

the present case because of the absence of any state action. See 41 *Yale L.J.* 1212, 1221 (1932) (comment).

In a state where selection in the primary is usually tantamount to actual election, the privilege to vote in the primary seems to be sufficiently connected with the election of state officials; so that any exclusion by a primary official from the primaries might be considered state action. *Cf. Love v Wilcox*, 119 Tex. 256, 28 S.W. (2d) 515 (1930); see Merriam and Overaker, *Primary Elections* (1928), 140; Evans, *Primary Elections and the Constitution*, 32 Mich. L. Rev. 45 (1934). Furthermore the Texas legislature had so surrounded the primary election with restrictions as to cause the Texas Supreme Court to say in a previous case that "the Legislature has assumed control of that subject to the exclusion of party action." *Briscoe v. Boyle*, 286 S.W. 275 (Tex. 1926). And we may well find state action where there is almost complete state control. See *White v. County Dem. Ex. Comm.*, 60 F. (2d) 973 (S. D. Tex. 1932); 1. *Univ. Chi. L. Rev.* 142 (1932); see also *Tex. Rev. Civ. Stat.* (1925), arts. 2935-3041; but see 5 *Tex. L. Rev.* 393, 399 (1927) where it is pointed out that state regulation in many fields is not necessarily state action. It has sometimes been urged that a primary represents state action provided state funds are used to pay primary officials and evidently no state funds are used in Texas. *White v. Lubbock*, 30 S.W. (2d) 722 (Tex. 1930). Moreover the position taken by the court in the present case makes it somewhat difficult to understand the previous decision in *Nixon v. Condon*, 286 U.S. 73 (1932), where the delegation to the executive committee of the convention of power to exclude was held bad. It is not at all clear that the committee would not have had this power in the absence of legislation, and it seems more than likely that the legislature did not intend to delegate power so much as to return power to the place where it was before the legislature entered the field with its own requirements. See 5 *Tex. L. Rev.* 393, 400 (1927). The complete failure to discuss the application of the Fifteenth Amendment in the present case also seems questionable inasmuch as its application was expressly held open by Justice Holmes in the *Herndon* case and was again reserved in the *Condon* case. It is true that the court in *Newberry v. U.S.*, 256 U.S. 232 (1921) indirectly held that a primary is not an election under Art. 1, § 4 of the federal Constitution, and thus, perhaps, it may be assumed that the right to vote under the Fifteenth Amendment would not include the right to vote in a primary. But the authority of the *Newberry* case has been considerably shaken. *Borroughs v. U.S.*, 290 U.S. 534 (1934); 1 *Univ. Chi. L. Rev.* 636 (1934). And no definition of the right to vote under the Fifteenth Amendment has been given. See *Hodge v. Bryan*, 149 Ky. 110, 148 S.W. 21; *Chandler v. Neff*, 298 Fed. 515 (W.D. Tex. 1929).

Corporations—Right to Cumulative Voting Though Not Complying with Statutory Requirement of Filing—[New York].—Pursuant to an agreement whereby the petitioner sold enough of his stock to the two respondents to make each owner of one-third the total stock, an amendment to the charter and a by-law were passed, unanimously, providing for cumulative voting. The New York Stock Corporation Law provides "unless otherwise provided in the certificate of incorporation . . . filed pursuant to law . . . every stockholder . . . shall be entitled . . . to one vote for every share . . ." and "the certificate of incorporation . . . filed pursuant to law may provide" for cumulative voting. *N. Y. Cahill's Consol. Laws* (1930), c. 60, §§ 47, 49. Through

no fault of the petitioner, the amendment was never filed. Upon the respondent's refusal to allow a cumulative vote for directors, the petitioner brought proceedings to have his candidate declared elected. *Held*, though the statutory requirement of filing had not been satisfied, the respondents were bound by contract to permit the petitioner to vote his shares cumulatively. *In re American Fibre Seat Corp.*, 265 N.Y. 416, 193 N.E. 253 (1934).

In absence of express "authorization," stockholders have no right to cumulative voting. *State v. Stockley*, 45 Ohio St. 304, 13 N.E. 279 (1887). Although usually provided for by statutory or constitutional provision, it has been suggested that cumulative voting may be authorized by "charter or by by-laws" if there is no mandatory statute requiring another method. Ballantine, *Corporations* (1927), § 172. If the present statute is considered as "permissive" it would seem that the by-law in itself would be sufficient authorization to allow the petitioner his right of cumulative voting. See decision below, *In re American Fibre Chair Seat Corporation*, 241 App. Div. 532, 272 N.Y.S. 206 (1934); 34 Col. L. Rev. 1361 (1934). But see 48 Harv. L. Rev. 509 (1935).

The language of the act, however, indicates that the statute is mandatory rather than permissive, "unless otherwise provided in the certificate filed pursuant to law . . . every shareholder shall be entitled to one vote for every share." See *Chappel v. Standard Scale and Supply Corp.*, 15 Del. Ch. 333, 138 Atl. 74 (1927), rev'd on other grounds, 16 Del. Ch. 331, 141 Atl. 191 (1928); Black, *Interpretation of Laws* (2d ed. 1911), §§ 147-149; Maxwell, *Interpretation of Statutes* (7th ed. 1929), 316. The court in the principal case accepted this construction: "the voting rights of the stockholders are immune from change except by amendment of the charter of incorporation."

It has been held that a unanimous voting agreement which does not satisfy a mandatory statutory provision for amendment will be unenforceable. *Nickolopoulos v. Sarantis*, 102 N. J. Eq. 585, 141 Atl. 792 (1928). There is authority, however, to the effect that stockholders who are parties to a voting agreement will be bound by its provisions even though the agreement is invalid as far as third parties are concerned. *Weiland v. Hogan*, 177 Mich. 626, 143 N.W. 599 (1913); Fletcher, *Corporations* (perm. ed. 1931), § 4194. Thus, though there was no valid charter provision in the principal case for cumulative voting, the court held that the respondents, as parties to the original agreement, were estopped from denying its validity. The court suggested that the petitioner could have obtained specific performance requiring the respondents to file the amendment pursuant to the voting agreement, and in effect, though not expressly treated "that as done which in good conscience should have been done."

The decision expressly construing the statute as mandatory and yet allowing the petitioner a right to cumulative voting presents an interesting problem: how far must the shareholders go toward a "de jure" amendment in order for the court to enforce the agreement? Would an oral agreement to amend the charter to provide for cumulative voting be enough? Would a written agreement be sufficient; or would the same result be reached if the proposed amendment were approved at a regular meeting but not actually prepared for filing?

The language of the court indicates that such an agreement will be enforced only if the objection to its validity is "purely technical," where no "rights of third parties are involved," where the agreement is "not contrary to public policy," and where it has been authorized by a "unanimous vote."