*564 fishing and hunting upon the granted lands in common with the *grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U. S. 371, 384, 49 L. ed. 1089, 1093, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia river, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 [12 Stat. at L. 951], said (referring to the authority of the state of Washington): "Nor does it" (that is, the right of "taking fish at all usual and accustomed places") "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

We have assumed the applicability of the state law in question, as its construction is determined by the decision of the state court. We also assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the *locus in quo*. Ward v. Race Horse and United States v. Winans, supra. There is no question of conflict with any legislation of Congress or with action under its authority; for the case rests on the construction of the treaty. The only action of Federal authority, that is pertinent, is found in the convention itself. It should be added that we have not considered any question relating to conduct or fishing rights upon territory, not ceded, which is comprised within the Indian Reservation; nor is it necessary to deal with other matters which have been discussed in argument touching the relation of the state of New York to the Indians within its borders.

We find no error in the judgment of the state court, and it is accordingly affirmed.

Judgment affirmed.

(241 U. S. 565)

STATE OF OHIO ON RELATION OF DAVID DAVIS, Plff. in Err.,
v.
CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor and Inspector of Elections, and State Supervisor of Elections, et al.

COURTS ⊂⊃394(3)—ERROR TO STATE COURT—SCOPE OF REVIEW — NON-FEDERAL QUESTION.

1. Whether a state, so far as it had the power to do so, had by constitutional amendment vested a part of the legislative power in the people, by reserving a right by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly, is a question of state law, a decision of which by the highest state court is not reviewable by the Federal Supreme Court on writ of error to the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1051; Dec. Dig. ⊂⊃394(3).]

UNITED STATES ⊂⊃10—CONGRESS — REAPPORTIONMENT—RECOGNITION OF REFERENDUM AS STATE LEGISLATIVE POWER.

2. Congress, by providing in the reapportionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), that the redistricting of the congressional districts should be made by each state "in the manner provided by the laws thereof," manifestly intended that where, by the state Constitution and laws, the referendum is treated as a part of the legislative power, the power thus constituted should be held and treated as the state legislative power for the purpose of creating congressional districts by law.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 6; Dec. Dig. ⊂⊃10.]

UNITED STATES ⊂⊃11—CONGRESS — REAPPORTIONMENT—RECOGNITION OF REFERENDUM AS STATE LEGISLATIVE POWER.

3. The recognition by Congress in the congressional reapportionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), of the referendum as a part of the state legislative power for the purpose of creating congressional districts, where, by the state Constitution and laws, the referendum is so regarded, does not violate the provision of U. S. Const. art. 1, § 4, that the "times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations."

[Ed. Note.—For other cases, see United States, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

CONSTITUTIONAL LAW ⊂⊃68(1)—POLITICAL QUESTION — REPUBLICAN FORM OF GOVERNMENT—REFERENDUM.

4. Whether or not a state has ceased to be republican in form, within the meaning of the guaranty of U. S. Const. art. 4, § 4, because it has made the referendum a part of the legislative power, is not a judicial question, but a political one, which is solely for Congress to determine.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. ⊂⊃68(1).]

CONSTITUTIONAL LAW ⊂⊃68(1)—POLITICAL QUESTION — CONGRESSIONAL APPORTIONMENT—REFERENDUM—REPUBLICAN FORM OF GOVERNMENT.

5. The courts may not treat the provisions of the congressional apportionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), under which the referendum is recognized as a part of the state legislative power for the purpose of creating congressional districts, where so treated by the state Constitution

and laws, as repugnant to the republican form of government guaranteed by U. S. Const. art 4, § 4, since Congress is vested with the exclusive authority to uphold this guaranty.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. ⚖68(1).]

[No. 987.]

Submitted May 22, 1916. Decided June 12, 1916.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment denying a writ of mandamus to compel state election officers to disregard the popular vote on a referendum disapproving a statute redistricting the state for the purpose of congressional elections. Affirmed.

For opinion below, see 94 Ohio St. 154, 114 N.E. 55.

The facts are stated in the opinion.

Messrs. **Sherman T. McPherson** and **J. Warren Keifer** for plaintiff in error.

Mr. Edward C. Turner, Attorney General of Ohio, and Messrs. **Edmond H. Moore** and **Timothy S. Hogan** for defendants in error.

*560 *Mr. Chief Justice **White** delivered the opinion of the court:

By an amendment to the Constitution of Ohio, adopted September 3d, 1912, the legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly. And by other constitutional provisions the machinery to carry out the referendum was created. Briefly they were this: Within a certain time after the enactment of a law by the senate and house of representatives, and its approval by the governor, upon petition of 6 per centum of the voters, the question of whether the law should become operative was to be submitted to a vote of the people, and, if approved, the law should be operative; and, if not approved, it should have no effect whatever.

In May, 1915, the general assembly of Ohio passed an act redistricting the state for the purpose of congressional elections, by which act twenty-two congressional districts were created, in some respects differing from the previously established districts, and this act, after approval by the governor, was filed in the office of the secretary of state. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved. Thereupon, in the supreme court of the state, the suit before us was begun against state election officers for the purpose of procuring a mandamus, directing them to disregard the vote of the people on the referendum, disapproving the law, and to proceed to discharge their duties as such officers in the next congressional election, upon the assumption that the action by way of referendum was void, and that the law which was disapproved was subsisting and valid. *567 The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed, it was in substance charged that both from the point of view of the state Constitution and laws and from that of the Constitution of the United States, especially § 4 of article 1, providing that "the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators;" and also from that of the provisions of the controlling act of Congress of August 8, 1911 (chap. 5, 37 Stat. at L. 13, Comp. Stat. 1913, § 15), apportioning representation among the states, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. The court below adversely disposed of these contentions, and held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

Without going into the many irrelevant points which are pressed in the argument, and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view,—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States, referred to.

1. As to the state power, we pass from its consideration,* 568 since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim

that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit.

2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress, in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since, under the act of Congress dealing with apportionment, which preceded the act of 1911, by § 4 it was commanded that the existing districts in a state should continue in force "until the legislature of such state, in the manner herein prescribed, shall redistrict such state" (act of February 7, 1891, chap. 116, 26 Stat. at L. 735); while in the act of 1911 there was substituted a provision that the redistricting should be made by a state "in the manner provided by the laws thereof." And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec. vol. 47, pp. 3436, 3437, 3507.

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3. To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 of the Constitution and hence void, even if sanctioned by Congress, because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance, for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution. Const. § 4, art. 4. But the proposition and the argument disregard the settled rule that the question of whether that guaranty of the Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224. In so far as the proposition challenges the power of Congress, as manifested by the clause in the act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which, from the point of view of § 4 of article 1, previously considered, the Constitution expressly gave the right to do. In so far as the proposition may be considered as asserting, on the other hand, that any attempt by Congress to recognize the referendum as a part of the legislative authority of a state is obnoxious to a republican form of government as provided by § 4 of article 4, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government, has done something which it is deemed is repugnant to that guaranty, therefore there was automatically created judicial authority to go beyond the limits of judicial power, and, in doing so, to usurp congressional power, on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control, free from judicial interference.

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It is apparent from these reasons that there must either be a dismissal for want of jurisdiction, because there is no power to re-examine the state questions foreclosed by the decision below, and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent, as to the result, which of the two be applied. In view, however, of the subject-matter of the controversy and the Federal characteristics which inhere in it, we are of opinion, applying the rule laid down in Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, the decree proper to be rendered is one of affirmance, and such a decree is therefore ordered.

Affirmed.