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THE LATEST PHASE OF NEGRO DISFRANCHISEMENT

JULIEN C. MONNET*

BEGINNING with Mississippi¹ in 1890, most of the southern states have passed statutes or adopted constitutional provisions, so drafted within limits which are hoped to be permissible under the United States Constitution, as, upon their face, to exclude from the right of suffrage as large a number of the negro race as possible without excluding the whites; or by fair intendment to bring about the same result by arming officers of registration and election with wide discretionary powers to that end.²

The latest provision of this character is Article 3, section 4a of the Oklahoma constitution,³ which was originally suggested as a constitutional amendment by concurrent resolution of the legislature in March, 1910, then initiated by the people and duly passed by a popular vote August 2, 1910:

“No person shall be registered as an elector of this state or be allowed to vote in any election herein unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person, who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the

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Editors' Note: For an essay analyzing this article and discussing its historical significance, see Harry F. Tepker, *The Dean Takes His Stand: Julien Monnet's 1912 Harvard Law Review Article Denouncing Oklahoma's Discriminatory Grandfather Clause*, 62 OKLA. L. REV. 427 (2010).

1. For a holding by the state court that the Mississippi provision does not violate the Constitution of the United States, see *Sproule v. Fredericks*, 69 Miss. 898 (1892); *Dixon v. State*, 74 Miss. 271 (1896).

2. The following are of that character: Mississippi Constitution, Article 12, secs. 241-245 (1890); South Carolina Constitution, Article 2, sec. 4 (1895); Louisiana Constitution, Article 197, secs. 1-5 (1898); North Carolina Constitution, Article 6, secs. 1-4 (1900); Alabama Constitution, Article 8, secs. 180-187 (1901); Virginia Constitution, Article 2, secs. 18-23 (1902); Georgia Constitution, Article 2, sec. 1 (1908); Acts of Maryland, 1908, c. 525.

3. Williams, *Annotated Constitution and Enabling Act of Oklahoma*, p. 25.

registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers, when electors apply for ballots to vote.”

A comparison of this clause with its predecessors shows the Oklahoma amendment to be the most sweeping attempt yet made constitutionally to include all whites and exclude all blacks from the privilege of voting. It represents something of a departure from the idea contained in the “understanding” clause of the Mississippi constitution of securing the ends aimed at by lodging an arbitrary discretion in election officials, in favor of a definite classification, which itself accomplishes the purpose; although there of course remains as an ultimate resource the possibility of a hostile enforcement by the precinct election officers in case its operation should not otherwise prove sufficiently exclusionary, or in case the grandfather clause proper should be excised by the courts and the remainder of the enactment allowed to stand.

Is this latest phase of such legislation constitutional? Appeals which may possibly test its validity are now pending in the Eighth Circuit Court of Appeals in a criminal case, and in a civil case in the Supreme Court of the United States.

I.

The question arises under the following clauses of the Fourteenth and Fifteenth Amendments:

Fourteenth Amendment: “No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Fifteenth Amendment: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Both articles contain clauses giving Congress power to enforce them by appropriate legislation.

Under Article I, section 2 of the United States Constitution it is further provided concerning the election of members of the House of Representatives that

“the electors in each state, shall have the qualifications requisite for electors of the most numerous branch of the State legislature.”

Soon after the passage of the Fourteenth and Fifteenth Amendments the question arose as to whether the elector derived any part of his right and, if so, what part from the federal government. It was held by the Supreme Court that suffrage is not a necessary incident of national citizenship,⁴ that the United States has not conferred the franchise upon any one, that it has no voters of its own creation, and that what it has conferred is merely the right to freedom from discrimination on the ground of race, color, or previous condition of servitude.⁵

In another case,⁶ the court held that the right to vote in the states comes from the states, but that the right of exemption from the prohibited discrimination comes from the United States. Before the Fifteenth Amendment was passed such discrimination could have been made and the negro race excluded, but now,

“If citizens of one race having certain qualifications are permitted to vote, those of another having the same qualifications must be.”⁷

And further, it was held that it is not every wrongful refusal to receive the vote of a qualified elector at state elections that Congress can punish, but only such as are refused on account of race, color, or previous condition of servitude. Sections 3 and 4 of the Act of May 31, 1870,⁸ known as the Enforcement Act, were held invalid as not confined in their operations to unlawful discrimination on account of race. The court, however, seemed to think later that it had gone too far in entering so complete a disclaimer on the part of the nation, of federal rights in the franchise, and in *Neal v. Delaware*⁹ it held that beyond all question the amendment does have the affirmative effect of removing the word “white” from all constitutions in which it appears and so to all intents and purposes under such circumstances giving votes to the colored people; and in *Ex parte Yarbrough*¹⁰ the court seems still further intent

4. *Minor v. Happersett*, 21 Wall. (U. S.) 162 (1874).

5. See 33 Congressional Record, 1162. In a debate in the United States Senate some years later concerning the North Carolina Constitution, Senator H. D. Money of Mississippi said, referring to the Fifteenth Amendment, “Outside of that one restriction the states can range from one end to the other of all the expedients proposed in order to restrict or enlarge their franchise in any manner that they deem best to promote their prosperity and progress.”

6. *United States v. Cruikshank*, 92 U. S. 542 (1875).

7. *United States v. Reese*, 92 U. S. 214 (1875).

8. 16 U. S. Stat. at Large, 140.

9. *Neal v. Delaware*, 103 U. S. 370 (1880).

10. *Ex parte Yarbrough*, 110 U. S. 651 (1884).

on modifying the language of prior decisions in this particular. The court says:

“Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor v. Happersett*, 21 Wall. 162, that ‘the Constitution of the United States does not confer the right of suffrage upon any one’ without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument. But the court was combating the argument that this right was conferred on all citizens and therefore upon women as well as men . . . the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution.”

And the court says again that it does confer upon him the right to vote because it annuls the word “white,” and somewhat prophetically adds that

“such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people. . . . In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right. . . . The principle . . . is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.”

But despite this language the Fifteenth Amendment could not have any real effect of conferring suffrage on the blacks for the reason well pointed out by John Mabry Matthews,¹¹ that even with the word “white” eliminated no negro could vote until he had first complied with other state requirements, such as the payment of poll taxes and the like, so that it still remains substantially true that suffrage comes not from the nation but from the state, and a mere general statement to the contrary in *Wiley v. Sinkler*,¹² apparently made from a supposed necessity to conserve national power, does not change the fact that the right to prescribe qualifications for electors of the most numerous branch of its legislature carries with it to the state essentially the power to grant or withhold the franchise.

Nor is this changed or modified by Article I, section 4, giving Congress the power to make or alter regulations as to the times, places, and manner of

11. Legislative and Judicial History of the Fifteenth Amendment, by John Mabry Matthews, p. 109.

12. *Wiley v. Sinkler*, 179 U. S. 58 (1900).

holding elections for senators and representatives. While this undoubtedly gives Congress paramount authority over such elections, and “it is not obliged to stand by as a passive spectator when duties are violated and outrageous frauds are committed,”¹³ yet the word “manner” has never been construed broadly enough to permit Congress to prescribe the qualifications of electors. To be sure this means that the states by failing to provide an electorate and not sending representatives might destroy the central government; but Webster admitted this to be true, and simply stated in answer that all governments could be destroyed by allowing their functions to lapse into disuse. Strictly speaking the United States can have no national electorate.

But while it is fairly well settled that suffrage does not come from the federal government, it is now also beyond controversy that the United States has full power to protect the exercise of the franchise from any act of the state tending to deny or abridge it on the ground of race. Conspiracies against voters and crimes against the franchise as such are not within federal jurisdiction; they are so only when they are committed by state agencies with state authority and when they are calculated to discriminate on account of race. The right to supervise the elections of representatives is unlimited under Article I, section 4, but the right of the federal government under the Fifteenth Amendment at those elections is absolutely confined to the one power of seeing that discrimination does not occur on the basis of race.

Congress, therefore, has no power to deal with unofficial individuals who interfere with the franchise in purely state elections. This was first decided in *United States v. Amsden*,¹⁴ where it was held that the Fifteenth Amendment does not lay a prohibition upon private individuals.¹⁵ The leading case on this point is *James v. Bowman*,¹⁶ which established finally and firmly the doctrine that the Fifteenth Amendment relates solely to action by the United States or by any state, and does not contemplate individual acts; and it was therefore held that a statute of Congress designed to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by this amendment.¹⁷ That would be an invasion of the police power of the state.¹⁸ “The power of Congress under the amendment is limited to legislation anticipatory or corrective of the discriminatory conduct of those exercising state authority.”¹⁹ Unless the wrong is being done by a representative of the

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

14. *United States v. Amsden*, 6 Fed. 819 (1881).

15. *Lackey v. United States*, 107 Fed. 114 (C. C. A. 1901).

16. *James v. Bowman*, 190 U.S. 127 (1903).

17. Mathews, *Fifteenth Amendment*, *supra*, p. 117.

18. *Karem v. United States*, 121 Fed. 250 (C. C. A. 1903).

19. Mathews, *Fifteenth Amendment*, *supra*, p. 112.

state no remedial power exists in Congress. But Congress has ample power even in a state or municipal election not involving the choice of federal officers to interfere for the purpose of preventing discrimination on account of race. Each of the two sources of federal authority in elections, namely, the Fifteenth Amendment and Article I, section 4, is very broad in one respect and very narrow in another. Under the former Congress has power to do anything it sees fit to prevent discrimination on the basis prohibited; under the latter anything that it may deem wise concerning the time, place, and manner of holding federal elections except as to the place of choosing senators. But under the former Congress has no power to interfere for any other purpose than to prevent such discrimination, and under the latter no power to prescribe or in any manner affect the qualifications for suffrage.

While these two principles are well settled, yet their application is not always clear. In the matter of discrimination it is evident that each individual enactment or situation must stand by itself. But as to the second question, although the inhibition of the Fifteenth Amendment is directed only against the acts of the United States and the states, yet as these agencies must operate through individuals it becomes necessary to ascertain when an act is the act of the individual alone and when it is imputable to the state. It also becomes necessary to determine at what point the action of the state in violation of the amendment touches the complainant in such a way as to give a right of action, or touches the federal relation in such a way as to constitute the individuals committing the act criminal offenders under the United States penal statutes.

With reference to the Fifteenth Amendment, manifestly the mere passage of an unconstitutional law by the legislative authority of the state, whether it be the legislature or the people as a whole acting on an initiated measure, gives a right of redress to no one, for the reason that such an act as yet is legally harmless. The rights of the individual in his personal relations are not yet invaded. Nor is he injured by a decision of a state court holding valid an unconstitutional suffrage law. His right arises, if at all, only at the moment an officer acting under such law attempts as to him to enforce it. But at this point it has been urged that, if the law is unconstitutional, it is *ab initio* void and of no effect, and therefore that a state officer acting under it is no more protected by it than if it did not exist. This is true; but when it is further contended that he is so completely without authority that his acts are merely the lawless acts of a private individual and no longer the prohibited acts of the state, we find that the strict logic of the situation cannot be maintained. The law stops short of this absurdity, for if such were true, Congress would be shorn of all power to deal with any form of violation by the state of the provisions of the Fifteenth Amendment. The acts of an executive or enforcing state officer in his official capacity for and on behalf of the state under color of an

unconstitutional law are the acts of the state itself within the terms of the Fifteenth Amendment, and such officers can be reached with civil process or punished in a criminal proceeding as the only means of preventing the unlawful state action. And the same is true of all acts done by a state officer in the line of his duty which are done without color of law. While there is some confusion upon this point, and decisions are not wanting to the effect that an unconstitutional law is to be treated wholly as if it never existed,²⁰ yet by analogy with other cases it seems clear that under the Fifteenth Amendment the actions of the officers who actually reject a voter's application to register or vote are the acts of the state and may be dealt with accordingly.²¹ If it were necessary to make the state itself a party defendant instead of its officers, the injured voter would be remediless, as a state cannot without its consent be sued by a private individual.²²

II.

James G. Blaine in his "Twenty Years in Congress" says that under the Fourteenth Amendment the states could have disfranchised the negro, and that it is only the Fifteenth Amendment which prevents. While it is probably true that under the Fourteenth Amendment alone the states could have directly discriminated *eo nomine* against the negro race in the matter of suffrage, because, except for the Fifteenth Amendment, a race distinction constitutes a legally permissible qualification, does it necessarily follow that the Oklahoma provision is not in conflict with the clause in that amendment to the effect that no state shall deny to any person within its jurisdiction the equal protection of the laws?

It is nowhere denied that notwithstanding both amendments any state may to-day deny the right to vote on account of age, sex, vocation, want of property, want of intelligence, want of character, failure to pay taxes, neglect of civic duties, vicious habits, the commission of crime, etc.²³ The equal protection of the Fourteenth Amendment does not prevent classification, and the question is, "Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished?"²⁴

20. *Poindexter v. Greenhow*, 114 U. S. 270 (1884).

21. *Virginia v. Rives*, 100 U. S. 313 (1879); *Arrowsmith v. Harmoning*, 118 U. S. 194 (1886); *Scott v. McNeal*, 154 U. S. 34 (1894); *Ex parte Virginia*, 100 U. S. 339 (1879); *Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U. S. 226 (1897).

22. *Hans v. Louisiana*, 134 U. S. 1 (1890).

23. *McKay v. Campbell*, 1 Saw. 374 (1870).

24. *Atchison, Topeka, and Santa Fé R. Co. v. Matthews*, 174 U. S. 96 (1899).

Cooley²⁵ says,

“All regulations of the elective franchise must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote. If they do, they must be declared void.”

And although there was no other restriction on the territory except section 1860 of the United States Revised Statutes which said that voters must be citizens of the United States, and that there must be no denial of suffrage because of race, yet the Supreme Court of Utah²⁶ decided that the territorial statute of 1878 which provided that all male voters should be taxpayers without imposing the same conditions upon the female voters, was void. The Supreme Courts of Ohio²⁷ and Massachusetts²⁸ have held the same doctrine, although both referred to denial by statute under the state constitution rather than denial by a state constitution under the provisions of the federal Constitution. The Supreme Court of the United States adds its sanction in *Yick Wo v. Hopkins*,²⁹ wherein it says:

“It has accordingly been held generally in the States, that, whether the particular provisions of an act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question.”

While the above was not necessary to the decision of the case, yet when reinforced with the following *dictum* of the same court in *Pope v. Williams*³⁰ it becomes very significant:

“It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against the individual rights of a citizen of the United States removing into the State and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came,

25. Cooley, *Constitutional Law* (6 ed.), 758.

26. *Lyman v. Martin*, 2 Utah (Ter.) 136.

27. *Monroe v. Collins*, 17 Oh. St. 665 (1867).

28. *Capen v. Foster*, 12 Pick. (Mass.) 485 (1832).

29. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

30. *Pope v. Williams*, 193 U. S. 621 (1904).

excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other state. In such case an argument might be urged that, under the Fourteenth Amendment of the Federal Constitution, the citizen from Georgia was by the State statute deprived of the equal protection of the laws. Other extreme cases might be suggested.”

This language very materially modifies and explains the language in the same case quoted by the Supreme Court of Oklahoma in *Atwater v. Hassett*,³¹

“The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.”

Taken together, these excerpts show that the United States Supreme Court did not mean to say that state suffrage provisions can under no circumstances contravene the equal protection clause of the Fourteenth Amendment. Willoughby in his work on the Constitution³² also takes a similar view and suggests other cases.

It is, of course, by no means necessary that restrictive laws should operate equally upon both races. Indeed probably no such law would be mathematically equal in its application whether it be a property, educational, or other qualification, or a criminal or other disqualification. But the restrictive provision and classification must be uniform, reasonable, and impartial.

Applying these principles to the Oklahoma provision we find first a restriction in favor of former voters. In *Atwater v. Hassett*³³ the Oklahoma Supreme Court says:

“That is a classification based upon a reason; that is, that any person who was entitled to vote under a form of government on or prior to said date is still presumed to be qualified to exercise such right.”

This may be conceded to be sound, although the reasoning is much weakened when we observe that the right is given to a former voter “under any form of government.” That an Indian, an Arabian, or an inhabitant of Thibet is qualified for the duties of an American voter because he once participated in

31. *Atwater v. Hassett*, 27 Okla. 292 (1910).

32. 1 Willoughby on the Constitution, § 238.

33. 27 Okla. 292 (1910).

some form of tribal government is not wholly convincing. But when the court adds,

“and the presumption follows as to his offspring; that is, that the virtue and intelligence of the ancestors will be imputed to his descendants just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation,”

it states a principle opposed to American tradition and ideals. Inheritance of governmental rights finds no sanction in American history or life. As the American electorate is the true ruler in this country, the adoption of the principle of inheritance in the choice of such ruler means a return to the rejected European system. But, if it be conceded that some legal ground of classification exists based upon a former right to vote or upon descent from such voter, what basis in law can be discovered for a classification which says in effect that large numbers of our own citizens who resided in Alabama, Georgia, Mississippi, or other states shall not be allowed to vote, but all persons who on January 1, 1866, or at any time prior thereto, resided in some foreign nation shall have that privilege? Can it be seriously contended that residence abroad is a rational qualification for voters as against residence at home? For it must be remembered that under the clause it is not even necessary that the foreigner be one who was permitted to vote in his own country or who lived in a nation having an electorate. The Kaffirs and Hottentots and the other negroes of modern Africa themselves are not excluded under this clause, and may even transmit the right to their lineal descendants.

The authors of the Oklahoma amendment desiring to include the Oklahoma Indians, namely, the six tribes of Choctaws, Chickasaws, Cherokees, Creeks, Seminoles, and Osages, who are intelligent, and who had in 1866 a well-defined government with a form of franchise, devised the “any form of government” clause, and, in their desire to include all whites if possible, the “foreign resident” clause, with the right going to lineal descendants in both. They excluded only former non-voting residents and their descendants. These classifications are wholly arbitrary. They are not founded on any distinction referring to the suffrage itself. By no sort of reasoning can it be made to appear that residence in a foreign nation is a special qualification for voting in this, or that such non-residence is a better preparation for the franchise than residence in our own country, or that a voter is necessarily better qualified than another because he had an ancestor who voted.³⁴ The most radical

34. Under the Maryland statute, *infra*, the terms “lawful descendant” are used; under the Oklahoma enactment the expression is “lineal descendant.” The question as to the rights under

features of the Oklahoma amendment are not found in the cognate legislation of any other state. It represents the extreme of this class of enactments, and is perhaps the most vulnerable to attack on constitutional grounds. While no one is verbally and literally excluded by it from the franchise, yet the educational qualification imposed is a virtual exclusion in numerous instances, and it is of course true that any abridgment of the right stands in the same category with its denial.

It will hardly be seriously contended that an enactment requiring a property or educational qualification for all voters, but providing that the same should not apply to democrats, or masons, or those in the state residing north of the Canadian River, would be constitutional, not to speak of lineal descendants of such persons; yet such distinctions are hardly more artificial and arbitrary than the distinctions actually made. They amount to a denial of the equal protection of the laws, for it is through the instrumentality of suffrage that our greatest protection comes.

To exclude a voter merely because he was once not entitled to vote cannot surely be very reasonable and impartial in view of such language as is found in *Mills v. Green*.³⁵ Speaking of the act of South Carolina from which the court deduces the conclusion that its purport is that if a voter were not qualified to vote in 1882, he never could vote thereafter, the court says:

“The statement is appalling, the outrage stupendous, the result close to the border land that divides outrage from crime. It is not necessary to discuss it further; likely the least said about it the better.”

III.

It is not, however, under the Fourteenth but under the Fifteenth Amendment that these disfranchising acts have usually been sought to be overthrown.

In *Mills v. Green* the plaintiff sought to enjoin the registrar to prevent him from denying plaintiff's right to register. On appeal to the Circuit Court of Appeals Justice Fuller held that the injunction would not lie, on the ground that equity has no jurisdiction in matters of a political nature and that “no discrimination on account of race is charged or pointed out as deducible on the face of the acts in question.”³⁶ On appeal the Supreme Court held that the time

the latter of the mulatto, who is able to trace his white blood back to a former voter, though not by lawful descent, might prove a very interesting one, if the constitutionality of the amendment were sustained.

35. *Mills v. Green*, 67 Fed. 818 (1895).

36. *Green v. Mills*, 69 Fed. 852 (1895).

of election having passed there was no subject matter before the court.³⁷ The court thus avoided passing upon the questions involved.

By far the most significant recent case is that of *Giles v. Harris*,³⁸ which was likewise an injunction by a colored citizen of Alabama to compel the registrar to register him as a voter. The court said that it could not order the plaintiff to be registered, for that would be to confirm the very scheme which the plaintiff alleged to be a fraud upon the Constitution of the United States, and that

“if the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration, which defeated their intent.”

The court also said that equity could not undertake now any more than it had done in the past to enforce political rights, and that

“Unless we are prepared to supervise the voting in that State by officers of the court it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the United States.”

The court also broadly intimates that it may not have been by accident that state constitutions are left unmentioned in section 1979 of the Revised Statutes, one of the so-called “Enforcement Acts” of the war amendments, which gives a remedy at law and in equity against any one who, under color of any state statute, ordinance, or regulation, deprives another of his constitutional rights. The court specifically expresses no opinion as to the unconstitutionality of the Alabama provision.³⁹ It contains no grandfather clause, but its vice in the view of the plaintiff was that it was to be so operated as to constitute a scheme to disfranchise the colored race.

From this case it seems clearly apparent that no relief can be expected of equity, for the reason that in addition to disclaiming jurisdiction in political matters equity considers her machinery too lame and impotent to attempt such

37. *Mills v. Green*, 59 U. S. 651 (1895). See Mathews, *Fifteenth Amendment*, *supra*, p. 141.

38. *Giles v. Harris*, 189 U. S. 475 (1903). See also *acc.* *Giles v. Teasley*, 193 U. S. 146 (1904).

39. 17 HARV. L. REV. 130. The writer of the note thinks that no constitutional question was decided by *Giles v. Harris*.

a gigantic task as preventing the people of a state from so administering a law, fair upon its face, as to effect a fraudulent discrimination on account of race. While Justice Harlan, representing a strong minority of the court, believed this to be suitable work for an equity court, yet the majority thought it to be political in its nature and only to be handled properly by the political department of the government. And, if the court should ultimately hold squarely that section 1979 of the Revised Statutes is fatally defective in the particular above mentioned, it would not only leave a plaintiff without a remedy in either law or equity in case the objectionable franchise provisions were found in a state constitution, but it would likewise make it impossible to punish registrars criminally, since section 5510 of the Revised Statutes, the penal statute, also omits the word state "constitution," and there is no other congressional legislation fully covering the same matters. These statutes, however, both contain the word "regulation," which seems broad enough to include every form of state enactment.

In *Jones v. Montague*⁴⁰ a petition was presented asking for a writ of prohibition to prevent the canvass of the votes cast at a congressional election upon the ground that petitioners had in violation of the federal Constitution been denied registration. The court refuses to review the dismissal of the petition for the reason that the canvass had already been made and the House of Representatives had recognized the holders of the certificates; and therefore no relief being possible the case was dismissed as a mere moot case.

A case somewhat confidently relied on by advocates of the modern grandfather clause is *Williams v. Mississippi*,⁴¹ wherein an indicted negro, a citizen of Mississippi, objected to the grand jury of white men who indicted him, on the ground that jurors must be electors, and electors must be able to read and write, and that registration officers are given arbitrary power in determining their qualifications. In commenting on the following language in the case of *Yick Wo v. Hopkins*, namely,

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution,"

the court says:

40. *Jones v. Montague*, 194 U. S. 147 (1904).

41. *Williams v. Mississippi*, 170 U. S. 213 (1898).

“This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them. . . . That amendment [the Fourteenth] and its effect upon the colored race have been considered by this court in a number of cases, and it has been uniformly held that the Constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discrimination by the general government or by the States against any citizen because of his race.”

The decision is not applicable to the Oklahoma situation, where it is not claimed there has been evil administration, for the reason that the Mississippi Constitution contains no grandfather clause or other classification of any character that could be said to be arbitrary *per se* or even to lack impartiality. A mere property or educational qualification uniformly applicable to all is legally unobjectionable. Even its “understanding” clause is of uniform application on its face, and therefore not objectionable apart from its unequal administration. Indeed “good character” as a qualification of voters has long been a legal prerequisite in several of the northern states, and no serious legal objection has ever been made to it on the ground that it lodged an unconstitutional and arbitrary discretion in the hands of the officers of election. There is no presumption that such officers will exercise it unequally.

But can it be said that the Oklahoma amendment does not upon its face discriminate on account of race, color, or previous condition of servitude? Does it not, when taken by its four corners, manifest an emphatic intention to do the exact thing forbidden by the Fifteenth Amendment, but to do it by the use of other language and of different modes of expression? If there can be any doubt of this intention, debates on such provisions are a legitimate method of throwing light upon it just as Elliott’s Debates are in interpreting the Constitution. Debates in the Oklahoma legislature which suggested the measure are not available, but those of the Louisiana constitutional convention on the Louisiana provision, which Oklahoma followed to a considerable extent, are available, and these show clearly, unmistakably, and without reserve an intention to thwart the Fifteenth Amendment and to deny suffrage to the negro because he is a negro.⁴² But is not the language itself

42. The following extracts are from “The Suffrage Clause in the New Constitution of Louisiana,” by Amasa M. Eaton, 13 HARV. L. REV. 279.

Lieutenant-Governor Snyder: “I am in favor of the proposition that every white man shall vote because he is white, and no black man shall vote because he is black. We cannot put in these words, but we can attain that result.”

discriminatory? Does it not fairly labor to give an accurate description of the negroes as the class of excluded persons by the use of language describing them as a race, by reciting historical incidents, and by phrases descriptive of practically all other persons but not applying to them? And where the intent and meaning of language are so clear, is not the substance to be looked at rather than the form, and is it not a trespass upon the dignity of a court to expect it to refuse to brush aside so thin a gauze of words?⁴³

To be sure, as the court points out in *Atwater v. Hassett*,⁴⁴ which sustains the validity of the Oklahoma amendment, a few blanket Indians not belonging to any of the leading tribes are excluded. And the court states that some resident alien whites, who on January 1, 1866, had not declared their intention to become citizens and some who came from other states, where prior to 1866 they were not allowed to vote because of property or other qualifications, are also excluded. But that can be true only provided they never had an ancestor, however remote, who could vote here or elsewhere. Such cases are rare. A few free negroes possessing the franchise before 1866, and likewise such as may have been residing in Africa in 1866 and their descendants, are not excluded; but could it be successfully contended that, for instance, a provision that all former slaves and all poor or illiterate whites should be denied the right of suffrage was not a discrimination against the negro race on account of race? It is no less a doing of the thing prohibited that something else is also done. As was well pointed out by Senator Pritchard⁴⁵ of North Carolina on the floor of the United States Senate, a description of a part of our citizens as not entitled to vote at a period immediately after the war is a good description of those who were in a previous condition of servitude, for no slave was ever allowed to vote. And, if a discrimination is made "on account of" race, color, or previous condition of servitude, it is immaterial what language is used to convey such a meaning.

President Kruttschnitt: "Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?" (Applause.)

Mr. Sanders: "We are here to write in the organic law of Louisiana that the white men shall always rule this state." (Applause.)

Mr. Boatner: "Will Mr. Breazeale permit me to suggest that the committee was seeking in this, in a general way, the exclusion of all the negroes and the inclusion of the whites."

Judge Semmes: "We proclaimed at least in my part of the state that we were coming to establish the ascendancy of the white race, and to see to it that no white man should be disfranchised."

43. In the debates in the Louisiana constitutional convention Judge Coco called the Louisiana provision a "weak and transparent subterfuge."

44. 27 Okla. 292 (1910).

45. 33 Congressional Record, 1027.

The only other case besides *Atwater v. Hassett* where the constitutionality of a genuine grandfather clause has been passed upon is *Anderson v. Myers*.⁴⁶ There were three suits, which were for damages against the registers of election. The statute⁴⁷ resembles somewhat closely the Oklahoma enactment. The opinion of the court says:

“It is true that the words ‘race’ and ‘color’ are not used in the statute of Maryland; but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention, and effect of the law, and not its phraseology, which is important. No possible meaning for this provision has been suggested except the discrimination which by it is plainly indicated. . . . But looking at the Constitution and laws of Maryland prior to January 1, 1868, how can it be said with any show of reason that any but white men could vote then? And how can the court close its eyes to the obvious fact that it is for that reason solely that the test is inserted in the Maryland Act of 1908, and is not the court to take notice of the fact that during all the forty years since the adoption of the fifteenth amendment colored men have been allowed to register and vote in Maryland until the enactment of the Maryland statute of 1908? . . . It was primarily the right of suffrage and its protection as against any discriminatory legislation of the states, which was the subject matter dealt with by the fifteenth amendment and the Revised Statutes; and considering the purpose of the law it does not seem that any other construction can be defensible.”

This decision seems sound, and it is believed that, if the Oklahoma case reaches the Supreme Court of the United States in a form that demands a decision on the constitutionality of the act, which is doubtful in view of the situation hereafter pointed out and in view of the avoidance of a decision by

46. *Anderson v. Myers*, 182 Fed. 223 (C. C., Dist. Maryland, 1910). Constitutionality was assumed, but no reasons given, with reference to the North Carolina provision in *Clark v. Statesville*, 139 N. C. 490 (1905), and with reference to the Oklahoma provision in *Ex parte Shaw*, 4 Okla. Cr. 416 (1910).

47. ACTS, MD., 1908, c. 525, prescribing the qualifications of voters at municipal elections in the city of Annapolis, declares that the registrar shall register all male citizens of twenty-one years or over, not convicted of crime, and assessed on the city tax books for at least \$500, also all duly naturalized male citizens twenty-one years of age, all citizens who prior to January 1, 1868, were entitled to vote in Maryland or any other state at a state election, and all lawful male descendants of the latter, and provides that no person not coming within one of the enumerated classes shall be registered as a legal voter in the city or be qualified to vote at any municipal election held therein.

that tribunal thus far, it will be held invalid.⁴⁸ Unfortunately no facts are given in the Oklahoma case, and it is therefore impossible to know whether the same obstacles will be encountered as in *Giles v. Harris*. The court at least will not decline the exercise of its jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of its judgment.⁴⁹

IV.

If grandfather clauses are unconstitutional, what is the remedy? Granting that the intimation of Justice Holmes in *Giles v. Harris*, that the federal statutes giving civil and penal causes of action when the constitutional rights of citizens are unlawfully invaded, are defective because of the omission in the enumeration of forbidden enactments to mention a state constitution, would not be insisted upon as fatal in view of the use of the broad term "regulation," then the situation in the courts is as follows:

1. The injured plaintiff might sue the offending representative of the state for damages. This is utterly inadequate, as it does not protect him in his right to vote; and before a hostile judge and jury of the locality, the judgment, if favorable at all, would probably be for a nominal sum.

2. A criminal prosecution may be instituted. This does no direct good to the injured party, and is even more likely to terminate unsuccessfully because of local prejudice and feeling. These cannot be avoided even when the trial takes place in the federal courts, where jurors will still be subjected to the local atmosphere of hostility to the plaintiff and his race.

3. If relief is sought in equity to compel state officers to register or receive his vote, we have found that the time for the granting of the relief of the bill will have passed in most instances before it can be reached by the court, and that equity is reluctant to endeavor to enforce political rights, and also considers her machinery inadequate for the immense and complicated task of seeing to it that registration and elections, national and state, are carried on without fraudulent discrimination on account of race.

It is doubtful, therefore, if anything adequate can be done in the courts. It is another example of the truth often clearly observable in the history of

48. "If the North Carolina and Louisiana forms of the grandfather clause shall come before the Supreme Court of the United States in such a way as to make it the right and duty of that court to pass upon their validity, I personally believe that they will be held invalid." *American Political Science Review*, Vol. I, p. 20, "Negro Suffrage," by J. C. Rose. These are the two states which prior to Oklahoma had typical constitutional grandfather clauses. The similar Maryland provision limited to a municipality was statutory. Some years ago the voters of Maryland defeated the most radical educational provision ever proposed.

49. *McPherson v. Blacker*, 146 U. S. 1 (1892).

English law that the remedy lags behind the right in spite of the familiar maxim to the contrary.

What can be done in the political department of the government?

1. Congress might take entire charge of federal elections, appointing its own registrars and its own officers of election.

2. Congress might strengthen its present penal statutes by providing severe penalties for all state officials who in state registrations or elections deny to any person the equal protection of the laws in respect to suffrage, or deny or abridge his right on account of race. It is not perfectly clear at the present time that the enforcement statutes now in effect are sufficient for this purpose. Mr. Rose is of the opinion that they are not.⁵⁰ A number of such statutes have been declared unconstitutional, and those remaining are of doubtful scope. However, it is not entirely apparent how an officer could be made punishable for refusing to register a voter under a wholly unconstitutional law, or even for refusing to permit him to vote. The same difficulty is met here as that which Judge Holmes says in *Giles v. Harris* is encountered in equity. If the law is invalid, it gives no one a right to vote. Perhaps, if it were contained in a state constitution the state would be left without a suffrage law, but how can the officer be reached for punishment? And, on the other hand, if only part of the enactment should be held unconstitutional, namely, the discriminatory phrases, and the main requirement of educational qualification which is admittedly competent should be allowed to stand as valid, then there is ordinarily nothing to punish, for the black, being unable to qualify under such circumstances, is denied no right by being refused the privilege of voting. Possibly Congress might meet this situation by enacting that, if any one is allowed to vote under state sanction, it shall be penal for any state officer to exclude or discriminate against the black because of his race.

3. Congress might empower federal courts of equity to take charge on the complaint of the party aggrieved, and might make it their duty to do so, thus enlarging the scope of clause 16 of section 629,⁵¹ which gives original jurisdiction to the federal circuit courts in such cases.

4. Congress might cut down the representation of the southern states in the lower house.

5. The Fifteenth Amendment might be repealed.⁵²

As to all of these it is evident that Congress contemplates no such action. In House Reports No. 1740, 58th Congress, 2d session, p. 3, it is said:

50. American Political Science Review, Vol. I, p. 34.

51. U. S. Comp. Stat., 1901, p. 506.

52. Arthur W. Machen, Jr., in an article in 23 HARV. L. REV. 169, maintains that the Fifteenth Amendment is void. See an argument *contra* by William C. Coleman in 10 Col. L. Rev. 416.

“However desirable it may be for a legislative body to retain control of the decisions as to the election and qualifications of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies. We have in this country a proper forum for the decision of constitutional and other judicial questions. If any citizen of South Carolina is now deprived [of his right to vote] by the provision of the present constitution he has a right . . . to bring suit in a proper court for the purpose of enforcing his right or recovering damages for its denial.”

Congress thus pushes the shuttle back to the courts. Neither seems inclined to take jurisdiction, for the perhaps unconscious but nevertheless apparent reason that public sentiment in neither the north nor the south would sustain a policy of radical enforcement. Public sentiment in the north is apathetic, while in the south the racial feeling is so powerful that endless new expedients would be resorted to in order to maintain the supremacy of the white race.⁵³ The very federal officers themselves sent in to attend to enforcement would soon partake of this feeling. Such a policy would engender most damaging sectional bitterness, and would greatly check the development of the new and broader sentiments of nationality, which have been rapidly growing in the south during the last few years. The people of the northern states have become convinced that they do not understand the negro problem, and that it should be left to the southern states to work out as they may deem wise. On the other hand, an attempt to repeal the Fifteenth Amendment would be utterly idle. The northern states are willing to be passive, but would resent with all their strength the principle of a repeal. It is not an inspiring spectacle to see a portion of the organic law of the land rendered nugatory by apathetic assent, and it is not calculated to inspire respect for constitutions. It is only another illustration of the practical death of legislation when it ceases to respond to imperative sociological demands; nor is this condition the less apparent because the nation is not in a mood for verbal repeal. The southern states are making the most of a bad situation. They have no desire to show disrespect for the Constitution, but on the other hand cannot be expected, without strenuous effort to discover methods of correction, to accept intolerable

53. The writer of a note in 24 HARV. L. REV. 388 thinks that where a clause exempts from the stricter requirements soldiers and sailors and their descendants it is clearly not contrary to the Fifteenth Amendment, a classification on that basis having been heretofore regarded as a legitimate one. This is the plan followed by Virginia and Alabama, and doubtless some such plan will be followed by other southern states in case the more radical enactments shall prove to have transgressed constitutional limitations.

conditions. The north is making no move toward any change, and matters are likely to drag on indefinitely in their present state of legal uncertainty.

Whether the Fifteenth Amendment was ever necessary to protect a race newly born to civil rights, it must be apparent even to a casual observer of southern affairs at the present time that a persistent attempt to enforce it fully in the light of its initial conception would be little less than a national calamity.⁵⁴

54. The southern viewpoint is well shown by the remarks of Senator John T. Morgan of Alabama on the floor of the Senate in January, 1900. 33 Congressional Record, 671 *et seq.* Speaking of the North Carolina suffrage provision he said: "In physical, mental, social, inventive, religious, and ruling power the African race holds the lowest place, . . . and it is no idle boast that the white race holds the highest place. To force this lowest stratum into a position of equality with the highest is only to clog the progress of all mankind in its march . . . toward the highest planes of human aspiration. . . . It is a vain effort and is fatal to the spirit and success of free government to attempt to use its true principles as a means of disturbance of the natural conditions of the races of the human family and to reestablish them on the mere theoretical basis, which is not true, that in political power all men must be equal in order to secure the greatest happiness to the greatest number. . . . No great body of white people in the world could be expected to quietly accept a situation so distressing and demoralizing as is created by negro suffrage in the south. It is a thorn in the flesh, and will irritate and rankle in the body politic until it is removed as a factor in government. It has been one unbroken line of political, social, and industrial obstruction to progress and a constant disturbance of the peace in a vast region of the United States. . . . The people of the south are justified, and it would be inexcusable if they failed, by every constitutional measure in their power to preserve in their own hands the power of government in their own states, they being responsible for their welfare, their education, their business interests, and the interests of civilization."