

OPINIONS AND REMARKS
OF
MR. COMMISSIONER BRADLEY
IN THE CONSULTATIONS OF THE
ELECTORAL COMMISSION
UPON THE
ELECTORAL VOTES OF FLORIDA, LOUISIANA AND OREGON.

The following **opinions** and remarks have been somewhat abbreviated, and repetition of the same **arguments** in the different cases has been omitted.

THE FLORIDA CASE.

In this case the objectors to the Certificate No. 1 (which was authenticated by Governor Steams, and contained the votes of the Hayes electors) proposed to prove by the papers accompanying the certificates, that a writ of quo warranto had been issued from a district court in Florida against the Hayes electors on the 6th day of December, before they gave their votes for President and Vice-President, which on January 26, 1877, resulted in a judgment against them, and in favor of the Tilden electors ; also an act of the Legislature passed in January, in favor of the Tilden electors ; and also certain extrinsic evidence described by the counsel of the objectors as follows :

“ Fifthly. The only matters which the Tilden electors desire to lay before the Commission by evidence actually extrinsic will now be stated.

“ I. The Board of State Canvassers, acting on certain erroneous views when making their canvass, by which the Hayes electors appeared to be chosen, rejected wholly the returns from the county of Manatee and parts of returns from each of the following counties : Hamilton, Jackson, and Monroe.

“ In so doing the said State board acted without jurisdiction, as the Circuit and Supreme Courts in Florida decided. It was by overruling and setting aside as not warranted by law these rejections, that the courts of Florida reached their respective conclusions that Mr. Drew was elected Governor, that the Hayes electors were usurpers, and that the Tilden electors were duly chosen.

“ II. Evidence that Mr. Humphreys, a Hayes elector, held office under the United States.

The question was argued as to the admissibility of this evidence.

SUBSTANCE OF JUSTICE BRADLEY'S OPINION, DELIVERED
FEBRUARY 9, 1877.

I assume that the powers of the Commission are precisely those, and no other, which the two Houses of Congress possess in the matter submitted to our consideration ; and that the extent of that power is one of the questions submitted. This is my interpretation of the act under which we are organized.

The first question, therefore, is, whether and how far, the two Houses, in the exercise of the special jurisdiction conferred on them in the matter of counting the electoral votes, have power to inquire into the validity of the votes transmitted to the President of

the Senate. Their power to make any inquiry at all is disputed by, or on behalf of, the President of the Senate himself. But, I think the practice of the Government, as well as the true construction of the Constitution, have settled, that the powers of the President of the Senate are merely ministerial, conferred upon him as a matter of convenience as being the presiding officer of one of the two bodies which are to meet for the counting of the votes, and determining the election. He is not invested with any authority for making any investigation outside of the joint meeting of the two Houses. He cannot send for persons or papers. He is utterly without the means or the power to do anything more than to inspect the documents sent to him ; and he cannot inspect them until he opens them in presence of the two Houses. It would seem to be clear, therefore, that if any examination at all is to be gone into, or any judgment is to be exercised in relation to the votes received, it must be performed and exercised by the two Houses.

Then arises the question, how far can the two Houses go in questioning the votes received without trenching upon the power reserved to the States themselves ?

The extreme reticence of the Constitution on the subject leaves wide room for inference. Each State has a just right to have the entire and exclusive control of its own vote for the Chief Magistrate and head of the republic, without any interference on the part of any other State, acting either separately or in congress with others. If there is any State right of which it is and should be more jealous than of any other, it is this. And such seems to have been the

spirit manifested by the framers of the Constitution. This is evidenced by the terms in which the mode of choosing the President and Vice-President is expressed. "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 electors shall meet in their respective States and vote by ballot, etc." Almost every clause here cited is fraught with the sentiment to which I have alluded. The appointment and mode of appointment belong exclusively to the State. Congress has nothing to do with it, and no control over it, except that, in a subsequent clause, Congress is empowered to determine the time of choosing the electors, and the day on which they shall give their votes, which is required to be the same day throughout the United States. In all other respects the jurisdiction and power of the State is controlling and exclusive until the functions of the electors have been performed. So completely is Congressional and Federal influence excluded that not a member of Congress or an officer of the general Government is allowed to be an elector. Of course, this exclusive power and control of the State is ended and determined when the day fixed by Congress for voting has arrived, and the electors have deposited their votes and made out the lists and certificates required by the Constitution. Up to that time the whole proceeding (except the time of election) is conducted under State law and State authority. All machinery,

whether of police, examining boards or judicial tribunals, deemed requisite and necessary for securing and preserving the true voice of the State in the appointment of electors, is prescribed and provided for by the State itself and not by Congress. All rules and regulations for the employment of this machinery are also within the exclusive province of the State. All over this field of jurisdiction the State must be deemed to have ordained, enacted, and provided all that it considers necessary and proper to be done.

This being so, can Congress, or the two Houses, institute a scrutiny into the action of the State authorities, and sit in judgment on what they have done ? Are not the findings and recorded determinations of the State board, or constituted authorities, binding and conclusive, since the State can only act through its constituted authorities ?

But, it is asked, must the two Houses of Congress submit to outrageous frauds and permit them to prevail without any effort to circumvent them ? Certainly not, if it is within their jurisdiction to inquire into such frauds. But there is the very question to be solved. Where is such jurisdiction to be found ? If it does not exist, how are the two Houses constitutionally to know that frauds have been committed ? It is the business and the jurisdiction of the State to prevent frauds from being perpetrated in the appointment of its electors, and not the business or jurisdiction of the Congress. The State is a sovereign power within its own jurisdiction, and Congress can no more control or review the exercise of that jurisdiction than it can that of a foreign government. That which exclusively

belongs to one tribunal or government cannot be passed upon by another. The determination of each is conclusive within its own sphere.

It seems to me to be clear, therefore, that Congress cannot institute a scrutiny into the appointment of electors by a State. It would be taking it out of the hands of the State, to which it properly belongs. This never could have been contemplated by the people of the States when they agreed to the Constitution. It would be going one step further back than that instrument allows. Whilst the two Houses of Congress are authorized to canvass the electoral votes, no authority is given to them to canvass the election of the electors themselves. To revise the canvass of that election, as made by the State authorities, on the suggestion of fraud, or for any other cause, would be tantamount to a recanvass.

The case of elections of Senators and Representatives is different. The Constitution expressly declares that "each House shall be the judge of the elections, returns and qualifications of its own members." No such power is given, and none ever would have been given if proposed, over the election or appointment of the Presidential electors. Again, whilst the Constitution declares that "the times, places and manner of holding elections of Senators and Representatives shall be prescribed in each State by the legislature thereof," it adds, "but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." No such power is given to Congress to regulate the election or appointment of Presidential electors. Their appointment, and all regulations for making it, and the manner of making it, are left exclusively with the States.

This want of jurisdiction over the subject makes it clear to my mind that the two Houses of Congress cannot institute any scrutiny into the appointment of Presidential electors, as they may and do in reference to the election of their own members. The utmost they can do is to ascertain whether the State has made an appointment according to the form prescribed by its laws.

This view receives corroboration from the form of a bill introduced into Congress in 1800 for prescribing the mode of deciding disputed elections of President and Vice-President, and which was passed by the Senate. It proposed a grand committee to inquire into the Constitutional qualifications of the persons voted for as President and Vice-President, and of the electors appointed by the States, and various other matters with regard to their appointment and transactions; but it contained a proviso, in which both Houses seem to have concurred, that no petition or exception should be granted or allowed which should have for its object to draw into question the number of votes on which any elector had been elected.

This bill was the proposition of the Federal party of that day, which, as is well known, entertained strong views with regard to the power of the Federal Government as related to the State governments. It was defeated by the opposition of the Republican side, as being too great an interference with the independence of the States in reference to the election of President and Vice-President. And taken even as the Federal view of the subject, it only shows what matters were regarded as subject to examination under the regulation of law, and not that the two Houses

of Congress, when assembled to count the votes, could do the same without the aid of legislation. The bill was rather an admission that legislation was necessary in order to provide the proper machinery for making extrinsic inquiries.

It is unnecessary to enlarge upon the danger of Congress assuming powers in this behalf that do not clearly belong to it. The appetite for power in that body, if indulged in without great prudence, would have a strong tendency to interfere with that freedom and independence which it was intended the States should enjoy in the choice of the national Chief Magistrate, and to give Congress a control over the subject which it was intended it should not have.

As the power of Congress, therefore, does not extend to the making of a general scrutiny into the appointment of electors, inasmuch as it would thereby invade the right of the States, so neither can it draw in question, nor sit in judgment upon, the determination and conclusion of the regularly constituted authorities or tribunals appointed by the laws of the States for ascertaining and certifying such appointment.

And here the inquiry naturally arises, as to the manner in which the electors appointed by a State are to be accredited. What are the proper credentials by which it is to be made known who have been appointed. Obviously if no provision of law existed on the subject, the proper mode would be for the Governor of the State, as its political head and chief, through whom its acts are made known, and by whom its external intercourse is conducted, to issue such credentials. But we are not without law on the

subject. The Constitution, it is true, is silent ; but Congress, by the act of 1792, directed that “ it shall be the duty of the executive of each State to cause three lists of the names of the electors of such State to be made and certified and to be delivered to the electors on or before the day on which they are required to meet ”; and one of these certificates is directed to be annexed to each of the certificates of the votes given by the electors. And if it should be contended that this enactment of Congress is not binding upon the State executive, the laws of Florida, in the case before us, impose upon the Governor of that State the same duty. I think, therefore, that it cannot be denied that the certificate of the Governor is the proper and regular credential of the appointment and official character of the electors. Certainly it is at least *prima facie* evidence of a very high character.

But the Houses of Congress may undoubtedly inquire whether the supposed certificate of the executive is genuine; and I think they may also inquire whether it is plainly false, or whether it contains a clear mistake of fact, inasmuch as it is not itself the appointment, nor the ascertainment thereof, but only the certificate of the fact of appointment. Whilst it must be held as a document of high nature, not to be lightly questioned, it seems to me that a State ought not to be deprived of its vote by a clear mistake of fact inadvertently contained in the Governor’s certificate, or (if such a case may be supposed) by a willfully false statement. It has not the full sanctity which belongs to a court of record, or which, in my judgment, belongs to the proceedings and recorded acts of the final board of canvassers.

In this case, it is not claimed that the certificate of the Governor contains any mistake of fact, or that it is willfully false and fraudulent. It truly represents the result of the State canvass, and if erroneous at all, it is erroneous because the proceedings of the canvassing board were erroneous or based on erroneous principles and findings.

It seems to me that the two Houses of Congress, in proceeding with the count, are bound to recognize the determination of the State Board of Canvassers as the act of the State, and as the most authentic evidence of the appointment made by the State ; and that whilst they may go behind the Governor's certificate, if necessary, they can only do so for the purpose of ascertaining whether he has truly certified the results to which the board arrived. They cannot sit as a court of appeals on the action of that board.

The law of Florida declares as follows :

On the thirty-fifth day after the holding of any general or special election for any State officer, member of the legislature, or **Representative** in Congress, or sooner, if the returns shall have been received from the several counties wherein elections shall have been held, the Secretary of State, Attorney-General and the Comptroller of Public Accounts, or any two of them, together with any other member of the **Cabinet** who may be designated by them, shall meet at the office of the Secretary of State, pursuant to notice to be given by the Secretary of State, and form a Board of State Canvassers, and proceed to canvass the returns of said election and *determine and declare who shall have been elected to any such office or as such member, as shown by such returns.*

The Governor's certificate is ***prima facie*** evidence that the State canvassers performed their duty. Indeed, it is conceded by the objectors that they made a canvass and certified or declared the same. It is not the failure of the board to act, or to certify and

declare the result of their action, but an illegal canvass, of which they complain. To review that canvass, in my judgment, the Houses of Congress have no jurisdiction or power.

The question then arises, whether the subsequent action of the courts or legislature of Florida can change the result arrived at and declared by the Board of State Canvassers, and consummated by the vote of the electors, and the complete execution of their functions?

If the action of the State Board of Canvassers were a mere statement of a fact, like the certificate of the Governor, and did not involve the exercise of decision and judgment, perhaps it might be controverted by evidence of an equally high character. Like the return to a *habeas corpus*, which could not in former times be contradicted by parol proof, but might be contradicted by a verdict or judgment in an action for a false return.

Looking at the subject in this point of view, I was, at one time, inclined to think that the proceedings on *quo warranto* in the Circuit Court of Florida, if still in force and effect, might be sufficient to contradict the finding and determination of the board of canvassers—supposing that the court had jurisdiction of the case. But the action of the board involved more than a mere statement of fact. It was a determination, a decision *quasi* judicial. The powers of the board as defined by the statute which created it are expressed in the following terms : “ They shall proceed to canvass the returns of said election and determine and declare who shall have been elected to any office”; and “ if any such returns shall be shown or shall appear to be so irregu

lar, false, or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration." This, clearly requires **quasi** judicial action. To controvert the finding of the board, therefore, would not be to correct a mere statement of fact, but to reverse the decision and determination of a tribunal. The judgment on the **quo warranto** was an attempted reversal of this decision, and the rendering of another decision.. If the court had had jurisdiction of the subject-matter, and had rendered its decision before the votes of the electors were cast, its judgment, instead of that of the returning board, would have been the final declaration of the result of the election. But its decision being rendered after the votes were given, it cannot have the operation to change or affect the vote, whatever effect it might have in a future judicial proceeding in relation to the Presidential election. The official acts of **officers de facto** until they are ousted by judicial process or otherwise are valid and binding.

But it is a grave question whether any courts can thus interfere with the course of the election for President and Vice-President. The remarks of Mr. Justice Miller on this subject are of great force and weight.

The State may, undoubtedly, provide by law. for reviewing the action of the board of canvassers, at any time before the electors have executed their functions. It may provide any safeguard it pleases to prevent or counteract fraud, mistake, or illegality on the part of the canvassers. The legislature may pass a law requiring the attendance of the Supreme Court, or any other tribunal, to supervise the action of the

board, and to reverse it if wrong. But no such provision being made, the final action of the board must be accepted as the action of the State. No tampering with the result can be admitted after the day fixed by Congress for casting the electoral votes, and after it has become manifest where the pinch of the contest for the Presidency lies, and how it may be manipulated.

I am entirely clear that the judicial proceedings in this case were destitute of validity to affect the votes given by the electors. Declared by the board of canvassers to have been elected, they were entitled, by virtue of that declaration, to act as such against all the world until ousted of their office. They proceeded to perform the entire functions of that office. They deposited their votes in a regular manner, and on the proper and only day designated for that purpose, and their act could not be annulled by the subsequent proceedings on the *quo warranto*, however valid these might be for other purposes. When their votes were given, they were the legally constituted electors for the State of Florida.

The Supreme Court of Florida said, in the Drew case, it is true, that the board of canvassers exceeded their jurisdiction, and that their acts were absolutely void. In this assertion I do not concur ; and it was not necessary to the judgment, which merely set aside the finding of the board and directed a new canvass. Under the Florida statute the board had power to cast out returns. They did so. The court thought they ought to have cast out on a different principle from that which they adopted. This was at most error, not want or excess of jurisdiction. They certainly acted within the scope of their power, though

they may have acted erroneously. This is the most that can be said in any event ; and of this the Houses of Congress cannot sit in judgment as a court of appeal.

The question is asked, whether for no cause whatever the declaration and certificate of the board of canvassers can be disregarded-as, if they should certify an election when no election had been held, and other extreme cases of that sort ? I do not say that a clear and evident mistake of fact inadvertently made, and admitted to have been made, by the canvassers themselves, or that such a gross fraud and violation of duty as that supposed, might not be corrected, or that it might not affect the validity of the vote. On that subject, as it is not necessary in this case, I express no opinion. Such extreme cases, when they occur, generally suggest some special rule for themselves without unsettling those general rules and principles which are the only safe guides in ordinary cases. The difficulty is, that the two Houses are not made the judges of the election and return of Presidential electors.

I think no importance is to be attached to the acts performed by the board of canvassers after the sixth day of December; nor to the acts of the Florida legislature in reference to the canvass. In my judgment they are all unconstitutional and void. To allow a State legislature in any way to change the appointment of electors after they have been elected and given their votes, would be extremely dangerous. It would, in effect, make the legislature for the time being the electors, and would subvert the design of the Constitution in requiring all the electoral votes to be given on the same day.

My conclusion is that the validity of the first certificate cannot be controverted by evidence of the proceedings had in the courts of Florida, by *quo warranto* ; and that said evidence should not be received.

It is further objected that Hurnphreys, one of the Hayes electors, held an office of trust and profit under the Government of the United States at the time of the general election, and at the time of giving his vote. I think the evidence of this fact should be admitted. Such an office is a Constitutional disqualification. I do not think it requires legislation to make it binding. What may be the effect of the evidence when produced, I am not prepared to say. I should like to hear further argument on the subject before deciding the question.

[It being shown that Humphreys resigned his office before the election, the question of ineligibility became unimportant. Justice Bradley held, however, that the Constitutional prohibition, that no member of Congress, or officer of the Government, should be appointed an elector is only a form of declaring a disqualification for the electoral office, and does not have the effect of annulling the vote given by one who, though disqualified, is regularly elected, and acts as an elector ; likening it to the case of other officers de *facto*.]

II.—THE LOUISIANA CASE.

The objections to the votes of the electors certified by Kellogg, as Governor of Louisiana, being condensed, are in substance as follows :

FIRST.—That the government of Louisiana is not republican in form.

SECOND.—That Kellogg was not Governor.

THIRD.—That at the time of the election, in November last, there was no law of the State directing the appointment of electors.

FOURTH.—That so much of the election law which was in force as relates to the returning board was unconstitutional and void.

FIFTH.—That the board was not constituted according to the law ; having only four members of one political party, when there should have been five members of different political parties.

SIXTHLY.—That they acted fraudulently and without jurisdiction in casting out and rejecting the returns or statements of various commissioners of election, without having before them any statement or affidavit of violence or intimidation as required by law to give them jurisdiction to reject returns ; that they neglected to canvass the returns of the commissioners and canvassed those of the supervisors of registration—that is, the parish abstracts instead of the precinct returns ; that they did not canvass all of these (which would have elected the Tilden electors), but falsely and fraudulently counted in the Hayes electors, knowing the count to be false ; and that they offered to give the votes the other way for a bribe ; and that the certificate given by Kellogg to the Hayes electors was the result of a conspiracy between Kellogg and the return-

ing board and others to defraud their opponents of their election and the State of her right to vote ; and that the Hayes electors were not elected, but their opponents were.

SEVENTHLY.—That two of the electors certified by Kellogg were ineligible at the time of the election by holding office under the Government of the United States ; and that others were ineligible by holding State offices ; and that Kellogg could not legally certify himself as an elector.

FEBRUARY 16, 1877.

JUSTICE BRADLEY : -

The first two objections, that the State is without a republican form of government, and that Kellogg was not Governor, are not seriously insisted upon.

The question whether the State had any law directing the appointment of electors of President and Vice-President, and regulating their proceedings, depends on whether the Presidential electoral law of 1868 was or was not repealed by the general election law of 1872, which is admitted to have been in force at the time of the last election.

The repealing clause relied on is in the last section of the act, and is in these words : “ That this act shall take effect from and after its passage, and that all others on the subject of *election laws* be and the same are hereby repealed.” The question is, whether the act relating to Presidential electors is an act “ on the subject of *election laws* ” within the meaning of this repealing clause. I am entirely satisfied that it is not, and that no part of it is repealed by the act of 1872, except one section which relates to the mode of returning and ascertaining the votes for electors. My reasons are these :

ing board and others to defraud their opponents of their election and the State of her right to vote ; and that the Hayes electors were not elected, but their opponents were.

SEVENTHLY.-That two of the electors certified by Kellogg were ineligible at the time of the election by holding office under the Government of the United States ; and that others were ineligible by holding State offices ; and that Kellogg could not legally certify himself as an elector.

FEBRUARY 16, 1877.

JUSTICE BRADLEY: -

The first two objections, that the State is without a republican form of government, and that Kellogg was not Governor, are not seriously insisted upon.

The question whether the State had any law directing the appointment of electors of President and Vice-President, and regulating their proceedings, depends on whether the Presidential electoral law of 1868 was or was not repealed by the general election law of 1872, which is admitted to have been in force at the time of the last election.

The repealing clause relied on is in the last section of the act, and is in these words : " That this act shall take effect from and after its passage, and that all others on the subject of *election laws* be and the same are hereby repealed." The question is, whether the act relating to Presidential electors is an act " on the subject of *election laws* " within the meaning of this repealing clause. I am entirely satisfied that it is not, and that no part of it is repealed by the act of 1872, except one section which relates to the mode of returning and ascertaining the votes for electors. My reasons are these :

In the session of 1868, an act was passed, approved October 19, 1868, which professed to be a general election law, regulating the mode of holding and ascertaining the result of all elections in the State, making provision for preserving order thereat, and for executing generally the one hundred and third article of the Constitution, which declares that "the privilege of free suffrage shall be supported by laws regulating elections and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice." A distinct act was passed at the same session, approved October 30, 1868, which is the act relating to Presidential electors, before referred to. It certainly was not supposed that one of these acts conflicted with the other. The one regulated the manner of holding and ascertaining the results of elections generally; the other prescribed the mode of appointing the Presidential electors to which the State was entitled, namely, that they should be elected on the day fixed by Congress, two for the State at large, and one in each Congressional district; prescribed their qualifications, and the time and place of their meeting to perform their duties; authorized them when met to fill any vacancies caused by the failure of any members to attend; and regulated their pay. One section, it is true, directed the manner in which the returns should be canvassed, namely, by the Governor in presence of the Secretary of State, the Attorney General, and a district judge; and the first section directed that the election for electors should be held on the day appointed by the act of Congress, and that it should be held and conducted in the manner and form provided by law for general State elections.

At the same session (1868) provision was made for revising all the general statutes of the State under the direction of a committee appointed for that purpose. This committee appointed Mr. John Ray to make the revision. It was duly reported, and adopted during the session of 1870. It contained, under the title of "Elections," the act of October 19, 1868 ; and under the title "Presidential Electors," the act of October 30, 1868 ; showing conclusively that at that time the two acts were not deemed incompatible with each other.

A new election law was passed at the same session as a substitute for that of October 19, 1868, repealing all conflicting laws ; but it was not inserted in the revised statutes, because they did not contain any of the laws of that session. A law was passed, however, authorizing the reviser (Mr. Ray) to publish a new edition, under the name of a Digest, which should embrace the acts of 1870. This was done, and the new election law was inserted under the title, "Elections," in place of the old law. The act relating to Presidential electors was untouched, except to insert in it the new method of making the returns of the elections by the returning board, which was the only part of the new law which conflicted with it. It is apparent, therefore, that the election law of 1870 was not deemed repugnant to the law relating to "Presidential Electors," except in the one particular mentioned.

Now, the act of 1872, which it is alleged does repeal the law relating to Presidential electors, is simply a substitute for the general election law of 1870, going over and occupying exactly the same ground,

and no more, and making very slight alterations. The principle of these is the reconstruction of the returning board. With this exception it does not in the least conflict, any more than did the act of 1870, with the provisions of the law relating to "Presidential electors." And as the repealing clause therein (before referred to) is expressly confined to "acts on the subject of *election laws*," it seems to me most manifest that the intent was to repeal the election law only, and not that relating to "Presidential electors." This view is corroborated by the sixty-ninth section, which has this expression: "The violation of any provision of the act, or section of *the act, repealed by this act*, shall not be considered," etc. Repealing clauses should not be extended so as to repeal laws not in conflict with the new law, unless absolutely necessary to give effect to the words. And when we consider the consequences which a repeal of the law relating to Presidential electors would have, in depriving the State of its power to have vacancies in its electoral college filled, in introducing confusion and uncertainty as to the districts they should be chosen from, and by leaving no directions as to the time and place of their meeting, it seems clear that it could never have been in the mind of the legislature to repeal that law.

There is a section in the act of 1872 relating to vacancies which it has been suggested is repugnant to the authority of the electoral college to fill vacancies in that body. It is section 24, which enacts, "that all elections to be held in this State to fill any vacancies shall be conducted and managed and returns thereof shall be made, ~~in~~ the same manner as is provided for general elections." But this is explained by

the fact that both the Constitution and the election law itself direct vacancies in certain offices named (including that of members of the legislature) to be filled by a new election. The twenty-fourth section means only, that where elections are to be held to fill vacancies, they shall be held in the usual manner. It cannot mean that all vacancies shall be filled by another election; because the Constitution expressly gives to the Governor the power to fill vacancies in certain cases.

I am clearly of opinion, therefore, that the law relating to Presidential electors has not been repealed, except as to the mode of canvassing the returns ; and that that is to be performed by the returning board created by the act of 1872, in lieu of the Lynch returning board created by the act of 1870, and in lieu of the method originally prescribed in the law relating to Presidential electors.

This disposes of the objection that the electoral college had no power to fill vacancies in its own body, since the electoral law has a section which expressly authorizes the college to fill any vacancy that may occur by the non-attendance of any of the electors by four o'clock in the afternoon of the day for giving their votes.

But it is insisted that that part of the election law of 1872 which reestablishes the returning board, and gives it its powers, is unconstitutional. The act declares " that five persons, to be elected by the Senate from all political parties, shall be the returning officers for all elections. In case of any vacancy by death, resignation or otherwise, by either of the board, then the vacancy shall be filled by the residue of the board of returning officers. "

The powers and duties of the board are, to meet in New Orleans within ten days after the election, canvass and compile the statement of votes made by the commissioners of election, and make returns of the election to the Secretary of State, and publish a copy in the public journals, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected. It is declared that the returns thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers, until set aside after contest according to law, of the right of any person declared elected. On receiving notice from any supervisor of election supported by affidavits, and being convinced by examination and testimony, that by reason of riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, the purity and freedom of election at any voting place were materially interfered with, or a sufficient number of qualified voters to change the result were prevented from registering and voting, it is made the duty of the board to exclude from their returns the votes given at such voting place.

Why this law is unconstitutional, I cannot perceive. The powers given may be abused, it is true ; but that is the case with all powers. The constitutionality of the board has been considered by the Supreme Court of Louisiana, and has been fully sustained. It is said that the term of office is indefinite, and might continue for life. But where no period is fixed for the tenure of an office, it is held at the will of the appointing power, which may, at any time, make a new appointment, So that no evil consequences can ensue from this cause,

If the members of the board were appointed for a term, the Senate could re-appoint them. Allowing them to remain, when power exists to remove them at will, is substantially the same thing.

The objection that there were only four members constituting the board at the canvass in December last is met by the general rule of the law in regard to public bodies, that the happening of a vacancy does not destroy the body if a quorum still remains. The Supreme Court consists of nine Justices ; but the court may be legally held though there are three vacancies, only six being required for a quorum. A vacancy in a branch of the legislature, in the board of supervisors of a county, in the commissioners or selectmen of a town, in the trustees of a school district, does not destroy the body, nor vitiate its action, unless there be an express law to make it do so.

But it is said that the power given to the board to fill vacancies in its own body is mandatory. It is in exactly the same terms as those contained in the election law of 1870 on the same subject. In several cases, arising under that act, the Supreme Court of Louisiana decided that this language was not compulsory, or, at least did not affect the legal constitution of the board if not complied with ; but that the board was a legal board, though only four members remained in it. Had the board never been filled at all it might be urged with more plausibility that it was never legally constituted. If a court be created to consist of five judges, although, if once legally organized, a single judge might hold the court in the absence of the others; yet if only one judge were ever appointed it might very properly be said that no legal

organization had ever taken place. In this case the vacancy in the board occurred after it had been duly constituted by the appointment of the full number of members. Afterwards the vacancy occurred. And if it be the correct view, as was decided by the Supreme Court of Louisiana in regard to the Lynch board, that the power given to the remaining members to fill the vacancy is not mandatory, a neglect on their part to fill it does not, it seems to me, destroy the existence of the board, or deprive it of power to act. If it be true, as alleged, that members of only one political party remained on it, it may have been an impropriety in proceeding without filling the vacancy, and the motives of the members may have been bad motives, corrupt, fraudulent, what not ; but with improprieties and with the motives of the members we have nothing to do. We are not the judges of their motives. The question with which we have to do is a question of power, of legal authority in four members to act. And of this I have no doubt. The board was directed "to be elected by the Senate from all political parties," it is true. It does not appear that this was not done. Can it be contended that the resignation or death of one of the members, who happened to be alone in his party connections, deprives the remainder of the power to act ? I think not. If the four members remaining were all of different politics, the objection would lose all its force. So that it is resolved to this ; that the power to fill a vacancy is mandatory when any political party ceases to be represented by the death or resignation of a member ; and is not mandatory in any other case. Suppose, instead of dying or resigning, the member changes his party affiliations ;

is there a vacancy then ? Can the other members oust him, or can he oust them ? The Senate, with whom resides the power of appointing a new board whenever it sees fit, might be in duty bound to act ; but the same cannot be said of the board itself. If this were not Louisiana, but some State in which no charges of fraud and disorder were made, the objection would hardly be thought of as having any legal validity.

The next question relates to the alleged illegality and fraud in the proceedings of the returning board. Can the two Houses of Congress go behind their returns and certificate and examine into their conduct ? I have already discussed this subject to some extent in the Florida case. I shall now only state briefly the conclusions to which I have come in this case.

First. I consider the Governor's certificate of the result of the canvass as *prima facie* evidence of the fact; but subject to examination and contradiction. This point has already been considered in the Florida case.

Secondly. The finding and return of the State canvassers of the election are, in their nature, of greater force and effect than the Governor's certificate, being that on which his certificate is founded, and being the final result of the political machinery established by the State to ascertain and determine the very fact in question. "*Each State shall appoint,*" is the language of the Constitution. Of course the two Houses must be satisfied that the State has appointed, and that the votes presented were given by its appointees. The primary proof of this, as prescribed by the laws of the United States, is the certificate of the Governor. But, as before stated, I do not deem

that conclusive. It may be shown to be false or erroneous in fact, or based upon the canvass and return of a board or tribunal that had no authority to act. This was conceded in the proceeding which took place with regard to the votes of Louisiana in 1873.

Was the returning board of Louisiana a tribunal, or body, constituted by the laws of the State, with power to ascertain and declare the result of the election, and did that board, in the exercise of the jurisdiction conferred upon it, ascertain and declare that result ? This, it seems to me, is the point to be ascertained.

This involves an examination of the laws of the State to ascertain what that tribunal is and what general powers it is invested with, not for the purpose of seeing whether all the proceedings of the board, or of the election officers whose action preceded theirs, were in strict compliance with the law, but for the purpose of seeing whether the result comes from the authorities provided by the State, acting substantially within the scope of their appointment. This is necessary to be done in order to see whether (whatever irregularities may have occurred) it was the State which made the appointment, or some usurping body not authorized by the State at all.

The examination to be made is somewhat analogous to that made into the jurisdiction of a court when its judgment is collaterally assailed. If the board declared the result of the election, and, in so doing acted within the general scope of its powers, it seems to me that the inquiry should there end. The Constitutional power of the two Houses of Congress does not go further.

On the question of jurisdiction, I think it competent for the Houses to take notice of the fact (if such was the fact) that the returning board had no returns before it at all, and, in effect (to speak as we do of judicial proceedings), without having a case before it to act on; or of the fact (if such was the fact) that the board which pretended to act was not a legal board. This view was taken by both Houses, if I understand their action aright, in the count of 1873 in rejecting the electoral votes from Louisiana on that occasion. (Document on Electoral Counts, 407). Anything which shows a clear want of jurisdiction in the return- & board divests its acts of authority, and makes it cease to be the representative of the will of the State. But it must appear that there was a clear and most manifest want of authority ; for, otherwise the State might be deprived of its franchise by mere inadvertence of its agents, or an honest mistake made by them as to the law.

In the case before us the board had ample powers, as we have seen. These powers have frequently been sustained by the Supreme Court of the State. The law of Louisiana not only gives the board power to canvass the returns, but to reject returns whenever in their opinion, upon due examination had, they are satisfied that the vote was affected by violence and intimidation. They did no more in this case, supposing them to have done all that is alleged. It is said, that they proceeded without jurisdiction, because they did not canvass the statements of the commissioners of election, but only the abstracts of the parish supervisors of registration. It is not denied that they had both and all of these statements before them. If they

acted wrongfully in relying on the abstracts and not examining the original statements, it may have been misconduct on their part, but it cannot be said that they were acting beyond the scope of their jurisdiction. If, in a single case, and without coming to an erroneous result, they took the abstracts instead of the original returns, it would be just as fatal as a matter of jurisdiction (and no more so), as if they relied on the abstracts in all cases. It would only be error or misconduct, and not want of jurisdiction. And the Houses of Congress, as before said, are not a court of errors and appeals, for the purpose of examining regularity of proceedings.

It is also said, that they acted without jurisdiction in rejecting returns without having before them certificates of violence or intimidation. It is admitted that they took a large quantity of evidence themselves on the subject ; but it is contended that they had no jurisdiction to enter upon the inquiry without a supervisor's certificate first had. Is this certain ? The one hundred and third article of the Constitution made it the duty of the legislature to pass laws regulating elections, to support the privilege of free suffrage, and to prohibit undue influence thereon from power, bribery, tumults, or other improper influences. The election law was passed to carry out this article. As one means of carrying it out in spirit, the returning board were prohibited from counting a return if it was accompanied by a certificate of violence, until they had investigated the matter by examination and proof. Receiving such a certificate they could not count a return if they wanted to. Now, is it certain, that under such a law, if the board had knowledge

from other sources than a certificate, that violence and intimidation had been exercised and had produced the result, they could not inquire into it ? And more, is their whole canvass to be set aside because they made an investigation under such circumstances ? There is no other tribunal in Louisiana for making it. The Supreme Court has decided that the courts cannot go behind these returns. In my judgment we have no more authority to reject their canvass for this cause than for that of not using the original statements. It is as if a court having jurisdiction of a cause, used a piece of evidence on the trial which it had no jurisdiction to take. It would be mere irregularity at most, and would not render its judgment void in any collateral proceeding.

I cannot bring my mind to believe that fraud and misconduct on the part of the State authorities, constituted for the very purpose of declaring the final will of the State, is a subject over which the two Houses of Congress have jurisdiction to institute an examination. The question is not whether frauds ought to be tolerated, or whether they ought not to be circumvented ; but whether the Houses of Congress, in exercising their power of counting the electoral votes, are entrusted by the Constitution with authority to investigate them. If in any case it should clearly and manifestly appear, in an unmistakable manner, that a direct fraud had been committed by a returning board in returning the electors they did, and if it did not require an investigation on the part of the two Houses to ascertain by the taking of evidence the truth of the case, I have no doubt that the Houses might rightfully reject the vote-as not being the rote

of the State, Cut where no such manifest fraud appears, and fraud is only charged, how are the two Houses to enter upon a career of investigation ? If the field of inquiry were once opened, where is its boundary ? Evidently no such proceeding was in the minds of the framers of the Constitution. The short and explicit directions there given, that the votes should first be produced before the Houses when met for that purpose, and that "the votes shall then be counted," is at variance with any such idea. An investigation beforehand is not authorized and was not contemplated, and would be repugnant to the limited and special power given. What jurisdiction have the Houses on the subject until they have met under the Constitution, except to provide by law for facilitating the performance of their duties ? An investigation afterwards, such as the question raised might and frequently would lead to, would be utterly incompatible with the performance of the duty imposed.

At all events, on one or two points I am perfectly clear. First, that the two Houses do not constitute a canvassing board for the purpose of investigating and deciding on the results of the election for electors in a State. The proposed act of 1800 carefully excluded any inquiry into the number of votes on which any elector was elected ; and I think it cannot well be pretended that the Houses have power to go further into the inquiry than was proposed by that bill. Secondly, that the two Houses are not a tribunal, or court for trying the validity of the election returns and sitting in judgment on the legality of the proceedings in the course of the election. The two Houses, with only their Constitutional jurisdiction, are neither

of these things ; though as to the election, qualifications, and returns of their own members, they are certainly the latter, having the right to judge and decide.

I have thus far spoken of the power of the two Houses of Congress as derived from the Constitution. Whether the legislative power of the Government might not, by law, make provision for an investigation into frauds and illegnities, I do not undertake to decide. It cannot be done, in my judgment, by any agency of the Federal Government without legislative regulation. The necessity of an orderly mode of taking evidence and giving opportunity to cross-examine witnesses, would require the interposition of law. The ordinary power of the two Houses as legislative bodies, by which they investigate facts through the agency of committees, is illy adapted to such an inquiry.

It seems to me, however, the better conclusion, -that the jurisdiction of the whole matter belongs exclusively to the States. Let them take care to protect themselves from the perpetration of frauds. They need no guardians. They are able, and better able than Congress, to create every kind of political machinery which human prudence can contrive, for circumventing fraud, and preserving their true voice and vote in the Presidential election.

In my judgment, the evidence proposed cannot be received.

Then, as to the alleged ineligibility of the candidates. First, their alleged ineligibility under the laws of the State, I think we have nothing to do with. It has been imposed for local reasons of State policy, but if

the State sees fit to waive its own regulations on this subject it is her own concern. If the State declares that no person shall hold two offices, or that all officers shall possess an estate of the value of a thousand dollars, or imposes any other qualification, or disqualification, it is for the State to execute its own laws in this behalf. At all events, if persons are appointed electors without having the qualifications, or having the disqualifications, and they execute the function of casting their votes, their acts cannot be revised here.

Two of the electors, however, Levisse and Brewster, are alleged to have held offices of trust and profit under the United States, when the election was held on the 7th of November. It is not alleged that they did so on the 6th of December, when they gave their votes. Being absent when the electoral college met, their places were declared Vacant, and the college itself proceeded to reappoint them under the law, and sent for them. They then appeared and took their seats. So that, in point of fact, the objection does not meet the case, unless their being federal office-holders at the time of the election affects it.

Though not necessary to the decision of this case, I have re-examined the question of Constitutional ineligibility since the Florida case was disposed of, and must say that I am not entirely satisfied with the conclusion to which I then came, namely, that if a disqualified elector casts his vote when disqualified, the objection cannot be taken. I still think that this disqualification at the time of his election is not material, if such disqualification ceases before he acts as an elector. But, as at present advised, I am inclined to the opinion that if constitutionally disqualified when he casts his vote, such vote ought not to be counted.

I still think, as I thought in discussing the Florida case, that the form of the Constitutional prohibition is not material ; that it is all one, whether the prohibition is that a federal officer shall not *be* an elector, or, that he shall not be *appointed* an elector. The spirit and object of the prohibition is, to make office-holding under the Federal Government a disqualification. That is all. And this is the more apparent when we recollect the reasons for it. When the Constitution was framed, the great object in creating the office of electors to elect the President and Vice-President, was to remove this great duty as far as possible from the influence of popular passion and prejudice, and to place it in the hands of men of wisdom and discretion, having a knowledge of public affairs and public men. The idea was that they were to act with freedom and independence. The jealousy which was manifested in the convention, against the apprehended influence and power of the general Government, and especially of the legislative branch, induced the prohibition in question. It was feared that the members of the Houses of Congress and persons holding office under the Government would be peculiarly subject to these influences in exercising the power of voting for Chief Magistrate. It was not in the process of appointment that this influence was dreaded ; but in the effect that it would have on the elector himself in giving his vote.

It seems to me, therefore, that if a person appointed an elector has no official connection with the Federal Government when he gives his vote, such vote cannot be justly excepted to. And that substantial effect is given to the Constitutional disqualification if the electoral vote given by such officer is rejected. And my present impression is that it should be rejected,

Circumstances, it is true, have greatly changed since the Constitution was adopted. Instead of electors being, as it was supposed they would be, invested with power to act on the dictates of their own judgment and discretion in choosing a President, they have come to be mere puppets, elected to express the pre-ordained will of the political party that elects them. The matter of ineligibility has come to be really a matter of no importance, except as it still stands in the Constitution, and is to be interpreted as it was understood when the Constitution was adopted. Hence, we must ascertain, if we can, what was its original design and meaning, without attempting to stretch or enlarge its force.

[It may be proper that I should here add, that. I concede that there is great force in what is urged by other members of the Commission, respecting the difficulty which still remains, of the two Houses, when assembled to count the votes, undertaking an investigation of facts to determine a question of ineligibility, which might be extended in such a manner as materially to interfere with the main duty for which they assemble. This was probably seen when the law of 1800 was proposed for the purpose of having such matters determined by a grand committee preparatory to the meeting of the two Houses in joint convention. The passage of some law regulating the matter is on all accounts desirable.]

III.-TIII' OREGON CASE.

The laws of Oregon do not provide for a Board of State Canvassers, but tlircc t as follows :

It shall be the duty of the Secretary of State, in presence of the Governor, to proceed within thirty days after the election, and sooner, if the returns be all received, to canvass the votes given for Secretary and Treasurer of State, State printer, Justices of the Supreme Court, members of Congress and district attorneys.

And then, with regard to State officers, directs :
“ The Governor shall grant a certificate of election to the person having the highest number of votes, and shall also issue a proclamation declaring the election of such person.”

But with regard to Presidential electors, it directs :
“ The votes for the electors shall be given, received, returned, and canvassed as the same are given, returned, and canvassed for members of Congress. The Secretary of State shall prepare two lists of the names of the electors electcd, and affix the seal of the State to the same. Such lists shall be signed by the Governor and Secretary, and by the latter delivered to the college of electors at the hour of their meeting on such first Wednesday of December.”

When the electors are met on the day for casting their votes, the law directs : “ If there shall be any vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend, or otherwise, the electors present shall immediately proceed to fill, by viva voce and plurality of votes, such vacancy in the electoral college. ”

Watts, one of the electors having the highest number of votes, was a postmaster at the time of the election, November 7, 1876 ; but resigned that office during the month.

On the 4th of December, the Secretary of State, in presence of the Governor, canvassed the votes for Presidential electors, made a statement of the result, authenticated it under the seal of the State, and filed it in his office. The following is a copy of this document :

ABSTRACT OF VOTES CAST AT THE PRESIDENTIAL ELECTION HELD IN THE STATE OF OREGON NOVEMBER 7, 1876, FOR PRESIDENTIAL ELECTORS.

Counties.	W. H. Odell.	J. W. Watts.	J. C. Cartwright.	Henry Klippel.	E. A. Cronin.	W. H. Laswell.	D. Clark.	F. Sutherland.	B. Carl.
Baker	318	319	319	549	550	549	1	1	1
Benton	615	615	615	567	567	567	77	77	77
Clackamas	949	950	950	724	724	724	1	17	17
Clatsop	432	432	432	386	385	386			
Columbia	157	156	157	179	179	179	22	22	22
Coos	571	571	571	512	516	515			
Curry	131	131	131	124	124	124	3	3	3
Douglas	1,002	1,002	1,003	847	847	847	43	43	43
Grant	315	314	316	279	279	277	3	3	3
Jackson	585	585	586	827	840	840	5	5	5
Josephine	209	209	209	252	252	252	4	4	4
Lane	949	949	949	946	946	946	33	33	33
Lake	173	173	173	258	258	258			
Linn	1,323	1,324	1,323	1,404	1,404	1,404	140	141	140
Marion	1,780	1,782	1,781	1,154	1,154	1,155	24	23	22
Multnomah ..	2,124	2,122	2,122	1,525	1,528	1,525	2	2	2
Polk	607	608	608	542	542	542	54	55	54
Tillamook	119	119	119	76	76	76	1	1	1
Umatilla	486	486	486	742	742	742	42	42	42
Union	366	366	366	525	525	525	32	32	32
Wasco	491	491	493	621	621	619			
Washington ..	693	692	693	423	424	423			
Yamhill	811	810	812	674	674	674	6	6	6
Total	15,206	15,206	15,214	14,136	14,157	14,149	509	510	507

Simpson, 1 ; Gray, 1 ; Saulsbury, 1 ; McDowell,

SALEM, STATE OF OREGON :

I hereby certify that the foregoing tabulated statement is the result of the vote cast for Presidential electors at a general election held in and for the State of Oregon on the 7th day of November, A. D. 1876, as opened and canvassed in the presence of his excellency, L. F. GROVER, Governor of said State, according to law, on the 4th day of December, A. D. 1876, at 2 o'clock P. M. of that day, by the Secretary of State.

[SEAL.]

S. F. CHADWICK,
Secretary of State of Oregon.

The statute of Oregon declares : “ In all elections in this State the person having the highest number of votes for any office shall be deemed to have been elected. ”

On the 6th of December, when the electors met to give their votes for President and Vice-President, Watts resigned as elector, and was re-appointed by Odell and Cartwright to fill the vacancy. The Governor refused them the usual certificate, but certified that Odell, Cartwright and Cronin received the highest number of votes cast for persons *eligible* under the Constitution of the United States, and declared them duly elected. As Odell and Cartwright refused to meet with Cronin, he assumed to fill two vacancies. This proceeding of the Governor and Cronin raised the principal question in the Oregon case.

FEBRUARY 23, 1877.

JUSTICE BRADLEY : -

This case differs from the two cases already heard in this : By the laws of both Florida and Louisiana, the final determination of the result of the election was to be made by a board of canvassers invested with power to judge of the local returns and to reject them for certain causes assigned. In Oregon, no such board exists. The general canvass for the State is directed to be made by the Secretary of State in presence of the Governor, from the abstracts sent to him by the County Clerks. This canvass having been made, the result is declared by the law. The canvass is the last act by which the election is decided and determined. This canvass was made in the present case on the 4th day of December (1876) ; the result

was recorded in a statement in writing made by the Secretary and filed by him in his office. This statement or abstract thus became the record evidence of the canvass. It remains in the Secretary's office to-day, as the final evidence and determination of the result-

We have before us, under the great seal of the State, a copy of this statement, which shows the result to have been a clear plurality of over a thousand votes in favor of the three electors, Odell, Cartwright and Watts ; and there is added thereto a list of the votes.

This document, after exhibiting a tabulated statement of the votes given for each candidate in each county of the State, footing up for Odell, 15,306; Watts, 15,206 ; Cartwright, 15,214 ; Klippel, 14,136 ; Cronin, 14,157 ; Laswell, 14,149, and a few scattering votes, was certified and authenticated at the end, as follows :

SALEM, STATE OF OREGON :

I hereby certify that the foregoing tabulated statement is the result of the vote cast for Presidential electors at a general election, held in and for the State of Oregon on the 7th day of November A. D. 1876, as opened and canvassed in the presence of his excellency, L. F. GROVER, Governor of said State, according to law, on the 4th day of December, A. D. 1876, at 2 o'clock P. M. of that day, by the Secretary of State.

[SEAL.]

S. F. CHADWICK,

Secretary of State of Oregon.

This document, with this certificate and authentication upon it, was filed by the Secretary in his office on the 4th day of December.

To the exemplified copy of it, which was sent to the President of the Senate (and which we have before us), is added another document, entitled "List of votes cast at an election for electors of President and

Vice-President of the United States in the State of Oregon, held on the 7th day of November, 1876," which contains the votes given for each candidate (the same as in the canvass) written out in words at length, and certified by the Secretary of State, also under the great seal of the State, to be the entire vote cast for each and all persons for the office of electors as appears by the returns of said election on file in his office.

Having made this canvass, recorded it, and filed it in his office, the Secretary of State was *functus officio* with regard to the duty of ascertaining the result of the election. He could not change it ; he could not tamper with it in any way. By his act, and by this record of his act, the ascertainment of the election in Oregon was closed. Its laws give no revisory power to any other functionary ; and give none to the Secretary himself. And this, as we have seen, was done and completed on the 4th day of December, at 2 o'clock in the afternoon, in the presence of the Governor, according to the law of Oregon.

Now, what is the decree of the law on this transaction ? It is clear and unmistakable. " In all elections in this State the person having the highest number of votes for any office shall be deemed to be elected." It is not left for any functionary to say that any other person shall be deemed to be elected. No discretion, no power of revision is given to any one, except as the general law of the State has given **to** the judicial department power to investigate the right of persons elected to hold the offices to which they have been elected.

Now, what is the next step to performed ? It is **this** : "The Secretary of State shall prepare two lists

of the names of the electors elected, and affix the seal of the State to the same. Such lists shall be signed by the Governor and Secretary, and by the latter delivered to the college of electors at the hour of their meeting on such first Wednesday of December." This direction seems to be intended as a compliance with the act of Congress of 1792. It is true, that this act requires three lists instead of two to be delivered to the electors ; but the number required by the State law was probably an inadvertence. Be this, however, as it may ; what names was the Secretary required by law to insert in his certificate ?

He made out his certificate on the 6th day of December, two days after his canvass had been completed, recorded, and deposited in the public archives. In making this certificate he was performing a mere ministerial duty. It was his clear duty to insert in his certificate the names of the persons whom the law declared to be elected. Doing otherwise was not only a clear violation of duty, but he made a statement untrue in fact ; and the Governor putting his name to the certificate, joined in that misrepresentation. It may not have been an intended misrepresentation, and the use of the word " eligible " may have been thought a sufficient qualification ; nevertheless it was a misrepresentation in fact and in law, and it all appears from the record itself. It needs no extrinsic evidence.

But it is said that the Governor has the power to disregard the canvass, and to reject an elector whom he is satisfied is ineligible. There is no law of Oregon which gives him this power. In my judgment, it was a ~~clear~~ act of usurpation. It was tampering with an election which the law had declared to be closed and ascertained.

It is said, however, that he may refuse a commission to an ineligible person elected to a State office. If So, it does not decide this case. And it seems to me that such an act, even with regard to State officers, would be an encroachment on the judicial power. A case is referred to as having been decided in Oregon, in which the appointment by the Governor to fill a vacancy in a State office caused by the incumbent being appointed to a United States office, was sustained. But surely the judgment in that case must have been based on the fact that there was a vacancy and not on the fact that the Governor assumed to judge whether there was a vacancy or not. His executive act, whether in determining his own action he had the right to decide the question of eligibility or not, was valid or not according as the very truth of the fact was.

But in the case before us he had a mere ministerial act to perform. He had no discretionary power.

If anyone could have taken notice of the question of supposed ineligibility it was the Secretary of State when making his canvass. Had he taken it upon himself to throw out the votes given for Watts, he would have had a much more plausible ground of justification for his act than the Governor had, to whom no power is given on the subject.

But it is said, no matter whether the Governor and Secretary acted right or wrong ; they were the functionaries designated for giving final expression to the will of the State, and their certificate must be received , as such, under the decision in the cases of Florida and Louisiana. To this view, however, there is a conclusive answer. As I said before, the certificate to be

given by the Secretarp and Governor to these electors was not intended as any part of the machinery for ascertaining the result of the election ; but as a mere certificate of the fact of election, as a credential to be used by the electors in acting as such and transmitting their votes to the President of the Senate of the United States, as required by the act of Congress of 1792. As such it is *prima facie* evidence, , it is true ; but no person has contended that it cannot be contradicted and shown to be untrue, especially by evidence of equal dignity. We did not so decide in the other cases. We held that the final decision of the canvass by the tribunal or authority constituted for that purpose could not be revoked by the two Houses of Congress, by going into evidence behind their action and return.

The only remaining question is, whether there was a vacancy in the college at the time when Ode11 and Cartwright assumed to fill a vacancy on the 6th day of December, 1876. It scenis to me, that there was, whether there was a failure to elect on account of the ineligibility of Watts, or on account of his resignation afterwards.

It is agreed by a large majority of the Commission, that Cronin was not elected. Some of this majority take the ground that Watts was duly elected, whatever effect his ineligibility, had it continued, might have had on his vote. Others of them take the ground that there was no election of a third elector. It seems to me that it makes no difference in this case which of these views is the correct one ; there was a clear vacancy in either case.

The act of Congress of 1845 declares that “ each

State may by law provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote''; and also, "that whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."

The first contingency would occur when some of the electors were elected and could meet and fill any vacancy in their number. The second contingency would occur when no electors were appointed, and, therefore, no meeting could be held. It is evident that these are two very different cases ; and that the one before us does not belong to the latter, but to the former. It is the difference between a college which is not full, and no college at all. In Oregon, according to the exigency supposed, the case belonged to that of a vacancy under the act of 1845.

The act of Oregon in relation to vacancies in the electoral college was evidently passed in view of the act of Congress upon which it was based ; and its terms are so broad and comprehensive that I cannot doubt that it was intended to apply to every case of vacancy. The words are that "if there shall be *any* vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend, *or otherwise*, the electors present shall immediately proceed to fill," etc. This clearly covers every supposable case, and must be intended to be as broad as the corresponding section of the act of Congress. It is more general in its terms than the act relating to vacancies in State offices, which specifies only certain classes of cases.

AS the electors Odell and Cartwright filled the vacancy in a regular manner, I cannot avoid the conclusion that they, together with Watts, were the true electors for the State of Oregon on the 6th day of December, and that their votes ought to be counted.

Their credentials are not signed by the Governor, it is true ; but that is not an essential thing ; and was not their fault. They have presented the records of the State found in its archives ; and these show that the act of the Governor was grossly wrong ; and they have also presented the certificate of the Secretary of State under the great seal of the State, conclusively showing their election. They have also shown by their own affidavit, that they applied to the Governor for his certificate and that he refused it. I think their credentials, under the circumstances, are sufficient.

It is urged that the distinction made between this case, and that of Florida and Louisiana is technical and will not give public satisfaction. My belief is that when the public come to understand (as they will do in time) that the decision come to is founded on the Constitution and the laws, they will be better satisfied than if we should attempt to follow the clamor of the hour. The sober second thought of the people of this country is in general correct. But, whilst the public satisfaction is always desirable, it is a poor method of ascertaining the law and the truth, to be alert in ascertaining what are the supposed wishes of the public. And as to deciding the case on technicalities, I do not know that technicalities are invoked on the one side more than on the other. In drawing the true boundary line between conflicting jurisdictions and establishing certain rules for just decision in such cases

as these, it is impossible to avoid a close and searching scrutiny of written constitutions and laws. The weight due to words and phrases has to be observed, as well as the general spirit and policy of public documents. Careful and exact inquiry becomes a necessity. And in such a close political canvass as this, in which the decision of a Presidential election may depend not only on a single electoral, but a single individual vote, the greatest strain is brought to bear on every part of our Constitutional machinery, and it is impossible to avoid a close examination of every part. There is a natural fondness for solving every doubt on some " broad and general view- " of the subject in hand. " Broad and general views " when entirely sound, and clearly applicable, are undoubtedly to be preferred ; but it is extremely easy to adopt broad and general views that will, if adhered to, carry us into regions of error and absurdity. The only rule that is always and under all circumstances reliable is to ascertain, at whatever cost of care and pains, the true and exact commands of the Constitution and the laws, and implicitly to obey them.

IV.—SOUTH CAROLINA CASE.

It is not pretended that the votes of the Tilden electors as presented in certificate No. 2, in this case, are legal. The entire controversy arises upon the objections to certificate No. 1, containing the votes for Hayes and Wheeler.

These objections are—

FIRST.—That the November election in South Carolina was void because the legislature of that State has never passed a registration law as required by the constitution of the State, Article VIII., Section 3, which is as follows : “It shall be the duty of the general assembly to provide from time to time for the registration of all electors.” This constitution was passed in 1868, and from that time to this, elections have been held, and the various elective officers of the State, as well as the office of Representatives in Congress, have been filled without a registration law having been passed. If the effect of the omission has been to render all these elections absolutely void, South Carolina has, for some years, been without any lawful government. But if the effect has only been to render the elections voidable, without affecting the validity of the acts of the government in its various departments, as a government *de facto*, then the election of Presidential electors and their giving their votes, have the same validity as all other political acts of that body politic. But, in my opinion, the clause of the constitution in question is only directory, and cannot affect the validity of elections in the State, much less the official acts of the officers elected. The passage of a registration law

was a legislative duty which the members on their oaths were bound to perform. But their neglect to perform it ought not to prejudice the people of the state.

The objection that it does not appear by the certificate that the electors voted by ballot, or that they took an oath of office as required of all officers in South Carolina are so formal and manifestly frivolous, that I shall not discuss them. The presumption is that all due formalities were complied with.

The only objections of any weight are those which charge that there was such anarchy and disturbance in the State during the elections, and such interference of United States troops and others therewith, that no valid election was held in the State, and it is impossible to know what the will of the State was. This is placing the objections and the offer of proof to support them, in their strongest light.

I think it is unquestionably true, that such a state of things as the objection contemplates ought to exclude any vote purporting to come from the State ; for no such vote can be regarded as expressing the will of the State. But that is not the only question to be considered.

The first and great question is, as to the Constitutional power of the two Houses of Congress, when assembled to count the votes for President and Vice-President, to institute an investigation by evidence such as is necessary to determine the facts to be proved. This power of canvassing the electoral votes is constantly confounded with that of canvassing the votes by which the electors themselves were elected—a canvass with which Congress has nothing to do.

This belongs to the jurisdiction of the States themselves, and not to Congress. All that Congress has to do with the subject is, to ascertain whether the State has, or has not, appointed electors—an act of the State which can only be performed by and through its own constituted authorities.

It seems to be also constantly overlooked or forgotten, that the two Houses, in their capacity of a convention for counting the electoral votes, have only a special and limited jurisdiction. They are not at all invested with that vast and indefinite power of inquisition which they enjoy as legislative bodies. Until met for the specific purpose of the count, they have no power over the subject, except to pass such laws as it is competent for the legislative branch of the Government to pass. The electoral votes are in sealed packages, over which the two Houses have no control. They have not, constitutionally, any knowledge of these until they are opened in their presence. Their jurisdiction over the subject of the count, and the votes and the appointment of electors, commences at that moment. They have no power before this to make investigations affecting the count. Could it have been in the contemplation of the Constitution that the two Houses, after commencing the count, should institute such an investigation as the objectors propose—involving (as it would be likely to do) many weeks in the process? It seems to me impossible to come to such a conclusion.

When the state of things in a State is of such a public character as to be within the judicial knowledge of the two Houses, of course, they may take notice of it, and act accordingly—as was done in the times of

secession and the late civil war-or as might have been done at any time, so long as the seceding States were not in harmonious relations with the general Government. But when a State is in the enjoyment of all those relations, when it is represented in both Houses of Congress, is recognized by the other departments of the Government, and is known to have a government republican in form—in other words, when all the public relations of the State are the same as those of all the other States, how can the two Houses in convention assembled (and assembled for such special purpose), go into an investigation for the purpose of ascertaining the exact state of things within the State, so as to decide the question (perhaps a very nice question to be decided), whether the tumults and disorders existing therein at the time of the election, or the presence of the troops sent there by the President for the preservation of the public peace, had such an influence as to deprive the State of its autonomy and the power of expressing its will in the appointment of electors ? Such an investigation, or one of any such character and extent, was surely never contemplated to be made whilst the votes were being counted.

That South Carolina is a State, and that she has a republican form of government, are public facts of which the two Houses (and we in their stead) must take judicial notice. We know that she is such a State. That she is capable of preserving the public order, either with or without the aid of the federal authority ; and that the executive interference, if made at all, was made in the exercise of his proper authority, for the reasons set forth in his public proclamations and orders, are facts to be presumed. At all events, the

two Houses, under their special authority to count the electoral votes, are not competent to take evidence to prove the contrary.

I do not doubt that Congress, in its legislative capacity, with the President concurring, or by a two-thirds vote after his veto, could pass a law by which investigation might be had in advance, under proper regulations as to notice and evidence and the cross-examination of witnesses ; the results of which could be laid before the two Houses at their meeting for the count of votes, and could be used by them as a basis for deciding whether such a condition of anarchy, disturbance and intimidation existed in a State at the time of the election of its electors, as to render its vote nugatory, and liable to be rejected. But without the existence of a law of this sort, it is, in my judgment, impracticable and unconstitutional for the two Houses to attempt the decision of such a question. The investigations made by legislative committees, in the loose manner in which they are usually made, are not only not adapted to the proper ascertainment of the truth for such a purpose, but are totally unauthorized by the Constitution. As methods of inquiry for ordinary legislative purposes, or for the purpose of laying the foundation of resolutions for bringing in an impeachment of the President for unconstitutional interference, of course they are competent ; but not for the purpose of receiving or rejecting the vote of a State for the Presidential office. They are not made such by any Constitutional provision or by any law. Legislation may be based on the private knowledge of members, and a resolution to bring in an impeachment may rest on *ex-parte* affidavits or on general informa-

tion ; and, therefore, the evidence taken by a committee cannot be decreed incompetent for such a purpose ; but is often of great service in giving information to the Houses as legislative bodies, and to the House of Representatives as the grand inquest of the nation. But the decision to receive or reject the vote of a State, is a final decision on the right of the State in that behalf, and one of a most solemn and delicate nature ; and cannot properly be based on the depositions of witnesses gathered in the drag-net of a Congressional committee.

For these reasons I am clear that the evidence offered in support of the objections made to the electoral votes of South Carolina cannot be received.

These are, in brief, the views which I entertain in reference to this case ; and under them, I am forced to the conclusion that the objections made to the votes given by the electors certified by the Governor of the State, and the evidence offered in support of the same, are insufficient ; and that the said votes ought to be counted.

ELECTORAL COMMISSION.

Mr. Black's article in the *North American Review* on the Electoral Commission of 1877 is pervaded by an entire disregard of two fundamental truths, which furnish a complete answer to his argument. The first is, that the United States is a government of law and not a democracy. The second is, that the several States, and not the general Government, have the appointment of electors of President and Vice-President, and are the sole judges of their appointment.

Mr. Black assumes that the popular vote was in favor of Tilden and Hendricks and against Hayes and Wheeler. Conceding that this may have been true, yet if a majority of the electors were in favor of Hayes and Wheeler, the latter were constitutionally elected.

If the United States were a pure democracy, the mere count of hands would decide all questions absolutely, without regard to the wisdom or justice of the decision. It would make laws as well as elect officers. It would be an absolute test of civil right and wrong, and, of course, what is right and wrong would depend on the absolute truth of the count. If the vote of one Louisiana negro, or of one New York rough, were omitted, it might wholly turn the scale. The discovery of such an omission at any time would change the result. A law might stand for a year and

then be subverted ; a President might act as such for three years, and then be unseated on the discovery of the supposed mistake. Such discovery, it is true, would depend on human testimony, which is sometimes fallible and sometimes corrupt ; no matter for that, as it is the only guide, the consequence must follow. The principles of pure democracy would demand it.

A government regulated by law is conducted on different principles. Under such a government a matter sometimes becomes settled. If a court of last resort decides a controversy the decision stands. If an election is held and decided according to law, there is an end of the matter. In the one case, as in the other, mistakes may be made in fact. But the law does not tolerate a change. It deems certainty, security and peace preferable to eternal contention. It regards some things as settled and not to be disturbed. It provides all reasonable opportunities of scrutiny and review, but imposes an end to controversy somewhere. It recognizes fallibility and mistake to a certain extent, but beyond all that, demands that its decisions shall be accepted as infallible.

Again, in gathering up the results of the public will, it proceeds by rules adopted and laid down beforehand. These rules are regarded as wholesome restraints on faction, and on corrupt influences of all kinds. To carry out these rules, it appoints public agents, officers and tribunals. Their action, subject to regular processes of correction (which are also prescribed) are received as definitive. With all its imperfections, this system is regarded better than anarchy, which would follow the want of it.

It cannot be doubted that the division of a State into small constituencies, each acquainted with its own wants and its own men, is a wise feature in a constitution. These constituencies often choose a **different** majority of representatives from that which would be chosen by a general vote of the whole population. The State of New York has one hundred and twenty-eight legislative districts, each entitled to a representative. A majority of these constituencies may be republican, whilst a majority of all the voters in the State may be democratic. This would arise from a large body of democratic voters being crowded into a locality—say the City of New York. Still the arrangement of constituencies is a wise one, though an artificial one. There is no reason to suppose that the State would be any better governed if the Irish vote of the city should control the policy of the whole State, than it would if the majority of the constituencies controlled it.

Our whole governmental system is an artificial one, regulated and controlled by law ; and it is this **very** feature of our government which secures public safety and order, and which, if anything can, will give perpetuity to our republican institutions. It is not the roar of mere numbers, but the still, strong voice of an organized community, which expresses the power, the wisdom and the dignity of a people.

STOWE, 1877.

REPLY TO CHARGES AS TO CONDUCT AS MEMBER OF
ELECTORAL COMMISSION.

[Newark *Daily Advertiser*, Wednesday Evening, September 5, 1877.]

JUSTICE BRADLEY SPEAKS.

We have just received the following prompt and manly letter from Mr. Justice Bradley, which so fully and completely explains itself that it needs no further comment. It comes from his summer retreat at Stowe, Vt., and though no vindication of his course in the Electoral Commission, of which he was the most conspicuous member, seemed called for by those who were familiar with all the facts, yet the injustice of the rumor that has recently been circulated, has prompted him to stamp it as basely false, and he does so with an emphasis of conscious rectitude that leaves no ground for mistake. His statement confirms what we took occasion to say on authority of almost equal responsibility as his own.

STOWE, Vt., Sept. 2, 1877.

EDITOR OF THE *Advertiser* :—I perceive that the New York *Sun* has reiterated its charge that after preparing a written opinion in favor of the Tilden electors in the Florida case, submitted to the Electoral Commission, I changed my views during the night preceding the vote, in consequence of pressure brought to bear upon me by Republican politicians and Pacific Railroad men, whose carriages, it is said, **surrounded** my house during the evening. This, I believe, is the important point of the charge. Whether I wrote one opinion, or twenty, in **my** private examination of the

subject, is of little consequence, and of no concern to anybody, if the opinion which I finally gave was the fair result of my deliberations, without influence from outside parties. The above slander was published some time since, but I never saw it until recently, and deemed it too absurd to need refutation. But as it is categorically repeated, perhaps I ought to notice it. The same story about carriages of leading Republicans, and others, congregating at my house, was circulated at Washington at the same time, and came to the ears of my family, only to raise a smile of contempt. The whole thing is a falsehood. Not a single visitor called at my house that evening ; and during the whole sitting of the Commission, I had no private discussion whatever on the subjects at issue with any person interested on the Republican side, and but very few words with any person. Indeed, I sedulously sought to avoid all discussion outside the Commission itself. The allegation that I read an opinion to Judges Clifford and Field is entirely untrue. I read no opinion to either of them, and have no recollection of expressing any. If I did, it could only have been suggestively, or in a hypothetical manner, and not intended as a committal of my final judgment or action. The question was one of grave importance, and, to me, of much difficulty and embarrassment. I earnestly endeavored to come to a right decision, free from all political or other extraneous considerations. In my private examination of the principal question (about going behind the returns), I wrote and re-wrote the arguments and considerations on both sides as they occurred to me, sometimes being inclined to one view of the subject, and sometimes to the other. But

finally I threw aside these lucubrations, and, as you have rightly stated, wrote out the short opinion which I read in the Florida case during the sitting of the Commission. This opinion expresses the honest conclusion to which I had arrived, and which, after a full consideration of the whole matter, seemed to me the only satisfactory solution of the question. And I may add, that the more I have reflected on it since, the more satisfied have I become that it was right. At all events, it was the result of my own reflections and consideration, without any suggestion from any quarter, except the arguments adduced by counsel in the public discussion, and by the members of the Commission in its private consultations.

As for the insinuations contained in a recent article, published in a prominent periodical by a noted politician,* implying that the case was decided in consequence of a political conspiracy, I can only say (and from the peculiar position I occupied on the Commission I am able positively to say) that it is utterly devoid of truth, at least, so far as the action of the Commission itself was concerned. In that article the writer couples my name with the names of those whom he supposes obnoxious to public odium. The decencies of public expression, if nothing more, might well have deterred so able a writer from malting imputation which he did not know to be well founded.

Yours respectfully,

(Signed) JOSEPH P. BRADLEY,

*Judge Jeremiah S. Black.

ELECTORAL COMMISSION.

The abuse heaped upon me by the Democratic press, and especially the New York Sun, for the part I took in the Electoral Commission, appointed to decide the controverted questions which arose upon the Presidential election of 1876-7, is almost beyond conception. Malignant falsehoods of the most aggravated character were constantly published. I bore these things in silence until it was stated that Judge Field had said, in conversation, that I had changed my mind during the sitting of the Commission, and that I had first written an opinion in favor of Tilden, and had read it to him and Judge Clifford. When this story appeared the Judge was in California and I was spending my vacation at Stowe, Vt. I immediately wrote to him, calling his attention to these charges. He replied, denying that he used the expressions attributed to him, and had said nothing derogatory to my honor or integrity.