Washington University Law Review

Volume 12 | Issue 3

1927

Discriminations Against Negroes in Primary Elections

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To the same effect are the holdings of the Supreme Court of Missouri in the case of *Holland Bank v. Heer Stores Company*,[33] and the Supreme Court of Iowa in *Leach v. Exchange Bank*.[34]

The vast sums of money that must be kept by the State Treasurer and deposited in designated banks calls for our depository laws to safeguard the State's interest and a strict adherence to the requirements of our depository laws by our state officials as to the kind and character of securities to be taken, makes a loss to the state almost impossible.

The law gives to the banks of our state who get the money, funds with which the industry of the state may receive the benefit and in no way endangers the right of the general depositor, for when the bank places the proper character of securities with the state treasurer he puts back in the bank the cash to take their place.

Whenever the State of Missouri has lost money which was on deposit in banks that have failed it has not been due to the form or the substance of our depository laws, but rather to a failure of those in charge of state funds to insist on the strict observance of the law.

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DISCRIMINATIONS AGAINST NEGROES IN PRIMARY ELECTIONS

With the adoption of the Fourteenth and Fifteenth Amendments to the Federal Constitution there arose many and diverse opinions among the political and social leaders of the nation as to the precise extent to which the Federal Government could exercise its prerogative in effecting an equality of rights between the newly emancipated Negro race and the Anglo Saxon race. Any friction or conflicting opinion was, however, in the course of a few years soon removed, for the United State Supreme Court in a series of cases resulting from race clashes promulgated a doctrine now seldom disputed. That court so construed the Fourteenth Amendment as conferring upon the negroes perfect equality of civil and political, though not social, rights with whites, and preventing any person from being made the object of discrimination.[1] The Court interpreted the Fifteenth Amendment as leaving in the several states the power to determine the qualifications of voters, the Federal Government interposing only where a qualified voter is denied the right to vote because of "race, color, or previous condition of servitude."[2]

It is because of the consistency with which the Supreme Court has construed the Fourteenth and Fifteenth Amendments that many of the early problems resulting from racial contacts are now treated as dormant issues, having been determined years ago by the courts. Despite the fact that under the Federal Constitution sufferage cannot be denied to

[33] 17 Otto 445, 27 L. Ed. 700.
[34] 281 S. W. 702. [34] 203 N. W. 31.
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[1] See Plessey v. Ferguson, 163 U. S. 554; McPherson v. Blacker, 146 U. S. 39.
[2] See Guinn v. U. S., 238 U. S. 247; Anderson v. Meyer, 238 U. S. 368.

the negro, the negro has within recent years been made the object of political discrimination in the State of Texas. Here for many years partly by party regulations and partly by force of custom, combined with an element of intimidation, the negro was denied the right to vote in Democratic primary elections. The great majority of the negroes are normally Republican in party matters, and for many years participated freely in the conventions by which the candidates of that party are nominated.[3] In more recent years however, the control of that party has passed into the hands of the "Lily White" faction, and the negro has become a stranger in his own house. Thus cast adrift the blacks pressed most vigorously for the right to vote in the Democratic primaries, and were admitted to the polls by the party committees in some few counties of the state. To check the threatened invasion of the Democratic fold, the Legislature in 1923, passed an act, the pertinent provision of which reads as follows:

> . . . However, 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 should be void, and election officials are herein directed to throw out such ballot and not count the same.[4]

By this act the practical elimination of the negro from effective participation in politics, which had previously been accomplished by party action, was written into the law of the land.

To test its constitutionality the aforementioned statute was brought before the United States Supreme Court in the recent case of *Nixon v. Herndon et al.*,[5] Nixon, a negro and Democrat, sued the defendants, election officials, in a Federal Court for the sum of five thousand dollars, for denying plaintiff the right to vote at the Democratic Primary Election of 1924. The defendant justified under the statute, and the court dismissed the cause for want of jurisdiction. From this action the plaintiff appealed, alleging that the statute contravened the Fourteenth and Fifteenth Amendments to the Constitution. In declaring the statute[6] void Mr. Justice Holmes, voicing the unanimous opinion of the Court, *held* that the law was clearly violative of the Fourteenth Amendment, saying:

> The important question is whether the statute can be sustained. . . . We find it is unnecessary to consider the Fifteenth Amendment because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That amendment while it applies to all, was passed as we know with a special intent to protect the blacks from discrimination against them. . . . 'That amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to

[3] The Texas statute provided that the primary is not applicable to a party not polling at least 100,000 votes at the last preceding general election.

[4] Article 3093-A; Revised Statutes of Texas-1925.

[5] Case not as yet officially reported—reprint in U. S. DAILY—March 8th, page 13—column 4.

[6] Statute quoted in footnote 4, *supra.*

> withhold from them the equal protection of the laws. . . . What is this but declaring that all persons whether colored or white shall stand equal before the laws of the states and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

In answer to the appellees' brief denying that the Democratic primary election is in any sense a public election, and instead alleging it to be a private organization of men and women, which they have a right to regulate independently of governmental interposition, the court said:

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

The court after stating that the statute discriminated against the negro on account of color alone, concluded by declaring "that there are limits to state legislative classification," the court referring here to the police power vested in the states, and further stating that color cannot be made the basis for statutory classification affecting the right to vote.

The significance of the instant decision may be easily over-estimated. At first glance its immediate effect is seemingly to admit the negro to participation in Democratic party activities. That such a result will follow may well be doubted. It is to be noted that until the enactment of the statute in 1923 the Democratic Party through its own councils determined the policies and membership of the organization. As long as the party determined these matters for itself, there is good reason to believe that the validity of its acts could not be questioned. Only when the membership qualifications of the Democratic Party remain the subject matter of state legislation is the instant decision obligatory. As a consequence of the decision the state of Texas will probably take definite action to repeal the statute, place the question of party membership back in the control of the party councils, and thus unmolested continue to forbid negro membership in the Democratic Party. It should be noted that the Fourteenth and Fifteenth Amendments only forbid a *state* from passing any law abridging the privileges and immunities of any citizen of the United States, or depriving any citizen of the United States of life, liberty or property without due process of law, or denying the right to vote on account of race, color, or previous condition of servitude. These amendments neither forbad these wrongs when done by private individuals or organizations nor authorized Congress to forbid them. Until some state law has been passed adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no Federal Control can be called into activity. The Fourteenth Amendment is not prohibitive, but instead only corrective of state statutes which impair the privileges and immunities named in that amendment. This is the whole of the power vested by the Fourteenth Amendment in the Federal Government.

This doctrine the United States Supreme Court enunciated in the celebrated *Civil Rights Cases.*[7] Here the court was asked to pass upon the validity of a Federal Statute wherein Congress sought to inflict punishment upon any individual, who denied negroes the equal and identical enjoyment with whites of such facilities as public conveyances, theaters, inns, and the like. In declaring the statute unconstitutional, the court held that in order to warrant Federal interposition for preservation of the rights names in the Fourteenth Amendment, the wrong committed must first be predicated upon some state law for its excuse or perpetration.

It is true Congress can lawfully punish persons who interfere with the rights of citizens to vote at elections at which members of Congress are elected. This it has done.[8] This authority however is not derived from any power vested in Congress by virtue of the Fourteenth Amendment, but instead from Section 4, Article I of the Federal Constitution, which section reads as follows:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

But in the case of *Newberry v. United States,*[9] the Supreme Court held that a party primary is not an election within the meaning of Section 4, Article I of the Constitution. Instead that Court declared that the regulation of primaries is a matter solely for the states; that Federal Control would interfere with the purely domestic affairs of the state, and would infringe upon the police power reserved in the states to suppress the evils incident to primary elections. In deciding the instant case of *Nixon v. Herndon et al.,* the court in no way confers upon the Federal Government the authority to regulate primary elections. Instead, the court merely holds that a state statute denying negroes the right to vote in primary elections is void as abridging the right to political equality afforded by the Fourteenth Amendment.

As exemplified in the *Civil Rights Cases,* when a constitutional guarantee enumerated in the Fourteenth Amendment is abridged by a state statute, Congress may provide modes of redress against the operation of such state laws. As the Texas statute regulatory of primary elections was held violative of the political equality guaranteed in the Fourteenth Amendment, Congress may at its discretion adopt appropriate legislation for correcting the effects of such a prohibitive state law. It is to be noted however that when the regulation of primary elections, including the policies and membership qualifications of the party organization, is withdrawn from state legislative dominion and replaced in the hands of the party councils, Federal Control over primary elections is unwarranted. In the light of this analysis, Senator Borah's conviction

[7] 109 U. S. 3.
[8] U. S. v. Cruikshank et al., 92 U. S. 542. See particularly in this connection Section 1 of the Enforcement Act of May 31, 1870. (16 Stat. 141.)
[9] 238 U. S. 297.

that the *Nixon* case puts primaries under the control of Congress is seemingly untenable.[10]

The Supreme Court in declaring in the *Nixon* case that color could not be the basis of a statutory classification to vote reiterated a doctrine enunciated by that court in prior adjudications.

Among instances of unwarranted discriminations by reason of color alone have been found state regulatory measures forbidding the purchase of property by negroes in zones restricted to whites. In *Buchanan v. Worley*[11] the court held that a city ordinance preventing the occupancy of a residence by a colored person in a block restricted to whites, is unconstitutional, and cannot be sustained on the ground that it is a valid exercise of the police power in that it promotes peace and prevents ill-feeling; instead such ordinance infringes upon the inviolate right to the enjoyment of property; and it makes color a basis for property classification, a discrimination prohibited by the Fourteenth Amendment.

Another instance of statutory discrimination under the guise of police regulation is depicted in the "grandfather clauses" of several state constitutions. The character and invalidity of such enactments are well illustrated in the case of *Guinn v. United States*.[12] An Oklahoma amendment disbarred from the polls, unless they were able to read and write, negro citizens who were otherwise qualified to vote, but whose heirs were not qualified voters on January 1, 1866. Plaintiffs insisted that the provisions in the amendment fixing voting standards based on January 1, 1866, were repugnant to the Federal Constitution and the Fifteenth Amendment. The court in declaring the Oklahoma amendment void admitted, that although the state has the inherent power to exercise discretion in fixing qualifications of suffrage, nevertheless, the Fifteenth Amendment denies the state any power to forbid citizens the right to vote solely by reason of race, color or previous condition of servitude.

In declaring void statutes prohibiting negroes from sitting as trial jurors, the Supreme Court has held that when privileges are conferred upon a class to which negroes are ineligible solely because of race and color, such negroes are discriminated against within the meaning of the Fourteenth Amendment.[13]

On the other hand legislatures frequently prescribe color as a basis for statutory classification and in accord with constitutional guarantees. The police power confers upon the several states the broad discretionary prerogative to take all necessary steps to effectively promote public health, safety, morals and welfare.[14] Under a reasonable exercise of this police power the states have been repeatedly conceded without question the right to enact "Jim Crow" statutes, assigning passengers to rail-

[10] Senator Borah, referring to the decision of Nixon v. Herndon et al., declared, "It puts primaries under the control of the Federal government. If we are disposed to take charge of them we may do so." U. S. DAILY—March 8th, page 1, column 1.

[11] 245 U. S. 60.

[12] 238 U. S. 297.

[13] Strauder v. West Virginia, 100 U. S. 303.

[14] People v. Wolf, 216 N. Y. S. 241.

road coaches according to their race,[15] providing each race is afforded equal accommodations without discrimination as to comfort, convenience, or safety. In *Berea College v. Kentucky*,[16] the Supreme Court declared that a Kentucky statute permitting equal education to negroes and whites in the same private corporation but in different localities is not an abridgment of the Fourteenth Amendment to the Federal Constitution, the court emphasizing the fact that the social and economic rights of the two races may be equal without being identical, and that such a segregation is conducive to a promotion of harmonious toleration between the races. Where appropriate public schools are maintained for colored children, statutes excluding negroes from public schools established for whites are valid, provided equal facilities are afforded the schools of each race.[17]

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OPINION OF ATTORNEY GENERAL*

First, can the General Assembly, by concurrent resolution, provide for the appointment of a committee or commission to investigate the State Penitentiary to continue its work and make its report to the Governor, President Pro Tem of the Senate and the Speaker of the House after the adjournment of the General Assembly? As you very well know, the General Assembly has the right to investigate any state institution, and it may, by concurrent resolution, appoint a committee for that purpose, and may authorize such committee to summon witnesses, administer oaths, and require the production of books and papers, and this has been done many times since 1875, the date of the adoption of the present state constitution. In 1879, in 1881 and in 1883 the General Assembly by concurrent resolution, appointed a committee to inquire into the affairs of the penitentiary, giving the committee authority to summon witnesses, administer oaths, and require the production of books and papers. In 1883, the General Assembly, by concurrent resolution, appointed a committee to inquire into the charges against the State School for the Blind, and it was given the same powers. In 1889, the General Assembly, by concurrent resolution, appointed a committee to investigate the management of the State University, and it was given the same powers. In 1897, the General Assembly, by concurrent resolution, appointed a committee to investigate the Kansas City Police Force, and it was given the same powers. In 1899, the General Assembly, by concurrent resolution, appointed a committee to investigate the municipal and state governments in St. Louis, and it was given the same powers. In 1911 the General Assembly, by concurrent resolution, appointed a committee to investigate the conduct of the State Game and Fish Warden, and it was given the same powers. In 1913, the General Assembly, by concurrent resolution, appointed a committee to investigate the State Poultry Board, and it was given the same powers.

[15] Plessey v. Ferguson, 163 U. S. 554. [16] 211 U. S. 45.
[17] People v. Gallagher, 93 N. Y. 438.
*An opinion given by North T. Gentry, Attorney General, to the Senate of Missouri.