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Constitutional Law - Civil Rights - Right of Negro to Vote in State Primary Elections

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CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT OF NEGRO TO VOTE IN STATE PRIMARY ELECTIONS—The Jaybird Democratic Association was formed in Fort Bend County, Texas, in 1889. Membership was open to all white voters in the county. The association was not governed by the state statute

regulating political parties.¹ Candidates nominated by the Jaybird Party entered the Democratic county primary as individuals, not as Jaybird candidates, but those candidates won both the Democratic primary and the general election with only one exception in the entire history of the Jaybird Party. Terry, a Negro, sought a declaratory judgment and injunction permitting Negroes to vote in the Jaybird primary. The federal district court ruled that the association was a political party and that Negroes could vote in its primary.² The Court of Appeals for the Fifth Circuit reversed.³ On certiorari from the Supreme Court, *held*, the exclusion of Negroes from the Jaybird primary violates the Fifteenth Amendment and the Civil Rights Act.⁴ *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809 (1953).

As long as primary elections were not part of the election process in a constitutional sense,⁵ there was no doubt that a state could, under a proper law, deny a Negro a vote in the state primary. However, the *Classic* case⁶ ruled that state-controlled primaries were a part of the state elective process and subject to congressional regulation under the Constitution.⁷ The Fifteenth Amendment had already been construed to give a federal right not to be discriminated against because of race or color either by state or federal action.⁸ The amendment was held self-executing⁹ and applicable to purely state elections.¹⁰ The Fourteenth Amendment also provided some protection. In 1927 a Texas statute expressly denying Negroes a right to vote in a primary was held a denial of equal protection.¹¹ Texas law then was revised to vest the power to determine voting qualifications for primaries in the political parties' executive committees. This attempt to preserve the white primary failed when the Supreme Court said that this was a delegation of power to the wrong body of the political party, so that the state was still acting in a discriminatory manner.¹² A subsequent delegation of the authority to the convention of the political party was upheld, the Supreme Court ignoring the fact that the primary determined the outcome of the general election.¹³ The controlling factor was that of "state action." The *Civil Rights Cases*¹⁴

¹ Tex. Rev. Civ. Stat. Ann. (Vernon, 1950) art. 3163. Political party primaries were held in June and July, and the Jaybird primary in May.

² *Terry v. Adams*, (D.C. Tex. 1950) 90 F. Supp. 595.

³ *Adams v. Terry*, (5th Cir. 1952) 193 F. (2d) 600.

⁴ 16 Stat. L. 140 (1870), 8 U.S.C. (1946) §31, 17 Stat. L. 13 (1871), 8 U.S.C. (1946) §§43, 47.

⁵ *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469 (1921).

⁶ *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941).

⁷ Specifically, U.S. CONST., art. I, §4; U.S. CONST., amend. XVII.

⁸ *United States v. Cruikshank*, 92 U.S. 542 (1875); *Guinn and Beal v. United States*, 238 U.S. 347, 35 S.Ct. 926 (1915); *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152 (1884).

⁹ *Guinn and Beal v. United States*, note 8 supra.

¹⁰ *United States v. Cruikshank*, note 8 supra.

¹¹ *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446 (1927).

¹² *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484 (1932).

¹³ *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622 (1935), overruled by *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944).

¹⁴ 109 U.S. 3, 3 S.Ct. 18 (1883).

had distinguished "state action" from "private action," and held that Congress could not reach private action. The state, the Supreme Court ruled, acted through its legislature,¹⁵ executive,¹⁶ judiciary,¹⁷ and administrative bodies.¹⁸ State officers acting under the color of authority of their offices, but contrary to state law, also acted for the state.¹⁹ *Grovey v. Townsend*²⁰ ruled that a political party was a private organization. Then in 1944 the Supreme Court expressly overruled the *Grovey* case, holding in *Smith v. Allwright*²¹ that when the state entrusts determination of voting qualifications to the political party there is state action. South Carolina at once repealed all statutes relating to primaries.²² The state constitution was amended, taking away the legislature's power to regulate primaries.²³ But this attempt to give complete control to the political party failed when the federal district court held in *Elmore v. Rice*²⁴ that the primary is part of the general election, so party members become officers of the state in determining voting qualifications.²⁵ The principal case can be distinguished from the *Rice* case in two ways. The *Rice* decision said that repeal of state law was state action. Texas did not have to repeal any laws in this case. And the Jaybird Association "primary" is one step further removed from the general election. The Court in the present case continues to pay lip service to the requirement of state action. Four justices find state action because the Jaybird primary is an auxiliary of the Democratic primary,²⁶ three find it in the integral relation of the primary to the general election,²⁷ and one in the participation of some state officials.²⁸ All stress the controlling nature of the primary on the election. A state in which there is any sort of

¹⁵ *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921).

¹⁶ *Virginia v. Rives*, 100 U.S. 313 (1879).

¹⁷ *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948); *Ex parte Virginia*, 100 U.S. 339 (1879); *Virginia v. Rives*, note 16 *supra*; 96 *UNIV. PA. L. REV.* 402 (1948).

¹⁸ *Nixon v. Herndon*, note 11 *supra*; *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362, 14 S.Ct. 1047 (1894).

¹⁹ *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945).

²⁰ Note 13 *supra*.

²¹ 321 U.S. 649, 64 S.Ct. 757 (1944).

²² S.C. Acts (1944) p. 2241.

²³ *Id.*, p. 2344; Weeks, "The White Primary: 1944-1948," 42 *AM. POL. SCI. REV.* 500 (1948).

²⁴ (D.C. S.C. 1947) 72 F. Supp. 516, *affd.* (4th Cir. 1947) 165 F. (2d) 387, *cert. den.* 333 U.S. 875, 68 S.Ct. 905 (1948).

²⁵ South Carolina's answer to the *Rice* case was an attempt to give, through the Democratic Party, all control to private clubs limited to white membership. This failed when it was held that any primary is part of the state's election machinery, so that the political party in the state performs a state function with the state's permission. *Baskin v. Brown*, (4th Cir. 1949) 174 F. (2d) 391. The Fifth Circuit said that while political parties were private organizations under Georgia law, they were a part of the general election process as far as federal elections were concerned. *Chapman v. King*, (5th Cir. 1946) 154 F. (2d) 460, *cert. den.* 327 U.S. 800, 66 S.Ct. 905 (1946).

²⁶ Concurring opinion of Justice Clark, with whom concurred Chief Justice Vinson, Justices Reed and Jackson.

²⁷ Justices Black, Douglas, and Burton.

²⁸ Justice Frankfurter.

primary at all appears to be inextricably bound to that primary.²⁹ State action in the field of discrimination at primaries is thus becoming a fiction. The white primary in any form seems to be on its way out.

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²⁹ 101 *UNIV. PA. L. REV.* 145 (1952).