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THE TEXAS "WHITE PRIMARY" CASE—

SMITH v. ALLWRIGHT

ROBERT E. CUSHMAN

The southern white people have always viewed the Fifteenth Amendment in much the same way in which patriotic Germans after the last war regarded the harsher provisions of the Versailles Treaty. It was a form of compulsion imposed by victors upon the defeated. They have never accepted the purpose of the amendment, i.e., the enfranchisement of the Negro, and they have shown great ingenuity in devising methods for defeating this purpose without violating the letter of the law. There has been no concealment or furtiveness about these efforts. They have been made openly and without apology. The Constitution of Mississippi of 1890 effectively provided for Negro disfranchisement by requiring those seeking to vote to produce evidence that they had paid their taxes, including a poll tax, and also to "be able to read any section of the Constitution of this state, or . . . understand the same when read to him . . . or give a reasonable explanation thereof."¹

In holding this provision valid, Judge Cooper of the Supreme Court of Mississippi observed:

Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race.²

When a similar provision was before the Virginia Convention in 1902, the chairman of the committee which drafted the clause explained to the convention that, while unfortunately a few Negroes might possibly meet the educational test provided,

"I expect the examination with which the black man will be confronted to be inspired by the same spirit that inspires every man upon this floor and in this convention. I do not expect an impartial administration of this clause."³

Thus the South has played with shrewdness and tenacity a game of constitutional trial and error in their determined efforts to circumvent the Fifteenth Amendment. Up till now they have won more often than they have lost. The educational tests just mentioned were held by the Supreme Court to be valid, since they were not in terms discriminatory.⁴

¹Miss. Const. Art. XII, § 244.
³Quoted in SUFFRAGE IN THE UNITED STATES, by KIRK PORTER at 218. Italics added.
⁴Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583 (1898).
ment of a poll tax as a prerequisite for voting has been held constitutional, although some constitutional lawyers believe that, in the light of the more searching analysis of this issue which has recently been going on, the Supreme Court might reach a different conclusion. The famous “grandfather clause” device by which Negroes were disfranchised by drastic suffrage qualifications from which persons of white ancestry were specifically exempted, was held to violate the Fifteenth Amendment. One of the most effective methods of disfranchising the Negro, and of preserving “white supremacy” in the South, was to keep the Negro from voting in the primary of the ever-dominant Democratic Party. After two attempts to do this by statute had been held unconstitutional, the Supreme Court in 1935, in *Grovey v. Townsend*, held that it could validly be done by a party rule established by the governing body of the party. It is easy, therefore to understand the consternation caused in many parts of the South by the recent decision of the Supreme Court in *Smith v. Allwright*, which overruled *Grovey v. Townsend* and held that Negroes cannot constitutionally be prevented from voting in primary elections. There is not the slightest doubt that the purpose of the “white primary” rule was to disfranchise the Negro. There is not the slightest doubt that the clear and single purpose of the Fifteenth Amendment is to prevent the Negro from being disfranchised. This, however, does not prevent southern leaders from viewing *Smith v. Allwright* with the disappointment and indignation of the man who suddenly finds himself evicted from a plot of land to which he thought he had established title by adverse possession. *Smith v. Allwright* can be accurately appraised only against the background of the whole “white primary” movement and the parallel change in the Supreme Court’s view of the nature and status of primary elections in general.

In 1923, the legislature of Texas made a startling frontal assault upon the problem of Negro voting by providing by statute that “in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot, and not count the same.” It is possible that this

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bold move may have been suggested by the opinion of the Supreme Court two years earlier in *Newberry v. United States*,\(^1\) but without closer knowledge of the legislative history of the Texas statute this cannot be stated as a fact. Newberry had been convicted of violating the Federal Corrupt Practices Act of 1910\(^2\) by spending a great deal more money in his senatorial primary campaign against Henry Ford in 1918 than the statute permitted. The Supreme Court set his conviction aside on the ground that the power of Congress to "make or alter" the regulations effecting the "times, places and manner of holding elections for Senators and Representatives,"\(^3\) which is the delegated power on which the Corrupt Practices Act depends, extends only to *elections* and not to *primaries*. When the framers of the Constitution used the word "election," they meant the final election process, and not any of the preliminary political activity by which candidates are nominated by their respective parties. Thus Congress had no control over congressional primaries and could not validly punish Newberry for his expenditures. While only four justices conurred in this doctrine, five agreed in setting aside Newberry's conviction, and, until the doctrine was repudiated by the Court in *United States v. Classic*\(^4\) in 1941, it was generally supposed that primary elections were unknown to the Federal Constitution, and were therefore beyond its reach or protection.

Whether or not the Newberry decision inspired the Texas legislature to pass its "white primary" statute of 1923, there is no doubt that the lower federal courts in Texas relied heavily upon the *Newberry* case in holding the Texas statute valid. A federal district court refused in *Chandler v. Neff*\(^5\) to enjoin the enforcement of the primary statute on the ground that the Fifteenth Amendment protects the Negro's right to vote in elections but not in primaries, and a similar result was later reached on similar grounds by the federal district court in *Nixon v. Condon*\(^6\). The Texas statute had been promptly challenged as a direct violation of the Fifteenth Amendment by reason of its specific denial to Negroes of the right to vote in primary elections, and it was commonly supposed that this alleged violation of the Fifteenth Amendment was the issue upon which the case would be decided. Now the Fifteenth Amendment forbids the denial on grounds of race of the "right . . . to vote." Certainly if the word "election," used

\(^{11}\) 256 U. S. 232, 41 Sup. Ct. 469 (1921).
\(^{13}\) U. S. CONST. Art. 1, § 4.
\(^{14}\) 313 U. S. 299, 61 Sup. Ct. 1031 (1941).
\(^{15}\) 298 Fed. 515 (1924).
\(^{16}\) 34 F. (2d) 464 (1929).
in Article I of the Constitution, means final election as the Court had said in the Newberry case, it may be plausibly argued that the words “the right to vote,” for the same reasons, mean the right to vote in final elections and not in primaries. The one constitutional interpretation seemed as reasonable as the other.

When the Texas statute came before the Supreme Court, however, in 1927 in the case of Nixon v. Herndon, it was unanimously held unconstitutional in an eight-hundred word opinion by Mr. Justice Holmes, which entirely by-passed the Fifteenth Amendment and never even mentioned the Newberry case. The Court held that the statute plainly discriminated against Negroes because of their race and, therefore, invalidly denied them the equal protection of the laws guaranteed by the Fourteenth Amendment. “We find it unnecessary to consider the Fifteenth Amendment,” observed Mr. Justice Holmes, “because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. . . . States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.”

After the decision in Nixon v. Herndon, the Texas legislature promptly set about repairing its broken fences. It replaced the invalid “white primary” provision by one which read: “every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.” Acting under the statute, the State Executive Committee of the Democratic Party promptly adopted a resolution that “all white democrats who are qualified under the constitution and laws of Texas . . . and none other, be allowed to participate in the primary election to be held” at an announced date. Nixon, whose claims had been upheld in the Herndon case, again tried to vote in the Democratic primary, was refused under the new rule, and again sued for damages. Again he won his case in the Supreme Court. In Nixon v. Condon, however, the Court divided five to four, and a strong dissenting opinion was written by Mr. Justice McReynolds. The issue in the case was not whether Nixon had been denied the right to vote, but whether it was the state which had denied him the right in violation of the Fourteenth Amendment, which can be violated only by state action and not by private

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17273 U. S. 536, 47 Sup. Ct. 446 (1927).
18Id. at 540, 541, 47 Sup. Ct. at 446.
20286 U. S. 73, 52 Sup. Ct. 484 (1932).
action. Speaking for the majority Mr. Justice Cardozo declared that the State Executive Committee of the party, in adopting the rule barring Negroes from membership in the party, was acting under authority conferred upon it by the new statute passed by the legislature. Without this statute the committee would have had no such power, since the party convention, the ultimate repository of party authority, had given it no mandate in the matter. Thus the action of the committee was assimilated to the state, became in consequence state action, and therefore, since it was clearly discriminatory, violated the equal protection clause of the Fourteenth Amendment. The dissenting justices insisted that the action of the committee was the action of a purely private and voluntary group and did not constitute state action, and could not, therefore, violate Nixon's constitutional rights.

As in the *Herndon* case, the Court in *Nixon v. Condon* made no mention of the Fifteenth Amendment, nor did it allude to the highly debatable doctrine of the *Newberry* case, that a primary is not an election and is therefore beyond the reach of any federal constitutional provisions. Furthermore, Mr. Justice Cardozo fairly plainly indicated the next move to be made by the Texas legislature by observing that:

> Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny.\(^2\)

This clearly suggested that while the Democratic Party could not bar Negroes from its primaries if it acted under statutory authorization in doing so, perhaps it might lawfully bar them if that statutory authorization were withdrawn, and the party acted entirely on its own authority.

The hint was promptly taken. The legislature of Texas repealed its authorization to the State Executive Committee of the party to determine party membership. No directions of any kind were put in its place. The party was left entirely on its own and at the next meeting of the state Democratic convention that body, uninstructed by any state law, adopted the following resolution:

> Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations.

Acting under the authority of this resolution, an election official refused an absentee ballot for the Democratic primary to a Negro who demanded it,

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\(^{21}\) *Id.* at 83, 52 Sup. Ct. at 485.
and he thereupon sued for damages. This was the case of Grovey v. Townsend\(^2\) which was decided in the Supreme Court in 1935. This time the Court was unanimous in its decision, and, speaking through Mr. Justice Roberts, held that the discriminatory action of the Democratic Party was not state action, and was not, therefore, in violation of the Fourteenth Amendment. The state legislature had withdrawn its earlier delegation of power to party authorities to determine party membership. The state ceased, therefore, to be a partner in the task of fixing the qualifications for such party membership. The Supreme Court of Texas in Bell v. Hill\(^2\) in 1934, had passed upon the constitutional issue presented in Grovey v. Townsend, and had held that under the constitution and laws of Texas a political party is a "voluntary political association" which has full power to determine who shall be eligible to membership, and as such, eligible to participate in its primaries. The Supreme Court obviously gave great weight to this decision. It was also impressed by the fact that in Texas the cost of conducting party primaries is not borne by the state but by the party members seeking nomination, and the ballots are furnished by the party and not by the state. It was strongly urged upon the Court that nomination in a Texas primary was, and virtually always had been, equivalent to final election, and that denial of the right to vote in the primary was the denial of the right to cast any effective vote.\(^2\) This argument was destined to weigh heavily with the Court in later cases,\(^2\) but Mr. Justice Roberts brushed it aside as irrelevant. As in the two Nixon cases, the Court gave no attention to the question whether party primaries should be regarded as vitally integral parts of the official election machinery of the state, even though the framers of the Constitution had never heard of primaries. It is difficult to read Grovey v. Townsend without feeling that the Court's decision rested upon factors in the Texas situation which were highly technical, if not artificial, and that the essential realities of the case were ignored. There was something strange-

\(^{22}\)22295 U. S. 45, 55 Sup. Ct. 622 (1935).

\(^{23}\)123 Tex. 531, 74 S. W. (2d) 113 (1934). It may be noted that the Supreme Court of Texas in Kay v. Schneider, 110 Tex. 369, 218 S. W. 479 (1920), had distinguished between primaries and elections by holding that a statute conferring voting privileges on women in primary elections was valid on the ground that the constitutional clause limiting suffrage to male citizens did not apply to primaries.

\(^{24}\)In State v. Meharg, 287 S. W. 670, 672 (Tex. Civ. App. 1926), the Texas court had taken judicial notice of this fact by observing: that it was "a matter of common knowledge in his state that a Democratic primary election, held in accordance with our statutes, is virtually decisive of the question as to who shall be elected at the general election. In other words, barring certain exceptions, a primary election is equivalent to a general election."

\(^{25}\)See attention paid to this point in United States v. Classic, 313 U. S. 299, 61 Sup. Ct. 1031 (1941).
ly anomalous and unrealistic about a result which, in spite of the Fourteenth and Fifteenth Amendments, left the one agency in the state of Texas which completely dominates the choice of state and federal officials just as free to bar Negroes from participation in that choice as though it were a Greek letter fraternity or an association of private business men.

_Grovey v. Townsend_ made it possible for any southern state, with a little finesse in juggling its statutory arrangements, to bar Negroes from the primary of the dominant party. Negro disfranchisement of the most effective kind thus received the acquiescence, if not the blessing, of the Supreme Court. The undermining and final reversal of the doctrine of _Grovey v. Townsend_ came about as the result of an unexpected collateral attack, rather than a direct frontal assault. This was in the case of _United States v. Classic_, decided in 1941. This case did not present any issue of racial discrimination under either the Fourteenth or Fifteenth Amendments. It involved the prosecution by the Federal Government of a crooked election official in the city of New Orleans who had altered ballots and falsified the number of ballots cast in a Democratic primary in which candidates for Congress were being nominated. The federal statute on which the prosecution was based made it a criminal offense to conspire to injure any citizen in the "exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States..." To apply this section of the statute to Classic's activities, was to assume that the right of a qualified voter to vote in a congressional primary and to have his ballot honestly and correctly counted is a right guaranteed to him by the Constitution and laws of the United States. This the Court did assume. In an opinion by Mr. Justice Stone, it held that the congressional primary is a vital and integral part of the congressional election machinery of Louisiana. It was strongly influenced in reaching that conclusion by evidence that for more than half a century a candidate's success in the Democratic primary had been tantamount to election, Mr. Justice Stone observed:

The words of sections 2 and 4 of Article I... require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representative in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.\(^{28}\)

Classic had interfered with the citizens' right to participate in this part of

\(^{26}\textit{Ibid.}\)

\(^{27}\textit{Rev. Stat.} \S 5508 (1875), 18 U. S. C. \S 51 (1927).\)

\(^{28}313 U. S. 299, 320, 61 Sup. Ct. 1031, 1040 (1941).\)
the election process and had therefore violated the section of the Criminal Code above quoted. The decision in the Classic case is in direct conflict with what had been commonly regarded as the doctrine of the Newberry case, i.e., that primary elections are not elections within the meaning of the Constitution, but since only four justices had joined in support of this doctrine in the Newberry case, Mr. Justice Stone states, "The question then has not been prejudged by any decision of this Court." 29 In the Classic case, the Supreme Court at last appraised with realistic accuracy the nature and effect of the primary election, and assimilated it into the machinery of elections.

The opinion in the Classic case did not mention Grovey v. Townsend. It was perfectly obvious, however, that the two cases rested on conflicting principles. If, according to the Classic doctrine, a primary election is a vital part of the election machinery of the state, then clearly it is not the non-governmental or unofficial activity of a private voluntary association which Grovey v. Townsend held it to be. Almost at once, steps were taken to bring before the Court for re-examination the constitutionality of the Texas "white primary." In due course, the case of Smith v. Allwright 30 reached the Supreme Court and Grovey v. Townsend was overruled.

The opinion of the Court in Smith v. Allwright, written by Mr. Justice Reed, makes it clear that the Court has been completely won over to the view that a primary election is a vital part of the machinery of government of the modern state. The conduct of a primary election, together with the determination of who shall be allowed to participate in it, can no longer be regarded as a private enterprise to be handled by politicians having no official status and unrestricted by constitutional or statutory rules. Mr. Justice Reed's argument begins with the Classic case. He states:

The fusing by the Classic case of the primary and general elections into a single instrumentality for the choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. 31

It raises sharply the question whether such exclusion of Negroes under the circumstances prevailing in Texas is state action. After viewing the constitutional and statutory provisions relating to political parties and primaries in Texas, the Court reached this conclusion:

We think that this statutory system for the selection of party nomi-

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29Id. at 317, 61 Sup. Ct. at 1039.
30321 U. S. 639, 64 Sup. Ct. 757 (1944).
31Id. at 660, 64 Sup. Ct. at 763.
needs for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. If the state requires a certain election procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state officers, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practised by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. 32

The Court went on to say that, while the privilege of membership in a political party may be no concern of the state under certain circumstances, when that privilege is made a necessary qualification for voting in a primary to select candidates for a general election, "the state makes the action of the party the action of the state." 33 The discrimination here involved accordingly violates the Fifteenth Amendment.

Mr. Justice Roberts, who wrote the Court's opinion in Grovey v. Townsend, dissented in Smith v. Allwright. He did not attempt to reargue the issues on which the case turned, but devoted his opinion to a vigorous protest against the Court's reversal of its earlier decision, and a warning against the growing uncertainty which is being injected into our constitutional law by the Court's apparent willingness to reconsider and overrule any previously decided case with the doctrine of which it does not at present agree. These frequent reversals, of which there have been over twenty since 1937, "bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." 34 He concludes his opinion with this observation:

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions. 35

32 Id. at 663, 664, 64 Sup. Ct. at 765.
33 Id. at 664, 665, 64 Sup. Ct. at 765.
34 Id. at 669, 64 Sup. Ct. at 768.
35 Id. at 670, 64 Sup. Ct. at 768.
A comment of a general nature may be made upon the broader significance of the decision in Smith v. Allwright. It is not to be lightly assumed that this decision has effected or will effect the immediate and complete enfranchisement of the southern Negro in the states in which the "white primary" has prevailed. Since southern primary laws vary from state to state, it is probable that the validity of the laws of each state will have to be brought to the Supreme Court for decision. Furthermore, collapse of the "white primary" as a means of Negro disfranchisement will almost certainly be followed by resort to some other method. It is reported that when Mr. Justice Holmes had finished reading his brief opinion in the case of Nixon v. Herndon, he added the oral comment: "I know that our good brethren, the Negroes of Texas, will now rejoice that they possess at the primary the rights which heretofore they have enjoyed at the general election."36 A few days after the decision in Smith v. Allwright was handed down, Senator Maybank of South Carolina, speaking in the Senate, expressed regret that the Court had reversed Grovex v. Townsend, and went on to say:

Mr. President, the white people of the South will not accept these interferences. We are proud of our section. We know what is best for the white people and the colored people. We are going to treat the Negro fairly, but in so doing we do not intend for him to take over our election system or attend our white schools. Regardless of any Supreme Court decisions or any laws that may be passed by Congress, we of the South will maintain our political and social institutions as we believe to be in the best interest of our people.37

Senator Maybank undoubtedly speaks for the South, and it is this determination to preserve at all costs the principle of "white supremacy" which will almost certainly lead the southern "white primary" states to seek to recover by some other method as much as possible of the ground lost by the decision in Smith v. Allwright.

In the opinion of the present writer, however, the outlawing of the "white primary" may prove to be an important event in the evolution of race relations in the South. The "white primary" as a means for Negro disfranchisement used the method of frank and open discrimination in the primaries against all Negroes because they were Negroes. The exclusion of Negroes was mandatory and complete. The system provided no loopholes whereby the rigor of the discrimination could be softened or lifted in individual cases. No steps away from this complete Negro disfranchise-

37Cong. Rec., April 13, 1944, at 3484-5.
ment could be taken while the "white primary" remained in force. Now the other methods by which southern Negroes are being disfranchised, i.e., the educational and poll tax requirements, do not have this quality of all-inclusiveness and inflexibility, and these are the methods to which the "white primary" states will probably feel impelled to resort. By these methods the Negro's right to vote is denied by discriminatory administration of tests which are fair enough on their face. This, of course, leaves open the possibility of relaxing the rigor with which discrimination against the Negro is actually practised from person to person or from place to place. And this means that no legal barriers stand in the way of the gradual admission into the political life of the South, or sections of the South, of eminently qualified Negroes. Progress in the improvement of race relations may easily be along this path. As Senator Maybank bluntly puts it, the South, even under legal pressure, is not going to enfranchise all of its Negroes as a group. But if it is not compelled by its own laws to deal with them as a group, but is free to deal with them as individuals, it may come about that an ever increasing number of educated and obviously qualified Negroes will ultimately enjoy the right to vote. As progress is made along these lines it might even come about that the present discrimination practised against the Negro by reason of his race, would gradually be replaced by discrimination against the unqualified and ignorant Negro, not because he is a Negro, but because he is unqualified and ignorant. By forcing the South to abandon its group disfranchisement of the Negro through the "white primary," the Supreme Court decision in *Smith v. Allwright* has at least kept the door open for some gradual improvement in the political status of the southern Negro.