THE WHITE PRIMARY LAWS IN TEXAS FROM 1923 TO 1953

THESIS

Presented to the Graduate Council of
Southwest Texas State University
in Partial Fulfillment of
the Requirements

For the Degree of

MASTER OF ARTS

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San Marcos, Texas

May, 1971

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

The writer would like to express his appreciation for the assistance received during this study. It is a pleasure to mention specifically those who served on the committee. Dr. Everette Swinney, who served as chairman, has rendered invaluable help and suggestions. Dr. Billy Ray Brunson and Dr. Miner L. Weems likewise have given aid and encouragement. The writer also wishes to extend thanks to his wife, without whose encouragement and assistance this work could not have been accomplished.

INTRODUCTION

The emergence of constitutional democracy in the United States during the latter part of the eighteenth century produced innumerable problems as well as benefits. The new republic found herself in the position of having to convert the lofty ideals contained in her constitution into a viable reality.[1] Among the problems that ultimately plagued the government was the institution of slavery, which had deeply entrenched itself in the nation, especially in the South.[2]

Beginning about 1830 Northern abolitionists began to pressure the South to emancipate the Negro. By 1850, one aspect of the general issue, whether or not slavery

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[1]For further treatment regarding the conflict of these ideas in the United States, see Chilton Williamson, American Suffrage: From Property to Democracy, 1776-1860 (Princeton: Princeton University Press, 1970).

[2]Alice Felt Tyler, Freedom's Ferment: Phases of American Social History to 1860 (Minneapolis, University of Minnesota Press, 1944), pp. 463-472.

should be extended into the territories, created a dangerous crisis. The Compromise of 1850 attempted to improve relations by allowing the new territories to come into the Union in the future with or without slavery as their constitutions might provide at the time of their admission and by ending the slave trade in Washington, D. C.[3] Both the North and South approved of the compromise, but it was at the most a temporary settlement which could not hold together two sections with such disparate interests. Each became more certain that the other must make extensive political and social changes if the Union were to be maintained.[4] With the election of Lincoln and the elevation of the Republican Party to power in 1861, ten states in the South followed South Carolina in seceding from the Union. Thus, after thirty years of acrimonious debate, the Civil War came.[5]

By 1864, Congress had begun work on a post-war settlement which would resolve once and for all those

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[3]Carl Russell Fish, The Rise of the Common Man, 1830-1850 (New York: MacMillian Company, 1946), pp. 313-323.

[4]Paul Lewinson, Race, Class and Party (New York: Russell and Russell, 1963), pp. 5-16.

[5]James Truslow Adams, The March of Democracy: Civil War and Aftermath (New York: Scribners, 1965), pp. 6-24.

issues which had so long plagued the nation. Fixing the status of the Negro was, of course, basic. The ratification of the Thirteenth Amendment in 1865 paved the way for two additional amendments designed to secure the rights of Negroes.[6] The Fourteenth Amendment, ratified in 1868, extended citizenship to the emancipated Negro by providing that: "all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the state wherein they reside."[7] It also provided that:

> No state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.[8]

Although the Fourteenth Amendment did not confer the right to vote, it did provide that when the privilege is withheld from a citizen by any state except as a

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[6]William Gillette, The Right to Vote: Politics and Passage of the Fifteenth Amendment (Baltimore: John Hopkins Press, 1965), p. 21.

[7]U. S. Constitution, Amendment XIV, Sec. 1.

[8]Ibid.

penalty for a crime, that "the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such states."[9] The passage and ratification of the Fifteenth Amendment in 1870 attempted to resolve the suffrage question by guaranteeing the Negro the right to vote. The amendment forbade both federal and state governments from attempting to deny the franchise to any person because of race, color, or previous condition of servitude.[10]

The enactment of these three "Civil War Amendments" did not automatically enable the Negro to enter the mainstream of American life. In the South numerous obstacles were erected in an attempt to circumvent the Fourteenth and Fifteenth Amendments. For example, various methods were developed to disenfranchise the black, such as literacy tests, understanding requirements, poll taxes, and the white primary. The latter was one

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[9] Ibid.

[10] U. S. Constitution, Amendment XV, Sec. 1. See also Robert K. Carr, Federal Protection of Civil Rights (Ithaca: Cornell University Press, 1947), pp. 35-55.

of the more effective methods.[11] Invented by Democratic conventions held in Mississippi in 1890, white primary laws proved to be an effective way of disenfranchising the Negro.[12]

In 1923, the state of Texas became the first Southern state to place a white primary law on its statutes. Similar laws were later enacted by every Southern state except Florida, North Carolina, and Tennessee. The passage of the Texas law was important because litigation growing from it eventually ended the white primary laws not only in Texas, but throughout the South as well.[13] It is the purpose of this thesis to trace the evolution of the Southern white primary laws from their inception in the latter part of the nineteenth century to their invalidation in the mid-part of the twentieth. Particular attention will be paid to Texas in the period from 1923-1953, and the numerous court cases contesting the white primary laws in this state will be emphasized.

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[11] V. O. Key, Southern Politics: In State and Nation (New York: Knopf, 1949), p. 619.

[12] Lewinson, Race, Class and Party, p. 112.

[13] Acts, 39th Texas Legislature, Second Called Session, 1923, p. 74.

CHAPTER I

BACKGROUND TO THE ENACTMENT OF THE WHITE PRIMARY LAW IN TEXAS

Radical Reconstruction, which began with the passage of the Reconstruction Act of March 2, 1867, provided for the establishment and administration of a vigorous and comprehensive military government throughout those states in the South, excepting Tennessee, which had not participated in the Civil War. In order to insure the Negro the full benefit of his newly-acquired political rights, Congress required that the restoration of states should be effected only after they were reorganized on the basis of general Negro enfranchisement and limited rebel disfranchisement.[1] Reconstruction, which was more difficult to bear than defeat itself, served to unify the whites in the deep South, which had been by long

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[1]William A. Dunning, Reconstruction: Political and Economic (New York: Harper and Brothers, 1907), p. 93.

tradition divided.[2]

Following the intervention of Congress, local groups throughout the South began organizing conservative parties in order to oppose federal policies. The political bankruptcy of the Radical-Negro coalition, which was becoming more evident by the late 1860's, resulted in the defection of numerous moderate Republicans into these conservative parties. The first significant step leading to the return of the Southern whites to political power occurred when a conservative government was elevated to power in Tennessee in 1869.[3] The doom of the Radical-Negro alliance was sealed in the presidential election of 1876. The Hayes-Tilden Controversy, which had resulted in a deadlock, provided the South with an opportunity to engineer a compromise. In the states where elections were in dispute, the electoral college votes were given to the Republicans in return for a promise from Hayes to order the withdrawal of all federal troops from the South by 1877. Following the

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[2]John Hope Franklin, From Slavery to Freedom (New York: Alfred A. Knopf, 1967), p. 315.

[3]Robert Cruden, The Negro in Reconstruction (Englewood Cliffs, New Jersey: Prentice-Hall, 1969), p. 113.

ascension of Hayes to the Presidency and the subsequent withdrawal of all Federal troops, the South was once again in the position to implement those changes deemed necessary under the direction of its own political leaders.[4]

Beginning in 1877 and extending into the first years of the twentieth century, two parallel developments commanded the attention of the South: (1) the numerous problems presented by enfranchising the Negro, and (2) the acute political divisions that had emerged among the various white groups. The Negro suffrage problem was met by a series of statutes passed by states throughout the South designed to minimize the Negro vote. Two of the most important devices were the gerrymander and highly centralized election codes. The Democratic legislatures also provided for the centralization of local government, poll tax requirements, and confusing registration schemes which complicated the balloting process.[5]

The elimination of the Negro from the political

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[4]Lewinson, Race, Class and Party, pp. 54-55.

[5]Ibid., pp. 61-65.

sphere in the midst of the Reconstruction period created circumstances that necessitated his return. By 1880, the menace of Black Republicanism had almost disappeared, dissipating the great cohesive force among Southern whites. Almost immediately, sharp class lines were drawn and irregularity in party voting became quite common. Now that the Southern farmer did not fear "Negro rule," he became more concerned with the agrarian depression, often blaming the dominant white group for farm ills. The emergence of the Populist Party, emphasizing a limited type of equalitarianism, provided the farmer with an opportunity to ally with the Negro to defeat the ruling white Democrats.[6] In 1892, the Populists sought to win the Negro vote in most of the Southern states, and in many instances resorted to desperate means to secure the franchise for Negroes. White conservatives deeply resented the political resurgence of the Negro since they were unable to control him. Thus, as the Negro returned to prominence, either as an elector or as an election issue, sentiment against his

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[6]C. Vann Woodward, The Strange Career of Jim Crow (New York: Oxford University Press, 1966), pp. 60-64.

participation in politics grew.[7]

This new threat of black domination left the white South with two distinct alternatives: to leave things in the existing condition or to unify in order to disfranchise the Negro. Maintenance of the status-quo was unthinkable to the vast majority of Southern whites. It was argued that as long as the Negro could vote, there was no way to prevent fraudulent practices by opposing parties. Many of the leading politicians from the different parties were thoroughly disgusted with the corruption inherent in the existing situation. The only workable solution was to completely disfranchise the Negro. On this point, most of the Southern white populace agreed. The only differences of opinion that emerged concerned the methods to be used. A popular view was that only intelligent property owners should be granted the use of the ballot. Yet, there were some who opposed such stringent measures, since numerous poor and uneducated whites would also be disqualified.[8] The sponsors of stricter suffrage rules had to be certain

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[7]Franklin, From Slavery to Freedom, pp. 334-336.

[8]Lewinson, Race, Class and Party, p. 79.

that they would not contravene the Constitution, despite the fact that the federal courts had shown no great interest in strictly enforcing the Fifteenth Amendment.[9]

In a succession of constitutional conventions held between 1890 and 1910, seven Southern states, following Mississippi's example, proceeded to disfranchise the Negro. The requirements enacted by the states were on the whole similar.[10] They perpetuated, in the first place, certain devices of the statutory election codes: some form of tax was to be paid by the applicant for registration; registration was to take place months before the actual vote was taken; and a receipt for taxes was required to be shown to either registration officials, or elected officials, or both. Among the new features introduced were poll taxes, property qualifications, literacy tests, and residence requirements. To safeguard

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[9]The most prominent cases surrounding the Fifteenth Amendment during this period were: U.S. v Reese and U.S. v Cruikshank. The court took the position that no positive grant of suffrage was implied in the Fifteenth Amendment. In order for any grievance pertaining to suffrage to become a Federal case, it must be on the grounds of race, color, or previous condition of servitude. The effect was that it left the Southern states the right to settle their own problems. Consult Sidney A. Jones, "The White Primary," National Bar Journal, II (March, 1945), pp. 11-14.

[10]Woodward, The Strange Career of Jim Crow, pp. 83-84.

whites who either owned no property or could not meet the literacy requirements, the "grandfather clauses" were devised. For a period of ten years after the adoption of these constitutions, permanent registration without tax or other prerequisites was bestowed upon persons who had served in the federal or confederate armies and their descendants, and to persons who had voted in elections prior to 1861 and their descendants.[11]

Of the several devices that were used to eliminate the Negro's vote, the white primary was perhaps the most effective as well as the most controversial. The white primary was based upon a declaration by the Democratic party authorities in each state that only white men were eligible to membership in the party and participation in the primary elections.[12] While white men of known Republican sympathies were generally permitted to vote in the Democratic primaries, only under exceptional circumstances were Negroes granted this privilege. Since nomination by the Democratic party was equivalent to election in all state-wide and local contests in the South, elimination

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[11]Lewinson, Race, Class and Party, pp. 80-81.

[12]Ibid., p. 111.

from the primary constituted, for all practical purposes, disfranchisement.[13]

The origin of the white primary in the South is found in local or county party rules of the Democratic party, which became prominent in the latter part of the nineteenth century as a method of excluding the Negro from the old precinct primary and from the newer local direct primary. This method transferred the function of nominating candidates for local and county office from delegate conventions to the rank and file of the Democratic party membership. This was the forerunner of the state-wide primary and had been adopted by most states in the South before 1900.[14] A local rule prohibiting Negroes from participating in either type of primary was sufficient since state-wide and district nominations were still in the hands of district or delegate conventions.[15]

At the very beginning all regulations concerning

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[13] O. Douglas Weeks, "The White Primary," Mississippi Law Journal, VII (Dec., 1935), pp. 135-136.

[14] James H. Booster, "The Origin of the Direct Primary," National Municipal Review, April, 1935, pp. 222-223.

[15] Texas Alamnac (Dallas, 1904), p. 37.

participation in Democratic party affairs were merely party regulations with which the state had no concern. After 1888, statutes were frequently enacted by state legislatures for the purpose of regulating the organization and activities of the party. Frequently these laws enumerated certain voter qualifications which were required of persons desiring to participate in the local, precinct, or district primaries.[16] After listing these qualifications, the laws generally added a statement similar to the one passed in Texas in 1903 which stated: "that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries."[17] While these statutory requirements were not intended to be exclusive, the inherent power residing in the party authorities to adopt rules of party membership was

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[16]C. E. Merrian and L. Overacker, Primary Elections (Chicago: University of Chicago Press, 1928), chaps. ii and iii. The passage of the Terrell Election Law in 1906 still allowed for actual nominations to be made by the convention, but the vote of each county represented at the convention was prorated among the candidates selected by the various county officials.

[17]General Laws of Texas, 29th Legislature, Regular Session 1903, Ch. 101.

recognized.[18]

With the enactment of state-wide mandatory or optional direct primary laws, the state party authorities in some states were recognized as having residual rule-making power to supplement the statutory qualifications for party membership and for participation in both the state-wide and local primary elections. The effect was that statutes which extended to the primary elections the requirements for participation in general elections specifically recognized the right of all parties to additional rules of eligibility. In no state did the law specify whether such rules were to be made by state or local party authorities.[19]

In 1923, Texas became the first state to attempt to place a white primary provision in the state statutes. This action was prompted by several developments which had begun in 1918 in Bexar, McLennan, and Harris counties. Two men of Bexar county, D. A. McAskill and J. W. Tobin, were engaged in a heated contest for the

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[18]Weeks, "The White Primary," p. 137.

[19]Ibid., p. 138.

office of district attorney. Prior to this time, Negroes had been admitted to the Democratic primaries in Bexar county, although the central committee of the Democratic party had passed a resolution barring them from participation. In previous primaries both McAskill and Tobin had received the support of Negroes, and both counted on the support of Negroes in return for past favors. In the election, the blacks overwhelmingly voted in favor of Tobin, thereby defeating McAskill. Following the election, McAskill began campaigning for a statutory provision that would bar the Negro from participating in Democratic primaries throughout the state. His campaign portrayed the Negro electorate as being Republicans that were illegally herded into Bexar County to swell the vote for Tobin.[20]

The same year, Waco blacks had taken issue with the white primary laws in their city. On February 12, 1918, in an injunction suit filed by several Negroes against E. L. Duke to restrain the holding of a white primary election, Judge E. F. Clark,

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[20]Lewinson, Race, Class and Party, p. 111.

presiding over the Nineteenth District Court, ruled that keeping Negroes from voting in the primaries was a violation of federal law.[21]

During the early part of 1921, a group of Houston Negroes applied for an injunction in the district court to restrain the City Democratic Executive Committee and the election judges from holding a white primary. The district court held that the question of voting under the primary election statutes was a political and not a legal one: therefore it had no jurisdiction to interfere with the action of the Executive Committee. The plaintiffs appealed to the First Court of Civil Appeals which dismissed the suit. They then sued on a writ of error to the Supreme Court of Texas, which also dismissed the case for want of jurisdiction and refused to write an opinion. The case was then taken to the United States Supreme Court on a writ of error. This court dismissed the case on the ground that the cause of action had ceased to exist. (The rule promulgated by the Democratic Executive Committee was for a single election only and that had taken place long

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[21] "The Negro and Texas Democratic Primary," Negro Yearbook, 1932, p. 99.

before the decision of the appellate court.) The court ruled that the constitutional rights of the plaintiffs in error were not enfringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was asked.[22]

In 1922, Negroes voted in the Democratic primary in San Antonio in spite of the growing opposition led by McAskill which was gaining state-wide attention. Reacting to the Negro vote in the Democratic primaries, the committee of salaries and platforms recommended to the State Democratic Convention that:

> In view of the fact that certain counties in this state have not adhered to the recommendations of the state Executive Committee to exclude Negroes from participating in the primary elextions, we direct our incoming legislatures to so amend the law as to forever exclude Negroes from participating in any Democratic primary election held in any county of this state.[23]

Following this recommendation Texas proceeded to

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[22]Ibid., p. 99.

[23]The primary source of this statement was unobtainable. It was quoted in "The Negro and Texas Democratic Primary," Negro Yearbook, 1932, p. 99.

disfranchise the Negro through state statutory law. The legal basis for this procedure was based in part on Newberry v United States, a 1921 decision of the United States Supreme Court.[24] Newberry had been convicted of violating the federal Corrupt Act of 1910 by spending more money in a senatorial campaign than was allowed by the statute. The Supreme Court set aside Newberry's conviction on the ground that the power of Congress to "alter or make" the regulations effecting the"times and places and manner of holding elections for Senators and Representatives" extended only to elections in the strict sense of the word and not to primaries.[25]

On May 1, 1923, Senator R. S. Bowers introduced a bill in the Texas Senate which stated that:

> any qualified elector under the laws and constitution who is a Democrat shall be eligible to participate in Democratic primaries, but

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[24]Robert E. Cushman, "The Texas White Primary Case," Cornell Law Quarterly, XXX (1944-45), p. 68, takes the position that although one cannot be absolutely certain how much the Texas legislature relied on this decision which was rendered by the Supreme Court in 1921, there is no doubt the lower federal courts in Texas relied heavily upon this decision in holding the statute valid.

[25]256 U. S. 232.

> declaring that in no event shall a negro participate in a Democratic primary in the state of Texas, and declaring ballots cast by Negroes as void.[26]

Following the reading of the bill, it was assigned to the Senate Committee of Privileges and Elections for further consideration. One week later, on May 8, Senator Bowers moved that the rule which required bills to be read on three separate days be suspended and that a vote be taken immediately on Senate Bill No. 44. The motion was accepted, and Senate Bill No. 44 was unanimously passed.[27] The same day the bill was sent to the House for reading and consideration. On May 9, following the second and third readings, the bill was passed by the House by a vote of ninety-two to ten.[28] Representative R. A. Baldwin, the only member to abstain, stated: "I seriously doubt the constitutionality of Senate Bill No. 44, expressly disenfranchising Negroes in primary elections, and I see in it legal complications and many contests of primary elections."[29]

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[26] Senate Journal, 38th Legislature, 2nd Session, 1923, p. 112.

[27] Ibid., p. 232.

[28] House Journal, 38th Legislature, 2nd Session, 1923, p. 377.

[29] Ibid., p. 378.

The enactment of the law meant that protection of party was to come from the state, for under the statute, state sanction was given to the exclusion of Negroes from primaries. The statute was "a pioneer in legislation of its sort." As one observer put it, "nothing like it was ever attempted in Texas before, and so far as is known, there is nothing akin to it in the statutes of any State."[30]

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[30] San Antonio Express, April 6, 1924, p. 3.

CHAPTER II

NIXON V HERNDON

On July 26, 1924, a Democratic primary election was held in El Paso, Texas,[1] in order to nominate candidates for federal and state offices. At this time, L. A. Nixon, a Negro physician and regular Democrat, who had voted in previous primary elections, was refused a ballot by the election judge, C. C. Herndon.[2] This denial of a ballot to Nixon was based on a law, Article 3093, enacted during the Second Called Legislature of 1923 which stated:

> any qualified elector under the laws and constitution who is a Democrat shall be eligible to participate in Democratic primaries, but declaring in no event shall a negro participate in a Democratic primary in the State

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[1]From the inception of the dual primary system in 1918 which lasted until 1960, the first primary was held on the fourth Saturday in July and the second on the fourth Saturday in August. The dates were changed to May and June by the legislature in 1959.

[2]Loren Miller and Harold Sinclair, "Justice Holmes and the Civil War Amendments," National Bar Journal, VI (June 8, 1948), p. 106.

of Texas, and declaring ballots cast by negroes as void.[3]

Nixon brought suit against Herndon in the District Court of the United States for the Western District of Texas to test the constitutionality of the law and to collect for damages resulting from the denial of his right to vote. He argued that the Fourteenth and Fifteenth Amendments had been violated, and he petitioned the court to invalidate 3093. After hearing Nixon's argument, the court ruled that his rights had not been violated and dismissed the case.[4]

Subsequently, Nixon entered a plea before the United States Supreme Court on January 4, 1927, in order to reverse the decision of the District Court as well as the Fifth Circuit Court of Appeals in New Orleans.[5] His attorneys, Fred C. Kollenberg, A. B. Spingarm, Louis Marshal, Moorfield Storey, James A. Cobb, and Robert Channel, submitted briefs contending that when the Fifteenth Amendment was enacted, its purpose was to provide the Negro immunity from

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[3]Senate Journal, 38th Legislature, 2nd Session, 1923, p. 112.

[4]Nixon v Herndon, 273 U. S. 539 (1927).

[5]This case was not recorded except in the United States Supreme Court Reports.

discrimination in voting on account of his race or color. They further argued that the Negro had acquired the same privilege and right as the white man to make his choice concerning political parties and candidates. When a person casts a ballot in a primary election, established and regulated by state law, it is an act of voting within the meaning of the Fifteenth Amendment. The state of Texas, which had enacted this law in order to exclude Negroes from the right of participation in the primary election, had violated not only the Fifteenth Amendment, but also the equal protection clause of the Fourteenth.[6]

C. C. Herndon, the defendant, though not present, was represented by Claude Pollard and D. A. Simmons, Attorney General and First Assistant Attorney General of Texas, respectively. They maintained that the Democratic party was a voluntary organization of individuals who had come together in order to advance certain political beliefs. In this respect, a political party was no different from any other organization formed for the purpose of advancing a cause or

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[6]Nixon v Herndon, pp. 536-537.

idea. The guarantees of the Fifteenth Amendment did not apply to all elections, but only to those within the strict sense of the amendment. Since nominating primaries were unknown at the time of the adoption of both the United States Constitution and the Texas Constitution of 1876, it was impossible to identify a primary as an election. The defense further maintained that the question of parties and their regulation was a political one rather than a legal one; therefore, persons who were denied participation in the nominating process could not petition the court for a redress. The Attorney General closed his argument by citing Chandler v Neff decided three years earlier by the Fifth Circuit Court of Appeals.[7] Hurley C. Chandler, a Negro, had contested the "white primary law" of Texas in 1924 on the ground that it violated the Fourteenth and Fifteenth Amendments. The Fifth Circuit Court had ruled that the denial of the right to vote in a Democratic primary was not a right included in the "privileges and immunities" clause of the Fourteenth Amendment. Moreover, primaries were merely nominating devices and were "in

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[7] Ibid., pp. 537-539.

no sense elections for office." A state through its police powers could regulate primary elections and prescribe party tests.[8]

On March 7, 1927, Justice O. W. Holmes delivered the opinion for the majority in Nixon v Herndon. Holmes rejected the argument that the question of primaries was political rather than legal. Although Nixon maintained that the Fourteenth and Fifteenth Amendments had both been violated, the court felt that it was unnecessary to consider the Fifteenth Amendment because of the direct and obvious infringement of the Fourteenth.[9] Quoting from a previous case, Buchanan v Warley, Justice Holmes remarked that the Fourteenth Amendment

> not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against by law because of their color.[10]

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[8]Chandler v Neff, 298 F. 515 (1924).

[9]Nixon v Herndon, pp. 540-541.

[10]Ibid., p. 541.

The court concluded that since the Texas statute did discriminate against the Negro on the basis of color and race alone, it violated the equal protection clause of the Fourteenth Amendment. The law was declared to be unconstitutional, thus reversing the previous judgments of the lower courts.[11]

This decision produced varied reactions throughout the nation. In the North, the ruling was met with considerable enthusiasm. The Nation wrote that it was "a decision in the spirit of Massachusetts in the Abolitionist days of Justice Holmes's youth, when liberty was still a living part of the American tradition."[12] The New York Times stated: "This is the first time that the Supreme Court has pronounced on a clear issue of the right of black men, as compared with white, under the constitutional amendments adopted after the Civil War." As the Times explained:

> A law barring the colored men from the Democratic primary was unnecessary and also offensive, and raised the constitutional issue in a way which, when fought through from the lower courts as it has been by the Association which has made a speciality of seeking to

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[11] Ibid., p. 541.

[12] Editorial, Nation, March 16, 1927, p. 275.

> secure the rights of Negroes through the courts, the Supreme Court could not avoid passing upon positively. This it has now done, and the result will be something like a judicial landmark, besides being big with political consequences.[13]

The New Republic, while voicing approval of the court's decision as eliminating "one more barrier to the growing racial self-respect of the Negro," did not feel the Negro's right to vote had been secured. It was the editor's opinion that "Texas will undoubtedly find some other way to maintain this disfranchisement."[14]

In Washington, several members of Congress viewed the decision as a vindication of the theory that the federal government has authority over state primary elections. Senator W. E. Borah of Idaho believed that the court's ruling indicated that the federal government possessed jurisdiction to regulate state and primary elections. The New York Times pointed out that the Supreme Court had adopted the reasoning of Justice White, who had dissented in the Newberry case.[15] Justice White held that a primary election could not be disassociated from a general election, and that Congress possessed the

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[13] New York Times, March 8, 1927, p. 6.

[14] Editorial, New Republic, March 16, 1927, p. 80.

[15] New York Times, March 8, 1927, p. 1.

power to enact legislation affecting both.[16] Some federal officials believed that the court's ruling would lead to the introduction of bills on primary elections in the new Congress. James Weldon Johnson, Secretary of the National Association for the Advancement of Colored People, commented that this ruling was "one of the most far reaching since the Civil War."[17]

The general feeling in Texas and throughout the South was that the law had been unwise and that the matter of excluding Negroes from the Democratic Party should have been left to party officials. The San Antonio Express seriously questioned whether the state and county Democratic committees, let alone the commonwealth, could bar Negroes from their party primaries so long as the voting in such primaries actually was conducted under the regulation and protection of state civil and penal laws.[18] State Democratic officials expressed concern over the possibility that a solid

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[16]Newberry v United States, 256 U. S. 232 (1921).

[17]New York Times, March 8, 1927, p. 6.

[18]San Antonio Express, March 9, 1927, p. 12.

Negro vote could control primary elections in various sections of Texas. At the same time it was acknowledged that the practical effects of the law's displacement would be almost negligible since few Negroes qualified to vote even in general elections. D. W. Wilcox of Georgetown, chairman of the State Democratic Executive Committee, said that he thought that it would be impractical to call any meeting of the Committee at the present time, "even if such should be adjudged desirable."[19]

Governor Dan Moody believed that legislation should be enacted that would authorize Democratic party committeemen to formulate rules to supplant the Texas statute prohibiting Negro voting in the Democratic primaries. In emphasizing this point, the governor stated:

> Some legislation will be necessary to protect the ballot and give that guaranty of good government which the voided statute was designed to offer. . . .Certainly the legislature can give the Party Executive Committee power to fix qualifications of primary voters. I take it that such a statute would not contravene the Fourteenth Federal Amendment.[20]

Former Attorney General W. A. Keeling thought that "All

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[19] Austin American, March 8, 1927, p. 1.

[20] New York Times, March 8, 1927, p. 6.

that is necessary is to empower all political parties to determine for themselves the membership of such political parties."[21]

Texas ultimately followed this course of action. On May 26, 1927, Representative E. W. Smith introduced House Bill No. 57 which proposed to give "the executive committees of the political parties within this State the authority to determine the qualifications of the voters of such parties."[22] Following the second and third readings of the bill on May 30, it was moved that Article 3107 of the Revised Civil Statutes of Texas be amended as follows:

> Nothing in this chapter shall be taken to prevent any political party, through its State Executive Committee, or its State Convention from determining and prescribing the qualifications for membership, and for the voting therein to secure adherence to its tenets, principles, and qualifications, for the accomplishment of its objects and purposes as lawfully exercised and practiced by said party aforetime.[23]

Representative H. L. Foulk, fearing that the amendment if

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[21] San Antonio Express, March 9, 1927, p. 4.

[22] House Journal, 40th Legislature, 1st Called Session, 1927, p. 210.

[23] Ibid., p. 244.

passed could be used to discriminate against those who owned no property, moved that an amendment be added to the amendment providing that: "no State Executive Committee of any political party shall ever disqualify any person for failure to own property, real or personal."[24] Representative A. E. Nabors expressed concern that the amendment, as it stood, could be construed in such a way as to bar persons who held views that were alien to the Democratic party. He moved that a further amendment be added stating:

> That no person shall be denied the privilege of voting at any election merely because of the former political views held by such voter, nor because he may or may not belong to some secret order or any kind of organization other than some other political party.[25]

After the amendment had been adopted, Representative Smith offered a resolution which called for the elimination of all previous amendments to Article 3107 and moved the substitution of another amendment:

> Allowing political parties to determine and prescribe qualifications for membership, and for voting therein, to secure adherence to its tenets, principles, and qualifications for the accomplishment of its objects

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[24] Ibid., p. 244.

[25] Ibid., p. 244.

> and purposes, as lawfully exercised and practiced by said party aforetime.[26]

This amendment was then adopted by the House with a vote of seventy-seven in favor and twenty-two opposed. Representative A. R. Stout, one of the members of the House who voted against the measure, considered the bill doomed because it violated the United States Constitution. Several other members of the House believed that it was "far more dangerous to entrust our whole political destiny to a few men, than the scare of the Negro question could ever be."[27]

On June 1, 1927, House Bill No. 57 was received by the Senate and sent to the Committee on Privileges for consideration. The bill was returned the same day with a recommendation that it be amended and passed.[28] The following day the Senate changed the wording:

> . . .every political party in this state through its State Executive Committee shall in its own way determine who shall be qualified to vote or otherwise participate in a primary in this State because of former political views or affiliations, or because of membership

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[26] Ibid., p. 246.

[27] Ibid., p. 302.

[28] Senate Journal, 40th Legislature, 1st Called Session, 1927, p. 344.

> or non-membership in organizations other than the political party.[29]

The bill was then passed by the Senate and returned to the House. On June 7, the House, after concurring with the Senate amendments, sent it to Governor Moody for his signature.[30]

Following the enactment of this law, the State Executive Committee of the Democratic party adopted the following resolution:

> . . .all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928 [sic] . . . .[31]

Both the statute and the subsequent action of the State Executive Committee of the Democratic Party barring Negroes from participation in the primary election proved to be unwise. The denial of the ballot to Texas Negroes initiated the second part of his struggle to obtain equal suffrage.

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[29] General and Special Laws of Texas, 39th Legislature, 2nd Called Session, 1923, Ch. 32.

[30] House Journal, p. 599.

[31] Resolution of State Executive Committee of the Democratic Party of Texas, 34 F. 2d 465 (1929).

CHAPTER III

NIXON V CONDON

A Democratic primary election was held in El Paso, Texas, on July 28, 1928, for the purpose of nominating candidates for federal and state offices. It was at this time that L. A. Nixon, a Negro physician and regular Democrat, attempted to vote. He was refused a ballot by the election judge, James Condon, on the sole ground that the State Executive Committee of the Democratic party had passed a resolution prohibiting Negroes from participating in the primaries. Nixon subsequently commenced a suit against Condon in the United States District Court for the Western District of Texas, Judge C. A. Boynton presiding.[1]

Nixon was represented by Fred C. Knollenberg and E. F. Cameron of El Paso and Louis Marshall of New York City. Counsel for Nixon argued that the action of the election judge in denying Nixon the right to vote in the

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[1] Nixon v Condon, 34 F. 2d 464 (Texas Court Dist., 1929).

primary was entirely dependent upon the force of the statute enacted in 1927, which had excluded Negroes from participation in the Democratic primaries by a resolution of the Democratic State Executive Committee. In so excluding Negroes, the Committee had acted under a statutory power rather than under any inherent power it might have possessed. Therefore, both the statute and the resolution were invalid in that they authorized a classification based on color, thus violating the Fourteenth Amendment. The Executive Committee of the Democratic party thus had become an agent of the state since it was subject to legislative control, and it was impossible for the state to accomplish through an agent that which it was incompetent to accomplish through its own name. Since the statute and resolution were "contrary to the Fourteenth and Fifteenth Amendments to the Constitution of the United States," Nixon's lawyers petitioned the court to grant him recovery of damages to redress the injury he had sustained.[2]

The defendant, James Condon, was represented by Ben R. Howell of El Paso, Texas, who petitioned the court to dismiss the case on the following grounds: (1) The

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[2]Ibid., p. 465.

Fourteenth and Fifteenth Amendments were not violated by the Texas statute or by the resolution of the State Executive Committee of the Democratic party; (2) The El Paso election was not an election in the sense of the Fifteenth Amendment, rather it was a nomination; (3) The State Executive Committee had the right to determine who should or should not enjoy the right of membership in the Democratic party in Texas; and (4) The Fifteenth Amendment is a limitation only upon states, and the state of Texas had not deprived Nixon of his vote.[3]

Judge Boynton, in his opinion of July 31, 1929, upheld the Texas statute as constitutional and dismissed the case. He based his decision on the following reasons: First, the primary elections held in Texas were not elections within the "purview and meaning of the Fourteenth Amendment." Secondly, the men who presided over the primary elections were not officers of the State of Texas at the time of the primary. Thirdly, the provisions of the Fourteenth Amendment of the Constitution of the United States have reference to state action exclusively and not to any action by private citizens. Fourthly, the Executive Committee of the Democratic party in Texas was not a

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[3]Ibid., pp. 466-467.

corporate body to which the state of Texas could have delegated authority to legislate at the time the resolution had been passed.[4]

Two years later the Fifth Circuit Court of Appeals, presided over by Circuit Judge Randolph Bryan, commenced hearings to consider Nixon's appeal. The plaintiff was again represented by Knollenberg and Cameron, together with one Arthur Spingarm of New York City. Condon was again represented by Howell, assisted by Thornton Hardie of El Paso.[5]

After reviewing the arguments presented in behalf of plaintiff and defense, Judge Bryan dismissed the case. It was his opinion that there was a vast difference between the 1923 statute prohibiting the Negro from voting in primaries and the 1927 statute which granted to the state Democratic Executive Committee the right to regulate its membership. He pointed out that the Fourteenth Amendment was directed against prohibitions and restraints imposed by the states, and the Fifteenth protected the right to vote against denial or abridgement by any state. Therefore, the court concluded that the resolution of the State

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[4] Ibid., pp. 468-470.

[5] Nixon v Condon, 49 F. 2d 1012 (5th Circ. 1931).

Executive Committee of the Democratic party did not violate the United States Constitution since the amendment did not apply to private individuals or private organizations.[6] The court's rebuff resulted in an appeal by Nixon to the United States Supreme Court.[7]

On May 2, 1932, the Supreme Court delivered its decision with Justice B. N. Cardozo reading the opinion for the majority. Cardozo observed that Nixon's situation was the same as when he had first appeared before the Court in 1926--he was still barred from the primary solely on the basis of color. Thus, it seemed to the court that "identity of result had been attained through essential diversity of method." The issue to be decided upon was whether or not the legislative enactment of 1927 made political parties instrumentalities of the state of Texas. The court refused to answer this question categorically; however, it pointed out that the statute in question "attempts to confide authority to the committee as to membership and to make it speak for the party as a whole." Cardozo felt that the inherent power political parties possessed to determine their membership resided in the

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[6]Ibid., p. 1013.

[7]Nixon v Condon, 286 U. S., 73 (1932).

State Convention. This power could not be exercised by the Executive Committee of the party unless delegated to it by the party convention.[8]

It was obvious to the court that the power exercised by the Democratic State Executive Committee had not been delegated by the State Convention, rather the power was conferred by the state. The Executive Committee had acted "not as delegates of the party, but as delegates of the state." Justice Cardozo stated:

> When those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent agencies of the state itself. . . .They are not acting in matters of purely private concern.[9]

After ruling that the Democratic party in Texas was an agency of the state, Cardozo explained the reasoning the court had followed in reaching the decision:

> Whether in given circumstances parties or their committees are agencies of government within the 14th or 15th Amendment [sic] is a question this court will determine for itself. . . .The test is not whether members of the Executive Committee are representatives of the State in the strict sense. . . .The test is whether they can be classified as representatives of the State to such

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[8] Ibid., p. 85.

[9] Ibid., p. 89.

> an extent and in such a sense that the great restraints of the Constitution set limits to their action.[10]

The State Executive Committee in Texas (as the delegates of the state's power) had carried out its official function in such a way as to discriminate between white and black citizens. Therefore, the court concluded the action constituted a denial of the equal protection of the laws by the state in violation of the Fourteenth Amendment and reversed the judgment of the lower courts.[11]

Four justices dissented in a minority opinion written by Justice J. C. McReynolds. It was their belief that no discriminatory results could be charged to the Texas statute of 1927. They reasoned that the majority's contention that the committee was an agency of the state was unsound because "the State acts through duly qualified officers and not through the representatives of mere voluntary associations."[12] For this reason the dissenting justices felt that the court should have upheld the statute and resolution in question.

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[10] Ibid., p. 89.

[11] Ibid., p. 90.

[12] Ibid., p. 103. Justices Sutherland, Van Devanter, and Butler concurred with McReynolds in dissent. Though on the bench in 1927, none of the four had dissented in the first white primary case.

The preoccupation of the nation with nominating presidential candidates tended to obscure the Supreme Court's opinion throughout the nation. The New Republic, one of the few Northern publications to comment on the decision, stated with reserved optimism: "It is a pleasant novelty to find a liberal majority giving a decision in the United States Supreme Court. . . .The South can still get its way, but it will have to abandon the primary system to do so."[13] Democratic leaders in Texas were confused about what action should be taken. One suggested extending permission to Negroes to vote in party primaries, but in separate lines.[14] Some felt that "discrimination against blacks is not useful; it is not reasonable; it is not even expedient."[15] C. M. Chambers, mayor of San Antonio, threatened that if the politicians in the Democratic party continued their attempts to evade the court's decision, he would submit a resolution to the Democratic National Convention "inviting all persons

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[13]Editorial, New Republic, May 11, 1932, pp. 336-337.

[14]Robert W. Hainsworth, "The Negro and the Texas Primaries," Journal of Negro History, XVII (October, 1932), p. 431.

[15]Editorial, Dallas Morning News, May 4, 1932, Sec. 2, p. 2.

regardless of race or color to participate in all elections."[16]

The Austin American, commenting on the decision, took advantage of the occasion to attack the continual attempts of Texas and the South to infringe upon the Negroes' voting rights:

> It was a sorry day for the black man when the slave traders invaded the coasts of Africa, seized their victims. . .and finally landed them on the shores of North America. They were emancipated by Abraham Lincoln. They were all given the rights of American citizens by the adoption of the 14th [sic] Amendment. They are not barred from party primaries in the New England states nor in the northern states or the western states. . . .In many of the southern states east of the river they are victims of state statutes and in Texas they . . .are not wanted in the wigwam errected by Thomas Jefferson.[17]

State Senator Thomas B. Love likewise applauded the decision:

> I told the state Senate of which I was a member when the bill was passed, that it would be held unconstitutional by the Supreme Court of the United States; just as it has been held; that the Texas legislature had not power to authorize a party executive committee to do something which

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[16]San Antonio Express, June 21, 1932, p. 4.

[17]Editorial, Austin American, May 4, 1932, p. 4.

> the legislature itself was powerless to do under the Constitution of the United States. . . .[18]

One leading Texas newspaper estimated that less than ten thousand Negroes would attempt to vote regardless of the court's ruling.[19] National committeeman Jed Adams of Dallas believed that the decision would have very little effect on voting, since "Negroes are not going to attempt to enter the primaries whatever the law."[20]

United States Senator Tom Connally suggested that it might be possible for the Democratic party in Texas (apart from a definite grant by the legislature) to prescribe party tests which would obstruct the Negro from participating in primary elections. He added that the State Executive Committee could be authorized to "take appropriate action. . .without conflicting with the court's opinion."[21] This recommendation, known as the "Page Plan," originated with Paul D. Page, Jr., a young

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[18]Dallas Morning News, May 3, 1932, p. 2.

[19]Houston Post, May 4, 1932, p. 2.

[20]Austin American, May 4, 1932, p. 4.

[21]Dallas Morning News, May 3, 1932, p. 2.

attorney from Austin. Page advised the Texas legislature to "clear the statute books of laws concerning political parties and their rights to prescribe qualifications of members." By removing these laws from the statutes and returning to the "executive committee its inherent right to prescribe qualifications of its members," Negroes could be effectively barred from the Democratic primaries without violating the Constitution.[22]

The most acceptable plan advanced to bar the Negro from the party primary was for the State Convention to adopt a resolution limiting membership in the Democratic party and participation in its primaries to white citizens of the state. On May 24, 1932, three weeks after the Supreme Court had handed down its decision, the State Convention meeting in Houston adopted the following resolution presented by State Democratic Chairman W. O. Higgins:

> Be it resolved, that all white citizens of the state of Texas who are qualified to vote under the constitution and law of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations.[23]

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[22]Editorial, Austin American, May 4, 1932, p. 4.

[23]John B. Chamberlain, "The Validity of Texas Legislation Limiting Voting at Primaries," Illinois Law Review, XXVII, (January, 1933), p. 688.

Negroes in Texas immediately initiated legal action contesting the constitutionality of the resolution. The result was that between May 24, 1932, and April 1, 1935, the contest over the primary issue was largely confined to the state and federal courts in Texas. Three cases were brought to prevent the enforcement of the party resolution.

In the first case, Julius White, a Negro, sought a writ of mandamus in the United States District Court for the Eastern District of Texas. Counsel for White contended that the resolution adopted by the State Convention had violated the Fourteenth Amendment by denying the right to vote solely on the ground of color. The court agreed with White that the resolution was unconstitutional, since the power exercised in adopting the resolution was derived from the state. Though the resolution in question violated the Constitution of the United States, the court felt that it was without power to grant a writ of mandamus. The case was subsequently dismissed for lack of jurisdiction.[24]

The Texas Court of Civil Appeals was soon confronted with a similar case--County Democratic Committee in Bexar

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[24]White v County Democratic Committee of Harris County, 60F 2d (Tex. Ct. Dist. 1929).

County v Booker. Booker had sought an injunction to prevent enforcement of the resolution; the injunction had been granted by the lower court, but on appeal by the County Committee the appellate court reversed the lower court and dismissed the suit for injunction.[25] The court ruled that the resolution was the "free voluntary act expressing the will of the Democratic party in Texas," and as a voluntary political organization the Democratic party had the right to determine who could participate in the primaries.[26]

The failure of the Negro to restrain the enforcement of the resolution in the state courts led them to attempt to obtain it from the United States District Court for the Southern District of Texas. In January, 1933, W. M. Drake, a Negro, petitioned that court for an injunction to restrain the Democratic Executive Committee of Houston from denying him the right to vote in the Democratic primary to be held on January 28th. He argued that such a denial would violate the "equal protection" clause of the Fourteenth Amendment. In denying

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[25] County Democratic Committee in Bexar County v Booker, 53 SW 2d 123 (Tex. Ct. App. 1932).

[26] Ibid., p. 25.

Drake's contention, the court ruled that the committee was acting under the inherent power of the party and thus could exclude him from the party if it so desired.[27]

These decisions produced an atmosphere of confusion and uncertainty regarding the validity of the Democratic State Convention's resolution. Such a confused state of affairs made it necessary that a clear decision be rendered by the Supreme Court in order to resolve the question.

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[27] Drake v Executive Committee of the Democratic Party of Houston, 2 Fed Sup. 486 (1933).

CHAPTER IV

GROVEY V TOWNSEND

In 1935, the Supreme Court was given an opportunity to consider the validity of the Texas Democratic Convention's resolution limiting participation in primary elections to whites in the case of Grovey v Townsend. This case resulted from the refusal of an election judge to grant R. R. Grovey an absentee ballot in a Democratic primary election held in Harris County on July 28, 1934. Contending that this denial violated both the Fourteenth and Fifteenth Amendments to the United States Constitution, Grovey, failing to obtain relief from the Justice Court, appealed to the United States Supreme Court.[1] On May 11, 1935, Grovey, represented by J. Alston Atkins, Carter W. Wesley, A. S. Wells, and F. S. K. Whittaker, appeared before the Supreme Court alleging that: (1) The resolution of the State Convention limiting membership to white and excluding Negroes from participation in Democratic

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[1] Grovey v Townsend, 295 U. S. 45 (1935).

primary elections did not relieve the elections of their true character as the act of the state, since the primary election was wholly statutory in origin and held under state compulsion. (2) The State Democratic Convention which adopted the resolution could not do what the Federal Constitution forbade its creator to do. (3) Sections two and twenty-seven of the Bill of Rights of the Texas Constitution violated the Federal Constitution because they failed to forbid classifications based upon race and color. (4) In Texas, nomination by the Democratic party was equivalent to election. (5) The National Democratic party had never declared that it desired to exclude Negroes from its circles.[2]

The Supreme Court rendered its decision on April 1, 1935, with Justice O. J. Roberts speaking for the majority. Roberts stated that the reason the court had taken the case on the writ of certiorari was "because of the importance of the federal question presented which had not been determined by the court." He called attention to the two previous cases, Nixon v Herndon and Nixon v Condon, which had previously come before the court. In both instances

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[2]Ibid., pp. 48-55.

the court had judged the Texas statutes to be in violation of the Fourteenth Amendment, since they involved state action. The court believed that under the present circumstances there had been no violation of Grovey's rights because state action was not involved.[3] Justice Roberts stated:

> The qualifications of citizens to participate in party counsels. . .have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action.[4]

The court also held that the exclusion of Negroes from primary elections under the resolution of the Texas Democratic Convention was not in violation of the Fourteenth Amendment, although it admitted that in Texas nomination by the Democratic party was equivalent to election. Also, provisions of the Texas Constitution which guaranteed the right to citizens to form political associations did not, by reason of their failure to

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[3] The Supreme Court relied upon the decision of the Texas Supreme Court in Bell v Hill, 123 Tex. 531, which had held the resolution in question valid after concluding that political parties in the state of Texas arose "from the exercise of the free will and liberty of the citizens composing them," and that they were "voluntary associations for political actions and not creatures of the state."

[4] Grovey v Townsend, p. 48.

forbid political organizations from making racial or color qualifications, violate the Fourteenth and Fifteenth Amendments. Further, the Democratic Convention in Texas was not an instrument of the state when it passed the resolution limiting membership to white citizens.[5]

Negroes and sympathetic whites reacted to this new ruling with deep disappointment and anger.[6] The decision was regarded as "regrettable, both from a racial and political viewpoint," for its result would be to "disfranchise Negroes in so far as the real exercise of suffrage is concerned." The Supreme Court by sanctioning a "subterfuge" had relegated the problem of Negro suffrage to the status of a local question and subjected it to local control.[7] The decision "indicates that the path to political power through the white primary offers no promise to

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[5] Ibid., pp. 49-55.

[6] It should be noted that the court's opinion was rendered on the same day that the second Scottsboro case (which was favorable to Negro interests) was handed down. This led one writer to remark in "The Supreme Court Blesses and Damns," Norfolk Journal and Guide, April 13, 1935, p. 8. "If one were suspicious of the court's motives, it would look as if they had made a trade. . .as an apology to the race's enemies for the Scottsboro decision."

[7] Editorial, Norfolk Journal and Guide, April 13, 1935, p. 8.

disfranchised blacks."[8] There was concern that the Supreme Court had "put at the mercy of party authorities the ballot-rights which the earlier primary decisions of the Supreme Court secured to voters without the distinction of race."[9]

One Northern publication which had extolled and defended the court's position in the two previous white primary cases responded with pungent criticism. It was believed that the court's judgment contained "elements of tragedy and humor tainted by an antique and erratic legalism." In failing to consider the political function of the primary, the court had been deceived into believing that the Democratic party in Texas was nothing more than a voluntary association. This "inability to see the primary as an inseparable party of the procedure through which voters exercise political rights" was viewed as a "judicial lapse from realism to nominalism."[10] Another writer commenting on the "irony" involved in the

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[8]E. Franklin Frazier, "The Negro in the American Social Order," Journal of Negro Education, IV. (July, 1935) p. 302.

[9]Editorial, "Negro Vote Barred," Literary Digest, April 13, 1935, p. 10.

[10]Editorial, "Should Negroes Vote," New Republic, May 8, 1935, p. 356. An unconfirmed report to the New Republic at this time was "that several of the justices were anxious to reach another result and that at least three of them had tried hard to discover a verbal formula that" would have made possible another ruling.

"decision which was tantamount to exclusion of the black from civic life," stated that: "A provision is written into the highest law of the land to insure the Negro the right to vote. This very clause is invoked as a sanction in the denial of that right."[11] The Houston Informer, a Negro paper, encouraged Texas Negroes to continue to seek legal action in order to obtain suffrage. It remarked:

> It is now up to the Negroes of Texas to resort to court action in another attempt to exercise their constitutional rights. We are still without an effective voice in our government and in the selection of public officers and the spending of tax money. Until we get these things, the ballot fight must be continued.[12]

Although most observers felt that the decision had settled once and for all the questions of Negro participation in Democratic primaries in Texas some did not agree. One writer predicted a future change in the court's position on the Texas primary question: "The Texas barrier will not be effective long. The court in 1935 did not ferret out the trickery behind the

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[11]Editorial, "Black Justice," Nation, May 1, 1935, p. 497.

[12]Taken from Monroe N. Work, ed., Negro Year Book 1937-38, (Tuskegee, Ala.: Negro Year Book Publishing Company, 1937) p. 111.

the statutes. Later it will go behind the law."[13] A professor at the University of Texas (who had engaged in the study of Negro participation in the Democratic primaries for a number of years) likewise concurred that the question of the white primary was not completely settled.[14] These predictions proved to be valid, for in subsequent years the issue of the white primary re-appeared before the Supreme Court.

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[13] P. Bernard Young, Norfolk Journal and Guide, April 13, 1935, p. 10.

[14] O. Douglas Weeks, The White Primary, p. 153.

CHAPTER V

SMITH V ALLWRIGHT

In the years between 1935 and 1941, the court gradually abandoned its position that party primaries were not the concern of the federal government. A Louisiana primary election in which fraud was involved provided the opportunity for the Supreme Court to reverse itself.[1] In the United States v Classic an indictment was filed in the United States District Court of Louisiana against several election commissioners. It was charged that the officials had willfully altered, falsely counted, and illegally certified the number of votes cast in a primary election, which had been held for the purposse of nominating a candidate for representative in Congress. The questions for decision related to the right of qualified voters to vote in a Louisiana primary and to have their ballots counted. The Justice Department questioned if this were a right "secured by the United States Constitution," within the meaning of Sections Nineteen and Twenty of the United

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[1] Jones, "The White Primary," p. 25.

States Criminal Code, and whether the acts of the defendants violated these sections. The election officials demurred, arguing that direct primaries were beyond federal regulation. The district court sustained the demurrer and dismissed the case.[2] The government then appealed to the United States Supreme Court. Justice Harlan Stone, in a well reasoned opinion, held that Congress had the right to regulate primary elections and that Sections Nineteen and Twenty of the Criminal Code included the offenses in question:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected.[3]

The court argued that the constitutional language directing that members of the House of Representatives should be "chosen. . .by the people in the several states," created a right protected by federal action for the voter to participate in that choice. The court felt that in Louisiana the primary was the election, for all

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[2] United States v Classic 313 U. S. 299 (1941).

[3] Ibid., p. 318.

practical purposes; therefore, a primary election official could be punished under the federal law which prohibited deprivation of a citizen's rights under the constitution.[4]

This decision indicated a departure from the court's previous position in Grovey v Townsend and paved the way for another challenge by the Negroes of Texas to the white primary resolution. One year prior to the court's decision, Lonnie F. Smith, a Negro residing in Harris County, had commenced suit against an election judge, S. E. Allwright in the District Court of the United States for the Southern District of Texas. The suit resulted from a refusal by Allwright to give Smith ballots in the Democratic primary and a run-off election held for the purpose of nominating federal and state officials on July 27, 1940, and August 24, 1940, respectively. The district court ruled that there had been no violation of Smith's rights, since the doctrine of Grovey v Townsend was still in effect. Smith then appealed to the Fifth Circuit Court, but his plea that the Texas resolution be declared void was rejected. The court dismissed the contention that the principles adopted by the Supreme Court in the Classic case

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[4]Ibid., pp. 321-327.

had involved a question of criminal law, which made the case substantially different from the one in question.[5]

Following the decision of the Circuit Court, an appeal was made to the United States Supreme Court. Argument began in November, 1943, before the court. The case was reargued in January, 1944, and the decision was released on April 3. Smith was represented by Thurgood Marshall of New York and William H. Hastie of Washington, D. C., who maintained that Allwright's refusal to permit him a ballot in the two primary elections constituted a violation of the United States Constitution. They alleged that Smith was deprived of rights secured in Sections Two and Four of Article I and the Fourteenth, Fifteenth, and Seventeenth Amendments to the United States Constitution. Also, the choice of a public candidate, whether at a primary or a general election, should not be considered the action of any private group. Further, when the state of Texas permitted a private association to function as a political party, though it bars persons from participation because of race or color, it in effect sanctioned the

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[5]Smith v Allwright, 131 F. 2d 594 (1943).

discrimination and thus violated the Fourteenth and Fifteenth Amendments. Finally the rationale of the Classic case was applicable to the Texas resolution, since there was no essential difference between the status of primary elections in Louisiana and Texas.[6]

Briefs were submitted on behalf of Allwright by George W. Barcus of Austin and Wright Morrow of Houston. They argued that: (1) An election judge who conducts a primary election for a political party in Texas is not a state officer. (2) The respondent had acted as an agent of the Democratic party of Texas. (3) The white Democrats of Texas, or any other political group in Texas, possessed the right to determine what class of people or voters shall constitute the party they desire to organize. (4) The Democratic primaries were elections conducted by the Democratic party through its party officials for the selection of the party's nominees in the general election. (5) The primaries were not elections conducted by the state of Texas.[7]

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[6]Smith v Allwright 321 U. S. 648 (1944).

[7]Ibid., p. 649.

When the court delivered its opinion in April, Justice S. F. Reed spoke for the majority. Reed stated that the reason the writ of certiorari had been granted was "to resolve a claimed inconsistency between the decision in the Grovey Case and that of United States v Classic." The Classic case which had been decided by the court in 1941 held that Section Four of Article I of the United States Constitution authorized Congress to regulate primary as well as general elections, when the primary was by law an integral part of the election machinery. It was not the intention of the court, according to Reed, to allow the Classic case to cut "directly into the rationale of Grovey v Townsend." The court believed that the Classic case directly related to Grovey v Townsend, "not because the exclusion of Negroes" from the primaries was "any more or less state action by reason of the unitary character of the electoral process, but because the recognition of the place of the primary in the electoral scheme." The grant of power by the state of Texas to the Democratic party to fix the qualifications of primary elections was the delegation of a state function that made the action of the Texas Democratic party state action. When the court rendered its opinion in the Grovey case, it had viewed the denial

of a vote in the primary as a "mere refusal by a party of party membership." After examining the qualifications for Democratic electors in Texas in order to determine whether state action or private action had excluded the Negro from the primary elections, the court concluded that state action was involved in the exclusion. The court reasoned that state action was integrally involved in the primary, since (1) the state of Texas required all electors to pay a poll tax in order to be eligible to vote in a primary election; (2) Texas required the election of County officers in the Democratic party who affected the selection of the State Executive Committee; and (3) the state convention could not request any legislation without the endorsement of such legislation by the voters in a primary. The primary elections were thus conducted by the Democratic party in Texas under state statutory authority. Since the Democratic party derived its character as a state agency from the duties that were imposed upon it by state statutes, these duties did not become, in the sight of the court, matters of private law because they were performed by a political party.[8]

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[8] Ibid., pp. 652-666.

Justice O. J. Roberts, the only justice to dissent, reprimanded the court for its inclinations to "disregard and overrule considered decisions and rules of law announced in them." The fact that the court had overruled three cases during the present term tended "to bring adjudications of this tribunal into the same class as a restricted railroad ticket good for this day and train only." He believed that the court had erred greatly by relying on the Classic case to reverse the earlier decision of the court in Grovey v Townsend. Roberts called attention to the "material differences" that existed between the two cases. Since the Louisiana statutes had required the primary to be conducted by state officials, state action had been involved. Under the Texas statute, primary elections were conducted at the expense of members of the party, thus state action was not involved. He concluded by charging the majority with breeding "fresh doubt and confusion" in an era marked by "doubt and confusion."[9]

For those who had felt dismay and anger in 1935 after the court had rendered its opinion in the Grovey case, this new decision was regarded as a great stride towards

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[9]Ibid., pp. 666-670.

political equality for the Negro. The New Republic observed that the Supreme Court had "retrieved its lapse from realism to nominalism in two jumps." The ruling was a "ringing declaration that the law, far from being based on precedents, is a living thing."[10] The decision was welcomed by liberals as a sign that the Supreme Court had moved the country closer "to a more perfect democracy, in which there will be but one class of citizens, not two or more classes."[11] C. A. Scott, Chairman of Public Affairs Committee of the N.A.A.C.P., believed that the ruling was "a new emancipation proclamation" and asserted that "it should give us an effective vote."[12]

The N.A.A.C.P., fearing that the Negro vote might still be obstructed, directed Thurgood Marshall (its chief counsel) to forward the following letter to Attorney General Francis Biddle:

> We are sure that the Justice Department will now recognize that criminal jurisdiction over interference with the right

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[10]"Negroes as Voters," New Republic, April 17, 1944, pp. 517-519.

[11]Editorial, New York Times, April 5, 1944, p. 18.

[12]San Antonio Express, April 5, 1944, p. 1.

> to vote extends to the primary elections. The decision in this case. . .clearly establishes the illegality of the practice in most of the States of the deep South, of refusing to permit qualified Negro electors to participate in party primary elections. . . .Now that there can be no doubt that such exclusion is a Federal crime, we urge you to issue definite instructions to all United States Attorneys, pointing out to them the effect of these decisions and further instructing them to take definitive action in each instance of the refusal to permit qualified Negro electors to vote in primary elections in states coming within the purview of the two decisions.[13]

Two Southern senators who had been questioned concerning what steps would be taken if Negroes attempted to participate in party affairs retorted that if any Negro attempted to attend a Democratic convention in the South he "will be thrown out by his pants."[14] Senator James Eastland of Mississippi stated that the decision revealed "an alarming tendency to destroy State sovereignty" and "amounted to Supreme Court usurpation of a Congressional function."[15] Those who shared this sentiment suggested that the Southern states should

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[13]New York Times, April 4, 1944, p. 15.

[14]Austin American, April 4, 1944, p. 1.

[15]New York Times, April 4, 1944, p. 1.

abandon the primary system and return to the convention method of selecting political candidates.[16]

Opposition to the court's ruling in Texas took the immediate form of an unsuccessful attempt to secure a rehearing of the case. While most state officials remained silent and refused to comment on the opinion, several members of Congress from Texas voiced bitter opposition to the decision. Representative Nat Patman said that he had:

> . . .an abiding faith that the negroes aren't going to vote in the white man's democratic primary. Our democratic people in Texas will find some way to work out a democratic primary for white folks. The negroes don't want to vote in an election that is not for them.[17]

Senator W. Lee O'Daniel believed that "the race problem has been fomented by Mr. and Mrs. Roosevelt, the Communist party, and labor racketeers for political purposes."[18] Charles E. Simmons, secretary of the Democratic State Executive Committee, also believed that "it is a political opinion by a politically packed court in a political year."[19]

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[16] Austin American, April 4, 1944, p. 2.

[17] Ibid., p. 2.

[18] San Antonio Express, April 6, 1944, p. 5.

[19] Ibid., April 5, 1944, p. 2.

During the weeks that followed, Texas newspapers quoted various politicians as recommending that Texas abandon the direct primary and revert to the convention system of nomination, which had existed prior to 1907.[20] In the 1945 session of the legislature, a white primary bill, which resembled the one enacted in 1944 in South Carolina,[21] was introduced in the Senate and given a favorable committee report; but it never was placed on the floor of either house. The reason for this was that after the intense party struggle over the 1944 electoral college vote, each faction distrusted the other too much to risk removing all legal control over the regulation of primaries.[22]

In 1947, the last state-wide effort by Texas

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[20]Donald S. Strong, "The Rise of Negro Voting in Texas," American Political Science Review, XLII (June, 1948), p. 513.

[21]Immediately following the decision, the South Carolina General Assembly attempted to circumvent the court's ruling by abandoning the primary system, and repealing all state laws that either recognized, authorized, or regulated the organization of political parties. For further information concerning the reactions of the various Southern states, consult O. W. Weeks, "The White Primary, 1944-48," The American Political Science Review, XLII (June, 1948), pp. 502-510.

[22]Strong, "The Rise of Negro Voting in Texas," p. 513.

politicans was made to circumvent the court's ruling. A bill similar to the one presented in 1945 was introduced in the House but was never acted upon by committee. The failure of the committee to act may be explained by the fact that the Negro voting bloc in Houston had supported one of the members of the committee to which the bill was assigned.[23] This, along with the dissipation of organized efforts to obstruct the Negro's voting in the Democratic primaries, resulted in the termination of attempts to bar the Negro from participation by the use of white-primary legislation on the state level.

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[23] Ibid., p. 513.

CHAPTER VI

TERRY V ADAMS

The final judicial proceedings relating to the history of the white primary in Texas occurred in 1953. This adjudication resulted from action by the Jaybird Association in Fort Bend County barring Negroes from participation in a pre-primary election. The Jaybird Association was organized in 1889 following a series of political encounters between two groups of whites. In 1888, these two groups had placed candidates on the Democratic ticket for local and national offices. One group, which consisted of persons outside of Fort Bend County, called themselves the Woodpecker Association. According to Judge D. R. Pearson, an original member of the Jaybird Association, the Woodpeckers were attempting to control the Negro vote. In order to counter the effort, the Jaybird Association was formed with "the sole intent. . .to provide for the election of honest and faithful county officials," and "to clean corrupt carpetbag rule" in the county.[1]

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[1] Adams v Terry, 193 F. 2d 605 (1950).

In order to insure and execute a local government which would be favorable to Jaybird interests, rules governing the association were formulated. The two major tenets of the organization were the white man's primary and the two term rule. The former dealt with the practice of the association to meet on the first Saturday in May for the purpose of choosing candidates to run in the Democratic primary. Those eligible to participate in this pre-primary election were all white persons whose names appeared on the official list of county voters. The latter limited those elected officials who had been nominated by the Jaybirds to two consecutive terms. Members who violated these rules were "henceforth and forever to be considered outcasts."[2]

The Jaybird Association was governed similarly to any other political party, with an executive committee named from the different precincts of the county. The expense of the primary was paid by an assessment on

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[2]Rosenberg Herald, May 7, 1953, p. 1.

candidates who entered the election.[3] After payment of the required fee, which normally was fixed at two or three percent of the annual salary paid by the office, the aspirants would submit their names to the Jaybird Committee. Political posters and advertisements were then circulated throughout the county declaring that these candidates were running for public office subject to the action of the Jaybird Association. Following the election, the ballots from each precinct were canvassed by the Jaybird Executive Committee and the identity of the persons who had received their endorsement was announced. Although the winners of the Jaybird primaries were under no obligation to enter the Democratic primaries, the majority did. Since 1889, with one exception, the winners ran without opposition in the Democratic primary and general elections.[4]

In 1950, John Terry, a Negro residing in Fort Bend

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[3] Ibid., p. 1. The only exception to this practice was during the depression when the expense became prohibitive for the candidates. In order to alleviate the situation, the Jaybird primary was combined with the Democratic primary with elections conducted on the same dates, at the same polling places, and by the same officials. The practice remained in effect until 1938 when the pre-primary was again initiated.

[4] Terry v Adams, 345 U. S. 472 (1953).

County, petitioned the Jaybird Association for membership in order to vote in the primary scheduled in May. Terry was refused membership in the Association because he was a Negro; and he along with other Negro citizens of Fort Bend County brought suit in March, 1950, in the United States District Court Southern District, Galveston Division, against A. J. Adams, President of the Jaybird Association, and others.[5]

The law firm of Allen, Smith, Neal, and Lehmann of Houston representing Terry contended that the defendants were officers of a political party in Fort Bend County known as the Jaybird Association. They also maintained that since the Texas statutes had made the primaries of political parties without a state organization an integral part of the procedure of choice, the association's rule barring Negroes was unconstitutional. They further alleged that for many years the officers of the Jaybird Association had violated the Fourteenth and Fifteenth Amendment by denying Negroes the right to vote.[6]

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[5] Ibid., p. 595.

[6] Ibid., p. 596.

Edgar E. Townes and Clarence I. McFarlane of Houston, and D. R. Pearson of Richmond, Texas, Adams' attorneys, requested the court to dismiss the suit. They argued that Adams and the other Jaybird officers were not representatives of the association. Counsel contended that the defendants were officers of an organization existing in Fort Bend County for the purpose of nominating candidates for county and precinct offices only, and not a political party within the meaning of the Civil Statutes of Texas. It was also alleged that defendants never attempted to operate under any state law governing elections.[7]

Judge Thomas Kennerly ruled the Jaybird Association was a political party within the meaning of Texas Civil Statutes. Terry was entitled to vote at the association's election, according to the court; but he was not entitled to enjoin the defendants from refusing to allow him to vote at the association's primary, because affairs of the association were in the hands of an executive committee and not in the hands of the defendants.[8]

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[7]Ibid., p. 597.

[8]Ibid., p. 595.

An appeal to the Fifth Circuit Court of Appeals by A. J. Adams resulted in a reversal of the judgment of the lower court. Judge Joseph C. Hutcheson, who spoke for the majority stated that the question which had to be answered was "whether the complained of action is action under color of state law, depriving plaintiff of rights accorded them by the involved constitutional provisions." The court believed that to answer the question in the affirmative would "go directly contrary to the long line of Civil Rights Cases."[9] Although the majority agreed with Terry that the endorsement of a candidate by the Jaybird Association generally eliminated any opposition in the Democratic primary, it contended that state action was not involved, observing that:

> This is not. . .because of any provision of state law or any agreement or arrangement with the Democratic party having the effect of state action. It is because. . .there is a consensus of opinion in the country the indorsement should be regarded as decisive.[10]

The confused state of affairs following the Circuit Court's decision in regard to the legality of political

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[9] Adams v Terry 193 F. 2d 605 (1952).

[10] Ibid., p. 605.

clubs which barred Negroes made it imperative that the Supreme Court rule on the constitutionality of the Jaybird Association. Following a petition by Terry, the Supreme Court granted a writ of certiorari to the Fifth Circuit Court of Appeals to review the decision. Argument commenced on January 16, 1953, before the Supreme Court. Counsel for plaintiff and defendant reiterated their arguments which had been placed before the lower courts.[11]

The court announced its decision on May 4, 1953, with Justice Black writing the opinion of the majority. After reviewing the history of the Jaybird Association, Black concluded that the constitution had been violated since the organizations purpose had been "to deny Negroes any voice or part in the election of Fort Bend County officials." He reasoned that: (1) The formation of a political club similar to those established in South Carolina following the Supreme Court's ruling in Smith v Allwright with the avowed attempt to bar the Negro from voting violated the Section Two of the Fifteenth

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[11] Terry v Adams 345 U. S. 458 (1953).

Amendment.[12] (2) State action was involved since the same qualifications as those prescribed by the state of Texas which entitled electors to vote in county-operated elections were adopted by the Jaybird Association. (3) The only election that had counted in Fort Bend County for more than fifty years had been the primary directed by the Jaybird Association. (4) The state of Texas had violated the United States Constitution by permitting a circumvention of the Fifteenth Amendment within the state. (5) The officials of Fort Bend County who were charged with the administration of the primaries had "participated in and condoned" the continued efforts of the Jaybird Association to exclude the Negro from voting. (6) The Jaybird Association was in fact a political party and operated as part and parcel of the Democratic party; therefore, the association's

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[12] Ibid., p. 464. It has been suggested that there existed a crucial difference between this case and the South Carolina cases cited Rice v Elmore 165 F 2d 387 and Baskin v Brown 174 F 2d 391. In South Carolina the names of the Democratic nominees were placed on the state's general election ballots as Democratic nominees. In Fort Bend County, Jaybird nominees were not placed on the ballot as Jaybird nominees, but rather had to enter their own names as candidates for the Democratic primary. The Court rejected this contention as being one of form rather than substance.

activities "fell within Fifteenth Amendment's self-executing ban."[13]

Justice Sherman Minton, the only dissenting member of the court, stated that while he "was not concerned in the least as to what happens to the Jaybirds or their unworthy scheme," he was "concerned about what this Court says is state action within the meaning of the Fifteenth Amendment." Minton alleged that the court had the authority to requite a wrong only if it had been committed by a state and not an individual. He viewed the action taken by the Jaybird Association as a deed by a pressure group comprised of persons who were not associated with the Democratic party. Justice Minton believed that the majority had erred in citing Rice v Elmore as the source of authority because in South Carolina the state Democratic party had co-operated in Negro disfranchisement, while Texas in its primaries took no cognizance of the Jaybird Association.[14]

Officials of the Jaybird Association remarked that while they had no immediate plans to deal with the court's decision, two alternatives were being considered.[15] The

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[13] Ibid., pp. 462-485.

[14] Ibid., pp. 485-494.

[15] San Antonio Express, May 5, 1953, p. 3.

secretary of the association, Windel Shannon of Richmond, stated that although their plans were indefinite, "whatever is done. . .it will be in accordance with the Court's decision, you can be sure."[16]

It should be noted that the Jaybird case was the first in which the court voided a prohibition against Negro participation in an election for state officers only.[17] Justice Black had stressed the point that the Fifteenth Amendment included any election in which public issues were decided or public officials were chosen.[18] This fact had been obscured by earlier decisions in which the court had seemed obsessed with a determination to find ways and means of restoring state supremacy in the area of civil rights.

By stressing the applicability of the amendment to all elections in Terry v Adams, the court abolished one of the most deceptive and effective devices errected by the South to disfranchise the Negro. It was now clear that the Supreme Court would no longer uphold legal barriers to Negro voting, no matter how ingeniously contrived.

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[16]Rosenberg Herald, May 7, 1953, p. 1.

[17]Loren Miller, The Petitioners (New York, N. Y.: Randon House, 1966), p. 297.

[18]Terry v Adams, 345 U. S. 486 (1953).

CHAPTER VII

SUMMARY AND CONCLUSION

The granting of citizenship and political rights to the Negro immediately following the Civil War created a crisis in Southern politics. Fear of black domination together with the conviction that Negroes were without the ability to perform the electoral function served to stimulate a systematic exclusion of the race from the ballot. Formal and informal methods were employed to effect this disfranchisement; usually legal forms were utilized in order to avoid any conflict with the Fourteenth and Fifteenth Amendments. Beginning in Mississippi in 1890 and gradually extending into other Southern states, various disfranchising devices were written into state constitutions. The most effective of these techniques was the Democratic white primary.

The white primary offered a way by which the South could disfranchise the Negro without bruising constitutional consciences. The United States Constitution prohibited discrimination by the state against the Negro. Theoretically, the Democratic party functioned as a

private organization of individuals banded together to further some particular idea. So long as the fiction of the party as a private organization existed, it could be maintained that the exclusion of Negroes from party primaries was not unconstitutional. Following a tortuous process of litigation from 1923-1953, the Supreme Court gradually dealt with the problem.

The white primary, which had existed since the post-Reconstruction period, was exposed to direct legal attacks following the decision of the Texas legislature to place a white primary law on the state statutes. The law was immediately challenged by L. A. Nixon, an El Paso Negro, when he was refused a ballot in a primary election conducted by the Democratic party. He challenged the law on the ground that it violated the Fourteenth and Fifteenth Amendments; however, in Nixon v Herndon the Supreme Court did not consider the validity of the statute under the Fifteenth Amendment, rather it ruled that the law violated the equal protection clause of the Fourteenth Amendment. The court avoided the question of whether party primaries were generally within reach of federal regulation.

The court's decision led Texas lawmakers to attempt another circumvention. In 1927, the legislature repealed

its statute barring Negroes from the Democratic primary and enacted another law which authorized the State Executive Committee of the Democratic party to determine the qualifications of its members. The Executive Committee thereupon adopted a resolution limiting participants in the Democratic primaries to whites. When L. A. Nixon was denied a ballot by an election judge, James Condon, at a primary election in El Paso in 1928, suit was again brought. The Supreme Court refused to say whether the party could exclude Negroes. It maintained that the State Executive Committee possessed no inherent power to exclude Negroes from the Democratic party. In barring Negroes from the primary election, the Exexutive Committee had acted under authority granted to it by the state. The court concluded that the action constituted a denial of the equal protection of the laws by the state and fell under constitutional prohibition.

Texas reacted to the court's decision by adopting a new resolution limiting participation in the direct primaries to whites only. This rule was enacted not by the legislature, or the Executive Committee, but by the State Convention of the Democratic party. In compliance with this action, Albert Townsend, an election judge, denied a ballot in 1934 to R. R. Grovey, a Houston Negro. The

court maintained that the action of the party through its convention was the action of a private voluntary organization; therefore, it could not be alleged that state action was involved. As a private association, the Democratic party might exclude Negroes from its primaries, the court concluded, without violating the equal protection clause which applied only to state action.

Following the Supreme Court's ruling in the Classic case in 1941, the way was prepared for a reversal of the courts' previous position that the regulation of party primaries was beyond federal control. In 1944, over twenty years after the beginning of suits involving Texas white primary laws, the court again had the question before it in Smith v Allwright. Lonnie E. Smith, a Negro residing in Harris County, attempted to vote in a primary election held in July, 1940, but was refused a ballot by the election judge, S. E. Allwright, on the basis of his race and color. On the ground of the Classic decision, the court held unconstitutional the exclusion of Negroes from primaries on the basis of the Fifteenth Amendment. The court reasoned that the primary involved "state action" since the election was regulated by state law and the state provided the procedure by which the party certified its

nominees for inclusion on the general election ballot.

The final chapter in the white primary controversy was written by the Supreme Court in 1953 in Terry v Adams. In 1889 a group of Democrats in Fort Bend County, Texas, formed an organization known as the Jaybird Association. The association included all eligible white voters in the county and barred Negroes from participation in its primary elections. On every even-numbered year, the Jaybirds held a primary of their own to select and endorse nominees, which in turn would then enter the Democratic primary. These endorsed candidates were usually successful in winning the Democratic nominations at which Negroes could, but often did not, vote. John Terry, a black, attempted to join the Jaybirds in 1950, but he was refused membership because of the Association's rule barring Negroes. He brought suit alleging that the Jaybirds' operation was a thinly disguised attempt to escape the Supreme Court's decisions outlawing the white primary. The court ruled that the Jaybird Association's primaries did involve state action, thus constituting a violation of the Fifteenth Amendment.

The outlawing of the white primary and the subsequent failure of the South to pass further legislation barring the Negro from participation in primaries can be

attributed to three reasons: (1) the organized efforts of Negroes, (2) the liberalization of the Supreme Court, and (3) civil rights legislation enacted by Congress.

Following World War I, increased educational opportunities provided for Negroes had the effect of creating an awareness of the discriminatory treatment accorded them in the South. This awareness was soon translated into a demand for full and equal participation in American democracy. At the same time, a renewed emphasis upon social solidarity and racial pride provided the stimulus for Negroes to close ranks and organize. The formation of the N.A.A.C.P., together with the National Bar Association, an organization of Negro attorneys, provided the black powerful instruments through which he could speak collectively. These two groups worked closely together to create a staff of competent lawyers who carried forward the cause of equal rights.

During the thirty years following the Civil War, the Supreme Court placed a fundamental and restrictive interpretation on the Fourteenth and Fifteenth Amendments. From the turn of the century until the late 1930's, the court rigorously applied these interpretations. The result was the debasement of the black and the denial of the rights as a free man.

Successive attacks on the court's restrictive position by Negro organizations ultimately led to a more liberal position. In the late thirties, the court rejected old precedents and began to move back to the original meaning of the Civil War amendments. This tendency was manifested by a more liberal application of these amendments, by litigation involving Negroes, and by a close examination of state legislation affecting the Negro.

The court's reiteration of the sentiment that its decisions regarding civil rights were required responses to constitutional guarantees created a climate of public opinion which demanded that Congress enact legislation. Finally, some eighty-two years after the passage of the Civil Rights Act of 1875, Congress passed the Civil Rights Act of 1957. A Commission on Civil Rights was established to investigate and report cases of racial discrimination, and the Attorney General was empowered to seek injunctions against the interference with the right to vote. Three years later Congress strengthened these provisions by enacting the Civil Rights Act of 1960. This act provided for federal voting referees to register Negroes when local officials would not do so. In June, 1963, President John F. Kennedy sent to Congress the most comprehensive Civil Rights bill in the history of the United

States. This bill, which was enacted by Congress in 1964 following Kennedy's death, provided for "more effective enforcement of the right to vote in federal elections without regard to race or color."[1] One year later the Voting Rights Act of 1965 was passed. With the enactment of this legislation, the last obstacles to Negro voting in the South were destroyed in the provision that:

> No voting qualifications or prerequisites to voting, or standard, practice or procedure shall be imposed or applied by any state or political subdivisions to deny or abridge the right of any citizen of the United States to vote on account of race or color.[2]

While there is a wide gulf between legal victories and the implementation of them into practical benefits, it does appear that the Negro voter is beginning to exert his influence. In 1932 there were approximately 100,000 registered Negro voters in the white primary states. By 1947 that number had risen to 645,000; by 1952 it exceeded a million; and by 1964 it had risen to more than two million.[3] Liberal interpretation of the Constitution by the

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[1] Public Law, 88-352; 78 Stat. 241.

[2] Public Law, 89-110; 79 Stat. 437.

[3] Miller, The Petitioners, p. 294.

Supreme Court and Congressional legislation, together with a general public concern for the rights of minorities, have truly made the Fourteenth and Fifteenth Amendments the sword and shield of constitutional rights.

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