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CONSTITUTIONAL LAW—ELECTIONS—JURISDICTION OF STATE COURTS
TO ENTERTAIN ACTIONS ARISING OUT OF CONGRESSIONAL ELECTIONS—Relator was the losing candidate in an election for the office of Representative to the United States Congress. He commenced proceedings in the House, pursuant to statute,¹ contesting the seating of his opponent, and petitioned the Minnesota Supreme Court to enjoin and restrain the Minnesota Secretary of State from issuing a certificate of election until the contest was finally determined. Relator based his petition on a Minnesota statute² which provides that the Secretary of State may not issue a certificate of election in case of a contest until it has been determined by the proper court. A temporary injunction and order to show cause were directed to the Secretary of State, requiring him to appear and answer relator's petition. Relator's opponent in the election entered as respondent. On final hearing, *held*, writ vacated, two justices concurring specially. The Minnesota statute does not apply to a contest instituted in the House of Representatives; state courts are constitutionally divested of jurisdiction to entertain cases contesting congressional elections.³ *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963).

Article I, section 4, of the Constitution submits to the legislatures⁴ of the states the power to prescribe the "Times, Places and Manner" of electing their senators and representatives in Congress.⁵ It reserves to Congress the

¹ REV. STAT. § 105 (1875), 2 U.S.C. § 201 (1958).

² MINN. STAT. ANN. § 204.32 (1962).

³ The reasoning of constitutional divestment was implied in the majority opinion. The concurring justices agreed that the Minnesota statute does not apply, but rejected the implication that the Constitution divests courts of jurisdiction to entertain such cases. Principal case at 721-23.

⁴ For interpretations of the meaning of "legislature," see *Commonwealth ex rel. Dummit v. O'Connell*, 298 Ky. 44, 181 S.W.2d 691 (1944); 30 HARV. L. REV. 184 (1917).

⁵ See generally THE FEDERALIST No. 59 (Hamilton).

right to make or alter such regulations, except as to places of choosing senators.⁶ The authority conferred is concurrent, and, unless there is an inconsistency, regulation by Congress of certain particulars of the elective process does not void state regulation of other particulars.⁷ Although state regulation is thus subject to alteration by Congress, the area has been left almost entirely to the states.⁸ For the most part, there has been little conflict concerning this dual control.⁹ However, a variance of opinion has arisen among the courts as to when this concurrent power conflicts with the exclusive power of Congress to judge the elections of its members.¹⁰ While the courts have been unanimous in holding that Congress is the sole judge of its members' elections and that no judgment by a state court or decision of a state official would be binding on that body,¹¹ they have differed in determining when state jurisdiction over elections ends and exclusive congressional jurisdiction begins.

In the principal case, the majority of the court, although it based its decision on interpretation of a statute, impliedly held that state courts are constitutionally divested of jurisdiction to entertain any action by a defeated congressional candidate contesting the election. The Minnesota court in several earlier cases has stated that which it implied in the principal case,¹² and a number of other jurisdictions have so held. Thus, relief has been refused in actions to have a state court determine who received the highest vote total,¹³ to have a recount ordered,¹⁴ or to have a candidate declared disqualified for violating a state corrupt practices act.¹⁵ Courts which

⁶ The exception for places of choosing Senators was inserted because the state legislatures originally elected them. Since the adoption of the seventeenth amendment, there seems to be no reason for continuing the exception; however, it has not been deleted.

⁷ See *Ex parte Siebold*, 100 U.S. 371 (1879).

⁸ "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government . . . it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are." *United States v. Gradwell*, 243 U.S. 476, 482 (1917); *accord*, *Voltaggio v. Caputo*, 210 F. Supp. 337 (D.N.J. 1962).

⁹ In the early decades of this century, a question arose as to whether federal election laws extended to primary elections. See *Newberry v. United States*, 256 U.S. 232 (1921). It was eventually determined that primaries were such elections as were within the congressional power. *United States v. Classic*, 313 U.S. 299 (1941); *cf. Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁰ "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." U.S. CONST. art. I, § 5.

¹¹ *E.g.*, *Keogh v. Horner*, 8 F. Supp. 933 (S.D. Ill. 1934); *Ekwall v. Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934); *State ex rel. McDill v. Board of State Canvassers*, 36 Wis. 498 (1874).

¹² *Youngdale v. Eastvold*, 232 Minn. 134, 44 N.W.2d 459 (1950); *Williams v. Maas*, 198 Minn. 516, 270 N.W. 586 (1936); *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604 (1927). Chief Justice Knutson, author of the opinion in the *Youngdale* case, qualified that holding in his concurring opinion in the principal case.

¹³ *Williams v. Maas*, *supra* note 12.

¹⁴ *Belknap v. Board of Canvassers*, 94 Mich. 516, 54 N.W. 376 (1893).

¹⁵ *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604 (1927); *Sutherland v. Miller*, 79 W. Va. 796, 91 S.E. 993 (1917).

have so held have considered the processes of election completed when the various canvassing boards have performed their statutory duties and certified the results to the appropriate state official.¹⁶ They have not considered the certification of winning candidates an integral part of the election processes over which the states have control. Rather, they have viewed certification as involving purely ministerial duties, affording no discretion to the courts or to the officials charged with performance.¹⁷

This position is probably founded upon broad policy bases, rather than a feeling that any further extension of jurisdiction would be unconstitutional.¹⁸ In the first place, it is desirable to secure prompt issuance of the certificates of election, so that public business can continue with as little delay as possible. By refusing to grant relief to candidates after the elections, except to order certification of the apparent winner, the courts have sought to avoid granting discretion to officials charged with ministerial tasks. The certainty that such officials will be ordered to issue the certificates, even if a contest is pending, no doubt eliminates some unnecessary delay. Another factor possibly influencing some state courts toward this position is a feeling that, since Congress is the final judge, a decision by a court would be a vain and unnecessary act.¹⁹

Other courts have seen the provisions of article I, section 4, as giving the states a more extended jurisdiction over congressional elections.²⁰ While acknowledging that Congress is the final judge of the elections of its members, these courts have seen no constitutional problems in assuming jurisdiction over election disputes. They have, however, exhibited reluctance to assume jurisdiction beyond the point where the certificate has been issued and the candidate sworn in.²¹ Behind the holdings of courts which have adopted this broader view of state authority, there are also several considerations. First, since the issuance of a certificate of election creates a prima facie right in the recipient,²² they feel it should register the true re-

¹⁶ In making their determination of whether the States are without jurisdiction, the courts often regard the completion of the "election processes" as determinative of the issue. *E.g.*, principal case at 721 (concurring opinion).

¹⁷ It should be noted that even those courts which have held that the Constitution divests them of jurisdiction have entertained actions to in mandamus to require state officials to issue the certificates. See, *e.g.*, *State ex rel. Fleming v. Crawford*, 28 Fla. 441, 10 So. 118 (1891); *Britt v. Board of Canvassers*, 172 N.C. 797, 90 S.E. 1005 (1916).

¹⁸ See generally Martin, *Changing Election Returns by Writs of Mandamus*, 10 BENCH & BAR (n.s.) 450 (1916).

¹⁹ "It would . . . be 'officious and nugatory.'" Principal case at 720.

²⁰ See *People ex rel. Brown v. Board of Supervisors*, 216 N.Y. 732, 110 N.E. 776 (1915); *Wickersham v. State Election Bd.*, 357 P.2d 421 (Okla. 1960); *McDill v. Board of State Canvassers*, 36 Wis. 498 (1874).

²¹ "No certificate of election has yet been issued to either candidate. . . . If it had already been issued, and the representative sworn in as a member, there would arise a different situation, involving different questions, on which we do not attempt to pass." *People ex rel. Brown v. Suffolk County*, *supra* note 20, at 733-34, 110 N.E. at 777.

²² *People ex rel. Brown v. Suffolk County*, *supra* note 20; 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1413 (8th ed. 1927). *Contra*, principal case at 720, where the court stated that

sult. Although Congress is not bound to admit the holder of a certificate, a candidate certified as elected has an initial advantage in claiming the right to hold office. The majority of the court in the principal case expressed a feeling that to grant injunctive relief would be to grant one of the candidates a tactical advantage.²³ Since failure to grant such relief carries the same peril, it would seem preferable to visit the disadvantage upon the candidate held to be not legally elected. This result could be guaranteed only by the assumption of jurisdiction to hear election controversies.

A second consideration supporting the broader view of state authority over election contests is that the fact finding of a court in such a proceeding would provide very useful information for consideration by Congress should any contest be instituted in that body.²⁴ It seems highly unlikely Congress would consider a court's determination "officious and nugatory," as the principal case suggested.²⁵ In fact, the Minnesota Supreme Court recognized in an early case the informational value a state court finding would have.²⁶ That case arose out of an election for a seat in the state legislature rather than Congress, but the Minnesota Constitution also contains a provision making the state legislature the judge of its members' elections.²⁷ The court, reversing a lower court dismissal, held that relief could be given. It pointed out that this merely provided a convenient means of preparing and securing evidence, and, since the legislature would not be bound by the findings, there was no conflict with the constitutional provision.

The justices who specially concurred in the decision in the principal case stated that they believed the broader view of the constitutionality of state jurisdiction was the more sound. It was their opinion that the court was not precluded by the Constitution from exercising jurisdiction, but was precluded by the lack of a state recount statute. A recount statute, they felt, was necessary before a state court could assume jurisdiction over a controversy arising out of an election. Only one court has so held,²⁸ and the soundness of this position is questionable. Such a statute is no doubt essential when recount is the relief asked, but it would seem to have little relevance when injunctive or declaratory relief is requested.

There seems to be little, if any, basis for holding that a constitutional prohibition prevents state courts from entertaining this type of case. Article I, section 5, does not expressly preclude the states or their courts from exercising jurisdiction over election controversies. It could, in fact, be

a certificate of election is merely a publication by the Secretary of State of the official action of the canvassing board.

²³ Principal case at 720.

²⁴ See *People ex rel. Brown v. Suffolk County*, 216 N.Y. 732, 110 N.E. 776 (1915); *cf. State ex rel. Haines v. Searle*, 59 Minn. 489, 61 N.W. 553 (1894).

²⁵ See note 19 *supra*.

²⁶ *State ex rel. Haines v. Searle*, 59 Minn. 489, 61 N.W. 553 (1894). *Contra, Ellison v. Barnes*, 23 Utah 183, 63 Pac. 899 (1901).

²⁷ MINN. CONST. art. 4, § 3.

²⁸ *Wickersham v. State Election Bd.*, 537 P.2d 421 (Okla. 1960) (dictum).

viewed as conferring a concurrent power, with the paramount authority resting with Congress, much as with article I, section 4.²⁹ Moreover, since certificates of election are not required by the Constitution or federal statute, but are provided for by the states,³⁰ it would seem the courts should have jurisdiction to determine whether a candidate is entitled to receive one under the applicable election laws. As a determination of who is entitled to a certificate is not equivalent to a final determination of who is entitled to a seat in Congress, state courts, by deciding the former question, would not be infringing the power of Congress.

Even if the broader view is taken, at some point it must be said the states no longer have jurisdiction. The proper place to draw the line which is called for would be after the certification of the apparent winner.³¹ Since certification is the last election process provided by the states, any proceeding after certification would, in reality, be one to try title to office. The statutory remedy of a contest in the House³² is, at that point, the only proper one.³³ By taking the narrower view, the majority in the principal case has apparently left Minnesota congressional candidates with no remedy in the state courts. If the view of the concurring justices is adopted in a future case, candidates will still be without a state remedy, at least until the legislature enacts a recount statute covering congressional elections. Nevertheless, the court is not bound to either holding in the principal case, for the relator based his petition for relief on a state statute,³⁴ which the court held inapplicable. Should the court retreat from its earlier holdings³⁵ on the constitutional question, as the concurring justices argued it should, a future petitioner seeking non-statutory relief might be successful.

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²⁹ The concurring opinion of Chief Justice Knutson seems to support this view. See principal case at 721.

³⁰ See, e.g., MINN. STAT. ANN. § 204.32 (1962).

³¹ See cases cited note 20 *supra*.

³² REV. STAT. § 105 (1875), 2 U.S.C. § 201 (1958).

³³ When title to office is the real point in issue, a proceeding in the nature of quo warranto is proper. Such an action will not be entertained when the court could not give judgment of ouster. See HIGH, EXTRAORDINARY LEGAL REMEDIES 88, 600 (3d ed. 1896).

³⁴ MINN. STAT. ANN. § 204.32 (1962).

³⁵ See cases cited note 12 *supra*.