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Constitutional Law - Exclusion of Negroes from Voting at Primaries as Party Action or State Action

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NOTES

CONSTITUTIONAL LAW—EXCLUSION OF NEGROES FROM VOTING AT PRIMARIES AS PARTY OR STATE ACTION

Overruling an earlier decision,[1] the United States Supreme Court in *Smith* v. *Allwright*[2] held that the State of Texas was violating the Fourteenth and Fifteenth Amendments of the United States Constitution by permitting the Democratic party to exclude Negroes from voting in primaries.

The point around which the controversy turns is whether the action of the Democratic party is state action or individual party action.[3] State action excluding Negroes from voting is prohibited by the Fourteenth and Fifteenth Amendments.

In *Nixon* v. *Herndon*,[4] a statute providing that ". . . in no event shall a Negro be eligible to participate in a Democratic party primary election held in the State of Texas"[5] was held void as being in violation of the equal protection clause of the Fourteenth Amendment. The statute clearly involved state action directly, and came within the limitation of the Fourteenth Amendment.

After the above decision the legislature of Texas repealed the statute declared unconstitutional and enacted a new law[6] whereby the power was transferred from the State to an agency of the State, a political party.

In *Nixon* v. *Condon*[7] the United States Supreme Court held that the statute made the committee a repository of official power, an agency of the state. The court further held that parties and their representatives have become custodians of official power and that, if heed is to be given to the realities of political life, they are now agencies

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[1] Grovey v. Townsend, 295 U.S. 45, 55 Sup. Ct. 622, 79 L.Ed. 1292 (1935).

[2] Smith v. Allwright, 64 Sup. Ct. 757 (1944).

[3] Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. 18 (1833), stated it is a state action of a particular character that is prohibited by the first section of the Fourteenth Amendment. Individual invasion of individual rights is not the subject matter of the Amendment * * * It nullifies and makes void all state legislation and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which denies to any of them the equal protection of the law * * * These civil rights are guaranteed by the Constitution against State aggression; invasion of these rights by wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings is not prohibited by the Constitution.

[4] Nixon v. Herndon, 273 U.S. 536, 47 Sup. Ct. 446, 71 L.Ed. 759 (1927).

[5] 2 Tex. Laws 2d Spec. Sess., p. 74 (1923).

[6] Tex Laws, p. 193 (1927) "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 * * *."

[7] Nixon v. Condon, 286 U.S. 73, 62 Sup. Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458 (1932).

of the State. The statute was held unconstitutional as violating the Fourteenth Amendment.

After the decision of the court in *Nixon v. Condon,* the legislature of Texas repealed the statutory provision passed upon in *Nixon* v. *Condon,* retaining only laws relating to primary procedure. The Democratic Convention met and passed a resolution reading as follows:

> "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 entitled to participate in its deliberations."

Under the above resolution a Negro was refused a ballot in the party primary in Texas.

The Supreme Court decided in *Grovey* v. *Townsend*[8] that the determination by the state convention of the membership of the Democratic party was a significant change from a determination by the Executive Committee. The former was party action voluntary in character; the latter, as had been held in the Condon case, was action by authority of the State. For a political party to deny a vote in the primary was mere refusal of party membership with which the state had no concern.

In *United States* v. *Classic,*[9] where an action was brought against election officials conducting a primary election to nominate a party candidate for representative in Congress, for wilfully altering, falsely counting, and certifying the ballots, the United States Supreme Court held as follows: "A primary election which is a necessary step in the choice of candidates for election as Representatives in Congress, and which in the circumstances of the case controls that choice is an election within the meaning of Art. I, sections 2 and 4 of the Constitution, and is subject to Congressional regulation. This right of participation is protected just as the right to vote at the election, where the primary is by law made an integral part of the election machinery."

The question arises as to how the inconsistency in the *Grovey* and the *Classic* cases can be explained. It is suggested that *Grovey* v. *Townsend* was overruled *sub silento* in *United States* v. *Classic.*[10] The principal case, *Smith* v. *Allwright,* resolves the inconsistency.

In *Smith* v. *Allwright,*[11] an action was brought by Lonnie Smith against S. E. Allwright, an election judge, for a declaratory judg-

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[8] Grovey v. Townsend, *supra.*
[9] United States v. Classic, 313 U.S. 299, 61 Sup. Ct. 1031, 85 L.Ed. 1368 (1941).
[10] Smith v. Allwright, *supra.*
[11] Smith v. Allwright, *supra.*

ment, and for damages for refusal of defendants to permit plaintiff to cast a ballot in a primary election.

The state by-laws required a certain electoral procedure[12] and prescribed a general election ballot made up of party nominees so chosen as to limit the choice of electorate in a general election for state officers, to those whose names appeared on such ballot.

The Supreme Court emphasizing the existence of the procedural laws held that under such a fact situation, the state endorses, adopts, and enforces discrimination against Negroes practiced by a political party intrusted by state law with determination of qualifications of participants in primary elections; that a state cannot cast its electoral process in a form which permits a private organization to practice racial discrimination.

The right to vote comes from the state,[13] but such right is protected by the Fourteenth and Fifteenth Amendments prohibiting the state from certain discrimination in laying down qualifications for its voters.[14]

A question arises as to whether the action of the political party can ever be entirely divorced from state action. Immediately following the *Smith* v. *Allwright* decision, legislatures of some Southern states enacted bills which separated the Democratic primary from state government control. Future primaries were to be operated entirely under party rule, without government sanction, prohibition, or direction. The problem is whether this procedure severs the bond between party and state. The answer would seem to be that it does not. The state and political party can never be entirely separated where primaries are held and the successful candidate of the party primary is made a candidate in the general election. The state by accepting the result of the primary would ratify it, making the unlawful act of the so called separated party primary its act. Any discrimination would therefore be state action. The state and its political parties are too interdependent to be ever entirely separated from each other. The results of the latter must be used in the former.

[12] Vernon's TEXAS STATUTES, Article 3118, provides for the election of a county chairman. Article 3134—The state convention has authority to choose the state executive committee and its chairman. Article 3139—Candidates for offices to be filled by election are required to be nominated at a primary election, if the nominating party cast over 100,000 votes at the preceding general election. Article 3103—Each precinct primary is to be conducted by a presiding judge * * *. Article 3109 prescribes the form of the ballot. Article 3108 requires each candidate to pay a fair share of the cost of the primary.

[13] Pope v. Williams, 193 U.S. 621, 24 Sup. Ct. 573, 48 L.Ed. 817 (1904); Mason v. Missouri, 179 U.S. 328, 21 Sup. Ct. 125, 45 L.Ed. 214 (1900); United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1874).

[14] Guinn v. United States, 238 U.S. 347, 35 Sup. Ct. 926, 59 L.Ed. 1340 (1915); Pope v. Williams, *supra*; James v. Bowman, 190 U.S. 127, 23 Sup. Ct. 678, 47 L.Ed. 979 (1903); State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 35 L.R.A. (N.S.) 353 (1910).

Unlike an election of a club, the results do not remain within the party primary itself, but the successful candidate's name is placed for nomination in the general election. It can be readily seen that the party primary is an integral part of an election and cannot be separated from it, no matter what methods are used.

Another question is whether the individual's right to vote in a municipal or state election is protected under the Constitution. *Myers* v. *Anderson*[15] holds: While the Fifteenth Amendment does not confer the right of suffrage on any class, it does prohibit the States from depriving any person of the right of suffrage whether for federal, state, or municipal elections.

The Fifteenth Amendment expressly protects the right to vote. The right to run for a state office, if protected by the Federal Constitution, must then be protected by the Fourteenth Amendment.

In *Snowden* v. *Hughes*,[16] petitioner's alleged cause of action was that members of the State Primary Canvassing board, acting as such, but in violation of state law, had by their false certificate or proclamation, and by their refusal to file a true certificate, deprived petitioner of nomination and election for representative in the state assembly.

The petitioner, in bringing his action, relied on the provisions of the Fourteenth Amendment.

The opinion states as follows:

> The right to become a candidate for state office is a privilege of state citizenship and is not protected by the privileges and immunities clause.[17]

An unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause.[18]

A violation of the statute is not, without more, a denial of equal protection of the laws. There must be a showing of clear and intentional discrimination.[19] Thus, the United States Supreme Court indicates that the right to run for an office is protected only by the equal protection of the laws clause when intentional discrimination is shown.

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[15] Myers v. Anderson, 238 U.S. 368, 35 Sup. Ct. 932 59 L.Ed. 1349 (1915).
[16] Snowden v. Hughes, 64 Sup. Ct. 397 (1944).
[17] In Re Slaughter-House Cases, 16 Wall. 36, 74, 79, 21 L.Ed. 394 (1873); Maxwell v. Bugbee, 250 U.S. 525, 538, 40 Sup. Ct. 2, 5, 63 L.Ed. 1124 (1919); Breedlove v. Suttles, 302 U.S. 277, 283, 58 Sup. Ct. 205, 82 L.Ed. 252 (1937).
[18] Taylr and Marshall v. Beckham, 178 U.S. 548, 20 Sup. Ct. 1009, 44 L.Ed. 1187 (1900); Cave v. State of Missouri ex rel Newell, 246 U.S. 650, 38 Sup. Ct. 334, 62 L.Ed. 921 (1918).
[19] Gundling v. City of Chicago, 177 U.S. 183, 186, 20 Sup. Ct. 633, 635, 44 L.Ed. 725 (1900); Ah Sin v. Wittman, 198 U.S. 500, 507, 508, 25 Sup. Ct. 756, 758, 759, 49 L.Ed. 1142 (1905); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1880).