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NOTES AND COMMENTS

CONSTITUTIONAL LAW

THE PRIVILEGE OF A NEGRO CITIZEN TO VOTE IN A PRIMARY

The petitioner, a Negro citizen of Texas, having been denied the privilege to vote[1] in the Texas Democratic primary[2] for federal and state officers, brought an action for damages against the respondents on the ground that such denial was based solely on the race and color of the petitioner. The United States District Court refused the relief requested and the Circuit Court of Appeals affirmed this judgment[3] on the authority of the Supreme Court's decision in the case of Grovey v. Townsend.[4] Certiorari was granted to dispel an alleged inconsistency between the Grovey case and that of United States v. Classic.[5] Held, reversed; the decision in Grovey v. Townsend was expressly overruled. Smith v. Allwright, Election Judge, et al., 321 U. S. 649 (1944). (Justice Roberts dissenting).[6]

The instant case is seemingly one of a series arising from the

1. U. S. Const. Amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges 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 laws." U. S. Const. Amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, conor, or previous condition of servitude." 16 Stat. 140 (1870), 8 U. S. C. A. § 31 (1942): "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the controversy notwithstanding."
2. Held on July 27, 1940.
3. Smith v. Allwright et al., 131 F.(2d) 593 (C.C.A. 5th, 1942).
4. 295 U. S. 45 (1935).
5. 313 U. S. 299 (1941).
6. In a dissenting opinion Mr. Justice Roberts criticized the Court's present practice of overruling prior decisions. Such action, he said, " . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." (p. 669). "It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions." (p. 670).

efforts of the southern state of Texas to prevent the Negroes from voting. Whether such "series" is terminated by this decision remains to be seen; to some extent the answer is dependent upon the ability of the southern state to "dodge"[7] the requirements of the federal constitution and the present decision, and this in turn depends on whether the "means" used to exclude the Negro is considered to be "state action."[8] State action is clearly prohobited by the United States Constitution.[9]

A review of prior cases indicates that what was and what was not action by the state was conjectural at most and not factual. In Nixon v. Herndon,[10] the court found state action where the Texas statute of 1923 provided that "in no event shall a negro be eligible to participate in a Democratic primary election held in the state of Texas," with the obvious result that a stautute per se is state action.

By 1932 Texas had amended this statute so that the state executive committee of the Democratic party was empowered to prescribe the qualifications of its members. Pursuant to that authority the committee passed a resolution barring Negroes from voting in the primary; such action was held unconstitutional in Nixon v. Condon[11] because it was carried out by an organ of the state and thus "state action."

Later the Democratic State Convention[12] adopted a resolution which in substance prohibited Negroes from voting at primaries; this method was held valid[13] as it was not state action. This result was reached by the Supreme Court when it followed the reasoning of the Texas Supreme Court in Bell v. Hill, which held that a Texas political party was but a "voluntary association" for political action and not an organ of the state.[14] Thus up to the time of the principal case determination of party membership by the state executive committee was invalid, while determination by the state convention was valid: query, what is the mark of distinction? Apparently only that the former acted under statutory authorization while the latter did not.[15]

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7. See Willoughby, "Principles of the Constitutional Law of the United States" (2d ed. 1935) § 234.
8. "The cases in which the equal protection clause has been definitely held to prevent unreasonable discriminations in defining the right to vote involved the exclusion of negroes from participation in the primary elections of the Democratic party in some of the southern states. The issue principally discussed in most of these cases was whether the action of the party constituted action by the state since the equal protection clause would apply only if it were such." Rottschaefer, "Handbook of American Constitutional Law" (1939) 753.
9. See note 1 supra.
10. 273 U. S. 536 (1927).
11. 286 U. S. 73 (1932).
12. Note that this is not the state executive committee as provided in the stautute mentioned in the preceding paragraph.
13. Grovey v. Townsend, 295 U. S. 45 (1935), cited supra note 4.
14. Bell et al. v. Hill, County Clerk, et al., 125 Tex. 531, 534, 74 S. W. (2d) 113, 114 (1934).
15. See note 17 infra.

Mr. Justice Reed, speaking for the majority, concluded that the case of United States v. Classic[16] was relevant since it held that Congress was authorized to regulate primary elections ". . . where the primary is by law made an integral part of the election machinery. . . ."[17]

The Court found state action present when the party, under statutory authority, conducted the primary election.[18] That the Court thought a state should not encourage any discriminatory activity was quite evident.[19]

The majority opinion conceded that the instant case presented a ". . . substantially similar factual situation. . ." as that found in the Grovey case.[20] Yet it maintained that " . . . when convinced of former error, this Court has never felt constrained to follow precedent."[21] It seems reasonable to say that the Court was quite aware of its action, and that it forcefully meant what it was deciding.

It is submitted that the decision in the principal case is sound. The plain words of the United States Constitution and their literal and unmistakable meaning,[22] could not easily dictate any other result.

CRIMINAL LAW

PRESENCE OF ACCUSED DURING REREADING OF THE INSTRUCTIONS

After the jury had deliberated five or six hours over its verdict on a rape charge, the judge, proposing to reread the instructions, called

16. 313 U. S. 299 (1941), cited supra note 5.
17. Id. at 318. The Classic decision was considered pertinent only ". . . because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." Instant case at 660.
18. Instant case at 663. It was found that certain committees of the party or its state convention would certify the party's candidates to be included on the official ballot for the ensuing general election. A name not so certified could not appear on that ballot. This statutory method of selection of party nominees required the party which adhered to these directions to be ". . . an agency of the State in so far as it determines the participants in a primary election." Ibid. The Court said further that "the party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." Ibid.
19. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state officers, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." Id. at 664.
20. Instant case at 661.
21. Id. at 665.
22. See note 1 supra.