Supplementary Material

Chapter 7: The Republican Era—Equality/Race/The Abandonment of Reconstruction

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

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*Jasper Yarbrough was convicted and sentenced to two years in prison after he and several other white men brutally attacked Berry Saunders, a person of color, because they wished to prevent African-Americans from voting in a federal election. The provision of federal law he was accused of violating declared,*

> *If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote from giving his support or advocacy, in a legal manner, towards or in favor of the election of any lawfully qualified person as an elector for president or vice-president, or as a member of the congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.*

*While in prison, Yarbrough sought a writ of habeas corpus on the ground that he was convicted under an unconstitutional federal law.*

*The Supreme Court unanimously determined that Yarbrough was constitutionally convicted. Justice Miller's opinion declared that the federal laws under which Yarbrough was convicted were constitutional exercises of federal power under the Fifteenth Amendment. How did Justice Miller distinguish this case from* U.S. v. Reese *(1876), in which the justices ruled that Reconstruction laws protecting voting rights were unconstitutional? Is that distinction convincing? What principles explain why the Supreme Court in the 1880s was willing to protect African-American voters in some instances, but not others? Is the difference between* Reece *and* Yarbrough *best explained by law, politics, or some combination of the two?*



JUSTICE MILLER

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. . . If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged. . . .

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. . . That a government whose essential character is republican, whose executive head and legislative body are both elective, whose numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.

The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of congress arises the advocate of the power must be able to place his finger on words which expressly grant it. . . . It destroys at one blow, in construing the constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,—a difficulty which the instrument itself recognizes by conferring on congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government or any branch of it by the constitution. . . .

We know of no express authority to pass laws to punish theft or burglary of the treasury of the United States. Is there therefore no power in congress to protect the treasury by punishing such theft and burglary? Are the mails of the United States, and the money carried in them, to be left at the mercy of robbers and of thieves who may handle the mail, because the constitution contains no express words of power in congress to enact laws for the punishment of those offenses? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States, and the laws which confer that jurisdiction. . . .

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[T]he congress [has] been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the constitution. This section declares that "the times, places, 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 make or alter such regulations, except as to the place of choosing senators." . . .

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. . . Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud? If this be so, and it is not doubted, are such powers annulled because an election for state officers is held at the same time and place? Is it any less important that the election of members of congress should be the free choice of all the electors, because state officers are to be elected at the same time? These questions answer themselves; and it is only because the congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers that they are now doubted. But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground, and are to be upheld for the same reasons.

It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by congress does not stand on the same ground. But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. . . .

This proposition answers, also, another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of congress is not dependent upon the constitution or laws of the United States, but is governed by the law of each state respectively. If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the state where he votes. It equally affects the government; it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of

persons who shall vote is determined by the law of the state, or by the laws of the United States, or by their united result. But it is not correct to say that the right to vote for a member of congress does not depend on the constitution of the United States. The office, if it be properly called an office, is created by that constitution, and by that alone. It also declares how it shall be filled, namely, by election. . . .

Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor* v. *Happersett* that "the constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument. But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the constitution adopts as the qualification for voters of members of congress that which prevails in the state where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the constitution alone, because you have to look to the law of the state for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of congress was not fundamentally based upon the constitution, which created the office of member of congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors. The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states. . . .

While it is quite true, as was said by this court in *U. S.* v. *Reese* (1876), that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding states had not removed from their constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word "white," and thus left him in the enjoyment of the same right as white persons. . . .

. . . This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States, essential to the healthy organization of the government itself. . . .

It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. . . . In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. . . . If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the government of the United States has within its constitutional domain no authority to provide against these evils,—if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint,—then, indeed, is the country in danger, and its best powers, its highest purposes, the

hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other.

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