AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Federalism

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

In 1891 the Michigan legislature provided for popular election of the state's Electoral College members. The act was challenged on a variety of grounds, and the dispute came well after the contested presidential election of 1876 and the adoption of the federal Electoral Count Act of 1887, which had expanded federal regulation over presidential elections. The litigation gave the Supreme Court an opportunity to address the role of state legislatures in presidential elections and to clarify that disputes over the actions of state legislatures were appropriately resolved by the judiciary rather than by the political branches. The justices unanimously held that state legislatures may choose how presidential electors are selected. How much discretion does the state legislature have in determining how presidential electors are selected? Could the legislature delegate the choice to the governor? Could the legislature allow citizens living in cities to choose all of the electors?

CHIEF JUSTICE FULLER, delivered the opinion of the Court.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress.

But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. . . .

On behalf of plaintiffs in error it is contended that the act [providing for the popular election of presidential electors] is void because in conflict with (1) clause two of section one of Article II of the Constitution of the United States; (2) the Fourteenth and Fifteenth Amendments to the Constitution; and (3) the act of Congress of February 3, 1887.

The second clause of section one of Article II of the Constitution is in these words: "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 the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve Congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment because the State is to appoint as a body politic and corporate, and so must act as a unit and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the appointment of electors by districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.

. . . The legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed. . . . [I]t is difficult to perceive why, if the legislature prescribes

as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed. . . .

The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. . . .

It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination....

[O]n reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways. . . . No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey and South Carolina. Pennsylvania . . . provided for the election of electors on a general ticket. Virginia . . . was divided into twelve separate districts and an elector elected in each district, while for the election of Congressmen the State was divided into ten other districts. In Massachusetts the general court . . . divided the State into districts for the election of Representatives in Congress, and provided for their election on December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of President and Vice President of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. In Maryland . . . electors were elected on general ticket, five being residents of the Western Shore and three of the Eastern Shore. In New Hampshire an act was passed . . . providing for the election of five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equaled double the number of electors elected. There being no choice the appointment was made by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the State might not be lost, to concur in the electors chosen by the senate. The State of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the Constitution. . . .

Without pursuing the subject further, it is sufficient to observe that, while most of the States adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824 and 1828. Massachusetts used the general ticket system, in 1804, chose electors by joint ballot of the legislature in 1808 and in 1816, used the district system again in 1812 and in 1820, and returned to the general ticket system in 1824. In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont and New Jersey in 1812. . . .

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the ap-

pointment of electors. . . . In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded. ,. . .

Nor are we able to discover any conflict between this act and the Fourteenth and Fifteenth Amendments to the Constitution. . . . Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors.

The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. . . ..

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of Article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect. . . .

The third clause of section 1 of Article II of the Constitution is: "The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." . . .

By the act of Congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice President," etc., 24 Stat. 373, c. 90, it was provided that the electors of each State should meet and give their votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by Congress. In this respect it is in conflict with the act of Congress, and must necessarily give way. But this part of the act is not so inseparably connected in substance with the other parts as to work the destruction of the whole act. . . .

The judgment of the Supreme Court of Michigan must be *Affirmed*.