Art. I, embraces any nominating system.

GENERAL REPLY TO APPELLANTS' CONTENTIONS MADE IN STATEMENT OF JURISDICTION BRIEF.

In the brief filed in this Court, the government concedes the holding in the *Newberry* case just mentioned, but comments that only a minority of the Court concurred in the chief opinion which held that the federal government had no right to regulate primary elections, which

statement, of course, is erroneous. It points out that the statute at issue in that case was enacted prior to the 17th Amendment, but also admits that Sections 51 and 52 were also enacted prior to the 17th Amendment and tries to differentiate by stating that in the *Newberry* case the general validity of the statute was at issue, whereas in this case the validity of the present application of Sections 51 and 52 are at issue.

We fail to see any distinction here at all. It is elementary that the unconstitutional application of a statute is just as much subject to attack as is a statute which is unconstitutional in general.

The government's principal argument is as follows:

> "The questions presented in the instant case are, we believe, of paramount public importance. The relationship between a primary election and the ensuing general election is so intimate that the outcome of the former is often determinative of the latter. This is particularly so in those sections of the country where nomination is tantamount to election and the election becomes merely perfunctory. Hence, a voter may be as effectually deprived of his right or privilege of participating in the final selection of Senators and Representatives where acts such as those charged in the indictment were committed at a primary as where they took place at the general election."

Appellant is in error when it states in its brief that the Court emphasized that the statute involved in the *Newberry* case was passed before the 17th Amendment. Four of the Justices held that Congress had no power to regulate *senatorial* primaries before the 17th Amendment,

and acquired none after its adoption. Justice McKenna held that the regulations of *senatorial* primaries exceeded the power of Congress as it stood in 1911, but reserved the question as to whether it would have been constitutional if enacted after the ratification of the 17th Amendment.

The 17th Amendment reads as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.
>
> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.
>
> "This amendment shall not be so constructed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

It must be noted that the aforesaid Amendment deals entirely with the election of Senators by Direct Vote. No Senator was up for nomination in the case at bar, therefore, that Amendment has no bearing on this case. In the *Newberry* case, Truman H. Newberry, the appellant, was a candidate for the Senate—hence, Justice McKenna's reservation of the question under the 17th Amendment. If Newberry had been a candidate for the House of Representatives as is the situation in our case, Justice Mc-

Kenna would have had no ground to reserve the question under the 17th Amendment as that Amendment does not apply to elections of members of the House of Representatives, which latter is governed exclusively by Sec. 4 of Art. I.

Appellant's argument that in some sections of the country nomination is tantamount to election, completely overlooks the fact that the Constitution and laws of the United States do not reach or protect the operations of the affairs of a party primary. That argument is identical with the one made in *Grovey v. Townsend,* 295 U. S. 45, the last of the series of celebrated Texas cases just mentioned, and this court disposed of that contention in this language:

> "The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the Primary election of July 9, 1934, and that in Texas *nomination by the Democratic Party, is equivalent to election.* These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that as a negro may not be denied a 'ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether.' So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimina-

tion by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution." (Italics supplied.)

CONCLUSION.

Of particular interest as background on this subject matter, are the cases of *U. S. v. Gradwell* and *U. S. v. Bathgate,*[37] in which are outlined the constitutional and legal history of federal laws relating to elections. Those cases announce the principle that criminal statutes must be strictly construed; that it is the policy of Congress to leave the conduct of elections to States; and that this policy should not be defeated by stretching old statutes to new uses to which they are not adapted, and for which they were not intended.

We respectfully submit that the judgment of the District Court should be affirmed.

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[37] U. S. v. Gradwell, 243 U. S. 476; U. S. v. Bathgate, 246 U. S. 218.

Thus, in *State ex rel. Nordin v. Erickson,* 119 Minn. 152, 156, in passing upon the constitutionality of a primary law the Court said:

> "In considering this question we must keep in mind that our primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled, while an election, which has its original in the Constitution, is the selection, by such voters, of officers to discharge the duties of the respective offices."

The Supreme Court of Missouri, in referring to the use of the word "election" in the Constitution of that State, said:

> "That the framers of the Constitution referred to the election of individuals to public office and not to mere nomination to office when they inserted Section 3 of Article 8 in the Constitution, we have no doubt whatever. As said by the St. Louis Court of Appeals in Dooley v. Jackson, 104 Mo. App. 1. c. 30, 'The word "election" frequently occurs in the Constitution of the State. First in Section 9, Article 2, and Article 8 of that instrument is wholly devoted to the subject of elections. But wherever used in the Constitution, it is used in the sense of choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for office by a political party.' " (The State ex rel. Von Stade v. Taylor, 220 Mo. 618, 631.)

In *State ex rel. Zent v. Nichols,* 50 Wash. 508, 522, it was said:

> "It is contended that this section adds a requirement to the qualifications of electors in addition to

> the constitutional requirements, and for that reason renders the entire act void. Were the primary election so far such an essential part of the general election as to make the constitutional provision relating to the qualification of electors entitled to vote at the general election applicable thereto, then there would be force in this objection; but we do not think the sections of the Constitution providing the qualifications of electors applicable to the primary election provided for by this statute. It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. Being so, the qualifications of electors provided by the Constitution for the general election can have no application thereto."

In *Ledgerwood v. Pitts*, 122 Tenn. 570, in passing upon the constitutionality of the primary election law of Tennessee, the Supreme Court of that State said (p. 587):

> "The first inquiry, therefore, presented for our examination is whether or not these provisions of the Constitution have any application at all to primary elections. Admittedly no such thing could have been in contemplation by the framers of the constitution when they came to formulate the election and suffrage clauses of that instrument, for at that time no such thing as a primary election had ever been suggested. The object of this modern invention of political parties is primarily for the purpose of permitting and requiring the entire electorate of that party to participate in the nomination of candidates for political office. The plan is simply a substitution for the caucus or convention. It is true, as stated, it is a part of the political machinery that starts the candidate on his way and the political party is thereby enabled to crystallize and concentrate its vote on

> that particular candidate who is chosen as the representative and expositor possibly of their political views, but the limitations and safeguards of the constitution apply exclusively to the final election when the officer is chosen in the mode required by the constitution."

In *State v. Woodruff,* 68 New Jersey Law, 89, 94, the Court said:

> "But the election at which the fraud is committed, to constitute the common law offense, must be a popular election, the fraud going to the destruction of the right of the elective franchise in the selection of public officers for public positions. Such a thing as a primary was not known at the common law. It is the outgrowth of modern convenience or necessity. A primary is not an election in the sense of the common law; it is merely a method for the selection of persons to be balloted for at such an election."

In construing the Act of 1839 in relation to the laying of wagers on the event of "any election", the Supreme Court of Pennsylvania said:

> "Instead of an election by all the electors of a municipality for public officers, it (the primary election) is an election by the members of a party for its candidates. These candidates may afterwards be voted for by some of the electors when all electors are entitled to vote. Men may be candidates who were not voted for, or who were defeated, at the primary election. An election by a party for its candidates widely differs in its object from an election by the electors for officers. Such primary election is as plainly without the purview of the Act of 1839 as is the election of officers for a private corporation." Commonwealth v. Wells, 110 Pa. 463, 468.

In *People v. Cavanaugh*, 112 Cal. 674, 676, 677, in construing the "Purity of Elections Act", the Court said:

> "The word 'election', as here used in subdivision 3, and the other subdivisions of section 19, does not refer to primary elections. The purity of elections law is entitled: 'An act to promote the purity of elections is regulating the conduct thereof, and to support the privilege of free suffrage by prohibiting certain acts and practices in relation thereto and providing for the punishment thereof'. In the body of this act may be found the word 'election' a hundred times or more, and it may be said in every instance that it is plainly apparent that the word is not used as applying to primary elections."

See, also,

State v. Simmons, 117 Ark. 159.
George v. State, 18 Ga. App. 753.
Riter v. Douglass, 32 Nev. 400, 433.
Gray v. Seitz, 162 Ind. 1.
Kelsow v. Cook, 184 Ind. 173.
Montgomery v. Chelf, 118 Ky. 766.
Hodge v. Bryan, 149 Ky. 110.
Hager v. Robinson, 154 Ky. 489.
Wilson v. Dean, 177 Ky. 97.
Len v. Montgomery, 31 N. D. 1.
Babbitt v. State, 174 Pac. (Wyoming) 188.

There is some conflict in the State cases with respect to the question whether the term "any election" can be deemed to include what has been called a "primary election". But, where the term "election" is held to include a so-called primary election, it is plainly because of the manner which the latter expression has been used in the

terminology of the State legislation. And the weight of authority is that even where the State statute has used the expression "primary election", a reference merely to an "election" is not sufficient to bring primary elections within the provision.

But when the State constitution or statute refers to an "election" in the sense of an election of public officers, it is not construed to include a so-called primary election, which is not an election of public officers but merely a selection of candidates.