AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 7: The Republican Era – Federalism/State Regulation of Federal Elections

**State ex rel Nebraska Republican State Central Committee v. Wait, 92 Neb. 313** (NE 1912)

*In 1907, the state of Nebraska adopted the Progressive reform of primary elections for the selection of party candidates for government office. The new state election laws specified that presidential electors need not be listed on the ballot, but only the names of the candidates for the presidency and vice presidency. Under the new system, the presidential electors for each party were chosen in the primaries and were required to submit a pledge that they would vote for the presidential candidate chosen by their national convention.*

*In 1912, the Republican presidential electors were selected in the Republican primary and “became in honor bound to vote for such nominees” as emerged out of the Republican national convention. The incumbent President William Howard Taft won the nomination of the Republican national convention, but his rival former-president Theodore Roosevelt announced that he would make an independent presidential run under the banner of the Progressive Party. Six of the eight presidential electors chosen by the Nebraska convention of the Progressive Party were individuals who had been chosen to serve as presidential electors in the Republican Party primary. Those individuals contended that since the Republican primary voters in Nebraska had favored Roosevelt, they were no longer bound to vote for Taft in the Electoral College but were instead free to cast those six electoral votes for Roosevelt.*

*Officials of the state Republican Party asked the state secretary of state to declare those six presidential electors to be disqualified and their offices vacant and presented a list of loyal Taft electors to take their place on the general election ballot. The secretary of state refused to replace the Roosevelt electors. The Republicans officials filed suit in state court seeking a writ of mandamus instructing the secretary of state to make the change. The trial court agreed, and the state secretary of state appealed to the state supreme court. The state supreme court unanimously affirmed the decision of the trial court and ordered the secretary of state to remove the Roosevelt-loyalists from the Republican column for the general election. In the context of the modern party system, the presidential electors could not be understood to be free agents. They were mere instruments of the political parties and the general election voters.*

JUDGE FAWCETT delivered the opinion for the court.

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It is contended by relator that, by this action on the part of the gentlemen named, the office of each as a candidate upon the republican ticket for presidential elector became vacant, and his right to remain upon the republican ticket as a candidate for presidential elector became forfeited as effectually as if he had resigned therefrom. We are all agreed that this contention is not only founded upon high moral grounds, but is also supported by the clear current of authorities. While a nomination as a candidate for election to an office does not make the nominee, strictly speaking, an officer, he is in his relation to the party which placed its confidence in him a *quasi* officer, and his duties are to be measured by that relation.

In *State v. Anderson* (IA 1912) it is said: "[T]his court held that, in determining whether a vacancy exists in an office, we are not confined to statutory causes, but may declare it vacant if it is incompatible with the office held. It is a well-settled rule of common law that if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' . . .

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The situation presented in the case at bar is more than one of mere incompatibility. Here the persons who have been nominated as presidential electors, having, if elected, but a single duty to perform, viz., to vote for the candidates nominated by the party by whose votes they were themselves nominated, openly declare that they will not perform that duty, but will vote for the candidates of another and distinctly antagonistic party. This would make performance of their duty impossible, and a judicial determination of the existence of a vacancy was, therefore, unnecessary. The candidates had, by their own acts, vacated their places as republican presidential electors. This action on their part *ipso facto* created six vacancies on the republican ticket for electors. These vacancies the duly recognized republican state central committee had a right to fill, and its action in that behalfis binding, not only onthe secretary of state, but on the court as well.

In *State v. Drexel* (NE 1905), the following language by Chief Justice Holcomb is instructive: “. . . . The integrity of the party and the success of its principles and policies can be best maintained by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the constitution. . . .”

At the time the electors were nominated at the April primary, there were but two parties which could hope to succeed in electing a presidential ticket at the November election. Since the holding of the primary and since the national conventions of these two parties, the progressive party has been organized, and is now competing with the republican and democratic parties for the election of its candidates for president and vice president, with the hope, and possibility, of its succeeding in so doing. . . . The progressive party therefore now has the same legal status before the voters of this state as either of the other two parties. Any voter who desires to cast his vote for Mr. Roosevelt for president and for the other nominees of the progressive party may do so by making a cross in the party circle of that party in precincts where the voting machine is not used, and by a single manipulation of the lever of the voting machine where such machines are used. A voter who desires to vote for the candidates of the democratic party may register his vote in the same manner. But, if the decision of the respondent be sustained, no voter can so vote for the candidates upon the republican ticket. By far the greater number of voters do not know the various candidates for electors, but they do know for whom they want to vote for president and vice president. They have been in the habit in the past of voting a straight ticket, and particularly so for presidential electors. It is rare indeed that a voter "scratches" that part of his ticket. He votes for entire strangers about whom he has never read, or made inquiry, because of the fact that they stand for the candidates whose election he desires. To deprive the voters who desire to vote a straight republican ticket of the opportunity of doing so, and at the same time afford such opportunity to the voters of the other parties named, would be repugnant to every sense of honor, and would be in defiance of the just rule that important privileges and partisan advantages cannot be conferred upon one class and denied to another class by hampering it with unfair and unnecessary burdens and restrictions.

The right of every voter, by a single cross or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party is guaranteed [by the state election laws]. Any attempt, by deception or otherwise, to deprive him of that right is a violation of both the letter and spirit of our laws. If such an attempt is made, it is the right of the governing body or committee of his party to appeal to the courts, if necessary, to protect him; and, when it is made to appear that such an attempt is intended, it is the duty of the court to prevent it. To permit the names of the six electors, who will not vote for the candidates of the republican party for president and vice president, but will vote for the candidates of another and different party, to be printed upon the official ballot as republican electors would be a gross deception, and would, without the possibility of a doubt, cause thousands of voters in this state to cast their votes for president and vice president for candidates other than their choice, and other than the candidates for whom it is their desire to vote. We cannot permit this to be done.

*Affirmed*.