

# Michigan Law Review

---

Volume 3 | Issue 5

---

1905

## Constitutional Limitations on Primary Election Legislation

Floyd R. Mechem

*The University of Chicago*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Floyd R. Mechem, *Constitutional Limitations on Primary Election Legislation*, 3 MICH. L. REV. 364 (1905).

Available at: <https://repository.law.umich.edu/mlr/vol3/iss5/4>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## CONSTITUTIONAL LIMITATIONS ON PRIMARY ELECTION LEGISLATION\*

IN determining what aspect of the general question I should discuss in the brief time available, it seemed to me desirable that I should confine my attention to the constitutional aspect of the matter, leaving the discussion of the practical workings of the various laws actually enacted to those who have had more opportunity to observe them. The constitutional side of the matter has already been very ably discussed by Professor Tuttle in *MICHIGAN LAW REVIEW*,<sup>1</sup> and I do not hope to add materially to what is there said, though certain of the questions may be approached in a somewhat different way.

In dealing with this constitutional aspect it is necessary to observe at the outset, that with very few exceptions, our constitutions are entirely silent upon the question of conventions, caucuses, and nominations. The whole question is so new that most of the existing constitutions, like that of Michigan, which went into effect in 1851, were enacted before the present interest in the matter had arisen. Under these circumstances, then, in most States, if any constitutional limitations exist they must be deduced from provisions of the constitution directed more immediately to other matters.

In California, however, since this question first arose, so many constitutional difficulties were found to be in the way of desired legislation<sup>2</sup> that the constitution has been amended so as to confer

---

\*A paper read before the Michigan Political Science Association, on February 10, 1905. This meeting of the Association was devoted entirely to the consideration of the various aspects of primary election legislation.

<sup>1</sup> *MICHIGAN LAW REVIEW*, 466.

<sup>2</sup> See *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659; *Britton v. Board of Commissioners*, 129 Cal. 337, 61 Pac. 1115; *Marsh v. Hanly*, 111 Cal. 368.

the power to legislate upon the subject in quite a radical way.<sup>3</sup> In a few other States, as, for example, in Mississippi, recent constitutional provisions have enjoined upon the legislature in a general way the duty to "enact laws to secure fairness in party primary elections, conventions and other methods of naming party candidates."

Where no such express constitutional provisions are found, the questions arising must usually be determined by reference to the general provisions respecting the right to vote and the power of the legislature to make regulations to protect or enforce it.

The right to vote under our political system is not a natural or inherent one, but must be conferred and regulated by the constitutions of the States. Since the federal government has no distinct body of voters of its own, the whole matter must be controlled by the State constitutions, and since it is a general rule of constitutional interpretation that an enumeration of the required qualifications by the constitution is a prohibition upon the requirement of any others, it necessarily follows that whatever the State constitutions provide must usually be both exclusive and conclusive of the whole matter and that the legislature can neither add to nor subtract from the provision so made.

Now, the actual provisions in most of the State constitutions are not very extensive. They consist usually of a specific declaration as to who shall be entitled to vote and of such general declarations as that all elections shall be free and equal, that no religious or political tests shall be imposed, that voting shall be by ballot, and that the legislature may pass laws to protect the purity of the ballot and to secure the free exercise of the elective franchise. In some of the

---

<sup>3</sup> Art. II, Sec. 2½—"The Legislature shall have the power to enact laws relative to the election of delegates to conventions of all political parties at elections known and designated as primary elections. Also to determine the tests and conditions upon which electors, political parties, or organizations of voters may participate in any such primary election, which tests or conditions may be different from the tests and conditions required and permitted at other elections authorized by law, or the Legislature may delegate the power to determine such tests or conditions, at primary elections, to the various political parties participating therein. It shall also be lawful for the Legislature to prescribe that any such primary election law shall be obligatory and mandatory in any city, or any city and county, or in any county, or in any political subdivision, of a designated population, and that such law shall be optional in any city, city and county, county, or political subdivision of a lesser population, and for such purpose such law may declare the population of any city, city and county, county, or political subdivision, and may also provide what, if any, compensation primary election officers in defined places or political subdivisions may receive, without making compensation either general or uniform."

States there are also express provisions authorizing the enactment of laws to secure the registration of voters.<sup>4</sup>

Under provisions of this nature it is everywhere held that the legislature has no power to enact any law by which the right of the citizen to vote or to hold office, as so conferred by the constitution, shall be in any way denied or substantially qualified or restricted. At the same time it is also everywhere held that the legislature has implied power to enact reasonable regulations for the purpose of protecting, and securing the peaceable and orderly exercise of, the constitutional rights conferred. This question has frequently arisen in respect to the right of the legislature to enact registration laws, and it has practically everywhere been held that, even in the absence of express constitutional authority, the legislature has the implied power to enact fair and reasonable regulations not materially infringing upon the voter's constitutional right. The same question has also arisen many times under the recent Australian ballot laws, and the power to require an official ballot and to regulate its use has been sustained as a measure designed to promote and protect the voter's right, wherever it appeared that under the guise of regulation his right has not been substantially impaired.<sup>5</sup>

---

<sup>4</sup> The most important of these provisions are here summarised:

Voting shall be by ballot in Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

The following States *require* registration: Delaware, Florida, Georgia, Louisiana, Maryland, Mississippi, Nevada, North Carolina, Virginia, Wyoming.

In Kentucky, Missouri, Texas, and Washington, registration is *required* in towns and counties having more than a specified population.

Alabama *permits* the passing of registration laws; Kentucky and Missouri *permit* it in counties where it is not required.

The constitutions *require* that elections shall be free and equal in: Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming.

In Alabama, Colorado, Delaware, Florida, Mississippi, Texas, West Virginia, and Wyoming, laws are *required* for preserving the purity of elections, and Michigan *permits* such laws.

<sup>5</sup> Thus in Independence Party Nomination, — Pa. St. —, 57 Atl. Rep. 344, it is said by Mitchell, C. J.: "The Constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right, and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors. The Constitution itself regulates the times, and, in a general way, the method, to wit, by ballot, with certain specified directions as to receiving and recording it. Beyond this the Legislature has the power to regulate the details of place, time, manner, etc., in the general interest, for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained on this ground alone. *DeWalt v. Bartley*, 146

It is in view of these general constitutional provisions and the rule for interpreting the legislative power already referred to, that the question of the enactment of laws governing the nomination of candidates for political office must be considered.

Where the number of voters is small and the issues simple it is conceivable that the voters may go to the polls and vote without any previous conference or agreement as to the men or measures to be supported. Such action is likely to result in much scattering of energy and in many ill considered consequences. There is therefore great practical necessity for coöperation and previous conference as to how the franchise may be most advantageously exercised, and this leads naturally to the previous suggestion of the men and measures to be supported or to the making of nominations and the adoption of platforms.

Nomination, as its name implies, is the naming or suggesting of some person as a candidate for office. It may be done by the candidate himself or by others. As a fact, in our political system, it has come to mean usually the naming of a candidate by caucus or convention of persons belonging to a political party, under an express or implied understanding that a majority of those present shall determine the selection, and a general understanding also that all members of the party will at the polls support the candidate nominated by the caucus or convention.

These "understandings" that the majority shall control the nomination and that the party will support the nominee are the essence of the system. Under such a system the nomination by a dominant party is practically equivalent to an election, the function of the voters becoming little more than a mere ratification of the selection by the convention.

Now, the constitutional right to vote involves not merely the right to vote for or against a suggested individual or measure—it involves also the right to propose men or measures, at least so far as the voter's own action is concerned. It is not merely a right to vote for or against the person or plan of some other person's choice, but it involves the right in the voter to take the initiative and to vote for the men and measures of his own choice.

It is therefore true, as has often been pointed out, that the right

---

Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814. Anything beyond this is not regulation, but unconstitutional restriction. It is never to be overlooked, therefore, that the requirement of the use of an official ballot is a questionable exercise of legislative power, and, even in the most favorable view, treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector."

to vote necessarily involves the right to nominate,<sup>6</sup> and that the right to nominate is an essential and inseparable part of the right to vote. The right to nominate therefore becomes a constitutional right, and any law which denies to the voter the right to determine for whom he shall vote must be void.

If the voter's constitutional right thus includes the right of initiative, it must also be true that he may exercise it either independently or in cooperation with others. He may stand aloof from parties or may unite with others of like mind to form a party at his pleasure. He may not force himself into an existing party without its consent, nor, on the other hand, can he be forced into a party without his own consent. The voter has not only the right to act on his own account, but he certainly may confer with other voters as to the ends to be accomplished.

Under the Constitution of the United States and the constitutions of practically all of the States, the right of the people to assemble and consult is expressly guaranteed. There is, it is true, as has been pointed out by my colleague, Dr. Freund, in his able book upon the "Police Power,"<sup>7</sup> no express declaration in our constitutions of a right of association; but notwithstanding this, it is, I believe, entirely safe to say that the right of the people to associate for lawful social, business or political purposes, subject to the general supervision of the State under its police power, is a constitutional right fairly to be deduced from the rights of assembly and liberty of action which our constitutions confer. Our whole system recognizes that voters will act in groups, and while parties are not expressly provided for, the fact that the majorities are to control clearly presupposes the division of the people into groups or parties. Concerted action and assembly to consult naturally give rise to parties.

The State cannot prescribe political views to any individual or group of individuals. Neither can the State, in general, impose any political test either to individuals or to groups of individuals. Freedom of political action is everywhere assured, and the exercise of political privileges cannot be made subject to discriminating laws, or to any political creed or party affiliation.<sup>8</sup>

If this right of the people to cooperate and associate for political purposes is a constitutional privilege, then certain other privileges

---

<sup>6</sup> See *De Walt v. Bartley*, 146 Pa. 543, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

<sup>7</sup> Freund on Police Power, §§ 481-484.

<sup>8</sup> 79 Va. 196, 52 Am. Rep. 626.

<sup>8</sup> See *Attorney General v. Common Council*, 58 Mich. 213, 55 Am. Rep. 675; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Baltimore v. the State*, 15 Md. 376; *Brown v. Haywood*, 4 Heisk. 357; *Evansville v. the State*, 118 Ind. 426; *Louthan v. Commonwealth*,

must be incident to it. If there are any such incidental rights, the right of existence must be paramount, including therein the right to maintain that existence. If such an existence is to be maintained, the right of membership must be voluntary, the associates must have the right to prescribe the tests for association with them and must be able to exclude those who are hostile to their own views and purposes. In the language of the Supreme Court of California, in *Britton v. Board of Commissioners*,<sup>9</sup> "the right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said, 'self preservation is an inherent right of political parties as well as of individuals.'<sup>10</sup> A law which will destroy such party organization or permit it fraudulently to pass into the hands of its political enemies cannot be upheld." For similar reasons the determination of all questions relating simply to party aims, principles, or policies must be left to the parties themselves to determine.<sup>11</sup>

But even though we concede to the utmost extent the right of parties to exist and coöperate for political purposes, does it necessarily follow that the State is bound to recognize the party as such in devising the machinery for nominations or elections? In my judgment, that question must be answered in the negative.

The right to associate is one thing, the right to vote is another and entirely different thing. The right to vote is an individual right; it is not given to parties. Association for political purposes necessarily leads to partisan association. The right to vote is entirely non-partisan.

It is entirely possible for the State to accomplish all the ends designed to be secured by the elective franchise without recognizing in any way the existence of a political party or a partisan organization. It is not at all essential to the exercise of the right to vote that party names or party emblems shall appear upon a ballot.

<sup>9</sup> 129 Cal. 337.

<sup>10</sup> *Whipple v. Broad*, 25 Colo. 407.

<sup>11</sup> The interesting question, much discussed of late, as to the power of the courts to determine controversies arising within the party over the regularity of proceedings, the right to use party names and emblems, the recognition of rival factions, and the like, instead of leaving them solely to the arbitrament of the party tribunals, is not within the scope of this paper. Some of the more important recent causes involving it, are: *State v. Houser*, — Wis. —, 100 N. W. Rep. 964; *State v. Metcalf*, — S. Dak. —, 100 N. W. Rep. 923; *State v. Larson*, — N. Dak. —, 101 N. W. Rep. 315; *Allen v. Burrow*, — Kan. —, 77 Pac. Rep. 555 (where many other cases are collected); *Beasley v. Adams*, — Ky. —, 82 S. W. Rep. 249; *State v. Weston*, 27 Mont. 185, 70 Pac. Rep. 519; *People v. District Court*, — Colo. —, 74 Pac. Rep. 896; *Rose v. Bennett*, 25 R. I. 405, 56 Atl. 185; *Stephenson v. Election Commissioners*, 118 Mich. 396, 42 L. R. A. 214; *Phillips v. Gallagher*, 73 Minn. 528, 42 L. R. A. 222.

Where the voters are left free to prepare their own ballots, the State need not concern itself with the question whether the voters are grouped into political parties or not. It is only when the State undertakes to prepare the ballot and make its use alone mandatory, that official recognition of political groups or parties becomes necessary. In some way now the names which are to appear upon the ballot must be suggested; practical convenience demands that similarity of desire in this respect of large groups of voters shall be recognized; and while it is not at all essential even now that party names or emblems be recognized, the recognition of the fact of more or less organized groups becomes practically indispensable.

Party names and party emblems are, however, exceedingly important. They appeal to the sentiment of some; they aid the recollection of others; and they guide the course of those whose mental infirmities are such that vision must come to the aid of other faculties for discernment.

Even, however, if political parties are not indispensable; even if they have no constitutional right to recognition as such at the polls, the fact of their existence and potency among us is one which cannot be ignored or disregarded. They dominate the legislatures which are to enact primary legislation; they have strong hold upon the judges who are to construe the laws so made; and more than all their existence, their principles and their methods have become an inherent and permanent factor in our national life.

Every measure thus far proposed for primary legislation has taken the existence of the parties into account in greater or less degree. And while to some extent non-partisan elections may be realized under local conditions, it is, in my judgment, idle to believe that any of us will live to see any marked decadence of the power of political organization among us.

Our problem then becomes this: Conceding the right of parties to exist; denying, as I think we may, however, their constitutional right to be recognized as such in framing the machinery for nominating and voting; but conceding also that they are even in this field exceedingly active if not dominant, how far may the legislature go in framing rules to regulate primary elections without infringing either the constitutional right of the individual voter, or the constitutional rights of groups of voters.

I. In the first place it may be noticed that parties would, for example, be subject to police regulation. All individual action is so subject, and the united action of many individuals may make it all the more necessary. Thus tumultuous meetings may be dis-



persed, and revolutionary or incendiary associations may be suppressed, without interfering with any constitutional right.

So regulations designed to protect and preserve the constitutional rights are unobjectionable so long as they do not really amount to a substantial and unreasonable interference with or denial of the right. It is upon this ground that registration laws are sustained.

If, in pursuance of a design to regulate, the State should undertake to provide a general scheme for making nominations, there are many things that could certainly be done without interfering with constitutional privileges. Regulations designed to suppress disorder, prevent fraud or intimidation, to facilitate the determination of the result, to secure proper evidence of the result, and the like, could be objected to by no one. Regulations designed to protect party organization, to protect their names, symbols, etc., are also unobjectionable.<sup>12</sup>

II. The State may also require that all nominations shall be made under official regulation, and decline to recognize nominations made by the methods adopted by the parties or by individuals, so long as reasonably convenient and available opportunities are afforded to all.<sup>13</sup>

This is, of course, the crux of the whole matter. But if we deny the power of the State in this regard, we must do so either because it infringes upon the right of the individual voter or of the party. So far as the individual voter is concerned, nothing more is involved here than has frequently been sustained in the way of registration and official ballots; while so far as the party is concerned, if we are right in holding that any constitutional right of association goes no further than to secure freedom of conference, assembly, advice and suggestion, then no constitutional right of the party is denied.

Under such official regulations, as is pointed out by the Supreme Court of Oregon,<sup>14</sup> "the right of the adherents of the respective parties to assemble and consult together for their common good is in no way infringed upon, and they may still advocate and promulgate political doctrines and principles without restriction, so that it is done in a peaceable manner, and does not tend to moral obliquity, the infraction of the law, or the destruction of the government itself."

<sup>12</sup> See *Davidson v. Hanson*, 87 Minn. 211, 92 N. W. Rep. 93.

<sup>13</sup> *Ladd v. Holmes*, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457; *Commonwealth v. Rogers*, 181 Mass. 184, 63 N. E. Rep. 423; *Hopper v. Stack*, — N. J. L. —, 56 Atl. Rep. 1; *People v. Democratic Committee*, 164 N. Y. 335, 58 N. E. Rep. 124, 51 L. R. A. 674; *State v. Jensen*, 86 Minn. 19; *Primary Election Case*, 80 Miss. 617, 32 So. Rep. 286.

<sup>14</sup> *Ladd v. Holmes*, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

The same idea was declared by the court in Mississippi: "Conventions, if necessary for the declaration of party principles, may be called and held, but they cannot be used, under our present law, for the making of party nominations for office."<sup>15</sup>

III. Such regulations make necessary the definition and the classification of parties. What shall constitute a "party"? How many voters must it include? Are all to be treated alike? With respect of these questions, there is room for difference of opinion, if not more.

Classification is not necessarily discrimination, though it may easily lead to that. So long as classification is based upon real differences, it injures no one. It simply follows where nature leads. But classification based upon artificial and arbitrary distinctions is unjust, and if it be made the ground for exclusion from legal privileges, it is illegal and unenforceable.

Most of the proposed primary election laws have made distinctions based upon numbers. Are such distinctions valid? In *Britton v. Board of Commissioners*<sup>16</sup> the question was very fully discussed, and the court emphatically denied that distinctions in this respect may be based upon mere numbers. In *State v. Jensen*,<sup>17</sup> on the other hand, the court said, "We are of the opinion that the legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates. While it seems to some of us that the percentage of the vote selected as the basis of the classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification was arbitrary." With these views of the Minnesota court I entirely concur.

IV. Where the Australian ballot law is in force, practical convenience may require limitation upon the number of party tickets which will be *printed* upon the ballot. This does not mean that there might be exclusion from the ballot of the name of any party or candidate, but only that the State would *print* only certain ones, leaving others to be written in by the voters who so desire.

---

<sup>15</sup> Primary Election Case, 80 Miss. 617, 32 So. 286.

<sup>16</sup> 129 Cal. 337.

<sup>17</sup> 86 Minn. 19.

That any party, however small, is entitled to have its candidates represented in some way, is believed to be the only sound and right rule. It is true that it has been held that the voter's right of choice may be limited to those whose names are printed upon the ballot,<sup>18</sup> but this rule is believed to be not only opposed to the weight of authority but entirely unsound.<sup>19</sup>

V. Under the power of classification, the State may provide that some parties shall make their nominations in one way and some in another. It may, for example, concede to the larger parties only the right to nominate by convention and require the smaller ones to nominate by petition. That this involves some inconvenience to the smaller parties cannot be denied, but mere inconvenience, so long as it does not amount to a substantial interference with the right, does not furnish ground for effectual complaint.<sup>20</sup>

This conclusion, it is true, has not passed unchallenged. That such distinctions may be made was denied by the Supreme Court of California,<sup>21</sup> but power to make them in that State has since been expressly conferred by constitutional amendment;<sup>22</sup> while courts in other States have not thought the distinction beyond the power of the legislature under existing constitutions.<sup>23</sup>

VI. Any primary election law which contemplates party caucuses or conventions necessarily involves the fixing of some test by which to determine who are to be permitted to participate in a party's action.

<sup>18</sup> *Chamberlain v. Wood*, 15 S. Dak. 216, 88 N. W. 109, 91 Am. St. Rep. 674. Compare *State v. Johnson*, 87 Minn. 221, 91 N. W. Rep. 840; *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67.

<sup>19</sup> See *State v. Dillon*, 32 Fla. 545, 14 So. 383; *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290; *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491; note to 91 Am. St. Rep. 682.

<sup>20</sup> *Commonwealth v. Rogers*, 181 Mass. 184, 63 N. E. 423.

<sup>21</sup> *Britton v. Board of Commissioners*, 129 Cal. 337.

In this case the court said: "Political conventions are, after all, but public assemblages of the people, having for their end the discussion of ways and means for the public good. By the declaration of rights of the constitution of this State the people have the right to assemble freely to consult for the common good, to instruct their representatives and to petition the legislature for redress of grievances. (Const., Art. I, Sec. 10.) No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens (Const., Art. I, Sec. 21), and all laws of a general nature shall have a uniform operation. (Const., Art. I, Sec. 11.) How can it be said that a law which protects by legislation a certain number of citizens forming one political party, and deprives a fewer number of citizens forming another political party of the same protection, is not violative of these provisions? Or how shall it be said that a man belonging to a party holding certain political principles may not participate in a primary election, when his neighbor of different political faith is accorded the right so to do?"

<sup>22</sup> Article II, Sec. 2½.

<sup>23</sup> See *State v. Jensen*; *Com. v. Rogers*; *Ladd v. Holmes*, cited *supra*. See also: *DeWalt v. Bartley*, 146 Pa. 543, 28 Am. St. Rep. 814; *State v. Kinney*, 57 Ohio St. 221; *Corcoran v. Bennett*, 20 R. I. 6; *Miner v. Olin*, 159 Mass. 487.

At this point it is necessary to make a distinction which I think is too often overlooked by those who discuss primary election laws, namely, the difference in the situation of the voter. The voter goes to the ordinary election merely in the character of a voter; he goes to a political caucus or convention necessarily in the character of a partisan. At the ordinary election, the qualified voter may go and vote and no one has the right to inquire as to his political views; a party primary election is necessarily a partisan matter, and no one has any business there if he does not belong to that party.

At the ordinary election, the voter is entitled to a secret ballot, and the secrecy extends not only to the names upon the ballot, but also to the political status of those voted for. At the party primary election, while the voter may maintain secrecy as to the names upon his ballot, his political complexion is disclosed, if in no other way, by the very fact of his presence at a partisan convention.

If partisan caucuses or conventions are to be held, it is, as has been said, a matter of vital consequence to determine who are entitled to participate in them. Party organization and party lines cannot be maintained unless the integrity of party views may be preserved. Each party must be left free to determine for itself what are to be the principles for which it stands. Certainly the legislature has no power to prescribe them.

If parties are to be recognized, they must in general have the right to exclude from participation in their action those whose views are hostile to the party principles. Legislation, therefore, which, while purporting to recognize parties, attempts to give the right to any one, however opposed, to participate in their party proceedings, must be invalid. As said by the Supreme Court of California in *Britton v. Board of Commissioners*,<sup>24</sup> "a law authorizing or even permitting the opponents of an organized political party to name the delegates to the nominating convention of that party could not for a moment be countenanced."

Even though we may concede all this, however, it does not necessarily follow that the legislature has no legitimate function to perform in determining who may participate in purely partisan conventions. The disorder and violence resulting from conflicting claims are certainly to be suppressed, and, though the legislature may not have the right to determine who are to be regarded as members of the party, it certainly may aid the parties in preserving their own autonomy by forbidding any one, not a member, from attempting to participate in the party proceedings.

Such legislation, of course, makes necessary the fixing of some

---

<sup>24</sup> 129 Cal. 337.

sort of test as to party allegiance. What shall it be? and who shall prescribe it?

If what has already been suggested be sound, any affirmative test, namely, that such and such persons *shall be admitted* to the party, can properly come only from the party itself; but a negative test, such as, for example, that no person, not a member of the party, shall have the right to participate in party proceedings, would seem to be within the legislative power as a regulation designed to protect and preserve party rights.

When the legislature begins to prescribe this sort of test, however, the question may arise whether it interferes, not with the rights of the party, but with the rights of the individual. Has the individual the right to change from one party to another—at least, so long as that party does not object? It would seem that there can be no reasonable doubt that he has such a right. If so, can a test be upheld that unreasonably interferes with that right? If we answer that question in the negative, what constitutes such an unreasonable interference?

Many of the statutes propose a test based in whole or in part upon past action.<sup>25</sup> Thus the statute of Minnesota, for example, requires that the person offering to vote shall take an oath (if challenged) not only that he is now affiliated with the party and proposes to be

---

<sup>25</sup> The most important provisions actually made are the following: In Florida, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Michigan (under the general law), Mississippi, Nevada, North Carolina, South Carolina (except in counties of over 40,000 inhabitants), Ohio, Rhode Island, Tennessee, Utah, Washington, qualifications for voters, in addition to legal requirements, are prescribed by the political committee holding the primary. In Minnesota, New Jersey, and Oregon, the voter must have supported the party ticket, generally, at the last election, and intend to support it at the next. In Idaho, Illinois, and Nebraska, support at the last election only is required. In California, Montana, New Hampshire, New York, and Maryland, except in Baltimore, an intention of support at next ensuing election is necessary. In Connecticut, Maryland (in Baltimore), Iowa, and South Carolina (in counties of more than 40,000 inhabitants) a party registration is required previous to the primary. In Arkansas, Indiana, South Dakota, North Dakota, and Texas, no mention of party qualifications is made.

Wyoming requires that a voter's political faith be in accordance with the party; West Virginia, that the voter shall be a "known, recognized, openly declared member of the party." In Colorado, any legal voter may vote who is not, at the time of the primary, a member in good faith of another party. In Maine, the request of fifty people secures the use of voting lists as a check list for party membership. In Virginia, the voter must have already registered for the next succeeding election. Rhode Island, in addition to regulations of the party, requires that the voter shall not have taken part in a caucus or voted in an election for the candidates of another party, within fourteen calendar months. Massachusetts forbids a committee to prevent a voter from participating in a primary because he has supported an independent candidate for office.

In Kent County, Michigan, the voter must make oath that he is "in sympathy with the aims and objects of said party and will support its principles and objects." In Grand Rapids, he may vote with the party "with which he then and there states he is affiliated." In Wayne County, he is required to make oath that he is "a member of the \_\_\_\_\_ party and is in sympathy with its aims and objects."

so at the next election, but that he "generally supported its candidates at the last election."

If past action is to be made the test, two objections may be urged against it. First, it may be made the excuse for violating the secrecy of the ballot by requiring the voter to disclose how he voted, though under the laws thus far framed the disclosure required is so general as not to be very objectionable;<sup>26</sup> and, secondly, it is evident that the period covered may easily be such as to unreasonably preclude a voter who has recently changed his party views from participating in the convention of the party with which he now desires to affiliate. To change one's political views and party affiliations must be not only a matter of highest policy but of constitutional right, subject only to those rules of good order and of practical convenience which the State finds it necessary to prescribe in order to administer the laws.<sup>27</sup> If the test based upon past action were the only reasonably appropriate one, it might perhaps be sustained even though it should occasionally prevent a particular voter from participating for a time in any party proceedings. But if another equally efficacious one may be found which does not thus prevent, it certainly is to be preferred. Present and future intention rather than past action should in general be the test. In New York it is required that the voter, if challenged, shall declare that he has a bona fide present intention of supporting the nominees of that political party at the next ensuing election, and that he has not enrolled with, or participated in the primary of, any other party since the first day of the preceding year; and this has elsewhere been approved.<sup>28</sup>

Moreover, even though it be conceded that the legislature may not prescribe tests which shall insure admission to party membership, it does not follow that the legislature may not provide that all persons holding substantially the same views shall make their nom-

---

<sup>26</sup> This was urged as an objection in the recent case in New Jersey, *Hopper v. Stack*, — N. J. L. —, 56 Atl. Rep. 1. The New Jersey constitution, however, does not provide for voting by ballot, which has elsewhere been construed to guaranty a secret ballot. Said the court: "The right to a secret ballot is not a constitutional right; it is given and may be taken away by legislative enactment. *Ransom v. Black*, 54 N. J. Law, 446, 24 Atl. 489, 1021, 16 L. R. A. 769. The argument, therefore, that the affidavit to be made by a challenged voter violates any natural or constitutional right to secrecy possessed by him, is entirely without foundation. Moreover, as the voter is not required to say for whom he voted, but only that he voted for a majority of the candidates of the party with which he claims to act, it is difficult to see wherein such partial avowal is any more inimical to secrecy than is the open and avowed partisan co-operation that has hitherto constituted the voter's credential."

The latter portion of this answer, although mere *dictum* here, would, of course, be applicable even in States providing for a secret ballot, and would seem to be sufficient if a test based on past action is to be sustained.

<sup>27</sup> See 1 MICHIGAN LAW REVIEW, at p. 499.

<sup>28</sup> In *Ladd v. Holmes*, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

inations at the same time or place. Certainly purely captious or caviling objections cannot be insisted upon at the expense of practical convenience in the administration of the law.

VII. As a reasonable regulation for determining who are entitled to participate in party conventions the State may doubtless require party registration. This may be open to two chief objections: *First*, It requires a voter to declare himself a partisan, and this can only be valid where it is confined in its operation to a mere condition precedent to taking part in a partisan proceeding. A man has a constitutional right not to be a partisan, but he has no constitutional right as a non-partisan to participate in partisan proceedings. *Second*, Under the guise of registration, the right itself may be impaired. Such a party registration, like the general registration, must furnish a fair and reasonable opportunity to every person entitled to register, to do so. A law which necessarily excludes classes of voters, or puts unreasonable restraints upon their registration under it, is void. So also, clearly, must be any law providing for general but not partisan registration for primary elections, which operates to exclude any who under the general election laws are entitled to vote.<sup>29</sup>

VIII. Where there is to be an official ballot which the State is to furnish, there must certainly be regulations to determine by whom each party's ticket which is to appear upon it shall be furnished, within what time it is to be supplied, and what shall be the evidence of its authenticity.

For this purpose it is doubtless competent for the legislature to require that each party shall have an officer or officers, of a certain kind and with certain powers, with whom, for the purposes in question, the officers of the State may deal.

But may the legislature go further and not only require the parties to provide such an officer, but also provide how he shall be chosen, and, when once so chosen, prevent his removal by any faction of the party who may differ from his political views?

This question was raised and elaborately discussed under the primary law of New York. It had formerly been held that membership in the county committee depended wholly upon the regulations prescribed and enforced by the committee itself, and that a member whose views were deemed hostile to those held by the majority of the committee might be removed.<sup>30</sup>

---

<sup>29</sup> *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659.

<sup>30</sup> *McKane v. Adams*, 123 N. Y. 609, 20 Am. St. Rep. 785.

After the decision in that case, however, the statute was amended. Each party was required to have a county committee, the method of electing that committee was prescribed, and it was declared that the statute should be controlling on the choice of members and on the conduct of the committee. While this law was in force a member of such a committee duly elected was removed by the committee for alleged disloyalty and hostility to the party. He brought an action to compel restoration. The trial court decided in his favor. The appellate division of the Supreme Court (four judges participating) unanimously reversed the lower court, upon the ground that the right to remove a member deemed hostile was an implied and inherent right.<sup>31</sup> Upon appeal to the Court of Appeals this last judgment was reversed and the judgment of the trial court, which restored him to the office, was affirmed, by a vote of four to three.

The opinion of the majority, written by Chief Judge Parker, proceeded upon the ground that the legislation in question, when read in connection with the history of preceding events, manifested a clear intention to subordinate the choice of members and their tenure in office to the terms prescribed by the statute; and that the statute was within the range of legislative power.<sup>32</sup>

The opinion of the minority, which contains, perhaps, as strong a statement as can be made of the contrary views, may be shown by these extracts: "It is asserted that the organization and control of a political party are no longer matters of voluntary agreement among the members of that party, but that, under the statute relating to primary elections, every party must have a county committee and that committee must be appointed and organized in the particular way prescribed by the statute. This doctrine is made the foundation for the argument that the legislature meant to deprive the general committee, or party organization, of all power, except such as the statute gives in express terms. From this doctrine I dissent *toto coelo*. If the statute is to be so construed, in my judgment it is unconstitutional and void. The right of the electors to organize and associate themselves for the purpose of choosing public officers is as absolute and beyond legislative control as their right to associate for the purpose of business or social intercourse or recreation. The legislature may, doubtless, forbid fraud, corruption, intimidation or other crimes in political organizations the same as in business associations, but beyond this it cannot go. \* \*

"An alliance cannot be made by one person alone. It requires the action of several whose rights are equal; no one can ally himself

---

<sup>31</sup> *People v. Gen'l. Committee*, 52 App. Div. 170.

<sup>32</sup> *People v. Democratic Committee*, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674.



with others solely by his volition. Therefore I do not see that an elector has any greater rights to join a party unless on the conditions that the party prescribes, than he has to insist upon entering a partnership on contributing his quota of capital, against the wish of the parties then conducting the business. \* \* \* \* \*

"The liberty of the electors in the exercise of the right vested in them by the Constitution, to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are, therefore, criminal, cannot be denied. It seems to me as absolute as the right to pursue any trade or calling, and, therefore, their right to associate and organize for that purpose is equally great. The statute of primary elections grants the right to join in the management of a party to any person on a declaration of his intention to support generally the candidates of that party, but a political organization may be unwilling to grant membership on these terms. It may make past conduct, and not future promise, the condition of membership. If the legislature can prescribe this test as a condition of membership in a party, I do not see why it may not require as a condition of voting at a Democratic primary a declaration of belief in the free coinage of silver at the ratio of sixteen to one, or of membership in the Republican party a denial of the application of the Constitution of the United States to the territories and dependencies of the country. Whether these are the fundamental doctrines of these parties, I do not attempt to say. If they are, it is for the parties themselves to so declare, not for the legislature. \* \* \*

"The legislature may doubtless, to a certain extent, affect the subject by providing for the conduct of elections in such manner as to render independent voting easy; but this is the extent of its power. The evil in all these things comes from the voluntary acts of the voters themselves, and can be corrected only by arousing the consciences of the electors to their responsibilities and duties. A rule which would permit interference with the liberty of an elector in his political action cannot be upheld, no matter how meritorious its object may be in a particular case.

"I think the statute of primary elections can be sustained, however, where political parties voluntarily take advantage of it, that is to say, political parties may have their organizations and primaries outside of the statute if they choose; but, if they adopt the statutory primaries held at public expense, they become subject to statutory rules. This admission does not render the views expressed as to the power of the legislature to control political organizations irrelevant to the discussion of this case; for, if the subjection of the political

parties to the provisions of the statute is voluntary, we may assume that the legislature did not intend to deprive party organizations of powers that they formerly had and seem almost necessary to their practical administration; powers which they would not be likely to surrender even for the advantage of holding their primaries at public expense."

There is force in these objections, but they did not prevail, and they insist upon a greater degree of party recognition and control than parties, in my judgment, are constitutionally entitled to demand. The error which underlies them, in my judgment, is the failure to distinguish between the right of parties to exist,—to associate on such lines as they choose, select their own members, regulate their own internal affairs, consult, recommend, declare principles, adopt "platforms," suggest candidates, and make unofficial nominations,—and their right, in the face of a regulating statute, to insist that the State shall recognize their methods of exercising another legal right in preference to the methods which it, itself, prescribes.

IX. Under several of the statutes actually in force, the candidate is required to make an avowal of his candidacy, often under oath; request a place upon the ballot; and, in some cases, pay a fee ranging from ten to twenty-five dollars, presumably to defray the expense of printing the tickets. Provisions of this sort may easily be carried to the point of doubtful validity. May the voters not vote for a man who will not seek the office and pay a fee for the printing of the ballots? A somewhat similar question arose recently in this State.<sup>33</sup>

The constitution of Michigan, Sec. 1, Art. 18, prescribes the oath of office, and further provides that no other oath, declaration or test shall be required as a qualification for any office or public trust. The primary election law for Kent County denied a place on the ballot to any candidate unless such candidate should declare on oath that he was a candidate.

This provision was held to be invalid. Said the court:

"This provision is not one designed for the benefit of the aspirant for public station alone; it is in the interest of the electorate as well. The provision of this law which requires that, before the name of any candidate shall be placed upon the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his State or his community in answer to the call of duty

---

<sup>33</sup> *Dapper v. Smith* (Mich.), 101 N. W. 60.

when chosen by his fellow citizens to do so is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by using 'pastors.' We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully recognizes the potency of parties, and provides for party action as a step toward the choice of an officer at the election. The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. *Attorney General v. Common Council*, 58 Mich. 213, 24 N. Y. 887, 55 Am. Rep. 675. We cannot escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, and that it is in conflict with the provisions of Sec. 1 of Art. 18 of the Constitution. It by no means follows that reasonable provision may not be made by legislation for an initiative in placing upon the ballot the names of those to be voted for, as, for instance, by requiring a petition by a stated percentage of the voters of the party. But this provision goes farther, and precludes the voters from choosing as a candidate one who declines to himself seek the office."

Not all the States have express constitutional provisions like the one here in question, but a general principle underlies it which, it is believed, is of universal application, even though some may differ as to the soundness of this particular application of it. Some reasonable evidence of good faith, and of a willingness to accept the nomination if tendered, could not, it would seem, be fairly objected to by any one.

This brief review has, it is thought, touched upon the most important of the constitutional objections which are likely to arise in this field. If the views advanced are sound, there can be no doubt of the power of the legislature to pass all of the laws which a fair and reasonable regulation of primary elections may demand.

FLOYD R. MECHEM.

THE UNIVERSITY OF CHICAGO.

## APPENDIX

An attempt has been made to collect here references to the primary election laws of the several States, so far as the library facilities at hand would permit.

### ARKANSAS

Session Laws, 1895, page 240.

## CALIFORNIA

Codes and Statutes of California (Political), 1886, Secs. 1357-1365.

Political Code of California, 1897, Sec. 1357-1365. Appendix, p. 987.

Statutes and Amendments to the Codes, 1897, pages 115-135.

Statutes and Amendments to the Codes, 1900-1901, pages 606-619.

Statutes and Amendments to the Codes, 1903, pages 49, 118, 119.

## COLORADO

Laws of Colorado, 1887, page 347.

Laws of Colorado, 1891, page 143.

## CONNECTICUT

General Statutes of Connecticut, 1902, page 462, Chap. 106.

## DELAWARE

Laws of Delaware, 1903, Chap. 285, page 593 (purely local law).

Vol. 20 of Laws of Delaware, Chap. 393.

## FLORIDA

Laws of Florida, 1897, page 62.

Laws of Florida, 1901, page 160.

Laws of Florida, 1903, page 241.

## GEORGIA

Acts of Georgia, 1887, page 42.

Acts of Georgia, 1890-1891, Vol. 1, page 210.

Laws of Georgia, 1900, page 40.

## IDAHO

Idaho Code, 1901, Vol. 1, Secs. 790, 791, 792, 793.

Session Laws

1899, Sec. 16, page 35.

1891, Sec. 25, page 62.

1903, page 360.

## ILLINOIS

Revised Statutes, 1903, Sec. 334-395, page 874-891.

## INDIANA

Burns Annotated Indiana Statutes, Revision of 1901. Vol. 3, Art. 8, page 318, Sec. 6339.

## IOWA

Laws of Iowa, 1904, Chap. 40, page 29.

## KANSAS

General Statutes of Kansas, 1901, Art. 11, page 593.

## KENTUCKY

The Kentucky Statutes, 1899, Sec. 1550-1565.

## LOUISIANA

Constitution and Revised Laws of Louisiana, 1904, Vol. 1, page 719.

## MAINE

Laws of Maine, 1897, page 353.

## MARYLAND

Public Local Laws of Maryland, 1888.

Vol. 1, page 379, 45.

Vol. 2, page 1687.

Laws of Maryland, 1892, Chaps. 238, 261, 508, 548.

Laws of Maryland, 1894, Chaps. 355, 384.

Laws of Maryland, 1902, Chap. 296, page 405.

Laws of Maryland, 1904, Chap. 682, page 1222.

## MASSACHUSETTS

Revised Laws of Mass., 1902.

Vol. 1, Sec. 136, page 137.

"Political Party," Sec. 1, page 104.

"Caucus," Sec. 91, page 126.

Acts and Resolves, 1902, page 163, 467.

Acts and Resolves, 1903, page 471-478.

## MICHIGAN

Compiled Laws, 1897, Vol. I, Chap. 93, page 1091.

Vol. 3, Sec. 11457-11469, page 3417.

Public Acts, 1899, pages 31, 308, 309.

Wayne County

Local Acts, 1895, No. 411.

Kent County (General)

Local Acts, 1901, No. 470.

Local Acts, 1903, No. 326.

Grand Rapids

Local Acts, 1901, No. 471.

## MINNESOTA

Statutes of Minnesota, 1894, Vol. I, Sec. 39, Chap. 1.

Laws of Minnesota, 1895, Chap. 276, page 661.

Laws of Minnesota, 1897,

(Amendment of 1895), Chap. 125, page 261.

(Amendment of 1895), Chap. 137, page 273.

Laws of Minnesota, 1899, Chap. 349, page 447-448.

Laws of Minnesota, 1901, Chap. 216, page 297-304.

Laws of Minnesota, 1902, (Extra Session), Chaps. 6 and 8, pages 55-56.

#### MISSISSIPPI

Annotated Code of Mississippi, 1890, Sec. 3256-3275.

Session Laws, 1892, Chap. 69, page 148.

Session Laws, 1902, page 105 et seq.

#### MISSOURI

Revised Statutes of Missouri, 1899, Vol. 2, Sec. 7082-7085.

Session Laws, 1901, pages 144, 149, 165.

Session Laws, 1903, page 193.

#### MONTANA

Montana Codes, 1895, Vol. I, Art. 2, pages 179-181.

Session Laws, 1901, pages 115-116.

#### NEBRASKA

Compiled Statutes, 1901, pages 586, 602, 604.

Session Laws, 1903, page 294-298.

#### NEVADA

Laws of Nevada, 1883, page 28.

#### NEW HAMPSHIRE

Statutes and Session Laws of New Hampshire, 1901, pages 140-141.

Session Laws, 1901, page 604.

#### NEW JERSEY

General Statutes of New Jersey, 1895, Vol. 2, pages 1371, 1369.

Session Laws, 1903, page 603.

Session Laws, 1904, page 416.

#### NEW YORK

Heydecker's General Laws and Statutes, 1901, Vol. I, pages 337-351.

Session Laws, 1902, Vol. I, page 488.

Session Laws, 1903, Vol. I, page 268.

Vol. 2, page 1279.

Session Laws, 1904, Vol. I, page 900.

Vol. 2, page 1247.

## NORTH DAKOTA

Revised Codes of North Dakota, 1899, Secs. 497, 6898, 498.  
 Laws of North Dakota, 1899, Chap. 38, page 36.  
 Laws of North Dakota, 1901, Chap. 47, page 60.

## NORTH CAROLINA

Session Laws, 1901, Chap. 752, page 978.

## OHIO

Code of Ohio, 1897, Sec. 1098, 1099.  
 Laws of Ohio, 1898, page 652.  
 Laws of Ohio, 1904, page 439.

## OREGON

Annotated Codes and Statutes of Oregon, 1902, Vol. 2, Chap. 10,  
 page 974.

## PENNSYLVANIA

Pennsylvania Statutes, 1896, Vol. I, page 1735.

## RHODE ISLAND

General Laws of Rhode Island, 1896, pages 85-88.  
 Session Laws, January, 1899, Chap. 662, page 60.  
 Public Laws, January, 1902, Chap. 867, page 150.  
 Public Laws, December, 1902, Chap. 1078, page 35.

## SOUTH CAROLINA

Session Laws, 1888, page 20.  
 Session Laws, 1896, page 56.  
 Session Laws, 1900, page 375.  
 Session Laws, 1902, page 375.  
 Session Laws, 1903, pages 9, 112.

## SOUTH DAKOTA

Annotated South Dakota Statutes, 1901, Vol. I, Secs. 2117, 2039.

## TENNESSEE

Session Laws, 1899, Chap. 407, page 963.  
 Session Laws, 1901, Chap. 39, page 54.  
 Session Laws, 1903, Chap. 241, page 553.

## TEXAS

Laws of Texas, 1895, page 40.

## UTAH

Revised Statutes of Utah, 1898, Chap. 3, page 259.  
 Laws of Utah, 1899, pages 118-119.  
 Laws of Utah, 1901, pages 72-73.

## VIRGINIA

Virginia Code, 1904,

Constitution of Virginia, Sec. 35, page CCXVI, Vol. I,  
Sec. 122c, 145a.

## WASHINGTON

Codes and Statutes of Washington, 1897, Vol. I, Sec. 1349, Chap.  
8, page 356.

## WEST VIRGINIA

Acts of West Virginia, 1891, page 175.

## WISCONSIN

Wisconsin Statutes, 1898, Vol. I, Chap. 5, page 164.  
Laws of Wisconsin, 1903, Chap. 451, p. 754 et seq.

## WYOMING

Election Laws of Wyoming, 1902, Chap. 3.