CONTESTED ELECTIONS

FROM THE

First and Second Districts of West Virginia,

FORTY-THIRD CONGRESS.

BRIEF IN BEHALF OF

BENJ. WILSON, of the First District,

AND

B. F. MARTIN, of the Second District.

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BRIEF IN BEHALF OF BENJ. WILSON OF THE FIRST, AND B. F. MARTIN OF THE SECOND DISTRICT.

To the Committee on Elections of the House of Representatives:

In the First and Second Congressional Districts of West Virginia, two elections have been held for Representatives therefrom to the Forty-third Congress of the United States, one on the fourth Thursday of August, and the other on the fourth Thursday of October, 1872.

At the August election, John J. Davis was elected for the first district and J. M. Hagans for the second district. At the October election, Benj. Wilson was elected for the first district and B. F. Martin for the second district.

Davis and Wilson both claim to be duly elected for the 1st district, and Hagans and Martin both claim to be duly elected for the second district. Although the facts and circumstances preceding and attending the election in the two districts are not the same, but variant, yet the chief question involved in the contest is a legal one, and resolvable into this: Which was the legal day for holding the election? Was it in August or October? If the former, Davis and Hagans may be entitled; if the latter, Wilson and Martin are entitled to represent their respective districts.

This brief, on behalf of Wilson and Martin, is designed to show that these two gentlemen are duly elected, and entitled, as they claim, on the ground that the election was lawfully held in October, 1872.

This brings us directly to consider the Constitution of the United States and the laws of West Virginia applicable to the subject.

The Constitution of the United States, article I, § 4, declares: "The *times*, places, and manner of holding elections for Senators and Representatives *shall* be *prescribed* in each State by the Legislature thereof; but the Congress may at any time make or alter such regulations, except as to the place of choosing Senators." This is the article of the Constitution which provides in our federal system for the creation, perpetuation, and powers of the Congress. The relations of the State to the legislative department and power of the United States is thereby clearly established. It declares the duty of the State, and the instrumentalities by which it shall be performed. Section 2 declares that the people qualified to vote for the most numerous branch of the State Legislature shall elect the members of the House of Representatives. But at what time, and in what manner? This requires specific regulation by law. Another instrumentality is, therefore, needed to prescribe these necessary regulations, and this is "the Legislature" of the State, or the Congress of the United States, and no other. Thus the means by which this State duty is to be performed are clearly specified, and admit of no substitution or other agency.

The Legislature of each State, by the oath of each member, is bound to *support* the Constitution of the United States, an obligation which compels the Legislature to prescribe "the time" for the election of Representatives in Congress. It is a duty imposed and most solemnly assumed. It cannot be omitted, for that would be moral perjury and virtual treason. It cannot be delegated to any other body, or exercised by any other State department or agency, directly or indirectly, by accident or design; for that would not support this Constitution, but would violate its terms and spirit. And this duty of the Legislature can no more be devolved upon another indirectly than directly.

It may at this day safely be affirmed, as a maxim of con-

stitutional law, that no Legislature can renounce or delegate its legislative power. A contrary doctrine, if ever seriously entertained, must now be regarded as exploded and discarded.

See Cooley on Const. Lim., 116–125.

Brightly's Dig. of L. C. on the Law of Elections, 3 *et seq.*, and the cases there cited from Delaware, Pennsylvania, Ohio, and New York.

And this maxim is most sound and salutary, on every principle of honor, responsibility, and policy. Legislative power is the highest civil trust, requiring for its exercise intelligence, probity, and a constant sense of responsibility; and these would be impaired and ultimately destroyed by any permissible device or expedient which, by delegation, should transfer duty and responsibility to others—even to the people themselves. It would speedily ruin the value and credit of representative government, and introduce the instability, turbulence, and mischief of lawless and irresponsible assemblies.

Such is the general rule against the delegation of legislative power. It should be deemed sacred. In our Federal system, under the imperative and specific injunction of the Constitution of the United States, commanding the State Legislature to perform an act—as to "prescribe the time," &c., for an election—it seems impossible to conceive any justification, or even plausible excuse, for the Legislature of the State to delegate the power to perform such duty to any other body, of whatever name or dignity. In such a case there is an utter incapacity to delegate; the very attempt to do it would be criminal. As the Legislature cannot transfer the power, so neither can any other body receive or acquire it.

These principles—especially as applicable to the legislative duty of prescribing "the times, places, and manner" of electing Representatives to Congress—appear to be sometimes ignored or misunderstood, if we may judge by reports of discussions, even in the House of Representatives.

Expressions used in the ardor of debate, however, do not always represent the dispassionate and deliberate opinion of the debater, as he would wish it to appear to posterity. However this may be, the House of Representatives has, in a late case, upon the report of a committee in the case of Baldwin *v.* Trowbridge, ————, recognized and established the doctrine that the Legislature (and *not* the State constitution) is the true and only power competent to fix the "time, *place*, and manner of the election of a member of the House of Representatives." (See Contested Elections, 1869–'70, p. 46.)

The Legislature of West Virginia, in exact obedience to the duty imposed by article I, section 4 of the Constitution of the United States, did "prescribe the times, places, and manner of holding elections for Representatives," the time being the fourth Thursday of October, in 1872. At this time, in pursuance of this prescription, Mr. Wilson, for the first district, and Mr. Martin, for the second district, were elected. They therefore demand the recognition and eujoyment of their rights as duly-elected Members.

The Code of West Virginia, (A. D. 1869,) chapter 3, page 44, presents the law on this subject, in sections 1 and 2, in the following words, to wit:

"1st. The general elections for State, district, county, and township officers, and members of the Legislature, shall be held on the fourth Thursday of October.

"2d. 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 eighteen hundred and seventy, 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 fourth day of March next after the election, for every congressional district." *

These two sections demonstrate that the Legislature assumed, and plainly and faithfully discharged, its duty under the Constitution of the United States, and did prescribe

the time, &c., for holding congressional elections in West Virginia. Except the Legislature, no other body could prescribe the time. The time here specified is the fourth Thursday of October. The Legislature has never changed this time. If, as Messrs. Wilson and Martin insist, this time has not been changed, they are duly elected, as their contestants or competitors admit.

But here these contestants interpose, and say that the time for the election of Congressmen was changed, in 1872, from the said fourth Thursday of October to the fourth Thursday of August of the same year. They do not pretend that the Legislature made the change or ever recognized the supposed change. They do not claim that the alleged change was ever expressly made by any authority, but they claim that the alleged change was made or effected by *implication* or *construction* by the provisions of the schedule to the new constitution of West Virginia of 1872. They therefore maintain that, by implication or construction of an act of the convention, the *time* for holding the election was changed to August from October.

We must then consider what force, if any, there is in this construction or implication.

The convention sat, in 1872, under a law which assembled them, to discuss, consider, and propose, for ratification or rejection, a new Constitution or amendments to the old, but with no grant of legislative power. This convention propounded a new Constitution, with a schedule, to the people, which was ratified on the 4th Thursday of August, 1872. The schedule (as in some other instances) provides for a vote to ratify or reject the Constitution, and for the election of such State and other officers as were deemed necessary to inaugurate and organize the new government under the Constitution in the event of its ratification. Of course all such elections would be abortive, in the contingency of a rejection of the Constitution.

The schedule does not provide for a *general election*, as has been alleged; it does not purport to be a general election; and the elections ordered lack every true character-

istic of a general election. The language of section 7 of the schedule, so far as concerns the election, is in the following words, to wit:

"On the same day, [of taking the vote on ratification,] and under the superintendence of 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. Such election shall be by ballot," &c.

Now, it is asserted that the convention, by this section 7 of the schedule, changed the time from October to August, 1872, for holding the *general elections*, and thereby repealed or altered section 1 of the Code of West Virginia, above cited, and that, as thus altered, the congressional elections were lawfully held in August instead of October.

We deny both the premises and the conclusion, for reasons which we trust to make satisfactory and conclusive.

The position of the contestants assumes (1) that the Legislature of West Virginia, by the Code, (above cited, ch. 3, secs. 1 and 2,) did not prescribe a time for holding elections for Representatives in Congress, but only indicated an *occasion* (a general election) as distinguished from the *time* specified, viz, fourth Thursday of October; (2) that the convention had power to change the time for general elections in West Virginia, and did change the time (to August) for the general elections; and (3) that, by this action of the convention, the election day for congressional elections was impliedly or constructively changed to August, 1872.

Let us consider these assumptions in the order indicated.

(1.) That the Legislature fixed no *time* for congressional elections, but only an *occasion*. This cannot be sustained without imputing to the Legislature a dereliction of duty, which no mere inference can warrant. But, on the contrary, we find the law as explicit in prescribing *time* as will

ordinarily be found in legislation on such a subject. How plain are the words of section 1, above cited! Read them:

"The general election for State, district, county, and township officers, and members of the Legislature, *shall be held* on the *fourth Thursday of October.*"

Time is an essential in all elections. It is therefore specified as part in every system of elections. Even at common law, with corporations generally, no election was valid unless the members had notice of the time. And under the United States Constitution, it was the imperative duty of the Legislature to *prescribe* the *time* for congressional elections. No other power—not a convention—could interpose and interfere with this power and duty. And, accordingly, in the following section, 2, it is enacted, that—

"At said elections * * * representatives in Congress shall be elected."

Thus the Legislature, in said section 2, regarded "the said elections" in section 1 as inseparably connected with the *time* specified, to wit, the fourth Thursday of October. Any State provision for the election of representatives to Congress omitting the essential element of time, would evince gross carelessness or culpability.

It will be remembered, too, that the above provisions of the code constituted part of the permanent law and policy of West Virginia, *unchangeable* except by her own Legislature; that no power could separate the occasion from the time of the election, except the Legislature.

These provisions, which united time and occasion—all in one sentence—were enacted for a permanent, continuous government, and not in contemplation of a possible future contingency, and a radical or fundamental change by convention.

Such being the case, it is not allowable or reasonable to imagine or conjecture, that the Legislature referred to an occasion instead of a time for the election. No candid mind can believe that the Legislature ever intended or

anticipated that the time specified should either be discarded or subordinated to the occasion. We maintain, then, that, as the Legislature did prescribe the time for congressional elections, and has never changed it, that time remains to this day. No other power of or in the State is competent to change it, or has ever attempted to change it.

Besides this, as it is the duty of the Legislature to prescribe the time in such elections, it must be *prescribed*, *i. e.*, enacted before the time, by its *own* definite act. It cannot subject this time to any change by accident, or the will or act of any other body or agency. To refer this time to any other agency or event, beyond its own control, would be *not* to "prescribe the time," &c.

(2.) The contestants assume that the convention had power to change the time for general elections, and did change the time. On the contrary of this, we contest both branches of the proposition. We deny that a convention is competent to repeal an existing law, or to enact a new law. It is not a legislative body. The existing constitution, laws, and institutions are wholly beyond the control of a convention. That body is deliberative, constructive, and advisory; it may devise, and frame, and propound propositions, and commend them to the people, but it cannot rightfully enact or repeal laws. It may be conceded that, in the absence of legislation, it may use the necessary means to a fair ratification or rejection of the proposed constitution, and to secure the necessary means for organizing the new government, in case of ratification, provided no existing law is violated.

Many vague and extravagant notions of the absolute or sovereign or transcendant powers of a constitutional convention exist in some minds; but they are not only unsound, but most dangerous. These extravagances are gradually yielding to more rational and necessary correctives. We learn by degrees; we cannot safely admit that all our rights which yesterday were sacred under the constitution

and laws, are to-day worthless or precarious, because to-day a convention is in session. In short, the session or act of a convention in no degree repeals, suspends, or modifies any law or any right under it.

But, whatever may be the power of the convention, we do not admit, but deny, that in fact the convention attempted the repeal of the old, or the adoption of a new general election law, or that it provided for a general election. Until the contestants can, by some means, repeal, vacate, or supersede the West Virginia law of general elections above cited, (Code, ch. 3, § 1,) which designates the fourth Thursday of October for the election, they have not a pretext for the election in August. Hence, they are obliged to maintain that the convention ordained, enacted, or established a *general election* in August, hoping thereby to legalize a congressional election "at said election." They insist that it was a general election; and this has been many times reiterated, for nothing else will suffice. They cannot admit that it was a *special* and *extraordinary election*, for that would be fatal to them.

It may not be necessary to define a general election. It will be sufficient to show that certain characteristics of a general election, known of all men, are not only lacking in this case, but are utterly inconsistent with the pretended general election under the schedule.

Elections are the means of ascertaining the true choice of voters, according to law. They are the methods or instruments for the continuance, support, and efficiency of the existing government and its functions. They are, therefore, acts or proceedings in conformity with and for the promotion of the existing system of government. These may be at regular stated periods, or at special and exceptional times. The former are regular general elections, recurring periodically, as part of the established machinery of government. These, and these only, are general elections. Again, vacancies, by death or otherwise, may occur within the regular periods, and be filled by election; and these are special elections. So in any special case, outside

of the regular recurring periodical elections, the election is special. Whenever the election is not according to the ordinary, regular, periodically recurring election, but is peculiar, single, and exceptional, it is a special election.

Now the election directed by the West Virginia convention, in § 7 of the schedule, was most emphatically an extraordinary, exceptional, and special election, and destitute of every characteristic of a general election. It was never again to occur, or recur; it was an experiment to change, not to sustain, the existing system, and it does not purport to be a general election. It follows, then, that this election, being extraordinary and special, and not general, did not repeal or supersede the general election law of the code. It follows, more especially, that it did not repeal or supersede that law, so far as it relates to the election of Representatives in Congress.

Just here we may examine § 7 of the schedule, which has been recited above: It provides for the election of certain enumerated officers, and all others *required by this constitution*, to be elected by the people. Neither in words nor by implication does it embrace Congressmen. All the elections directed by it are dependent upon the ratification of the constitution; all fail in case of rejection of that instrument. What, then, would have been the fate of successful candidates for Congress at that election, had the constitution been rejected? Could he gain the seat? Yet who ever heard of such a congressional election?

(3.) It is asserted that by the election ordered by the convention, the time previously fixed by the Legislature was changed.

This assertion has, in some measure, been anticipated. But a brief consideration is therefore necessary here. It must be manifest that the Legislature has not changed, or intended to change, the time for congressional elections from October to August. It is equally manifest that the convention did not change, or intend to change, the time, if it had been competent.

If then, as we have seen, the Legislature of West Virgi-

nia, in the discharge of its duty, did prescribe the fourth Thursday of October for election of Representative in Congress; if the Legislature never did change that time, or intend to change it; if, moreover, the convention did not change, or intend to change that time, if it had been competent so to do, how was the alleged change effected? It exists only in the imagination of those who, at most, rely on forced, unnecessary, and violent constructions. As they cannot find an actual and intentional change, they assert one by implication against the acts and intentions of the public authorities.

If it be admitted that section 7 of the schedule operated to any extent a modification of the general election law of West Virginia, it can only be so implication. And the repeal of laws by implication being disfavored, the repeal operates only to the extent of the necessity which forces the repeal. Accordingly, the repeal by this rule would leave untouched and in full force so much of the general election law as related to the election of members of Congress in October.

This view is fortified by article 8, § 36, of the new constitution of West Virginia, from which we copy these words, to wit:

"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 the State, until altered or repealed by the Legislature." * * * * * *

By the general law, the fourth Thursday of October was prescribed for the congressional election; to continue that law was in no manner *repugnant* to the constitution, for that instrument does not touch that subject. So that, in addition to the previous general argument, we find here a distinct recognition and continuance of the law for the October election.

That the fourth Thursday of October remains the legal day for elections of Representatives in Congress from West

Virginia, has never been denied by the State authorities, or any department of the State government. The Legislature has repeatedly recognized it as the lawful time. The Governor has never recognized any other day, though his proclamation, which certifies the election both in August and October, *provided*, in each case, the day specified was the legal day, indicates a doubt in his mind. He has not, therefore, certified for either day. His certificate is not such as the law requires, and deprived the State of her due representation in Congress. In consequence of this, the Legislature appointed a board of six of the chief executive officers, including the Governor, to ascertain and certify who were elected to the 43d Congress. This board, all being present except the Governor, who failed to attend, unanimously decided, and formally certified, that Mr. Wilson, from the first district, and Mr. Martin, from the second district, were duly elected in October to this Congress.

It is also well known, and will not be denied, that the leading and distinguished men of the convention, and of the State generally, have firmly held and declared the opinion, from the adjournment of the convention to the present, that the fourth Thursday of October was the lawful day for the congressional election. In the second district, the two political parties assembled in their respective conventions, prior to the August election, and both being equally satisfied that the election could not be held till October, adjourned without nominating a candidate. The press also, including the leading organs of both parties, unite in this opinion. In this state of affairs, Mr. Hagans, who had been in one of said party conventions, received in seven counties (chiefly in four) of the eighteen counties of the district, 3,441 votes at the August election. No other person in the district was a congressional candidate at that time. At the October election, when there were several candidates for Congress in this district, Mr. Martin received over 5,000 and nearly 6,000 votes. Considering all these facts, the concurrence of both political parties, through their representative men in convention, that no legal

election for Congress could be made till the fourth Thursday of October; that neither party had, therefore, a nominee for Congress; that the press and the public were united in this opinion; that the people acquiesced in and accepted this conclusion, and therefore did not vote for Congressman—how can any candid mind hold or maintain that there was or could be any *bona fide* election of Congressman for the second district in August, 1872. The people were not in fault; they were neither factious nor negligent. They acted in good faith, according to the lights before them.

Under these circumstances, it is impossible to maintain that any valid election for Congressmen was held in that district in August. That election was a surprise and a fraud upon the people, without a precedent for justification or palliation. Elections, to be valid, must be fair and free. In the language of a high authority, "That cannot be called an election, or the expression of the popular sentiment, where part only of the electors have been allowed to be heard, and others, (especially a large majority,) without being guilty of fraud or negligence, have been excluded.' (Cooley on Const. Lim., 616.)

The people at large—a vast majority, in this case—were neither guilty of fraud nor negligence; for they did all they could to act lawfully and prudently in the exercise of their high prerogative. Even if there was, technically, an error of opinion touching the day, it was general, if not universal—not among the ignorant, but with the most enlightened. In such a case, in behalf of popular liberty and the sanctity of suffrage, surely the people may claim the benefit of the maxim, *communis error facit jus*, at least for the purpose of defeating an unparalleled fraud upon public right.

We conclude, therefore, that, in every aspect of the case, the election on the fourth Thursday of October was the lawful election, and that Mr. Wilson and Mr. Martin, being elected at that time, are entitled to seats as members of the House of Representatives for their respective districts.

JAMES NEESON,

Counsel for B. Wilson, and for B. F. Martin.