Smith
v.
Allwright
321 U.S. 649

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, *Petitioner,*

—vs.—

S. E. ALLWRIGHT, Election Judge, and JAMES E. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,

Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
Louisville, Ky.,

CARTER WESLEY,
Houston, Texas,

Of Counsel.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Lonnie E. Smith, appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 152), which affirmed a final judgment for the respondents, defendants below, by the District Court of the United States for the Southern District of Texas, Houston Division (R. 85-87).

The opinion of the Circuit Court of Appeals appears in the record herein (R. 150-151) and is reported in 131 F. (2d) 593.

The jurisdiction of this Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C., sec. 347 (a)).

PART ONE.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates of the Democratic party for the offices of U. S. Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th, and 17th Amendments of the United States Constitution (R. 4-16). The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in

Texas was "a political party affair" not subject to federal control (R. 59-71). Both parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. KENNERLY filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment that: (1) the petitioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants (respondents here) in enforcing and maintaining the policy, custom, and usage of which planitiff (petitioner here) and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the Fourteenth, Fifteenth, or Seventeenth Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).[1]

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed by petitioner on June 6, 1942 (R. 148). On November 30, 1942, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court (R. 153).[2] Petition for rehearing was promptly filed and denied on January 21, 1943, without opinion (R. 160).

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[1] The District Court reached the conclusion: "I, therefore, follow *Grovey* v. *Townsend,* and render judgment for defendants" (R. 85).

[2] The *per curiam* opinion of the Circuit Court of Appeals concluded: "The opinion in that case (U. S. v. Classic) did not overrule or even mention *Grovey* v. *Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed" (R. 152).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, and has been a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic party and, as found by the district judge, is a Democrat (R. 81).

On July 27, 1940, a primary, and on August 24, 1940, a "run off" primary were held in Harris County, Texas, for nomination of candidates upon the Democratic ticket for the offices of U. S. Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct with his poll tax receipt and requested to be permitted to vote. Respondents refused him a ballot because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article

2955 of the Revised Civil Statutes of Texas, which statute sets forth identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Primaries in Texas are created, required and controlled in minute detail by an intricate statutory scheme.[3]

According to the stipulations of facts made a part of the Findings of Facts of District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

While there is a statutory provision requiring the payment of certain primary election expenses by the candidates, all other expenses are borne by the State of Texas. The County Clerk, the Tax Assessor and Collector, and the County Judge of Harris County all performed duties required of them under Articles 3100-3153, Revised Civil Statutes of Texas, in connection with holding of the primaries on July 27, 1940 and August 24, 1940, without cost to the candidates, or the Democratic party, or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination are certified by the County Executive

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[3] The present election laws of Texas originated with the so-called "Terrell Law," being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82 to 107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C filed herewith.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D filed herewith.

Committee to the State Executive Committee; the State Executive Committee, in turn, certifies said nominees to the Secretary of State who places the names of these candidates on the General Election Ballot to be voted on in the General Election. Such services are rendered by the Secretary of State as a part of his governmental function and are paid for by the State of Texas. Said Secretary of State also certifies other Party candidates as well as Independent candidates for places upon the General Election Ballot; such services as rendered by the Secretary of State are paid by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee (R. 76), it is admitted: "that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned pro rata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied" (R. 76).

The stipulation of facts agreed upon by petitioner and respondents provides that: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas with two exceptions" (R. 72).

PART TWO.

Question Presented.

Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of federal officers?

PART THREE.

Reasons Relied on for Allowance of the Writ.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN UNITED STATES v. CLASSIC.

II. RATIO DECIDENDI OF GROVEY v. TOWNSEND SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

A. GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC PRESENT INCONSISTENT THEORIES AS TO FEDERAL AUTHORITY OVER PRIMARIES WHICH DECIDE ELECTIONS.

B. GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC PRESENT INCONSISTENT THEORIES OF WHAT CONSTITUTES "STATE ACTION" IN THE CONDUCT OF PRIMARIES.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
Louisville, Ky.,

CARTER WESLEY,
Houston, Texas,
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S. E. ALLWRIGHT, Election Judge, and JAMES J. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240(2) of the judicial code (28 U. S. C. Sec. 347 (A)).

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the

time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

Statement of the Case.

The statement of the case and a statement of the salient facts from the record are fully set forth in the accompanying petition for certiorari. Any necessary elaboration on the finding of the points involved will be made in the course of the argument.

Errors Below Relied Upon Here.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN UNITED STATES V. CLASSIC.

II. RATIO DECIDENDI OF GROVEY V. TOWNSEND SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN GROVEY V. TOWNSEND AND UNITED STATES V. CLASSIC APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

Argument.

I.

The decision of the Circuit Court of Appeals in this case is inconsistent with the decision of this Court in *United States* v. *Classic*.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights

secured by Sections 2 and 4 of Article I and the 14th, 15th, and 17th Amendments of the Constitution of the United States. The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner and other qualified electors to vote in the Democratic primary election held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. Those rulings were inconsistent with the decision of this Court in *United States* v. *Classic,* 313 U. S. 299 (1941).

Petitioner seeks to maintain this action to obtain redress for deprivation of a constitutional right specifically recognized and described by this Court in the *Classic* case. There, relying on Section 2 of Article I this Court said: "The right of the people to choose (Congressmen) * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314).

In the *Classic* case, as in the instant case, the acts complained of had been committed in connection with primary elections. Nevertheless, this Court concluded that those acts were an interference with a right "secured by the Constitution," saying:

> "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 in the primary, is rightfully included in the right in Article I, Section 2. This right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right

> at a party primary which invariably, sometimes or never determines the ultimate choice of the representative" (313 U. S. 299, 318).[1]

In the instant case the record demonstrates that the laws of the State of Texas have made the primary "an integral part of the procedure of choice." No valid distinction can be drawn between the Texas and Louisiana statutes in this connection.[2] Moreover, the history of Texas elections shows that the Democratic primary "effectively controls the choice" of the elected representatives in the State,[3] and respondents in this case have so stipulated.[4]

While *United States* v. *Classic, supra,* was a criminal case, the statutory prohibition (18 U. S. C. sec. 51, 52), involved there closely parallels Section 43 of Title 8 of the

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[1] Compare statement by Holmes, J., in *Nixon* v. *Herndon* (273 U. S. 536, 540) 1927.

> "If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

[2] See Appendix B for a comparative table of the Texas and Louisiana constitutional and statutory provisions applicable to primary elections.

[3] See: *American Parties and Elections* by Edward A. Sait (1942), pp. 63 *et seq.*: *The Fate of the Direct Primary* by Charles Evans Hughes, 10 National Municipal Review 23, 24; *Party Government in the House of Representatives* by Hasbrouck (1927) pp. 172, 176, 177; *Primary Elections* by Merriam and Overacker (1928) pp. 267-279.

> On the great decrease in the vote cast in the general election from that cast at the primary in "one-party" areas of the country, see George C. Stoney, *Suffrage in the South,* 29 Survey Graphic 163, 164 (1940). In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

[4] Both parties agreed to the following stipulation: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72).

United States Code upon which petitioner here relies. These sections of the United States Code are parts of the same Acts of Congress, the legislative history of which demonstrates that they were intended to provide both civil and criminal redress for the same wrongs.[5] Both the criminal sanction of Section 52 of Title 18 and the civil sanction of Section 43 of Title 8 are aimed at any deprivation of con-

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[5] After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men including language similar to that in Section 43 of title 8 and section 52 of title 18. The 2nd Civil Rights Act (16 Stat. 140—16 Stat. 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third civil rights act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of the United States Civil Code were both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

Sec. 43 of Title 8

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

Sec. 52 of Criminal Code

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalities, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510, Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

stitutional right "under color of any statute, ordinance, regulation, custom, or usage of any state or territory." Election judges in Texas, just as in Louisiana, have authority to act in primary elections only by virtue of the State laws.[6] The decision of the Court below is inconsistent with the determination made by this Court in the *Classic* case that the "alleged acts of appellees were committed in the course of their performance of duties under Louisiana statutes requiring them to count the ballots, to record the result of the count, and to certify the result of the elections. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" (313 U. S. 299, 325-326).[7]

Moreover, this Court having found that the misconduct of primary election officials in the *Classic* case constitutes action taken "under color of state law" within the meaning of Section 52 of Title 18, United States Code, it necessarily follows that similar misconduct here involves "state action" within the meaning of the 14th Amendment.[8] Where such misconduct is discrimination on account of the race or color of the complaining voter, there is, likewise, a violation of the 15th Amendment and section 31 of Title 8 of the United States Code which is a part of an original act entitled, "A Bill to Enforce the Right of Citizens of the

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[6] See Appendix B.

[7] Section 43 of Title 8 has been used repeatedly to enforce the right of citizens to vote without discrimination because of race or color. See: *Myers* v. *Anderson,* 238 U. S. 368 (1914); *Lane* v. *Wilson,* 307 U. S. 268 (1939).

[8] *Cf. Ex Parte Virginia,* 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913); *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 507, 519 (1939).

United States to Vote in the Several States of this Union and for other purposes" (17 Stat. 13).[9]

It is, therefore, submitted that the decision of the Circuit Court of Appeals affirming the action of the District Court in this case is inconsistent with the decision of this Court in *United States* v. *Classic, supra.*

II.

Ratio decidendi of _Grovey_ v. _Townsend_ should be re-examined in the light of new facts disclosed by the present record.

The record formerly before this Court in *Grovey* v. *Townsend,* 295 U. S. 45 (1935), failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary". That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record. In the words of Mr. Justice BRANDEIS:

> "Not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile." *Burnett* v. *Coronado Oil and Gas Co.,* 285 U. S. 393, 412 (1932).

In *Grovey* v. *Townsend, supra,* this Court decided that the present method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th

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[9] *Myers* v. *Anderson* (*supra*).

Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grovey v. *Townsend, supra,* was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic party of Texas and permitted the assumption that the "party" had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of "party membership" and restricted to members of an organized voluntary association called the "Democratic party."[10] The present record and the following analysis will show that these supposed facts, vital to the decision in *Grovey* v. *Townsend, supra,* did not exist.

The problem in *Grovey* v. *Townsend, supra,* as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th

[10] "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary * * *" (296 U. S. 45, 50).

and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

In contrast, the nature, organization and functioning of the "Democratic party" were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell* v. *Hill,* 123 Tex. 531, 74 S. W. (2d) 113 (1938), that the "Democratic party" of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.[11]

Now, for the first time, this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and "party" in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey* v. *Townsend, supra,* an election at which the members of an organized voluntary political association choose their candidates for public office.

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democartic" primary. The testi-

[11] *Bell* v. *Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

mony of the respondent Allwright is positive and stands unchallenged on this point.

> "Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.
>
> Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.
>
> Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.
>
> Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.
>
> Q. And you do let them vote? A. Yes" (R. 106).

Second, the "Democratic party" of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the "Democratic party" in Texas is not organized. Officials claiming to represent the "party" testified positively that the "party" has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic "party" conventions are preserved (R. 131). The "party" has no officers between conventions (R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party

doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the "Democratic party" and the "Democratic primary" elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the "Democratic party" is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey* v. *Townsend, supra,* compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.86% of the total adult population (citizens) of Texas.[12] It is for the correction of this error and the resultant deprivation of constitutional right that the present petition is submitted.

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[12] United States Census (1940). (Figures include native born and naturalized adult citizens.)

III.

Inconsistency between the decisions of this Court in *Grovey* v. *Townsend and United States* v. *Classic* apparent in their application to the instant case should be resolved.

The District Court and the Circuit Court of Appeals refused to follow the decision in *United States* v. *Classic, supra,* because of their belief that the instant case was controlled by the earlier decision in *Grovey* v. *Townsend, supra.* The District Court concluded: "I, therefore, follow *Grovey* v. *Townsend,* and render judgment for Defendants" (R. 85). The Circuit Court of Appeals likewise followed the *Grovey* case in affirming the lower court. In a *per curiam* opinion it was stated:

> "The Texas statutes regulating party primaries which were considered in *Grovey* v. *Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this. It is argued that different principles were announced by the Supreme Court in *United States* v. *Classic,* 313 U. S. 301. The latter was a criminal case from Louisiana, and did not involve the Texas statutes. It differs in many points from this case. The opinion of the court in that case did not overrule or even mention *Grovey* v. *Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed" (R. 152).

In thus following the *Grovey* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between apparently inconsistent legal theories of this Court as to federal control over primaries.

A. Grovey v. Townsend and United States v. Classic present inconsistent theories as to Federal authority over primaries which decide elections.

The decision in the *Grovey* case was based on the theory that the right to participate in the Democratic Primary is one of the privileges incidental to membership in the Democratic Party of Texas and should not be confused with "the right to vote." Thus, the opinion stated:

> "The complaint states that * * * in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. * * * The argument is that as a Negro may not be denied a ballot at a general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of race or color is prohibited by the Federal Constitution" (295 U. S. 45, 54).[13]

In following the decision in the *Grovey* case the lower courts ignored the reasoning in the *Classic* case that in a state where choice at the primary is tantamount to election, the right to vote in the primary is derived not from the party but from the Constitution. In the *Grovey* case the

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[13] Similar reasoning appears throughout the *Grovey* decision: *e. g.*, "Here the qualifications of citizens to participate in party counsels and to vote at primaries has been declared by the representatives of the party in convention assembled, and this action upon its face is not state action" (295 U. S. 45, 48).

question as to whether or not federal authority extended to primary elections was approached by a consideration of the relation between the Democratic primary elections and the "Democratic party" in Texas. In the *Classic* case the Court viewed as controlling the fundamental relationship between the Democratic primary elections and the choice of office-holders. The Court was not concerned with who ran the machinery but with the practical operation of that machinery upon the expression of choice.[14]

The *Grovey* case was a complaint for damages in a state court based solely upon the Fourteenth and Fifteenth Amendments, and this Court, therefore, centered its attention upon the question of what constituted "state action" under those Amendments. Yet the language of the opinion is so broad as to create the impression that the effect of the primary in controlling the choice of office-holders has no bearing whatsoever upon the question of federal authority over the conduct of primary elections. The lower courts here gave this all-inclusive effect to the language of the *Grovey* case thereby ignoring the decision of this Court in the *Classic* case that the right to vote in such a primary is derived from the Constitution and protected by federal statutes not involved in the *Grovey* case.

[14] "The right of the people to choose (Congressmen), * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314).

B. Grovey v. Townsand and United States v. Classic present inconsistent theories of what constitutes "state action" in the conduct of the primaries.

The Louisiana and Texas election statutes are substantially alike. On the basis of the Louisiana election laws this Court in the *Classic* case concluded that the Democratic primary in Louisiana was "an integral part of the election machinery of Louisiana and that the election officials who refused to count the ballots of qualified electors in the primary election in Louisiana were rightfully charged with violation of Sections 19 and 20 of the Criminal Code (18 U. S. C., secs. 51 and 52) because "misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken 'under color of' state law" (313 U. S. 299, 326). But in the *Grovey* case the action of officials conducting a primary election which was similarly created, required, regulated and controlled by the State was held not to be "state action." The essential inconsistency is that in the *Classic* case the Court decided the issue of state action by examining the relation of the state to the enterprise in which the election judges were engaged, while in the *Grovey* case the Court disregarded this relationship and gave legal effect to the circumstances that the particular act complained of was not authorized by the state. If the *Grovey* doctrine had been applied in the *Classic* case it would have led to the conclusion that the election frauds were not "under color of state law" because they were not authorized by the state.

It is these conflicts between the theories of *United States* v. *Classic* and *Grovey* v. *Townsend* which should be resolved, and resolved in accordance with the sound theory in the *Classic* case.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
Louisville, Ky.,

CARTER WESLEY,
Houston, Texas,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, *Petitioner,*

—vs.—

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

THURGOOD MARSHALL,
New York, N. Y.,

WILLIAM H. HASTIE,
Washington, D. C.,

Attorneys for Petitioner.

W. J. DURHAM,
Sherman, Texas,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

CARTER WESLEY,
Houston, Texas,

MILTON R. KONVITZ,
Newark, N. J.,

Of Counsel.

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Supreme Court of the United States

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BRIEF FOR PETITIONER.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

The jurisdiction of the Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C. Sec. 347 (A)). Certiorari was granted June 7, 1943.[1]

[1] 87 L. Ed. 1167.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates upon the Democratic ticket for the offices of United States Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th and 17th Amendments of the United States Constitution (R. 4-16).[1] The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in Texas was "a political party affair" and, therefore, not subject to federal control (R. 59-71). The parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. Kennerly filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment: (1) that the peti-

[1] Jurisdiction of the federal courts is invoked under Sections 41 (11), 41 (14) and 400 of Title 28 of the United States Code.

tioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom, and usage of which plaintiff [petitioner here] and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents of and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic Party and, as found by the district judge, is a Democrat (R. 81). Petitioner has never voted for any other candidates than those of the Democratic Party in any general election at all times material to this case; has been and is ready and willing to take the pledge of persons voting in the Democratic Primary (R. 71, 81).

A primary and a "run off" primary were held in Harris County, Texas, on July 27, 1940 and August 24, 1940, for nomination of candidates upon the Democratic ticket for the

offices of United States Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner with his poll tax receipt presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct and requested to be permitted to vote. Respondents refused him a ballot solely because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article 2955 of the Revised Civil Statutes of Texas. This statute prescribes identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Direct primary elections in Texas were created and are required and controlled in minute detail by an intricate statutory scheme.[1]

According to the stipulations of facts made a part of the Findings of Facts of the District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

[1] The present election laws of Texas originated with the so-called "Terrell Law", being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82-107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C heretofore filed.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D heretofore filed.

The Democratic Party in Texas.

The Democratic Party is the only party in Texas required by law to hold primary elections (R. 72). The Democratic Party in Texas is a voluntary association of individuals without any rules or procedure for becoming a member (R. 119). There is no constitution, nor are there by-laws or fixed rules for the Democratic Party (R. 133, 146). It is admittedly run in a "slip-shod" manner (R. 146). There are no permanent records (R. 131). There are no fixed rules for the "government of the affairs of the Party" other than the election laws of the State of Texas (R. 133-134). The policy of the party is dictated by the conventions held every two years. There are no permanent officers of the party (R. 125). Officers of the convention are elected at each convention and their duties end at the adjournment of the convention (R. 146).

Every two years primary elections are held pursuant to the elections laws of the State of Texas (R. 131-132). In the holding of these elections the laws of Texas are followed (R. 131). There are no rules for holding these elections other than the election laws of Texas (R. 133-134). At these primary elections any white elector, regardless of party affiliation, is permitted to vote (R. 106, 81).

After the elections are held the successful candidates are certified to the Secretary of State of Texas (R. 128). This likewise is done pursuant to and by virtue of the election laws of Texas (R. 128).

Expenses of the Primary.

The County Clerk, the Tax Assessor and Collector, the County Judge of Harris County all performed their duties under Articles 3100-3153, Revised Civil Statutes of Texas,

in connection with holding of the primaries on July 27, 1940, and August 24, 1940, without cost to the candidates or the Democratic Party or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination were certified by the County Executive Committee, and the State Executive Committee, in turn, certified such nominees to the Secretary of State who placed the names of such candidates on the General Election Ballot to be voted on in the general election. All services rendered in this connection by the Secretary of State were paid for by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee, it is admitted: "... that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned prorata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied" (R. 76).

Errors Relied Upon.

The question presented by the Petition for Certiorari heretofore granted was:

> *"Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of Federal officers?"*

The Circuit Court of Appeals erred in affirming the judgment of the trial court denying petitioner relief and

issuing a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom and usage, of which plaintiff [petitioner here] and other Negro citizens are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed for the following reasons:

I.

THE CONSTITUTION AND LAWS OF THE UNITED STATES AS CONSTRUED IN UNITED STATES v. CLASSIC PROHIBIT INTERFERENCE BY RESPONDENTS WITH PETITIONER'S RIGHT TO VOTE IN TEXAS DEMOCRATIC PRIMARIES.

A. THE RATIONALE OF THE CLASSIC CASE COVERS A CIVIL ACTION FOR DENIAL OF THE RIGHT TO VOTE IN A LOUISIANA PRIMARY ELECTION BECAUSE OF RACE OR COLOR.

B. THERE IS NO ESSENTIAL DIFFERENCE BETWEEN THE STATUS OF PRIMARY ELECTIONS IN LOUISIANA AND IN TEXAS.

(1) Texas like Louisiana has made primary elections "an integral part of the procedure of choice".

(2) In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.

C. THE RESPONDENTS HERE ARE SUBJECT TO THE CONTROLLING FEDERAL STATUTES.

II.

THE ACTION OF RESPONDENTS HEREIN WAS IN VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

A. THE CONDUCT OF RESPONDENTS IN DENYING PETITIONER A BALLOT TO VOTE IN THE TEXAS DEMOCRATIC PRIMARY WAS STATE ACTION.

B. NEW MATTER DISCLOSED IN THE PRESENT RECORD DESTROYS THE FACTUAL BASIS FOR THE DECISION IN GROVEY V. TOWNSEND.

ARGUMENT.

I.

The Constitution and laws of the United States as construed in *United States v. Classic* prohibit interference by respondents with petitioner's right to vote in Texas Democratic primaries.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article 1 and the Seventeenth Amendment of the Constitution of the United States (R. 4-5).[1] The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner

[1] Jurisdiction of the District Court was invoked under sub-divisions 11 and 14 of Section 41 and Section 400 of Title 28 of the United States Code (R. 4-5).

and other qualified electors to vote in the Democratic primary elections held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. These rulings are inconsistent with the decision of this Court in *United States* v. *Classic.*[1]

A. The rationale of the *Classic* case applies to a civil action for denial of the right to vote because of race or color in a Louisiana primary election.

In *United States* v. *Classic, supra,* all of the Justices agreed that the right to vote in a direct primary election which the State has made an integral part of the procedure of choice among candidates for Congress or which in fact effectively controls such choice is secured by the Constitution as fully as is the right to vote in a general election.[2]

The majority of the Court then concluded that the criminal sanctions of Sections 19 and 20 of the Criminal Code in terms directed at "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and the laws of the United States" were applicable to the deprivation of the right of a voter to have his ballot counted in such a primary election.

It necessarily follows that the defendants, *Classic,* and others, were likewise liable civilly to the complaining witness under Section 43 of Title 8 of the United States Code, which is part of the same original Act as Sections 19 and

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[1] 313 U. S. 299 (1941).

[2] Compare statement by HOLMES, J., in *Nixon* v. *Herndon,* 273 U. S. 536, 540 (1927): "If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

20 of the Criminal Code and the language of which closely approximates the language of Section 20.[1]

If the person seeking civil remedy has been debarred from participation in the primary because of race or color, he need not rely upon the general language of Section 43 alone because the act complained of is expressly prohibited by Section 31 of Title 8 of the United States Code, under the heading "Race, color or previous condition not to affect right to vote", which provides as follows:

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the

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[1] After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men. The second Civil Rights legislation (16 Stat. 140; *id.* 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third Civil Rights Act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of Title 18 (Section 20 of the Criminal Code) of the United States Code are both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

Sec. 43 of Title 8	Sec. 20 of Criminal Code
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."	"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510, Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

> 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 contrary notwithstanding. R. S. sec. 2004."

The dissenting Justices in the *Classic* case were of opinion that Section 20 as a criminal statute should be given a restrictive construction which would exclude frauds in primary elections from the wrongs embraced by that section. However, the allowance of a civil remedy is not impeded by the special restrictive canons of construction which are peculiarly applicable to criminal statutes. Indeed, Section 43 of Title 8 has been used repeatedly to enforce the right of the citizen to vote without discrimination because of race or color.[1]

This problem of statutory construction is obviated altogether by Section 31 of Title 8, *supra,* since it is directed at the very wrong now under consideration; namely, the denial of the right to vote at any election because of race or color.

Once a primary becomes an election within the purview of federal authority, Sections 31 and 43 of Title 8 provide the voter with a civil remedy calculated to protect his right to vote in such primary election without distinction because of race or color. It follows that if the present petitioner were a Negro citizen of Louisiana complaining of acts in that State identical with those which occurred in Texas, he would have a cause of action under the doctrine of this Court in *United States* v. *Classic, supra.*

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[1] See *Myers* v. *Anderson,* 238 U. S. 368 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939).

B. There is no essential difference between primary elections in Louisiana and in Texas.

A comparison of primary elections and primary election laws in Texas with primary elections and primary election laws in Louisiana, demonstrates that in Texas, as in Louisiana, "the state law has made the primary an integral part of the procedure of choice [and that] . . . in fact the primary effectively controls the choice".[1]

1. *Texas like Louisiana has made primary elections "an integral part of the procedure of choice".*

In *United States* v. *Classic,* this Court decided that a direct primary election is subject to federal control under Article I "where the state law has made the primary an integral part of the procedure of choice".[2] The Court pointed out that these constitutional provisions do not cease to be applicable when a state "changes the mode of choice from a single step, a general election to two, the first of which is a choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election".[3] In another formulation of the same principle the Court said "that the authority of Congress . . . includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress".[4] To determine the applicability of the stated principle in the *Classic* case, this Court considered the statutes of Louisiana concerning direct primary elections. While the Court did not in terms indicate which statutory pro-

[1] *United States* v. *Classic,* 313 U. S. at p. 318.
[2] 313 U. S. at p. 318.
[3] 313 U. S. at pp. 316-317.
[4] 313 U. S. at p. 317.

visions were of greatest significance in establishing the primary as part of the procedure of choice, the opinion does specify the two decisive types of state action from which this consequence had resulted; namely, (1) "setting up machinery for the effective choice of party candidates"; and, (2) eliminating or seriously restricting "the candidacy at the general election of all those who are defeated at the primary".[1]

Comparison of the Texas and Louisiana statutes demonstrates that the legislatures of both states have taken the same type of action.[2]

In Louisiana all political parties casting five per cent. or more of the total votes at the preceding elections are required to nominate by direct primary election (Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3). In Texas all political parties casting 100,000 or more votes at the last general election are required by statute to nominate by direct primary election. (Vernon's Revised Civil Statutes, Article 3101.) It is agreed by both parties that: "At all times material herein the only state-wide primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

Texas eliminates or restricts the candidacy of persons other than primary victors to a greater extent than does Louisiana. The Texas law provides restrictions equivalent to those in Louisiana.[3] In addition the Texas law requires

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[1] 313 U. S. at p. 311.

[2] See Comparative Tables of Louisiana and Texas election statutes in Petitioner's Appendices filed herein under separate cover.

[3] Candidacy at the general election by means of independent nominating petition is restricted by the pledge required by statute of all persons participating in primary elections and the further statutory provision that persons participating in primary elections in which a candidate is chosen for office may not sign a petition in favor of another's nomination to said office (Article 3160).

that all party or organization candidates for Senator must be chosen at a primary election, and goes so far in making this restriction explicit as to preclude any candidates defeated in a senatorial primary from running as an independent or non-partisan candidate in the general election.[1]

It is submitted that the foregoing are controlling factors sufficient in themselves to make a primary election an integral part of "the procedure of choice". Other statutory provisions may be relevant but they are not decisive. A large number of such subsidiary items appearing in both the Texas and Louisiana statutes are assembled for the purpose of comparison in parallel columns in Petitioner's Appendices. Only one of these cumulative circumstances appears in the Louisiana statutes but not in the Texas statutes. In Louisiana the State collects a fee from all candidates participating in primary elections and thereafter conducts the primary at its own expense, while in Texas, the statutes require the payment of certain prescribed fees by candidates to the Executive Committees of the Democratic Party to be used for the purpose of paying certain of the expenses of said primary.[2] In Texas many of the expenses of the primary are paid in their entirety and directly by the

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[1] Vernon's Revised Civil Statutes of Texas, Arts. 3090, 3096.

[2] These funds contributed by candidates are considered a trust fund solely for the purpose of paying of certain expenses for the primary election and cannot either be appropriated by the Democratic party or used for any purpose other than those purposes specifically set out in the primary election statutes. *Kaufman et al.* v. *Parker,* 99 S. W. (2d) 1074 (1936); *Small* v. *Parker,* 119 S. W. (2d) 609 (1938).

state.[1] However, this factor, in the Texas scheme does not make the primary either more or less a part of the procedure of choice. It does not change the effectiveness of the primary in eliminating candidates, nor does it make primaries more or less mandatory or more or less completely defined by law. Thus tested by the criteria set up by this Court in the *Classic* case, this factor is in no sense controlling.

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[1] Pursuant to Article 2975 of the Revised Statutes of Texas the County Collector of Taxes of Harris County, Texas, prepared a list of qualified voters of said county who paid their poll tax prior to January 31, 1940. Pursuant to Article 3121 of the Revised Statutes of Texas, the County Collector for Harris County, Texas, delivered a copy of this list to the defendants in their official capacities as Judges of Primary Elections, to be used by them in determining the qualifications of voters in said primary election. The expenses for the listing of qualified electors and the furnishing of these lists in the primary elections are paid for by the State of Texas and Harris County; pursuant to statute as follows:

> "The tax collector shall be paid fifteen cents for each poll tax receipt and certificate of exemption issued by him to be paid *pro rata* by the State and County in proportion to the amount of poll tax received by each, which amount shall include his compensation for administering oaths, furnishing lists of qualified voters in election precincts for use in all general and primary elections and primary conventions where desired. . . ." (Article 2994.)

Pursuant to Article 3120 of the Revised Statutes of Texas, voting booths, ballot boxes, and guard rails prepared for general elections may be used for primary elections.

Pursuant to Article 2956 of the Revised Statutes of Texas, the County Clerk of Harris County, Texas, is authorized and required to receive absentee ballots for voting in the primary elections.

Pursuant to Article 3128 of the Revised Statutes of Texas, the County Clerk is required to cause the names of the candidates who have been nominated to be printed in some newspaper published in the County and to post a list of such names in at least five public places in the county, one of which shall be upon the courthouse door.

2. *In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.*

In *United States* v. *Classic, supra,* this Court decided that "where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary" is protected by the Constitution. In that case, an allegation that selection in the Democratic primary in Louisiana was decisive of election to Congress was admitted by demurrer to the indictment.

In the present case, it was alleged by the petitioner in his complaint and demonstrated by a summary of election statistics appended thereto that nominees of the Democratic Party have been elected in all major elections in Texas with but two exceptions since 1859 (R. 9, 29-59). Thereafter, by stipulation of the parties duly incorporated in the trial record, it was established as a fact that "since 1859 all Democratic nominees for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72). In his trial findings the District Judge stated that "the facts in detail have been stipulated, but it seems only necessary to refer to the Stipulations and to make them a part thereof" (R. 81).[1]

As a matter of fact, in 1940 when petitioner tried to vote the only opportunity for any Texas voter to exercise his choice for United States Senator was in the Democratic

[1] The full import of this is made clearer upon consideration of the fact that during this period two senators have been elected each six years, 21 members of United States House of Representatives have been elected every two years, and a governor elected every two years. The fact that during this period of more than eighty years there have only been two instances of election of candidates other than those of the Democratic Party demonstrates clearly that nomination at the Democratic primary in Texas is tantamount to election.

primary election. It was the only primary election held in 1940 (R. 72). The figures for the 1940 general election in Texas show the following vote for United States Senator: Democrat 978,095 and Republican 59,340.[1]

The Texas Court of Civil Appeals has pointed out that it is "a matter of common knowledge in this state that a Democratic primary election, held in accordance with our statutes, is virtually decisive of the question as to who shall be elected at the general election".[2]

It is adequately established in this record that in Texas, as was the case in Louisiana, the Democratic primary in fact "effectively controls the choice". The legal consequence of this, under the *Classic* case, is that the right to vote in Texas primary elections is secured by the Constitution.

C. The respondents herein are subject to the controlling federal statutes.

Section 31 of Title 8 of the United States Code declares the federal right of otherwise qualified electors to vote at

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[1] Congressional Directory (1943), p. 250.

[2] *State* v. *Meharg,* 287 S. W. 670, 672 (1926). One of the major reasons for the development of the primary election was that in "the South, where nomination by the dominant party meant election, it was obvious that the will of the electorate would not be expressed at all, unless it was expressed at the primary". CHARLES EVANS HUGHES, *The Fate of the Direct Primary,* 10 National Municipal Review, 23, 24. See also: HASBROUCK, *Party Government in the House of Representatives* (1927), 172, 176, 177; MERRIAM and OVERACKER, *Primary Elections* (1928), 267-269.

On the great decrease in the vote cast in the general election from that cast at the primary in the "one-party" areas of the country, see GEORGE C. STONEY, *Suffrage in the South,* 29 Survey Graphic 163, 164 (1940). In Louisiana there were 540,370 ballots cast in the 1936 Congressional primaries, as against 329,685 in the general election. In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

all elections without distinction of race or color.[1] It is admitted that respondents prevented petitioner from voting because of his race and color. Sub-division 11 of Section 41 of Title 28 of the United States Code[2] gives the District Court jurisdiction of all suits to enforce rights of citizens of the United States to vote in the several states.[3] Similarly Section 400 of Title 28 conferring jurisdiction over proceedings for a declaratory judgment contains no limitation significant for present purposes as to the person against whom such proceedings may be brought. Thus it is necessary only that the petitioner show that the respondents are persons who have in fact infringed the right which he asserts, and it is not necessary that he shows that respondents acted under color of any state law.

It is only under Section 43 of Title 8 and under Subdivision 14 of Section 41 of Title 28 that a question arises whether the respondents acted "under color of any statute, ordinance, regulation, custom, or usage of any state". The

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[1] See: *Guinn* v. *United States,* 238 U. S. 347 (1915); *Myers* v. *Anderson* (*supra*); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Nixon* v. *Condon,* 286 U. S. 73 (1932).

[2] "The district courts shall have original jurisdiction. . . .

"Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States."

[3] Section 31 of Title 8 is codified from Section 1 of the Act of May 31, 1870 (16 Stat. 140) which was amended by the Act of February 28, 1871 (16 Stat. 433). Section 15 of this amended statute provided that the Circuit Courts of the United States should have jurisdiction of all cases in law and equity arising under the original and amended acts. By Act of March 7, 1911 (36 Stat. 1092) the jurisdiction over these actions was transferred to the District Courts of the United States. This section has now become Section 41 (11) of Title 28 of the United States Code.

facts show that they did so act. It is the State of Texas which, by its election laws, creates, requires, regulates and controls the direct primary election as an integral part of the election machinery in that state. It is the statutes of Texas which require the appointment of primary election judges and prescribe the qualifications and disqualifications for such office, which are the same as the qualifications and disqualifications for judges of general elections. (Vernon's Revised Statutes, Articles 3104, 2930, 2940.) The statutes of Texas prescribe in minute detail the powers of primary election judges, which are likewise the same as those of general election judges. Specifically, respondents as such primary election judges were under statutory mandate to administer oaths, to preserve order, and to appoint special officers to assist in the maintenance of order (Art. 3105). They were required to compel the observance of the law prohibiting loitering and electioneering near the polling places and to arrest any person engaged in conveying voters to the polls in carriages or other conveyances except as permitted by statute (Art. 3105). All of these significant police powers of the respondents as election judges are derived solely from and exercised under the sovereign authority of the State of Texas. It is particularly significant that respondents as election judges are required by Article 3104 of the Revised Civil Statutes of Texas to take an oath which is the same oath that is required of officials serving in general elections and, moreover, Articles 217 and 231 of the Penal Code of the State of Texas make it a criminal offense subject to fine for any election judge to refuse to deliver a ballot to or receive the vote of a qualified elector in a primary election.

It is the usual procedure in Harris County, Texas, for the same individuals who are appointed election judges in the general elections also to serve as election judges in

the Democratic primary elections (R. 74). The respondents conducted the Democratic primary elections of 1940 in the same manner as the general elections and in conformance with the statutes of the State of Texas (R. 74, 103-108).

With their offices thus created and defined by the State and with their duty to receive and count ballots imposed by statute, respondents so exercised their official function under the laws of Texas as to deny petitioner the right to vote. Thus the action of which petitioner complains comes squarely within the test of action under color of state law as formulated in *United States* v. *Classic:* "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law".[1] Respondents "possessed" their "power . . . by virtue of state law" and their rejection of the petitioner's ballot was "made possible only because [they were] clothed with the authority of state law". Controlling effect should be given here as in the *Classic* case, to the relationship of the State to the enterprise in which the primary election judges were engaged. Once the state's relationship to the enterprise in which the offending persons are engaged is established, it is immaterial what sanction, if any, is claimed for a particular act done in performing an official function. Indeed,

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[1] 313 U. S. at 326.

Cf. *Ex Parte Virginia,* 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913); *Hague* v. *Committee for Industrial Organization,* 307 U. S. 469, 507, 519 (1939).

if the matter of such sanction were controlling, the Court would necessarily have concluded in the *Classic* case that the alleged election frauds were not "under color of" state law because they were not authorized by the State.[1]

It is submitted that this reasoning should have been but was not adopted when the status of Texas primary elections was considered by this Court in *Grovey* v. *Townsend.*[2] In that case, the conduct of election judges was considered to be private rather than State action because the act complained of—the exclusion of Negroes from voting—was not authorized by the State. Under the correct approach of the *Classic* case, authority for the particular act is immaterial so long as the relationship of the State to the enterprise in which the election judges are engaged is such as to bring their whole course of official conduct "under color of state law". This conflict between the theories of *United States* v. *Classic* and *Grovey* v. *Townsend* should now be resolved in accordance with the sound reasoning of the *Classic* case.

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[1] In an unbroken line of decisions this Court has held that an officer of a state finds no shield from enforcement of federal constitutional and statutory limitations in the fact that the state law did not authorize the acts complained of. Even prohibition of misconduct by state statute does not operate to limit the federal authority to enforce constitutional restrictions as against state officers. See: *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20 (1907); *Siler* v. *Louisville and Nashville R. R.,* 213 U. S. 175 (1909); *Des Moines* v. *Des Moines City Ry.,* 214 U. S. 179 (1909); *Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913); *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239 (1931). These cases must be taken as overruling the earlier and inconsistent *Barney* v. *City of New York,* 193 U. S. 430 (1904).

[2] 295 U. S. 45 (1935).

II.

The action of respondents herein was in violation of the Fourteenth and Fifteenth Amendments.

The refusal of the respondents to permit petitioner to vote in the Democratic primary in Texas because of race or color also violated the Fourteenth and Fifteenth Amendments to the Constitution of the United States. In the State of Texas, where the state law has made the primary an integral part of the procedure of choice and where in fact the primary effectively controls the choice, the prohibitions of the Fourteenth and Fifteenth Amendments apply to primary elections to the same extent as in the case of general elections.

A. The conduct of respondents in denying petitioner a ballot to vote in the Texas Democratic primary was state action.

In the *Classic* case this Court indicated that in primaries which are an integral part of the election machinery of a state the protection afforded by the Fourteenth Amendment to Negro voters is even clearer than the more generalized protection of Article I. Interpreting Section 19 of the Criminal Code the Court stated: "It does not avail to attempt to distinguish the protection afforded by Sec. 1 of the Civil Rights Act of 1871, 8 U. S. C. A. Sec. 43, to the right to participate in primary as well as general elections, secured to all citizens by the Constitution, . . . on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment".[1]

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[1] 313 U. S. at p. 323.

The action of the respondents herein in refusing petitioner a ballot to vote in the Texas Democratic primary was "state action" within the meaning of the Fourteenth and Fifteenth Amendments to the same extent that the action of the defendants in the *Classic* case was "under color of" state law within the meaning of Section 20 of the United States Code. In the *Classic* case this Court after finding that the Democratic primary in Louisiana was "an integral part of the election machinery" of that state concluded that the election officials who refused to count the ballots of qualified electors in the primary elections were rightfully charged with violation not only of Section 19 of the Criminal Code, prohibiting such action by private individuals, but also Section 20, prohibiting such action by persons acting "under color of" state law. This conclusion was reached by applying the principle that: "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action 'under color of' state law".[1] It has been established in preceding sections of this brief that there is no essential difference between the legal character of the primaries in Louisiana and Texas and that respondent election judges acted "under color of" state law just as did the Louisiana election judges in the *Classic* case (pp. 12-21). Where conduct of the individual is so related to the state as to be "under color of" state law it necessarily follows that such conduct is likewise state action within the meaning of the Fourteenth and Fifteenth Amendments.[2]

The District Court conceded that the right to vote in a primary election which is "by law made an integral part of the election machinery" would be a right protected by the

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[1] 313 U. S. 299, 326.

[2] Cf. *Ex parte Virginia, supra; Home Telephone & Telegraph Co.* v. *Los Angeles, supra; Hague* v. *Committee for Industrial Organization, supra.*

Federal Constitution. The District Judge, however, considered the decision of this Court in *Grovey* v. *Townsend* as controlling and that he must therefore "follow *Grovey* v. *Townsend* and render judgment for defendants" (R. 85). The United States Circuit Court of Appeals also considered the decision in *Grovey* v. *Townsend* as controlling and concluded that "we may not overrule it. On its authority the judgment is affirmed" (R. 151).

In thus following the *Grovey* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between inconsistent methods of determining whether conduct in primary elections is public or private action. It is respectfully submitted that the *ratio decidendi* of the *Classic* case rather than of the *Grovey* case should be followed.

B. New matter disclosed in the present record destroys the factual basis for the decision in *Grovey* v. *Townsend*.

The record before this Court in *Grovey* v. *Townsend, supra,* failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary." That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record.

In *Grovey* v. *Townsend, supra,* this Court decided that the method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grovey v. *Townsend, supra,* was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic Party of Texas and permitted the assumption that the party had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of party membership and restricted to members of an organized voluntary association called the "Democratic Party."[1] The present record and the following analysis will show that these supposed facts, vital to the decision in *Grovey* v. *Townsend, supra,* did not exist.

The problem in *Grovey* v. *Townsend, supra,* as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

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[1] "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary . . ." (295 U. S. 45, 50).

In contrast, the nature, organization and functioning of the Democratic Party were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell* v. *Hill*,[1] that the Democratic Party of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.[2]

This Court was not bound to accept the conclusion of the Supreme Court of Texas as to the legal character of the primary election and the Democratic Party in Texas; for it is well settled that where the claim of a constitutional right is involved, this Court will review the record and find the facts independently of the state court.[3] This Court should

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[1] 123 Tex. 531, 74 S. W. (2d) 113 (1934).

[2] *Bell* v. *Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

[3] In *Powell* v. *Alabama,* 287 U. S. 45 (1932), the Court decided for itself what duties counsel performed, in considering the question of adequate representation by counsel appointed by the state court. In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), the Court made independent findings of fact as to the character of phonograph records played by Jehovah's Witnesses. In *Norris* v. *Alabama,* 294 U. S. 587 (1935), the Court weighed evidence showing that Negroes had been excluded from jury service by reason of race prejudice, against evidence that they had been excluded for other reasons, and held that the former outweighed the latter.

Accord: *Avery* v. *Alabama,* 308 U. S. 444 (1940).

In *Smith* v. *Texas,* 311 U. S. 128, at p. 130 (1940), this Court said:

> "But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment. But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And *it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.*" (Italics supplied.)

Accord: *Ward* v. *Texas,* 316 U. S. 547 (1942).

have reserved to itself the right to pass upon the mixed question of law and fact involved in the decision whether the conduct of primary election officials in Texas constituted state action.[1]

Now, for the first time this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and party in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey* v. *Townsend, supra,* an election at which the members of an organized voluntary political association choose their candidates for public office.

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[1] In *Pierre* v. *Louisiana,* 306 U. S. 354, at p. 358 (1939), the Court said:

> "In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

In *Norris* v. *Alabama,* 294 U. S. 587, at p. 590 (1935), Mr. Chief Justice HUGHES, in his opinion for the unanimous Court, said:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Accord: *Great Northern Railway* v. *Washington,* 300 U. S. 154 (1937), *United Gas Co.* v. *Texas,* 303 U. S. 123 (1937), Cf. *Mason Co.* v. *Tax Commission,* 302 U. S. 186 (1937).

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democratic" primary. The testimony of the respondent Allwright is positive on this point.

> "Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.
>
> Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.
>
> Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.
>
> Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.
>
> Q. And you do let them vote? A. Yes" (R. 106).

Second, the Democratic party of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the Democratic party of Texas is not organized. Officials claiming to represent the party testified positively that the party has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic party conventions are preserved (R. 131). The party has no officers between conventions

(R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the Democratic Party and the Democratic primary elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the Democratic Party is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey* v. *Townsend, supra,* compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.88% of all adult citizens of Texas.[1] *Grovey* v. *Townsend* should be overruled.

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[1] United States Census (1940). (Figures include native born and naturalized adult citizens.)

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,
New York, N. Y.,

WILLIAM H. HASTIE,
Washington, D. C.,

Attorneys for Petitioner.

W. J. DURHAM,
Sherman Texas,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

CARTER WESLEY,
Houston, Texas,

MILTON R. KONVITZ,
Newark, N. J.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 51

LONNIE E. SMITH, *Petitioner,*

—VS.—

S. E. ALLWRIGHT, Election Judge, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF GERALD C. MANN, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE

GERALD C. MANN,
Attorney General of Texas.

R. W. FAIRCHILD.

GEORGE W. BARCUS,
Assistant Attorney General.

Attorneys for Amicus Curiae.

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Supreme Court of the United States

OCTOBER TERM 1943

No. 51

LONNIE E. SMITH, PETITIONER

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents.

BRIEF OF GERALD C. MANN, ATTORNEY GENERAL OF TEXAS AS AMICUS CURIAE.

To the Honorable Supreme Court:

Now comes Gerald C. Mann, Attorney General of Texas, leave of this court first having been obtained, and files this his amicus curiae brief in the above cause. He shows to the court that while the Democratic Party in Texas is purely political, and that as Attorney General he is not authorized to represent the party as such. The question involved in this litigation however is of such importance to the citizenship of Texas and to the preservation of the purity of the ballot in primary elections, that as Attorney General of Texas, he feels that it is his duty to file this brief.

He shows to the court that by reason of the far-reaching effect of the questions involved, and by reason of the fact that the respondents have not filed any brief in this court or appeared, that the question should be argued orally, and he has therefore requested permission of this court to argue same at such time as is convenient to the court.

The two major questions that are necessary to be determined in this litigation are:

POINT ONE: Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

POINT TWO: Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

PRELIMINARY STATEMENT

It is now well recognized in practically every state of the Union that in order to maintain a Democratic form of government, it is necessary to have political parties, which in turn select candidates for office from the President of the United States down to the smallest office-holder in the respective states.

In practically every state stringent laws have been enacted regulating these primary elections, or nominating conventions, in order to eliminate as far as

possible corruption and get the free, full and fair expression from those who constitute the particular party seeking to nominate or select its candidates for the respective offices.

Looking toward this end, the Legislature in Texas in 1903 passed its first full and complete primary election law. This law was entirely rewritten in 1905, and since that time has been amended in many respects to meet the contingencies and conditions that have arisen by reason of certain groups seeking to corrupt the ballot box in the primary election or nomination conventions.

So far as we have been able to ascertain the courts have never held that they had the right to determine who would or would not compose a particular political organization. Under the Constitution of the United States, as well as the Bill of Rights in Texas, citizens of the State have always had the privilege to create any kind of an organization they desired which does not violate the law.

POINT ONE (restated): Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

ARGUMENT AND AUTHORITIES UNDER POINT ONE

The highest courts in Texas have definitely held that the Chairman of the County Democratic Execu-

tive Committee is not an officer within the terms and definitions of the Constitution and laws of the State of Texas. Article 3101 of the Revised Statutes of Texas provides for the holding of a primary election to be held by each organized political party that casts more than one hundred thousand votes in the last general election to nominate candidates for all offices to be filled at the general election. The effect of this statute unquestionably was and is to require political parties in Texas which have sufficient strength to have cast as many as one hundred thousand votes in the preceding general election to nominate its candidates if any or desired by a primary election. This law was evidently passed to prevent a small group within such political party from meeting in a convention and nominating such officers.

Article 3104 of the Revised Statutes of Texas provides that the primary election shall be conducted by a presiding judge to be appointed by a Chairman of the County Executive Committee of the party, with the assistance and approval of at least a majority of the members of the County Executive Committee. The presiding judge is then authorized to select his associate judge and clerks.

In order that peace may be preserved and no disturbing element prevent the election from being held in an orderly manner, Article 3105 of the Revised Statutes gives to the judges of the primary election authority to maintain peace and order, and if necessary, arrest any person causing disturbance within one hundred feet of the election polling place.

Article 3105 of the present statute is in the exact language of Article 3090 of the Revised Statutes of Texas of 1911, and was passed by the Legislature in 1905.

In 1907 the Court of Criminal Appeals in Texas, which is the court of last resort in criminal matters, in the case of *Ex parte Anderson*, 51 Tex. Cr. R. 239, 102 S. W. 727, passed directly upon the question as to whether the County Chairman of the Democratic Executive Committee was an officer under the provisions of the Texas Constitution and law. In said case it appears that a prohibition election had been held, and the presiding judge at one of the largest voting boxes was the chairman of the Democratic Executive Committee. The contention was made that the election was void because of said fact. In overruling this contention, the court used the following language:

> "Relator insists that the local option law is invalid because the presiding judge of the voting precinct No. 2 in the local option election was at the time of holding of said election an officer of trust under the laws of this state, to-wit, was chairman of the Democratic executive committee, having been theretofore elected to said office at the primary election held in said county on July 28th. The insistence is that he was thus holding two offices of profit and trust. We do not think there is anything in this contention. To be chairman of the Democratic executive committee for the county was not an office of profit and trust within the contemplation of the laws of this state. * * * ."

In the case of *Walker* v. *Mobley,* 101 Tex. 28, 103 S. W. 490, the Supreme Court of Texas definitely passed upon the question as to whether the County Chairman of the Democratic Executive Committee of a particular county was an officer, within the purview of our Constitution and law, and held specifically that he was not, and in so doing, used the following language:

> " * * * . The ground of disqualification urged is that the chairman of an executive committee of a political party is an officer of the state or county. There is nothing in the language of the law or the Constitution to support the contention. Dean (who was chairman of the county Democratic executive committee) was not disqualified to act as judge of the (prohibition) election."

The same question came before the Court of Civil Appeals in Texas in case of *Walker* v. *Hopping,* 226 S. W. 146, and no application for writ of error was made in said case. The Court of Civil Appeals at Amarillo in said case in holding that the members of the Democratic County Executive Committee were not state officers used the following language:

> "(3) Appellant first advances the proposition that the executive committeemen provided for by this article of the statute are officers within the provisions of article 16, § 17, of the Constitution, reading:
>
> " 'All officers within this state shall continue to perform the duties of their offices until their

successors shall be duly qualified.'

> "We think that the term 'officers,' referred to in the Constitution, has reference to public or governmental officers, and that the officers of a political party, although provided for by statutory law, are not to be regarded as public or governmental officers. Coy v. Schneider, 218 S. W. 479; Waples v. Marrast, 108 Tex. 5; Walker v. Mobley, 101 Tex. 28. A reference to the decisions cited, we believe, will render a further discussion of this proposition superfluous."

In *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, the Supreme Court of Texas held unconstitutional that portion of the primary election law in Texas which required the various counties to pay the expenses of said primary elections. In said opinion the court reviewed at length the entire primary election law. It held specifically that the nomination by political parties of their officers was not a State business, and could not, therefore, be paid for with State money, and we think in effect definitely held that the officers of a political party were not in any sense of the word officers of the State. The court used the following language:

> (6) * * * "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord

with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. * * *.

"The great powers of the State,—and the taxing power is the one to be always the most carefully guarded,—cannot be used, in our opinion, in aid of any political party or to promote the purposes of all political parties. * * *.

"To provide nominees of political parties for the people to vote upon in the general elections, is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues cannot be employed in that connection. * * *. Political parties are political instrumentalities. They are in no sense governmental instrumentalities."

While petitioner seeks to minimize the opinion of

this court in the case of *Grovey* v. *Townsend*, 295 U. S. 45, on the theory that the facts were not developed in that case, we submit that the entire question as to whether the election judge is a State officer was fully and definitely settled by this court. The primary election law in Texas has not been in any way changed or modified since said opinion was written. The opening sentence on page 48 of the Grovey v. Townsend opinion reads:

> "The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and its consequent denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution."

After discussing said proposition at length, and citing numerous authorities from the State of Texas, this court on page 53 of said opinion, used this language:

> "In the light of the principles so announced, we are unable to characterize the managers of the primary election as State officers in such sense that any action taken by them in obedience to the mandate of the State convention respecting eligibility to participate in the organization's deliberation, is the State action."

While it is true the Legislature in Texas has attempted to throw every safeguard around primary elections held by any and all political parties who seek to nominate candidates for office, in order to

preserve the purity of the ballot, the Texas Legislature has not attempted to control who must be the members of any political branch or party. It did attempt to pay the expenses of primary elections, but as before stated, our courts held under our Constitution the Legislature could not do so.

POINT TWO (restated): Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

ARGUMENT AND AUTHORITIES UNDER POINT TWO

As we construe same, it is petitioner's contention that a political party in Texas cannot determine who shall be a member thereof. We submit this proposition is not tenable. To say that any group of citizens cannot lawfully assemble and organize a political party for the purpose of nominating candidates for office would be to deprive them of the inalienable right given under the First Amendment to the Federal Constitution as well as Sec. 27 of the Bill of Rights in the State of Texas. On page 29 in the brief filed herein by petitioner, he states there are now in Texas 540,565 adult Negro citizens. If these Negro citizens in Texas desire to organize a political party, petitioner would not, we are confident, argue that they could not do so. Neither would this court, we are constrained to believe, hold that they could not organize a political party in the State of Texas,

and exclude from said Party all persons except Negroes.

We have in Texas approximately 400,000 Mexicans. Unquestionably, under their constitutional rights, they are entitled to organize a political party to be composed entirely of Mexicans, and no one would, we think, contend that they did not have this inalienable constitutional right.

We have in Texas some 300,000 Republican voters, who are adherents to and believers in the principles of the Republican party. While this number is not sufficient to elect officers in most districts or precincts of the State, no one would contend that they are not entitled to create a political party and limit their membership to Republicans.

By the same token and reason there cannot, we submit, be any reason why the white Democrats in Texas may not organize for themselves a political party in Texas. Whether this is wise is not a question for the courts to determine, and we submit is a matter over which the courts cannot within the Constitution exercise or control their actions. For the courts to say that any group of citizens cannot meet peacefully and quietly and nominate candidates for political offices would be to deny them the inalienable rights for which our forefathers fought and the principles upon which this Government is founded.

The above general principles, we think, have been

definitely settled by the decisions of the Supreme Court, as well as by the courts of last resort in Texas. This court in *Grovey* v. *Townsend*, supra, stated:

> "Fourth. The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the primary election of July 9, 1934, and that in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that a Negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him this suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the State need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of their race or color is prohibited by the Federal Constitution."

In the case of *Drake* v. *Executive Committee of the Democratic Party*, 2 Fed. Supp. 486, the District Court in Texas held that the Democratic party in Houston could exclude Negroes from voting in the primary election to nominate city officers, and used this language:

"(4, 5). This then brings forward the question of whether, in the absence of a controlling statute of the state, a political party in Texas, acting through its convention, committee, or otherwise under party rules and regulations, has inherent power to prescribe the qualifications of its members. I think this must be answered in the affirmative, Nixon v. Condon, 49 F. (2d) 1012, White v. Democratic Executive Committee, 60 F. (2) 973, and that the action of defendant, city executive committee (acting not under powers derived from the state, and not as an agency of the state, but presumably in accordance with rules and regulations of the Democratic Party), in so denying plaintiff the right to vote in such primary election, does not violate plaintiff's rights under the Fourteenth Amendment."

In the case of *Bell* v. *Hill*, 123 Tex. 531, 74 S. W. (2) 113, the State of Texas, speaking through its then Chief Justice, Judge Cureton, discussed at length the organization of political parties, what they were, and their functions, and the power of a political convention to determine its membership, and to restrict its membership to white citizens. The case involved a mandamus, wherein the petitioners, Bell and Jones, who were Negroes, sought a mandatory injunction against the members of the Democratic Executive Committee in Jasper County to require them to permit the petitioners to vote in the Democratic primaries in 1934. The court used this language, beginning with the last paragraph on column 1, p. 119, 74 S. W.

"We come now to the constitutional basis of

political parties, as well as other voluntary associations. That basis is found in the first section of the Bill of Rights, the First Amendment to the Constitution of the United States, which declares: 'CONGRESS SHALL MAKE NO LAW respecting an establishment of religion, or prohibiting the free exercise thereof; or ABRIDGING the freedom of speech, or of the press; or the RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.'

" * * *

"In United States v. Cruikshank, 92 U. S., 542, the Supreme Court of the United States, in an opinion by Chief Justice Waite, declared: 'The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'

"Section 27 of the Bill of Rights, art. 1, Constitution of Texas, reads: 'The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.'

"The applicability of this section of the Bill of Rights to political associations is made manifest when we consider section 2 of the Bill of Rights, which declares: 'All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.'

" * * *

"(3, 4) Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the power of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances be conferred upon a state or governmental agency.

" * * *

"(8) * * * . There is no limitation contained in article 3167 with reference to declarations of

policy by a State Democratic Convention called for the purpose of electing delegates to a National Convention. Necessarily such convention has the same power and authority to determine the membership of the party as any other State Convention of the party would have. The statute does not in any way attempt to limit the power of such Convention; and, indeed, under our view of the Bill of Rights, the Legislature could not limit its power with reference to either policies or membership. A National Party Convention necessarily formulates a platform and policies, and if the will of a state party is to be made known to a National Convention, it necessarily has the power to formulate its policies and define its membership."

In *Scurry* v. *Nicholson*, 9 S. W. (2) 747, the Court of Civil Appeals in holding that a political party could determine its membership and fix its policies stated:

"(4-6) We think it must be conceded that, in the absence of some legislative interdict, that the Democratic executive committee of any single county may properly enforce a rule or regulation prescribed and enforced by the supreme powers of the organization, and it is common knowledge, of which we may take judicial notice, that, in the late state Democratic convention, that body unhesitatingly refused to recognize and ousted delegates from a number of counties, including Tarrant county, who had avowed their purpose of supporting the nominees of the Republican Party for President and Vice President. It is likewise so known to us that the Democratic executive committee of the nation

peremptorily ousted and named another in place of a member of the national Democratic executive committee from the same county on the same ground. * * * ."

In *White* v. *Lubbock*, 30 S. W. (2) 722, the Court in discussing the power of the Democratic Party to determine who should vote in its primary elections, used the following language:

"(3-5) In a state like Texas, where the political parties have not by law been made either to perform any governmental function or to constitute any governmental agency by the payment by the State of their expenses of operation, or otherwise, but have only been regulated—however elaborately—as to how they shall elect their nominees (Waples v. Marrast, 108 Tex. 5), they are not state instrumentalities, but merely bodies of individuals banded together for the propagation of the political principles or beliefs that they desire to have incorporated into the public policies of the government, and as such have the power, beyond statutory control, to prescribe what persons shall participate as voters in their conventions or primaries; in no event, therefore, did the inveighed-against course of both the state and Harris county managers of the Democratic Party of Texas in so barring all but white Democrats from its primaries constitute action by the State of Texas itself that was interdicted by the invoked provisions of the National Constitution, but only the valid exercise through its proper officers of such party's inherent power (recognized but not created by R. S. article 3107) to determine who should make up the membership of its own private household. * * * ."

In *Love* v. *Buckner*, 121 Tex. 369, 49 S. W. (2) 425, the Supreme Court of Texas held that the Democratic State Executive Committee was authorized to require the voters to take the specific pledge to support the nominees of the Democratic party for President and Vice-President before they could vote in the Democratic convention held to elect delegates to the national convention and used this language:

> "We do not think it consistent with the history and usages of parties in this state nor with the course of our legislation to regard the respective parties or the State Executive Committee has denied all power over the party membership, conventions, and primaries, save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party organizations including the State committees, as the repositories of party power, which the Legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership. * * *
>
> "It is true the statute forbids participation in the precinct primary conventions of those who are not certified qualified voters, but the only voters referred to throughout the Article as comprising the precinct primary convention, and who can determine the real and effective party decisions are the voters of said political party."

Petitioners in their brief make the statement that

any white citizen of Texas can vote in the Democratic primary election, basing this statement, we presume, upon the testimony of Mr. Allwright, one of the respondents, who was the election judge in the precinct in which the petitioners offered to vote, wherein Allwright testified that if any white citizen came to the polls and offered to vote he himself did not question them, but permitted them to vote.

Article 3109 of the Revised Statutes of Texas provides that in all general primary elections there shall be an official ballot prepared by the party holding same.

Article 3110 of the Revised Statutes of Texas provides specifically that the official ballot may have printed thereon the following primary test: " 'I am a (insert name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary,' and any ballot which shall not contain such printed test above the names of the candidates thereon shall be void and shall not be counted."

We submit that under the authorities above cited the election judge has the right to presume that a man who presents himself as a voter is in fact a member of the Democratic party and will support its nominees, and that no one who is a Republican or who is affiliated with any other political party will offer to vote. If any voter's right to vote is challenged on the ground that he is not a member of the party, then the judge can refuse to permit the vote

to be cast unless the voter will take the required pledge.

In *Love* v. *Buckner*, 49 S. W. (2) 426, the court at page 426, column 1, stated:

> "In our opinion, a voter cannot take part in a primary or convention of a party to name party nominees without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely regardless of any express pledge, and entirely regardless of the requirements of any statute. * * * . Being unenforcible through the court, the obligation is a moral obligation. Westerman v. Mims, 116 Tex. 371.
>
> "The opinion in Westerman v. Mins quoted with approval the decision of the Supreme Court of Louisiana in the case of State Ex rel v. Michel, Secretary of State, 46 So. 430, to the effect that 'the voter by participating in a primary impliedly promises and binds himself in honor to support the nominee, and that a statute which exacts from him an express promise to that effect adds nothing to his moral obligation and does not undertake to add anything to his legal obligation. The man who cannot be held by a promise which he knows he has impliedly given will not be held by an express promise.'"

As is revealed by a number of the opinions of the Supreme Court of Texas, hereinabove referred to and quoted from, unquestionably the Democratic party in Texas can exclude from participation in its primary election all voters who refuse to take the

pledge of allegiance to the party, or who refuse to support the nominee of the primary election or convention at the general election to be held thereafter. Whether the party exercises this right or privilege is of no concern to the petitioners in this case. It is true, however, as is shown by the cases hereinbefore quoted from, that the Democratic party in Texas has definitely passed resolutions restricting its membership to those white citizens who are Democrats and who are willing to take a pledge, to support the nominees of the convention or primary election.

GROVEY V. CLASSIC CASES

While we do not consider it necessary to attempt to reconcile the opinions of this court in the case of *Grovey* v. *Townsend*, 295 U. S. 45, and *United States* v. *Classic*, 313 U. S. 299, we submit that the facts in the two cases are so different that the opinion in one does not necessarily control the opinion in the other case.

The primary question determined in the *Grovey* v. *Townsend* case was that an election judge holding the primary election in Texas for the Democratic party was not a state officer, and that the Democratic party could for itself determine the kind and class of voters that could participate in the Democratic party, without violating the Federal Constitution or the Constitution of the State of Texas.

In the case of *United States* v. *Classic* it appears

the State of Louisiana had made the primary election law a state matter, paid for by the State, and controlled by the State, and it was charged that one of the election judges holding said primary election counted votes cast for a candidate for Congress for another and entirely different candidate. By reason of this alleged open fraud and violation of law, the election judge was indicted under the Federal criminal statutes, and this court held that in such an election, in order to maintain the purity of the ballot, the election judge could not claim immunity by reason of the fact that the election being held in which he fraudulently and criminally counted ballots was a Democratic primary.

While it is not necessary to determine the question, it may be that in a Democratic primary held in Texas, or a Republican primary held in any state where the nomination of the party candidate as a matter of history results in the election of such candidate, (said primary election being held under the laws of the respective state governing same), if the election judge should fraudulently, deliberately and criminally count ballots cast for one candidate for Congress for another candidate and thereby defeat the nomination of a particular candidate for Congress, the judge could be prosecuted under the Federal statutes. This question is not before the court in the case at bar, and therefore need not be determined.

In Texas the State has not attempted to control who may organize a political party. It has passed

most stringent laws regulating any and all political parties with reference to the manner of holding primary election or conventions for the nomination of candidates for the respective offices, including Presidential electors, Senators, Congressmen and all State officers. The State of Texas is not interested in who constitutes a party, or what class of citizens may become members of any particular party. It is interested, of course, in maintaining the purity and integrity of the ballot or elections held by any party.

Article 1, section 2, and Article 17 of the Constitution of the United States secures to the citizens of the several States who are "qualified electors for the most numerous branch of the state legislature" the right to choose the state's representatives to the Congress.

Petitioners contend that these provisions secure to such qualified electors the right to participate in the procedure by which members of a private political organization choose its candidates, at least where the party's candidates are almost invariably elected.

The Attorney General submits that this contention is both unsound and untenable.

It is familiar doctrine that provisions in the Constitution preserving to the people certain rights and privileges were designed to render such rights and privileges immune from denial or abridgment by governmental action. Before placing a construction

on the provisions involved in this case which assumes a purpose to grant a right immune from private abridgment, it is proper, we think, to consider the extremes to which such construction must inevitably lead. Since the problem of construction is to ascertain the intent, we must be prepared to hold that the inevitable consequences of a particular construction were intended, else we are not at liberty to adopt the construction.

The Constitution prescribes the qualifications of those to whom it gives the right to choose the state's representatives to the Congress. Those qualifications must be the same as those required by the State to render them "qualified electors for the most numerous branch of the state legislature." If those possessing such qualifications are accorded by the Constitution the right to participate in the procedure for selecting candidates established by a private political organization, indisputably such private political organization may not prescribe other or different qualifications as a prerequisite to the exercise of the right. Such organization may not accord the right only to qualified electors who entertain certain political beliefs, denying it to qualified electors who espouse a different set of political principles.

The effect is to deny to those "qualified electors" holding certain political beliefs in common the right to organize and select candidates to advocate those beliefs. For, if participation in the procedure cannot be restricted to those of common political ideals,

there can be no assurance that the candidates nominated will represent those ideals.

The nomination for election of candidates espousing a particular set of political principles is the essential function of the political party. To give the Constitution the construction contended for by petitioners is to declare that the people intended to prohibit the organization of political parties, by the adoption of that instrument.

Further, we desire to call to the attention of the Court the provisions of Section 2 of Article 14 of the Constitution. This section declares that when the right to vote at any election for the choice of electors for President and Vice-President, or representatives to the Congress, is denied to any of the male inhabitants over twenty-one years of age, the basis of State representation in Congress shall be reduced "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

If a private political party in a state is invariably successful in procuring the election of its candidates and through private action of its membership excludes large numbers of "qualified electors" from participation in the party procedure for selecting its candidates, is the State subject to the penalty prescribed in Section 2 of Article 14? If such "qualified electors" have a Constitutional right to participate in the party procedure, it would seem so. Certainly if a party primary is an "election" within the

meaning of Constitutional provisions granting the right to vote, it is an "election" within the meaning of those provisions prescribing a penalty for denying that right.

The result would be, if we are correct in this assumption, that the people in adopting the Constitution intended that the representation of a State in the Congress should be subject to reduction on account of purely private action of a part of its citizens.

The extremes to which an adoption of the construction contended for by petitioners lead, we think, demonstrate the fallacy of their argument.

If the Constitution secures the right contended for by petitioners, the right is of a most peculiar character, and it is most difficult to determine when and under what circumstances it comes into being.

It seems to be urged that the right to participate in the party procedure exists where the party is always successful in procuring the election of its candidates. At what stage of the political life of a party would this "right" come into existence? Will success on the first occasion after the organization of the party give rise to the right, or must there be a longer period of gestation? If, after a long period of success, the party loses an election, is the right lost? For what period does it remain dormant; how much success, after a loss, does it take to revive the right? If a party is always successful in State-

wide elections, but not in particular district elections, does the "qualified elector" have the right to participate in the primary for the selection of candidates for the State-wide election but not for the selection of candidates for the district election?

Conceding the invariable success of the "Democratic" party, over a long period of years, how is it to be determined that the party is the same through that period? Is the test of party identity the mere "party label"? Or does the identity of the party through the period depend on substantial sameness of membership, or upon substantial sameness of principles through the years, or upon some combination of characteristics?

It is respectfully submitted that the Constitution does not grant a right to participate in party procedure of a private nature, the existence of which depends upon the answer to be made to such fact questions.

CONCLUSION

The Attorney General of Texas submits that the basic principle announced in all the decisions of our courts relative to the conduct of primary elections by political parties to nominate candidates is that the party can regulate its policies, and determine who shall constitute its membership, unless specifically prohibited by statutory law.

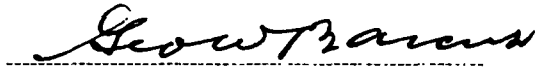
In Texas the Legislature has passed laws to con-

trol the primary election in many respects. It has not, however, passed any law which in any way prevents the white Democrats or any other group of citizens from organizing a political party to nominate candidates for any or all offices to be voted upon in the general election.

The Attorney General of Texas prays that the judgment of the trial court and the Circuit Court be in all things affirmed.

GERALD C. MANN,
Attorney General of Texas

R. W. FAIRCHILD



GEORGE W. BARCUS
Assistant Attorney General

Attorneys for Amicus
Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

—vs.—

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA,
Associate Election Judge, 48th Precinct of
Harris County, Texas,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

THURGOOD MARSHALL,
New York, N. Y.,

WILLIAM H. HASTIE,
Washington, D. C.,

W. J. DURHAM,
Dallas, Texas,

Attorneys for Petitioner.

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Authority for Filing

By permission of this Court granted in open court on January 12, 1944, petitioner files this reply brief addressed to the arguments submitted in this cause by the Attorney General of Texas.

ARGUMENT

I

Petitioner's Right to Relief Under Section 31 of Title 8 Remains Unchallenged

Petitioner in this case asserts three distinct statutory bases for relief, viz.: First, the remedy provided by section 41 (11) of Title 28 of the United States Code for violation of section 31 of Title 8; second, the remedy provided by section 41 (14) of Title 28 for violation of section 43 of Title 8, and third, the remedy of declaratory judgment provided by section 400 of Title 28 for violation of either section 31 or section 43 of Title 8.

The right to recover under section 31 of Title 8 does not depend on whether or not respondents were state officers or were acting under color of state law. This question can only be material in considering the applicability of section 43 of Title 8. The brief *amicus curiae* filed herein by the Attorney General of Texas is addressed to the question whether or not respondents were state officers[1] and makes no mention of petitioner's claim to recovery under section 31 of Title 8.

Section 31 of Title 8[2] is directed at the denial of the right to vote at any election because of race or color, and the official position of the individual interfering with this right is immaterial. Section 31 declares the federal right of otherwise qualified electors to vote at all elections without distinction of race or color and subdivision 11 of section 41 of Title 28 gives the District Courts jurisdiction "of all

[1] See Brief of Attorney General of Texas, p. 2.

[2] "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 contrary notwithstanding. R. S. sec. 2004."

suits . . . to enforce the right of citizens of the United States to vote in the several States".[3]

Although section 31 does not contain specific provision for remedy for violations of the rights therein declared, there can be no doubt that section 31 in conjunction with section 41 (11) of Title 28 provides sufficient basis for recovery in the present case. In an opinion delivered by Mr. Chief Justice Hughes in a case involving the applicability of certain sections of the Railway Labor Act,[4] it was stated:

> "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. *Many rights are enforced for which no statutory penalties are provided.* In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each . . . The right is created and the remedy exists."[5] (Italics ours.)

The necessity for and propriety of such statutory construction has most recently been affirmed by this Court in the case of *Switchmen's Union of North America* v. *National Mediation Board*[6] in the following language:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those Courts to control . . ."

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[3] See petitioner's principal brief, pp. 11, 17-18.

[4] *Texas and New Orleans R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

[5] 281 U. S. 548, at p. 569.

[6] 64 S. Ct. 95 (1943).

II

The Attorney General's Approach to and Analysis of the Status of Election Judges Are Unsound

The Attorney General of Texas contends that primary election judges in Texas are not "state officers". In support of this contention he cites *Ex parte Anderson*,[7] holding that the chairmanship of a Democratic County Committee is not "an office of profit and trust within the contemplation of the laws" of Texas prohibiting the simultaneous holding of two such offices. The Attorney General also cites *Walker* v. *Mobley*,[8] holding that the statutory disqualification of any person "who holds an office of profit or trust under . . . this state" does not prevent the chairman of a Democratic County Committee from serving as an election judge. Finally, he relies upon *Walker* v. *Hopping*,[9] holding that a state constitutional provision that "all officers within this state" continue in office until their successors shall be duly qualified, does not apply to members of a Democratic County Committee.

These cases merely highlight the fallacy of testing the present issue, whether the United States Constitution restricts the official conduct of primary election judges, by analogy to cases controlled by considerations not material here. The policies which dictate the rule against holding two profitable state offices simultaneously or against a member of the administration in power judging an election have no bearing on the present issues. It is not particular local incidents of the office of election judge but the basic relationship of the state to the enterprise in which the election judge is engaged which is controlling here. As Mr. Justice Cardozo said in *Nixon* v. *Condon*:[10]

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[7] 51 Tex. Cr. Rep. 239, 102 S. W. 727 (1907).
[8] 101 Tex. 28, 103 S. W. 490 (1907).
[9] 226 S. W. 146 (Tex. Civ. App. (1920)).
[10] 286 U. S. 73, 89 (1932).

> "The test is not whether the members of the Executive Committee are representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action".

Indeed, the Attorney General's argument would necessarily challenge the soundness of this Court's decision in *Nixon* v. *Condon*. For his contention, consistently applied, would lead to the conclusion that members of the State Democratic Executive Committee in that case should not have been considered as "acting under color of state law" and subject to the restraints of the 14th and 15th Amendments when they excluded Negroes from participating in Democratic primaries.

The only sound test of the status of the officials in question for the purpose of determining whether restrictions of the Federal Constitution apply to their official conduct is that stated in *United States* v. *Classic*:[11] "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." The analysis of the relationship of the State to Texas direct primary elections and the judges who conduct them, as set forth in pages 19 to 25, inclusive, of petitioner's principal brief, contrasted with the absence of any offsetting control by the party makes clear the applicability of this test to the official conduct of respondent primary election judges.

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[11] 313 U. S. 299, 326 (1941).

III

A Qualified Negro Elector Cannot Be Denied a Primary Ballot on Any Theory That the Integrity of the Democratic Party Is Thereby Destroyed

The Attorney General of Texas has sought to establish that under Texas law and polity a political party has inherent power to determine its own membership and that this case involves no more than the exercise of such power by the Democratic party of Texas.

In the petitioner's view of the case this entire argument is beside the point. Petitioner asserts a right to participate in the choice of Senators and Representatives in Congress founded upon and guaranteed by Article I and the 17th Amendment of the Constitution of the United States. He asserts further that his privilege of voting as guaranteed by the 15th Amendment of the Constitution has been abridged. It follows from the decision of this court in *United States* v. *Classic, supra,* that an elector's constitutional right to vote for and to participate in the choice of federal officers extends to voting in primary elections which a state has made an integral part of its machinery of choice, or which in fact are decisive of the choice. Petitioner's principal brief has demonstrated that the primary elections in which he sought to vote are within these categories as set up in *United States* v. *Classic.*

Under such circumstances the abridgement of constitutional privilege is established and the claim of inherent power to do the acts which have resulted in such abridgement can be of no legal significance. Whatever power local law or local political theory may confer upon a political party with reference to the determination of its membership, that power cannot be exercised in such manner as to infringe the constitutional privilege of voting for federal officers.

In this connection it is important to note that although

the 15th Amendment prevents the abridgement of petitioner's right to vote because of color, and Article I and the 17th Amendment protect his right to participate in the choice of Senators and Representatives, this does not necessarily preclude the application of local rules of allegiance to party political tenets or a pledge to support party candidates. A requirement of adherence to the party's political faith may be reasonable and proper and compliance is within the power of the elector. Thus there is nothing inconsistent between preventing the exclusion of qualified electors from primary voting because of color and at the same time permitting a locally imposed requirement that the elector make manifestation of allegiance to party principles.

A. *Under Texas Polity the Choice of the Elector Determines His Party Affiliation*

Although the conclusions of the Attorney General of Texas concerning the nature of political parties and their inherent powers in Texas, if correct, would in no sense be decisive of the issues in this case, his conclusions are incorrect and his analysis of Texas statutes and decisions is faulty and incomplete.

It is the essence of the Attorney General's argument that unless political parties have inherent power of defining membership the party system can have no meaning. At the outset it should be pointed out that one of the fundamental facts in this case is that for all practical purposes there is only one political party in Texas and that the significant and decisive political contests occur within the Democratic party and not between or among two or more different parties.

However, there is in fact and in law, as recognized by the Texas courts, a workable method of defining the party status of the individual elector, a method adequate to serve the realities of the political situation in Texas. The party convention drafts and publishes the party platform. The his-

torical behaviour of party leaders and public officers elected on the party ticket have demonstrated the basic political principles to which the party adheres. The elector by reason of such history, or because of the party platform, or in the light of tradition, or for any other reason satisfactory to him, determines to support the Democratic ticket. He openly declares his allegiance by subscribing to the statutory pledge on the primary ballot. He affirms that he will support party candidates. By these tokens he considers himself a Democrat. It is the genius of Texas political organization, further attested by the absence of membership rolls or similar organizational devices within the party, that it is the choice of the elector rather than any action of the "party" which determines who is a Democrat. It was this conception of political status which enabled the District Judge in his trial findings in this case to find as a fact that petitioner "is a Democrat" (R. 81).

The clearest judicial exposition of this view that in Texas the voter chooses his party in accordance with his political beliefs rather than the party delimiting participation in primary elections upon some other basis appears in *Briscoe* v. *Boyle*.[12] There the Court said: "If (the qualified elector) considers himself a member of the party holding the election, and if he has a present intention to vote for the nominees selected at such election, he is entitled to vote therein, and by doing so he obligates himself to support such nominees at the resulting general election."[13]

The whole course of legislative and judicial action in Texas, except with reference to voting by Negroes, is consistent with this analysis. In *Love* v. *Wilcox*,[14] the Supreme Court of Texas has traced the history of legislation concerning primary voting. The Court there pointed out that

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[12] 286 S. W. 275 (Tex. Civ. App. 1926). This decision of the Texas Court of Civil Appeals was subsequently cited and discussed with approval by the Supreme Court of Texas in the leading case of *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (1930).

[13] At page 276.

[14] Supra note 13.

the Democratic party platform of 1905 and the message to the Legislature from the Governor elected upon that platform both stressed the importance of uniform legislation to determine eligibility for voting in primary elections. It was pointed out further that in the ensuing debate the Legislature considered various restrictions and finally enacted a statute imposing the single uniform pledge of party loyalty, which is now incorporated in Article 3110 of the Texas Revised Civil Statutes. The Court then reviewed with approval several earlier decisions and concluded that the party can impose no new test of loyalty upon and can require no additional pledge of a qualified elector who seeks to vote in the party primary.

It is only where the Negro elector seeks to vote that there is any contrary legislation or adjudication. Such inconsistent rulings are made boldly and obviously. In *Briscoe* v. *Boyle, supra,* the Court of Civil Appeals in San Antonio clearly declared that a party could not exclude any *white* elector, who had complied with statutory requirements, from voting in its primary. In *County Democratic Executive Committee* v. *Booker,*[15] the same Court held that the exclusion of Negroes from voting in Democratic primary elections is within the power of the party. In *Clancy* v. *Clough,*[16] the Court of Civil Appeals at Galveston enjoined Democratic party officials from exacting of a white voter a pledge in addition to that prescribed by statute. But, in *White* v. *Lubbock,*[17] the same Court in the same volume of reports declared the inherent power of the party to exclude Negroes from primary voting.

Similarly, the Supreme Court of Texas concluded in the leading case of *Love* v. *Wilcox, supra,* after elaborate review of legislative and judicial history, that neither past party disloyalty nor new forms of pledges as to fealty may bar

[15] 53 S. W. (2d) 123 (1935).
[16] 30 S. W. (2d) 569 (Tex. Civ. App. 1928).
[17] 30 S. W. (2d) 722 (Tex. Civ. App. 1930).

or impede the elector who seeks to vote in a party primary. Yet in *Bell* v. *Hill*,[18] the State Supreme Court determined that the party has inherent power to exclude Negroes from primary elections. It has already been pointed out in petitioner's principal brief that *Bell* v. *Hill* was decided on motion for leave to file a petition for writ of mandamus without the taking of testimony as to party structure or functioning. But beyond that, the report of the case shows that the motion for leave to file a petition for mandamus was presented to the Court on July 19 and the Court's decision was rendered the following day, July 20.

The Texas decisions in this field make clear two things and two things only; first, the courts of Texas are determined to sanction the exclusion of Negroes from voting in Democratic primaries; second, these same courts are equally determined that no other qualified electors shall be excluded.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,
New York, N. Y.,
WILLIAM H. HASTIE,
Washington, D. C.,
W. J. DURHAM,
Dallas, Texas,
Attorneys for Petitioner.

[18] 123 Tex. 531, 74 S. W. (2d) 113 (1934).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, *Petitioner,*

—vs.—

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

WHITNEY NORTH SEYMOUR,
Counsel for American Civil Liberties Union, Amicus Curiae.

Of Counsel:
GEORGE CLIFTON EDWARDS,
of Dallas, Texas.

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Petitioner,

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.* Only the consent of the attorney for the petitioner to the filing of this brief has been obtained.

Special reasons in support of this motion are set out in the accompanying brief.

October 18, 1943.

WHITNEY NORTH SEYMOUR,
Counsel, American Civil Liberties Union.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner,

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Introduction

The American Civil Liberties Union is a nationwide organization, members of which reside in and are citizens of Texas. It is devoted to the protection of the Bill of Rights and the extension of democratic privileges. It has consistently opposed racial discrimination wherever the problem has arisen, and has fought against unreasonable limitations on the exercise of the right to vote.

Every substantial interference with the ballot is a blow at representative democratic government. We are particularly concerned, therefore, when, as in this case, many qualified citizens are effectively deprived of their participation in the choice of those who are to represent them and thus of the reality of the right to vote, solely because of race and color.

I

The importance of primaries and their integral relationship to the right to vote in general is today axiomatic.

The primary is an integral part of the entire elective machinery. It is essential to the operation of the democratic process that the voter be given an effective choice in a general election. Thus, over the entire nation, the position of the primary, as the means used in selecting the candidates among whom the electorate must choose, is of great importance.

It is common knowledge that in many States the primary is, in effect, the election. Selection of one party ticket or another, depending on the State, is an assurance of election.

> "The fact is that the primary is the election in about one-half of the states, one-half of the counties, and one-half of the legislative congressional districts of the nation. The voter's power is practically ended in these instances when the party nominations are once made. Theoretically and legally he can choose members of another party, but practically he will not do so in these jurisdictions. The significance of the primary as a part of the governing process is therefore very great, and should be examined with all the care given to an electoral process of a final nature."[1]

If the shield of the Constitution were to extend no further than the "final" choice it would, in many instances, be no safeguard at all. For the shield to be real

1. Merriam and Overacker—Primary Elections (1928) at p. 269.

and to accomplish its purpose, it must intervene at the stage when the electoral process may still be influenced by the voter and, therefore, at the primary elections.

II

The recent history of the "White Primary" in Texas shows a studied intent to disfranchise the Negro.

It hardly needs to be said that the commands of the Constitution have not been so uniformly accepted as to assure full participation of our Negro citizens in their electoral rights. Many efforts have been made to frustrate these commands, as previous decisions of this Court and common knowledge attest. Texas, as well as other States, has overlooked the constitutional injunctions. The recent history of changes in the electoral machinery of Texas statutes reflects the disposition to see to it that Negroes shall have no effective voice in the selection of candidates of the dominant party.

In 1923 Texas enacted the following statute:[2]

> "All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

2. Acts 2d C.S. 1923, p. 74, Article 3093a from Acts 1923.

In *Nixon v. Herndon,* 273 U. S. 536, this Court declared the provision violative of the Fourteenth Amendment.

In the next year (1928) the legislature of Texas enacted Ch. 67[3] which permitted a similar result—the elimination of Negro electors. Removing the discrimination denounced by this Court from the face of the statute, it was nevertheless implemented so as to circumvent the decision.[4]

This Court again declined to countenance such discrimination, *Nixon* v. *Condon,* 286 U. S. 73.

Three weeks[5] after the decision in *Nixon* v. *Condon, supra,* the Texas Democratic State Convention proceeded to a new formula to accomplish the same purpose by adopting the following resolution:

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."[6]

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3. "Article 3107 (Ch. 67, Acts 1927) Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

4. Pursuant to this statute the following resolution was adopted by the Texas State Democratic Executive Committee:

> "Resolved: That all white Democrats who are qualified and (sic) 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, and further, that the Chairman and the secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

5. 43 Harv. Law Rev. 812 (1932).

6. See, *White* v. *County Democratic Executive Committee,* 60 F. (2d) 973, n. 1.

Unfortunately, when this newest episode in the series was presented to the Court, it came up on an inadequate record and the Court sustained the action against challenge under the Fourteenth and Fifteenth Amendments. *Grovey* v. *Townsend,* 295 U. S. 45. The inadequacies of that record have been corrected in the present record, where the true nature of the present restrictions and their consequences can at last be clearly observed.

This Court has frequently shown its determination not to allow the commands of the Constitution to be avoided by ingenious subterfuges. This record presents a proper opportunity to re-examine the *Grovey* case and to make sure that the franchise is not effectively denied on grounds of race to an important segment of the population of Texas.

III

Article 1, Section 2 of the Constitution protects every citizen in his right to choose candidates and vote at congressional elections.

As far back as *Ex Parte Yarbrough,* 110 U. S. 651,[7] this Court held that the right to vote at Congressional elections was granted by the Federal Constitution, and that it safeguarded a qualified voter at such elections from violence by persons acting in their individual capacities.

In *Nixon* v. *Herndon, supra,* and *Nixon* v. *Condon, supra,* the protection of the Constitution was applied to attempts by State authorities to deprive the voter of his constitutional rights in primary elections.

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7. See *United States* v. *Mosley,* 238 U. S. 383; *Swafford* v. *Templeton,* 185 U. S. 487; *Wiley* v. *Sinkler,* 179 U. S. 58.

In *United States* v. *Classic,* 313 U. S. 299, this Court held that the protection of the Constitution extends to qualified voters in primary elections for Federal office. In view of that decision it is difficult to see how studied interference with the right to vote in Federal elections can be without constitutional protection however the interference is disguised.

IV

This Court should now overrule its decision in *Grovey* v. *Townsend.*

Grovey v. *Townsend, supra,* was decided on demurrer so that the Court was necessarily restricted in its consideration.

The evidence, now for the first time fully presented in the record before the Court, indicates, among other things, that the Democratic party is not a closely organized private voluntary association with the usual attributes of such bodies;[8] that the election laws of the State of Texas are actually so closely integrated with primary procedures that they cannot be separated from the actions of the Democratic party; and that the primary is, in fact, the election in Texas.

When grave constitutional questions are re-presented on records which permit a complete consideration and where the nature and consequences of discrimination are fully disclosed as they are here, the Court should have no reluctance to reconsider and reverse an earlier decision. (See the dissenting opinions in *Burnet* v. *Coronado Oil*

8. Cf. Merriam and Overacker, *Primary Elections* (1928), at p. 140; "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency, subject to legal regulation and control."

& Gas Co., 285 U. S. 393.)[9] In the present state of the world, a further declaration by this Court of the principles underlying the constitutional safeguards of the ballot, denying the power of the majority, on grounds of race or color, to repress a minority which is contributing so much to the nation's cause, would be heartening to all who believe in human liberty and dignity.

Conclusion

The effective corollary of the great freedoms guaranteed by the Constitution is the right to vote. A reversal in this case should go far towards removing restrictions which now, especially, have no proper place in our democracy.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for
American Civil Liberties Union,
Amicus Curiae.

Of Counsel:

GEORGE CLIFTON EDWARDS,
of Dallas, Texas.

CLIFFORD FORSTER,
STANLEY LOWELL.

9. This Court has only recently overruled two of its decisions involving important civil rights. See *Murdock* v. *Pennsylvania,* 87 Law. Ed. 827, overruling *Jones* v. *Opelika,* 316 U. S. 597; and *West Virginia State Board of Education,* 87 Law. Ed. 1171, overruling *Minersville School Dist.* v. *Gobitis,* 310 U. S. 586.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, *Petitioner,*

—VS.—

S. E. ALLWRIGHT, Election Judge, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF GEORGE A. BUTLER, CHAIRMAN OF STATE DEMOCRATIC EXECUTIVE COMMITTEE OF TEXAS, AS AMICUS CURIAE

WRIGHT MORROW,
Counsel for Amicus Curiae.

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JAMES J. LIUZZA, ASSOCIATE ELECTION JUDGE,
FOURTH PRECINCT OF HARRIS COUNTY, TEXAS,
Respondents

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE SUPREME COURT:

Now comes George A. Butler, Chairman of the State Democratic Executive Committee of Texas, and respectfully moves the court for leave to file the accompanying brief in this case as Amicus Curiae. The consent of the at-

torney for respondents has been obtained. Consent of attorneys for petitioner has not been received as of the time of the mailing of this brief.

Special reasons in support of this motion are set out in the accompanying brief.

WRIGHT MORROW,
Counsel for Amicus Curiae

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL.,
Respondents

BRIEF OF AMICUS CURIAE

Amicus Curiae is Chairman of the State Democratic Executive Committee of Texas. This Committee is composed of one male and one female committeeman from each of the thirty-one state senatorial districts of Texas; the chairman and the members of the committee were regularly elected at the Texas State Democratic Convention held in Austin, Texas, in September, 1942. As Chairman of this committee, he is vitally interested in all matters affecting the operations and affairs of the Democratic Party in Texas, and the con-

duct of the party's primary elections out of which this suit arises.

Preliminary Statement

On May 24th, 1932, the Democratic Party of Texas, assembled in convention at Houston, Texas, unanimously adopted the following resolution:

> "BE IT RESOLVED, that all white citizens of the State of Texas, who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations" (R. 75).

Respondents were the Presiding Judge and Associate Judge of the Democratic Primaries in Precinct 48, Harris County, Texas, on July 27, 1940, and August 24, 1940. Respondent Allwright had been elected by the Democrats of Precinct 48 as their party chairman of such Precinct; and thereafter, following party custom, was made presiding judge to hold the two primaries for the Democratic Party by the chairman of the Harris County Democratic Executive Committee (R. 76). Respondent Liuzza was appointed associate judge (R. 76). Respondents received their instructions with reference to holding such primary from the County Chairman (R. 76). All instructions to the presiding judges, assistant judges, clerks and supervisors at such primary elections came from Charles E. Kamp, Chairman of the Harris County Democratic Executive Committee, or the regulations were promulgated by the Executive Committee itself at a meeting of its membership held approximately one month before the first primary election (R. 140). The election judge conducted the election in accordance with the instructions thus received (R. 107). The Harris County Democratic Executive Committee determined how many

clerks the respondents should have (R. 107); it fixed the compensation for the election officials (R. 107). The entire expense of holding and conducting primaries in Harris County on July 27, 1940, and August 24, 1940, was borne and paid for by the Harris County Democratic Executive Committee from funds received by levying an assessment against each person whose name was placed upon the primary ballot (R. 76). After such primary elections the names of the candidates receiving the nomination were certified by the Democratic County Executive Committee to the party's State Executive Committee, which in turn certified the party's nominees to the Secretary of State, who placed their names on the general election ballot to be voted on in the general elections (R. 74). In the general elections negro electors could and did vote (R. 74, 108).

The policy of the Democratic Party is adopted at gubernational conventions (R. 126). The Executive Committee arranges the place for the meeting, the State Committee sets up a program for the temporary officers, which are usually confirmed from then on, the temporary officers put the Convention in operation, and after the Convention is over the management of the party reverts to the Executive Committee which carries out the policies adopted by the Convention (R. 124, 125). The county convention is a political unit in itself; the county convention elects its own chairman and precinct chairmen and they function as the election organization (R. 124). The Democratic Party of Texas is a political party and the Harris County Democratic Party is a subdivision of the state-wide political party (R. 140).

Question Involved

Does the Democratic Party in Texas, a voluntary association of persons of common political beliefs, have a right to

prescribe the qualifications of its membership and electors for the selection of the party's nominees for office?

Argument and Authorities

This court has previously had before it three cases arising in Texas involving the Democratic Party primary elections. In the case of NIXON v. HERNDON, 273 U.S. 536 (1927), the court had before it for consideration the attack on the constitutionality of Article 3107 of the REVISED CIVIL STATUTES, 1925, which read:

> "In no event shall a negro be eligible to participate in a Democratic party election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same."

This court found the above statute offensive to the FOURTEENTH AMENDMENT to the CONSTITUTION, the court pointing out that color cannot be made the basis of a *statutory* classification.

In NIXON v. CONDON, 286 U.S. 73 (1932), this court, speaking through MR. JUSTICE CARDOZO, referred to the NIXON v. HERNDON case, supra, in the opening language of its opinion and referring to Article 3017 stricken down in that decision stated: "While that mandate was in force, the negro was shut out from a share in primary elections, *not in obedience to the will of the party speaking through the party organs, but by the command of the state itself, speaking by the voice of its chosen representatives.*" (Italics ours).

In NIXON v. CONDON, supra, the court had before it a resolution adopted by the State Democratic Executive Committee limiting the right to vote in primary elections to white democrats who are qualified and none others, such

resolution having been adopted by the State Democratic Executive Committee of Texas under authority of Article 3107 (Chapter 67, Acts 1927), which article provided:

> "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

The court held that the above quoted Statute constituted a grant of power by the State to the Executive Committee which it did not otherwise possess as a mere agent of the party. The court stated: "Whatever inherent power a state political party has to determine the content of its membership resides in the state convention. Bryce, Modern Democracies, Vol. 2, p. 40." * * * "Never has the state convention made declaration of a will to bar negroes of the state from admission to the party ranks. Counsel for the respondent so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the Committee has come to them, therefore, not as the delegates of the party, but as the delegates of the state. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the Committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the Committee yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the State had not

conferred it, there would be hardly color of right to give a basis for its exercise."

In the NIXON v. CONDON case, the court expressly reserved decision on the validity of action by the Democratic Party itself in Texas which had the effect of restricting its membership to white democrats.

The issue raised and the contentions made by petitioners in the present case was finally placed directly before this court in GROVEY v. TOWNSEND, 295 U.S. 45 (1935). In that case the court had before it the resolution of the State Democratic Convention of Texas adopted May 24, 1932, which is the same resolution which was in effect at the time of the occurrences out of which the present suit arises (R. 75). Such resolution provided:

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

The court referred to its previous decisions in NIXON v. HERNDON and NIXON v. CONDON and pointed out that in those cases it had held that the denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution, but "Here the qualifications of citizens to participate in party councils and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action."

In GROVEY v. TOWNSEND it was argued, as it is argued in the present case, that the elaborate statutory provisions set up in Texas with reference to the primary elections had the effect of making the party primaries state elections as fully as general elections and had the further effect of making

those who managed the primaries state officers subject to state direction and control. In reply to this argument, the Supreme Court said:

> "While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination (Arts. 3108, 3116); the ballots are furnished not by the state, but by the agencies of the party (Arts. 3109, 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123, 3124-5, 3127); and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136, 3139)."

Likewise, in GROVEY v. TOWNSEND, petitioners made the argument, as is made in the present case, that candidates for the offices of Senator and Representative in Congress were to be chosen at the primary election in which petitioner attempted to participate, and that in Texas nomination by the Democratic Party is equivalent to election. This court replied that such facts, even if true, did not make out a forbidden discrimination, since a similar situation might exist in other states where one or another party includes a greater majority of the qualified voters.

Petitioners, in the present case, charge that in GROVEY v. TOWNSEND the record had not been fully developed and hence this court could not be governed in the present case by its previous decision in which it disposed of the contentions presently made by petitioners. In reply to this argu-

ment, we need only point out that GROVEY v. TOWNSEND came to this court on demurrer in which all of the facts alleged in plaintiff's petition were assumed as true and the allegations made by plaintiff in such cause were certainly as favorable to them in every respect as the record which they have developed in this cause.

Petitioners have placed much emphasis on UNITED STATES v. CLASSIC, 311 U.S. 299, in support of their application. The facts in that case and this are not the same. UNITED STATES v. CLASSIC involved a criminal prosecution for election fraud, and in no wise did the court in that case deny the right of a political party to regulate its membership or that of its electors in the party primary elections. The court further pointed out in the CLASSIC case that the Louisiana primaries were conducted by the state at state expense, while the court, in GROVEY v. TOWNSEND, pointed out that the Texas Democratic primary is a party primary, the expense of which is borne by the party, the ballots for which are furnished by the agencies of the party, the votes are counted and returns made by instruments of the party, and the Democratic Convention is the organ of the party for the declaration of party principles and policies.

Under the Record in the present case it is clear that the conduct of the Democratic primaries in Harris County by respondents was as agents of the Democratic Party of Texas and not as officers of the State of Texas. It is further evident that 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, and that such primaries were not elections conducted by the State of Texas. By reason of such facts it is apparent that petitioners have not been denied any rights guaranteed to them under the Constitution.

We conclude by borrowing from the language of JUSTICE MCREYNOLDS in NIXON v. CONDON:

> "Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The state may not interfere. Whites may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government."

It is respectfully urged that the judgment of the trial court and the circuit court should be affirmed.

Respectfully submitted,

WRIGHT MORROW,
Counsel for Amicus Curiae