

Chapter XVII.

TIMES, PLACES, AND MANNER OF ELECTION.

1. Provisions of Constitution and statutes. Sections 507 516.¹
 2. Power of State executive to call elections to fill vacancies. Sections 517, 518.²
 3. Time fixed by schedules of new State constitutions. Sections 519, 520.³
 4. Disputes as to legal day of election. Sections 521–525.
 5. Failure of Territorial legislature to prescribe manner, etc. Sections 526, 527.
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507. The times, places, and manner of elections of Representatives are prescribed by the State legislatures, but Congress may make or alter such regulations.

Reference to discussions of the constitutional provision as to fixing the time, etc., of elections.

Section 4 of Article I of the Constitution provides:

SECTION 4. 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 by law make or alter such regulations, except as to the places of choosing Senators.⁴

¹ Election must be by the people and not by lot. Section 775 of this volume.

² Discussion of the functions of the State executive. Section 312 of this volume.

³ Relative powers of State constitutional conventions and legislatures in fixing times, places, and manner. Sections 363, 367, 388 of this volume; sections 846, 856, 1133 of Volume II.

Is the establishing of districts a prescribing of “manner?” Sections 310, 311 of this volume.

Respective powers of Congress and the States discussed. Section 313 of this volume.

Argument that State laws are, as to Congressional elections, really Federal laws. Section 1105 of Volume II.

Federal statutes in relation to State laws. Section 961 of Volume II

The Federal Constitution the source of the States’ power. Sections 947, 959 of Volume II.

May the State legislature delegate the power of prescribing the “manner?” Section 975 of Volume II.

⁴ The history and intent of this clause of the Constitution have been discussed elaborately in House and Senate in connection with legislation. Thus in the Fifty-first Congress, in connection with a bill (H. R. 11045) relating to Federal regulations for elections, Mr. Henry Cabot Lodge, of Massachusetts, from the Committee on the Election of President, Vice President, and Representatives in Congress, submitted a report (House Report No. 2493, first session Fifty-first Congress) discussing the meaning of the clause. Mr. C. R. Buckalew, of Pennsylvania, submitted minority views in connection with this report. In reference especially to a limited construction of the clause the minority views submitted by Mr. Henry St. George Tucker, of Virginia, from the same committee, in connection with the bill [H.R. 7712] discussed the subject very elaborately. (House Report No. 1882, first session Fifty-first Congress.) In 1893, in the Fifty-third Congress, the clause was again examined fully in connection with the bill H.R. 2331) to repeal certain portions of the Federal election laws. Mr. Tucker in this case submitted the report, and Mr. Martin N. Johnson, of North Dakota, submitted the minority views. (Report No. 18, first session

508. A Federal law fixes the Tuesday next after the first Monday of November of every second (even numbered) year for election of Members and Delegates.

Certain States, by special exception, elect their Members on a day other than the day fixed generally by Federal statute.

Section 25 of the Revised Statutes, embodying the laws of February 8, 1872, and March 3, 1875, provides:

The Tuesday next after the first Monday in November, in the year 1876, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday of November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

By the act of March 3, 1875,¹ the above provision was modified—

so as not to apply to any State that has not yet. changed its day of election and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State.²

509. Territorial laws fix the times, places, and manner of election of Delegates.—Section 1863 of the Revised Statutes provides:

The first election of a Delegate in any Territory for which a temporary government is hereafter provided by Congress shall be held at the time and places and in the manner the governor of such Territory may direct, after at least sixty days' notice, to be given by proclamation; but at all subsequent elections therein, as well as at all elections for a Delegate in organized Territories, such time, places, and manner of holding the election shall be prescribed by the law of each Territory.

510. A Federal law provides that votes for Representatives to be valid must be by written or printed ballot or by voting machine indorsed by State law.—Section 27 of the Revised Statutes, dating from February 28, 1871, and May 30, 1872, provides:

All votes for Representatives in Congress must be by written or printed ballot, and all votes received or recorded contrary to this section shall be of no effect. But this section shall not apply to any State voting otherwise whose election for Representatives occurs previous to the regular meeting of its legislature next after the twenty-eighth day of February, 1871.

Fifty-third Congress.) The Senate report at the next session merely quoted the House report. (Senate Report No. 113, second session Fifty-third Congress.)

In the Forty-fifth Congress an ambiguity in Colorado law as to the date of the election led to the contest of Patterson and Belford. In order to remove all further doubt Congress passed a law, approved June 11, 1878, "designating the times for the election of Representatives to the Forty-sixth and succeeding Congresses from the State of Colorado." (20 Stat. L., p. 112, second session Forty-fifth Congress, Record, pp. 4082, 4083.)

Also in the same Congress an act (approved June 19, 1878) (2 Stat. L., p. 174) was passed to regulate the election in North Carolina in the coming Congressional elections, specifying that an election conducted by the sheriffs or other duly appointed persons in accordance with certain specified North Carolina laws should be legal. See history of bill, H. R. 4931, second session Forty-fifth Congress, for further explanation.

In 1879, in connection with proposed legislation to repeal the Federal election laws, the subject was discussed. See Record, first session Forty-sixth Congress, p. 513 (Senator Teller's speech); also President Hayes's veto message (first session Forty-sixth Congress, Record, p. 1710).

The Supreme Court has also considered this clause. See, for instances, *ex parte Siebold*, 100 U. S., 371; *ex parte Clarke*, 100 U. S., 399; *ex parte Yarbrough*, 110 U. S., 651; *in re Coy*, 127 U. S., 731.

¹ 18 Stat. L., p. 400.

² The States of Maine, Vermont, and Oregon elect under the law providing the exceptions.

On February 14, 1899,¹ the above section was amended to read as follows:

All votes for Representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect.²

511. A Federal statute provides that all citizens of the United States qualified to vote shall be allowed to do so without distinction of race, etc.—Section 2004 of the Revised Statutes, which dates from May 31, 1870, provides:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.³

512. No officer of the Army or Navy shall prescribe qualifications of voters or interfere with the suffrage. Section 2003 of the Revised Statutes provides:

No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State or with the exercise of the free right of suffrage in any State.⁴

Section 5530 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer of the Army or Navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section [section 5529].⁵

513. A Federal law provides a penalty against armed interference of Federal troops at an election.—Section 5528 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control, any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States or to keep the peace at the polls, shall be fined not more than five thousand dollars and suffer imprisonment at hard labor not less than three months nor more than five years.

¹ 30 Stat. L., p. 836.

² The Revised Statutes, sections 14 to 17, inclusive, provide for the times and manner of election of Senators.

³ The following decisions relate to the above: 2 Abb. U. S., 120; *McKay v. Campbell*, 1 Saw., 374; *U. S. v. Reese et al.*, 92 U. S., 214; *U. S. v. Cruikshank et al.*, 92 U. S., 542.

The above section was originally the first section of the act of May 30, 1870, "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." (16 Stat. L., p. 140.) This section simply declared a right, without providing for its enforcement. Other sections of the act provided penalties for the denial of the right. The decisions of the court impaired somewhat the efficiency of the act, and in the Fifty third Congress the sections of the statutes containing the efficient provisions of the act were repealed. (28 Stat. L., pp. 36, 37.) The declaratory section was permitted to remain, however.

⁴ This law dates from February 25, 1865.

⁵ See section 514 of this chapter.

514. A penalty is provided against interference by military or naval force in the exercise of the right of suffrage and conduct of elections.—Section 5529 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer or other person in the military or naval service who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned at hard labor not more than five years.¹

Section 5531 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer or other person in the military or naval service who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty shall be punished as provided in section 5529 [of the Revised Statutes].

515. The executive of a State issues writs of election to fill vacancies in its representation in the House.—Section 2 of article 1 of the Constitution, provides:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

516. A Federal law empowers the States and Territories to provide by law the times of elections to fill vacancies in the House.—Section 26 of the Revised Statutes, dating from February 2, 1872, provides:

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

517. The Pennsylvania election case of John Hoge, in the Eighth Congress.

An election to fill a vacancy, called by the governor in pursuance of constitutional authority, was held valid although no State law prescribed time, place, or manner of such election.

In 1804,² the House considered a petition alleging the undue election and return of Mr. John Hoge, of Pennsylvania, who claimed a seat as successor of William Hoge, resigned. On December 19, 1804, the Committee on Elections, in their report in favor of John Hoge, found the following state of facts:

That William Hoge, Member of the House of Representatives for the Eighth Congress, having, by letter to the governor of the State of Pennsylvania, dated the 15th of October, resigned his seat in Congress, the governor, in pursuance of the provisions made in the second section of the first article of the Constitution of the United States, issued a writ of election to supply the vacancy which had thus taken place. That the said writ was issued on the 22d day of October, and the election directed to be held on

¹ Sections 5507 to 5510 of the Revised Statutes, inclusive, provide penalties for punishment of persons who, individually or in conspiracy, influence or prevent by bribery or intimidation the exercise of the right of suffrage by those to whom it is guaranteed by the fifteenth amendment.

Sections 5516 to 5519 (the Hains case (106 U. S., 629) involves the constitutionality of section 5519), inclusive, provide penalties for obstructing the enforcement of the Civil Rights Law, and for denying to persons offices or privileges thereunder.

² Second session Eighth Congress, Contested Elections in Congress, from 1789 to 1834, p. 135.

the 2d day of November, eleven days after the date of the said writ; that the writ was brought by the mail to the prothonotary's office in Washington County on the 30th of October, but not proclaimed by the sheriff till the 31st.

It appears to the committee that, though, by the second section of the first article of the Constitution of the United States, it is made the duty of the executive authority of the respective States to issue writs of election to fill vacancies, yet, by the fourth section of the said article, it is made the duty of the legislature of each State to prescribe the times, places, and manner of holding such elections. It appears, however, that several elections to supply vacancies in Congress have been held heretofore in Pennsylvania; yet, on examining the laws of that State, it appears that no law exists prescribing the times, places, and manner of holding elections to supply such vacancies as may happen in the representation in Congress; and, consequently, if the election of John Hoge is, on this account, set aside, no election can be held to supply the vacancy until the legislature of the State enact a law for that purpose.

The committee go on to show that the Pennsylvania law for general election of Representatives to Congress required a notice of thirty days. In this special election the governor directed the election to be held on the same day on which the electors of President and Vice President were to be chosen. And although it so happened that the notice was in effect but two days, the committee found no evidence of abuse in the manner of conducting the election. Therefore they reported the opinion that John Hoge was entitled to a seat in the House.

On December 19, after full debate, the recommendation of the committee was concurred in, by a vote of 69 yeas to 38 nays, and John Hoge was admitted to his seat.

518. The Mississippi election cases of Gholson, Claiborne, Prentiss, and Word in the Twenty-fifth Congress.

Discussion of power of a State executive to call an election to fill a vacancy, although the State law did not provide for the contingency.

Examination of the term "vacancy" as used in the Federal Constitution to empower a State executive to issue writs for an election.

An instance wherein a State law prescribed a day of election which arrived after the beginning of the term of the Congress affected.

The House declined to give prima facie effect to credentials regular in form but relating to seats already occupied.

The House gave prima facie effect to credentials, although there appeared a question as to the regularity of the writs of the election.

In a case wherein a contestant appeared after a determination of final right to a seat by the House the sitting Member was unseated and a vacancy declared.

There being rival claimants to a seat, elected on days different but each constitutionally fixed, the House declared the seat vacant.

On September 25, 1837,¹ the Committee on Elections reported in the case of Messrs. Gholson and Claiborne, of Mississippi.

The law of Mississippi provided that Representatives in Congress should be elected once in every two years, to be computed from the first Monday in November, 1833. And, acting in pursuance of this law, the people of Mississippi would, on the first Monday of November, 1837, elect Representatives for the Congress actually

¹ First session Twenty fifth Congress, 1st Bartlett, p. 9; Globe, pp. 95, 97; Journal, p. 142.

beginning March 4, 1837, but not to assemble, in the ordinary course, until December, 1837.

But the President, by proclamation of May 15, 1837, called an extra session of the Twenty fifth Congress, to meet September 4, 1837. Thus it happened that Mississippi had no Representatives, the terms of the Representatives in the Twenty fourth Congress having expired March 4, 1837.

The governor of Mississippi—there being no State law providing for such a contingency issued his proclamation under the clause of the Constitution of the United States:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The governor accordingly issued his writ calling an election for the third Monday in July "for two Representatives to Congress, to fill said vacancy, until superseded by the Members to be elected at the next regular election on the first Monday and day following in November next."

When the House organized, Messrs. Samuel J. Gholson and John F. H. Claiborne appeared with credentials showing their election at the election called in pursuance of the governor's writ.

Objection to their taking their seats was overruled, and the question was referred to the Committee on Elections.

Two objections were urged before the committee. In the first place, the point was raised in relation to the power of the governor to restrict the terms of those elected to the time of the next regular election. The committee, with one Member only dissenting, held that the writ of election might not make such restriction, and that the two Members were elected for the whole term of the Congress. They did not conceive, moreover, that the election was invalidated by the illegal clause in the writ.

The second objection occasioned considerable controversy, involving the meaning of the word "vacancy" as used by the Constitution in this connection. The committee were divided, a majority holding that in this case a vacancy existed as much as if it had been occasioned by death or resignation. The committee were of the opinion that the Constitution authorized the executive power of the States, respectively, to order the filling of all vacancies which have actually happened, whether by death, resignation, or expiration of the terms of Members previous to the election of their successors. The word "happen" made use of in the Constitution, was not necessarily confined to fortuitous or unforeseen events, but was equally applicable to an events which by any means occur or come to pass, whether foreseen or not; and as in this case confessedly the vacancy existed, it might properly be said to have happened, although the means or circumstances by which it was brought about may have been foreseen.

Therefore the committee reported the following resolution, which, on October 3, was agreed to by the House—yeas 118, nays 101:

Resolved, That Samuel J. Gholson and John F. H. Claiborne are duly elected Members of the Twenty fifth Congress, and, as such, are entitled to their seats.

On the first Monday of November—the time for the regular election—Messrs. Gholson and Claiborne announced that they were not candidates, considering that their reelection was not necessary, in view of the decision of the House. Nevertheless, there was an election for Congress, Messrs. S. S. Prentiss and Thomas J. Word contesting. Votes were cast for Messrs. Gholson and Claiborne, however, although they were not candidates. Messrs. Prentiss and Word received large majorities over Messrs. Gholson and Claiborne; but the general state of the poll indicated the probability that the two latter gentlemen would have been elected had they entered the contest.

The governor of the State issued credentials to Messrs. Prentiss and Word, which were presented soon after the opening of the regular session, on December 27, 1837.¹

The subject was, after debate, referred to the Committee on Elections, Messrs. Prentiss and Word not being sworn in.

On January 12, 1838,² the committee reported the facts of the case, and on January 16³ consideration by the House began, when Mr. Isaac H. Bronson, of New York, offered the following:

Resolved, That Sergeant S. Prentiss and Thomas J. Word are not Members of the Twenty-fifth Congress and are not entitled to seats in this House as such.

On January 31⁴ this resolution was amended by striking out all after the word “Resolved” and inserting:

That the resolution of this House on the 3d of October last, declaring that Samuel J. Gholson and John F.H. Claiborne were duly elected Members of the Twenty-fifth Congress be rescinded; and that John F.H. Claiborne and Samuel J. Gholson are not duly elected Members of the Twenty-fifth Congress.

This amendment was agreed to—yeas 119, nays 112.

On February 1 a motion was made to further amend the resolution as amended by adding the following:

Resolved, That Sergeant S. Prentiss and Thomas J. Word are not Members of the Twenty-fifth Congress.

On February 5⁵ that resolution was carried—yeas 118, nays 117, the Speaker voting in the affirmative to break the tie.

A motion was agreed to to further amend by adding the following:

Resolved, That the Speaker of the House do communicate a copy of the above resolutions to the governor of the State of Mississippi.

The question then recurred on agreeing to the original amended resolution as amended by the addition of the second and third resolutions. A division of the question being demanded, the first resolution, rescinding the decision of October 3 and unseating Messrs. Gholson and Claiborne, was agreed to—yeas 121, nays 113.

¹ Second session Twenty-fourth Congress, Journal, p. 150; Globe, p. 56.

² Journal, p. 257.

³ Journal, p. 289; Globe, p. 104.

⁴ Journal, p. 338; Globe, p. 150.

⁵ Journal, p. 354; Globe, p. 158.

Then the second resolution, declaring Messrs. Prentiss and Word not entitled to seats, was agreed to—yeas 118, nays 116.

The third resolution was agreed to—yeas 122, nays 88.¹

519. The Minnesota election case of Phelps, Cavanaugh, and Becker, in the Thirty-fifth Congress.

Objection being made to the administration of the oath to a Member-elect, the Speaker held that the question should be decided by the House and not by the Chair.

The House declined to give immediate prima facie effect to credentials when historic facts impeached the authority of the governor and the legality of the election.

The House gave prima facie effect to the perfect credentials of a State delegation, declining at that time to inquire whether or not the election was invalidated by choice of three persons for two seats.

The House sometimes seats Members-elect on their prima facie showing, stipulating that this shall not preclude examination as to the final right.

Representatives elected at the time the constitution of a new State was adopted were seated after the State was admitted to the Union.

Indorsement of the principle that a State may elect Representatives on a general ticket, even though the law of Congress requires their election by districts.

On May 13, 1858,² Mr. Henry M. Phillips, of Pennsylvania, announced the presence of Representatives from the recently admitted State of Minnesota and moved that they be sworn in, at the same time presenting the following credentials:

I, Samuel Medary, governor of Minnesota, hereby certify that at a general election held on the 13th day of October, 1857, under the constitution adopted by the people of Minnesota preparatory to their admission into the Union as a State, W. W. Phelps received a majority of the votes cast at said election as one of the Members of the United States House of Representatives of the Thirty-fifth Congress from the State of Minnesota; and by an official canvass of said votes was, on the 17th day of December, 1857, declared duly elected one of said Members.

{ Great Seal of Minnesota. }	In testimony whereof I have hereunto set my hand, and caused to be affixed the great seal of Minnesota, at the city at the city of St. Paul, this 18th day of December, 1857.	S. MEDARY.
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A similar certificate was presented for James M. Cavanaugh.

Mr. John Sherman, of Ohio, objected to the motion to swear in the two gentlemen. The constitution of Minnesota had provided for the election of three Representatives, while only two had appeared. Furthermore, Samuel Medary, who signed the certificates, was no longer governor of Minnesota. He had been Territorial governor, but the only mode by which the House could judge was by the certificate of the executive officer of the State, under the seal of the State.

¹ Besides the debates printed in the *Globe* on the days the subject was considered, several able speeches are found in the Appendix (pages 68, 93, 124, 127), wherein the constitutional features are discussed.

² First session Thirty-fifth Congress, Journal, p. 792; *Globe*, p. 2108.

Question being raised as to the procedure, the Speaker¹ said:²

The Chair will follow the precedent, which he thinks is a correct one, which was set in the case of the California Members. The Chair did not undertake thereto decide that the Members should be sworn in when they presented themselves, inasmuch as the Constitution of the United States provides that each House shall be the judge of the election, returns, and qualifications of its own Members. The Chair then referred the question to the House to let it decide whether the Members purporting to be elected should be sworn in or not. Therefore the Chair now entertains the motion of the gentleman from Pennsylvania as a proper one, which refers the question to the House to decide whether they should or should not be sworn in.

As a substitute for the pending motion, Mr. Sherman offered a proposition referring the credentials to the Committee on Elections,

with instructions to inquire into and report upon the right of those gentlemen to be admitted and sworn as Members of this House.

This amendment was agreed to, yeas 91, nays 84.

The original motion as amended was then agreed to, yeas 108, nays 84.

On May 20 the Committee on Elections reported.³ The following facts appeared:

By the act of February 26, 1857, Minnesota Territory was authorized to form a constitution and State government preparatory to admission into the Union; and it was declared that they should have one Representative, and as many more as their population might entitle them to under the existing ratio.

On October 13, 1857, the people of Minnesota voted on and adopted a constitution, and on the same day elected three Representatives in Congress, in accordance with a section of the constitution providing that the State should consist of one district and elect three Representatives. The votes for the three Representatives were canvassed and the results declared. It was alleged by the minority that certificates were issued to the three; but only two were presented to the House.

On May 11, 1858, an act of Congress admitted Minnesota to the Union and provided that the State should "be entitled to two Representatives in Congress."

The majority of the committee contended that their only jurisdiction was to inquire into the *prima facie* right of Messrs. Phelps and Cavanaugh to be admitted and sworn. The question of election was not involved, and hence the question as to the election of three Members did not arise. The committee had seen no other credentials, and had no evidence before them that more than two were elected. The House would not voluntarily search for evidence to reject those appearing with credentials, regular on their face. The committee quoted the constitution of the State of Minnesota to show that the certificates were "in due form, certified according to law." The majority therefore recommended a resolution admitting Messrs. Phelps and Cavanaugh to be sworn, but reserving the privilege of contesting their final right.

The minority admitted the inexpediency of discussing the right to the seat on the presentation of credentials, but doubted the strict propriety of such a course whenever the papers in possession of the House and the laws which the House was presumed to know showed that there could have been no legal election. The House must know that an election was held under the constitution of Minnesota for three

¹ James L. Orr, of South Carolina, Speaker.

² *Globe*, p. 2109.

³ House Report No. 408; 1 *Bartlett*, p. 248; *Rowell's Digest*, p. 154.

Representatives, and that under the law admitting the State only two were allowed. If the law of Minnesota was valid, three were elected. If not valid, none were elected. The case of *Reed v. Causden* had shown that the people only should elect, and that no power could prefer two out of three elected by the people.

The minority further objected that on October 13, the election day, Minnesota was still a Territory, and the people were engaged in voting under a law of Congress on a constitution. The Territorial laws and authorities, as decided by the Supreme Court, continued exclusively in force until the passage of the act of admission. Therefore the election of the Representatives was an act of usurpation and void. There is no case" say the minority, "where the people of a Territory have presumed to elect, by the same ballots which determined whether they should adopt the constitution preparatory to admission, Representatives to Congress; still less when on that day they elected more Representatives than the act, under which they were proceeding, said they should have when admitted as a State." The census so far as completed indicated that the State would be entitled to but one Representative under the act of Congress authorizing the adoption of the constitution.

In reply to this contention, the majority say:

An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union. In the opinion of the committee, if it be admitted that there is no force in numerous precedents scattered through the journals of Congress, and extending back to the earliest times of the Republic, sanctioning this course, it should be considered that Congress, by the enabling act authorizing the formation of a constitution and State government, thereby fully empowered the people of Minnesota to prepare themselves to assume, upon their admission, all the rights, powers, and attributes of a sovereign State in the Union. One of these rights is that of being represented in Congress; and were elections held prior to admission for Members of the House of Representatives held void, States must remain unrepresented after their admission, and until elections can be subsequently held, presenting the anomalous spectacle of States in the Union without representation or voice in the national councils. The act of admission into the Union upon being consummated, relates back to and legalizes every act of the Territorial authorities exercised in pursuance of the original authority conferred. As the election of Members to this House looks directly to the end in view contemplated by the enabling act of Congress, the committee think it entirely within the scope of action conferred upon the people of the Territory, and should be respected by Congress.

As to the objection that the Representatives were elected on a general ticket, which was forbidden by the act of 1842, the majority say that even if the act of 1842 were still in force, yet the decision of the House in the cases from New Hampshire, Georgia, etc., would dispose of this objection.

On May 20 to 22¹ the report was considered by the House. The debate occurred on the latter date, when attention was called to a certificate on the files of the House dated December 18, 1857, and certifying the election of three Representatives, George L. Becker being the third. A signed statement of the canvassers was also presented to show that the highest votes were thrown for Messrs. Phelps and Cavanaugh.

Mr. Thomas L. Harris, of Illinois, who had made the majority report, said these papers had not been brought to the attention of the committee, and did not form part of the case. The majority of the committee still adhered to the opinion that the question involved was not one of election, but of *prima facie* right.

¹ Journal, pp. 859, 870, 883; Globe, pp. 2275, 2292, 2310, 2315.

The minority proposition, that Messrs. Phelps and Cavanaugh be not sworn, was disagreed to—yeas 74, nays 125.

Then the resolution of the majority, providing that they be sworn, but that a contest should not thereby be precluded, was agreed to, yeas 135, nays 63.

Then the two Representatives from Minnesota were sworn in.

520. The California election case relating to Gilbert and Wright in the Thirty-first Congress.

The House has sworn in on prima facie showing Members-elect chosen at an election the day, etc., of which was fixed by the schedule of a constitution adopted on that election day.

Objection being made to the administration of the oath to a Member-elect, the Speaker held that the question should be decided by the House and not the Chair.

References to elections of Representatives in new States wherein no legislation had fixed the time, place, and manner.

On September 10, 1850,¹ the credentials of Edouard Gilbert and George W. Wright, as Representatives from California, were presented to the House. These credentials showed that the two gentlemen had been elected on November 13, 1849, "in pursuance of the sixth section of the schedule appended to the constitution of the State of California." This section of the schedule provided, among other things, that "this constitution shall be submitted to the people for their ratification or rejection at the general election to be held on Tuesday, the thirteenth day of November" [1849], and furthermore provided machinery for holding the election. Section 8 of the schedule provided that on the above date "two Members of Congress" should be elected.

Mr. Abraham W. Venable, of North Carolina, objected to the swearing in of the two gentlemen, and moved that the credentials be referred to the Committee on Elections.

Mr. James Thompson, of Pennsylvania, made the point of order that it was the duty of the Speaker, immediately upon the presentation of the credentials under the seal of the State, to administer the oath of office.

The Speaker² overruled the point of order, saying that if objection was made it was the duty of the House, not of the Speaker, to determine the question. This decision the Speaker justified under the clause of the Constitution providing that—each House shall be the judge of the elections, returns, and qualifications of its own Members.

Mr. Venable then presented his objections to the swearing in of the two gentlemen. He said that the credentials and the annexed schedule of the constitution of the State of California showed that at the time of the election there was no constitution, no legislature, and no law in California other than the Constitution and laws of the United States. The constitution perfected by the California convention was of no force until ratified by the people. By the provisions of the Constitution itself it was not legally ratified until after a comparison of the votes and a proclamation of the governor, thirty days after the election. Elections to be valid must

¹ First session Thirty-first Congress, Journal, p. 1442; Globe, pp. 1789, 1795; Appendix, p. 1253.

² Howell Cobb, of Georgia, Speaker.

take place under the constitution and not anterior to its ratification. The Constitution further provided that the times, places, and manner of elections of Representatives in Congress "shall be prescribed in each State by the legislature thereof." This condition had not been complied with, for California was not legally a State when the election took place. There was no legislature in existence to regulate the times, places, and manner. There was no standard of qualification of voters as provided by the Constitution. Furthermore, the convention of California, without a census, had assumed that they were entitled to two Representatives. If California had assumed for herself 10 Members, they would have been admissible on the same reasoning that would admit the 2. It could not be argued that the constitutional convention was a primary assembly of the people, and its action equivalent to a corresponding act of a legislature, because the instrument carried on its own face the evidence of its nullity until ratified by the people.

In reply to this argument it was stated that all the new States, except Missouri and Texas, had sent Representatives before any law had been passed by the legislatures designating the times, places, and manner of holding elections. It was customary for a schedule to be appended to the constitutions such as had been appended in this case. It was true that in most cases the constitutions had been adopted before the Members of Congress were elected; but in the case of Michigan the constitution had been voted on the very day when the Members of Congress were elected.

On September 11, by a vote of yeas 109, nays 59, the motion of Mr. Venable was amended by adding—

that the Speaker proceed to administer the oath, as prescribed by law, to Edouard Gilbert and George W. Wright, as Members of the House from the State of California.

The original motion, as amended, was then agreed to. So it was ordered that the credentials be referred, and that the gentlemen be sworn in.

521. The election case of Tennessee Members in the Forty-second Congress.

Members-elect from Tennessee were seated in 1871 on prima facie showing, although there was a question as to whether or not the day of their election was the legal day.

An opinion that the House, in construction of a State law, should follow the construction given by the proper State officers.

On March 22, 1871,¹ Mr. George W. McCrary, of Iowa, submitted the report of the Committee on Elections in the case of the Tennessee Members, who had been sworn in at the organization of the House, but of whose election there was doubt because they had been chosen on November 8, 1870, while there was a question as to whether or not the law of Tennessee did not provide for election in August instead of November.

The committee, after a discussion of the Tennessee statutes, concluded that November 8 was the legal day of election. They further said:

If, however, the question as to whether by the act of 1870 the time for holding the election in question was changed from August to November was one of doubt, we should feel bound to follow the construction given to it by all the authorities of the State of Tennessee whose duty it has been to construe it and to execute it. It is admitted that the governor and all other authorities in Tennessee having

¹ House Report No. 1, first session Forty-second Congress, Smith, p. 3; Rowell's Digest, p. 261.

anything to do with the construction and enforcement of this act of 1870 have construed it as in nowise affecting the act of 1868, and by common and universal assent the election was held at the time fixed in the latter act. It is a well established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex governments, State and National, and your committee are not disposed to be the first to depart from it. The committee recommend the adoption of the following resolution:

Resolved, That the election for Members of Congress from the State of Tennessee, held on the 8th day of November, 1870, was held on the day fixed by law, and was not void by reason of having been held on the said day.

On April 11¹ the resolution was agreed to by the House without debate or division.

522. The election case of the West Virginia Members in the Forty-third Congress.

The House seated a claimant elected on what it decided to be the legal day.

Discussion as to the power of a State convention to fix the time for election of Representatives in Congress, when the legislature had already acted.

Discussion as to the retroactive effect of the schedule of a new State constitution, whereby a date for election of Congressmen was fixed.

A question as to whether or not a State might make the time of election of Congressmen contingent on the time of the State election.

Credentials issued by a governor raising a doubt as to election, the Clerk and the House declined to allow to them *prima facie* effect, although positive credentials authorized by the State legislature accompanied.

Discussion as to whether or not credentials which required reference to State law to make certain their import should be given *prima facie* effect.

Instance of an amendment changing the character of a resolution by striking out the word "not."

At the session of 1873–74² the House was confronted with a question relating to the validity of the election of the three Representatives from West Virginia, at the election due to be held in that State in 1872 for Members of the Forty-third Congress.

A law enacted by the West Virginia legislature in 1869 provided:

1. The general election of State, district, county, and township officers, and members of the legislature, shall be held on the fourth Thursday of October.

2. At the said elections in every year there shall be elected delegates to the legislature and one senator for every senatorial district. And in the year 1870, and every second year thereafter, a governor, secretary of state, treasurer, auditor, and attorney general for the State, a prosecuting attorney, surveyor of lands, recorder, and the number of assessors prescribed by law, and a Representative in the Congress of the United States for the term beginning on the 4th day of March next after the election, for every Congressional district; and in the year 1870, and every fourth year thereafter, a judge of the supreme court of appeals for the State, and a clerk of the circuit court, and a sheriff for every county; and in the year 1874, and every sixth year thereafter, a judge for every circuit.

¹ Journal, p. 146; Globe, p. 582.

² First session Forty-third Congress.

In the early winter months of 1872 a constitutional convention was in session in West Virginia, and prepared a new constitution, one of the provisions of which was:

The general elections of State and county officers and members of the legislature shall be held on the second Tuesday of October until otherwise provided by law.

The constitutional convention also agreed to a schedule as follows:

SEC. 3. The officers authorized by existing laws to conduct general elections shall cause elections to be held at the several places for voting established by law in each county on the fourth Thursday of August, 1872, at which elections the votes of all persons qualified to vote under the existing constitution, and offering to vote, shall be taken upon the question of ratifying or rejecting this constitution and schedule.

SEC. 7. On the same day, and under the superintendence of the officers who shall conduct the election for determining the ratification or rejection of the constitution and schedule, elections shall be held at the several places of voting in each county for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people.

The new constitution did not specify any requirement as to the election of Members of Congress by the people. It did provide as follows:

Such parts of the common law and of the laws of this State as are in force when this constitution goes into operation, and are not repugnant thereto, shall be and continue the laws of this State until altered or repealed by the legislature.

The schedule further provided, in event of ratification, that "this constitution and schedule shall be operative and in full force from and including the fourth Thursday of August, 1872." They were ratified by the people on the said day.

Several things are evident from the above state of facts:

(a) That the constitutional convention, by its schedule, established a new date and a new machinery for the election of State officers, thereby superseding the requirements of the law passed by the legislature in 1869.

(b) That the constitutional convention did not specifically name the Congressional elections as taking place on the day set apart for election of State officers.

(c) That the Constitution of the United States provides that the times for holding Congressional elections shall be prescribed by the "legislature" of the State, and that the West Virginia law of 1869 fulfilled that requirement, although it might be claimed that the schedule of the constitutional convention had swept away the machinery of that act.

(d) That the schedule was of doubtful validity in prescribing the time of a Congressional election, especially since it was ratified only on the very day when that election would be held.

There was much doubt in West Virginia as to what should be done, and elections for Congressmen were held both on the fourth Thursday of August and the fourth Thursday of October. At the August election 81,875 votes were cast on the constitutional question and 44,917 for Congressmen.

In the Third district Frank Hereford was a candidate and was elected at each election. Therefore the Clerk of the House put his name on the roll at the organization of the House.¹

¹ First session Forty-third Congress, Record, p. 5.

In the other districts the following took place,¹ as stated in the report of the Committee of Elections in its description of the August election:

At this election, in the first district—

	Votes.
Mr. Davis received	13,361
Mr. Wilson	12,948
H.W. Rook	4
Aggregate	26,313

In the second district the Congressional conventions of both parties met before the August election and adjourned without making nominations. At the August election, however, Mr. Hagans received 3,441 votes returned, and, it is claimed, other votes which were not returned. There were 600 votes for other candidates.

Upon the fourth Thursday of October another election for Representatives was held, at which the aggregate vote cast was 22,146. In the first district—

	Votes.
Mr. Wilson received	3,708
Thirty nine other candidates	381
Total vote	4,089

In the second district, at the October election, Mr. Martin received nearly 6,000 votes, which was a majority over all other candidates.

The governor of West Virginia gave Messrs. Davis and Hagans credentials certifying that they were elected, provided the fourth Thursday of August was the legal day for electing Representatives in Congress; and to Messrs. Wilson and Martin like credentials certifying that they were elected, provided the fourth Thursday of October was the legal day for electing Representatives.

The legislature of West Virginia subsequently passed an act directing certain State officers to give certificates to the Representatives elected to Congress, who gave formal certificates to Messrs. Wilson and Martin,

who had been elected in October.

The form of the certificates² given was:

STATE OF WEST VIRGINIA, *to wit*:

I, John J. Jacob, governor of the said State, pursuant to the act of the legislature thereof in such case made and provided, do hereby certify that Benjamin Wilson was duly chosen on the 24th day of October, 1872 (provided that was the time prescribed by law for holding an election for Representatives in the Congress of the United States), a Representative in the Congress of the United States for the First Congressional district of this State, composed of the counties, etc. * * *, for the term commencing on the 4th day of March next.

Given under my hand and the great seal of the State of West Virginia, this 29th day of January, 1873.

[SEAL.]

JOHN J. JACOB.

By the governor:
JOHN M. PHILLIPS,
Secretary of State.

The certificate given in pursuance of the act of the legislature was in this form:

STATE OF WEST VIRGINIA, *to Wit*:

We [names of officials enumerated], of said State, pursuant to the act of the legislature thereof in such case made and provided, do hereby certify that Benjamin Wilson, of the county of Harrison, was duly chosen and regularly elected, in accordance with the laws of this State, on the 24th day of October, 1872, a Representative in the Congress of the United States, for the First Congressional

¹ See House Report No. 7.

² Record, p. 40.

district of this State, composed of the counties, etc., * * *, for the term commencing on the 4th day of March, 1873.

Given under our hands and the great seal of the State of West Virginia, which is hereto affixed by the secretary of state, this 22d day of November, 1873.

CHARLES HEDRICH, *Secretary of State, etc.*

(Other signatures being appended.)

The Clerk, in view of the alternative nature of the certificates issued by the governor, announced to the House, at its organization on December 2, 1873,¹ that he considered them inadmissible for enrolling either of the candidates from the First and Second districts.

On December 3² Mr. John Cessna, of Pennsylvania, proposed the following resolution:

Resolved, That the name of John J. Davis be placed on the roll of this House as a Representative from the First Congressional district of West Virginia, without prejudice to the right of Benjamin Wilson to contest the seat hereafter; and that the name of J. Marshall Hagans be placed on the roll of this House as a Representative from the Second Congressional district of West Virginia, without prejudice to the right of Benjamin F. Martin to contest his seat hereafter, and that they be forthwith sworn in as Members of this House.

This resolution precipitated a long debate on the sufficiency of the *prima facie* evidence in the case. The argument for the resolution was based on the supposition that a reference to the law of West Virginia would show the August election legal. On the other hand it was argued, especially by Mr. L.Q.C. Lamar, of Mississippi, that such an argument was fatal, since no *prima facie* right could be based on a certificate which had to be supported by reference to other matters, whether circumstances of law or fact. Furthermore, the alternating feature of the governor's certificate emasculated the certificates. Also the Clerk had, acting under the law, rejected the certificates, and the House ought not to reverse his decision until after examination by a committee.

The demand for the previous question on the resolution was negatived—ayes 54, noes 109. Then the resolution was, without division, referred to the Committee on Elections, and the oath was not administered to either of the claimants.

On January 14, 1874,³ the report of the committee was submitted by the chairman, Mr. H. Boardman Smith, of New York. It was also signed by Mr. C. K. Thomas, of North Carolina; Edward Crossland, of Kentucky; R. M. Speer, of Pennsylvania, and L.Q.C. Lamar, of Mississippi. Messrs. Lemuel Todd, of Pennsylvania; Horace H. Harrison, of Tennessee, and Ira B. Hyde, of Missouri, gave a qualified approval. Mr. Speer submitted views supplemental to the report, giving the argument in a different way. Messrs. J. W. Hazelton, of Wisconsin, and J.W. Robinson, of Ohio, filed minority views sustaining the August election, while the majority of the committee sustained the October election.

The questions discussed may be divided into several branches, and for convenience the minority propositions may be stated first, since the House ultimately decided in favor of the minority views:

(1) May a constitutional convention prescribe the time for electing Representatives in Congress?

¹ Record, p. 5.

² Record, pp. 35 46; Journal, pp. 39 41.

³ House Report No. 7; Smith, p. 108; Rowell's Digest, p. 284.

The minority say:

The constitutional convention had authority to prescribe a time, after its ratification, for the election of Representatives. The case of Michigan is in point. The State constitution was adopted on the 24th day of June, 1835. Section 6 of the schedule contained these words:

"The first election of governor, lieutenant-governor, members of the State legislature, and a Representative in the Congress of the United States shall be held on the first Monday of October next and on the succeeding day."

The Representative was so elected on the first Monday and succeeding day in October, 1835, and was subsequently admitted to his seat in the House.

See also the case of Iowa. The constitution of Iowa was adopted May 18, and ratified August 3, 1846. The sixth section of the schedule provides as follows:

"The first general election under this constitution shall be held at such time as the governor of the Territory, by proclamation, may appoint, within three months after its adoption, for the election of a governor, two Representatives in the Congress of the United States (unless Congress shall provide for the election of one Representative), members of the general assembly, and one auditor, treasurer, and secretary of state."

Representatives were chosen under the governor's proclamation on the 26th of October, 1846, and subsequently admitted to seats in the House.

We are very firmly impressed with the conviction that the precedents cited are conclusive upon this question. The word "prescribe," as used in the Constitution of the United States in connection with the election of Representatives, may well be said to have a settled meaning and construction.

We may add, in conclusion, that we are all the more willing to follow this construction in the present case, because it saves us from the alternative of disfranchising a State, while it seems to do no injustice to anyone.

As a precedent, it is entirely without consequence one way or the other, because Congress has already fixed a uniform time for electing Representatives in Congress, and thus taken the whole subject out of State control, after the year 1876.

The supplemental majority report, presented by Mr. Speer and signed by Messrs. Lamar and Crossland, took the contrary view:

But if it is possible to claim that the convention did change the day for holding Congressional elections in West Virginia from the fourth Thursday of October to the fourth Thursday of August, in 1872, then it is respectfully submitted that its act was unauthorized and void. Where the legislature has prescribed no time, a different question may arise. But in this case the legislature had prescribed a time, had obeyed the requirement of the Federal Constitution, had discharged its sworn duty, and had exercised its undoubted power. What shadow of authority, therefore, was there in the convention to interfere? The State constitution had not given to the legislature the power to say when Congressmen shall be elected (for it did not have it to give), and neither State constitution nor State convention could take it away. The legislature derived it from the supreme law of the land, the Constitution of the United States, and in its exercise it knew but one master.

In the Massachusetts convention of 1820 a resolution was submitted declaring that the State constitution ought to be so amended as to provide for the election of Members of Congress in such districts "as the legislature shall direct," thus limiting its discretion to prescribe "the times, places, and manner" of their election. In the discussion that followed Justice Story opposed the resolution, declaring that it "assumes a control over the legislature which the Constitution of the United States does not justify. It is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provisions to which I have referred."

Mr. Webster followed, limiting himself, however, to the expediency of the proposition. He declared that "whatsoever was enjoined on the legislature by the Constitution of the United States, the legislature was bound to perform; and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution." And the proposition failed.

In the case of *Baldwin v. Trowbridge*, in the Thirty-ninth Congress, this House held that “where there is a conflict of authority between the constitution and the legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount.”

This case goes further than is required in the cases now pending.

An apparently contrary doctrine was sustained in the case of *Shiel v. Thayer*, from Oregon, in the Thirty-seventh Congress. The committee there say they “have no doubt that the constitution of the State has fixed, beyond the control of the legislature, the time for holding an election for Representative in Congress.”

But this part of the report was a mere dictum, for there was nothing in the case to require the committee to determine any such question. *Shiel* had been elected on the day fixed by the constitution, while *Thayer* claimed to have been elected on the day of the Presidential election—a day not prescribed by any authority for the election of a Member of Congress. No question as to the power of the legislature to fix the time arose in the case; and what was said upon this point was wholly unnecessary, in view of the undisputed facts.

In the debate,¹ quoting the Federal Constitution, Mr. Wilson, of Maryland, contended that the word “prescribe” meant the laying down beforehand of an absolute rule, not a conditional one, and therefore that the schedule in question did not “prescribe” sufficiently.

Mr. Lamar contended² that the distinction between the words “legislature” and “convention” were well understood by the framers of the Constitution. A convention could not by its essential nature and functions overrule the legislature. A convention, like the legislature, was not sovereign, but only one of the agencies of absolute sovereignty which resided in the people.

Mr. Robinson, of Ohio, argued³ that the issue was not drawn between the convention and the legislature, since the convention merely changed the occasion which the legislature had prescribed as the time for holding Congressional elections.

(2) Might the schedule of the constitution, the ratification of which could be certain only at the conclusion of the election, actually attempt to prescribe the time for the election of Representatives in Congress?

The minority say:

We maintain the affirmative of this proposition. Even if we concede that the word “prescribe” shall have here its narrowest and most technical signification, there seems to us to have been a sufficient prescription of the time.

The schedule submitted with the new constitution provides that, in case of adoption, the same shall be deemed and taken to have been in force from and during the whole said fourth Thursday of August. The law knows no fraction of a day. Being ratified, it became and was, in fact as well as legal intendment, the law of the State prior to the opening of the polls on that day. The time was therefore prescribed when the ballot boxes were opened on that day; that is to say, the law making that day the day of the general election for State and local officers was in force before a vote was polled. But it is said that this was not a prescription of the time, because, if the constitution had not been ratified, the election would have amounted to nothing. Saying nothing just here about the impolicy and injustice of applying so technical a rule for the purpose of disfranchising a State, we submit that it is too late to raise that question.

The majority report thus combats this theory:

5. In answer to these difficulties, it is suggested that by night of election day the old constitution was superseded, and that the new constitution was thereupon “operative and in full force from and including the fourth Thursday of August, 1872,” and that “fractions of days are not noticed by the makers either of statutory or organic laws.”

But the answer suggested admits that down to the morning of the fourth Thursday of August any

¹ Record, p. 934.

² Record, p. 846.

³ Record, p. 848.

law or ordinance prescribing the holding of a Congressional or State election on that day was unconstitutional and void. Nor (if this be material) is it unqualifiedly true that "fractions of a day are not noticed."

"Common sense and common justice equally sustain the propriety of allowing fractions of a day whenever it will promote the purposes of substantial justice." (Potter's Dwarrior, 101; see 2 Story, C. C. R., 571.)

It is also suggested that the admission of Senators and Representatives simultaneously with the admission of new States, who have been elected at the same time with the ratifications of the first State constitutions, is sufficient authority for sustaining the validity of the August election. But these cases have always been put upon the ground of "necessity," and upon the theory, whether it be a "legal fiction" or whatever else, that a State is not fully in the Union until it is in its normal and constitutional relations with the Union and represented in Congress. Of course between such cases, whether right or wrong, and the case of West Virginia no analogy can be drawn. The constitutional provision had been in full sway in West Virginia for some ten years. What suspended it?

At page 409 of Jameson's work on constitutional conventions the author says of these precedents:

"There being as yet no State, and of course no State legislature, unless the convention could make a temporary arrangement for the election of Members of Congress, the new State must, after its admission into the Union, be unrepresented in that body until a State legislature could be elected and could pass the necessary laws—a condition involving often a considerable delay. In such cases, accordingly, the custom has been for the convention to anticipate the action of the legislature, a course which, on account of its obvious convenience, has been commonly acquiesced in. These cases, however, form exceptions to a rule which is general—that it is the State legislatures which apportion their several States for Congressional elections. I have failed to find a single exception to that rule, save in the cases of Territories seeking to become States or of States standing substantially upon the same footing as Territories.

"Besides, in one view of the subject such action of the Territories, taken in connection with that of Congress following it, involves no impropriety, if it is not strictly regular. Immediately following that clause of the Federal Constitution giving the power of determining the 'times, places, and manner of electing Senators and Representatives' to the State legislature, is the important reservation, 'but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators.' Hence, having the power to make or alter, Congress doubtless might ratify such regulations, however made; or if a State, actual or inchoate, were in such a condition that it had no lawful legislature, Congress might itself, for the sake of convenience, establish them by its direct action. This it does, in substance, by anticipation in those cases in which it accepts and admits into the Union Territories presenting themselves with constitutions containing the apportionments referred to."

In the course of the debate¹ the chairman of the committee, Mr. Smith, called attention to the fact that the old constitution of West Virginia provided that the ordinances of the constitutional convention should have no effect until they were ratified, and that they should not have any retroactive effect. Senators and Members admitted simultaneously with the admission of new States had always been elected outside the constitution. Such was the case in elections under the reconstruction acts, such as that of March 11, 1868. These precedents could not be applied to the case of a State already within the Union. It was further urged by Mr. Lamar² that the schedule was a mere addendum, temporary in its nature, to test the will of the people and secure the transition from the old to the new system. As to the point that the schedule was retroactive, and no one could tell in advance whether the election was to be valid or not, Mr. Benjamin F. Butler, of Massachusetts, pointed out³ that it proved too much, since if the objection was good it went to the whole State government of West Virginia and invalidated it.

(3) Might the State make the election of Representatives in Congress contingent upon the date of election of State officers, and moveable therewith?

¹ Record, pp. 818, 819.

² Record, p. 843.

³ Record, p. 959.

The minority views say:

The legislature of 1869, when it framed the election law and provided all the machinery for conducting an election, and enacted that Representatives in Congress should be elected at said elections, intended to point out and designate the occasion for electing such Representatives; intended that the one election should be held in conjunction with the other; in other words, that when it provided the means or agencies for holding the State election, and authorized Representatives to be elected at the time of said election, and under and by virtue of the machinery for said election, it did not intend that Representatives in Congress should not be elected at said election and without any legal "manner" whatever provided therefor.

Connecting the election of Representatives with an occasion was, moreover, entirely in harmony with the practice of the old State of Virginia, which for some forty years, it seems, was authorized to elect Representatives in Congress under a statute which fixed the election at the holding or opening of certain terms of court, which latter were constantly changing with successive acts of the legislature.

It being, we think, clearly the purpose of the legislature that Representatives in Congress should be elected at the general election, it follows that when the occasion was changed, transplanted, the election of Representatives in Congress went with it.

The majority say, in the views filed by Mr. Speer—

West Virginia was a State in full life, with all the departments of her local government in active and harmonious operation. It was the duty—the sworn duty—of her legislature to prescribe the time of electing her Representatives in Congress. Recognizing this duty, the legislature, as we believe, did definitely prescribe the time, and if it did, there was no power in the State or out of it competent to change the time except Congress and the legislature itself. It is claimed by those who hold the August election to be valid that the legislature prescribed only the "occasion" and not the time. But this assumes that the legislature did not only not do its duty, but that it did not intend to do it. For whence does it derive the power to prescribe the occasion for holding Congressional elections—to prescribe an event, the happening of which may be placed utterly beyond its control or authority? It not only has the power, but it is under the most positive obligation, to prescribe the time. But naming an event on the occurrence of which the election shall be held, and leaving the time of the event to be fixed or changed by another body, which has no power to fix the time of the election itself, it seems to us can in no just sense be regarded as a compliance with the mandate of the Federal Constitution. And hence no intention on the part of the legislature so to evade its duty is to be inferred, and no such construction should be placed upon its act, unless the language absolutely demands it. If the legislature can discharge its duty by naming an occasion, which occasion may be fixed by some other power in the State, then that other power may, under the same reasoning, entirely abolish the occasion. If it is competent to postpone it for a day, it is equally competent to postpone it for a year or for all time. Under this view the legislature would legally prescribe the occasion, which occasion could legally never happen.

Premises which lead to such a conclusion can not be sound, and any construction of the statute of a State legislature which logically leads to such a result should be adopted with extreme hesitation, and only from absolute necessity.

The report of the majority says:

A general State election can only be "prescribed" by law. Does it stand to reason that section 2, chapter 3, of the code meant to fix any other kind of a State election as the "occasion" of the Congressional election? But this convention could not enact a "law," and if it could, and had full legislative power, a law (though it may be made to take effect on the happening of a future contingency) must be a valid law, in presenti, when it leaves the hands of the legislature, and can not become a "law" by the approval of a popular vote. (4 Seld., N. Y., 483, etc.; *Rice v. Foster*, *Brightly's Election Cases*, 3.)

The right of the legislature to hinge the Congressional election on the State election was strongly combated in debate. Mr. Lamar said ¹ that the Congressional

¹ Record, p. 843.

elections must be final and unconditioned by any contingencies which looked to their nullification. If the makers of the West Virginia law of 1869 had intended such a construction they would have made it plain. Mr. Lamar challenged the alleged Virginia precedents; but Mr. Robinson, of Ohio, replied¹ by quoting the Virginia law of 1813, which was in force forty years, and fixed the Congressional elections “on the first day of their April court” in each county. He also quoted a Kentucky statute of 1802, a Louisiana law of 1841, and a New Jersey law of 1820 to the same effect.

(4) Did the law of 1869 actually prescribe the fourth Thursday of October as the date for the election of Representatives in Congress independent of the State election?

Speaking of the West Virginia law of 1869, already quoted, the minority views say:

The second section says—

At the said election, * * * in the year 1870, and every second year thereafter, a governor, secretary of state, etc., “and a Representative in the Congress of the United States” shall be elected.

At the said election; at what said election? Clearly that election mentioned in the first section, to wit, the general election for State, district, county, and township officers.

The word which is employed to introduce the said second section, as well as the general meaning and obvious intent of the section, render this very manifest.

“At the said election for State and local officers Representatives shall be elected.” “At,” in its ordinary and usual application as applied to time, means contemporary with, in conjunction with.

Now, how can it be claimed that Representatives in Congress can be elected at the general election for State and local officers on the fourth Thursday of October when there is no general election for State and local officers on that day?

Again, we fail to understand what authority there was for holding an election for Representatives in Congress only, on the fourth Thursday of October. The law of the State, the code of 1869, regulating the manner of holding the elections, prescribing the officers who should conduct the same, directing as to the making returns, etc., had reference to the State election—the election of the officers of the State government as distinguished from the Federal Government. The election of Representatives in Congress was hinged on to the State election. It was a mere incident of the State election. They were to be elected at the general election for State and local officers.

Where is the authority for setting in motion the machinery provided for the State government to elect Representatives in Congress alone? Who is to give the requisite notice; who to act as inspectors; who to furnish places for conducting the election; who to make the returns and declare the result? The code of West Virginia does not require one of the officers named in the election act to take a step or lift a finger at any election of Representatives in Congress apart and distinct from the State election. Their duty relates exclusively to the State election and the election of Representatives in connection with such election.

The majority report joins issue on this point:

Section 2 is simply an enumeration of the officers, the day of whose election was prescribed under generic terms in section 1.

The legislature therefore had implicitly obeyed the requirement of Article I, section 4, of the Constitution of the United States, and had “prescribed” for the election of Representatives in Congress a day certain in section 1 and not an occasion in section 2.

The fact that Representatives are specially mentioned in section 2 does not affect the question, except to demonstrate that they are included in the term “district officers” in section 1. So is the governor mentioned in section 2, though plainly included in the class of “State officers” mentioned in section 1.

¹Record, p. 847.

4. Is there any opportunity for "construction" here? If there be, then the old election law of West Virginia, passed November 13, 1863, quoted above, and which was codified and somewhat abbreviated in chapter 3 of the code, seems to be important on this question. By the second paragraph of that act it is provided, "And on the fourth Thursday of October, in 1864, and on the same day in every second year thereafter, a governor, * * * a Representative in the Congress of the United States," etc., shall be elected.

This act prescribed a day certain. Can it be fairly claimed that, as abbreviated in the codification, there was an "intention" to change the "prescribed time" from a day certain to an ambulatory "occasion?"

The attempt at abbreviation consisted in the mention but once of the prescribed day, whereas in the act codified it was often repeated, and in grouping each class of officers to be elected under a generic term in the first section, which alone prescribes the time.

In the debate¹ Mr. Robinson, of Ohio, urged that the code of 1869 in failing to specify Representatives particularly in the first section, had intended to change the more specific designation of the former law. It was also urged² by Mr. Wilson, of Maryland, that manifestly the lawmakers of West Virginia never contemplated that the fourth Thursday of October should continue an election day for Congressmen after it had ceased to be a State election day. It was further argued that in 1872 there manifestly could be no State election in October, because the new constitution had abrogated it.

(5) Did the schedule of the new constitution actually provide for a general election and repeal the law of 1869 prescribing the October election?

The minority views say:

It is true it was not held at the same time as had previously been designated for the general election, but uniformity of time is not of the essence of a general election. It may be one year in October and the next in November and yet be the general election. In the State of Iowa, for instance, the general election every fourth year is held in a different month from that in which it occurs in the intermediate years.

The legislature in a State where there is no constitutional inhibition may change the time of the election every year or every other year, but it is no less the general election.

It is true it was not "to count" in case the constitution should fail to be ratified. It is equally true that an acknowledged general election does not count in case of a tie. If a mere uncertainty as to results varies the case in one instance, it does in another.

It is not true that it was an election simply to ratify or reject the constitution. It was equally an election—made so by the same section of the schedule—to officer the State. Every officer required to be elected by the people, from governor down to constable, was to be elected on that day. The people were required to do exactly that thing in August, 1872, which in October, two years before, was known to everybody to be the general election and which all concede will be the general election when it occurs in October, 1874; and yet for some reason it is insisted that it was, nevertheless, not a general election then. It is unnecessary to enlarge upon what is a general election. Definitions are easy. The case under consideration seems to us to comprehend all the elements of what we every day speak of and recognize as a general election. It was the only general election held in 1872. It was intended to and did provide the entire official staff of the State government.

The minority hold that the convention had full and ample authority to change the election from October to August.

The majority, in the views submitted by Mr. Speer, quoted the language of the schedule and say:

Here is a plain, clear designation by name or class, of all the officers to be voted for at the August election. Members of Congress are not named, and as they are not State officers and are not "required

¹ Record, p. 847.

² Record, p. 935.

by this constitution to be elected," they are excluded from the provisions of the section upon the familiar maxim, "*expressio unius, exclusio alterius*." The convention, apparently conscious of its want of power, was careful in the use of its language.

Under what authority, then, could an election for Representatives in Congress be held on the fourth Thursday of August, 1872? The code prescribed the fourth Thursday of October, and the constitution and schedule were intentionally silent upon the subject. No change in the time of holding the Congressional election in West Virginia has been directly made or attempted by any power, competent or incompetent, authorized or unauthorized. If made at all, it has been made indirectly by a body that had no power to make it directly, or, if it had, clearly did not attempt to exercise it. If the code, as claimed by those who hold the August election valid, prescribed only the occasion, and that the general election, yet the new constitution did not provide that the general elections should be held in August, but "on the second Tuesday of October until otherwise provided by law." The election held in August, 1872, was for the special purpose of voting for or against the constitution; specially for this purpose, because a candidate for any of the offices voted for might have received every vote cast, and yet he would not have been elected, or, what is practically the same, would not have been entitled to hold the office if the constitution had been defeated, for there would have been no office to hold. It is not easy to understand how the "general elections" provided for by the code can be construed to mean a single election, held for an extraordinary purpose, on a day not prescribed by the legislature, and never to be held again on that day or for that purpose, and which, in a certain contingency, is not to elect anybody! The code provides that "at the said elections" certain officers shall be elected; and yet it is urged that the schedule supplants these "said elections" with an election at which nobody can, in one event, be elected! It seems to us too clear for argument that no legal election for Congressmen could be held in August, either under the code or the constitution. There was no provision in the schedule for such an election, and there was clearly none in the constitution, for upon its ratification it became operative for every hour of the day on which the August election is held, and, by the express language of section 7, article 4, transferred the "general elections" to the second Tuesday of October. Hence, from the earliest hour of that day it was the organic law of the State that the "general elections" must be held in October, until otherwise provided; and yet it is claimed that the general elections prescribed in the code were held in August by virtue and force of this same constitution.

Neither Congress nor the legislature having changed the time of holding the Congressional election, and the convention not having done so directly, if changed at all, how was it done?

The schedule could not by implication carry with it the repeal of the law prescribing a time for the election of Congressmen, as there was nothing repugnant to the new constitution in that law.

In debate¹ an equal diversity of views arose as to whether or not the election provided by the schedule was a special or general election.

(6) As to the merits of the case, considering the elections as expressions of the will of the people.

The minority views argue:

In view of the foregoing considerations, and of the further facts that nearly double the number of votes were polled in August as in October; that the Representative from the Third district has already taken his seat and entered on his duties; that in the First district, at the August election, a joint discussion was held, a larger vote was polled—larger than that for several of the candidates on the State ticket—and that no public interest is likely to be subserved by imposing upon the State the expense, agitation, and delay of another election, we are in favor of sustaining the August election.

The majority call attention to the fact that in the Second district the conventions of both parties assumed that the election would be in October and that the vote received by Mr. Hagans in August was much smaller than that received by Mr. Martin in October.

¹ Record, pp. 843, 934, 958.

In the debate this point was dwelt on at greater length, Mr. Todd denying that a sufficient number of votes was cast in October in the First district to constitute an election, and quoting various cases in support thereof.

After having been debated on January 21, 22, 23, 26, and 27,¹ the questions came to an issue on the latter date.²

The first question was on two resolutions of the majority of the committee declaring the two persons claiming seats by virtue of the August election not entitled thereto:

First. *Resolved*, That Mr. Davis, claiming to have been elected a Representative in the Forty-third Congress from the First Congressional districts of West Virginia, was not duly elected, and is not entitled to a seat in this House.

Second. *Resolved*, That Mr. Hagans, claiming to have been elected a Representative in the Forty-third Congress from the Second Congressional district of West Virginia, was not duly elected, and is not entitled to a seat in this House.

On behalf of the minority Mr. Hazelton moved to strike out the word “not” in the first of the two resolutions; and this motion was agreed to—yeas 147, nays 82. Then the resolution as amended was agreed to—yeas 137, nays 81.

Thereupon Mr. Davis appeared and took the oath.

In a similar manner the word “not” was stricken from the second resolution by a vote of yeas 119, nays 88, and then the resolution as amended was agreed to—yeas 115, nays 75.

Thereupon Mr. Hagans appeared and took the oath.

523. The Colorado election case of Patterson and Belford in the Forty-fifth Congress.

The Clerk declined to enroll the bearer of credentials regular in form but showing an election at a time apparently not that fixed by law.

The House declined to give prima facie effect to credentials perfect in form, but referring to an election on a day of doubtful legality.

Instance wherein credentials were referred to a committee with instructions to inquire either as to prima facie or final right.

Form of resolution instructing a committee to inquire either as to prima facie or final title to a seat.

On October 15, 1877,³ at the organization of the House, after the roll of Members had been called, the Clerk⁴ announced that there had been received from the State of Colorado a certificate signed by the governor and under the seal of the State, declaring the election of James B. Belford on the 3d day of October, 1876. The Clerk stated that under the law he could enroll only those whose credentials showed them to be elected in accordance with the laws of their States respectively, or the laws of the United States. In the opinion of the Clerk there was no law of Colorado or the United States authorizing the election of a Representative to the Forty-fifth Congress on the 3d day of October, 1876. Therefore he had not enrolled the name of Mr. Belford. The Clerk also announced that he had received a protest signed by Thomas M. Patterson, claiming to be a Representative-elect from the State

¹ Record, pp. 816, 842, 875, 933, 958–964.

² Journal, pp. 325–331.

³ First session Forty-fifth Congress, Record, p. 52.

⁴ George M. Adams, Clerk.

of Colorado, and accompanying that protest a certified copy of an abstract of the votes cast in each county on the Tuesday after the first Monday of November for Representative to the Forty-fifth Congress. The abstract showed, however, that the votes were never canvassed by any board of canvassers and that no certificate was ever issued by anyone declaring the result of the election. While of the opinion that the November election was the one provided for by law, the Clerk did not consider that Mr. Patterson's credentials entitled him to be enrolled.

On October 17,¹ after the House had been organized, Mr. Eugene Hale, of Maine, presented Mr. Belford's certificate, and moved that he be sworn in. The question was discussed on the 17th, 22d, 24th, and 25th.² Mr. Hale urged that as Mr. Belford had a certificate in due form he was entitled *prima facie* to the seat. But it was objected that as the certificate specified that the election was on October 3, it became the duty of the House in determining the *prima facie* right to decide whether October 3 was really the election day.

On October 25,³ by a vote of yeas 137, nays 130, the House substituted for the motion of Mr. Hale the following, proposed by Mr. John T. Harris, of Virginia:

Resolved, That the certificate presented by James B. Belford and the certified abstracts of votes cast upon the 7th day of November, A. D. 1876, for Representative to the Forty-fifth Congress, and accompanying papers, presented by Thomas M. Patterson, upon which each claims the office of Representative to the Forty-fifth Congress of the United States from the State of Colorado, be referred to the Committee on Elections, to be appointed hereafter, with instructions to said committee to report either as to the *prima facie* right or final right of said claimants, as the committee shall deem proper, and that neither claimant be sworn in until said committee reports.

Then Mr. Hale's motion as amended by the substitute was agreed to.

524. The election case of Patterson and Belford, continued.

A question as to the right of a constitutional convention of a State to fix the time for the election of Representatives in Congress.

A claimant who received a small vote, not officially canvassed or declared, but cast on the legal day, was preferred to one receiving a far larger vote on a day not the legal one.

Votes cast on a legal election day were held valid by the House although the State official had withdrawn his proclamation calling the election for that day.

The fact that a large portion of the electors fail to participate does not invalidate an election held on the legal day.

A question as to the authority of a construction of law by State officials and people in a case relating to time of electing Congressmen.

On December 6, 1877,⁴ Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the majority of the committee.

The report disregarded the question of *prima facie* right, and proceeded at once to a discussion of the merits of the case.

¹ Journal, p. 25; Record, p. 94.

² Record, pp. 94, 118, 135, 150–163.

³ Journal, pp. 38–40.

⁴ House Report No. 14, second session Forty-fifth Congress; 1st Ellsworth, p. 52.

In brief, two elections were held in the State, and the question at issue was as to which, if either, was the legal election. The circumstances of the two elections were thus stated in one of the minority views:

At a general election held in that State on the 3d day of October, A. D. 1876, votes were cast for a Representative in both the Forty-fourth and Forty-fifth Congresses. A little over 26,000 votes were polled for the two candidates, which is admitted to be a full vote for the State. The vote for the Representative for the Forty-fifth Congress, as polled and returned, was a little larger than that for Representative in the Forty-fourth Congress. There is no reasonable doubt that both political parties did, in fact, cast their full vote at that election for Representative in both Congresses, and that if said election can be considered as a lawful election for a Member of the Forty-fifth Congress, James B. Belford is entitled to the seat, he having received a majority of the votes cast. As to this there is no dispute.

Thomas M. Patterson, who received a minority of the votes cast for Representative in the Forty-fifth Congress at the election above mentioned, seems to have claimed, prior to the October election, that no valid election for the present Congress could be held in October, but that the 7th of November, the day fixed by Federal statute (if such statute controlled the matter), was the day on which the election for the Forty-fifth Congress must be held. He accordingly seems to have taken steps to have an election held on said 7th of November, and on that day 3,829 votes were cast for Representative in this Congress, of which 3,580 were cast for said Patterson and 172 for said Belford, the rest scattering. If said 7th of November was the lawful day for holding said election, and if a real election was then held by the people of Colorado, Thomas M. Patterson is entitled to the seat, he having received nearly all the votes cast.

A question arose in the course of the discussion as to whether or not the November election could, in view of the small number of votes cast, be considered an election. The majority of the committee held that it could be, saying:

Objection has been made to the seating of Mr. Patterson, upon the ground that there was a light vote polled at the November election, compared with the vote at the October election. But Mr. Belford can not complain of this, nor can his political supporters, for his name was withdrawn from the canvass three weeks before the November election, and his supporters were advised not to participate in the election. The absence of 9a. contest would naturally result in a light vote. At the recent election for governor and other State officers in the State of Virginia there were polled in the city of Richmond less than 2,000 votes out of an aggregate voting population of 13,000. There was no contest between opposing forces, and a light vote was the result. But no one will seriously contend that this impaired, in the slightest degree, the validity of the election. The law is well settled on this point. Mr. McCrary, in his work on the law of elections, states the rule thus (see. 448):

"If an election is held according to law, and a fair opportunity is presented to all voters to participate, those who do not vote are bound by the result."

In the case of *Rem v. Munday* (2 Couper, 238), Lord Mansfield, in delivering the opinion of the court, said:

"Upon the election of a member of Parliament, where the electors must proceed to an election because they can not stop for that day to defer it to another time, there must be a candidate or candidates; and in that case there is no way of defeating the election of one candidate proposed but by voting for another."

In the case of *The Commonwealth v. Read* (Brightly's Election Cases, 130-131) this rule is recognized to the fullest extent. In this case it was the duty of the board of county commissioners, under the statute, to elect a county treasurer. The board consisted of 20 members, all of whom were present, but a controversy arose among them as to the manner of voting, whether viva voce or by ballot, and only one of their number, Abraham Miller, voted by ballot, while the others voted viva voce. The statute required the election to be by ballot, and by virtue of this one vote Read claimed to be elected. The court instructed the jury as follows:

"In all our public elections those who neglect or refuse to vote according to law are bound by the votes of those who do vote, no matter how small a minority those who do vote are of the whole constituency. It is an historical fact that about 40,000 electors who voted for one or the other of the candidates for governor at the late election did not cast any vote for or against the amended constitution,

and yet that instrument has, by a comparatively small minority, become the supreme law of the land. The result of our opinion is that if you are satisfied from the evidence that Abraham Miller tendered a vote by ballot for the defendant, and that his vote by ballot was received as such, then has the defendant sustained his plea of having been, on the 1st of April last, duly elected county treasurer."

A former Committee of Elections of this House (Nineteenth Congress, first session), in the case of Biddle and Richard *v.* Wing (Clark and Hall, p. 507), laid down the rule which has always been recognized. The report in that case held that—

"The law appoints a particular time and place for the expression of the public voice. When that time is past it is too late to inquire who did not vote, or the reason why. The only question now to be determined is for whom the greatest number of legal votes have been given."

The small vote on the 7th of November in Colorado was not the result of intimidation of voters; but, on the contrary, the supporters of one of the claimants of the seat voluntarily absented themselves from the election by preconcerted arrangement, and for the very purpose of invalidating the election, so far as it was in their power to do so by their absence. Conceding that there was an honest difference of opinion among the voters of Colorado as to the legal day for the election, some believing the 3d day of October and others the 7th day of November to be the lawful day, yet it will not be pretended that the proper construction of an act of Congress is to be determined by the voters of a particular district. The provisions of law which fix the time or place of holding elections are mandatory. As to the time of election, the day cannot be changed even by the consent of all the voters. (McCrary, sec. 114.)

Ignorance of the proper time or a misunderstanding of the law on the part of a portion of the electors will not deprive those who do understand the law and who do act upon the day prescribed by law from their right to vote and control the election. It is not denied that the election on the 7th day of November was conducted in accordance with the general election law of the State, that all electors who desired to do so were permitted to vote, and that the canvass and result were honestly made and published.

Mr. J.D. Cox, of Ohio, who filed individual views, held the opposite view:

In regard to the 7th of November election, the day was not only not the lawful one, as we have above shown, but the State officials had become convinced of this and withdrawn the election proclamation and notices.

The condition of the public mind is probably best described by the secretary of state, Mr. Clark, who testifies:

"Many were doubting the legality of an election for Representative in the Forty-fifth Congress on the 7th day of November, others claiming that it would be a mere matter of form anyway, because there was some kind of an understanding between Mr. Belford and Mr. Patterson that whichever was beaten at the October election would not be a contestant against the other at the November election; others claimed that only a Member to the Forty-fourth Congress could be elected under the constitution and that the general assembly must provide by law for the holding of an election for the Forty-fifth Congress." (Record, p. 16.)

When in the midst of the public uncertainty thus described, in which the confusion was increased by the acts of party committees, prompted by the fear that their opponents would get the start of them, an election was nominally held, in which hardly more than one-seventh of the electors took part, less than one-third, even, of the party claiming the victory, and almost none of their opponents; when in the city of Denver, the capital of the State, and where were the political managers and committeemen, the proportion of votes cast was not larger than in the rest of the State; and when in eight counties there was not even a show of election, it would be doing violence to language and to justice to call the result an expression of the popular will or the formalities which took place an election by the people of the State.

In the debate on December 13,¹ this feature of the case was discussed somewhat at length, the minority citing the case of Buttz *v.* Mackey, where after casting out a third of the poll it was decided that the remainder of the votes were not sufficient to constitute an election and the seat was declared vacant. In opposi-

¹Record, pp. 186, 187.

tion the majority cited the West Virginia election cases of 1873 and the vote for Mr. Hagans.

But the main issue of the case was as to which election was legal. Section 25 of the Revised Statutes of the United States provided:

The Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to Congress commencing on the fourth day of March next thereafter.

On March 3, 1875, after the above law had been enacted, the law admitting Colorado as a State was approved. It contained this provision:

That until the next general census said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative, together with the governor and State and other officers provided for in said constitution, shall be elected on a day subsequent to the adoption of the constitution and to be fixed by said constitutional convention; and until such State officers are elected and qualified under the provisions of the constitution, the Territorial officers shall continue to discharge the duties of their respective offices.

In accordance with this enabling act the constitutional convention of Colorado adopted the following sections:

One Representative in the Congress of the United States shall be elected from the State at large at the first election under this constitution, and thereafter at such times and places and in such manner as may be provided by law.

SEC. 16. The votes cast for Representative in Congress at the first election held under this constitution shall be canvassed and determined in the manner provided by the laws of the Territory for the canvass of votes for Delegates in Congress.

Section 7 of the Colorado constitution provided:

A general election shall be held on the first Tuesday of October, in the years of our Lord 1876, 1877, and 1878, and annually thereafter on such day as may be prescribed by law.¹

These conflicting provisions left a doubt as to when the election of 1876 for Congressman should be held. The majority report thus sets forth what was done:

The following facts are established beyond controversy:

1. That the secretary of state did, on the 31st day of August, 1876, issue his proclamation (printed Record, p. 138) notifying the people that there would be an election on the 3d day of October, 1876, for State officers and for "one Representative for the unexpired term, Forty-fourth Congress; "that this proclamation made no mention of the election of a Representative in the Forty-fifth Congress, and that the sheriffs of the several counties of the State promulgated like proclamations and notices.

2. That on the 14th day of September, 1876, the secretary of state issued his proclamation (printed Record, p. 254) giving notice of an election to be held November 7, 1876, for a Representative from the State at large for the Forty-fifth Congress; that no other officers were to be elected at such election, and that the sheriffs of the several counties issued like notices in their several counties.

3. That these proclamations by the secretary of state and the sheriffs of the several counties were the only notices published by legal authority or otherwise relating to said elections until after the election on the 3d day of October.

4. That the names of both contestant and contestee were printed generally upon the tickets used at the election on the 3d day of October for both the Forty-fourth Congress (unexpired term) and the Forty-fifth Congress; but there was no agreement between the respective claimants or their friends

¹This provision of the constitution appears in full in the debates, Record, p. 147.

as to whether the 3d day of October was the day prescribed by law for holding the election for a Representative in the Forty-fifth Congress.

5. That on the 10th day of October, one week after the election on the 3d day of that month, J.C. Wilson, chairman of a State political committee favoring the election of Mr. Belford, issued an address (Record, pp. 45–47) calling on the friends of Mr. Belford to prepare by registration and otherwise for the election on the 7th day of November.

6. That on the 16th day of October the secretary of state issued a proclamation withdrawing his proclamation of September 14, which gave notice of the election on the 7th of November.

7. That on the 14th day of October the said J. C. Wilson, on behalf of Mr. Belford, withdrew his name from any further candidacy for Congress, claiming that he had been elected on the 3d day of October to the Forty-fifth Congress, as well as to the unexpired term of the Forty-fourth Congress, and advised Mr. Belford's friends to take no part whatever in the election on the 7th day of November.

8. That the votes cast at the election on the 7th day of November were counted by the proper officers in 11 counties and transmitted to the secretary of state, but were not canvassed by that officer or by any State canvassing board; that in the other 15 counties of the State no abstracts of the votes cast were sent to the secretary of state by the county clerks; but the stipulation filed by the parties to the contest, and above set forth, shows the true result of the votes actually cast in the whole State.

A diversity of opinion existed in the committee and the House as to which day the law designated for the election. The majority contended that November 7 was the legal day. The minority views, presented by Mr. John T. Wait, of Connecticut, contended that the October election was the legal one, while Mr. Cox contended that neither was legal.

The majority admitted that the failure of the proper officer to give notice of the election of a Congressman in October did not invalidate the election, since it was settled by authorities (Cooley and McCrary) "that where the time and place for holding an election are fixed by statute, any voter has a right to take notice of the law and to deposit his ballot."

Also the majority held that the failure to canvass the votes and declare the result "does not invalidate an election otherwise regular and valid."

This therefore left as the important question the determination of the day fixed by law.

The majority held that the enabling act did not repeal the statute fixing generally the day of election in all the States, citing authorities to show the danger of the doctrine of repeal by implication. The law of Congress was the supreme law of the land, and Congress having, in the exercise of its constitutional power, fixed the time for holding the election for Representative in the Forty-fifth Congress in all the States, from the moment of the passage of the act of Congress it became and was engrafted upon the statutes of every State in the Union, and it required no auxiliary State legislation to give effect to the national statute. But the election laws of the several States which fixed the places and prescribed the manner of such elections were not affected, altered, or repealed; and the national statute fixing the time and the State statutes fixing the places and prescribing the manner of holding the Congressional elections, formed a complete election machinery for the election of Representatives in Congress.

The schedule to the Colorado constitution (sec. 1) provided that all laws in force in Colorado at the adoption of the constitution should remain in force until altered or repealed by the legislature. It was not disputed that there was a well-defined and perfect code of election laws in force in Colorado at the time of the adoption

of the constitution. In pursuance of these laws, the State election and the election for Representative in Congress for the unexpired term of the Forty-fourth Congress were held on the 3d day of October, 1876, and Mr. Belford did not question the validity of such laws, for he claimed his own election on the 3d of October, 1876, to this Congress, by virtue of an election held in pursuance thereof. These State laws provided fully for the places and prescribed the manner in which "all general and special elections" should be held in the State. There were, then, in force in the State of Colorado on the 7th day of November, 1876, laws providing a full, complete, and perfect election machinery for electing a Representative to the Forty-fifth Congress—the time fixed by Congress, and the places and manner provided by the State statutes.

The minority, after quoting section 16 of the Colorado constitution, say:

That the constitutional convention assumed it had full jurisdiction of the question and intended to exercise it the last-quoted section makes apparent; it continued the election laws of the Territory to the election in October and no further, and by the provisions of the constitution fixing the time of the assembling of the first legislature of the State and its methods of enacting laws, it was impossible for it to provide election laws for the first Tuesday after the first Monday in November (see constitution of Colorado); the inference follows it assumed a Representative to this Congress was to be elected in October, 1876; otherwise it intended not to make provision for such an election.

The minority contended, on another point, that the action of the people of Colorado settled the question:

But the State of Colorado and her people alone are interested in this question. She is entitled to representation, and the proper and only function of the House is to see that, within the principles of representation underlying the legislative branch of our Government, she has her constitutional right. And upon this complex question—for we suppose it must be complex, since the views of members of your committee are so diverse—her people have put a construction.

We suppose it to be well settled in cases of the doubtful construction of a statute involving the rights of the people, and only their rights as distinguished from individual rights, the adoption of a particular construction with entire unanimity has never been disturbed by a power only interested to preserve the rights of the State; certainly never when the only possible injury to the constituency is in the political associations of the individual who shall represent the State if that construction shall remain unreversed. And we affirm most confidently the people of Colorado have construed the provisions hereinbefore discussed in accordance with our views.

The majority considered that the constitution of Colorado intended to fix only the day for the election of the first Congressman, and it was contended in debate that this was as far as a constitutional convention might go.¹ The minority views, however, contended that the convention might fix also the times of other elections, citing the case of *Shiel v. Thayer*. This also was urged in debate.²

The majority concluded that Mr. Patterson was entitled to the seat and presented a resolution so declaring.³

The minority presented a resolution declaring Mr. Belford entitled to the seat.

The report was debated at length on December 12 and 14.⁴ On the latter day the House disagreed to the minority resolution, yeas 109, nays 126. The proposi-

¹ Record, p. 160.

² Record, p. 180.

³ Congress passed a law to remove any ambiguity as to the next election in Colorado. Second session Forty-fifth Congress, Record, pp. 4082, 4083; 20 Stat. L., p. 112.

⁴ Record, pp. 145, 178–199.

tion declaring that there had been no legal election was decided in the negative, yeas 116, nays 117. Then the resolution of the majority was agreed to, yeas 116, nays 110. Mr. Patterson was then sworn in.¹

525. The Iowa election case of Holmes, Wilson, Sapp, and Carpenter in the Forty-sixth Congress.

An instance after the enactment of the law regulating election contests wherein a contest was instituted by petition.

An election for Congressmen not called or sanctioned by State officers, and participated in by a fraction merely of the people, would not be valid even although held on the legal day.

Discussion of the force to be given by the House to a construction by the proper State officials of a State law fixing the time for electing Congressmen.

The constitution of a State may not control its legislature in fixing, under the Federal Constitution, the time of election of Congressmen.

Reference to practice of agreeing to questions of fact in contested election cases as liable to abuse.

An instance wherein an elections committee held certain testimony, which was not legal in form, as an offer of proof.

On December 21, 1880,² Mr. Walbridge A. Field, of Massachusetts, from the Committee on Elections, submitted a report in the Iowa election cases raised by the petitions of J. C. Holmes and John J. Wilson. All of the committee but one concurred in the conclusions of this report, but four of the ten stated that they did not concur in all the legal opinions stated in the report. Mr. Walpole G. Colerick, of Indiana, filed minority views dissenting from both the reasoning and the conclusion.

The salient facts underlying the question are included in the following extract from the minority views:

The Constitution of the United States 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 by law make or alter such regulations, except as to the places of choosing Senators." (Art. I, sec. 4.)

Under this provision of the Constitution the legislature of the State of Iowa was authorized and required to prescribe the time, place, and manner of holding elections in that State for Representatives in Congress, subject to the power of Congress to alter at any time such regulations. By virtue of this provision of the Constitution the legislature of that State did enact a law prescribing "the time, place, and manner" of holding elections for Representatives, and designated the second Tuesday in October as the time for the holding of said election. Subsequently, in February, 1872, Congress, exercising the power conferred upon it by the Constitution, altered the regulations so prescribed by the legislature of Iowa, as to the time designated for the holding of said election, by the following enactment:

"The Tuesday after the first Monday in November, in the year 1876, is established as the day in each of the States and Territories for the election of Representatives and Delegates in the Forty-fifth Congress, and the Tuesday next after the first Monday in November in every second year thereafter is established as the day for the election in each of said States and Territories of Representatives and Delegates to the Congress commencing on the 4th day of March thereafter." (Sec. 25 Rev. Stat., U.S., 1878.)

¹ Journal, pp. 113–116.

² Third session Forty-sixth Congress, House Report No. 19; 1 Ellsworth, p. 322.

Afterwards Congress modified said law, as follows:

"That section 25 of the Revised Statutes, prescribing the time for the holding elections for Representatives to Congress is hereby modified so as not to apply to any State that has not yet changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State." (Sec. 6, ch. 130, acts 2d sess. 43d Cong., approved Mar. 3, 1875.)

The question presented to us is, Does the State of Iowa come within the exception named in said act, as modified? Must her constitution be amended "in order to effect a change in the day of the election of State officers in said State"?

The constitution of Iowa provides that "The first election for secretary of state, auditor, and treasurer of state, attorney-general, district judges, members of the board of education, district attorneys, Members of Congress, and such State officers as shall be elected at the April election in the year 1857, * * * shall be held on the second Tuesday of October, 1858." (Sec. 7, art. 12.)

This language of the constitution gave rise to a doubt as to whether the constitution would have to be amended in order to effect the change prescribed by the law of Congress.

At the general election of October 8, 1878, in Iowa, Messrs. William F. Sapp and Cyrus C. Carpenter were elected Representatives, respectively, from the Eighth and Ninth districts of Iowa, received their certificates from the governor, and were seated in the House.

But Mr. J. C. Holmes, in the Eighth district, and Mr. John J. Wilson, in the Ninth district, offered themselves for election on November 5, 1878, claiming that it was the legal election day, according to the constitution and laws of Iowa.

In Mr. Holmes's district votes were cast in four townships, and the report thus summarizes:

The result is, in the case of Holmes, that the papers, if taken to be true statements, show that in these four townships certain voters got together and went through the forms of an election for Representative in Congress; that in all 171 votes were cast, of which Holmes received 162, Sapp 2, and Chapman 6, and there was 1 blank; and that these votes were never canvassed by any State officers and no certificate of election issued. In the Congressional Directory, which refers to the election held in October, Sapp is put down as receiving 15,343 votes, against 7,453 votes for Keatley, Democrat, and 7,760 votes for Hicks, National, in all 30,556 votes.

It does not appear that the voters of this Representative district understood generally that an election was to be held on the 5th day of November, being the Tuesday next after the first Monday of November, for Representative in Congress, or that any attempt would be made by anybody to hold such an election or that any person had notice that any such election would be held, except the persons voting.

It does not appear that the governor issued his proclamation for any such election, which by section 577 of the code of Iowa he is required to issue thirty days before any general election, "designating all the offices to be filled by the votes of the electors of the State, or by those of any Congressional, legislative, or judicial district, and transmit a copy thereof to the sheriff of each county."

It does not appear that the sheriff gave "at least ten days' notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county, or if there be no such paper, by posting such a copy in at least five of the most public places in the county," as required by section 578 of the code.

It does not appear that any registry of voters was established, or that any of the regularly appointed officers, except one township clerk, took any part in this election, or that the board of supervisors of the county canvassed the returns and made abstracts thereof, as provided in section 635 of the code of Iowa, or that any abstracts thereof were forwarded to the secretary of state or filed by the county auditor (section 637 of code), or that any canvass was made by the executive council (sections 651, 652, code), or that any certificate of election was issued under the seal of the State (section 653 of code). So far as appears this might have been an election held by a few persons in only four townships, without

any knowledge on the part of anybody except themselves that any attempt to hold an election would be made, and without any recognition at all by the authorities of the State.

It was stated in argument that Mr. Holmes had his ballots secretly printed in St. Louis, Mo., and that the election was in fact a secret to nearly all the electors of the district, but as the committee have not been authorized to take testimony, the undersigned have considered this as hearsay, and have not regarded it.

In Mr. Wilson's district the result is thus summarized:

If the statements in these papers are taken to be true there were votes cast in twelve townships on the 5th of November, 1878, for Representative in Congress to the number of 357, of which Wilson received 260 and Carpenter 97. In the Congressional Directory, which refers to the October election, Carpenter is put down as receiving 16,489 votes, against 1,202 for W. H. Brown, Democrat, and 12,338 votes for L. Q. Hoggatt, National; in all, 30,029 votes.

There is the same absence of any evidence of action on the part of the authorities of the State in making proclamation and giving notice of the election and canvassing the votes cast after the elections as in Holmes's case, and there is no evidence whatever that it was generally understood that an election for Representative in Congress was to be held on the 5th day of November, or that any attempt was to be made to hold any election on that day, or that it was known to anybody except the persons voting that any such election was to be held. The papers do show that the governor of Iowa was advised by the persons named that such an election could lawfully be held only on the second Tuesday of October.

Several questions arose from this dispute as to the date of election and the proceedings resulting therefrom:

(1) Both Holmes and Wilson petitioned, not against the election of Messrs. Sapp and Carpenter, but that such action might be taken as would give them their legal rights as Representatives elected in November. Their petitions were referred to the Committee of Elections. That committee, after discussing its own powers, said:

The power of the House to judge of the elections, returns, and qualifications of its members is ample, and it can proceed in its own way; a committee of the House has such power as is given it.

The importance of election cases demands that the testimony should be taken on notice to all persons interested, with the right on their part to cross-examine witnesses and to exhibit testimony in reply, so far as their rights may be affected by the inquiry.

This may be done under or after the analogy of the statute relating to contested elections, or by summoning witnesses before the committee, or in any other manner the House may direct.

None of the certificates or affidavits found in the papers in a judicial court would prove themselves or be judicially recognized except the certificates of the sitting Members.

The committee sent notice of the pendency of these petitions to the Members in Congress from the State of Iowa, and some of them appeared specially, without acknowledging by their appearance that their rights could be determined under these petitions. The undersigned agree with the remainder of the committee that chapter 8 of the Revised Statutes of the United States, relating to contested elections, has no direct application to a contest between persons claiming under elections held on different days, and could only be made applicable by a resolution of the House authorizing such parties to proceed after the analogy of the statute and fixing in the resolution a time from which the first thirty days should begin to run.

The undersigned think that the words "such election" in the third line of section 105 of the Revised Statutes mean an election contested, and a person claiming to be elected on a subsequent day might not be elected until more than thirty days after the result of the first election had been determined, and might not be able under the statute to give any notice at all; but they think that the provisions of that chapter or some analogous provisions ought in general to be made applicable to any contest in which the rights of sitting Members are involved, or else that the Committee on Elections should be authorized to summon persons and take testimony, with notice to the sitting members, and perhaps, in a case like this, to the State of Iowa, to appear and by testimony and arguments be heard. The

petitions in these cases should not, therefore, be dismissed merely because they do not conform to the statutes.

The agreement of parties has sometimes been received as to disputed questions of fact, but it has always been held that this should be done with great caution, as these are not merely contests between the parties, but the rights of the people of the district and of the State and of the people of the United States are involved and can not be agreed away.

In these cases no testimony has been taken by the committee; there are no parties and no agreement of parties. Certain facts have been stated in argument for and against the cases of the petitioners, and have been conceded in argument by counsel, but the undersigned do not feel at liberty to consider them as agreed facts.

It was suggested to the counsel of the petitioners that if they proposed to prove any other facts than those set forth in their papers, they should state them; but there was no intimation that they desired to offer evidence of any other facts than those alleged in the papers.

In determining what should be done with the petitions, the undersigned were of the opinion that the affidavits and certificates accompanying the petitions should be regarded as offers of proofs; that is, statements by the petitioners of the facts which they propose to prove; and that the committee should consider whether, if all these statements of facts were taken to be true, the petitions could be maintained; that if they could not, it would not be worth while to ask this House for authority to take testimony on the subject, or to take any other action than to dismiss the petitions.

(2) After reviewing the facts as to the alleged November elections, the report says:

The undersigned think that it is impossible to hold on these alleged facts, if proved, that either Mr. Holmes or Mr. Wilson has been duly elected Representative in Congress, whether the Tuesday after the first Monday of November or the second Tuesday of October be the lawful day for such an election, and that there is no need of taking testimony in these cases, because the facts alleged, if proved, would not entitle either of these gentlemen to a seat, and that the committee should be discharged from any further consideration of these petitions; and that in coming to this conclusion it is not necessary to decide whether the authorities of the State were right or not in determining that the legal day of election was the 8th day of October, because if it be assumed to be true that the 5th day of November was the legal day of election, the election was not held under the sanction of the authorities of the State of Iowa, was not generally known so far as appears, and was not participated in by such numbers of the people of Iowa that on any grounds this House would be justified in declaring Mr. Holmes or Mr. Wilson entitled to a seat.

These petitions, as has been said, can not be considered as petitions of citizens or voters of Iowa asking that the whole election in Iowa for Representatives in Congress in October should be declared void.

They are not drawn with any such intention and pray no such relief. So far as appears, if Holmes and Wilson can not be seated they are content as citizens of Iowa that the existing delegation of Iowa should retain their seats.

If resolutions should be offered in the usual form declaring either Mr. Holmes or Mr. Wilson entitled to a seat, the undersigned think that they should be decided in the negative.

The minority views reach the same conclusion:

While, in my judgment, the failure of the governor to issue a proclamation, and the omission of other officers to perform their duties would not alone invalidate the election, as their neglect or refusal to comply with their duties should not result in depriving the people of the right to elect their officers at the time fixed by law for that purpose, yet it is quite evident from the very small vote cast that the voters of the district generally abstained from voting or taking any part whatever in said election, and it is fair to assume that the cause of their failure to do so is alone attributable to the fact that they believed that the election which had been held in October for Representative to Congress was authorized by law and legal, and that said subsequent election was unauthorized and illegal, and by reason of this belief, so created, they failed to participate in said election and thereby the will of the people was not fairly or fully expressed at the election held in November, and therefore I do not think that the claimants who base their right to the seats in dispute under and by virtue of said election are entitled to the same.

(3) The majority further held that under the petitions in the present case the committee might not investigate the validity of the October election:

And if resolutions should be offered declaring Mr. Sapp and Mr. Carpenter entitled to their seats, that they should be decided in the affirmative, because nothing as yet has appeared to invalidate the title by which they now hold them; and that as a decision of the validity of the election of Messrs. Sapp and Carpenter, or perhaps of all the delegation from Iowa, is not necessary, in the opinion of the undersigned, in order to make a proper disposition of these petitions, a decision against them or against the whole delegation of Iowa should not be made without formal notice to the Representatives of Iowa, and perhaps to the State of Iowa, and after taking testimony of such facts and circumstances surrounding the election on the second Tuesday of October as might properly be considered in construing the statutes and laws relating to the legality of an election on that day.

Mr. Colerick, having concluded that the law and constitution of Iowa were so worded that the legal time of election was in November, said that it followed that the seats of Messrs. Sapp and Carpenter were vacant, and he proposed resolutions declaring the vacancies.

(4) The majority, while deeming it unnecessary under their view of the case to investigate the legality of the October election, still discussed the question, since other opinions had been expressed. In this discussion the following questions appeared:

(a) The report points out that the House might, if it chose, take action as to Messrs. Sapp and Carpenter independently of the petitions. But it appeared that both political parties and the State officials, with the acquiescence of the great mass of the people, had decided that the laws and constitution of Iowa were of such tenor as to make the October election the legal one. These facts were undoubted, although there might be a question as to whether they were properly before the committee. They were of great significance, for—

It is the doctrine of the Supreme Court of the United States that decisions of the highest judicial court of a State upon the meaning of the State laws and constitution, when its decisions are uniform, are binding on that court.

The construction of the Constitution and laws of the United States belongs of course to the courts of the United States in any controversy before those courts; but in considering whether the laws and constitution of a State conflict with the laws and Constitution of the United States as construed by the courts of the United States, those courts take the laws and constitution of the State as construed by the courts of the State when their decisions are uniform.

The undersigned are not prepared to hold that the decision of the highest authority of a State upon the meaning of its constitution in reference to whether the day of the election of State officers is fixed by that constitution or not, so far as it is material in determining the legality of an election of Representatives in Congress, is absolutely binding upon this House.

In a report from the Committee on Elections, adopted by this House April 11, 1871, in the matter of the Tennessee election (Digest of Election Cases, compiled by J. M. Smith, p. 1), the committee say:

"It is a well established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex Government, State and national, and your committee are not disposed to be the first to depart from it."

We are not disposed to be the first to depart from it, and we certainly think that such a decision made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury.

Mr. Colerick, in the minority views, denied this reasoning:

While it is true that the Federal courts have repeatedly held that the construction placed upon the constitution and laws of the respective States by the latest utterances of the highest judicial tribunals thereof, will be respected and adopted by the Federal courts (7 Wallace, 523; 9 Wallace, 35; 14 Howard, 438; 23 Wallace, 108), yet they have never, so far as I am aware, extended the limits of this rule so as to embrace decisions rendered by any other than the judicial department of a State. It is not claimed that the highest or any other judicial tribunal of the State of Iowa has given a construction to these provisions of her constitution, and in the absence of such decision we are left unrestrained to place our own construction thereon.

(b) As to the sufficiency of a provision in a State constitution prescribing the time of electing Representatives in Congress, the majority report says:

Section 4, article 1, of the Constitution of the United States confers power on the legislatures of the States to prescribe the time of electing Representatives in Congress in the absence of any controlling regulations by Congress.

The provisions of the constitution of a State can not take this power from the legislature of a State and Congress can not take from a State the right to fix either by its constitution or by its laws the day of electing State officers.

The object of section 6, chapter 130, of the acts of 1875, was to prevent compelling any State against the will of its legislature to have two elections on different days, one for Representatives in Congress and one for State officers, or else to change its constitution.

We are therefore of opinion that the governor of Iowa adopted the right construction of the constitution of that State in deciding that it did fix the day of election of State officers (with the exception perhaps of the attorney-general), whether those State officers were to be elected on the odd or even numbered years, so that it would require a change in that constitution to elect State officers (who were required by the State constitution to be regularly elected by the people in the year 1878) on the Tuesday next after the first Monday in November, and that the election of Representatives in Congress, held in accordance with the laws of the State on the second Tuesday in October, 1878, was held on the day on which alone it could lawfully have been held.

In reaching this conclusion we disregard altogether the provision for the election of Members of Congress found in section 7, article 12, of the constitution of Iowa. That provision may tend to show that it was the intention of the people of Iowa that Members of Congress should be elected on the second Tuesday in October of the even numbered years not Presidential, but the time of electing Members of Congress can not be prescribed by the constitution of a State, as against an act of the legislature of a State or an act of Congress, and the amendment to the twenty-fifth section of the Revised Statutes of the United States is confined to States whose constitutions fix the day of election of State officers in said State.

The only apparent exception has been in the constitutions which have been formed by Territories, and with which such Territories have been admitted into the Union as States; but this, if it be a valid exception, does not prove that Territories have the right by a constitution to fix the time for electing Representatives in Congress when they become States; but the authority of these provisions rests on the sanction and adoption of them by Congress in admitting such Territories as States with constitutions containing such provisions.

(c) As to the interpretation of the constitutional provision of Iowa, the majority concluded that it would need to be amended in order to effect a change of the election day, and so the law of Congress fixing elections in November would not apply in Iowa. Mr. Colerick took the opposite view.

In accordance with their conclusions the majority reported the following:

Resolved, That the petitioner, J. C. Holmes, in the matter of his petition asking to be admitted to a seat in the Forty-sixth Congress as a Representative from the Eighth Congressional district of the State of Iowa, have leave to withdraw his petition.

And also a similar resolution applying to Mr. Wilson.

On January 31, 1881,¹ these resolutions were agreed to in the House without debate or division.

526. The election case relating to Delegate Wilcox, of Hawaii, in the Fifty-sixth Congress.

Failure of a Territorial legislature to prescribe specially time, place, and manner of electing a Delegate did not invalidate an election actually held.

Instance of the impeachment of the election and qualifications of a Delegate through proceedings instituted by a memorial.

Instance of examination by a House Committee of charges of bigamy and treason against a Delegate.

The organic act of Hawaii fixed the qualifications of the Delegate therefrom.

A memorial preferring charges against Mr. Robert W. Wilcox, Delegate from Hawaii, having been referred to the Committee on Elections No. 1, at a time after the Delegate had taken the oath, that committee on March 1, 1901,² submitted a report.³ The charges were three: (1) that he was guilty of bigamy; (2) that he was guilty of treason against the United States, and (3) that there had been no valid election for Delegate from Hawaii.

1. As to the first charge the committee found that Mr. Wilcox had married his second wife under an erroneous impression that he had secured a valid divorce from his first wife. But as there was no pretense that he had lived with the two women at the same time or held himself out as the husband of two women the committee did not conceive that a question of ineligibility was presented.

2. In regard to the charge of treason the committee found:

On the 7th of July, 1898, Congress adopted a joint resolution to provide for annexing the Hawaiian Islands to the United States. The organic act providing for a system of government for these islands was not passed until April 30, 1900. Early in 1899 Wilcox wrote several letters to an Italian friend of his in Washington, and one letter of introduction of this friend to certain representatives of the Philippines then in Washington, in which he gave expression to unpatriotic and treasonable propositions. In one of these letters he told the Philippine representatives that he was ready to give his services to their country and ready to obey orders to go to their country and fight for the independence of their people.

Your committee has carefully considered the duty of the House in this relation, and after full discussion and consideration are clearly of opinion that under the circumstances of the case no action ought to be taken by the House.

Wilcox was one of the adherents of Queen Liliuokalani, and therefore of the "royalist party." Against his will, and in spite of his objection and the objection of his associates, the monarchy was overthrown and a republic created. No doubt this revolution was in the interest of civilization and good government, but the attitude of those who believed in the monarchy and whose government was overthrown was not to be scrutinized with the same care as if those whose conduct was questioned could justly be compelled to show instant allegiance to the new governing power.

When in 1898 the Republic of Hawaii proposed to the United States terms of annexation, which were accepted by the joint resolution of July 7, 1898, it is not strange that those who were opposed to the Republic and hoped for the restoration of the monarchy should be unwilling to yield allegiance to the power which, as it seemed to them, had forcibly assumed jurisdiction of their country. At the time

¹ Record, p. 1074.

² Second session Fifty-sixth Congress, House Report No. 3001; Rowell's Digest, p. 601.

³ The report was drawn by Mr. R. W. Tayler, of Ohio.

when Wilcox wrote his treasonable letters the only government which the Hawaiian people had was that which the Republic of Hawaii had set up, supplemented by the resolution of 1898, which merely transferred nominal sovereignty to the United States. When in 1900 Congress provided a system of government for the Hawaiian people at once just and generous, by the orderly operation of which the Hawaiian people, on a full and representative vote, elected Wilcox as their Delegate in Congress, it was natural that a revolution in public sentiment should occur.

A Territorial Delegate has no legislative power; he can in no respect influence the legislation applicable to the States; he has no power to be feared, and is indeed merely the agent and spokesman of his people. Such being the case, in view of the changed—the radically changed—politics relations between the Hawaiian people and the United States, resulting from the act of April, 1900, we do not think that the conduct of a native of the Hawaiian Islands a year or more prior to the adoption of that organic act, however improper it may have been, abstractly viewed, ought to deprive the Hawaiian people of the representative whom they have solemnly sent.

3. The objection that the election was not valid was found by the committee to be technically of some force:

The organic act passed April 13, 1900, has this provision:

“SEC. 85. That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature; such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate but not of voting.”

It is not clear that the expression “shall be as fixed by law” does not mean as fixed by the law then in force in the Hawaiian Islands. This organic act reenacts all of the election laws of the Republic of Hawaii, in so far as they are applicable to the conditions then existing, or made to exist, by the organic act itself. Under the Hawaiian system of government the only officials elected were the representatives and senators to the legislature of the Republic. For the election of these senators and representatives full and complete machinery was devised and had been in operation up to the time of the joint resolution annexing the islands. Of course they made no provision for the election of a Delegate to Congress, nor was any additional legislation had, except that which is contained in section 85 of the act of Congress above referred to. With no machinery of election except that provided by the laws of the Republic of Hawaii and section 85 above quoted, it is claimed that no valid election could be held. In this view we do not concur.

Previous to the election of November, 1900, the proper officers issued a proclamation calling for the election of a Delegate to the United States Congress, as well as for the election of representatives and senators to the Territorial legislature. Separate ballot boxes were provided, tickets were printed, and the whole machinery set in perfect motion for the election of the Delegate to Congress. The same precautions were observed and the same kind of machinery of election provided for the election of Delegate as for representative and senator in the Territorial legislature. Practically all of the people voted, and quite as many voted for Delegate to Congress as for representatives and senators in the Territorial legislature. There was a full and free expression of the popular will, under the theory that the Territory was entitled to send a Delegate to Congress, and as a result of that full and free popular expression, Wilcox was chosen by a considerable plurality. He comes here, therefore, as the agent of his people, chosen apparently under the forms of and with all the solemnity which surrounds the most carefully conducted election, and we think he ought to be permitted to retain his seat as their representative in the capacity of a Delegate.

We are not uninfluenced, in arriving at this conclusion, by a consideration of the fact that the people who send him here are to a large extent unfamiliar with the methods, the policy, and the inspiration, of a free government.

The report was not acted on by the House, and Mr. Wilcox of course retained his seat.

527. The election case of Iaukea v. Kalanianaʻole from the Territory of Hawaii in the Fifty-ninth Congress.

Instance in the absence of specific law of an election of a Delegate on rules based on analogy to the law providing for election of other Territorial officers.

Ballots which were by error cast with a numbered stub still attached were deducted from the poll as bearing a distinguishing mark forbidden by law.

An informal removal of a numbered stub by election officers from ballots erroneously cast with such illegal distinguishing mark did not save the ballots from rejection by the House.

On March 26, 1906,¹ Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, submitted the report of the committee in the case of Iaukea v. Kalanianaʻole from the Territory of Hawaii.

The report sets forth at the outset the following conditions:

The Territory of Hawaii is divided into 6 election districts and 69 election or voting precincts. The said election took place on the 8th day of November, 1904. Thereafter the votes cast at said election for the office of Delegate to Congress were counted and canvassed, and as the result of said count and canvass Hon. Jonah K. Kalanianaʻole, the contestee, was declared to have received 6,833 votes, Hon. Curtis P. Iaukea, the contestant, to have received 2,868 votes, and the Hon. Charles Notley, the candidate of the Home Rule party, to have received 2,289 votes, making a total of 11,990 votes cast for this office, and the governor of the Territory issued to the contestee herein the certificate of election.

The notice of contest was served by the contestant on the contestee within the time specified by law, and sets forth the allegations and charges on which this contest is based, and which, briefly stated, are substantially as follows:

That the official ballots prepared by the secretary of the Territory of Hawaii and furnished to the various inspectors of election throughout the Territory were illegal, in that said ballots had printed thereon numbers whereby they could be identified, contrary to the express provisions of law regulating such election; that said ballots with the numbers on were actually cast or voted in many of the precincts; that the numbers on such ballots corresponded with the numbers entered on the poll book opposite the electors' names, and by that method the secrecy of the ballot was destroyed; that many of the electors in the Territory were, prior to and at the time of said election, in the employ of the Territorial government, whose officers and agents were the party friends and supporters of the contestee, and the fact that the election inspectors could determine how any man voted afforded a means of intimidating and coercing those employees to vote for the contestee even against their convictions; that employees of the Territorial government engaged in the construction of roads and other public works were organized into political clubs by government officials in authority over them and were prevented from attending or participating in meetings held in behalf of contestant, and were threatened with loss of employment if they manifested any favor for his candidacy, and that such employees were marched to the polls and voted in bodies while wearing the uniforms of such clubs, and were threatened with loss of employment if they did not vote for the contestee; that there were several precincts in which ballots were cast with the numbers on, and such numbers were torn off by the election officers before they were counted or before they were opened and credited to the several candidates; that this was a mutilation of the ballots, and that those ballots were void and should have been rejected.

In due time the contestee filed an answer to the notice of contest, which is, in substance, a general denial of the material allegations set forth in the notice of contest.

The contestant, through his counsel, expressly stated that the contestee was not personally responsible, directly or indirectly, for any of the irregularities or violations of law set forth in the notice of contest.

¹First session Fifty-ninth Congress, Record, p. 4285; House Report No. 2651.

Section 85 of the organic act for the government of the Territory of Hawaii provides:

"That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature. Such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives with the right of debate, but not of voting."

Section 6 of that act provides: "That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 64 of said act provides that the rules and regulations for holding elections under the Republic shall continue in force after the annexation, with a few modifications therein set forth, which were made necessary by the change of government from the Republic to its present status as a Territory of the United States, and no provision is there made for the election of a Delegate to the Congress.

Section 65 of said act provides: "That the legislature of the Territory may from time to time establish and alter the boundaries of election districts and voting precincts, and apportion the senators and representatives to be elected from such districts."

Section 55 of said act, which sets forth and enumerates the legislative powers of the Territory, confers no jurisdiction on the Territorial legislature to modify or amend the election law, and makes no reference to it. The election laws of the Republic contained no provision for the election of a Delegate to Congress, for no such office existed, and the organic act has no provision for that purpose except as contained in section 85, and apparently confers no power on the legislature of Hawaii to amend or supplement those laws. But Hawaii is entitled to a Delegate in Congress, and such Delegate must be elected by the voters qualified to vote for members of the house of representatives of its legislature. The time for holding such election is fixed by section 14 of the organic act, but neither in that act nor in the laws of the Territory is there any definite procedure for the conduct of such election. Therefore the secretary of the Territory was obliged to formulate entirely new and independent rules and regulations for the election of a Delegate, or to so adjust and supplement its present election laws and machinery as to accomplish the same purpose. The counsel for both parties to this contest assumed that the Delegate should be elected according to the election laws of the Territory, so far as they applied, and made their briefs and arguments on that assumption. The report in the Wilcox contested-election case (Rowell's Digest of Contested Election Cases, p. 601) is an authority in support of their action.

The committee were unanimous (with the possible exception of one Member) in declaring that they did not find in the record sufficient evidence of intimidation, fraud, corruption, or irregularities of any kind to justify it in unseating the contestee or in setting aside the election.

In conclusion the committee respectfully recommended to the House of Representatives that the election laws of the Territory of Hawaii be so amended and supplemented as to provide definitely for the election of a Delegate to the Congress.

On the remaining question, that of the ballots, five Members concurred in the report, which purged the poll, while three, Messrs. W. E. Humphrey, of Washington, Marshall Van Winkle, of New Jersey, and Frank B. Fulkerson, of Missouri, did not agree that any ballots should be rejected.

The report found as follows in regard to the ballots:

Under the Hawaiian election law it was the duty of the secretary of state to have all the ballots printed and sent to the several voting precincts, to furnish ballot boxes, and generally to provide the ways and means for holding elections. This he undertook to do. The statute requires that two suitable ballot boxes be provided for each election precinct. That one be marked in plain letters, "For senators," and the other "For representatives." That was done, and a third box was provided and marked, "For Delegate." The statute requires that ballots for senators be of blue paper, and the ballots for representatives of white paper, and in the absence of statutory direction the ballots for Delegate were

made of pink paper. Thus far no fault is found with the preparations made or criticism offered on the action of the secretary of state in supplementing the statute by providing for separate balloting for Delegate. Aside from the Delegate to Congress, senators and representatives to the legislature of the Territory of Hawaii are the only officers of that government elected by the people. The secretary of state and election officers of Hawaii, having attempted to follow the election law in the choice of Delegate, with the apparent consent of the several candidates for that office, are bound by that law.

They should not be permitted to invoke it for one purpose and reject it for another. So far as it goes it is definite and clear. It declares that the ballot shall bear no word, motto, device, sign, or symbol other than allowed therein, and shall be so printed that the type shall not show a trace on the back; and if a ballot contains any mark or symbol contrary to the provisions therein set forth it must be rejected, and otherwise carefully guards and protects the secrecy of the ballot. It has no provision for numbering the ballots, or implied authority so far as your committee can discover. However, in the year 1903 the ballots prepared for the county election did contain numbers. Those were on the sides of and separated from the main parts of the ballots by perforated lines. This was done to avoid substitutions and perhaps other possibilities of fraud or irregularity, and according to the evidence they proved satisfactory and tended toward honest elections. In the preparation of the ballots for the general election of 1904 the secretary of state adopted the same plan so far as numbering was concerned. But the numbers were not placed in the same relative positions.

The ballots were printed and put up in pads of 100 each and numbered in sequences from 1 to 100. Clear across the top of each ballot and separating it from its stub was a distinctly perforated line, and a number on such stub corresponded with the number on the upper right-hand corner of the ballot separated from the balance of it by less distinctly perforated lines. It was the intention that the ballot should be torn off from the stub on such large perforated line. But this, by mistake of the election officers, was not done in all instances. The two numbers, one on the stub and one on the upper righthand corner of the ballot proper, were liable to lead to confusion and mistakes on the part of election officers, some of whom naturally had not much experience and were not particularly instructed as to their duty. When an elector was given a ballot his name was put down on the poll list, and his number, which was apt to correspond with the last figures on his ballot number. It is therefore clear that if the number were not removed from the ballot before depositing it in the box the identity of his vote could be determined by the election officers or other persons who afterwards examined the ballots and poll lists, and the secrecy of the ballot was violated. This was admitted by contestee's counsel. It was the intention of the secretary of state that the number in the upper right-hand corner of the ballot should be removed before such ballot was deposited in the box, for the instructions sent out by him to the voters and election officers alike contained this provision:

"Before leaving the compartment the voter is to refold his ballot just as he received it from the chairman, and thus folded deliver it to the inspector of election in charge of the ballot box and announce his name. After his name is checked on the register, the inspector shall remove the perforated slip, so that the ballot shall have no mark of identification, and then deposit it in the ballot box."

The "perforated slip" here referred to is clearly intended to be the perforated slip in the upper right-hand corner. This perforation is not so distinct as the one across the top of the ballot dividing it from the stub, and it was claimed by contestant's counsel that it was not in fact a perforation, but an indentation. However, it is very frequently spoken of by witnesses for both parties as a "perforation" and a "perforated line." Besides, if the number were left on the ballot it would contain a mark of identification, which the instruction sought to guard against.

In many of the precincts the election officers, by a misconception of the law and directions, did not detach the numbers in the upper right-hand corners of the ballots before depositing them in the boxes. Of those ballots 5,127 were cast. In the afternoon of election day the secretary of state learned that at some of the precincts ballots were being deposited with the numbers on, and he immediately notified the election officers as far as possible, by the use of the telephone and special messengers, that they were making mistakes. After the polls were closed some of them undertook to correct those mistakes by removing the numbers from such ballots before they were counted, or, at all events, before they were opened and credited to the several candidates. Of those ballots from which the numbers were removed there were 2,200, leaving 2,927 on which the numbers were allowed to remain. The counsel for the contestee in their briefs and arguments admitted that these 2,927 ballots were void and should be rejected from the count. But they insisted that the 2,200 ballots from which the numbers had been removed were valid and should be counted. With this conclusion your committee can not agree. If the 2,927 ballots from which the numbers were not removed were void, we are of the opinion that the 2,200 from which the numbers

had been removed were valid and should be counted. With this conclusion your committee can not agree. If the 2,927 ballots from which the numbers were not removed were void, we are of the opinion that the 2,200 from which the numbers were removed were void also. Those ballots were cast when they were deposited in the boxes, and if void then nothing which the election officers did afterwards could make them valid.

Section 95 of the Hawaiian election law provides that "all questions as to the validity of any ballot shall be decided immediately, and the opinion of a majority of the inspectors shall be final and binding, subject to revision by the supreme court as herein provided."

But this does not permit the inspectors to add to, take from, or change any ballot, nor is any power or discretion to do that given them anywhere in the law. They must pass on the validity of a ballot and return it just as it is, with their decision thereon, subject to revision by the supreme court. Open the door and permit election inspectors, after the polls are closed, to meddle with the ballots, even to correct their own mistakes, and no one can tell what the abuse of that discretion may lead to. The duties of such inspectors are and should be strictly ministerial. There should be no relaxation of the law in this regard. They should be required to carefully follow the statute, leaving discretionary power, if at all, to the court or reviewing boards. This procedure is apt to secure more uniformity and safer results. If the election inspectors had the right to remove the numbers from the 2,200 ballots and count them, it may be argued with considerable force that the canvassing board had a right to remove the numbers from the 2,927 ballots and count them.

We therefore reject 5,127 ballots as void. Deducting these from the total of 11,990 it leaves 6,863 valid ballots. Of these, contestee received 4,097; contestant, 1,578; Mr. Notley, 1,188.

The contestee received a plurality over contestant of 2,519, and a majority over all of 1,331. We are of the opinion, after a careful examination of the record, that the secretary of state intended no wrong in preparing the ballots in the manner described, nor do we find that a conspiracy was entered into for party success by means of fraud or intimidation. We believe that the depositing of the ballots without detaching the numbers was done by mistake and misapprehension on the part of the election inspectors, and not through any design or concerted plan to commit any wrong against the contestant or any other candidate. An examination of the returns confirms this view. One would naturally expect, if there was a scheme devised for the purpose of intimidating voters to support contestee, that he would have received an unduly large proportion of the votes where such scheme was carried out, whereas the contrary appears to be the fact, for his percentage of the void and rejected ballots was not as large as of all the ballots cast nor was it as large as his percentage of the valid ballots.

The following resolutions, in which all the committee concurred, were agreed to without division by the House:

Resolved, That Curtis P. Iaukea, the contestant, was not elected a Delegate to the Fifty-ninth Congress from the Territory of Hawaii.

Resolved, That Jonah K. Kalanianaʻole, the contestee, was duly elected a Delegate to the Fifty-ninth Congress from the Territory of Hawaii, and is entitled to a seat therein.