Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Voting/Regulation

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Newberry v. U.S., 256 U.S. 232 (1921)

Truman Newberry was the Republican nominee in 1918 from Michigan for the Senate. In a close race, he bested automobile tycoon, Henry Ford. Ford demanded that the Senate not seat Newberry because the latter violated the provision in the Federal Corrupt Practices Act of 1911 which forbade candidates for the Senate from spending more than $10,000 to obtain election. Newberry was estimated to have spent ten times that amount, an outrageous sum by early-twentieth-century standards. A grand jury indicted him, Newberry was convicted at trial, and he was sentenced to two years in prison. Newberry appealed to the Supreme Court of the United States. His lawyer, former justice and future Chief Justice Charles Evans Hughes, claimed that Congress had no constitutional power to regulate primaries.[1]

The Supreme Court unanimously overruled the trial court on the ground that the trial judge had misinterpreted federal law. The justices by a narrower 5–4 majority declared that Congress had no power to regulate primary elections. No justice discussed whether the limits on campaign spending violated the First Amendment. The judicial opinions in Newberry *focus on the meaning of Article I, Section 4, which gives Congress the power of regulating the "time, place, and manner of federal elections." Why did Justice McReynolds think primaries are not federal elections for the purpose of Article I? Why did the dissenting justices disagree?* Newberry *was another case in which Justice Holmes (majority) and Justice Brandeis (dissent) were on the opposite sides. Similarly, Justice McReynolds, the authority of the majority opinion, and Justice Pitney, the author of the dissent, were on the opposite sides, even though they were the leading conservatives on the Taft Court. How do you explain these different votes? How do you explain the absence of any discussion about whether campaign finance restrictions violate the First Amendment?*

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JUSTICE McREYNOLDS delivered the opinion of the Court.

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We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from section 4.

> "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee* (1816).

Clear constitutional provisions also negative any possible inference of such authority because of the supposed anomaly "if one government had the unrestricted power to control matters affecting the choice of the officers of another." Mr. Iredell (afterwards of this court) in the North Carolina Convention of 1788, pointed out that the states may—must indeed—exert some unrestricted control over the federal government:

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[1] This introduction relies heavily on Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government 1919–1921* (New York: Cambridge University Press, 2007), 969–82.

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> "The very existence of the general government depends on that of the state governments. The state Legislatures are to choose the senators. Without a Senate there can be no Congress. The state Legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state Legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state Legislature. If there are no state Legislatures, there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state Legislatures." . . .

Undoubtedly elections within the original intendment of section 4 were those wherein Senators should be chosen by Legislatures and Representatives by voters possessing "the qualifications requisite for electors of the most numerous branch of the state Legislature." . . . The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. Primaries were then unknown. Moreover, they are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. And this view has been declared by many state courts.

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If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition does not directly affect the manner of holding the election. Birth must precede but it is no part of either funeral or apotheosis.

We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people.

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JUSTICE McKENNA concurs in this opinion as applied to the statute under consideration which was enacted prior to the Seventeenth Amendment; but he reserves the question of the power of Congress under that amendment.

CHIEF JUSTICE WHITE, dissenting from the opinion, but concurring with a modification in the judgment of reversal.

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The provisions of sections 2 and 3 of article I of the Constitution fixing the composition of the House of Representatives and the Senate and providing for the election of Representatives by vote of the people of the several states and of Senators by the state Legislatures, were undoubtedly reservoirs of vital federal power constituting the generative sources of the provisions of section 4, clause 1, of the same article creating the means for vivifying the bodies previously ordained (Senate and House). . . .

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As without this grant no state power on the subject was possessed, it follows that the state power to create primaries as to United States Senators depended upon the grant for its existence. It also follows that as the conferring of the power on the states and the reservation of the authority in Congress to

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regulate being absolutely coterminous, except as to the place of choosing Senators which is not here relevant, it results that nothing is possible of being done under the former which is not subjected to the limitation imposed by the latter. . . .

But it is said that, as the power which is challenged here is the right of a state to provide for and regulate a state primary for nominating United States Senators free from the control of Congress, and not the election of such Senators, therefore as the nominating primary is one thing and the election another and different thing, the power of the state as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators. But the proposition is a suicidal one, since it at one and the same time retains in the state the only power it could possibly have as delegated by the clause in question and refuses to give effect to the regulating control which the clause confers on Congress as to that very power. . . .

But, putting these contradictions aside let me test the contention from other and distinct points of view: (1) In last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination, that a paramount government authority having the right to regulate the latter is without any power as to the former. The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement.

(2) Moreover the proposition, impliedly at least, excludes from view the fact that the powers conferred upon Congress by the Constitution carry with them the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" . . .

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The large number of states which at this day have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is to intimate that the influence of the former is largely determinative of the latter. . . . Under these conditions I find it impossible to say that the admitted power of Congress to control and regulate the election of Senators does not embrace, as appropriate to that power, the authority to regulate the primary held under state authority.

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Can any other conclusion be upheld except upon the theory that the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished, may now be revived for the purpose of depriving Congress of the right to exert a power essential to its existence, and this in the face of the fact that the only basis for the doubts which arose in the beginning (the election of Senators by the state Legislatures) has been completely removed by the Seventeenth Amendment?

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In view, then, of the plain text of the Constitution, of the power exerted under it from the beginning, of the action of Congress in its legislation, and of the amendment to the Constitution, as well as of the legislative action of substantially the larger portion of the states, I can see no reason for now denying the power of Congress to regulate a subject which from its very nature inheres in and is concerned with the election of Senators of the United States, as provided by the Constitution.

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JUSTICE PITNEY, concurring in part.

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It is contended that Congress has no power to regulate the amount of money that may be expended by a candidate to secure his being named in the primary election; that the power "to regulate the manner of holding elections," etc., relates solely to the general elections where Senators or Representatives are finally chosen. Why should "the manner of holding elections" be so narrowly construed? An election is the choosing of a person by vote to fill a public office. In the nature of things it is a complex process, involving some examination of the qualifications of those from whom the choice is

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to be made and of those by whom it is to be made; some opportunity for the electors to consider and canvass the claims of the eligibles; and some method of narrowing the choice by eliminating candidates until one finally secures a majority, or at least a plurality, of the votes. For the process of elimination, instead of tentative elections participated in by all the electors, nominations by parties or groups of citizens have obtained in the United States from an early period. Latterly the processes of nomination have been regulated by law in many of the states, through the establishment of official primary elections. But in the essential sense, a sense that fairly comports with the object and purpose of a Constitution such as ours, which deals in broad outline with matters of substance and is remarkable for succinct and pithy modes of expression, all of the various processes above indicated fall fairly within the definition of "the manner of holding elections." This is not giving to the word "elections" a significance different from that which it bore when the Constitution was adopted, but is simply recognizing a content that of necessity always inhered in it. . . .

It is said that section 4 of article I does not confer a general power to regulate elections, but only to regulate "the manner of holding" them. But this can mean nothing less than the entire mode of procedure—the essence, not merely the form, of conducting the elections. The only specific grant of power over the subject contained in the Constitution is contained in that section; and the power is conferred primarily upon the Legislatures of the several states, but subject to revision and modification by Congress. If the preliminary processes of such an election are to be treated as something so separate from the final choice that they are not within the power of Congress under this provision, they are for the same reason not with within the power of the states, and, if there is no other grant of power, they must perforce remain wholly unregulated. For if this section of the Constitution is to be strictly construed with respect to the power granted to Congress thereunder, it must be construed with equal strictness with respect to the power conferred upon the states; if the authority to regulate the "manner of holding elections" does not carry with it *ex vi termini* [by the very meaning of the expression] authority to regulate the preliminary election held for the purpose of proposing candidates, then the states can no more exercise authority over this than Congress can; much less an authority exclusive of that of Congress. For the election of Senators and Representatives in Congress is a federal function; whatever the states do in the matter they do under authority derived from the Constitution of the United States. . . .

But if I am wrong in this, and the power to regulate primary elections could be deemed to have been reserved by the states to the exclusion of Congress, the result would be to leave the general government destitute of the means to insure its own preservation without governmental aid from the states, which they might either grant or withhold according to their own will. This would render the government of the United States something less than supreme in the exercise of its own appropriate powers; a doctrine supposed to have been laid at rest forever by the decisions of this court in *McCulloch v. Maryland* (1819). . . .

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Why should this provision of the Constitution—so vital to the very structure of the government—be so narrowly construed? It is said primaries were unknown when the Constitution was adopted. So were the steam railway and the electric telegraph. But the authority of Congress to regulate commerce among the several states was extended over these instrumentalities, because it was recognized that the manner of conducting the commerce was not essential. . . .

Why is it more difficult to recognize the integral relation of the several steps in the process of election?

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But if I am wrong thus far—if the word "elections" in article I, section 4, of the Constitution must be narrowly confined to the single and definitive step described as an election at the time that instrument was adopted—nevertheless it seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress. It is matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interest, their environment, and various other

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influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made. Hence, the authority of Congress to regulate the primary elections and nominating conventions arises, of necessity, not from any indefinite or implied grant of power, but from one clearly expressed in the Constitution itself:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This is the power preservative of all others, and essential for adding vitality to the framework of the government. Among the primary powers to be carried into effect is the power to legislate through a Congress consisting of a Senate and House of Representatives chosen by the people—in short, the power to maintain a law-making body representative in its character. Another is the specific power to regulate the "manner of holding elections for Senators and Representatives," conferred by section 4 of the first article; and if this does not in literal terms extend to nominating proceedings intimately related to the election itself, it certainly does not in terms or by implication exclude federal control of those proceedings. From a grant to the states of power to regulate the principal matter, expressly made subject to revision and alteration by the Congress, it is impossible to imply a grant to the states of regulatory authority over accessory matters exclusive of the Congress. . . .

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The passage of the act under consideration amounts to a determination by the lawmaking body that the regulation of primary elections and nominating conventions is necessary if the Senate and House of Representatives are to be, in a full and proper sense, representative of the people. . . . To safeguard the final elections while leaving the proceedings for proposing candidates unregulated, is to postpone regulation until it is comparatively futile. And Congress might well conclude that, if the nominating procedure were to be left open to fraud, bribery, and corruption, or subject to the more insidious, but (in the opinion of Congress) nevertheless harmful, influences resulting from an unlimited expenditure of money in paid propaganda and other purchased campaign activities, representative government would be endangered.

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JUSTICE BRANDEIS and JUSTICE CLARKE concur in this opinion.

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