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STATUTES AND TEXTS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 117.

L. A. NIXON,
Plaintiff-in-Error,

against

C. C. HERNDON and CHARLES PORRAS,
Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

The State of Texas has intervened by special leave of this Court in support of the constitutionality of Article 3093-A of the Texas Civil Statutes, enacted by its Legislature in May, 1923. Permission has been granted to the plaintiff-in-error to reply to the contentions of the State.

The State of Texas, with a negro population of 741,694, according to the census of 1920, is, therefore, seeking to sustain a statute which declares that "in no event shall

a negro be eligible to participate in a Democratic primary election held in the State of Texas," and that if a negro shall vote in a Democratic primary election his ballot shall be void and the election officials are required to throw it out and not count it. This is in marked contrast with the initial paragraph of the Article, that "all qualified voters under the laws and constitution of the State of Texas who is (*sic*) a bona fide member of the Democratic party, shall be eligible to participate in any Democratic primary election, provided such voter complies with all laws and rules governing party primary elections" (*Rec., p.* 4).

It is conceded that the plaintiff-in-error, Dr. Nixon, though a negro, is a qualified voter under the laws and Constitution of the State of Texas, is a *bona fide* member of the Democratic party and has complied with all the laws and rules governing the party primary elections, and that the defendants, who were the inspectors at the Democratic primary held on July 26, 1924, refused to allow him to vote solely because he is a negro. It is this action, based upon the mandate of its Legislature, which excludes a negro from voting at a Democratic primary election held in that State, which the State of Texas now seeks to uphold.

It is argued on behalf of the State that the right of a negro to vote at a primary election does not come within the protective provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. We contend that it does, and shall now discuss the validity of the statute pursuant to which the plaintiff's vote was rejected, first considering the applicability of the Fifteenth and then that of the Fourteenth Amendment.

POINTS.

I.

The right of a citizen to vote, regardless of race, color or previous condition of servitude, is denied and abridged by a law which forbids him, on account of his race and color, to vote at a primary election held under the laws of Texas.

(1) The Fifteenth Amendment employs the broadest and most comprehensive terms to express the idea that a citizen of the United States shall not, on account of his race or color, be debarred from participating in *the right to vote.* There is no limitation or qualification as to the time, occasion, or manner of voting. It is not confined to any particular method or mechanism. It relates to the exercise of the right of a citizen to give expression to his political ideas and predilections in such a way as to make them effective. It forbids not only the *denial* of that right, but also its *abridgment, where such denial or abridgment is based on race, color or previous condition of servitude.* To deprive a citizen by virtue of legislative enactment of the right to choose his own political party, to compel him to affiliate politically with a party with whose principles he is not in sympathy, or to reduce his right of selection to a mere shadow, to an idle formality, constitutes a denial or abridgment of the right to vote.

(2) Whatever may have been the case in earlier days before the status of a political party had developed as it has to-day, when the party primary has become an essential element in the mechanism of voting; when it is recognized by statute as one of the controlling factors of that process; when the proceedings of the primary are regulated by law, and when its action is subject to judicial review, as in the State of Texas, it would constitute a total disregard of the realities to say that *voting* at a primary is not voting in the constitutional sense of the term. This is particularly

true in the present instance, where the Legislature of Texas, after declaring that all *bona fide* members of the Democratic party who are qualified *"voters"* under the laws and Constitution of the State of Texas, have the right to participate in a Democratic primary election, ordains that "in no event" shall a negro have that right. There is thus a literal denial and abridgment of the right of a citizen to vote, solely "on account of his race, color and previous condition of servitude."

(3) The significance of this statute as a denial and abridgment of the right of a negro to vote at a Democratic primary solely because of his race and color, where every other qualified citizen who is a Democrat may vote at such primary, becomes apparent when one takes cognizance of the political conditions which now prevail in those States where negroes are most numerous. The *New York World Almanac* for 1927, at page 318, shows, according to the census of 1920, the white and negro population, in the following Southern States, to have been:

	White	*Negro*
Alabama	1,447,032	900,652
Arkansas	1,279,757	472,220
Florida	638,153	329,487
Georgia	1,689,114	1,206,365
Louisiana	1,096,611	700,257
Mississippi	853,962	935,184
North Carolina	1,783,779	763,407
South Carolina	818,538	864,719
Texas	3,918,165	741,694
Virginia	1,617,909	690,017

All of the United States Senators from these several States are Democrats. Of the 10 members of the House of Representatives from Alabama, all are Democrats, as

are all the 7 members from Arkansas, the 12 members from Georgia, the 8 members from Louisiana, the 8 members from Mississippi, the 10 members from North Carolina, the 10 members from South Carolina, the 10 members from Virginia, the 4 members from Florida and 17 of the 18 members from Texas.

The Governors of all of these States are Democrats. At the election for Governor of Texas held in 1926, Mr. Moody, then Attorney General, upon whose motion the right of the State of Texas to intervene in this case was granted, received 89,263 votes, while Haines, the Republican candidate, received 11,354 votes. It is significant, however, that at the Democratic primary election held in 1926, hundreds of thousands of votes were cast, there being a heated contest in which there were six candidates for Governor, the leaders being Mr. Moody and Mrs. Ferguson. None of the candidates having received a majority of the votes received at the first voting, pursuant to the law of the State of Texas, another vote was taken at a second election, which was confined to the two candidates who had received the highest number of votes at the first primary.

By way of contrast of the vote cast at the general election for Governor above mentioned, and the vote cast at the two Democratic primary elections held in 1926, let us call attention to the results of these primary elections. At the Texas Democratic primary election held on July 24, 1926, as reported in the *New York Times* of July 27, 1926, the follow votes were cast for the candidates named:

Moody	366.954
Ferguson	252,425
Davison	110,113
Zimmerman	2,421
Johnston	1,830
Wilmans	1,443
Making a total vote of	735,186

At the "run-off primary election" held on August 28, 1926, for the choice between the two candidates who at the first election received the largest vote, as reported in the *New York Times* of August 30, 1926—

Mr. Moody received.....	458,669	votes and
Mrs. Ferguson received.....	245,097	
Making a total vote of.....	703,766	

This means that while the total vote received by the Democratic gubernatorial candidates at the first election was 735,186 and at the second was 703,766, the vote cast for the Democratic candidate for Governor at the general election was only 89,263, or a little more than 12 per cent. of the votes cast at the first primary election, and somewhat less than 13 per cent. of the votes cast at the "run-off" primary election.

For further illustration, it appears from the *New York World Almanac* that in 1920 Mr. Cox, the Democratic candidate for President, received in South Carolina 64,170 and Mr. Harding 2,244. In 1926, Richards, Democratic candidate for Governor, was elected without opposition, and Smith, Democrat, was likewise elected without opposition as United States Senator. In a recent publication it appeared that at the election held in 1926 for members of the House of Representatives in South Carolina, the aggregate vote received by all of the Democratic candidates was a little over 10,000. In most of the districts there was no opposition to them. Let this fact be contrasted with the population, white and black, of South Carolina, and the returns of the Democratic primary elections held in that State.

In 1906 the Democratic candidates for Governor and United States Senator were elected without opposition. That was likewise true in Mississippi, and of the election

held in Louisiana in 1926 for United States Senator. In 1924 the Democratic candidate for Governor in that State received 66,203 votes, and the Republican candidate 1,420. Similar conditions obtained in other of the States.

(4) It is thus evident that in these States, including Texas, party lines are so drawn that a nomination in the Democratic primary is equivalent to an election. The real contest takes place in the primary or preliminary election. The general election is nothing more than a gesture, in which but few participate, everything having been determined for all practical purposes at the primary election; so much so that the Republican party, such as there is, contents itself by occasionally going through the motions of voting, so that, in effect, the Democratic candidates chosen at the primary election are unopposed at the general election. If, therefore, negroes, who are in good faith attached to the principles of the Democratic party and are otherwise qualified, are prevented from voting at a Democratic primary, they are virtually denied the right to vote, so far as the right possesses any value. The mere fact that they, too, may go through the form of casting a vote at the general election, in ratification of what has been done at the primary, is a tragic joke. Their voice is not heard. They have the alternative of absenting themselves from the polls or of voting for candidates who may be inimical to them. They are prevented from casting their votes in the primary for such candidates as may appreciate their problems and sympathize with them in their difficulties and to some extent, at least, may desire to relieve their hardships. Though citizens, they are rendered negligible, because their votes, to all intents and purposes, have been nullified. To them the right of suffrage would cease to be that thing of substance which it was intended to be, and would be converted into a useless toy, a Dead Sea apple, the lifeless

corpse of a constitutional right, if the legislation now under consideration were to be upheld.

If the Legislature of Texas were sufficiently concerned in the Republican party to make it worth while, it might likewise provide that negroes shall not be permitted to vote at a Republican primary, or, so far as that is concerned, at any other primary. It is significant that the Election Law of Texas, while permitting other political primaries to be held, limits the exclusion of the negro vote to the Democratic primary elections, but it is conceivable that it might have extended such exclusion to all primaries. Then what would be the status of the negro voters? Instead of only the Democratic negroes, all negroes would be literally disfranchised.

(5) That this is not an imaginative fear, let us call attention to what Mr. Chief Justice White said in the course of his opinion in *Newberry* v. *United States* (p. 267):

> "The large number of states which at this date have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject, *showing how well founded this conviction is and how it has come to pass that in some cases at least the result of the primary has been in substance to render the subsequent election merely perfunctory.*"

The publication to which reference is made is *Merriam on Primary Elections,* published in 1908, where the author says:

> "In many western and southern states the direct primary method has been applied to the choice of

> United States senators as well as to state officers. *In the southern states,* victory in such a primary, on the Democratic side, is practically the equivalent of an election, as there is but one effective party in that section of the country."

That this fact is recognized by the Courts of Texas is shown in *State ex rel. Moore* v. *Meharg,* 287 S. W. Rep. 670, decided by the Court of Civil Appeals of Texas on October 9, 1926. That was an action brought to enjoin the Secretary of State and other officials from placing the name of one McFarlane as the Democratic nominee upon the ballots for the next election on the ground that he had expended more money in the primary campaign than allowed by statutes. After reviewing the statutes of Texas regulating primary elections, the Court said:

> "Other articles of the statutes clearly show that it was the intention of the Legislature that the candidate in such a race who receives a majority of the votes cast shall be considered the nominee for the office and his name shall be placed upon the ballots to be cast in the next general election. That general purpose of the statutes should not be disregarded unless it clearly appears from the provisions of article 3170, and other provisions of chapter 14, tit. 50, referred to above, that the candidate who has received a majority of the votes has violated the provisions of that article. Gray v. State, 92 Tex. 396, 49 S. W. 217; Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913A, 699. *Indeed, 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. In other words, barring certain exceptions, a primary election is equivalent to a general election."*

Professor Merriam in his book on *Primary Elections,* which was published in 1908, since which time the ideas

by him expressed have been greatly extended, further says at page 116:

> "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. The element of public concern in the making of nominations has been strongly emphasized, and the right of the Legislature to make reasonable regulations to protect and preserve the purity and honesty of elections has been vigorously asserted."

In 23 Michigan Law Review 279, the decision in *Chandler* v. *Neff,* 298 Fed. Rep. 515, on which the State relies, received elaborate comment in an able article written by Meyer M. Brown, Esq. It will be found worthy of consideration in its entirety. The following passages are especially in point:

> "What in their nature is peculiar to primary elections that should differentiate them from the public elections and exempt them from the operation of the Constitution? It has been pointed out that the right to choose candidates for public office whose names shall appear on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. *People* v. *Board of Election Comm'rs,* 221 Ill. 9. The primary election has the effect of selecting from the large possible field of choice for the office a few candidates whose names are to be printed on the ballot at the general election. This final election is a further, but similar, limitation; it is the selection of one from the few. That the second selection should be called an election while the first should not, would seem like an unreasonable distinction. In accord with this view is the holding that since, under the primary system, there is scarcely a possibility that any person will or can be elected to office unless he shall be chosen at a

primary election, a primary election must be regarded as an integral part of the process of choosing public officers and as an election within the meaning of the constitutional provisions defining the rights of voters. *People* v. *Board of Election Comm'rs, supra.* * * * Modern primary elections have not only the same essential nature as the general elections, as shown above, but the machinery and details of conducting them are generally the same in both cases. Primary elections are held at the same public polling places as the general elections, with the same election officials in charge. The ballots which are printed and paid for by the state are counted by government election officials, and the names of the winners are printed on the ballots at the general election. In case of a primary election dispute, recourse is had to the same election commissioners or judges of election as in the case of general elections. Not only is the expense of holding primaries paid by the government out of the general taxes, but they are completely controlled and regulated by the state, rather than by party leaders or bosses as was the case under the 'King Caucus' regime, the convention system and the early form of primary. *Hermann* v. *Lampe,* 175 Ky. 109. The modern primary election is thus seen to be on a part with general elections in regard to their actual conduct, public nature and governmental control. * * *

While the general elections are usually thought of as being of more importance than the primaries, the contrary is often true, for in many states the voting strength and solidarity of some one party is such that the contest for nomination of candidates is practically equivalent to an election. *State* v. *Breffeihl,* 130 La. 904. In Texas, victory in a primary, on the Democratic side, means practically certain election. Merriam, p. 84. 'No court can blind its eyes to this universally known fact. * * * Of what use is it to enforce the Constitution only in general elections, when, in fact, the primary elections are the decisive elections in this State in the

> choosing of public officers.' Ch. J. Phillips, in *Koy* v. *Schneider,* 110 Tex. 369."

(6) But it is argued that the Fifteenth Amendment does not expressly refer to voting at primaries. That is true. It does not descend to particulars. It deals with the all-inclusive subject, "the right to vote," and, unless intellectual blindness were to be attributed to the earnest and high-minded statesmen who sponsored this Amendment, that right must be deemed to relate to any form of voting and for any purpose and to any part of the process whereby what is intended to be accomplished by voting is brought about. There is certainly nothing in this Amendment which declares that voting at primaries is to be excepted from its scope.

It is said that in 1870, when the Fifteenth Amendment was adopted, there were no primary elections and that, therefore, the right to vote at a primary election could not have been contemplated. We reply that in 1870 the so-called Australian ballot was unknown. Voting machines had not been invented, and other possible methods of voting than the primitive methods then in vogue, *e. g.,* voting *viva voce,* or by a show of hands, or by a ballot thrust into the hands of the voter by the poll workers, had not been conceived. Neither had the initiative, the referendum, the recall, been introduced into our political vocabulary. Can anybody have the hardihood to claim that for these reasons the newer methods and purposes of voting are not covered by the Constitution? Its language is adequate to include any act or conception or purpose which relates to or substantially affects the free exercise in its essence of the right to vote.

When, by Article I, Section 8, subdivision 3, of the Constitution, in seven words, Congress was given "the power to regulate commerce among the several States," our instrumentalities of commerce were limited to stage coaches

and wagons on land and to sloops, rafts and rowboats on the water. The articles which then came within the scope of commerce were pitifully few, compared with its present vast expansion. But this simple phrase sufficed to include, as they were from time to time devised, as instrumentalities of commerce, steamboats, railroads, aeroplanes, the telegraph, the telephone, and the radio. They likewise became the authority for the creation of the Interstate Commerce Commission, the Federal Trade Commission, the enactment of the Employers' Liability Act, and numerous other far-reaching agencies for the regulation of commerce.

Subdivision 7 of the same section empowered Congress "to establish post-offices and post-roads." Yet who in 1787 would have conceived the possibility, latent in these words, in reference to which Mr. Chief Justice White said, in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 301, 302:

> "And the wise combination of limitation with flexible and fecund adaptability of the simple yet comprehensive provisions of the Constitution are so aptly illustrated by a statement in the argument of the Government as to the development of the postal system, that we insert it as follows:
>
> 'Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employes, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billion of pounds, the incorporation of railroads, the establishment of rural free delivery system, the money-order system, by which more than a half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of

> fraudulent and criminal schemes impossible to be reached in any other way.' "

These illustrations relate only to material things. In so far as they are concerned, the elasticity of the constitutional language has been marvelously vindicated. Is it possible that the language of the same Constitution relating to human rights, and intended to bring about the realization of the noble conception of human equality and the prevention of hateful discrimination, shall be crippled, hampered and deprived of its very life by a narrow and technical interpretation, which would defeat its underlying purpose? Is it possible that the expression of an exalted human purpose shall after half a century be made meaningless by the employment of an artificial mechanism?

There is still another illustration which adds to the strength of our contention. It is afforded by the Nineteenth Amendment. Its form and language are identical with the terms of the Fifteenth Amendment until we reach the last words. Both begin:

> "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of * * *."

The Fifteenth Amendment continues with the words "race, color, or previous condition of servitude." The Nineteenth Amendment continues with the single word "sex."

Nobody to-day pretends that a woman may not take part in a primary election without further authority than that conferred by the Nineteenth Amendment, so long as she possesses the other qualifications requisite to the exercise of the right of suffrage. In other words, she may not be prevented from voting at a primary election on account of her sex. Of course, under the Texas statute, if she is a

negro, her sex would not save her from its discriminatory purpose. It is true that when the Nineteenth Amendment came into force on August 26, 1920, voting at primary elections, unknown fifty years before, had become familiar. Yet, would it not be an absurdity to say that in 1920 the right to vote, so far as it related to women, included the right of voting at a primary election, whereas at the same time the right of a negro to vote at a primary election did not exist because when the Fifteenth Amendment was adopted there were no primary elections? The provisions of the Nineteenth Amendment might very well have been included by an amendment to Article 15 of the Amendments to the Constitution, so that the article might have read: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of *sex,* race, color or previous condition of servitude." Could it then have been contended that under such a provision of the Constitution the right of women to vote at primaries could not be denied or abridged, but that the right of negroes to vote could nevertheless be denied and abridged, because the same words had two different meanings due to the fact that they originated in two different periods of our social development?

(7) The history of the Thirteenth, Fourteenth and Fifteenth Amendments discloses that it was the purpose of the framers to make them self-executing from the moment of their adoption, and to confer upon the negroes *ipso facto* political equality.

In *United States* v. *Reese,* 92 U. S. 214, Mr. Justice Hunt, although his was a dissenting opinion, made the statement which has never been questioned:

> "The existence of a large colored population in the Southern States, lately slaves and necessarily ignorant, was a disturbing element in our affairs.

> It could not be overlooked. It confronted us always and everywhere. Congress determined to meet the emergency by creating a political equality, by conferring upon the freedman all the political rights possessed by the white inhabitants of the State. It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty, and the pursuit of happiness, by giving to them that greatest of rights among freemen—the ballot. Hence the Fifteenth Amendment was passed by Congress, and adopted by the States. The power of any State to deprive a citizen of the right to vote on account of race, color, or previous condition of servitude, or to impede or to obstruct such right on that account, was expressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.
>
> The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for specified officers, not for Federal officers or for State officers, but the right to vote in its broadest terms."

In *Ex parte Yarbrough,* 110 U. S. 651, 665, Mr. Justice Miller said:

> "While it is quite true, as was said in this court in *United States* v. *Reese,* 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white,* and thus left him in the enjoyment of the same right as white persons. *And such would*

> *be the effect of any future constitutional provision of a State* which should give the right of voting exclusively to white people, whether they be men or women. *Neal* v. *Delaware,* 103 U. S. 370.
>
> In such cases this Fifteenth article of amendment does, *proprio vigore,* substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.
>
> In the case of *United States* v. *Reese,* so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that 'it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

In *Guinn* v. *United States,* 238 U. S. 347, Mr. Chief Justice White, considering the Fifteenth Amendment, said at page 362:

> "While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarbrough,* 110 U. S. 651; *Neal* v. *Delaware,* 103 U. S.

> 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all *white* male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State.
>
> With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason *other than the purpose to disregard the prohibitions of the Amendment by creating a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.*"

In *Myers* v. *Anderson,* 238 U. S. 368, it was held that while the Fifteenth Amendment does not confer the right of suffrage on any class, it prohibits the States from depriving any person of the right of suffrage whether for Federal, State or municipal elections. A State may not establish a standard existing prior to the adoption of that Amendment and which was rendered illegal thereby. In

that case counsel had argued with great seriousness that the words "right to vote" as used in the statutes or constitutions usually meant the right to vote at elections of a general public character, and not at municipal elections, and that they did not in any event mean or refer to the right to vote in corporate bodies created solely by legislative will, and wherein such right is dependent altogether upon legislative discretion, as in municipal corporations. That contention was rejected.

(8) It has also been argued that the question here involved is a political question, and on the authority of *Chandler* v. *Neff,* 298 Fed. Rep. 515, it is claimed that such questions are not within the province of the judiciary.

Political questions which are not within the province of the judiciary, where the power to deal with them has not been conferred by express constitutional or statutory provisions, are not such as relate to the maintenance of civil, social or even political rights conferred on the citizen by the Constitution or a statute, or even such as exist at common law.

The phrase "political questions" is ordinarily used to designate such questions as lie outside of the scope of the judicial power, as for instance, where the issue arises as to which of two rival governments is legitimate. This is illustrated by *Luther* v. *Borden,* 7 How. 1, 42. Such questions also arise where the Federal Government has recognized a state or foreign government, or a sovereign *de jure* or *de facto* of a particular territory. Whether a state of war exists; or what is the political status of a state of the Union; or whether the government of a State has ceased to be republican in form by reason of the adoption of the Initiative and Referendum are political questions. But the determination of a boundary between two states presents a judicial and not a political question (*U. S.* v. *Texas,* 143 U. S. 621, 640).

So, too, the questions of whether an officer elected by the people or appointed by the Governor has the qualifications required by law, or where a county seat is, or whether a law creating a new county violates a provision of the Constitution, which limits the area of a county to be erected or of the county from which the territory is taken; or whether a majority in fact of the votes cast on a proposition is by fraud converted into a minority on the face of the election returns, are judicial.

By the Election Laws of Texas the proceedings of primary elections are subject to judicial review (*Ashforth* v. *Goodwin,* 103 Tex. 491, 131 S. W. Rep. 535).

The present case does not involve a political question in the sense in which that phrase is properly used. It doubtless relates to a political right—the exercise of suffrage. But in the same sense freedom of speech, and of the press, of the right of free exercise of religion, the right of peaceable assembly, of petition to the Government for redress of grievances, are political rights, as is the right to life, liberty and property and of being protected against the denial of the equal protection of the laws. A citizen who is deprived of these rights may seek redress for the injury inflicted and protection against injury threatened in the Courts. The books are full of precedents in which the Courts have intervened on behalf of those who complain of the invasion of these precious rights. This is especially true where redress is sought in an action at law, as in the present case. *Chandler* v. *Neff* was a suit in equity.

Even at common law the right to maintain an action at law against an election returning officer for refusing to recognize an elector's right to vote was enforced in the great case of *Ashby* v. *White,* 2 Lord Raymond Rep. 938, 3 *id.* 320; 1 *Smith's Leading Cases,* 9th Ed., pp. 464-509. There Ashby, who was a qualified voter of the Borough of Aylesbury, offered his vote at an election for members of Parliament. The defendants refused to permit him to

vote, and two burgesses of that borough were elected to Parliament, "he, the said Matthias Ashby, being excluded as before set forth, without any vote of him, the said Matthias Ashby * * * *to the enervation of the aforesaid privilege of him,* the said Matthias Ashby." Justices Gould, Powys and Powell held that the action was not maintainable. Chief Justice Holt held that it was. The case was then taken before the House of Lords, where a judgment was given for the plaintiff by fifty Lords against sixteen. When judgment was thereafter rendered for the plaintiff by Chief Justice Holt, he closed his remarks with the impressive statement:

> "Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of *Barnardiston* v. *Soame,* 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense. Let all people come in, and vote fairly: it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right: and if this action be not allowed, a man may be forever deprived of it. *It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make."*

The subsequent history of *Ashby* v. *White* constitutes an important chapter in English constitutional history. A furious controversy was waged between the Houses of Lords and Commons, as is set forth on page 506 of the note to *Ashby* v. *White* in *Smith's Leading Cases* and in Volume 2 of *Hallam's Constitutional History of England* (6th Ed.), 436-439, 444.

A similar precedent is afforded by the case of *Green* v. *Shumway,* 39 N. Y. 418, where the inspectors of an election held for the purpose of choosing delegates to a con-

stitutional convention refused to accept the vote of an elector who declined to take the "test oath" prescribed by the act relating to the election of such delegates and which was not applicable to voters at a general election. The provision of the statute requiring such oath was held to be unconstitutional, and, consequently, the rejection of the vote was held to constitute a cause of action independently of any statutory authority.

In *Wylie* v. *Sinkler,* 179 U. S. 58, it was held that the Circuit Court of the United States had jurisdiction of an action brought against election officers of the state to recover damages for refusing the plaintiff's vote for a member of Congress; and in *Swafford* v. *Templeton,* 185 U. S. 487, there was a similar ruling.

Referring to these cases in his dissenting opinion in *Giles* v. *Harris,* 189 U. S. 498, Mr. Justice Harlan said that they "recognized that the deprivation of a man's *political rights* (those cases had reference to the elective franchise) may properly be alleged to have the required value in money" within the jurisdiction of the requirement.

Giles v. *Harris,* 189 U. S. 475, in no way conflicts with our contention, that being a suit in equity to compel the Board of Registrars to enroll the names of themselves and other negroes upon the voting lists of the county in which they resided. The decision was based upon the ground that it was impossible for the Court to grant the equitable relief which was asked. The complaint was characterized as "a bill for a mere declaration in the air." The relief asked for the right of registration under what was declared to be a void instrument. It was also held that a court of equity could not take jurisdiction because it could do nothing to enforce any order that it might make. In the course of his opinion Mr. Justice Holmes said, on the authority of *Wylie* v. *Sinkler* and *Swafford* v. *Templeton:*

> "We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money."

In the present case the action is one at law for damages occasioned by the deprivation of the plaintiff of his political and social rights.

Love v. *Griffith,* 266 U. S. 32, was likewise a bill in equity filed in February, 1921, by the plaintiffs, who were qualified electors of the Democratic political faith, to enjoin the City Democratic Executive Committee of Houston, Texas, from enforcing a rule that negroes could not be allowed to vote in the Democratic city primary election to be held on February 9, 1921. The State Court in the first instance dismissed the bill. On appeal to the Court of Civil Appeals of the State the case came up for hearing months after the election, and it was decided that the cause of action had ceased to exist and that therefore the appeal would not be entertained. In that situation the case came before this Court. Mr. Justice Holmes said:

> "If the case stood here as it stood before the court of first instance *it would present a grave question of constitutional law* and we should be astute to avoid hindrances in the way of taking it up. But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time."

As has been already pointed out, the present action is one at law for damages, and therefore does not come within

the ruling made in the case cited. Moreover, it is significant that that case arose two years before the enactment of the statute which we are now attacking. It merely involved a rule of the Democratic Executive Committee of Houston. Here, we are confronted by an Act of the Legislature sought to be enforced by the State of Texas and directed against a component part of the citizenry of the State. We are contending against the validity of the legislation of the State and not merely against the action of a Democratic executive committee taken pursuant to that legislation. From this statement we do not wish it to be inferred that we entertain any doubt as to the right of a negro citizen otherwise qualified to vote to attack the validity of the action of such a committee excluding him from voting on account of his race or color, even in the absence of legislation. It is likewise significant that in the case just cited this Court recognized that if the case stood here as it did before the court of first instance, it would "present a grave question of constitutional law."

(9) The stress of the argument of the State rests on the proposition that the primary of a political party is not an election within the meaning of the Constitution of the United States, and that is stated to be "the crux of the whole case."

It has, of course, been observed that we have not referred to any constitutional provision which mentions the word "election." Our reliance is upon the Fifteenth Amendment, which relates to "the right to vote" and which forbids the denial or abridgment of that right. We are not, therefore, concerned with the decisions that have been cited at pages 9 to 13 of the State's brief. In none of them is there any question as to the right to vote. Even as to the propositions discussed in those cases there is a

contrariety of opinion in the authorities. The following are opposed to those cited:

People v. *Chicago Election Commissioners,* 221 Ill. 9; 77 N. E. 321;
People v. *Strassheim,* 240 Ill. 279; 88 N. E. 821;
People v. *Haas,* 241 Ill. 575; 89 N. E. 792;
People v. *Deneen,* 247 Ill. 289; 93 N. E. 437;
State v. *Hirsch,* 125 Ind. 207; 24 N. E. 1062;
Heath v. *Rotherham,* 79 N. J. Law 72; 77 Atl. 520;
Spier v. *Baker,* 120 Cal. 370; 52 Pac. 659;
Leonard v. *Commonwealth,* 112 Pa. 607; 4 Atl. 220;
Anderson v. *Ashe,* 66 Texas Civil App. 262; 22 S. W. 1044.

The State's principal reliance is on the decision in *Newberry* v. *United States,* 256 U. S. 232, which involved the constitutionality of Section 8 of the Federal Corrupt Practices Act, which undertook to limit the amount of money which the candidates for Representative in Congress or for United States Senator might contribute or cause to be contributed in procuring his nomination or election. In so far as it applied to a primary election of candidates for a seat in the Senate, the Fifteenth Amendment was in no way involved.

The meaning of the phrase "the right to vote" was not and could not have been considered, since there had been no denial or an abridgment of that right on account of race, color, previous condition of servitude, or of sex. The sole constitutional question involved concerned the interpretation to be given to Article I, Section 4, of the Constitution, which provides:

> "The times, places and manner of holding elections for senators and representatives, shall be pre-

> scribed 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."

The question, therefore, was whether the limited right to deal with "the times, places and manner of holding elections" involved the right to regulate the use of money in connection with the primary election of candidates for the Senate and House of Representatives.

It was held that an undefined power in Congress over elections of Senators and Representatives not derived from Article I, Section 4, could not be inferred from the fact that the offices were created by the Constitution or by assuming that the Government must be free from any control by the States over matters affecting the choice of its officers. It was further held that the elections within the original intendment of Section 4 of Article I were those wherein Senators should be chosen by legislatures and Representatives by voters "possessing the qualifications requisite for electors of the most numerous branch of the state legislature."

It was likewise held that the Seventeenth Amendment did not modify Article I, Section 4, which was the source of Congressional power to regulate the times, places and manner of holding elections; and, finally, that the power to control party primaries for designating candidates for the Senate was not "within the grant of power to regulate the manner of holding elections."

The "right to vote" is infinitely more comprehensive in its meaning, scope and operation than is the reference to the "manner of holding elections for senators and representatives," which was under consideration in *Newberry* v. *United States.*

Moreover, in that case Justices McReynolds, Holmes, Day and Vandevanter voted for reversal on the constitu-

tional ground, while Mr. Chief Justice White, differing on the constitutional question, voted for a reversal and a new trial because of an error in the charge to the jury, and Justices Pitney, Brandeis and Clarke, likewise finding error in the instructions to the jury, were of the opinion that the Act itself was valid. Mr. Justice McKenna concurred in the opinion of Mr. Justice McReynolds "as applied to the statute under consideration, which was enacted prior to the Seventeenth Amendment, but reserved the question of the power of Congress under that Amendment."

In view of this divergence of opinion with respect to the provision of Section 4 of Article I of the Constitution, it can scarcely be said that it has any direct bearing on the questions here involved arising under the Fourteenth and Fifteenth Amendments.

II.

The statute under consideration likewise offends against the Fourteenth Amendment inasmuch as it is a law abridging the privileges and immunities of citizens of the United States, and because it denies to persons within its jurisdiction the equal protection of the laws.

This statute takes from negroes who are qualified as voters under the laws and Constitution of the State of Texas, and who are *bona fide* members of the Democratic party, the right to participate in the Democratic primary election which is conferred on all other persons coming within that definition. It likewise classifies qualified voters who are *bona fide* members of the Democratic party by permitting all persons who are white to vote at Democratic primary elections, and prohibits all who are black from so voting.

Independently, therefore, of the Fifteenth Amendment, we contend that this statute is a violation of the Fourteenth Amendment, which brings us to a consideration of the scope of the latter amendment as interpreted by this Court. In reference to it Mr. Justice Strong said in *Strauder* v. *West Virginia,* 100 U. S. 306, where a statute in effect singled out and denied to colored citizens the right and privilege of participating in the administration of the law as jurors because of their color, though qualified in all other respects:

> "This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. * * * It was in view of these considerations that the Fourteenth Amendment was framed and adopted. *It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.* It not only gave citizenship

> and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases,* 'No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' "

The opinion then discusses the terms of the Fourteenth Amendment and the necessity of construing it liberally to carry out the purposes of the framers, and then proceeds to consider the equal protection clause:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to *exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps reducing them to the condition of a subject race.*
>
> That the West Virginia statute respecting juries —the statute that controlled the selection of the

> grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. *The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*"

To the same effect are opinions in

> *Virginia* v. *Rives,* 100 U. S. 313, and
> *Ex parte Virginia,* 100 U. S. 339.

In *McPherson* v. *Blacker,* 146 U. S. 1, 39, it is stated:

> "The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. *In re Kemmler,* 136 U. S. 436.
>
> The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any per-

sons or class of persons from being singled out as a special subject for discriminating and hostile legislation. *Pembina Company* v. *Pennsylvania,* 125 U. S. 181, 188."

In *Buchanan* v. *Warley,* 245 U. S. 76 (the Louisville Segregation Case), Mr. Justice Day said:

"The effect of these Amendments was first dealt with by this court in *The Slaughter House Cases,* 16 Wall. 36. The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the States were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In *The Slaughter House Cases* it was recognized that the chief inducement to the passage of the Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States."

See also:

Gibson v. *Mississippi,* 162 U. S. 565;
Carter v. *Texas,* 177 U. S. 442, 447;
Rogers v. *Alabama,* 192 U. S. 226, 231.

A mere reference to *Yick Wo* v. *Hopkins,* 118 U. S. 356 and to the classic opinion of Mr. Justice Matthews in that case will suffice for the purposes of this argument, although in the ordinance there in question there was not the brutal frankness which characterizes the legislation now under consideration which expressly discriminates against the negro. In the case cited, without reference to the fact that it was intended to discriminate against Chinese laundrymen, they were not named in the ordinance, although in its operation, as well as in its purpose, it was designed to differentiate between them because of their race and others who conducted laundries.

See also:

Truax v. *Reich,* 239 U. S. 33;
Ah Kow v. *Nunan,* 5 Sawyer 552;
Re Tiburcio Parrott, 1 Fed. 481;
Re Ah Chong, 2 Fed. 733;
People ex rel. Farrington v. *Mensching,* 187 N. Y. 18;
Royster Guan Co. v. *Virginia,* 253 U. S. 412.

Illustrations could be multiplied, but none of them would be so directly applicable here as are those to which attention has been directed.

The vice of this legislation appears on its face. It lays down a general principle which confers the right to vote at a Democratic primary election upon all voters qualified under the Constitution and laws of the State of Texas who are *bona fide* members of the Democratic party. Their

follows the discrimination, couched in the most emphatic terms, that in no event shall a negro be permitted to participate in a Democratic primary election held in the State of Texas. Not content with that explicit discrimination, there follows the provision that should the negro vote in a Democratic primary election his ballot shall be void, and then, to emphasize the humiliation sought to be inflicted upon the negro, the election officials are directed by the statute to *"throw out"* such ballot and *"not count the same."* It is like administering a kick to a murdered man as an evidence of malice and contempt.

If this is not arbitrary classification by race and color; if it does not constitute a complete deprivation of the equal protection of the laws; if it is not an abridgment of privileges and immunities of a citizen of the United States, then it is impossible to conceive of any acts which come within those terms. Every white man and every white woman who possesses the qualifications mentioned in the act, however ignorant or degraded, or mentally unfit, whether naturalized or native, may vote without let or hindrance, and no negro, though possessing all the qualifications prescribed by the statute, however intelligent and patriotic and industrious and useful a citizen he may be, though he and his ancestors may have lived and labored within the State from the time of its organization, is denied that right.

We are not here concerned with a political question. It is one that transcends all politics. It is one which involves the supremacy of the Constitution both in its letter and in its spirit. It cannot be met with the contemptible platitude that is in itself an insult to the Constitution, that the "Democratic party of the State (Texas) is a white man's party." Nor is it an answer to say to a negro who believes in the doctrines of the Democratic party, that because the law relating to the primaries of

other political parties has not provided for the exclusion of negroes from membership therein and because such parties may select their own candidates to be voted upon in the general election that he has no cause for complaint. In other words, the suggestion is that in view of the fact that the Legislature of Texas has not yet prohibited negroes from voting in the Republican primaries, and regardless of the fact that there are negroes who conscientiously prefer to vote for the principles and policies of the Democratic party, their remedy for exclusion from that party is to vote for the candidates of a party to whose doctrines they are opposed.

Let us suppose the conditions were reversed, and the white Democrats of Texas were excluded from the Democratic primaries, and, by way of consolation, were informed that they might vote for the candidates of the Republican party of Texas. With what satisfaction such a sop would be received!

III.

It is respectfully submitted that the judgment of the Court below should be reversed, and the cause remanded for trial upon its merits.

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