that the chief financial officer of the government shall be heard by the commissioner before a final decision is made.

Further, the original internal revenue act, in which, by section 44, "the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury," was authorized to pay back duties erroneously and illegally collected by the government, etc., was enacted on June 30, 1864. 13 St. pp. 223, 239. These regulations were prescribed by the secretary of the treasury on January 12, 1866, and on July 13, 1866, the internal revenue act was amended, (14 St. pp. 98, 111,) section 44 being amended by striking out all after the enacting clause, and inserting in lieu thereof that which now appears as section 3220 of the Revised Statutes. It might well be held that congress, having knowledge of the secretary's regulations of January, 1866, by re-enacting in modified form section 44 approved these regulations, among them the seventh,—the one in question. If that be so, of course there could have been no final action by the commissioner, but only a transmission of the matter to the secretary for his consideration and advice.

But, if this be not so, and the regulation be considered as in excess of the authority vested in the secretary of the treasury, in that it is an attempt to regulate the procedure before the commissioner, still it cannot be held that there was a final determination by the commissioner. Whether these regulations were valid or invalid, the commissioner acted under them, and therefore the meaning and scope of his action must be interpreted by them. The schedule purports to be transmitted to the secretary for consideration and advisement, in accordance with the regulations. The certificate made to the secretary repeats the statement. Read in the light of the seventh regulation, it is as though the commissioner said: "I have examined this claim, and think it should be allowed, but before final decision I await your consideration and advisement." Certainly, if the commissioner was waiting for such consideration and advisement, he was not making or intending to make a final decision. Not only is this the plain import of the language of the schedule, but the further fact that the commissioner did not comply with either the 3d, 4th, or 5th regulations emphasizes the correctness of such construction. He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back; no entry of a decision appears in any docket; and no list including this award was ever transmitted by him to the first comptroller of the treasury; and the fifth regulation surely is within the competency of the secretary of the treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, make it perfectly clear that no final determination was made or intended by Commissioner Pleasonton. Therefore the matter was one still pending until the action of Commissioner Douglass, on November 9, 1871, rejecting the claim.

The decision of the court of claims was right, and its judgment is affirmed.

(146 U. S. 1)

McPHERSON et al. v. BLACKER, Secretary of State.

(October 17, 1892.)

No. 1,170.

SUPREME COURT—JURISDICTION—POLITICAL QUESTIONS—CONSTITUTIONAL LAW—APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS—TIME OF MEETING.

1. Whether or not Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors by congressional districts instead of by the people of the state at large, is repugnant to the constitution and laws of the United States, is a judicial, and not a political, question, which the supreme court has power to determine, the validity of the act having been sustained by the Michigan supreme court.

2. Such act does not violate Const. art. 2, § 1, which declares that "each state shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress," since, by the construction placed on the constitution contemporaneously with and for many years after its adoption, such constitutional provision conferred on the state legislature plenary power to prescribe the method of choosing electors, and did not require the state, in appointing electors, to act as a unit. 52 N. W. Rep. 469, affirmed.

3. The fact that all the states gradually adopted a uniform method of popular election for presidential electors by general ticket, and that such system has prevailed among the states for many years, have not deprived the legislature of any state of its power to adopt a different method. 52 N. W. Rep. 469, affirmed.

4. The power thus confided to the states by the constitution has not ceased to exist because the original expectation of the framers of the constitution in respect to the independence of electors may be said to have been frustrated in practice.

5. The power of a state to change its mode of choosing presidential electors was not taken away by the fourteenth and fifteenth amendments, because of the additional rights and guaranties therein secured to citizens in respect to voting at national elections, although at the time of their adoption all the states chose their electors by elections at large. 52 N. W. Rep. 469, affirmed.

6. The provision of Pub. Acts Mich. 1891, No. 50, which conflicts with Act Cong. Feb. 3, 1887, in that it fixes a different date for the electors to meet and give their votes, is separable from and does not vitiate the whole act. 52 N. W. Rep. 469, affirmed.

In error to the supreme court of the state of Michigan. Affirmed.

Statement by Mr. Chief Justice FULLER:

William McPherson, Jr., Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock filed their petition and affidavits in the supreme court of the state of Michigan on May 2, 1892, as nominees for presidential electors,

against Robert R. Blacker, secretary of state of Michigan, praying that the court declare the act of the legislature, approved May 1, 1891, (Act No. 50, Pub. Acts Mich. 1891,) entitled "An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith," void and of no effect, and that a writ of mandamus be directed to be issued to the said secretary of state, commanding him to cause to be delivered to the sheriff of each county in the state, between the 1st of July and the 1st of September, 1892, "a notice in writing that at the next general election in this state, to be held on Tuesday, the 8th day of November, 1892, there will be chosen (among other officers to be named in said notice) as many electors of president and vice president of the United States as this state may be entitled to elect senators and representatives in the congress."

The statute of Michigan (1 How. Ann. St. Mich. § 147, c. 9, p. 133) provided: "The secretary of the state shall, between the 1st day of July and the 1st day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this state a notice in writing that, at the next general election, there will be chosen as many of the following officers as are to be elected at such general election, viz.: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of state land office, members of the state board of education, electors of president and vice president of the United States, and a representative in congress for the district to which each of such counties shall belong."

A rule to show cause having been issued, the respondent, as secretary of state, answered the petition, and denied that he had refused to give the notice thus required, but he said "that it has always been the custom in the office of the secretary of state, in giving notices under said section 147, to state in the notice the number of electors that should be printed on the ticket in each voting precinct in each county in this state, and following such custom with reference to such notice, it is the intention of this respondent in giving notice under section 147 to state in said notice that there will be elected one presidential elector at large and one district presidential elector and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting precinct, so that the election may be held under and in accordance with the provisions of Act No. 50 of the Public Acts of the state of Michigan of 1891."

By an amended answer the respondent claimed the same benefit as if he had demurred.

Relators relied in their petition upon various grounds as invalidating Act No. 50 of the Public Acts of Michigan of 1891, and, among them, that the act was void because in conflict with clause 2 of section 1 of article 2 of the constitution of the United States, and with the fourteenth amendment to that instrument, and also in some of its provisions in conflict with the act of congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate the counting of the votes for president and vice president, and the decision of questions arising thereon." The supreme court of Michigan unanimously held that none of the objections urged against the validity of the act were tenable; that it did not conflict with clause 2, § 1, art. 2, of the constitution, or with the fourteenth amendment thereof; and that the law was only inoperative so far as in conflict with the law of congress in a matter in reference to which congress had the right to legislate. The opinion of the court will be found reported, in advance of the official series, in 52 N. W. Rep. 469.

Judgment was given, June 17, 1892, denying the writ of mandamus, whereupon a writ of error was allowed to this court.

The October term, 1892, commenced on Monday, October 10th, and on Tuesday, October 11th, the first day upon which the application could be made, a motion to advance the case was submitted by counsel, granted at once in view of the exigency disclosed upon the face of the papers, and the cause heard that day. The attention of the court having been called to other provisions of the election laws of Michigan than those supposed to be immediately involved, (Act No. 190, Pub. Acts Mich. 1891, pp. 258, 263,) the chief justice, on Monday, October 17th, announced the conclusions of the court, and directed the entry of judgment affirming the judgment of the supreme court of Michigan, and ordering the mandate to issue at once, it being stated that this was done because immediate action under the state statutes was apparently required and might be affected by delay, but it was added that the court would thereafter file an opinion stating fully the grounds of the decision.

Act No. 50 of the Public Acts of 1891 of Michigan is as follows:

"An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith.

"Section 1. The people of the state of Michigan enact that, at the general election next preceding the choice of president and vice president of the United States, there shall be elected as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of president and vice president of the United States in each district, who shall be known and designated on the ballot, respectively, as 'east-

ern district elector of president and vice president of the United States at large,' and 'western district elector of president and vice president of the United States at large.' There shall also be elected, in like manner, two alternate electors of president and vice president, who shall be known and designated on the ballot as 'eastern district alternate elector of president and vice president of the United States at large,' and 'western district alternate elector of president and vice president of the United States at large;' for which purpose the first, second, sixth, seventh, eighth, and tenth congressional districts shall compose one district, to be known as the 'Eastern Electoral District,' and the third, fourth, fifth, ninth, eleventh, and twelfth congressional districts shall compose the other district, to be known as the 'Western Electoral District.' There shall also be elected, by the electors in each congressional district into which the state is or shall be divided, one elector of president and vice president, and one alternate elector of president and vice president, the ballots for which shall designate the number of the congressional district and the persons to be voted for therein, as 'district elector' and 'alternate district elector' of president and vice president of the United States, respectively.

"Sec. 2. The counting, canvassing, and certifying of the votes cast for said electors at large and their alternates, and said district electors and their alternates, shall be done as near as may be in the same manner as is now provided by law for the election of electors of president and vice president of the United States.

"Sec. 3. The secretary of state shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the state to the same, and deliver such certificates thus signed and sealed to one of the electors, on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act, or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers.

"Sec. 4. The said electors of president and vice president shall convene in the senate chamber at the capital of the state at the hour of twelve o'clock at noon, on the first Wednesday of December immediately following their election, and shall proceed to perform the duties of such electors as required by the constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings, except as herein provided.

"Sec. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meeting, the same to be paid by the state treasurer upon the allowance of the board of state auditors.

"Sec. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Pub. Acts Mich. 1891, pp. 50, 51.

Section 211 of Howell's Annotated Statutes of Michigan (volume 1, c. 9, p. 145) reads:

"For the purpose of canvassing and ascertaining the votes given for electors of president and vice president of the United States, the board of state canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before that time as the secretary of state shall appoint; and the powers, duties, and proceedings of said board, and of the secretary of state, in sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of such electors, shall be in all respects, as near as may be, as hereinbefore provided in relation to sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of state officers."

Section 240 of Howell's Statutes, in force prior to May 1, 1891, provided: "At the general election next preceding the choice of president and vice president of the United States, there shall be elected by general ticket as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress."

The following are sections of article 8 of the constitution of Michigan:

"Sec. 4. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors, to examine and adjust all claims against the state, not otherwise provided for by general law. They shall constitute a board of state canvassers, to determine the result of all elections for governor, lieutenant governor, and state officers, and of such other officers as shall by law be referred to them.

"Sec. 5. In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill

such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected." 1 How. Ann. St. Mich. p. 57.

Reference was also made in argument to the act of congress of February 3, 1887, to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate the counting of the votes. 24 St. p. 373.

Henry M. Duffield, W. H. H. Miller, and Fred A. Baker, for plaintiff in error. Otto Kirchner, A. A. Ellis, and John W. Champlin, for defendant in error.

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*Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

*23

*The supreme court of Michigan held, in effect, that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

And having ruled all objections to the validity of the act urged as arising under the state constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the constitution and laws of the United States.

We are not authorized to revise the conclusions of the state court on these matters of local law, and, those conclusions being accepted, it follows that the decision of the federal questions is to be regarded as necessary to the determination of the cause. De Saussure v. Gaillard, 127 U. S. 216, 8 Sup. Ct. Rep. 1053.

Inasmuch as, under section 709 of the Revised Statutes of the United States, we have jurisdiction by writ of error to re-examine and reverse or affirm the final judgment in any suit in the highest court of a state in which a decision could be had, where the validity of a statute of the state is drawn in question on the ground that it is repugnant to the constitution and laws of the United States, and the decision is in favor of its validity, we perceive no reason for holding that this writ was improvidently brought.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.

But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. *Boyd v. State, 143 U. S. 135, 12 Sup. Ct. Rep. 375. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U. S. 672.

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As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own.

On behalf of plaintiffs in error it is contended that the act is void because in conflict with (1) clause 2, § 1, art. 2, of the constitution of the United States; (2) the fourteenth and fifteenth amendments to the constitution; and (3) the act of congress, of February 3, 1887.

The second clause of section 1 of article 2 of the constitution is in these words: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment, because the state is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the *appoint- *25
ment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.

"A state, in the ordinary sense of the constitution," said Chief Justice Chase, (Texas v. White, 7 Wall. 700, 731,) "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The

legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that "each state shall;" and if the words, "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts. In other words, *20 the act of appointment is none the less the act of the state in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed.

By the first paragraph of section 2, art. 1, it is provided: "The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;" and by the third paragraph, "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." Section 4 reads: "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."

Although it is thus declared that the people of the several states shall choose the members of congress, (language which induced the state of New York to insert a salvo as to the power to divide into districts, in its resolutions of ratification,) the state legislatures, prior to 1842, in prescribing the times, places, and manner of holding elections for representatives, had usually apportioned the state into districts, and assigned to each a representative; and by act of congress of June 25, 1842, (carried forward as section 23 of the Revised Statutes,) it was provided that, where a state was entitled to more than one representative, the election should be by districts. It has never been doubted that representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity.

By original clause 3, § 1, art. 2, and by the twelfth amendment, which superseded that clause, in case of a failure in the election of president by the people the house of representatives is to choose the president; and "the vote shall be taken by states, the representation from each state having one vote." The state acts as a unit, and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in congress elected by districts.

The state also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the constitution being too strong and obstinate to be shaken or controlled. Stuart v. Laird, 1 Cranch, 299, 309.

It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as

conveying the broadest power of determination. It was used in article 5 of the articles of confederation, which provided that "delegates shall be annually appointed in such *28 manner as the legislature of each state shall direct;" and in the resolution of congress of February 21, 1787, which declared it expedient that "a convention of delegates who shall have been appointed by the several states" should be held. The appointment of delegates was, in fact, made by the legislatures directly, but that involved no denial of authority to direct some other mode. The constitutional convention, by resolution of September 17, 1787, expressed the opinion that the congress should fix a day "on which electors should be appointed by the states which shall have ratified the same," etc., and that, "after such publication, the electors should be appointed, and the senators and representatives elected."

The journal of the convention discloses that propositions that the president should be elected by "the citizens of the United States," or by the "people," or "by electors to be chosen by the people of the several states," instead of by the congress, were voted down, (Jour. Conv. 286, 288; 1 Elliot, Deb. 208, 262,) as was the proposition that the president should be "chosen by electors appointed for that purpose by the legislatures of the states," though at one time adopted, (Jour. Conv. 190; 1 Elliot, Deb. 208, 211, 217;) and a motion to postpone the consideration of the choice "by the national legislature," in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in committee of the whole, (Jour. Conv. 92; 1 Elliot, Deb. 156.) Gerry proposed that the choice should be made by the state executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

Therefore, on reference to contemporaneous and subsequent action under the clause, *29 we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina. Pennsylvania, by act of October 4, 1788, (Acts Pa. 1787–88, p. 513,) provided for the election of electors on a general ticket. Virginia, by act of November 17, 1788, was divided into 12 separate districts, and an elector elected in each district, while for the election of congressmen the state was divided into 10 other districts. Laws Va. Oct. Sess. 1788, pp. 1, 2. In Massachusetts, the general court, by resolve of November 17, 1788, divided the state into districts for the election of representatives in congress, and provided for their election, December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of president and vice president of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. Mass. *30 Resolves 1788, p. 53. In Maryland, under act of December 22, 1788, electors were elected on general ticket, five being residents of the Western Shore, and three of the Eastern Shore. Laws Md. 1788, c. 10. In New Hampshire an act was passed November 12, 1788, (Laws N. H. 1789, p. 169,) providing for the election of five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equaled double the number of electors elected. There being no choice, the appointment was made by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the state might not be lost, to concur in the electors chosen by the senate. The state of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the constitution.

Fifteen states participated in the second

presidential election, in nine of which electors were chosen by the legislatures. Maryland, (Laws Md. 1790, c. 16; Laws 1791, c. 62,) New Hampshire, (Laws N. H. 1792, pp. 398, 401,) and Pennsylvania, (Laws Pa. 1792, p. 240,) elected their electors on a general ticket, and Virginia by districts, (Laws Va. 1792, p. 87.) In Massachusetts the general court, by resolution of June 30, 1792, divided the state into four districts, in each of two of which five electors were elected, and in each of the other two three electors. Mass. Resolves, June, 1792, p. 25. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the house of representatives. The legislature was not in session, and did not meet until November 15th, while under the act of congress of March 1, 1792, (1 St. p. 239,) the electors were to assemble on December 5th. The legislature passed an act dividing the state into four districts, and directing the members of the legislature residing in each district to meet on the 25th of November, and choose three electors. 2 Ired. N. C. Laws, 1715–1800, c. 15 of 1792. At the same session an act was passed dividing the state into districts for the election of electors in 1796, and every four years thereafter. Id. c. 16.

Sixteen states took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine states the electors were appointed by the legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, was entitled "An act to alter the mode of electing electors," and provided for dividing the state into ten districts, each of which districts should "elect and appoint one person, being a resident of the said district, as an elector." Laws Md. 1795, c. 73. Massachusetts adhered to the district system, electing one elector in each congressional district by a majority vote. It was provided that, if no one had a majority, the legislature should make the appointment on joint ballot, and the legislature also appointed two electors at large in the same manner. Mass. Resolves, June, 1796, p. 12. In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, "one in the district of Washington, one in the district of Hamilton, and one in the district of Mero," and, "that the said electors may be elected with as little trouble to the citizens as possible," certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Laws Tenn. 1794, 1803, p. 209; Acts 2d Sess. 1st Gen. Assem. Tenn. c. 4. Electors were chosen by the persons thus designated.

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least "until some uniform mode of choosing a president and vice president of the United States shall be prescribed by an amendment to the constitution." Laws Va. 1799–1800, p. 3. Massachusetts passed a resolution providing that the electors of that state should be appointed by joint ballot of the senate and house. Mass. Resolves, June, 1800, p. 13. Pennsylvania appointed by the legislature, and, upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17. Six states, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which had theretofore followed that course. Tennessee, by act of October 26, 1799, designated persons by name to choose its three electors, as under the act of 1796. Laws Tenn. 1794-1803, p. 211; Acts 2d Sess. 2d Gen. Assem. Tenn. c. 46.

Without pursuing the subject further, it is sufficient to observe that, while most of the states adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, (Mass. Resolves, June, 1804, p. 19;) chose electors by joint ballot of the legislature in 1808 and in 1816, (Mass. Resolves 1808, pp. 205, 207, 209; Mass. Resolves 1816, p. 233;) used the district system again in 1812 and 1820, (Mass. Resolves 1812, p. 94; Mass. Resolves 1820, p. 245;) and returned to the general ticket system in 1824, (Mass. Resolves 1824, p. 40.) In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. Rev. St. N. Y. 1827, tit. 6, p. 24. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont, and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the states excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the states excepting South Carolina, where the legislature chose them up to and including 1860. Journals 1860, Senate, pp. 12, 13; House, 11, 15, 17. And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166,) and by Colorado in 1876, as prescribed by section 19 of the schedule to the constitution of the state, which was admitted into the Union,

August 1, 1876, (Gen. Laws Colo. 1877, pp. 79, 990.)[1]

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly 50 years after the adoption of that instrument, after stating that "in some states the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole state; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district,"—adds: "No question has ever arisen as to the constitutionality of either mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, (3 Elliot, Deb. 100, 101,) has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it." And he remarks that "it has been thought desirable by many statesmen to have the constitution amended so as to provide for a uniform mode of choice by the people." Story, Const. (1st Ed.) § 1466.

Such an amendment was urged at the time of the adoption of the twelfth amendment, the suggestion being that all electors should be chosen by popular vote, the states to be divided for that purpose into districts. It was brought up again in congress in December, 1813, but the resolution for submitting the amendment failed to be carried. The *34 amendment was renewed in the house of representatives in December, 1816, and a provision for the division of the states into single districts for the choice of electors received a majority vote, but not two thirds. Like amendments were offered in the senate by Messrs. Sanford of New York, Dickerson of New Jersey, and Macon of North Carolina. December 11, 1823, Senator Benton introduced an amendment providing that each legislature should divide its state into electoral districts, and that the voters of each district "should vote, in their own proper persons," for president and vice president, but it was not acted upon. December 16 and December 24, 1823, amendments were introduced in the senate by Messrs. Dickerson, of New Jersey, and Van Buren, of New York, requiring the choice of electors to be by districts; but these and others failed of adoption, although there was favorable action in that direction by the senate in 1818, 1819, and 1822. December 22, 1823, an amendment was introduced in the house by Mr. McDuffie, of South Carolina, providing that electors should be chosen by districts assigned by the legislatures, but action was not taken.[2] The subject was again brought forward in 1835, 1844, and subsequently, but need not be further dwelt upon, except that it may be added that, on the 28th of May, 1874, a report was made by Senator Morton, chairman of the senate committee on privileges and elections, recommending an amendment dividing the states into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, *35 or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st Sess. 43d Cong. No. 395.

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Even in the heated controversy of 1876–77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged, and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.

In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States. They are, as remarked by Mr. Justice Gray in Re Green, 134 U. S. 377,

[1] See Stanwood, Presidential Elections, (3d Ed.) and Appleton, Presidential Counts, passim; 2 Lalor, Enc. Pol. Science, 68; 4 Hild. Hist. U. S. (Rev. Ed.) 39, 382, 689; 5 Hild. Hist. U. S. 389, 531; 1 Schouler, Hist. U. S. 72, 334; 2 Schouler, Hist. U. S. 184; 3 Schouler, Hist. U. S. 313, 439; 2 Adams, Hist. U. S. 201; 4 Adams, Hist. U. S. 285; 6 Adams, Hist. U. S. 409, 413; 9 Adams, Hist. U. S. 139; 1 McMaster, Hist. People U. S. 525; 2 McMaster, Hist. People U. S. 85, 509; 3 McMaster, Hist. People U. S. 188, 189, 194, 317; 2 Scharf, Hist. Md. 547; 2 Bradf. Mass. 335; Life of Plumer, 104; 3 Niles' Reg. 160; 5 Niles' Reg. 372; 9 Niles' Reg. 319, 349; 10 Niles' Reg. 45, 177, 409; 11 Niles' Reg. 296.

[2] 1 Benton, Thirty Years' View, 37; 5 Benton, Cong. Deb. 110, 677; 7 Benton, Cong. Deb. 472–474, 600; 3 Niles' Reg. 240, 334; 11 Niles' Reg. 258, 274, 293, 349; Annals Cong. (1812-13,) 847.

379, 10 Sup. Ct. Rep. 586, "no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.

*36 The question before us is not one of policy, but of power; and, while public opinion had gradually brought all the states as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long-continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

It is argued that the district mode of choosing electors, while not obnoxious to constitutional objection, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated. Miller, Const. Law, 149; Rawle, Const. 55; Story, Const. § 1473; Federalist, No. 68. But we can perceive no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

*37 *Nor are we able to discover any conflict between this act and the fourteenth and fifteenth amendments to the constitution. The fourteenth amendment provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

The first section of the fifteenth amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

In the Slaughterhouse Cases, 16 Wall. 36, this court held that the first clause of the fourteenth amendment was primarily intended to confer citizenship on the negro race; and, secondly, to give definitions of citizenship of the United States, and citizenship of the states; and it recognized the distinction between citizenship of a state and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause of the fourteenth amendment.

*38

We decided in Minor v. Happersett, 21

Wall. 162, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that, at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state, nor was it at the time of the adoption of the constitution; and that neither the constitution nor the fourteenth amendment made all citizens voters.

The fifteenth amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been. U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, Id. 214.

If, because it happened, at the time of the adoption of the fourteenth amendment, that those who exercised the elective franchise in the state of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of article 2 has been so amended that the states can no longer appoint in such manner as the legislatures thereof may direct; and yet no such result is indicated by the language used, nor are the amendments necessarily inconsistent with that clause. The first section of the fourteenth amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the state having attained majority, and being a citizen of the United States, then the basis of representation to which each state is entitled in the congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty; and so of the right to vote for representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. There is no color for the contention that under the amendments every male inhabitant of the state, being a citizen of the United States, has from the time of his majority a right to vote for presidential electors.

The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. In re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930.

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Milling Co. v. Pennsylvania, 125 U. S. 181, 188, 8 Sup. Ct. Rep. 737.

In Hayes v. Missouri, 120 U. S. 68, 71, 7 Sup. Ct. Rep. 350, Mr. Justice Field, speaking for the court, said: "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32, 5 Sup. Ct. Rep. 357."

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of article 2 has been divested, and the state has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect.

The third clause of section 1 of article 2 of the constitution is: "The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

Under the act of congress of March 1, 1792, (1 St. p. 239, c. 8,) it was provided that the electors should meet and give their votes on the first Wednesday in December at such place in each state as should be directed by the legislature thereof, and by act of congress of January 23, 1845, (5 St. p. 721,) that the electors should be appointed in each state on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed: provided, that each state might by law provide for the filling of any vacancies in its college of electors when such college meets to give its electoral vote: and provided that when any state shall have held an election for the purpose of choosing electors, and has failed to

make a choice on the day prescribed, then the electors may be appointed on a subsequent day, in such manner as the state may by law provide. These provisions were carried forward into sections 131, 133, 134, and 135 of the Revised Statutes, (Rev. St. tit. 3, c. 1, p. 22.)

By the act of congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of president and vice president," etc., (24 St. p. 373,) it was provided that the electors of each state should *41 meet and give their votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by congress. In this respect it is in conflict with the act of congress, and must necessarily give way. But this part of the act is not so inseparably connected, in substance, with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. The state law yields only to the extent of the collision. Cooley, Const. Lim. *178; Com. v. Kimball, 24 Pick. 359; Houston v. Moore, 5 Wheat. 1, 49. The construction to this effect by the state court is of persuasive force, if not of controlling weight.

We do not think this result affected by the provision in Act No. 50 in relation to a tie vote. Under the constitution of the state of Michigan, in case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention chooses one of these persons to fill the office. This rule is recognized in this act, which also makes it the duty of the governor in such case to convene the legislature in special session for the purpose of its application, immediately upon the determination by the board of state canvassers.

We entirely agree with the supreme court of Michigan that it cannot be held, as matter of law, that the legislature would not have provided for being convened in special session but for the provision relating to the time of the meeting of the electors contained in the act, and are of opinion that that date may be rejected, and the act be held to remain otherwise complete and valid.

And as the state is fully empowered to fill any vacancy which may occur in its electoral college, when it meets to give its electoral vote, we find nothing in the mode provided for anticipating such an exigency which op- *42 erates to invalidate the law.

*We repeat that the main question arising for consideration is one of power, and not of policy, and we are unable to arive at any other conclusion than that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the constitution of the United States, for want of power in its enactment.

The judgment of the supreme court of Michigan must be affirmed.

(146 U. S. 56)

HUBBARD, Collector of Customs, v. SOBY.

(October 31, 1892.)

No. 1,094.

SUPREME COURT—JURISDICTION—REVENUE CASES.

In an action against a collector to recover duties paid, no writ of error will lie to the supreme court when the judgment was entered and the writ sued out after July 1, 1891. Lau Ow Bew v. U. S., 12 Sup. Ct. Rep. 517, 144 U. S. 47, and McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661, followed.

In error to the circuit court of the United States for the district of Connecticut.

Action by Charles Soby against Charles C. Hubbard, collector of customs. Judgment for plaintiff. Defendant brings error. Writ dismissed.

Edwin B. Smith and Lewis E. Stanton, for the motion. Asst. Atty. Gen. Maury, opposed.

Mr. Chief Justice FULLER delivered the opinion of the court.

This was a suit brought October 9, 1890, in the circuit court of the United States for the district of Connecticut, to recover an alleged excess of duties upon imports exacted by plaintiff in error in his capacity of collector of customs of the port of Hartford prior to the going into effect of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues." 26 St. p. 131. Judgment was given for defendant in error, February 27, 1892, (49 Fed. Rep. 234,) and on June 11, 1892, the pending writ of error was sued out. The motion to dismiss the writ must be sustained upon the authority of Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. Rep. 517; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118.

Writ of error dismissed.

(146 U. S. 54)

CINCINNATI SAFE & LOCK CO. et al. v. GRAND RAPIDS SAFETY DEPOSIT CO.

(October 31, 1892.)

No. 872.

SUPREME COURT—JURISDICTION—WRIT OF ERROR.

In a case where federal jurisdiction depends on the diverse citizenship of the parties, a writ of error which was filed after July 1, 1891, must be dismissed, notwithstanding that it was allowed by the court, and a supersedeas filed and approved before that date. Wauton v. De Wolf, 12 Sup. Ct. Rep. 173, 142 U. S. 138; Brooks v. Norris, 11 How. 204; and Credit Co. v. Arkansas Cent. Ry. Co., 9 Sup. Ct. Rep. 107, 128 U. S. 258,—followed.

In error to the circuit court of the United States for the southern district of Ohio.

Action by the Grand Rapids Safety Deposit Company against the Cincinnati Safe & Lock Company and others to recover damages