AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Federalism/State Regulation of Federal Elections

**In the Matter of the Application of William A. Thomas v. Cohen, 262 N.Y.S. 320** (NYS Kings Co., 1933)

*The New York City lawyer William Thomas avowed that he was a supporter of Franklin Roosevelt’s in the presidential election of 1932, but he was dismayed when he arrived at the polls in Brooklyn and discovered that the voting machine only listed the party-nominated candidates for the presidency and vice presidency and did not list the names of the individual presidential electors. The traditional paper ballots in New York had listed the names of the presidential electors, and Thomas contended that this arrangement was constitutionally mandatory because “we do not vote for the persons who are to serve as president and vice president; we vote for presidential electors who choose such officials for us.” The question of whose names should appear on the ballot was a narrow one, but the argument that Thomas raised was a fundamental one about the role of members of the Electoral College in the modern constitutional system. Were voters merely electing members of the Electoral College, or were they really electing the president himself?*

*Thomas filed suit in the local state court seeking a writ of mandamus ordering election officials to list the candidates for the Electoral College in the voting machines. The argument was sufficiently important that the state attorney general appeared at the trial court to defend the constitutionality of the state’s new electoral process. The judge sided with the state, concluding that the presidential electors were no longer constitutionally important and exercised no discretionary authority and thus voters did not need to know who they were.*

JUDGE CUFF.

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Does section 1 of article 2 of the United States Constitution give the right to voters to vote for presidential electors? It does not. It empowers the State to appoint them "in such Manner as the Legislature thereof may direct." As a matter of history, for many years after the Constitution was adopted the Legislatures made the appointments. The States early in 1800 (except South Carolina, which retained the old method until 1860) gave the voters the right of selection. Paper ballots, at first, were furnished. Among other things, the names of the presidential electors were set out in alphabetical order. . . .

Times changed, and the paper ballot was no longer efficient or satisfactory. The Legislature, that provided the paper ballot for election of presidential electors, authorized the use of the voting machines. These legislators, direct representatives of the people of the State, knowing that voters were no longer interested in the personnel of the group of electors, and realizing that the whole block was voted for or against, depending upon the presidential candidates or as a matter of party attachment, omitted the names. . . .

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Petitioner means by these utterances that the electors are not bound to vote for the candidates nominated by the political parties which they represent; that they may vote for any qualified person. Do presidential electors possess such freedom of action? Does the United States Constitution require them to vote as directed by the voters of their State? Confining yourself to the exact language of that instrument brings a negative answer to that question. We must inquire, however, if anything has happened since those constitutional provisions were written which might alter the apparent meaning. If presidential electors may name any persons for President and Vice-President, no one will deny that their names should be posted before the voters on the machines, for they would be the most important and powerful officials voted for. What has happened since section 1 of article 2 was written?

For a generation the people of this country have understood that the presidential candidate who received the plurality in a State was entitled to the electoral vote of that State. That understanding has developed because of the unfailing performance by presidential electors. We started in 1787 with the system by which uninstructed individuals (the electors) appointed by Legislatures were empowered to choose the executive for the nation. We now have, and for a long time have had, a system of popular balloting for individuals (electors) who have been designated by the political parties for the sole purpose of voting for those nominated for President and Vice-President by the national convention of their party -- the real persons voted for or against by the electorate of the country on election day. How did that change come about? It evolved. . . . About eighty-five years ago, the national convention idea came into being, and since then the aspirants [for the White House] have been named by the political parties.

Since then every four years the people participated, or interested themselves, in these nominations. Prior to the election the nominees and thousands of spokesmen in their behalf, by the written and spoken word, declared themselves on questions of interest to the people andimportance to the country. The widest publicity was given to these pronouncements. The nominees submitted their qualifications to the people for examination. Their names were heralded throughout the land. Laws were enacted by the States, and expensive primary elections held, to bring about these nominations. Vast sums were expended, subject to restriction by legislation, during the campaign to promote the candidacies of the nominees.

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On election day the people vote, not for electors (it is safe to say that no voter could name those he voted for), but for the nominees for President and Vice-President. Presidential elections are required to be held on the same day throughout the Union.

Election night in the United States is devoted by the public, generally, to learning the result of the vote which has been cast that day by the citizens of the nation. Before they retire for the night, or at least by the next day (in one instance it was three days later) the American public -- in fact the world -- knows who was chosen President and Vice-President. . . . No one has ever suggested that the choice was not made on election day. No one has ever ventured the thought that the announcement of the victors should await the meeting of the presidential electors.

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. . . . The American people have grown to regard the electoral college as a matterof minor importance. Very few know exactly when and where the meeting takes place, and a great many have no knowledge of the gathering at all. The electors are expected to choose the nominee of the party they represent, and no one else. So sacred and compelling is that obligation upon them, so long has its observance been recognized by faithful performance, so unexpected and destructive of order in our land would be its violation, that the trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years, ripened into a bounden duty – as binding upon them as if it were written into the organic law. The elector who attempted to disregardthat duty could, in my opinion, be required by mandamus to carry out the mandate of the voters of his State.

The services performed by the presidential electors today are purely ministerial, notwithstanding the language of the Constitution written over 100 years ago. To read that document with an eye to the language only and with a disregard for the brilliant history of party government in this nation, which has been attended with such signal success (placing us first among the nations of the world), would mean to hold that our primaries, nominating, campaigning, and voting, are empty gestures. . . . The American public understands that the electoral vote is sealed when the results in the States are known, and that the meeting of the electors is for the purpose of formally casting that vote for the presidential nominees who won the States.

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It is apparent that all the reasons for indirect voting for our national executive have vanished. The Legislatures of the States have given up their right of appointment and passed the power of choosing of electors to the voters over 100 years ago. The conditions that obtained then changed radically long ago. There is no ruling class. No one has even the slightest excuse to think that he owns the government or the country to-day. It is not supported or backed by any individual or group ofindividuals. No small number, as in 1776, were under arms during the last war. Four million Americans participated. Each of the 120,000,000 inhabitants contributes his share to the support of this government. Every man, woman and child claims equal rights with every other person. Every citizen over twenty-one years of age, except idiots and felons, may vote, and true expression of opinion is now obtainable for the whole country. This evolution has placed the power unmistakably in the hands of the voter to select the executive officers of this country. In my opinion that apparent right of freedom and choice which was incorporated in the Constitution was lost to the presidential electors long ago because of these changes.

Section 1 of article 2 [of the U.S. Constitution] would not have been written if present-day conditions existed or if a majority of those present could have foreseen even to a slight degree what has happened. Could they have visualized the national convention, direct voting would have received consideration.

Free people have the right to effect a change in the meaning of their written constitution by the process of long and continuous interpretation followed by action, which interpretation and action are contrary to the exact wording of the organic law. Marked change in conditions, non-existence of reasons for provisions, official action coupled with universal public acceptance and co-operation repeated over a long period of time, such as 100 years, warrant giving to words a meaning interpretive of those new conditions and actions, when the new meaning accords fully and completely with the understanding that the public has had for a long time. That is especially so, when a strict interpretation of the language is fraught with unnecessary dangers that would, without doubt, menace the peace and well being of the nation and might even rise to proportions that would challenge the very existence of the republic.

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I cannot subscribe to the doctrine advanced by petitioner that presidential electors have a right to defy the will of the people and to "vote as they please, even for a candidate whose electors were rejected at the polls." Their importance has been greatly reduced; their "choosing" is a mere formality now. They must vote in accordance with the vote of the people. . . .

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The application for the writ of mandamus is denied.