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CONSTITUTIONAL LAW - FEDERAL ELECTION LAWS - PRIMARY ELECTIONS

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CONSTITUTIONAL LAW — FEDERAL ELECTION LAWS — PRIMARY ELECTIONS — Several members of the New Orleans Board of Commissioners of Elections were indicted on charges of having fraudulently altered and counted numerous votes in a Louisiana primary election to nominate a candidate of the Democratic Party for representative in the United States Congress. The indictments were brought under sections 19 and 20 of the Criminal Code of the United States,[1] which make it a criminal offense to injure or deprive a citizen of any right or privilege secured to him under the Constitution. The defendants were alleged to have conspired together to deprive citizens in Louisiana of the right to vote at a Congressional election for a United States representative, and of the right to have their ballots counted for the candidate of their choice. The district court sustained a demurrer to all counts on the ground that the statute was not applicable to the facts presented. The government appealed to the Supreme Court. *Held,* the decision of the district court should be reversed on the ground that the allegations stated a cause of action under the Criminal Code. *United States v. Classic,* 313 U. S. 299, 61 S. Ct. 1031 (1941).

The several states are given extensive regulatory power over Congressional elections by article I, section 4 of the Constitution, but authority also is conferred upon Congress to make or alter all regulations of time, place and manner of holding such elections.[2] Moreover, Congress has the power, by appropriate legislation, to protect any rights or privileges arising from, created, or secured by, or dependent upon the Constitution.[3] The Criminal Code is essentially such legislation, and the right of suffrage in the election of members of Congress has

[1] 35 Stat. L. 1092 (1909); 18 U. S. C. (1934), §§ 51, 52.

[2] U. S. Const., art. I, § 4: "The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

[3] Ex parte Virginia, 100 U. S. 339 (1880); Ex parte Yarbrough, 110 U. S. 651, 4 S. Ct. 152 (1884).

been adjudged one of the rights protected by it.[4] Although several state courts have held that primaries are "elections" within the meaning of state constitutional or statutory provisions,[5] the Supreme Court's decisions, prior to the principal case, negatived the inclusion of primaries within the scope of "elections" under the protection of the Federal Constitution.[6] While the principal case holds that the Louisiana primary is under federal protection, it does not present a single and conclusive test for determining what other primaries fall into the same category. At one point in the majority opinion, Justice Stone refers to primaries which are "by law made an integral part of the election machinery." [7] In the preceding sentence he mentions primaries which effectively control the choice of the representative.[8] From these statements may be derived two possible tests for determining whether a primary is entitled to federal protection: (1) a primary must "by law be made an integral part of the election machinery of the individual state," or (2) a primary must "effectively control the choice of the representative." It is not clear from the decision itself what is meant by "integral part," for at least two definitions are feasible. One is that the primary must play a controlling part in the final election. Of the forty-five states which now have some type of direct primary legislation,[9] some twenty allow a person

[4] Ex parte Yarbrough, 110 U. S. 651, 4 S. Ct. 152 (1884); Felix v. United States, 108 C. C. A. (5th) 503, 186 F. 685 (1911).

[5] Cases deciding the question under a state constitutional provision are: Spier v. Baker, 120 Cal. 370, 52 P. 659 (1898); Leonard v. Commonwealth, 112 Pa. 607, 4 A. 220 (1886); Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071 (1907); People ex rel. Breckon v. Board of Election Commrs. of Chicago, 221 Ill. 9, 77 N. E. 321 (1906). Cases deciding the question under a state statutory provision are: State v. Hirsch, 125 Ind. 207, 24 N. E. 1062 (1890); State v. Cole, 156 N. C. 618, 72 S. E. 221 (1911); Heath v. Rotherham, 79 N. J. L. 22, 77 A. 520 (1910).

[6] Two cases have been considered authority for this point. United States v. Gradwell, 243 U. S. 476, 37 S. Ct. 407 (1916), and Newberry v. United States, 256 U. S. 232, 41 S. Ct. 469 (1922). In the principal case, however, Justice Stone states that the question has never been conclusively decided. The point was expressly reserved in United States v. Gradwell. While four justices (McReynolds, Day, Holmes, and Van Devanter) stated in Newberry v. United States, that the federal government had no power to regulate senatorial primaries, either before or after the Seventeenth Amendment, four others (White, Brandeis, Clark, and Pitney) were just as certain that Congress always had had that power. Justice McKenna, who swung the balance in favor of the first four justices, stated that he believed that Congress had no such power before the Seventeenth Amendment was adopted, but reserved his judgment as to whether it had been acquired under it.

[7] 313 U. S. 299 at 318.

[8] Id. At this point, Justice Stone states, "the right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes, or never determines the ultimate choice of the representative." In the next sentence, however, he points out that, in addition to the Louisiana primary being an integral part of the election, the right to choose a representative is in fact controlled by the primary, because the choice of candidates at the Democratic primary determines the choice of the elected representative.

[9] New Mexico has a convention system, while Connecticut and Rhode Island have caucus systems. An excellent summary of primary election legislation in the

to become a candidate in the general election by petition, thereby escaping the primary election.[10] Due to the difficulty and inconvenience of this method of becoming a candidate, however, it is not so important as to render the primary not controlling in those states, and hence outside the scope of the Criminal Code.[11] Another definition is that the primary must be mandatory, in that the political parties are compelled to make their nominations in the manner specified by the local primary legislation.[12] Thirty-nine of the states employ this type of mandatory primary legislation; [13] and all their primary elections are protected by the Criminal Code if this definition of "integral part" is adopted. In regard to the second test mentioned above, the primary has always "effectively controlled the choice of the representative" in the southern states,[14] and until recently had the same effect in at least ten others.[15] Thus, if the control over the final choice is the test to be applied, twenty states at the most, and probably not more than twelve or thirteen, are included under the principal case. In determining which of the two tests is correct, the practical effect of their respective applications must be considered. In discarding its former position in the matter involved, the Court probably intends to bring as many states as possible within the protection of the Criminal Code. Consequently, the "integral part" test likely will be considered the more important prerequisite to federal jurisdiction, since the greatest number of states is affected by this interpretation.

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various states is contained in Appendix A of MERRIAM and OVERACKER, PRIMARY ELECTIONS 359 ff. (1928).

[10] Id.

[11] In the principal case, 313 U. S. at 313, Justice Stone states that even if the Louisiana final election can be entered by petition, the primary is still an integral part of the election machinery.

[12] MERRIAM and OVERACKER, PRIMARY ELECTIONS, Appendix A, 359 (1928).

[13] Id., Appendix A.

[14] Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, North Carolina, South Carolina, Texas and Virginia.

[15] Illinois, Iowa, Maine, Michigan, Minnesota, Oregon, Pennsylvania, Vermont and Wisconsin.