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A STUDY OF THE ELECTIVE FRANCHISE IN THE UNITED STATES

Since the United States has become engaged in a second world war, a great many of our customs and activities have been set aside or pushed into the background due to the all out effort to win the war. Some of these customs will be greatly changed when we finally gain victory. All of our pre-war activities will have felt the shock of this earth-rocking conflict. Not only will our social and economic institutions be changed or modified, but our political ideas and aims will be pointed in new directions. This latter institution, namely, our political party system, will probably be one of the greatest post-war influences on all other institutions. For it is through political activity that the people give life and effect to their new ideas.

Many of our young people who have gone into this conflict with hazy ideas of what they want from their government, or what their government should do, have learned from bitter reality the heritage of free men. They have found that in order to gain a better life, a free, peace-loving world, they must take an active, positive part in the governmental affairs of their countries. In some of the countries of this world, this task is difficult since the people are not given a hand or a voice in the affairs of state. Many people on this earth do not have a thing to say as to who is to rule them or to put into practice the desirable and needed policies to preserve the better world which they are now fighting to obtain. These people will be in a rather sad situation since they cannot find a positive way to exercise their will in order to gain their ideals of a better world.

However, the young people of the United States are in a much different position. They have fought to preserve a

heritage of freedom. They were born free, fought as free men, and now they have within their power, if they choose to exercise it, the means of seeing that their new found ideas of social and economic benefit will be carried into effect. For in the United States, the people choose their governmental officers and their representatives who can carry out the principles for which the people have fought and died to gain. This means, which gives the people of the United States an opportunity to shape their own destinies, is the privilege of voting.

Through the elective franchise the citizens of the United States as citizens of each of the states make themselves felt. This brings forth the important feature of dual citizenship which we have in this country. A person "born or naturalized in the United States and subject to the jurisdiction thereof"¹ is a citizen of the United States and also of the state where he lives. Since we have two sovereignties in this country, it must be remembered that the people are citizens of both the United States and the separate states.² Thus the responsibility of each citizen is twofold. He must, therefore, accept the responsibility and exercise his elective franchise as he has never done before in order to gain his new ideals.

In the past non-voting has been famous in the United States. In some of our past Presidential elections as high as eighty percent of the eligible voters have voted, but in other state and local elections a much lower number has participated. Some people have suggested compulsory voting like that used in some of the foreign countries be instituted here. However, the idea of compelling people to vote is repugnant to the American ideals of freedom and democracy. The solution to non-voting does not lie in compulsion; it lies in the intelligent education of our people as to the innate power they possess through their privilege of elections. For an

¹ United States Constitution, Art. 14, Sec. 1.

² Slaughter House Cases, 16 Wall. 73; 21 L. Ed. 394 (1873). Also see U. S. Western Mutual Fire Ins. Co. v. Lamson Bros. & Co., 42 F. Supp. 1007 (1941).

election, broadly defined, means an expression of a choice for candidates by the voters of a body politic.³

Therefore, it is desirable, to examine this almost sacred privilege of voting and see the position of the electors in the American form of "government of the people, by the people, and for the people."⁴

In order to facilitate a study of this important privilege, a definite plan will be followed. There is some necessary overlapping of subject-matter in the following divisions, but this can not be helped since there can be no natural subdivision of such a composite function. Any division will be at best an arbitrary separation in order to explain certain features of the elective franchise. Thus the following eight divisions will be discussed:

1. The Constitutional Provisions.
2. The Elector.
3. The Electors' Qualifications.
4. Political Parties and Primary Elections.
5. Corrupt Practice Acts.
6. Secrecy of Voting.
7. Absentee Voting and Voting by Persons in Military Service.
8. Federal Soldiers' Vote Act.

I

CONSTITUTIONAL PROVISIONS.

Perhaps the first place to start in examining the elective franchise in the United States is to search the Federal Constitution. For in the case of *Taylor v. Beckham*⁵ it was observed that the elective system in the United States is not of

³ See *State v. Hirsch*, 125 Ind. 207, 24 N. E. 1062 (1890) and *Maynard v. Board of Canvassers*, 84 Mich. 228, 47 N. W. 756 (1890).

⁴ Lincoln's Gettysburg Address.

⁵ 172 U. S. 548, 44 L. Ed. 1187 (1900).

common law origin, but it is purely a matter of constitutional and statutory provisions. The right to vote is governed by the constitutions and statutes of the respective states bounded by the limitations and grants contained in the Federal Constitution.⁶

The first appropriate section which draws our attention is Article I, Section 2. It provides that "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for election of the most numerous branch of the state legislatures."

This section provides in effect that whatever the respective states have established as qualifications for electors for elections of their legislatures, the same electors shall be deemed to be electors for the House of Representatives in the Federal Government.⁷

The next important section is Article I, Section 4. It provides that "The time, place, 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 regulation, except as to the place of choosing Senators." Thus each state may make the necessary laws through its legislature which shall govern the time, place and manner of holding Congressional elections. However, in *Ex Parte Yarbrough*⁸ the Supreme Court held that it is in the power of Congress to provide laws for the proper conduct of elections held for congressmen; to provide, if necessary, the officers who shall conduct them and

⁶ It should be noted that since many of the constitutional questions raised under these specific provisions are decided in cases under specific topics, many of the cases will be discussed under the individual topic rather than here under the general constitutional provision.

⁷ See *Ex Parte Yarbrough*, 110 U. S. 663, 28 L. Ed. 274 (1884).

⁸ 110 U. S. 661, 28 L. Ed. 274 (1884).

make returns of the results; and to provide for elections held under its authority; and for the security of the voter while voting.

The next appropriate section is Article 2, Section 1. It provides for the election of the President and the Vice-President and "each state shall appoint in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in Congress." It further provides for the working of the Electoral College. This section of the Constitution was superseded by the 12th Amendment to the Constitution which changes the electoral college system, to the extent of having the electors meet in the states and then in case of no majority for the President or Vice-President being attained, the House of Representatives and the Senate respectively choosing the President and the Vice-President from the two highest numbers on the list.

Article 14, Section 1, is the next important section to examine. It provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege and 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." Section 2 " * * * But when the right to vote at any election for the choice of election for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislatures thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and a citizen of the United States, or in any way abridged * * * the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall

bear to the whole number of male citizens twenty-one years of age in such state.”

This amendment gives added views as to the idea of dual citizenship. It recognizes both United States and state citizenship existing simultaneously.⁹ This amendment recognizes the qualification of twenty-one years of age and citizenship of the United States as part of the requirements for voting for Federal officers. It denies the states’ right to prevent male citizens the right to vote if they are twenty-one years of age and are citizens of the United States. This amendment does not prescribe the qualifications for voters, nor does it grant the right to vote to the above mentioned males. It merely provides a penalty for the states that discriminate against any male inhabitants who are qualified. This amendment does not supersede the states’ lists of qualifications for electors within their boundaries for state officers; and since the qualifications prescribed by the state for the election of its legislators are used for requisites for the eligibility of electors for Federal officers, this amendment does not change the states’ power of defining qualifications.

For example, in *Spencer v. Board of Registration*¹⁰ the court held that to make a person a citizen is not to make him or her a voter. All that has been accomplished by the amendment was to advance such person to full citizenship and clothe him with the capacity to become a voter. The court of California in *Van Valkenburg v. Brown*¹¹ held that the right to vote is not one of the privileges and immunities of a citizen protected by this amendment.

Article 15, Section 1, is extremely important in that it provides that “the right of a citizen 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.”

⁹ Slaughter House Cases, 16 Wall. 73, 21 L. Ed. 394 (1873).

¹⁰ 1 MacArthur D. C. 169 (1873). See also *Gouger v. Timberlake*, 148 Ind. 38; 46 N. E. 339 (1897).

¹¹ 46 Cal. 52 (1872).

In construing this amendment the court in *Lackey v. United States*¹² held that this amendment does not confer the right of suffrage upon any one, nor does it secure or guarantee any right of suffrage to any class of citizens. It has the effect of prohibiting discrimination in the United States "on account of race, color, or previous condition of servitude." Then in *United States v. Cruikshank*¹³ the Supreme Court held that the right to vote in the states comes from the states; the right of exemption from prohibited discrimination comes from the United States. The first has not been granted by the 15th amendment, but the prohibition against discrimination on the basis of race, color or previous condition of servitude has been.

As to the effect of the 15th Amendment, the court in *Neal v. Delaware*¹⁴ held that the adoption of this amendment had the effect in law of removing from the state constitutions or at least rendering inoperative, provisions which restricted the right of suffrage to the white race.

Applying the prohibitive provisions of the 15th Amendment in the famous case of *Nixon v. Herndon*¹⁵ the Supreme Court held that where a state statute was passed which prohibited negroes from participating in party primary elections, the state statute was clearly a violation of this amendment. The state cannot pass an act which discriminates against a citizen of the United States, otherwise qualified to vote, which denies or abridges that citizens' right to vote because of the "color, race, or previous condition of servitude" of that citizen.

Then in *Quinn v. United States*¹⁶ the court was called upon to decide the constitutionality of the so-called "grand-

¹² 107 F. 114 (1901), certiorari denied in 181 U. S. 621, 45 L. Ed. 10, 1032 (1901).

¹³ 92 U. S. 555, 23 L. Ed. 588 (1876). See also *Guinn v. United States*, 238 U. S. 347, 59 L. Ed. 1340 (1915).

¹⁴ 103 U. S. 388, 26 L. Ed. 567 (1881).

¹⁵ 273 U. S. 536; 71 L. Ed. 759 (1927).

¹⁶ 238 U. S. 347, 59 L. Ed. 1340 (1915).

father clause." This provision in the states, either through constitutional or statutory enactments exempted certain persons from the educational requirements prescribed for voters, if the person's forefathers were voters on or before a certain date. The date fixed by these state provisions was previous to the freeing of the negroes during the Civil War. It was in effect to allow uneducated whites who could not pass the educational requirement an exemption while at the same time keeping the educational qualifications in force to prevent a great many illiterate negroes from voting. The court held that such provisions as a condition for voting is a denial of the right to vote to citizens of the United States "on account of race, color or previous condition of servitude." The court thus held these provisions unconstitutional as violative of the 15th Amendment.

The next important section of the Federal Constitution is Article 17. This article provides that "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures." Under this amendment the court in *United States v. Aczel*¹⁷ held that the right to vote for United States Senators is not derived merely from the constitution and laws of the state in which they are elected, but it has its foundation in the Constitution of the United States.

The last constitutional provision which is important to the subject of elections is Amendment 19. This provides that "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 sex." This amendment was the result of a bitter struggle on the part of women to gain the right to vote. Up until the passage and ratification of the amendment, women were not considered eligible to vote in most of the

¹⁷ 219 F. 917 (1915).

states. In 1867 in Kansas a women's suffrage amendment was offered to the people along with a negro suffrage amendment, but both were defeated. Susan B. Anthony was a leader in the fight to gain the voting franchise for women. Organizations sprang up in different states to secure the privilege for women in the states separately. However, this proved rather hopeless. These organizations next started a campaign to secure a federal constitutional amendment. Severe opposition was met in this endeavor also. Then in 1917 the United States became engaged in World War I. The women of the country performed valuable and noble work. This broke down the last restraints of male superiority as far as voting was concerned. Finally in 1919, Congress adopted the 19th amendment and submitted it to the state legislatures. In 1920 the necessary thirty-six states ratified and the discrimination as to voting on account of sex was prohibited. Women were thus freed from this discrimination and the way was open for them by state action to secure the right of suffrage.

Under this important amendment it is interesting to examine its effect by looking at the different judicial holdings which have been decided under it. First, it can be seen that the 19th amendment to the Constitution of the United States automatically struck out the word "male" as a definition of electors in all state statutes and constitutions regarding elections.¹⁸ It is a popular misconception that the 19th Amendment conferred upon women the right to vote. However, this is not the case, for in the case of *State v. Mittle*¹⁹ the court held that the 19th amendment merely prohibits discrimination against women on account of their sex in legislation or constitutional provisions prescribing the qualifications of suffrage. The right to vote is left to state action and deter-

¹⁸ *Graves v. Ewbank*, 205 Ala. 174; 87 S. 587 (1921). See also *People ex rel Murray v. Holmes*, 341 Ill. 23, 173 N. E. 145 (1930).

¹⁹ 120 S. C. 526, 113 S. E. 325 (1922); certiorari denied, 260 U. S. 744, 67 L. Ed. 473 (1922). See also *In Re Graves*, 325 Mo. 888, 30 S. E. (2d) 149 (1930).

mination, but the qualifications cannot be based on the sex of the individual.

One of the important questions which has arisen under the amendment is the liability of women to pay poll tax as required in many states as a prerequisite to voting. For example in *Graves v. Eubank*²⁰ the court held that women were liable for the payment of the poll tax because by erasing the word "male" from the statute both men and women were equal as far as the election laws were concerned. The court said "The result is that upon the final ratification of the 19th Amendment it had the effect of making our organic as well as statutory laws applicable to men and women alike, and placed all women in the state upon the same footing with men." However, an opposite view was taken in *Davis v. Warde*.²¹ There the court held that the 19th Amendment did not in effect make women liable for poll tax under the statute of the state requiring "each and every male inhabitant of the state to pay poll tax." Thus as to the effect of the 19th Amendment it can be said that it does not confer upon women the right to vote, but simply prohibits discrimination against them on account of their sex.²²

Under these above amendments Congress has enacted statutes which reaffirm the amendments as far as the federal government is concerned.²³ However, it is interesting to note that Congress has passed statutes which prohibit Army and Navy officers from interfering with elections.²⁴ A criminal punishment of \$5,000 and imprisonment for not more than five years is provided for any Army or Navy officer who attempts to prescribe or fix the qualifications of voters at any election in any state or who attempts to interfere or impose regulations on any officer conducting an election in any state,

²⁰ 205 Ala 174, 87 S. 587 (1921).

²¹ 155 Ga. 748, 118 S. E. 378 (1923). Appeal denied 263 U. S. 725, 68 L. Ed. 527 (1923).

²² *Glover v. Cobb*, (Tex. Civ. App.) 123 S. W. (2d) 794 (1938).

²³ See 8 U. S. C. A. Section 31.

²⁴ 18 U. S. C. A. Sections 57, 58.

or who attempts to compel the receiving of any vote of an unqualified person in an election.

Perhaps the greatest single feature of all these provisions in the Federal Constitution is that not one of the amendments or articles therein contained confer on anyone the right to vote. This right springs from the respective states through their own constitutions and statutes, and the Federal Constitution merely limits and regulates the unlimited power of the states on the subject of controlling and providing for elections and qualifications of electors. Thus the states are the source of the privilege of voting.

Blending these constitutional provisions more directly with this privilege of voting and examining the privilege itself, it is interesting to see how the courts have held on the nature and regulation of the elective franchise. In the case of *Parvin v. Wenberg*²⁵ the court of Indiana held that the right of suffrage is a political right and not a natural one. Thus it is within the authority of the state to prescribe the manner in which the franchise shall be exercised. Thus subject to the above constitutional limitations, the state can define the qualifications of electors, the form of the ballot, the manner of choosing candidates, and regulate the conduct of elections under their police power. Then in the case of *Attorney General ex rel Coneley v. Detroit*²⁶ the court held that the courts try not to hamper the legislature in the exercise of its control over the elective franchise, particularly with regard to safeguarding the privilege, but the courts do look at all such regulatory laws to see that they are reasonable and impartial. All legislative regulations must be aimed at helping and aiding in the exercise of the elective privilege and not detrimental to its use. The court will declare void any action on behalf of a legislature which endeavors to hinder or deny the

²⁵ 130 Ind. 561, 30 N. E. 780 (1892).

²⁶ 78 Mich. 545, 44 N. W. 388 (1889).

constitutional right of a citizen to vote. This applies also to acts which indirectly try to impede the exercise of the voter's rights.

Many of the state constitutions provide that elections within the state must be "free and equal." To obtain the significance of these terms and their effect, the court in *Ladd v. Holmes*²⁷ held that "free" means that the elector can exercise his right unrestrained either directly or indirectly by military or civil authorities. The voter is not to be interfered with in going to the polls and voting.

Then in Illinois the court in *People ex rel Lindstrand v. Emmerson*²⁸ construing the term "equal" held that it means that the elector could go to the polls free from coercion and cast his vote, and that after the vote was cast, it would have just as much weight in the result as that of any other voter. The Pennsylvania court in *Winston v. Moore*²⁹ held that an election is "free and equal" when it is open and public to all qualified electors on the same footing. The elector has the right to cast his vote and have it honestly counted; that when there are regulations as to the exercise of the franchise, the regulations do not deny the right itself nor do they impose so great a burden on the voter that it is an effective denial of his constitutional right to vote. An example of acts which are denial of these "free and equal" provisions are found where class regulations are imposed on voters of certain counties or cities.³⁰

Under this section on constitutional provisions it is important to see what power Congress has in the control of elections. We have seen that under Article 1, Section 4 of the Federal Constitution, Congress has the power to regulate congressional elections.³¹ Thus Congress has power to supplement, amend, or supersede any state regulations which

²⁷ 40 Oregon 167, 66 P. 714 (1901).

²⁸ 333 Ill. 606, 165 N. E. 217 (1929).

²⁹ 244 Pa. 447, 91 A. 520 (1914).

³⁰ *Ibid.*

³¹ *Ex Parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274 (1884).

have been passed to regulate Congressional elections.³² It was held earlier in *United States v. Wurzbach*³³ and *Newberry v. United States*³⁴ that this article of the constitution did not give Congress power to regulate and control party primaries or conventions which nominated the candidates for election. However, the rule has been overruled and limited by the case of *United States v. Classic*.³⁵ In this case the court held that Congress' power under Article 1, Section 4 of the Constitution, to regulate the elections of its members includes the power to regulate primary elections and their conduct, where and when, by the laws of the state, primary elections are made an integral part of the procedure for the choice of representatives for Congress and as a practical matter, almost conclusively control the choice for Congressmen. The power of Congress under this article includes the right to safeguard the right of the people to choose their representatives in Congress by regulating primary elections in which the candidates are chosen, particularly where the primary is in effect the same as the regular election. For example, in the Southern States where the voters are solidly Democratic, the primary election is the same as a regular election.

While Article 1, Section 4 gives Congress power to regulate Congressional elections, there is no such comparable provision in the Constitution with regard to presidential elections. In the case of *McPherson v. Blacker*³⁶ the Supreme Court held that the method and manner of appointing presidential electors belongs exclusively to the states. Congress' only other source of power to regulate elections comes from the 15th Amendment. However, it is a negative or limitative power since it extends only to discrimination against an elector "on account of race, color or previous condition of

³² *Smiley v. Holm*, 285 U. S. 355, 76 L. Ed. 795 (1932).

³³ 280 U. S. 396, 74 L. Ed. 508 (1930).

³⁴ 256 U. S. 232, 65 L. Ed. 913 (1921).

³⁵ 313 U. S. 299, 85 L. Ed. 1368 (1941).

³⁶ 146 U. S. 1, 36 L. Ed. 869 (1892).

servitude." It is interesting to note that in the case of *Karen v. United States*³⁷ the court held that when Congress does legislate within its constitutional powers over elections, the legislation must be addressed to state action and not toward individuals since these constitutional limitations apply only to the Federal Government and the states and not individual actions. If individuals do act and assume the power of the states, then Congressional legislation will apply. But if individuals by their own acts discriminate against negroes in their right to vote, and there is no cloak of state authority, then the power of Congress is not applicable.

II

ELECTORS.

Under this section the nature of the right to vote in the individual elector is considered. Much of this material has been covered under the first section on constitutional provisions. As to electors themselves, the term means all those citizens who have the constitutional and statutory qualifications which entitle them to vote. Thus the term includes those who possess these qualifications regardless of whether they vote or not.³⁸ As to the nature of the right itself, the case of *Pope v. Williams*³⁹ held that the right of suffrage is not a natural, vested right of which a citizen cannot be deprived except by due process of law. Then in *Grouger v. Timberlake*⁴⁰ the Indiana court held that the right to vote is a conventional right which is subject to constitutional restrictions even to the extent of being withheld since it is granted by the constitution or statutes of the states. If the constitutions of the states did not grant the right, it would not exist to the in-

³⁷ 121 F. 250 (1903).

³⁸ *Guinough v. Police Comrs.* 30 R. I. 212, 74 A. 785 (1909). See also *State ex rel Blair v. Brooks*, 17 Wyo. 344, 99 P. 874 (1909).

³⁹ 193 U. S. 621, 48 L. Ed. 817 (1904).

⁴⁰ 148 Ind. 38, 46 N. E. 339 (1897); *Coffin v. Election Comms.*, 97 Mich. 188; 56 N. W. 562 (1893); *State ex rel LaFollette v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930).

dividual citizen of the states. The right to vote is a political right which distinguishes it from a civil right or a property right.⁴¹

There are three general views as to the right to vote. One group of states hold the view that the right of suffrage is an inherent or natural right which is guaranteed to an individual citizen by a republican form of government. The right is included and protected by the liberties and immunities of the form of government. The right to the citizen cannot be deprived except through due process of law.⁴² This view places the right to vote on the footing of a natural, inherent right which every citizen would become entitled to have by living under a "republican" form of government. This is rather a liberal view, and gives a broader background as to the source of the right. For under this view, the state being bound to guarantee a republican form of government, is bound to recognize the natural liberties and immunities of the citizen. Thus a person gains the right upon satisfying the prescribed qualifications without any enabling or conferring by the states. If the right to vote is inherently a natural right possessed by the citizen, the state is not the source of the franchise, but rather the state is a mere guardian to preserve the natural right to the individual. The complete significance of this view cannot be grasped without remembering the decisions of the courts in construing the effect of the Federal Constitutional Amendments. This comparison will be postponed for the moment while we examine the other two views taken on the right to vote with regard to the individual elector.

The second group looks to the elector himself for the basis of their idea. This group holds that the right to vote is a personal right. In the case of *United States v. Bathgate*⁴³ the

⁴¹ *Walls v. Brundidge*, 109 Ark. 250, 160 S. W. 230 (1913). See also *Morris v. Colorado M. R. Co.*, 48 Colo. 147, 109 P. 430 (1910).

⁴² See *State ex rel LaFollette v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930).

⁴³ 246 U. S. 220, 62 L. Ed. 676 (1918). See also *Ex Parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274 (1884).

court said: "The right or privilege to be guarded (the right to vote) as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicial one common to all that the public shall be protected against harmful acts. * * * The right to vote is personal and we have held it is shielded by the section in question." The section being considered was the congressional act which undertook to preserve the freedom and integrity of elections by providing criminal punishment for interfering with the individual elector exercising his franchise at a congressional election.

This view goes along with the courts' long line of decisions that the right to vote is a personal one which is conferred by the states. This view is the support for the idea that the voting franchise is really a privilege and not a strict right. Thus the state confers the privilege on each citizen under and pursuant to its own qualification which must be construed in light of the Federal Constitutional provisions.

The third view taken on this elective franchise is that expressed by the West Virginia court in the case of *State v. Edwards*.⁴⁴ The court said that "The right to vote is one reserved by the people of the state to members of a class, and when so reserved by constitutional enactment, the right is guaranteed to the class of persons named and is thus given a dignity not less than any other of many fundamental rights." This view looks to the people of the states themselves as the source of the right. The people say who is to vote; they create a class of which persons can become members by satisfying the prescribed qualifications. Once a person has attained the class he is possessed of a right which is guaranteed to him by the constitution, the organ of the people creating the right. Thus once the right is gained and possessed, it is a right which is fundamental and is on an equal plane with the persons' other fundamental rights of life, liberty and property. Just because a person attains the right

⁴⁴ 95 W. Va. 599, 122 S. E. 272 (1924).

there is no guarantee that he will retain it. He is protected from loss of the franchise while he satisfies the necessary qualifications, but once he loses the prescribed prerequisites which make him a member of this electors' class, he loses his class membership. Thus he loses his right. But as long as he maintains his class membership, he possesses his fundamental, constitutionally granted right to vote.

Under the first view presented which dealt with the right to vote as an inherent natural right in the individual citizen, there are several important concepts which must be considered in light of the court's decisions under the Constitution of the United States. Under the view taken above the right to vote is guaranteed by the republican form of government, and is a natural right. It would seem that the voting franchise has its source in a "republican form" of government. Now under the Constitution, "the United States shall guarantee to every state in this Union a republican form of government."⁴⁵ Now if the right to vote is a natural inherent right which is guaranteed by such a form of government, then under this Article of the Constitution, the United States through Congress should be able to regulate and control the states with regard to voting, in seeing that a republican form is guaranteed to the state. In other words by taking this liberal view, it would seem that the United States, through Congress, has a greater part in the franchise than the Supreme Court has held that it has.

For in the case of *United States v. Cruikshank*⁴⁶ the court held that the right to vote is not conferred by the Federal Constitution. There are two systems of government in this country — one of the states and the other of the United States. Each is distinct from the other, has citizens of its own, whose rights it alone must protect. The same person may be a citizen of the United States and the state at the same time, but his rights of citizenship under one of these

⁴⁵ U. S. Constitution, Article 4, Section 4.

⁴⁶ 92 U. S. 542, 23 L. Ed. 588 (1875).

governments are different from those under the other. The government of the United States cannot grant or secure to its citizens rights or privileges which are not expressly or by implication placed in its jurisdiction. Thus the court has decided that the right to vote does come from the Federal Constitution. Then in *Minnesota v. Happersett*⁴⁷ the court held that the constitution did not confer the right of suffrage on anyone and that the United States has no voters of its own creation in the states. And in *United States v. Reese*⁴⁸ the court held that the right to vote in the states comes from the states. Then in *Pape v. Williams*⁴⁹ the court said "The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper."

The court further held that the right of suffrage is not ordinarily considered as being within the privilege and immunities of a citizen of the United States.

Now with this in mind and with the view that the right to vote is inherent in the citizen guaranteed by a republican form of government, it can be asked whether the Federal Government under Article 4, Section 4 of the Constitution, guaranteeing to every state a republican form of government, could force a state to confer the right of voting on its citizens if the state should abolish the right? Could the United States reason that since the right to vote is a natural inherent right guaranteed by a republican form of government, and the right guaranteed was abolished or unprovided for by the state, then the state government was not one of a republican form? Thus since the United States must guarantee such form of government to the states, it had authority under Article 4, Sec. 4 to force the state to provide for election privileges. It seems that the analogy has gone far enough to see that such could not be the case in view of the above

⁴⁷ 21 Wall. 178, 22 L. Ed. 627 (1875).

⁴⁸ 92 U. S. 214, 23 L. Ed. 563 (1876).

⁴⁹ 193 U. S. 621, 48 L. Ed. 817 (1903).

Supreme Court decisions. However, if the liberal view of the right to vote as an inherent natural right were carried out to its conclusion, such a situation of reasoning might arise. To answer the above questions which have been posed, it is sufficient to say that in view of the decisions, the United States would have neither the authority nor the inclination to force a state to establish the right to vote.

It is interesting to note that the right of suffrage in the individual elector which is conferred by constitutional and statutory means cannot be denied to that elector unless he is given notice and an opportunity to be heard. This was so held in *Pierce v. Superior Court*.⁵⁰

An interesting question arises as to electors within territories of the United States. However, since the subject of territories is under the jurisdiction of Congress, and Congress can provide for the affairs of the territory, Congress can authorize and permit the inhabitants of the territory to vote for its own elections. Congress would be limited in the power by the constitutional limitations as far as discrimination goes, but on the whole Congress would be free to determine whether properly qualified persons within a territory will be allowed the privilege of suffrage. Thus it would appear that where Congress had conferred the right of suffrage on territorial residents, Congress by the same manner can take away, modify or alter the right to vote as it sees fit.⁵¹ For being the creator of the power, Congress can also destroy it.

As far as the individual elector is concerned we have seen the effect of different constitutional provisions on his right to vote in the preceding section. For example, in *Guinn v. United States*⁵² the court in construing the effect of the 15th Amendment held that the amendment did not take away the power from the states over elections which they possessed

⁵⁰ 1 Cal. 759, 37 P. (2d) 453 (1934).

⁵¹ *Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 47 (1884).

⁵² 238 U. S. 347, 59 L. Ed. 1340 (1915).

from the beginning. The amendment operates only to take away the authority from the states and the Federal government from discriminating against any citizen of the United States with regard to voting because of his color, race or previous condition of servitude.

Thus we have seen in a general way the source of the right to vote and we have seen who the electors are in relation to that right. While this section has been concerned mainly with the source of the right, it must be remembered that the source of the elective franchise determines who the electors will be. In the next section, *Qualifications of Electors*, we shall be interested in the specific individual elector to see how he may qualify to gain this privilege of suffrage.

III

THE QUALIFICATIONS OF ELECTORS

Since the source of the right to vote rests in the states, it is important to see how they have acted in order to determine who shall vote. The states have attained this end by prescribing certain qualifications which a citizen must have in order to obtain the privilege of voting. Generally this has been accomplished by constitutional provisions. In some states the general outline of required qualifications are provided for, and the specific prerequisites are left to the legislatures to work out.

Generally, however, the states' power to define the qualifications of its voters is practically unlimited, except that the states must not violate the Federal Constitutional provisions. This view has been taken in *Guinn v. United States*⁵³ and *Pope v. Williams*.⁵⁴ In the opinion of the justices in *Re Opinion of Justices*⁵⁵ it was held that the state power in this

⁵³ 238 U. S. 347, 59 L. Ed. 1340 (1915).

⁵⁴ 193 U. S. 621, 48 L. Ed. 817 (1904); see also *Election Commrs. v. Knight*, 187 Ind. 108, 117 N. E. 565 (1917); *Kenneam v. Wells*, 144 Mass. 497, 11 N. E. 916 (1887).

⁵⁵ 118 Me. 544, 107 A. 673 (1919).

field, subject to the above limitations, was unlimited as far as elections for local officers and presidential electors. With these general statements in mind let us turn to the actual qualifications as prescribed by the states.

In the case of *Morris v. Powell*⁵⁶ it was held that where the state constitution enumerates the qualifications and classes of citizens who may exercise the privilege of voting, these constitutionally established prerequisites are to be considered the final and only tests with regard to the franchise. The legislatures are not authorized to change, add to or suspend any of these qualifications later by legislation, unless the constitution expressly empowers it to do so, or the authority can be necessarily implied from the constitution itself. Thus where the state constitution is specific in its enumeration of the qualifications required of a citizen to vote, these are the prerequisites which are needed and no more regardless of what the legislature may do or say. In the case of *State ex rel Taylor v. French*⁵⁷ the court of Ohio construing legislative action on the subject of qualifications under a specific constitutional provision, held that the only method by which the qualifications of an elector could be changed was through a constitutional amendment. Under the same circumstances, the court of Indiana held in *Morris v. Powell*⁵⁸ that a person could not be compelled to give proof of certain qualifications which were not required of him under the state constitution in order that he could vote in an election. These cases form the general rule on the subject of constitutionally prescribed qualifications.

Some state constitutions contain certain of the qualifications required of a citizen to vote, but instead of setting them

⁵⁶ 125 Ind. 281, 25 N. E. 221 (1890). See also *Reson v. Farr*, 24 Ark. 161, 87 Am. Dec. 52 (1865); *State ex rel LaFollette v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930).

⁵⁷ 96 Ohio St. 172, 117 N. E. 173 (1917).

⁵⁸ 125 Ind. 281, 25 N. E. 221 (1890); see also *Coffin v. Election Comms.*, 97 Mich. 188, 56 N. W. 567 (1893), where the legislature was denied the right to change the qualifications of a voter prescribed by the constitution under the power to "prescribe" by law the time and place of holding the election.

out in detail, the constitution expressly or impliedly authorizes the legislature to fill in or add to the requirements. Under these circumstances many questions arise as to the extent or reasonableness of the legislative requirement. Where there is expressed authority for the legislature to fill in the framework of the constitution as to the prerequisites the courts are concerned only with the general principle of whether the acts passed unnecessarily hinder or impede the right of suffrage to the citizen.

The courts have their most difficult times on this subject where the constitution does not expressly authorize the legislature to act. When acts are passed to give added clarity or definition to the prescribed qualifications, the court has to examine carefully each proposal with the view of finding the implied authorization for the legislative action. In a great many cases the grounds for sustaining the legislative action is hinged on the constitutional provision which provides that the legislature may "prescribe by law the time and manner of holding the election." However, it must be said that unless the action so prescribed by the legislature is clearly helpful to the voting right, the courts will conservatively hold against the proposed act.

Next, it should be noted just what particular qualifications are needed by a citizen in order that he might become eligible to exercise the right of suffrage. While each state differs as to the different prerequisites, certain general requirements are contained in most all of the states. The following are briefly the most common qualifications called for by state constitutions:

1. *Citizenship*. All the states require that those who exercise the voting franchise must be citizens of the state. In the case of *People ex rel Hedgman v. Board of Registration*⁵⁹ the court of Michigan held that since the constitu-

⁵⁹ 26 Mich. 51, 12 Am. Rep. 297 (1872). An interesting question arises as to marriages between American-born women and alien men. Whether the woman loses her right to vote or not, see *MacKenzie v. Hare*, 165 Cal. 776, 134 P. 713, annotation, Ann. Cases 1915 B, 265.

tion required that a person voting must be a citizen, a non-naturalized alien was denied the right to vote. This is the first and most generally uniform requirement prescribed by state constitutions or statutes.

2. *Age.* Generally most of the states provide that citizens must be twenty-one years of age before they are able to exercise the right to vote. This is an arbitrary age line drawn by constitutions.⁶⁰ However, during this present war, World War II, there has been great agitation to lower the age requirement. The argument is proposed that since young men and women of the ages from eighteen to twenty-one are fighting for the country and particularly since young men of that age are subject to be drafted these young people should have the right to vote and express their views by ballot. If these people are old enough to fight and die for their country, then they are old enough to vote for the government of the country. This argument gains weight when it is realized that the age requirement as set by the states is a purely arbitrary one. There are active movements under way in many states at the present time to allow these young people to vote. This is particularly true since the passage of the Federal Ballot Act.

3. *Sex.* As we have seen under the discussion in a prior section on the 19th Amendment, the United States Constitution before 1920 did not guarantee to women the right to vote. For in the case of *Minor v. Happersett*⁶¹ the court held that a woman's status as a citizen, under the Federal Constitution did not confer upon her the right to vote. The court held that this right was constitutionally limited to males. There were some states which allowed women to exercise the right of suffrage in special elections and even general elections.⁶² In 1920 with the ratification of the 19th Amendment,

⁶⁰ *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303 (1898).

⁶¹ 21 Wall. (U. S.) 162, 22 L. Ed. 627 (1875).

⁶² *Scown v. Czarnecke*, 264 Ill. 305, 106 N. E. 276 (1914); also *Gouger v. Timberlake*, 148 Ind. 38, 46 N. E. 339 (1897); also *Coggeshall v. Des Moines*, 138 Iowa 730, 117 N. W. 309 (1908).

the question as to women's suffrage was settled. No longer could there be any discrimination in the right to vote on account of sex. Then in the case of *People ex rel Murry v. Holmes*⁶³ the Illinois court held that the amendment did not confer the right to vote on women, but it merely prevented discrimination against them because of their sex. Women were thus free to exercise the right to vote on an equal with males.

4. *Race or Color.* While earlier state provisions before the Civil War prevented the negro from voting, the passage of the 15th Amendment struck down the states' discriminations. After the ratification of the amendment, the right to vote could not be denied to a citizen on account of race, color or previous condition of servitude.

5. *Residence.* The states usually require that each elector must reside within the state, county, and voting district for a prescribed period of time before the election in order to qualify as an elector. The aim of this requirement is to guard against fraud and the difficulty of identifying persons seeking to vote. Also it affords some certainty that the voter has become a member of the community and has a definite interest in the governmental affairs of the place.⁶⁴

As to the term "residence" the court of Indiana in the case of *Quinn v. State*⁶⁵ held that the term as used in the State Constitution for voting purposes cannot be made a matter of legislative construction but is purely a judicial question. It is also well settled that a person must have a domicile or a residence somewhere.

Under the provision of residence, an interesting problem arises in the case of students and teachers seeking residence for voting purposes in the place where their schools are located. The residence of these classes of people depend upon the constitutional provisions and the construction placed up-

⁶³ 341 Ill. 23, 173 N. E. 145 (1930).

⁶⁴ See *Howard v. Skinner*, 87 Ind. 556, 40 A. 379 (1898).

⁶⁵ 35 Ind. 485, 9 Am. Rep. 754 (1871).

on them, as to the method of acquiring residence. But the mere fact that the student or the teacher is enrolled or attending the school does not satisfy the residence requirement. It was said in the case of *Wickham v. Coyner*⁶⁶ that the "fact that one is a student in a university does not entitle him to vote where the university is located nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified." Then in *Re Foster*⁶⁷ the court held that if a student does acquire a domicil at the school town, it is not retroactive so as to date back to his entrance into the school.

In the famous case of *Anderson v. Pifer*⁶⁸ the court of Illinois held that if the student enters college with the intention of returning to his former home after his graduation, he does not attain a voting residence at college. Then in the case of *People v. Osborne*⁶⁹ the court held that where a student is self supporting and he gives up his former residence and comes to college with the intention of remaining in the county after his studies are over, he acquires a residence for the purpose of voting.

In the case of *Dale v. Irwin*⁷⁰ it was held that undergraduates at a college, who were free from parental control and had no other place to go to in the event of sickness, were considered to be residents within the meaning of the statute requiring a permanent abode as a residential requirement, the term "permanent abode" being considered to mean an abode which the occupant had no present intention of leaving and they were thus entitled to vote from the school. Finally, in the case of *Gross v. Wahl*⁷¹ the court held that a student at a university who is self-supporting, who had voted from places other than his original home, and who might not

⁶⁶ 30 Ohio C. C. 765 (1902).

⁶⁷ 123 Misc. 852, 206 N. Y. S. 853 (1923).

⁶⁸ 315 Ill. 164, 146 N. E. 171 (1924).

⁶⁹ 170 Mich. 143, 135 N. W. 921 (1912). See also *Saunders v. Hanna*, 98 Mich. 515, 57 N. W. 738 (1894).

⁷⁰ 78 Ill. 170, 37 A. L. R. 142 (1875).

⁷¹ 164 Wis. 91, 159 N. W. 549, 37 A. L. R. 144 (1916).

stay at the university town, depending upon the opportunity presenting itself at the end of his course, was entitled to vote. The court felt that such a student showed an abandonment of his former home and a sufficient intention to remain in the university town to gain a residence there.

The above rules apply generally to the cases of teachers. A teacher does not become a resident for the purpose of voting in the school town unless he has given up his former residence and has no intention of returning to that former residence.⁷²

An interesting question arises under the present war situation on the subject of residence. Many people are moved around by the Federal government to work on defense projects. These people live in government housing projects on land acquired by the Federal authorities. The question presented is, do these people gain residence in the place where they are located on Federal government property? In the case of *State of Kansas ex rel Parker v. Corcoran*⁷³ this question was answered. In the Act of Congress providing for the housing of national defense workers,⁷⁴ there was a provision for the acquisition of real property for the purpose and the act further provided that such acquisition shall not deprive any state or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the state or local law of the inhabitants on such property. The court held that "civil rights" as used in this section was broad enough to include "political rights." The court found that the Federal Government did not acquire exclusive jurisdiction over the land in Kansas City to be used for housing purposes, nor did it gain exclusive jurisdiction over land leased for temporary living in the area. Thus without this exclusive control, the persons

⁷² See *Nelson v. Bullard*, 155 Minn. 479, 194 N. W. 308 (1923); *Crawford v. Wilson*, 4 Barb. (N. Y.) 504 (1848); *Perry v. Reynolds*, 53 Conn. 527, 3 A. 555 (1885).

⁷³ 155 Kan. 714, 128 P. (2d) 999 (1942).

⁷⁴ 42 U. S. C. A. Sec. 1501 et seq.

living upon this land were not excluded from the right to vote because of living on the land obtained by the Federal Government. The court held that the Federal Government is not required to exercise exclusive jurisdiction over all the land it purchases within a state. It can work out any agreement it desires with the state as to the purchase and matters of jurisdiction. The mere fact that a person works for the Federal Government does not determine a person's qualification to vote. Thus the court held that the persons were entitled to register to vote in the state election provided they possessed the other necessary qualifications.⁷⁵

6. *Ownership of Property.* Generally the ownership of real estate and other forms of property have been abandoned by the state as a qualification to vote in state and national elections. However, in special or limited elections such as school district or drainage district elections, the qualification is still required. For these latter cases, the term "owner" was construed in *People ex rel Shakles v. Milan*⁷⁶ where the statute provided that at all elections every owner of land within the district shall be enrolled to vote. The term meant that the person must have the legal title to the land, and a person who held a contract to purchase is not within the meaning of the statute.

7. *Payment of Taxes.* If the state constitution or the legislature has not been so restricted in its authority in this regard, either may provide as a qualification for voting that the citizen must present proof of the payment of taxes.⁷⁷ Most generally this tax requirement takes the form of poll taxes. In the case of *Breedlove v. Suttles*⁷⁸ the court held that statutes and constitutional provisions which require the payment of poll tax as a requirement to the right to vote or

⁷⁵ For a similar case holding the same way, see *Johnson v. Morrill*, Cal., 126 P. (2d) 873 (1942).

⁷⁶ 89 Colo. 556, 5 P. (2d) 249, 95 A. L. R. 1099 (1931).

⁷⁷ See *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563 (1876).

⁷⁸ 183 Ga. 189, 188 S. E. 140 (1936); affirmed in 302 U. S. 277, 82 L. Ed. 252 (1938).

to register was not a violation of the privilege and immunities clause of the Federal Constitution (Article 4, Section 2). Then in the case of *Davis v. Teague*⁷⁹ the statute of Alabama exempted persons who had served in the military or naval forces of the United States between January 1, 1917 to November 11, 1918 from paying poll tax. The court held that this statute did not deny "equal protection of the laws" since the right of voting is considered a political privilege which the state can control or regulate. The court held that the right of suffrage and of holding office is not a privilege or immunity, belonging to a citizen of the United States, nor is it an inherent or natural right but it constitutes a political privilege which the state may regulate so long as the right to vote is not denied or abridged to any person on account of race, color or previous condition of servitude.

8. *Mentality.* Many of the states have constitutional or legislative provisions which prevent lunatics or idiots from voting. This disqualification is based on the principle that these classes of persons do not possess the sufficient reason or understanding to know what the purpose of the election is or what issue is being decided in the election. The right to vote carries with it the responsibility of understanding the purpose of the right.

9. *Literacy.* The presence of this requirement in the various states depends upon whether the constitution or the legislature is empowered to make it a qualification. In *Davis v. Allen*⁸⁰ the court held that illiteracy will not disqualify a person from voting providing there is no constitutional or statutory provision to the contrary. Then in *Williams v. Mississippi*,⁸¹ a case concerning the famous "grandfather clauses," the court held that an election cannot be subjected to a literacy or educational test where it is not provided for

⁷⁹ 220 Ala. 309, 125 S. 51 (1929); appeal dismissed in 281 U. S. 695, 74 L. Ed. 1123 (1930).

⁸⁰ 157 W. Va. 84, 160 S. E. 85 (1931).

⁸¹ 170 U. S. 213, 42 L. Ed. 1012 (1898).

by the constitution or statute. However, where such provisions are established in the constitution or statutes, they are valid and do not violate the Federal Constitution as long as they do not directly or indirectly discriminate among electors.

There have been attempts under the guise of literacy tests which on the surface establish regular standards of literacy to be passed by all persons as a qualification for voting. However, certain exemptions exist where a person's ancestors before a specified period were voters and these ancestors voted during that period as set up by the statute, the person seeking to vote under this literacy requirement was exempted from the test. In other words the date set by the statute based on a period of previous elections and the person's ancestors was made controlling as to the applicability of the test. This date was usually set before the negro was set free or before any negro could vote. The effect of this type of statute was to allow illiterate whites whose ancestors voted on or before the date set in the statute to be exempt from the literacy test while all the negroes who wanted to vote could not gain the exemption since the date in the acts was set at a time before negroes could vote. These acts were held unconstitutional⁸² on the grounds of discriminating against citizens on account of race, color and previous condition of servitude. Since most negroes were illiterate, they could neither pass the test nor gain the exemption. This was a method attempting to circumvent the effect of the 15th Amendment and was declared void on the grounds of discrimination.

Closely related to the subject of qualifications is the subject of disqualification or disfranchisement. In the case of *Blair v. Redgely*⁸³ the court held that a state has the right to provide that any person who is convicted of a crime shall

⁸² *Meyers v. Anderson*, 238 U. S. 368, 59 L. Ed. 1349 (1915). Also *Guinn v. United States*, 238 U. S. 347, 59 L. Ed. 1340 (1915).

⁸³ 41 Mo. 63, 97 Am. Dec. 248 (1868).

lose his right to vote. The court based its decision on the right of the state to preserve the purity and integrity of elections. Many of the states have enacted such disfranchising laws. Some states have gone as far as to disfranchise a person who was convicted of bribery in an election. These latter provisions were upheld in the cases of *Baum v. State*⁸⁴ in Indiana and *Jones v. Board of Registrars*⁸⁵ in Mississippi. It is difficult to generalize state constitutional provisions for disfranchisement because of conviction of a felony. However, every state has some provision on the subject, but they differ as to the extent or the severity of the crime which will disfranchise the convict.⁸⁶

Another interesting problem is raised under these state provisions where a person is convicted of a crime in a federal court. In the case of *State of Missouri ex rel Barrett v. Sartrebus*⁸⁷ the court held that where the state constitution provides that "persons convicted of a felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting," it was within the authority of the state legislature under the act to deny the right to vote to any person who was convicted of a felony under the laws of the United States. This is generally the prevailing rule on the subject. Thus a conviction of a felony or an infamous crime in a federal court will result in the disfranchisement of the person convicted under most states' provisions.

Under the same subject, there is a split of authority as to whether a pardon granted to a person convicted of a crime restores the person to his right to vote in the state.⁸⁸ In the

⁸⁴ 157 Ind. 282, 61 N. E. 672 (1901).

⁸⁵ 56 Miss. 766, 31 Am. Rep. 385 (1879).

⁸⁶ See *State ex rel Olsen v. Langer*, 65 N. D. 68, 256 N. W. 377 (1934); see also *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407 (1892); and *U. S. v. Barnabo*, Fed. Cases No. 14,522, Mo., 175 S. W. (2d) 787, 149 A. L. R. 1075 (1943).

⁸⁷ Mo., 175 S. W. (2d) 787, 149 A. L. R. 1075 (1943).

⁸⁸ Holding pardon restores person to his right to vote: *Reson v. Farr*, 24 Ark. 161, 87 Am. Dec. 52 (1865), *Jones v. Board of Registrars*, 56 Miss. 766, 31 Am. Rep. 385 (1879), where a pardon by the President of the United States of

case of *Osborne v. County Court*⁸⁹ the court held that where a person has served his punishment for the crime, he is no longer disfranchised under some constitutional provisions.

Now that we have seen the general qualifications which are provided for electors in order to gain the right to vote, it is important to examine the manner in which the state sees to it that all these persons who vote possess these prerequisites. The states in all instances attain the result through the process of registration. Under this system at a specified period before the election is to be held, each person desiring to vote must appear and give proof of his qualifications. If his qualifications are all in order, his name is entered on the Voters' Registration Books in his voting district. This qualification is recorded and he is then eligible to vote.

There are different procedures as to registration. In some states the elector may have to go before a registration board of his voting district. In other states, the political parties make a canvass of all the eligible voters and register them at the time of the canvass. But whatever method is used, this process of registration is the way the states check on the qualifications of the voters. This procedure of registration must be complied with on behalf of all the electors or else they will not be allowed to vote. Thus the process becomes a qualification to vote, namely, if the person complies with the process of registration he can vote, but if he does not comply he is prevented from voting even if he is otherwise fully qualified. Usually this latter situation is not as extreme as it appears, since the states usually provide for exceptions to the rule in cases of hardship and upon proof of qualifications through other means. But this depends entirely on the provisions in the different states.

one convicted of the embezzlement in a Federal Court restores the offender to his right as a voter in the state. *Arnett v. Stumbo*, Ky., 153 S. E. (2d) 889 (1941) where the pardon power in the governor to restore rights of suffrage was expressly granted by the constitution. Contra: *Ex Parte Hunter*, 2 W. Va. 122.

⁸⁹ 68 W. Va. 189, 69 S. E. 470 (1910).

Let us examine some of the courts' decisions on the general nature of these registration laws. For example in the case of *People ex rel Grinnell v. Hoffman*⁹⁰ the court of Illinois held that a registration law which requires the giving of information as to the age, sex, residence and other qualifications of an applicant for registration or voting, is clearly within the power of the legislature to provide. Then in the case of *Morris v. Powell*⁹¹ the court of Indiana held that the registration laws should be impartial, uniform, and reasonable, giving to all citizens who have the right to vote a fair and reasonable opportunity to exercise their right to vote.

There have been questions raised as to the validity of these registration laws. However, it can be generally stated that the courts have recognized and upheld the legislature's power where it has been expressly granted to the legislature by the constitutions and also where there has not been express grants of authority.⁹²

This brings up the main point about the general constitutionality of these registration laws. As we have seen most states provide in their constitutions for the qualifications which are necessary in order to exercise the voting privilege. Such requirements as to age, citizenship, and residence are the most common. A person who thus possesses these qualities is eligible to vote. Where the state constitution makes these qualifications specific and extensive, the requirements are exclusive, and the legislature does not have the authority over the power to add to or alter these set qualifications. Now the problem arises with regard to registration laws when the legislatures pass such acts in order to establish and confirm the constitutionally required qualifications in the in-

⁹⁰ 116 Ill. 587, 56 Am. Rep. 793, 14 A. L. R. 260 (1886).

⁹¹ 125 Ind. 281, 25 (1890).

⁹² See *Blue v. State*, 206 Ind. 98, 188 N. E. 583 (1934); *McMahon v. Swanah*, 66 Ga. 217, 42 Am. Rep. 65 (1880); *People v. Gordon*, 274 Ill. 462, 113 N. E. 864 (1916); *Atty. Gen. ex rel Conely v. Detroit*, 78 Mich. 545, 44 N. W. 388 (1889); see also 18 Am. Jur. 231, n. 1.

dividual electors. If the person, possessing all the qualifications, does not conform to the registration laws, he cannot vote. Thus in effect the legislature by passing the registration act has added a new requirement to the already established constitutional ones. Where the view is taken that the qualifications as set out in the constitution are exclusive and the legislature does not have the authority to add to or take away from these set requirements, these registration acts are attacked on the ground that the legislatures have in fact added another qualification. Before we consider this particular situation a word should be added concerning those states which provide expressly for registration laws.

Some of the constitutions provide that a system of registration be established. Where this is the case, there is no question as to the legality of this type of law when passed by the legislature. There is no question as to the legislature adding other qualifications than those contained in the constitution. The only questions which are considered by the courts concerning these laws are whether they are reasonable and uniform.

Now let us consider again the cases where the constitution has provided for the general qualifications for voting but where there is no provision as to the establishment of a system of registration. When the legislature enacts such laws, they are attacked on the ground that it is a legislative attempt to add qualifications for the privilege of voting. However, it must be said that generally where the aim of such registration laws is not to add to the constitutional qualifications but is merely to define and certify as to their existence in each voter, the laws are upheld. The courts view these laws in the light that as long as the laws are reasonable and uniform to the above aims, it is an aid and a preservation of the elective franchise.⁹³ Thus generally in the ab-

⁹³ See *United States v. Quinn*, 8 Blatchf. 48, Fed. Cases No. 16,110 (1870); *Simmons v. Byrd*, 142 Ind. 274, 136 N. E. 14 (1922); see annotation 91 A. L. R. 350, 351, 353.

sence of an express constitutional provision for registration laws, the courts have upheld them.⁹⁴ The presence of necessity and need is an important factor in these decisions. There are cases, however, where for reasons of sickness and reasons beyond the control of the person preventing them from registering the registration laws have been held to be unreasonable.⁹⁵ With these generalizations in mind, let us examine some of the courts' decisions rendered on the subject.

In *Blue v. State ex rel Brown*⁹⁶ the court of Indiana held that the registration law did not add to the constitutional qualifications but merely were aimed to regulate the right to vote by furnishing proof of the existence of the qualifications. The constitution by establishing the qualifications to vote, implies legislative enactment of such registration laws so as to determine the established requirements. And also, if the voter is allowed to have a reasonable time within which to register, the fact that he fails to comply with the law through some means, does not invalidate the law. This brings up one of the grounds of attack on these acts, namely, that the voter is not given enough time within which to register. However, if the laws are reasonable as to the time element, they are sustained.⁹⁷ For example in Michigan in the case of *Attorney General ex rel Conely v. Detroit*⁹⁸ the court held that where the statute provided that a person must reside sixteen days in his precinct before the election to be eligible, but where the constitution of Michigan set the time of resi-

⁹⁴ For cases generally upholding registration acts as constitutional see *Mason v. Missouri*, 179 U. S. 328, 45 L. Ed. 214 (1900); *Simmons v. Byrd*, 192 Ind. 274, 136 N. E. 14 (1922); annotation 91 A. L. R. 350, 351.

For cases holding registration acts unconstitutional on various grounds see: *Re appointment of Supervisors*, 52 F. 254 (1892); *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109 (1907); annotation 91 A. L. R. 351.

⁹⁵ *White v. Multnomah County*, 13 Ore. 317, 10 P. 484 (1886); *Dells v. Kennedy*, 49 Wis. 555, 6 N. W. 216 (1880).

⁹⁶ 206 Ind. 98, 188 N. E. 583 (1934).

⁹⁷ *State ex rel Canoll v. Superior Court*, 113 Wash. 54, 193 P. 226 (1920); and *Simmons v. Byrd*, 192 Ind. 274, 136 N. E. 14 (1922) where 29 days before election was held reasonable.

⁹⁸ 78 Mich. 545, 44 N. W. 388 (1889).

dence in the precinct at ten days, the statute was void as denying the elector his constitutional right to vote.

Considering again the decisions rendered generally under the registration acts, the case of *Pope v. Williams*⁹⁹ is outstanding. There the court held that where a person was required to register his intention to become a resident of the state before he could register to vote, such a law was reasonable, and it was not an act to hinder or delay the exercise of the voting franchise, nor did it add another qualification for the right to vote to those set out in the constitution. It was not considered an increase in the length of time required for residence as a qualification for voting either. Then in the case of *Morris v. Powell*¹⁰⁰ the court held that the act of the legislature which makes the exercise of the right of suffrage, by one who has been absent from the state for six months or more on business of the state, dependent on proof that he is a taxpayer of the county, and that his name has been continuously kept on the tax duplicate during his absence, is unconstitutional and void, as it requires a property qualification in the class of voters in addition to the qualifications set out in the constitution.

Next in the case of *State of Ohio ex rel Klein v. Hillenbrand*¹⁰¹ the statute provided that the person seeking to place his name on the registration list as a qualified elector of a municipality, must state his age. The statute was attacked as being unreasonable and in violation of the Ohio constitution. The court held that the statutory requirement did not deny the constitutional right of a citizen to vote, nor does it unreasonably impair the exercise of the right. The court held that such requirement of registration was a reasonable uniform and impartial provision to regulate, facilitate, and secure the exercise of the voting privilege. It is aimed at preventing frauds at elections. In North Dakota, in the case of

⁹⁹ 98 Md. 56, 56 A. 543 (1903) affirmed in 193 U. S. 621, 48 L. Ed. 817, 91 A. L. R. 355 (1904).

¹⁰⁰ 125 Ind. 281, 25 N. E. 221 (1890).

¹⁰¹ Ohio St., 130 N. E. 29 (1920).

*Fitzmaurice v. Willis*¹⁰² the court in construing an act of the legislature which required that at an election no persons could vote unless their names were on the registration lists, or they could file affidavits that they were residents of the precinct, and giving their residence, held that the statute was a reasonable regulation for the conduct of the election to prevent fraud. The court then said, "It (the statute) deprives no one of his right to vote, and is only a reasonable regulation under which he may exercise such right." But in *Mills v. Green*¹⁰³ the court held a registration act invalid which required that a person seeking to register must file an affidavit stating his name, age, occupation and residence at the time of the general registration in 1882 or at the time he became entitled to register, with a list of all the places he had resided since he was eligible to register and his affidavit must be supported by two persons who were 21 years of age on June 30, 1882 or the time he became eligible to register. The provision was aimed at keeping negroes from voting and was void for that reason.

In the case of *Davis v. Allen*¹⁰⁴ the registrar of elections asked the applicant such questions as to the payment of poll tax, which was not required as a qualification and asked as to what requisites were necessary to enable one to register. The court held that these questions were improper in that they were designed to test the knowledge of the person as to the law of registration, and were used in an educational test which was beyond the required ability necessary on the part of a person to fill out an application. The registrar is entitled to ask questions concerning the person's qualifications as a voter, but the knowledge of the registration laws is not a prerequisite to the person's right to register. Finally, in the case of *State ex rel Weinberger v. Miller*¹⁰⁵ the court

¹⁰² 20 N. D. 372, 127 N. W. 95 (1910).

¹⁰³ 67 F. 878, reversed on other grounds in 68 F. 852, and appeal dismissed in 159 U. S. 651, 40 L. Ed. 293 (1895).

¹⁰⁴ Va., 160 S. E. 85, 76 A. L. R. 1234 (1931).

¹⁰⁵ 87 Ohio St. 12, 99 N. E. 1078 (1912); see also *People ex rel Chadbourne v. Voorhis*, 236 N. Y. 437, 141 N. E. 907 (1923).

held that the provision of the legislature that the ballots be printed was not an addition of an educational qualification to the existing requirements of the constitution.

Finally, on this subject of registration, it is interesting to note that an important problem is brought forth when a name is illegally or improperly placed on the registration list. The remedy and the procedure of purging these lists is extremely important, particularly in large areas where "boss control" holds sway. Each state has its own laws of purging and no general statements can be made on the subject. However, the two remedies which have been attempted in order to force a purging of the lists by the registration boards are injunction and mandamus. Whether such relief is granted or denied depends upon both the jurisdiction and facts of the case.¹⁰⁶

Thus we have seen the development of the elector's right to vote through the stages of qualifications of the voter so that he can exercise the privilege. We have examined the elector's position with reference to his own personal qualities in the field of voting. Next we must turn to external fields to see how and through what mediums this franchise is exercised. Perhaps the most important influence on the individual elector and the greatest organizer of all the electors for concerted action is the political party. This is the next subject which we must examine. In this field we will also see how the elector participates in the nominating process through primary elections.

IV

POLITICAL PARTIES AND PRIMARY ELECTIONS.

A good definition of a political party is found in the case of *Kelso v. Cook*.¹⁰⁷ The court pointed out that a political party is an unincorporated voluntary association of persons

¹⁰⁶ *Pierce v. Superior Court*, 1 Cal. (2d) 759, 37 P. (2d) 460 (1934). Also see 96 A. L. R. 1049, 1050.

¹⁰⁷ 184 Ind. 173, 110 N. E. 987 (1916).

who are bound together by certain ideas of governmental affairs and who maintain certain views as to political beliefs as to how the government is to operate. These groups seek to carry out their ideas by urging them on all the other electors. They seek to carry out their beliefs by electing officers to the government who share in their ideas. This right to associate together for the sponsoring of certain political beliefs is a right which cannot be unreasonably interfered with by the legislature.¹⁰⁸

Ordinarily men do not act independently in government or in their choice of officers, and during the nineteenth century it was a source of great marvel in the United States that such vast power and influence was held by these political parties. This situation was due to the reliance for organization and education of the people as electors which the political parties handled almost exclusively during that century. Candidates were nominated and elections were practically run by the parties. In the midst of this process, the functions of the government were carried on through political organization, and the states made no move to control or regulate the activities of the parties.

The states awoke to this great concentration of power in political parties when the growth of the "boss" came forth in the latter part of the 19th and the early part of the 20th century. For the first time the great fields of patronage, party favors, government contracts and economic control were seen. Corrupt practices such as buying and selling votes, ballot stuffing, crooked election officials and the like came forth with open notoriety. In the '80's with California leading, the states began to regulate party activities in the nominating processes. The legislatures began, at public demand, to regulate more closely political activity of these associations. In 1912 primary conventions for the nomination of the candidates for the presidency were estab-

¹⁰⁸ *Sarlis v. State*, 201 Ind. 88, 166 N. E. 270, 67 A. L. R. 718 (1929).

lished. Now almost all of the states have some regulation regarding the nomination of candidates by the parties. Most of the crude, open forms of corruption have died out, but more subtle and clever means have developed. The "machine politicians" still control the political parties, and "bosses" still hold sway over the organizations. The laws of control have merely tended to drive a large part of the "political bossing" into the background as pre-nominating or pre-election activity.

There are definite reasons why this kind of groups have grown so fast and wield such great influence. As we have seen the states have the responsibility of conducting local, state and national elections. The states thus prescribe the qualifications which the individual elector must possess in order to vote. These requirements must stay within the Federal Constitutional limitations. Women gained political equality in 1920 with the passage of the 19th Amendment. Then there was the matter of officers to be elected to the governments. In the Federal Government the President, Vice-President, Representatives and Senators had to be elected. In the states, large groups of officers were elected both for the state and local governments. For these numerous offices, the individual elector was faced with a different and difficult task of choosing one candidate out of many. In some cases officers were chosen from two or three hundred nominees. On the same ballot there were usually from one to thirty technical proposals for the electors' choice for proposed changes in the governmental structure. It was impossible for each individual elector to be informed as to all the issues or qualifications of all the candidates. From a combination of all these reasons, political parties arose. The need for a clearing house of information plus the necessity of educating the individual elector brought about the growth of parties. Where first there were small disunited groups of electors, these above situations gave fertile grounds from which strong, vastly organized parties sprang. And, because of

these factors, political parties have made themselves felt. Originally starting as voluntary organizations, they soon swept the control of elections, nominations and policies of government from the individual elector into party domination until now it is practically impossible to gain political office without being a staunch member of one of the two principal political parties.

The methods of the parties have thus become of great importance to the life of the government itself. Today these political parties are in reality no longer voluntary organizations, but by state action and legislation, they are virtually organs of the government.

Before 1888 the parties printed the ballots used themselves, but so many abuses arose that after 1888, the states adopted the Australian ballot and printed and controlled it at state expense. This ballot listed all the candidates of one party in a vertical row next to the respective offices. It allowed a "straight party vote." Another form of ballot which was used was called the "Massachusetts ballot." Under this form all the candidates are grouped under the respective officers, and "straight party voting" cannot be done.

Control over the ballot led to close party organization regulations. Required expense accounts for money spent in party nominations and elections for party committeemen has been enacted by legislature. However, in spite of the abuses and growing control over party affairs and methods, they perform valuable functions. For through these organizations, the voters are kept informed as to the issues of the elections. They help get the qualified voters registered and they get the people out to vote.

In spite of this growing control by the states, the political parties are still run by professional politicians popularly referred to as "bosses." These men keep the organization running and give it life. Patronage and job-getting are still powerful weapons in the hands of these men, and they are used to keep the members working for the party.

Some states have endeavored to remove the political activities in the seeking of certain offices such as judgeships. This has been tried by having nonpartisan elections where no political party label is attached to the candidates. However, this attempt has not been very successful since the party has methods of endorsing and backing certain candidates, particularly the ones who have either helped or cultivated party friendship. With the general history of political parties in mind, let us turn to a more detailed study of the parties and the methods of nominations.

Since the parties have become so important in the affairs and the life of the government itself and since the public welfare is so greatly affected by their activities, many of the states enacted regulatory acts to control these political parties. These acts were attacked as to their constitutionality but the court in *Britton v. Election Commissioners*¹⁰⁹ held that as long as these measures were reasonable, the legislatures were empowered to control the parties under the police power of the state. The above view of the California court is generally considered the accepted rule on this matter.¹¹⁰ Thus political parties are subject to reasonable governmental control and regulation. Then in the case of *State ex rel Webber v. Felton*¹¹¹ the court of Ohio viewed the subject in the light that it is within the constitutional powers of the legislature to prescribe reasonable regulations for a group of people who organize for political purposes and who seek the privilege and benefits of such a status under the election laws, and that it is not unreasonable to prescribe that such groups in order to gain this position must have polled a specified number of the total vote cast at the previous election.

Perhaps one of the most important functions of any political party is to nominate and elect candidates of the party to office. However, this function of nominating or se-

¹⁰⁹ 129 Cal. 337, 61 P. 1115 (1900).

¹¹⁰ 18 Am. Jur. Sec. 132-145.

¹¹¹ 77 Ohio St. 554, 84 N. E. 85 (1908).

lecting candidates for local, state and national offices by these groups was never provided for in the Federal constitution or in fact, in many of the state constitutions. Such a situation was not dreamed of by the constitution makers of the 18th century. But this selection process has become so important a function of political parties that the practice dominates and influences the very affairs and administrations of the offices of the government. Recognizing this situation in all its aspects some of the courts like Illinois in the case of *People ex rel Lindstrand v. Emmerson*,¹¹² have held that party nominations are inseparable from a republican form of government. In fact some feel that these political party nomination processes are essential to a republican form of government.

During the early history of our government, political parties were not strongly organized and candidates for office had to build themselves up by their own efforts and the help of their friends. However, the potential power of the vastness of political organization was soon recognized, and since 1832 all presidential candidates have been nominated at the national party conventions. These party conventions were the first undertakings to be used to select party candidates for office.

Each year when a presidential election was to be held, each political party held a national convention. At the gathering, party representatives chosen by the party organization of each state met to nominate candidates for the national offices. These representatives had been likewise chosen at a state party convention which had nominated loyal party followers for state offices. At the national convention such business as forming a party platform, whipping up party interest, organizing the party forces for the election is performed. After this business was accomplished, the process of choosing a nominee began. First there were nominations

¹¹² 333 Ill. 606, 165 N. E. 217 (1929). See also *State ex rel La Follette v. Kohler*, 200 Wis. 518, 226 N. W. 895 (1930).

of different party personages. Then the convention delegates voted as to which one of the various nominees would be their choice for the party candidate at the general election for the office of President and Vice-President of the United States. When this was accomplished the convention led by its executive committee adjourned for the campaign fight.

The underlying principle behind these conventions was the nominating process. But the whole structure of the conventions was built upon the idea of representation. In other words, the party, through the democratic choice of delegates of the party by its members, nominated candidates. This function and principle behind the national convention was exactly the same for the state party conventions. There were many attempts to control the party conventions and their organization, and many controversies arose concerning them. The courts have usually declined to take part in the arguments holding that in the absence of express power, they have no jurisdiction over the policies and organization of the party conventions.

Many abuses arose in the convention system of nominations. The control of certain "bosses" caused the convention system to be torn from the hands of the individual party members. Practices such as bribery and fraud were prevalent. As a result of these abuses, not only in the conventions but in the old party caucuses, a movement grew to change the method of nomination. This desire to correct the system and once again to return the nominating processes to the individual party members resulted in the adoption of primary election laws. These primary elections were to be conducted by the state under the same care and supervision as the general elections were carried out. Thus each party member could vote for his nominee and have his vote count equally with all other party members, and the candidates so nominated would be the choice of the party members themselves. Thus as was pointed

out in *Kelso v. Cook*¹¹³ the primary election meant, in fact, a choosing of candidates prior to the general election or an antecedent choice in the primary before the final choice of candidates in the final or regular election. The primary thus became the initial step in choosing candidates who, as the result of such election, would take their places on the ballot at the regular election. The purpose was to give the individual added guarantee of a free election; for the choice of candidates for nominations is no less important than the choice of candidates for the offices at the final election. It should be noted here that when primary laws were established, only the process of nomination, since it was vested with great public welfare, was regulated, and the control of the state did not go beyond the nomination process of the party to reach into the other party affairs.

As soon as these primary election laws were passed, grave questions arose as to their validity. Generally, these acts have been upheld by the courts.¹¹⁴ Then as to Congressional authority to regulate and control party primaries, it was held in *People ex rel Phillip v. Strassheim*¹¹⁵ that Congress had no authority to regulate party primaries since this regulation of state primaries is properly the subject of state legislative control.

In providing for the holding of such elections it is within the power of the state to call on and use the party machinery. The legislature of the state may require that notice be given and that the supervision of such elections be held under officers not chosen by the party.

In order to see the correct position of primary elections, it is interesting to note that there is a conflict of authority

¹¹³ 184 Ind. 173, 110 N. E. 987 (1916); see *People ex rel Lindstrand v. Emerson*, 333 Ill. 606, 165 N. E. 217 (1929).

¹¹⁴ Primary Law upheld against the attack of invalid delegation of power see *State ex rel McCue v. Blaisdell*, 18 N. D. 55, 118 N. W. 141 (1908), and held not to violate the constitutional guarantee of freedom of election in *Kelso v. Cook*, 184 Ind. 172, 110 N. E. 987 (1916).

¹¹⁵ 240 Ill. 279, 88 N. E. 821 (1909); see also *State ex rel LaFollette v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930).

as to whether constitutional or statutory provisions relating to elections generally apply to primary elections. One group of authorities hold that the laws relating to primary elections do not apply to primary elections in the constitutional sense. This was held in effect in *Line v. Election Commissioners*.¹¹⁶ These authorities reason that since the primary elections are mere substitutes for party conventions, they are not intended to displace the party and are thus not under the constitutional and statutory principles of general elections.

Another group of authorities hold that the right to nominate candidates whose names will go on the final election ballot is as important as the right to elect the candidates on the final election. Both processes are of equal importance, and thus the process of nomination by primary election must be considered a vital part of the regular election law. In *Britton v. Election Commissioners*¹¹⁷ the court held that a statute which regulated the method of nominations and the rights of the voters in the party was a part of the general election law. These latter authorities also base their view on the practical ground that the party primary is equivalent to the final election since one party is so predominant in the state. This is true in the South where the Democratic Party is the only real party of strength. So when the primary election for the Democratic Party is held in that section, the candidates nominated are assured of election in the general election.¹¹⁸

It should also be noted here that in most primary elections strict party lines are maintained. Only proven or qualified Democrats can vote in the Democratic primary and the same rule applies to Republican primaries. Under this situation the party or the legislature can prescribe reasonable tests for the proof of party qualifications. To what extent the party or

¹¹⁶ 154 Mich. 329, 117 N. W. 730 (1908); Annotation in Ann. Cases, 1913 A, 702; 1918 E, 79.

¹¹⁷ 129 Cal. 337, 61 P. 1115 (1900).

¹¹⁸ See *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987 (1916).

the legislature can go in prescribing qualifications becomes of great importance where the question of discrimination against negroes takes place, particularly in the Southern states. This question will be dealt with in more detail a little later.

Many interesting questions arise as to the construction and applicability of these primary laws. The two views as to whether primary elections are elections within the meaning of the constitutional and statutory meanings or not must be kept in mind here.

Where the provisions for primary elections are made compulsory these laws form a part of the general election law of the state.¹¹⁹ If this is the provision of the statute, this is the one and only way a candidate can get his name placed on the ballot. Under this view, the qualifications of the voter for the primary cannot be different than those established in the constitution for the regular election.¹²⁰ And in the case of *Spier v. Baker*¹²¹ the California court holding the above view ruled that the residence requirement for primary elections could not be set at a shorter period than that time set in the constitution for the general election. Then in the case of *State ex rel Webber v. Felton*¹²² the expenditure of public funds by the state for primary elections was upheld as expenditures for a public purpose on the grounds that such elections are not the private business of the parties, but are part of the general election machinery.

Another view of construction applies in those states where the primary laws either expressly or impliedly do not apply to certain officers. For example in *Kelso v. Cook*¹²³ the statute authorized the nomination of United States Senators and the Governor to be made in the primary, but the other state officers were to be nominated at state conventions. The court

¹¹⁹ *Britton v. Election Commrs.*, 129 Cal. 337, 61 P. 1115 (1900).

¹²⁰ *Johnson v. Grand Forks Co.*, 16 N. D. 363, 113 N. W. 1071 (1907).

¹²¹ 120 Cal. 370, 52 P. 659 (1898).

¹²² 77 Ohio St. 554, 84 N. E. 85 (1908).

¹²³ 184 Ind. 173, 110 N. E. 987 (1916).

held that such an act was unconstitutional. Another form which this view takes is where the legislature provides that the primary law applies only to parties of a certain number.¹²⁴ As to the extent of qualifications under these jurisdictions the case of *Kelso v. Cook*¹²⁵ is typical. There it was held that a statute which prescribed different qualifications for voting in the primary than those required by the constitution for a general election was unconstitutional, since the constitutional provisions relating to elections were not applicable to primaries. Then on the subject of expenses in *Waples v. Marrast*¹²⁶ the court of Texas held that public money expended for primary election purposes was not a fund for a public purpose and thus was unauthorized since the primaries are nothing more than a private matter of the political party.

Perhaps one of the most interesting questions which arises under these two views of primary elections is the question where discrimination is made against negroes to keep them out of the primaries. Two famous cases, *Nixon v. Condon*¹²⁷ and *Nixon v. Hernden*¹²⁸ on this subject held that where the primary election is carried out as a governmental function, qualifications cannot be based on race nor color, nor can these factors be used as a base for disqualification in a primary election. A bit of historical background on the reasoning behind this subject is helpful. As we have seen, the early nomination processes were controlled by the parties. However, when the legislature established primary elections, this power passed from the parties and became vested in the legislature. Thus by subsequent action, the legislature empowers the political party to determine the qualifications of the members for the election, it is not an invalid delegation of power since it amounts only to a regulation of power al-

¹²⁴ See *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180 (1916).

¹²⁵ 184 Ind. 173, 110 N. E. 987 (1916).

¹²⁶ 108 Tex. 5, 184 S. W. 180 (1916).

¹²⁷ 286 U. S. 73, 76 L. Ed. 984 (1932).

¹²⁸ 273 U. S. 536, 71 L. Ed. 759 (1927).

ready possessed by political parties. Under this development the case of *Grigsby v. Harris*¹²⁹ held that since the parties were voluntary organizations, each one was free to select or reject those persons whom it pleased for membership. However, this broad holding must be qualified. For when the exclusion is based on discrimination in violation of the 14th and 15th Amendments, the exclusion is unconstitutional where the primary election is considered a state function. Whether the exclusion by the parties of certain classes of people amounts to a violation of these constitutional provisions depends upon whether the action taken is under the authority of the state or whether it is taken under party action alone — the inherent power of the party to choose its members until it is taken over by the state. Thus the test is whether the holding of the primary election is a state function by the passage of an act which makes it so or whether the power to choose members is left in the party outside of the state control.

The Federal courts have used this as a basis for their decisions on the subject. They have also used the test as to whether the expenses for the primary are borne by the state or the party. If they are borne by the state, these courts consider that the primary election becomes part of the state function and are under the prohibitions of the 14th and 15th Amendments. However, if the party pays for the election, then these constitutional amendments have no application since they are not intended to apply to private individuals in their actions. Thus under this latter test, party exclusions of negroes is valid. With these reasons above in mind, it is interesting to examine some of the Federal decisions on this subject.

First, in *Nixon v. Condon*,¹³⁰ the court held that under the Texas law where the political parties paid the expenses of the

¹²⁹ 27 F. (2d) 942 (1928).

¹³⁰ 34 F. (2d) 464 (1929). This is reversed in 286 U. S. 73, 76 L. Ed. 984 (1922).

primary, and the state did not, the party was not an agency of the state so that when the Democratic committee excluded negroes from the primary election, there was no violation of the Federal Constitutional Amendments since they applied only to state action. The case was appealed to the United States Supreme Court and was reversed. The court held that since Texas, after the declaration of the statute which expressly prohibited negroes from voting as void, had passed another statute which gave the political parties the right to define the qualifications of its own members, the second act was a denial of the equal protection of the laws to negroes. The court reasoned that since the State of Texas had taken the authority to empower the political party to so define the qualifications, it showed that the party did not have inherent power to so define them in the first place. The court said: "When those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power." Then the court reversed the lower court and held the exclusion by the political party void as discriminating against the negroes.

Then in the case of *West v. Bliley*¹³¹ the court held that where the State of Virginia bore the expense of the primary, the exclusion of negroes from the election by the party pursuant to a statute authorizing that the party define the qualifications of its members, was void as discriminatory, contrary to the Federal Constitution. The court held that by authorizing the party to act as it did so as to exclude negroes, the state had tried to do indirectly that which it could not do directly; namely, discriminate on account of color. The fact that the state paid the expense of the primary election made the election and its machinery a state agency.¹³²

¹³¹ 33 F. (2d) 177 (1929).

¹³² See also *Robinson v. Holman*, 181 Ark. 428, 26 S. W. (2d) 66 (1930), and *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (1930). For other cases on the subject of whether or not the exclusion of negroes by a political party is a

On this subject a series of cases arising in Texas prove interesting. The first case which came up was *Nixon v. Condon*¹³³ (*supra*). The legislature of this state after passing an act to prohibit negroes from voting in primary elections and having it declared void as discriminatory, passed another act giving the party the right to determine qualifications of its members for voting in the primary. The Supreme Court declared this attempt void and unconstitutional as a denial of equal protection of the laws in the above mentioned case. Then in 1935, the case of *Grovev v. Townsend*¹³⁴ was decided. In this case the county clerk refused to grant a negro an absentee ballot. The clerk was bound by certain statutes of Texas to perform only public duties of a clerical nature with regard to primary elections. The State Convention of the Democratic Party, by resolution, adopted a measure which made only white citizens eligible for membership. In view of this resolution the clerk refused the ballot. The Supreme Court declared that this action was not a violation of the 14th and 15th Amendments to the Federal Constitution since it was not state action. The Democratic Convention had taken the action by its resolution, and the state had nothing to do with it. This case was distinguished from *Nixon v. Condon* (*supra*) in the fact that in the principal case the action of exclusion was taken by the Democratic Convention which was not a state agency, while in the Nixon case the action was taken by the Democratic Executive Committee pursuant to statute which conferred the right to so act on that body. In the principal case the action was held not to be taken by authority of the state but was voluntary party action. In the Nixon case the action was taken under state authority.

violation of the 14th and 15th amendments see *White v. Lubbock*, 30 S. W. (2d) 722 (1930); *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180 (1916); *Bell v. Hill*, 123 Tex. 531, 74 S. W. (2d) 113 (1934) holding that the exclusion of negroes from the primary is lawful.

¹³³ 286 U. S. 73, 76 L. Ed. 984 (1932).

¹³⁴ 295 U. S. 45, 79 L. Ed. 1292 (1935).

Then in 1941 the case of *United States v. Classic*¹³⁵ arose out of election frauds in the Louisiana Democratic primary. In this election nominations were being made for representatives in Congress. The State of Louisiana paid the expenses of the primary and had passed numerous laws which in effect made the primary an integral part of the state election machinery. Because of these frauds by the officers of the election, there was a prosecution under the Federal Criminal Code.¹³⁶ The court held that the prosecutions were good under the Federal Code since Article 1, Section 4 of the United States Constitution protected the electors right to vote for Congressional officers in primary elections as well as general elections where the primary election is conducted as a state agency. Thus the power of Congress to regulate primary elections as well as general elections where representation in the Federal legislature is involved was recognized.

Then another case arose in Texas in 1940 which reached the United States Supreme Court in 1944. This was the case of *Smith v. Allwright*.¹³⁷ The primary and general election laws of Texas were exactly the same as they were in 1935 when *Grovey v. Townsend* (*supra*) was decided. In this case a negro was denied the right to vote in the Democratic primary for the nomination of Congressmen as well as the state officers. He brought suit for damages and the recovery was denied on the strength of *Grovey v. Townsend*¹³⁸ (*supra*). The Supreme Court heard the appeal and re-examined its former decision on the grounds of the Constitutional principles involved. The court decided that the exclusion of the negro from voting was discriminatory and a violation of the 14th and 15th Amendments since the primary election was conducted basically as a state agency. Since the legislature had placed the selection of candidates for public office whose names were finally to go on the official ballot in the political

¹³⁵ 313 U. S. 299, 85 L. Ed. 1368 (1941).

¹³⁶ See 18 U. S. C. A. Sec. 51, 52.

¹³⁷ 64 Sup. Ct. 757, 88 L. Ed. 701 (1944).

¹³⁸ 295 U. S. 45, 79 L. Ed. 1292 (1935).

party, it had, by this action, made the primary election a state function conducted under state authority. Thus the party action of excluding the negro was subject to the 14th and 15th Amendments of the Constitution since it was taken in the primary conducted as a state instrumentality or agency. This case thus directly overruled *Grove v. Townsend* (*supra*). There was a vigorous dissent made to the majority opinion of the court by Justice Roberts.

Thus this last case completed the view of the regulation of primary elections as being included under the 14th and 15th Amendments where federal candidates are being nominated. There has been a great deal of criticism of this decision by prominent members of the American Bar Association.¹³⁹ It is particularly under attack by the Democratic Party in Texas which is presently engaged in a new process of finding a way around the decision in order to exclude negroes from its primary. Needless to say more cases will arise in Texas and elsewhere on this question. Now leaving this question of discrimination and its effect in primary elections, there are other interesting problems under the subject of primaries.

For example in the cases of *People ex rel Lindstrand v. Emmerson*¹⁴⁰ the question of cumulative voting arose. A statute of Illinois provided that the committee of a political party could determine the number of candidates of their party for representatives in the legislature, and each elector of that party was given an equal voice in the primary as to the number of candidates so determined. The statute in effect provided for cumulative voting on behalf of party primary electors. The court held that such a provision was not unconstitutional and is violative of the guaranty that all elections shall be free and equal. The court held that such a statute was not an invalid delegation of power either.

¹³⁹ Article, Chicago Tribune, September 15, 1944.

¹⁴⁰ 353 Ill. 606, 165 N. E. 247 (1929).

Another question on primary elections arises when the party establishes tests of party loyalty as to previously known voting as a qualification. In the case of *McLean v. Fish*¹⁴¹ the court held that as long as the states have made no provisions as to these tests of party affiliations as a qualification, the party is free to prescribe such tests on the subject as they see fit. Then in the case of *Friberg v. Scurry*¹⁴² the court held that the Democratic Party had no power to deny an otherwise qualified voter from the primary because he had previously voted for the Republican President. The court held that they had no power because of a statute which provided that no person could be denied the right to vote in a primary because of his former political affiliation.

Another interesting problem is presented where people are excluded from primary elections because they have failed to comply with party enrollment requirements. In the case of *Brown v. Cole*¹⁴³ the court held that where the state has prescribed qualifications of voters for its primary election, the party committee has no power to establish different qualifications by adopting a system of enrollment of voters for the primary.¹⁴⁴

An interesting question arises as to the constitutional rights of groups nominating candidates for public office outside of the regular primaries or conventions. The question comes up because of the fact that state statutes providing for primary elections usually limit the primary to parties of a certain size.

¹⁴¹ 159 Ark. 199, 251 S. W. 686 (1923); see also *Ferguson v. Montgomery*, 148 Ark. 83, 229 S. W. 30 (1920); *Love v. Taylor*, (Tex. Civ. App.) 8 S. W. (2d) 795 (1928); *Clancy v. Clough*, (Tex. Civ. App.) 30 S. W. (2d) 569 (1928); *Lett v. Dennis*, 221 Ala. 432, 129 S. 33 (1930); *White v. Co. Democratic Executive Com.*, 60 F. (2d) 973 (1932).

¹⁴² (Tex. Civ. App.) 33 S. W. (2d) 743 (1930); see also *Raymer v. Willis*, 240 Ky. 634, 42 S. W. (2d) 918 (1931); *Love v. Buckner*, 121 Tex. 369, 49 S. W. (2d) 425 (1932); *State ex rel Hinrub v. Parish*, 173 La. 857, 138 So. 826 (1931).

¹⁴³ 39 N. Y. C. P. R. 296, 104 N. Y. S. 109 (1907).

¹⁴⁴ For exclusion because of refusal to pay party assessments see *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388 (1904).

If a party does not conform to the statutory size, it is left to its own methods of nomination. The courts have usually held that state statutes prescribing the minimum size of parties eligible to take part in the primary are constitutional. The only questions which give rise to litigation are the reasonableness or arbitrary nature of the standards set by the statute.¹⁴⁵

A final problem under this section of primaries and political parties is the one of "nonpartisan ballots." The courts have viewed these provisions favorably. Under this system of elections certain officers are elected on ballots which do not place party denominations on the candidates. In other words, instead of the candidates running under party labels for an office, no party designation is given, and the man runs for the office on his own name. The reason for these "nonpartisan ballots" is to cut out "party politics" in certain elections. However, the aim of these acts is not always carried out because the party can throw its weight behind certain candidates on the nonpartisan ballot who are favorable and friendly to the party. But the courts have held that such provisions for a nonpartisan ballot for certain offices like judgeships are constitutional.¹⁴⁶

Thus we have seen generally the position of political parties and primary elections as a part of our electoral process, together with the influence these institutions have on the individual elector. Next, let us examine briefly the restraints put on parties and candidates as far as their actual conduct for nominations and elections is concerned. This entails a brief study of the so-called Corrupt Practice Acts.

¹⁴⁵ *Munsell v. Hennegan*, Md., 31 A. (2d) 640 (1943); *Speckles v. Graham*, 194 Cal. 516, 228 P. 1040 (1924); *Brown v. Election Commrs.*, 174 Mich. 477, 140 N. W. 642 (1913); *State ex rel Harris v. Belote*, 106 Fla. 938, 143 S. 881 (1932); *Moore v. Walsh*, 286 N. Y. 552, 37 N. E. (2d) 555 (1941); *Nelson v. Marsh*, 123 Neb. 423, 243 N. W. 277 (1932).

¹⁴⁶ See *Moon v. Halversen*, 206 Minn. 331, 288 N. W. 579 (1939); *Hoelsh v. Girard*, 54 Idaho 452, 33 P. (2d) 816 (1934); *Sarles v. State*, 201 Ind. 88, 166 N. E. 270 (1929); *Ann. 67 A. L. R. 737*, 125 A. L. R. 1044.

V

CORRUPT PRACTICE ACTS.

In most of the states in this country, the legislatures are bound to maintain the purity and integrity of elections. In order to do this, the legislature must pass acts preventing buying of votes, ballot box stuffing, false counting, and other methods of contorting elections. The legislatures have acted in this matter by passing *Corrupt Practice Acts*. These statutes usually regulate the expenses of candidates running for election, and provisions are made whereby the candidate must file an accounting for public inspection of the income, contributions, and expenses which the candidate had for the election. These acts go further and cover the matters of electioneering practices also. Some of the state statutes are more comprehensive than others. But on the whole the courts have viewed these acts favorably and have held them constitutional under the police power of the state.¹⁴⁷

In order to give the full legislative intent to these acts, the courts construe them liberally on the grounds that the legislature has broad power in the field of purity and integrity of elections. Under these acts, some states have provided that where a candidate has been guilty of "corrupt practices," he is disqualified from holding the office he sought. In almost all of the states, however, a candidate who violates the terms of these statutes is liable for criminal prosecution and punishment.¹⁴⁸

The Federal Government has also enacted Federal Corrupt Practice Acts for the purity of elections where Federal officers are concerned.¹⁴⁹ However, in an act of 1911, the Federal Government tried to enact a *Corrupt Practice Act* which regulated the amount of money a candidate for Sena-

¹⁴⁷ *People v. Gansley*, 191 Mich. 357, 158 N. W. 195 (1916); *State ex rel LaFollette v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930).

¹⁴⁸ *People v. Gansley*, 191 Mich. 357, 158 N. W. 195 (1916); *State v. Paris*, 179 Ind. 446, 101 N. E. 497 (1913).

¹⁴⁹ 2 U. S. C. A. Sec. 241-256.

tor or Representative could expend for the nomination in a primary election. The Supreme Court in the famous case of *Newberry v. the United States*¹⁵⁰ held that the act was unconstitutional. The court held that the power of Congress to regulate "the manner of holding elections" was not broad enough to include primary elections. However, as we have seen this view has been changed, and the court has said that Congress does have power under the above provision to regulate primary elections where Federal officers are concerned.¹⁵¹ After the *Newberry* case, Congress passed another *Corrupt Practice Act*.¹⁵² This statute was upheld as constitutional in the case of *Burroughs v. United States*.¹⁵³ The court held the act valid as far as Presidential and Vice-Presidential elections are concerned.

Turning from these *Corrupt Practice Acts*, let us return to the individual elector and his right to vote and examine that person's right to have his vote rendered in private and to keep his choice secret.

VI

SECRECY OF VOTING.

Before 1884 the general practice in the United States was to conduct elections by open and public voting. But the practice proved embarrassing and clumsy. Certain individuals could, by their position, such as big employers, force others to vote the way they wanted by the simple expediency of discharging the person who didn't vote according to the wishes of the influential person. By open elections, a complete check on the vote of each person would be kept. So to meet this problem and to satisfy the need for a more workable system, the states adopted the individual Australian Ballot. Under this system, the individual elector marked an individual bal-

¹⁵⁰ 256 U. S. 232, 65 L. Ed. 913 (1921).

¹⁵¹ *United States v. Classic*, 313 U. S. 299, 85 L. Ed. 1368 (1941).

¹⁵² 2 U. S. C. A. Sec. 241-256.

¹⁵³ 290 U. S. 534, 78 L. Ed. 484 (1934).

lot of his choice for office and dropped it into the ballot box. There were no markings, names or similar identifications on the ballot to tell of the election. The state paid the expenses of the printing of these ballots. The idea of freedom had at last flowed to the election proceedings as far as the electors were concerned.

The people of the country had fought to gain their freedom and in the Bill of Rights of the Constitution, had enumerated certain freedoms such as freedom of speech and religion which the government of the country could not deny. However, until 1884, the freedom of the ballot had not been provided for. The very fact that elections were the medium by which the people controlled and chose their government began to be recognized as the one basic way to enforce the freedoms for which they had fought. So it became evident that the unrestrained, uninfluenced right to vote in order to be properly exercised to gain the purpose, must be protected by secrecy.

Many of the states recognize this situation and in order to preserve the integrity of elections have provided in their constitutions for the secrecy of voting.¹⁵⁴ In the states where the constitution is not specific on the point, a split of authority develops as to whether the constitutional provision requiring that voting be done by ballot implies a requirement of secrecy. The better reasoned view and the weight of authority holds that such secrecy is required.¹⁵⁵ Michigan and Pennsylvania have passed strict laws which are aimed directly at preserving and protecting the secrecy of the ballot. In these two states as well as the others which protect this secrecy, the laws prohibit marking the ballots for subsequent

¹⁵⁴ *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97 (1871); *Detroit v. Rush*, 82 Mich. 532, 46 N. W. 951 (1890).

¹⁵⁵ *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97 (1871); *Detroit v. Inspector of Elections*, 139 Mich. 548, 102 N. W. 1029 (1905); also Alabama, Minnesota, Missouri, North Carolina, South Carolina, and Virginia. Contra: *State ex rel Plemmer v. Posten*, 59 Ohio St. 122, 52 N. E. 196 (1898).

identification, exhibiting the contents of the ballot, and election officers from disclosing how a voter marked his ballot.

One of the interesting questions which is involved in this problem of the secrecy of voting is whether an elector can be required to disclose his choice in an election when he is testifying at a trial. Some of the cases decided on this point will be interesting to examine.

In *Glenn v. Snow*¹⁵⁶ the court of Kentucky held that the rule of privilege exempting a voter from testifying how he voted in an election under a constitutional guarantee of secrecy of the ballot, had no application where the person was an illegal voter. The court also held that the rule of privilege did not extend to primary elections even if the person was a legal voter since the constitutional guarantee of secrecy of the ballot did not apply to primary elections.

It is generally held, however, in a regular election that a legal and honest voter cannot be required to testify as to which candidate he voted for. It is a privilege guaranteed by the constitutional provisions protecting the secrecy of the ballot. It is an outgrowth not only of the secret ballot which we have in the United States, but also out of the desire to preserve a purity of elections and an independent exercise of the voting privilege.¹⁵⁷ In the case of *McArtor v. State*¹⁵⁸ the court of Indiana held that the secrecy extending to legal voters in a regular election, extends also to absentee voters and they cannot be required to testify as to which candidate they voted for.

As we have seen in *Glenn v. Gnau (supra)* the privilege of secrecy does not extend to an illegal voter, and he is not exempt from testifying for whom he cast his ballot.¹⁵⁹ However,

¹⁵⁶ 251 Ky. 3, 64 S. W. (2d) 168 (1933).

¹⁵⁷ *Stevenson v. Barker*, 347 Ill. 304, 179 N. E. 842 (1932); *Gardner v. School District*, 248 Mich. 134, 226 N. W. 895 (1929); Annotation: 90 A. L. R. 1362.

¹⁵⁸ 196 Ind. 460, 148 N. E. 477 (1925).

¹⁵⁹ See also *Gardner v. School District*, 248 Mich. 134; 226 N. W. 895; *Thompson v. Clarke*, 254 Mich. 641, 236 N. W. 893 (1931); *Robinson v. McAbee*, 64 Cal. App. 709, 222 P. 871 (1923).

it must be added that in some jurisdictions an illegal voter can claim the privilege of not testifying as to the way he voted on the grounds that he cannot be compelled to incriminate himself.¹⁶⁰

Since the right not to testify is a privilege, the question of waiver arises. A legal voter can claim this privilege from not testifying and thus gain his exemption, and it is also true that since this privilege is personal to the voter, he can waive the privilege personally just as when he claims it.¹⁶¹ Then on the question of an illegal voter and waiver, the court in *Gardner v. School District*¹⁶² held that if a voter voluntarily admits the illegality of his vote he is deemed to have waived his right of refusing to testify because of self-incrimination, and the witness will be required to testify as to how he voted in the election.

Next let us turn to the important question of absentee voting. This is an important provision as far as the individual elector is concerned, and especially during the time of this present war since so many voters are away in military service.

VII

ABSENTEE VOTING AND VOTING BY PERSONS IN MILITARY SERVICE.

The problem of absentee voting arises where qualified electors are absent from their voting precinct on the day of election due to some necessity. There is a problem as to how these people can vote without appearing personally at the polls. This situation has been greatly enlarged by the fact

¹⁶⁰ *Stevenson v. Barker*, 347 Ill. 304, 179 N. E. 842 (1932); *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248 (1907). For the necessary evidence before requiring an illegal voter to testify as to his choice see *Montoya v. Ortez*, 24 N. M. 616, 175 P. 335 (1918).

¹⁶¹ *State ex rel Hutchins v. Tucker*, 106 Fla. 905, 143 S. 754 (1932); *Stevenson v. Barker*, 347 Ill. 304, 179 N. E. 842 (1932).

¹⁶² 248 Mich. 134, 220 N. W. 895 (1929).

that during the present war, many of the young, qualified electors are absent from their voting districts. To meet this situation many states have passed Absentee Voters' Laws. In some of the states the acts were limited to cases of military men only, while in other states the privilege of voting by absentee ballot has been extended to all electors who for various specific reasons are unable to vote on election day in person.

Generally under these acts certain specific reasons are set out which are the basis for the voters' absence from the polls on election days. If the voter cannot appear in person to cast his ballot because of one of these reasons, such as sickness, urgent business, and state or Federal business, he can apply for an absentee ballot. There are usually regularly established forms which can be made out for this application. It must be filed within a specified period in order to obtain a ballot. If the voter's qualifications measure up to the standards, and he comes under one of the absentee voter's reasons as set out in the statute, a special absentee voter's ballot is given or mailed to him. This ballot contains the regular lists of candidates. Usually it must be filled in and sealed before some officer able to administer oaths. The ballot thus sealed is mailed back to the voter's precinct so that it will arrive within a certain period of time around the general election day. Upon complying with all of these requirements, the absent voter thus has his vote counted in the general election just as if he had personally cast it at the polls.

Of course these acts were subjected to many attacks as to their constitutionality. Of course no question arises on this subject where the constitution of the particular state expressly authorized the legislature thereof to enact such laws.¹⁶³ Under this situation the only questions for litigation revolve around the reasonableness and extent the legislature went in their enactments. The real issues arose on this subject where

163 See 35 A. L. R. 815.

the state constitutions did not expressly provide for this situation.

Many of the early absentee voters' laws were declared unconstitutional as far as state officers were concerned since many of the state constitutions expressly provided for the elector's residence, and the time and place of holding the election. These provisions were made specific as qualifications for the exercise of the voting franchise. Where they were specifically provided for in the constitution, the legislature could not change these requirements. However, as far as the Presidential and Vice-Presidential elections were concerned, these absentee voters' laws were declared valid since the Federal Constitution, Article 2, Section 1, provides that each state shall appoint electors for the President and Vice-President in such manner as the legislatures thereof may direct.¹⁶⁴ This was in effect held in *People ex rel Twitchell v. Blodgett*¹⁶⁵ where the Michigan court held the absentee voters' act unconstitutional as to the state election of state officers, but constitutional as far as Representatives in Congress was concerned, because the Federal Constitution, Article 1, Section 4, provided that the time, place and manner of holding the elections for Senators and Representatives shall be prescribed in each state by the legislature thereof.

No general rule can be made for the earlier decisions on this subject of absentee voter laws since it always depended on whether the state constitutions were specific as to the time, place and manner of conducting the elections. If the constitutions were specific as to these requirements, the legislatures were deemed to be forbidden to change these provisions by the enactment of absentee voters' laws.¹⁶⁶ In the

¹⁶⁴ See *Re vote of Soldiers in Military Service*, 27 Pa. Dist. Rep. 10 (1917); 14 A. L. R. 1256.

¹⁶⁵ 13 Mich. 127 (1865).

¹⁶⁶ *Bourland v. Hildreth*, 26 Cal. 161 (1864); act held unconstitutional because of the residence requirement of the California constitution. In 1922 the California constitution was amended to provide for absentee voting laws. *Chase v. Miller*, 41 P. 403 (1862), act declared unconstitutional as repugnant to the residence requirement of the constitution. *Opinion of Judges*, 30 Conn. 591 (1862), act un-

case of *Clark v. Lyons*¹⁶⁷ another ground for declaring these acts unconstitutional was found. The court of Kentucky declared the absentee voters' act invalid on the ground that it violated the constitutional guarantee of the secrecy of the ballot.

However, if the constitutions of the states did not contain specific provisions as to the time, place and manner of conducting elections and the legislatures were given authority, either expressly or impliedly, to fill in the general requirements as set forth in the constitution, the legislatures were thus free to enact laws prescribing the qualifications or the manner of conducting elections. Under these conditions the absentee voters' laws were upheld.¹⁶⁸ This same distinction is the basis for the decisions on the subject today. One of the many interesting cases on this subject is *Jenkins v. State Board of Elections*.¹⁶⁹ In this case the court held that although a constitutional provision that elections shall be by ballot means a secret ballot, the voter may waive the provision and mail his ballot to the election officials to be deposited in the box by them. And further, that the provision that every person offering to vote shall be a legal resident of the election district, does not require his personal presence in the district where the offer is made, but it may be made in writing.

The same questions as to the constitutionality of the absentee military voters' laws are presented as were found

constitutional as violative of the constitutional requirements of the manner of conducting elections. *Re Contested Elections*, 281 Pa. 131, 126 A. 199 (1924), act unconstitutional as violative of the constitutional provision as to residence. *State v. Lyons*, 1 Terry 40 Del. 77, 5 A. (2d) 495 (1939).

¹⁶⁷ 192 Ky. 594, 234 S. W. 1 (1921).

¹⁶⁸ *Morrison v. Springer*, 15 Iowa 304 (1863); *Lehman v. McBride*, 15 Ohio St. 573 (1863); *State ex rel Chandler v. Main*, 16 Wis. 398 (1863); For special elections see *Goodell v. Judith Basin Co.*, 70 Mont. 222, 224 P. 1110 (1924); *Jones v. Smith*, 165 Ark. 425, 264 S. W. 950 (1924); *Gleck v. Hunter*, 190 Ind. 51, 129 N. E. 232 (1920); as to the construction and effect of Absentee Voters' Act, *State ex rel Whitley v. Rinehart*, 140 Fla. 654, 192 S. 819 (1940); absentee's presence at polls on election day, not rendering vote cast by absentee ballot illegal: *McCardle v. Holcomb*, 216 Ind. 267, 23 N. E. (2d) 470 (1939); *Burke v. State Bd. of Canners*, 152 Kan. 826, 107 P. (2d) 773 (1940).

¹⁶⁹ 180 N. C. 169, 104 S. E. 346 (1920).

above under the regular absentee voters' acts. The problem for the courts to determine is whether the state constitution has so fully defined the time, place and manner of holding the election as to preclude and prevent the legislature from passing statutes allowing a different method of voting as to the time, place and manner under the situation of persons in the military service. For example, in the case of *Re Lancaster City's Fifth Ward Election*¹⁷⁰ the court held that the legislature of a state cannot provide for general absentee voting where the constitution provides that the elector shall have resided in the district "where he shall offer to vote" a specified period of time preceding the election and provide a special provision for absentee soldiers' vote.

Most of the soldier voting laws which were passed before the Civil War were declared unconstitutional as far as state officers were concerned because of some constitutional provision which conflicted with them. However, these same laws were upheld as to electors of the President and Vice-President.¹⁷¹

Several of the military absentee voters' laws were attacked on the ground that they were class legislation and thus void. However, the courts of Ohio¹⁷² and Wisconsin¹⁷³ held this contention was not true since the acts were limited in their application to military personnel in the service of the state or the United States. Missouri enacted a broader absentee voters' law which was attacked on the same grounds. But the court in *Straugham v. Meyers*¹⁷⁴ held that the act was unconstitutional since it applied equally to all persons who were unavoidably out of the county on business.

In the opinion of the Rhode Island court in *Opinion of the Justices*¹⁷⁵ the constitution provided that electors who were

¹⁷⁰ 281 Pa. 131, 126 A. 199 (1924).

¹⁷¹ See annotations, 14 A. L. R. 1257; 19 A. L. R. 308; 35 A. L. R. 819.

¹⁷² *Lehman v. McBride*, 15 Ohio St. 573 (1863).

¹⁷³ *State ex rel Chandler v. Main*, 16 Wis. 398 (1863).

¹⁷⁴ 268 Mo. 580, 187 S. W. 1157 (1916).

¹⁷⁵ R. I., 25 A. (2d) 360 (1942).

otherwise qualified to vote except being absent from the state, shall have the right to vote and further that the assembly may provide special regulations in the manner of voting for persons in the actual military service of the United States. The court was of the opinion that the provisions did not confer on the persons in the military service the right to vote for officers not specifically enumerated in the constitution for such absentee voting. The court was of the further opinion that the assembly could provide for the registration of those in military service since the constitution had conferred such power on that body.

It should be remembered on this topic that generally a person who is in the military service is not disqualified *ipso facto* from voting unless the constitution specifically prohibits them from voting. This view was taken in *People ex rel Orman v. Riley*.¹⁷⁶ In the case of *Dirst v. McDonald*¹⁷⁷ the court of Illinois held that residence for voting is neither gained nor lost by the presence of a person in a particular place because of military duty or being absent from his regular residence in the scope of his military duties.

Then in the case of *Taylor v. Reading*¹⁷⁸ the court held that a soldier did not gain a voting residence in the locality by the mere fact that he was stationed there. In New York the court held in *Re Cunningham*¹⁷⁹ that the intention of the person in the military service will determine whether or not he has gained or lost his voting residence. Then in the case of *In re Right of Electors*¹⁸⁰ the court construed the amendment to the Rhode Island Constitution providing for voting by persons absent in the military service broadly to include all persons who were absent while engaged in the

¹⁷⁶ 15 Cal. 48 (1860); *Hunt v. Richards*, 4 Kan. 549 (1868); but for constitutional provisions preventing military personnel from voting see: *Savage v. Umphries*, (Tex. Civ. App.) 118 S. W. 893 (1909); *State ex rel Simon v. Moorhead*, 102 Neb. 276, 176 N. W. 70 (1918).

¹⁷⁷ 372 Ill. 498, 24 N. E. (2d) 361 (1939).

¹⁷⁸ 4 Brewst (Pa.) 439 (1870).

¹⁷⁹ 91 N. Y. S. 974 (1904).

¹⁸⁰ 41 R. I. 118, 102 A. 913 (1918).

prosecution of the war. The court used the term "military establishment of the United States" to cover the scope of its decision.¹⁸¹

Let us next examine some of the recent decisions on this subject which have arisen during the present war. In the case of *Rentz v. Gauney*¹⁸² the court held that the statute requiring the election inspectors to leave on the registration lists all those who voted at the last general election except those who have ceased to be voters in the district, did not apply to persons in the United States Marines, and that the person's name should be left on the list. Then in *State ex rel Walker v. Harrington*¹⁸³ the court declared unconstitutional a statute which provided that persons in military service could vote at the polling place at their encampment or a convenient encampment since it was an unreasonable restriction on the right of challenge, departed from the prescribed election procedure and frustrated the power of the court sitting as a board of canvass.

In the case of *Gregory v. Sanders*¹⁸⁴ the statute required the candidates to pay a fee for having his name placed on the ballot. The ballots with one of the candidate's names printed on it were mailed to absent soldiers for voting purposes. The candidate failed to pay the fee. The court held that the absentee soldiers' votes should be counted regardless of the candidates' failure to comply with the statute even though the candidates' failure to pay the fee required a new printing of the ballots for local use. The court held that the statute must be construed in the light of the circumstances of the case so as not to frustrate the intention of the ab-

¹⁸¹ For the construction and interpretation of these absentee voters' laws see: *People ex rel Brush v. Schum*, 168 N. Y. S. 391, (1917); statute construed liberally: *People ex rel Colne v. Smith*, 176 N. Y. S. 608 (1919); *Re Zierbel*, 169 N. Y. S. 270 (1918); *Vote of Soldiers in Military Service*, 27 Pa. Dist. R. 10 (1917); see 140 A. L. R. 1110 for complete annotation for Pennsylvania, New Jersey, Nebraska, Indiana, Kentucky, and North Carolina.

¹⁸² 179 Mass. 156, 39 N. Y. S. (2d) 289 (1942).

¹⁸³ Del., 30 A. (2d) 688 (1943).

¹⁸⁴ Miss., 15 S. (2d) 432 (1943).

sentee soldiers' voting acts. Since the statute did not declare such a violation as a forfeiture of the soldiers' ballots because of the necessity of printing new ones, the court would construe the statute as merely directory rather than mandatory.¹⁸⁵

Next, in the case of *Richardson v. Radics*¹⁸⁶ the court held that a person who was in the military service but who had not registered according to the statute was not eligible to vote under the constitutional provision that no "elector" should be deprived of his right to vote because of his absence from the election district due to military service. The court held that "elector" meant "qualified elector" and a person who had not registered was not a "qualified elector." Finally, in the opinion of the court in *Re Opinion of Justices*¹⁸⁷ the court was of the opinion that the legislature could not empower the Governor to advance the date of the primary election so as to let military personnel vote in the coming general election since the grant was so broad and undefined as to render it unconstitutional as an invalid delegation of power.

Thus it can be seen that the scope, application and effect of absentee voters' laws, both general and for military persons, depends upon the scope of the constitutional provisions and the construction of the state statutes. In the case of Absentee Soldier Voters' laws, particularly, these two problems of construction are felt. No definite rule can be advanced which will serve as a test which will assure a person in the military service that he will be able to vote. Because of this situation, there was a great deal of agitation to provide definitely that all such people should be able to vote in the 1944 Presidential election. This feeling gained such strength that the Congress of the United States passed legislation which attempts to provide an opportunity for each person in the

¹⁸⁵ On the question of the construction of the registration requirement of the New Jersey statute with regard to absentee soldiers' registration, see: In *Re Donahay*, N. J., 34 A. (2d) 299 (1943).

¹⁸⁶ N. J., 35 A. (2d) 425 (1943).

¹⁸⁷ Mass., 52 N. E. (2d) 974 (1943).

military service of the country who is a qualified voter to vote. An examination of the Federal Act will be both informative and interesting.

VIII

FEDERAL SOLDIERS' VOTE ACT.

As we have seen in the preceding section, the people in military service are under a handicap in the exercise of their right to vote. By being absent from their districts on election day, they are not able to vote in person. Where provisions for absentee balloting are attempted by the legislatures to remedy this situation, constitutional hurdles such as residence, registration, poll tax, and place of holding elections must be overcome. Because of failure to comply with all of these requirements, many military personnel are deprived of their right to vote.

The present war has greatly magnified this situation, since there are many more qualified electors engaged in the conflict. Grave concern arose over the fact that around 11,000,000 members of the armed forces of the country would lose their right to vote. It is practically impossible for this group of people to comply with the different requirements of the forty-eight states. For example, the statutes of four states do not provide for absentee voting at all.¹⁸⁸ In eleven states registration is required before an absentee can vote.¹⁸⁹ In most of the states the procedure necessary in order to obtain absentee ballots is so complicated and time consuming that military personnel do not have the means nor the time to comply with them. Then the fact that these people are spread out all over the world makes it impossible for them to get all the necessary applications and the final ballot back to their districts in time for the election. The space of time between the primaries where the candidates are nominated

¹⁸⁸ President Roosevelt's message to Congress, Jan. 26, 1944, 20 Cong. Record 752.

¹⁸⁹ *Ibid.*

and the general election is so short that the names of the candidates cannot be sent to the absentees in time. The only remedy for this situation is in the centralization of all these voting procedures into a swift workable plan which would coordinate all the different state voting laws. This was just what Congress did in 1942.

In that year Congress passed an act ¹⁹⁰ which provided for a federal ballot to be prepared by the states. It further cut out or limited state requirements as to registration, payment of poll tax, and other time consuming procedures as far as military personnel was concerned. Provisions were made whereby these people could, by post card, furnished by the Federal Government, request a federal ballot from their respective states. This act in effect provided for absentee voting in the states which had none and also eliminated many state requirements under their voting procedures. Still few service forces were able to take advantage of the provisions of the Federal Act because the ballots could not be sent out until after the candidates had been nominated in the primaries. Thus there was not enough time between the nominations and the general election to get the ballots printed, sent to the armed forces, and receive them back for recording in the general election returns. President Roosevelt's message to Congress in January of 1944 conveyed this picture of the situation of absentee military voting. As a result of this, Congress on April 1, 1944 passed a new absentee military voters' act.¹⁹¹ The act provided only for the right to vote for the Presidency, the Vice-Presidency and Congressmen. A summary of the act is extremely interesting.

Section 303 ¹⁹² provides that the act shall not limit the right to vote of any person in the military service or any other person to vote according to the laws of his resident state.

¹⁹⁰ Public Law 712, 56 Statute 753.

¹⁹¹ 58 Statutes 136, 50 U. S. C. A. Sec. 301-354.

¹⁹² 50 U. S. C. A. Sec. 301-354.

Section 321 sets out the purpose of the act, namely, that Congress recommends that the states pass appropriate legislation to allow people serving in and attached to the armed forces who are absent from their voting districts to vote by absentee ballots for Federal, State and local officers in both primary and general elections.

In Section 322, Congress recommends that the states waive their registration requirements and empower their election officials to send out absentee ballots to the voters in the armed service. It is further recommended that where the registration requirement is not waived, that the states should allow and accept the absentee voters' post card application as both an application for registration and a request for a ballot.

The people included under the provisions of the act are as follows: "Every voter serving in the armed forces of the United States or in the Merchant Marine of the United States, or serving in the American Red Cross, the Society of Friends, the Women's Auxiliary Service, Pilots of the United States Organizations and attached to and serving with the armed forces of the United States."¹⁹³

Then Section 323 provides for the printing of these post card applications for absentee ballots. The form of the card is set out in the statute. This section again stresses the favoring of Congress that these post cards be used by the states for applications for ballots for the state and local elections. This section provides that the War Ballot Commission,¹⁹⁴ made up of the Secretaries of War and Navy and the Administrator of the War Shipping Administration, should send these post cards to the voters in the armed forces. Whether the post cards are allowable by the states for their own elections or not, these cards are to be used by the military voters in securing their ballots for any general election where the

¹⁹³ Section 322 — for a complete listing of people eligible under the act both outside of and inside of the United States.

¹⁹⁴ Provided for and established in Subchapter III, Sec. 331.

electors for the Presidency, Vice-Presidency, or Congressmen are to be voted upon. These cards must be delivered to the absentee military voters by certain dates: i.e. by August 15th if the voter is outside of the United States and by September 15th if inside the United States.

Then by Sections 325 and 326, the Commission must gather information as to the holding of the different state elections and transmit this data to the armed forces' voters. This Commission must aid and expedite the sending of both the applications and the ballots themselves between the voter and the states. Section 327 provides for the distribution of the ballots; the designation of ballot envelopes and instructions, a recommendation of the states' extension of the time limit as to the mailing of ballots before the election, a recommendation to the state to waive registration requirements for absentee voters included under this act, and finally a recommendation to the states to reduce the size and weight of absentee voters' materials in order to expedite transportation.

Subsection III provides for the establishment of the War Ballot Commission and establishes the form of the Federal Ballot. This ballot is to be used where the governor of the state of the voter has certified that no procedure for absentee voting has been made to grant absentee ballots to voters in the armed forces, or where the state law has adopted the use of the Federal ballot, or when the governor of the voter's state has made neither of the above certifications but the voter makes an oath that he has applied for a state ballot but has not received it by October 1. If any of these four situations exist and the person is in the classification of persons under the act, the Federal Ballot can be used.

The Federal Ballot provides for the voting by writing in the name of the candidates for the President, Vice-President, Senator and Representatives in Congress from the voter's district and Representatives-at-Large. Then the ballot goes on and provides for a form of an oath to be taken by the voter as to his qualifications under this act. This oath is

printed on the "official inner" envelope which contains the ballot. This "inner" envelope is placed in an "official outer" envelope and sealed after the voter has exercised his vote.

Then in Section 336 it is provided that the War Ballot Commission shall compile the lists of candidates and their political parties from the respective states for President and Vice-President or for Senators and Representatives in Congress. These lists, whether complete or not, will be transmitted by the Commission all over the world where voters are located who are under the act. Sections 337 and 338 provide for the distribution and collection of the ballots of the members of the armed forces and others and of the merchant marine. Then Section 339 provides for the transmission of the marked ballots back to the United States and thence to the respective states. Section 340 provides for reports by the respective states as to the receipt of these ballots.

In Section 341 the validity of the Federal Ballots is provided for. There are three situations which will render such a ballot void: (1) If the voter has voted in person at the polls or has voted by means of the procedure of absentee voting in his state; (2) If the oath of the voter on the Federal Ballot is later than the date of the holding of the election; and (3) if the Federal Ballot is received later than the closing time of the polls on the election day, except where there is a state provision for an extension of time for receiving absentee ballots which is made applicable to the Federal Ballots.

Section 343 provides for the application of the laws prohibiting offenses against the voting franchise to the cases of voting done under this act. In Section 344 the taking of "polls," i.e. requests for information as to the manner or choice of the elector on his ballot, is forbidden. These are the main sections of this important act.

Thus this act provides for a new, quick method of absentee voting for the election of federal officers by voters of the service branches engaged in the fighting of the war. Form

ballots, lists of candidates, and transmission of the ballots is provided for to gain speed and ease in allowing these persons to exercise their voting privilege. Under this act the states are free to determine for themselves whether or not the voters under the act are qualified to vote under the laws of the states. The counting of the ballots is left to the state. The act makes two inroads on the state's power over elections. First the state requirements as to the registration for voters are abolished insofar as they concern absentee voters who are under the act. Secondly, the state requirement for the payment of poll tax is suspended for these persons. These inroads are made on the states' power over elections only in the case of the election for the President, Vice-President, or Senators and Representatives in Congress.¹⁹⁵

The act makes no provision for the voting of these persons insofar as state and local elections are concerned. It is on this fact that the grounds for Congress' power to pass such a law can be seen. As has been seen before, Congress, under Article 1, Section 4 of the Constitution, has power to change any of the state regulations as to the "time, place and manner of holding elections for Senators and Representatives in Congress." This act as far as Congressional control of elections is concerned is based on this provision. But the power of Congress to so provide the same procedure for the election of the President and Vice-President is not so clear and has no express constitutional authority. Thus it is questionable whether Congress has the power to change the state law as to registration and the payment of poll tax as state qualifications for voters is concerned in Presidential and Vice-Presidential elections.

The reason that Congress made no attempt to apply the provisions of this act to state or local elections is the fact that Congress has no power, either expressed or implied, to interfere with the states on this matter. To have done so

¹⁹⁵ President Roosevelt's message to Congress, Jan. 26, 1944, 20 Cong. Record 752.

would have resulted in an unconstitutional act. But this body has extended itself into the field of the states' power over elections on the above constitutional power. Whether the action is valid as far as Presidential and Vice-Presidential elections are concerned remains to be seen. But it would appear that Congress has overstepped its legal and constitutional authority in this matter. The purpose of the act is laudable, but from a strict constitutional viewpoint, it is rather doubtful. Thus we have seen the latest development in the field of absentee voting.

We have examined the privilege of voting in this country. The development of this right is the one potent factor in maintaining our country the great nation it is today. On each individual elector rests the obligation, nay, the absolute duty, to exercise this privilege with intelligence and resolution. An understanding of the voting franchise is the first step toward the intelligent use of the right. To that end and goal, this study is humbly dedicated.

Charles M. Boynton.