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CITATIONS.

CITATIONS—(Continued)

MISCELLANEOUS.

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.

SUPPLEMENTAL BRIEF OF DEFENDANTS AND APPELLEES IN REPLY TO BRIEF OF APPELLANT.

CONGRESS DERIVES POWER TO REGULATE ELECTIONS FROM SEC. 4 OF ART. I, NOT SEC. 2 OF ART. I OF CONSTITUTION OF THE UNITED STATES.

Throughout appellant's brief, mention is made of Sec. 2 of Art. I of the Constitution, as the source of the power of Congress to enact Sections 19 and 20 of the Criminal Code.

Undoubtedly Congress obtains its power to legislate in connection with Congressional elections from Section 4 of Article I. This was originally held by this Court in *Ex parte Yarbrough*[1] and when the question was next raised[2] the *Yarbrough* case was cited with approval. Thereafter all of the cases on this subject are based on the assumption that the source of Congressional power to regulate Congressional elections is derived from Section 4 of Article I, and not on Section 2 of Article I.

It is clear that the choosing of the members of the House of Representatives has reference to the manner of making that choice, as stated in Article I, Section 4 which refers to holding elections. It is likewise clear that the "electors" spoken of in Section 2 of Article I, are the persons who vote at the "elections", spoken of in Section 4 of Article I.

Apparently appellant seems to rely as little as possible on Section 4 of Article I, thus avoiding the argument that will be raised as to the meaning of the word "elections", as used in that section, and as understood at the time of the adoption of the Constitution. Appellant seeks to make a distinction between the word "election", as stated in that Section, as against the word "chosen", as spoken of in Section 2, but it is clear that whatever power Congress has to pass laws concerning Congressional elections

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[1] Ex parte Yarbrough, 110 U. S. 651, the Court said, "So also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the 4th Sec. of the 1st Art. of the Constitution.

"It was not until 1842 that Congress took any action under the powers here conferred," etc.

U. S. v. Gradwell, 243 U. S. 476, the Court said, "The power of Congress to deal with the election of Senators and Representatives is derived from Sec. 4 of Art. 1 of the Constitution of the United States.

[2] U. S. v. Mosely, 230 U. S. 383.

is derived from Section 4 of Article I, not from Section 2 of Article I. We have discussed in our original brief the history of this enactment, showing that it was a limited power given Congress and not a general one.

There is no clearly defined authority for assuming that Congress has a general power of legislation concerning federal elections. The power to regulate the election of senators and representatives comes wholly and entirely from Article I, Section 4 of the United States Constitution.[3]

In the *Yarbrough* case, in which the specific question was the right of Congress to punish criminally a conspiracy to intimidate a citizen in the exercise of his right to vote under #5508 R. S., the court reviews the regulatory statutes previously enacted by Congress for the control of elections and definitely grounds them upon the express authority of Art. I, Sec. 4.

When the 17th Amendment, providing for the popular election of senators, was first reported on January 11, 1911 by Senator Borah of the Senate Judiciary Committee, it contained a clause providing that it should be in lieu of Sec. 4 of Art. I insofar as it related to any authority in Congress to make or alter regulations as to the time or manner of holding elections for senators. But this clause was omitted and all reference to Sec. 4 of Art. I was eliminated from the resolution. "As finally submitted and adopted the amendment," says the Supreme Court in

[3] Ex parte Siebold, 100 U. S. 371; Ex parte Clark, 100 U. S. 399; Ex parte Yarbrough, 110 U. S. 651.

Newberry v. U. S.,[4] "does not undertake to modify Article I, Sec. 4, the source of congressional power to regulate the times, places and manner of holding elections." That section remains intact and applicable to the election of senators and representatives.[5]

There is another provision of the Constitution which may be here noted, namely Article I, Sec. 5, which makes each house the judge of election of its members which could be considered along with Article I, Sec. 2, para. 1 which says that the House of Representatives shall be composed of members chosen by the people of the several states. These clauses cannot be construed to give either House of Congress any additional affirmative authority to control or regulate the elections in the state. Congress, having been empowered to make regulations only as to the times, places and manner of holding elections for senators and representatives, cannot go beyond these limitations. This conclusion reasonably follows, otherwise it would have been meaningless for the Supreme Court to have so seriously weighed the limits and scopes of Section 4 of Article I, if by the mere application of Sections 5 and 2 it could have held that Congress possessed an additional indefinite, perhaps, limitless authority. It cannot be that the framers of the Constitution, after pointedly fixing the federal authority over elections in Article I, Section 4 intended to give by indirection a blanket authority under Sections 5 and 2. The words of

[4] Newberry v. U. S., 256 U. S. 232: "We find no support in reason or authority for the argument that because the officers where created by the Constitution, Congress has some indefinite, undefined power over elections for senators and representatives not derived from Section 4, Art. I."

[5] Congressional Record, Vol. 46, Page 846.

these latter sections do not lend themselves reasonably to such interpretations and in no opinion has the Supreme Court suggested such a conclusion.[6]

Insofar as Article I, Section 2 is concerned, the word "chosen", used there, is defined in Article I, Section 4, which infers that the method of choosing shall be by election.

DEFENDANTS WERE NOT OFFICERS OR EMPLOYEES OF STATE.

Appellant's brief is based entirely on the premise that commissioners of election, under Louisiana Act 46 of 1940, are state officers. This premise is assumed. The only real argument made to justify this assumption is that the method of their selection is prescribed by statute, and their compensation is provided by the local units of the state government. Appellant also cites the old case[7] which contains a statement that the primary is part of the election machinery of the State.

It is argued that because the State has regulated the activities of the political party and the primary, and has provided for a fair method of selecting the political party's officers and employees, that such officers and employees thereby become state officers. We do not believe that such contention is sound in reason or authority. This is particularly true where the State leaves the entire ad-

[6] See 6 Geo. L. J. 314, 322 (1928).
[7] State v. Michel, 121 La. 374.

ministration of the functions of the nominating primary to the political party and its officers and employees.[8]

Appellant has quoted elaborately from Louisiana Act 46 of 1940 but has overlooked the most important section having a bearing on the issues involved here, which is Section 10.[9]

There is nothing in Louisiana's Act which would justify the conclusion that the defendants here were merely acting as the agent of the State, as was the case in *Nixon v. Condon,* 286 U. S. 73. The commissioners here were merely performing administrative duties on behalf of a political party.

IS PRIMARY SUCH PART OF ELECTION MACHINERY OF STATE THAT WOULD CONSTITUTE COMMISSIONERS OFFICERS OR EMPLOYEES OF STATE? MICHEL CASE DISCUSSED.

The *Michel* case, relied upon by appellant, was decided in 1908 during the early history of the operation of the primary law in this State. It was an attack upon many features of the Act, as it existed at that time.

One of the points raised was that the State had no right to appropriate any of its funds to defray the expenses of

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[8] For further argument on this point see Appellee's Or. Br., p. 22.

[9] Section 10. "The members of the State Central Committee, shall be elected at the first primary election held in the State in January, 1944, for the nomination of State and parish officers, and every four years thereafter. They shall serve without compensation, shall be elected for a period of four years, and shall serve until their successors are elected. **They shall never be considered as officers or employees of the State of Louisiana, or any of its subdivisions.**" (Emphasis supplied.)

the primary, but the Court in holding that it did have such a right, merely stated that the money appropriated was for a public purpose, as the primary was a part of the election machinery of the State. We understand that to mean that under the primary system the political party would have the right to have the name of the candidate nominated by it printed on the State ballot; that the State would recognize the party selected by the political party in printing its ballot; and to that limited extent it was part of the election machinery of the State. This is true in the Texas cases and all other cases which have come before this Court.[10] But, we do not understand that decision to abolish the general concept of the primary or the political party, for on Page 391 of that decision the Court definitely showed that it recognized the distinction which we are arguing here by using the following language:

> "It is of the very essence of a primary that none should have the right to participate in it but those who are in sympathy with the ideas of the political party by which it is being held. Otherwise the party holding the primary would be at the mercy of its enemies, who could participate for the sole purpose of its destruction, by capturing its machinery or foisting upon it obnoxious candidates or doctrines. It stands to reason that none but Democrats should have the right to participate in a Democratic primary and none but Republicans in a Republican primary. *A primary is nothing but a means of expressing party preference,* and it would cease to be that if by the admission of outsiders its result might be the very reverse of the party preference. If, therefore, there

[10] Grovey v. Townsend, 295 U. S. 45; Nixon v. Condon, 286 U. S. 73; Nixon v. Herndon, 273 U. S. 536.

> could not be a primary under our Constitution without the admission of outsiders, the consequence would be that under our Constitution such a thing as a primary would be impossible. The argument, therefore, that in a statute-regulated, or compulsory, primary the qualifications of voters cannot be other than as fixed by the Constitution for the general election, would lead to the conclusion that such a primary was a legal impossibility." (Italics supplied.)

and again on Page 393, the Court said further:

> "It is not true that it is by delegation from the Legislature that the state central committees hold the power of fixing the political qualifications of the voters at the primary. *They hold said power virtute officii, as being the governing bodies of the political parties. The Legislature has simply abstained from interference, leaving the power where it originally resided and naturally belongs.* And in so doing it has but obeyed the constitutional injunction to pass laws to secure the fairness of primaries. A primary wherein the governing body of the political body holding it could not determine the political qualification of those who are to have the right to participate in it would not only not be fair, but would be a legal monstrosity.
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> "In conclusion, and as a general commentary upon this statute, we will say that it has been adopted in the exercise of the police power of the state, and that the reader of it cannot but be impressed that its aim has not been to create conditions, or to confer rights or bestow benefits, or to take away rights, but simply to act upon and regulate existing conditions, with a view single to the public interest; that in nearly every state of the Union such a law has been adopted, and the assaults upon it have been repulsed everywhere,

> except in California alone; and that, finally, as expressed by Judge Parker (People v. Dem. Cen. Com., supra), the idea of such a law is 'to permit the voters to construct the organization from the bottom upwards, instead of from the top downwards,' and it would be strange indeed if the Constitution had made such a scheme impossible." (Italics supplied.)

If any other interpretation can be placed upon the holding in that case, we say that such is no longer the law of the State. The primary law, as well as the Constitution of the State has been changed many times since that case was decided. At present, Act 46 of 1940 clearly shows that the Legislature has recognized the independence of the political parties as being free from interference by any officer or employee of the State, and also specifically states that the members of the governing body should not be considered as officers or employees of the State or its subdivisions, and the courts, although not controlled, will always give great deference to the expressions of policy by the Legislature.

PERSON DEFEATED IN PRIMARY CAN BE ELECTED BY VOTERS IN GENERAL ELECTION.

Appellant argues that certain sections of the laws of Louisiana prevent a "write in" vote for a candidate defeated at a primary.[11]

This is incorrect. Appellant has fallen into this error because it relies on Act 160 of 1932, Sec. 1, which is no

[11] (Appellant's Br., pp. 19-22.)

longer in effect, but has been superseded by an amendment to the Constitution of the State found in Act 80 of 1934.

All of the Louisiana cases uniformly hold[12] that the voter cannot be deprived of his freedom of expressing his will at a general election by a restriction placed on the candidate by the Legislature, and that any prohibition against a candidate who was defeated at a primary, does not prevent his election at a general election, nor does it prevent the voter from voting for him at such election. The Constitution of the State protects the voters' rights in this respect.

It is argued that the later provision in Act 160 of 1932[13] was a method devised by the Legislature to prevent the voters from exercising their constitutional right to elect a defeated party candidate by writing his name in on the ballot at the general election.

That was not the reason for the enactment. It was passed to prevent a situation, such as recently occurred, wherein a candidate died the day before the general election, and a person attempted to claim the election by having a number of his friends write in his name at the last minute. It was to give interested parties notice that a contest was to be expected. It was also passed to avoid the necessity of a general election and the expense entailed when in fact the nominee of the party had no opposition.

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[12] Lacombe v. Laborde, 132 La. 435; Seal v. Knight, 10 La. Ap. 563; Payne v. Gentry, 149 La. 707.

[13] No longer in effect.

In Sec. 15 of Art. VIII, as amended by Act 80 of 1934,[13a] no provision is made in the fundamental law which would deprive the voters of electing a person who was defeated at a primary by writing in his name.

On the contrary, that enactment specifically guarantees to the voters the privilege of writing in the names of the candidates on the ballot, and the construction placed upon Sec. 87 of Act 46 of 1940 by the appellant as depriving the voters of this right would render that section of the act unconstitutional.

The aforesaid constitutional article, as amended, clearly so implies. It provides, at least by implication, that a candidate defeated in a primary can be voted for under the condition that he file a statement with the proper authority 10 days before the general election that he is willing and consents to be voted on for that office.

That is a constitutional amendment, voted upon by the people of the State, and there is nothing in it to justify the conclusion that the people have deprived themselves of the right they always enjoyed to vote for any person who was willing to be voted for, by writing his name on the ballot. If the framers of that constitutional amendment intended to deprive the voters of their long recognized right to vote for any candidate who desired their vote, that amendment would have so stated in clear and unmistakable language. If it had so provided, the people would no doubt have defeated it. Any restrictions found in the law is against the candidate, and not the voter,

[13a] See Appendix, p. 28.

as there is no law in Louisiana which says that a defeated candidate at a primary cannot file a statement signifying his willingness for the voters to vote for him. Such a construction on that act would be in accordance with the policy of the Courts to allow complete freedom to the voters to select the candidate of their choice, and will so remain until the people decide to change the Constitution of the State of Louisiana.

The highest Court of Louisiana has spoken on that subject,[13b] and its finding is entitled to great weight in deciding the policy of the law of the State, as follows:

> "The inhibition placed upon the candidacy at the general election of one who has been defeated in a primary, however does not prevent the voter from voting for the candidate defeated in the primary. The law allows to the voter the right to vote for whom he chooses, and this right cannot be denied him merely because the one for whom he votes is prohibited from being an avowed or official candidate. The intent of the law is to allow the voters the greatest freedom in the expression of his will, and this freedom is not to be interfered with by the Court, in the absence of a clear and unambiguous expression by the lawmaking power of an intent to limit, or restrict within certain bounds, the exercise by the voter of this freedom of choice."

CAN PROVISIONS OF FOURTEENTH AMENDMENT BE INVOKED IN BRIEF WHERE IT FORMS NO PART OF RECORD?

For the first time in the proceedings in this case, appellant invokes the provisions of the 14th Amendment;

[13b] Lacombe v. Laborde, 132 La. 435.

and argues that voters in the primary election were denied the equal protection of the laws by state officers who refuse to count their votes as cast, and counted them in favor of an opposing candidate in violation of the equal protection clause of the 14th Amendment.

This point was never presented to nor passed upon, nor argued in the District Court, (see opinion R. 18-22); it was not specifically raised in the assignment of errors filed in this Court (R. 24); the statement of jurisdiction filed in this Court in compliance with Rule 12, as amended, relied exclusively on the incorrectness of the *Newberry* case.[14] No issue in connection with the 14th Amendment is stated in the jurisdictional statement. It therefore, appears that this question is not properly before this Court.

INDICTMENT FAILS TO CHARGE VIOLATION OF FOURTEENTH AMENDMENT.

Besides, as we read the indictment, it appears that Count 2 would be insufficient to charge defendants with depriving any citizen of the equal protection of the laws under the 14th Amendment. The indictment is drawn exclusively to cover such protection as would be afforded under Section 4 of Article I, of the Constitution. It charges that defendants wilfully subjected registered voters to the deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States, and then

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

it proceeds to particularize the rights, as follows: Their right to cast their vote for the candidate of their choice, and to have their votes counted for such candidates, as cast. That allegation could only cover such rights as the voters had under Section 4 of Article 1, giving Congress the right to regulate elections. Nowhere in the indictment is it charged by the Grand Jury that the defendants deprived any person of their rights to the equal protection of the laws.

DEFENDANTS ENTITLED TO BE INFORMED OF NATURE AND CAUSE OF ACCUSATION.

To permit the appellant to indict defendants for depriving voters of rights under the Constitution, to-wit: their right to cast their vote for the candidate of their choice and to have their votes counted for such candidates, as cast, (which would be a right which the courts have held is derived from Section 4 of Article I of the Constitution), and then for the first time to contend in an appellate court that such an indictment can be sustained on the theory that the deprivation was not what was alleged, but something different, that is to say, the deprivation of a right under the Constitution, to-wit, the equal protection of the law; would be to deprive these defendants of their rights under Amendment 6 to be informed of the nature and cause of the accusation.[15]

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[15] Amendment 6 of the Constitution provides:
"In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation."

Appellant anticipating this objection, and realizing its force answers it.[16]

In the first place the District Court did not err on this point at all for the point was not even mentioned in that Court.

In the second place, this Court has uniformly held that it is not sufficient to plead the offense in the language of the statute. The necessity is emphasized here when the language of the statute under which the offense is charged is so sweeping that it is capable of embracing innumerable rights, privileges, immunities and acts.

On this subject we believe we need only refer the Court to its holding in the celebrated *Cruikshank* case[17] which has been consistently followed as the law on this point, particularly to that part wherein this Court said,

> "These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, all and singular' the rights granted them by the Constitution, etc. The language is broad enough to cover all."
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> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must

[16] Br., p. 30 thus:

> "It is of no consequence that the indictment does not count in terms upon the 14th Amendment and at 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."

[17] U. S. v. Cruikshank, 92 U. S. 542, 557.

set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged:' and in U. S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of the offense whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition: but it must state the species: it must descend to particulars'."

SECTION 20 C. C. WAS ENACTED TO ENFORCE THE ELECTIVE FRANCHISE, AND NOT THE FOURTEENTH AMENDMENT AND DOES NOT EMBRACE RIGHTS PROTECTED BY FOURTEENTH AMENDMENT.

Appellant bases its argument on the statement that Section 20 of the Criminal Code was originally enacted to enforce the 14th Amendment. The genesis of that Section is set forth in the *Gradwell* case.[18]

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[18] U. S. v. Gradwell, 243 U. S. 476:

"* * * in 1870 * * * a comprehensive system for dealing with congressional elections was enacted. This system was comprised in Sec. 19-22 of the Act app. 5/31/79 (16 Stat. at L., p. 144, c. 114) in Sec. 5 and 6 of the Act app. 7/14/70 (16 Stat. at L., p. 254, c. 254) and in the act supplementing these acts, app. 6/10/72 (17 Stat. at L., pp. 347-349, c. 415.)"

"These laws provided extensive regulations for the conduct of congressional elections. * * *"

"These laws were carried into the revision of the United States statutes of 1873-74, under the title, 'Crimes Against the Elective Franchise and Civil Rights of Citizens, R. S. Sec. 5506 to 5532 inclusive.'

"It is a matter of general as of legal history that Congress, after 24 years of experience, returned to its former attitude toward such elections, and repealed all of these laws. * * * (Act app. 2/8/94 (29 Stat. at L. p. 36 c. 25) Comp. Stat. 1913, Sec. 1015). **This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the 8 sections of Chapter 3 of the Criminal Code Sections 19 to 26, inclusive, which have not been added to or substantially modified during the 23 years which have since eslapsed.** (Emphasis supplied.)

It is therefore plain that Section 20 was not enacted for the purpose of enforcing the 14th Amendment, but was enacted to protect the elective franchise and particularly to enforce the 15th Amendment. Appellant contends that the point was settled *sub-silentio* in *Guinn v. U. S.*, 238 U. S. 347, 368; if it was so settled, it is not apposite as the case involved the 15th Amendment.

CRIMINAL STATUTES ARE STRICTLY CONSTRUED: INTENT OF CONGRESS IN PASSING SEC. 20 CRIMINAL CODE.

It is well settled that the only crimes against the United States are those which are statutory, and that statutes creating crimes do not extend to cases not covered by the words used. The Supreme Court of the United States has repeatedly laid down that doctrine.[19]

Congress never intended to include within the sweeping terms of the language of Section 20, the myriad of rights that are protected generally under the broad clauses of the 14th Amendment. To place the construction on

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[19] "There are no common law crimes against the United States."—U. S. v. Eaton, 144 U. S. 677.

"Regards must ALWAYS be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown PLAINLY AND UNMISTAKABLY constitute an offense within the meaning of an Act of Congress."—Bonnelley v. U. S., 276 U. S. 505; Fasulo v. U. S., 272 U. S. 620.

"Statutes creating crimes are to be STRICTLY construed in favor of the accused; they may not be held to extend to cases not covered by the words used."—U. S. v. Resnick, et als., 299 U. S. 207; U. S. v. Wiltberger, 5 Wheat. 76, 95.

"Before one may be punished, it must appear that his case is PLAINLY within the statute; there are no CONSTRUCTIVE offenses."—U. S. v. Lacher, 134 U. S. 624; U. S. v. Chase, 135 U. S. 255."

Sec. 20 contended for here would convert the Federal Court into a veritable police Court, for the activities falling within the scope of the 14th Amendment are so varied that it is not conceivable that Congress intended to include within the general terms of Section 20, all of the rights within the 14th Amendment.

On the contrary, it intended to make only such specific acts that contravened the provisions of the 14th Amendment a violation of the criminal laws of the United States that were specifically denounced in a congressional enactment, the other acts being relegated to the protection of the civil courts. This has been so since the time of the enactment of the 14th Amendment.

CONGRESS PASSES SPECIFIC ACTS TO PUNISH CERTAIN VIOLATIONS OF RIGHTS PROTECTED BY 14TH AMENDMENT.

Section 5 of the 14th Amendment provides that:

> "The Congress shall have power to enforce, by appropriate legislation the provisions of this Article."

Many instances could be cited to show that Congress did not believe that Section 20 applied to all of the rights protected by the 14th Amendment, for whenever it desired to punish acts violating the terms of the equal protection of the law clause, it passed special legislation denouncing the *particular activities* which deprived the person or class of persons of the equal protection of the laws.

There are many such laws.[20]

This Court recognized this fact in *Ex parte Comm. of Va.*, 100 U. S. 313, 317, and stated,

> "Congress, by virtue of the 5th Sec. of the 14th Amend. may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. *The mode of enforcement is left to its dicretion.*" (Italics supplied.)

An examination of the various Congressional enactments discussed in the Civil Rights Cases, *supra,* will disclose that in each instance Congress deemed it necessary to pass specific enactments denouncing these specific activities under the equal protection of the laws clause that it wished to make criminal, and to fix the penalty commensurate with the nature of the activity. Sec. 20 provides a penitentiary sentence, but only a fine is provided for the kind of activity under the statute passed upon in *Ex parte Va.*

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[20] Sec. 5519 read:

"If two or more persons in any State or Territory conspire to go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory, the equal protection of the laws, each of such persons shall be punished, etc."

See also the various enactments passed upon in the Civil Rights Cases, 109 U. S. 3.

See also the statute on which the prosecution in Ex parte Virginia was based, 100 U. S. 339, which sec. read:

"That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall on conviction thereof, be deemed guilty of a misdemeanor."

supra. This would not have been necessary if Section 20 had the sweeping effect contended for here. It is true that those laws were declared unconstitutional, as being directed at the individual rather than the State, still Congress enacted them under the power that they deemed they had under the 14th Amendment.

5TH AND 6TH AMENDMENTS REQUIRE ASCERTAINABLE STANDARD TO BE FIXED BY CONGRESS, RATHER THAN COURTS AND JURIES.

Under the familiar principle of law that criminal statutes must be so specific that any person reading them would be able to tell whether or not a particular activity would violate a criminal law, it could not be possible that Congress intended that Section 20 should be applied to the thousands of matters and things both grave and minor, embraced within the sweeping terms of the 14th Amendment. Any such construction as contended for here would render Sec. 20 unconstitutional as being too indefinite,[21] and this Court will not give such a construction to a statute as to render it unconstitutional when another reasonable construction can be placed thereon.

To state a *reductio ad absurdum* let us take the very case cited by appellant, for example, the *Iowa-Des Moines*

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[21] Congress, in attempting as it did in the Lever Act of 8/10/17, Sec. 4 (40 Stat. 276) as renacted in the act of 10/22/19, 2 c. 80 (41 Stat. 297) to punish criminally any person who wilfully made 'Any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", violated the 5th and 6th Amendments, which require an ascertainable standard of guilt, fixed by Congress, rather than by Courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. U. S. v. L. Cohen Gro. Co., 255 U. S. 81.

Bank v. Bennett case, 284 U. S. 239, where the tax collector discriminated against a foreign corporation in favor of a domestic corporation in collecting taxes. If the discrimination had been a few dollars, those tax collectors would have to go to jail for if appellant's argument holds true here, then it should equally apply to that case.

Sec. 20 would likewise apply to such discriminations by State employees as resulted from the following activities to mention but a few; regulating railroad rates, all relations of employer and employee, all regulations relating to pursuit of occupations such as the practice of professions, etc., all cases arising under condemnation proceedings, all of the various cases whereby the state discriminates in classifications such as taxation, all would be covered by Section 20, and in general, in all matters where the state or its officers or employees exercise the police power of the state in a manner which may be found ultimately to deprive citizens of the equal protection of the law in petty matters as well as in matters of great importance, and the innumerable matters that would arise under that heading, such as zoning regulations, blue-sky regulations, regulations of bill-boards, regulating sales of various merchandise, etc.

It is clear that whenever Congress intended any of such matters to be cognizable under the federal criminal laws, it has passed a definitive statute setting forth the particular activity under the due process of law clause which it intends to make criminal, pursuant to the authority it has under Section 5 of the 14th Amendment.

CASES CITED BY APPELLANT DISCUSSED.

The cases cited by appellant (Br. p. 37) do not set forth any contrary doctrine than that argued here. The cases are all civil cases, with the exception of *Ex parte Virginia* and that case was based on a statute specifically denouncing the act which deprived negroes of the equal protection of the laws when State Officers discriminated against them, and the case illustrates our point.

We do not contend, as was the case in *Ex parte Va.*, that Congress lacks power to pass criminal statutes to enforce the equal protection of the law clause. We say that Congress has not done so, and did not so intend when it passed Sec. 20.

It will be noted that in all of the cases relied upon by appellant [22] there is a direct and intimate connection with the acts resulting in the discriminating against the citizen and the state government, not a fictitious or theoretical one, but a real and systematic connection with the act of the official and the state.

In the *Iowa-Des Moines Nat. Bk.* case, the state insisted on retaining the discriminatory tax, and was sustained by the highest Court in the State; in the *Missouri ex rel. Gaines* case, the curators in refusing the negro admission to the State-operated law school were sustained by the highest Court of the State; in the *Mosher* case and the *C. B. & Q. R. R.* case private property was illegally taken for a subdivision of the state.

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[22] Iowa-Des Moines Bk. vs. Bennett, 284 U. S. 239; Missouri Ex rel Gaines v. Canada, 305 U. S. 337; Mosher v. City of Phoenix, 287 U. S. 29; C. B. & Q. R. R. v. City of Chicago, 166 U. S. 226.

But in this case there is no connection between the state and the election commissioners, even if the court did find them theoretically to be state officers, any more than if they had been charged with stealing the voters' money instead of their ballots because the connection of the actions of the state and the commissioners is too remote, for as was said by this court in *Grovey v. Townsend,* 295 U. S. 45:

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

14TH AMENDMENT EMBRACES ALL CIVIL RIGHTS THAT MEN HAVE: THOSE THAT CONGRESS DESIRED TO PUNISH CRIMINALLY WOULD HAVE TO BE SET FORTH IN CODE OF LAWS.

When the 5th Sec. of the 14th Amendment was proposed in Congress, a clause was offered reading thus:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens

> of each state all the privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property."

That, of course, was not adopted, but if it had been, Congress would have then had the power to adopt affirmative legislation, and to make a code of regulations such as it has power to make original laws touching commerce. That code of laws could have extended to the original power embracing all of the rights of the citizen covering immunities, privileges, life, liberty, property and equality.[23]

Here appellants in effect contend that Congress intended Sec. 20 C. C. to accomplish objects and purposes that could only be accomplished by a code of laws covering all of the civil rights of man.

Congress can only, by proper legislation, render harmless hostile legislation or actions of states, or perhaps punish the agents of the State for enumerated and defined acts, which acts would have to be so enumerated and defined because the 14th Amendment covers all of the civil rights that men have.

Where Congress has not merely prohibitory power, but affirmative, original power given up to it by the states, such as to regulate commerce, coin money, carry mail, lay tariff, it is different; it is vested with power of general legislation on those subjects;[24] and it is to one of the rights which Congress has affirmative, original power to enact

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[23] See, Bannon, "The Fourteenth Amendment," pp. 459, 461.
[24] Bannon, "The Fourteenth Amendment, p. 462.

general laws, as contradistinguished from the 14th Amendment, which covers prohibitory power, that Sec. 20 appears to apply.

In passing on the nature of the legislation that Congress can provide under the 14th Amendment, this Court has said:[25]

> *"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property,* defining them and providing for their vindication. *That would be to establish a code of municipal law regulative of all private rights between man and man in society.* It would be to make Congress take the place of state legislatures, and supersede them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore enact due process of law in every case; and that because denial by a state to any person of the equal protection of the law is prohibited, therefore Congress may establish laws for their equal protection. *In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation,* this is, such as may be necessary for counteracting such laws as states may adopt, and which, by the amendment, they are prohibited from making, or *such acts or proceedings as the state may commit or take, and which, by the amendment, they are prohibited from committing or taking."* (Italics supplied.)

[25] The Civil Rights Cases, 109 U. S. 3.

When the court said "such acts" it undoubtedly contemplated that Congress would define "such acts" as it intended to punish criminally.

It seems clear from the language of that case that Sec. 20 could have no application to the rights protected by the 14th Amendment for Sec. 20 is all inclusive in scope, and would run counter to just what this Court said could not be done, i. e., "such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property." That section is general legislation, and it is said in the aforesaid opinion, "the legislation which Congress is authorized to adopt in this behalf is not general legislation."

Of course, Congress may under the amendment, provide legislation in advance to meet the exigency when it arises, but when it does so it should specify and define the acts of the states and its agents which are to be criminal cases, all in the manner set forth in the opinion in The Civil Rights cases aforesaid.

CONCLUSION.

With respect to the other points involved in this case, we submit the matter upon what is said in our principal brief.

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

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

APPENDIX.

I.

Commissioners Selected Pursuant to Act 46 of 1940, Sec. 61.

Appellant errs when it states in note 2, p. 56 of its brief that the selection of commsisioners at the election involved in this case must have been under sections 2675 and 2678 of La. Gen. Stat. Ann. (Dart, 1939).

Those sections have been entirely superseded by Act 46 of 1940. Although a change in the personnel of the old Parish Committee does not take place until January, 1944, Sec. 19 of Act 46 of 1940 recognizes and continues the old committee in office until the January, 1944 election, but the committee is governed by Act 46 of 1940, and the commissioners of election involved in this case were selected pursuant to Act 46 of 1940, there being no warrant for the assumption that the provisions of Act 46 of 1940 are not operative until January, 1944.

II.

Commissioners Not Paid By State Treasury.

Appellant is incorrect in stating (B. p. 57) that the commissioners receive from the state treasury three dollars for each day's active service, citing Section 2675.

That section has been superseded by Secs. 35 and 61 of Act 46 of 1940, which provides that the municipality shall pay the commissioners. The payment does not come from the State Treasury.

III.

Art. 8, Sec. 15 of Constitution as Amended by Act 80 of 1934.

"The Legislature shall provide some plan by which the voters may prepare their ballots in secrecy at the polls. This section shall not be construed so as to prevent the names of independent candidates from being printed on the ballots with a device; *and names of candidates may be written on the ballot.* These provisions shall not apply to elections for the imposition of special taxes, for which the Legislature shall provide special laws.

"Provided that no person whose name is not authorized to be printed on the official ballot, *as the nominee of a political party* or as an independent candidate, shall be considered a candidate for any office unless he shall have filed with the Clerks of the District Court of the Parish or parishes in which such election is to be held, or the Clerk of the Civil District Court of the Parish of Orleans if he be a resident of the Parish of Orleans, at least ten (10) days before the general election, a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office, and provided further that no commissioners of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner." (Italics supplied.)