nation as a whole might well benefit were insurance companies with their vast influence in the commercial and industrial life of the country to have a financial stake in the success of interracial housing projects.

THE RIGHT TO VOTE IN SOUTHERN PRIMARIES

Four years ago South Carolina made the latest move in the game of constitutional chess which the southern states have long been playing with the Supreme Court on the question of the "white primary." The South Carolina legislature repealed every statute relating in any way to primary elections or political parties,[1] and proposed a constitutional amendment,[2] subsequently ratified[3] by the voters at the general election of 1944, which eliminated every reference to "primary" and "political party" in the state constitution. The Democratic state convention then met and adopted a set of regulations embodying virtually all the provisions previously contained in the repealed statutes. By this action it was hoped to circumvent the rulings in *Smith v. Allwright*[4] and *United States v. Classic*,[5] and thus enable the Democratic Party, in the guise of a private club, to retain an all-white primary. In an action for a declaratory judgment to determine the rights of Negro voters under the new primary rules, the federal district court held that in the South Carolina Democratic convention the "people of the State . . . had enacted" what amounted to "custom, usage, or regulation" of the state, and that such state action depriving the Negro plaintiff and others similarly situated of the right to vote violated the Fifteenth Amendment of the federal Constitution.[6] On appeal, the circuit court affirmed the decision, but on the ground that the South Carolina primary is an integral, inseparable part of the election machinery of the state, and when party officials deny the Negro a vote in what is a part of the state's election machinery, they are exercising state power for an unconstitutional purpose. *Rice v. Elmore*.[7]

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and Alexandria, Virginia and has over $200,000,000 invested in housing. Metropolitan Life Makes Housing Pay, 33 Fortune 133 (April, 1946). Its Parkchester Project in New York is the best-paying investment that it has. Ibid., at 134. Since the New York Redevelopment Companies Law, § 3408, permits the corporate owner of a housing project to earn 6% on its investment it is particularly interesting to note that Metropolitan reported to the New York Insurance Commission in 1946 that its income from all assets averaged exactly 3%. PM, § 1, p. 11, col. 3 (July 30, 1947). Metropolitan has constantly earned its statutory 6% on its New York and other housing projects. Metropolitan Life Makes Housing Pay, 33 Fortune 133, 209 (April, 1946).

[1] S.C. Acts Extra. Sess. 1944, Nos. 688–839. In 1943 the Legislature had repealed forty-five code provisions governing the conduct of the primary effective June 1, 1944. S.C. Acts 1943, No. 63.

[2] S.C. Acts Extra. Sess. 1944, No. 830.

[3] S.C. Acts 1945, No. 11, whereby the amendment to Article II, § 10 of the Constitution was adopted by the voters at the general election of 1944.

[4] 321 U.S. 649 (1944). [5] 313 U.S. 299 (1941).

[6] Elmore v. Rice, 72 F. Supp. 516 (S.C., 1947), aff'd on other grounds, Rice v. Elmore, 165 F. 2d 387(C.C.A. 4th, 1947), noted in 33 Iowa L. Rev. 412 (1948).

[7] Rice v. Elmore, 165 F. 2d 387(C.C.A. 4th, 1947), cert. den. 16 U.S.L. Week 3314 (1948).

To frustrate each of the long succession of attempts to keep the Negro from voting, the courts have relied upon two major weapons: "state action" and the "right to vote." Racial discrimination in any election by organs of a state is labeled "state action" in violation of the Fourteenth and Fifteenth Amendments. But acts of individuals which are not "state action" may still be unlawful if they deprive a qualified elector of the "right to vote" in contravention of the federal Constitution[8] and the Civil Rights Act.[9] To meet each new southern attempt at Negro disfranchisement the federal courts have either had to discover "state action" where none had been found before, or to broaden the protection extended to the "right to vote" by the Constitution.

The first of these methods has been called into play more frequently. The "grandfather clauses"[10] were declared unconstitutional as thinly disguised legislative attempts at disfranchisement.[11] Next, it was held that a state law directly forbidding Negroes to vote in Democratic primaries violated the Fourteenth Amendment.[12] Southern efforts then turned to attempts at divorcing the act of discrimination from any recognized state activity. But the discriminatory regulations of the Texas Democratic state executive committee, when authorized by the legislature to prescribe the qualifications for voting in the Democratic primary, were struck down by the Supreme Court as "state action."[13] Not long

[8] The federal right to vote stems from Article I, Sections 2 and 4, and the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments to the Constitution. For the purpose of this discussion the most pertinent provisions are those of Art. I, §§ 2 and 4.

Art. I, § 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, § 4: "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 Chusing Senators."

[9] The criminal provisions of the Civil Rights Acts are Sections 19 and 20 of the Criminal Code, 35 Stat. 1092 (1909), 18 U.S.C.A. §§ 51, 52 (1927). Section 51 provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, . . . they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Section 52 provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully 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 penalties, 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."

[10] These clauses set up a literacy qualification for voting, excusing from the qualification those who had been entitled to vote in 1867 and their descendants, and Civil War veterans and their descendants.

[11] Guinn v. United States, 238 U.S. 347 (1915).

[12] Nixon v. Herndon, 273 U.S. 536 (1927).

[13] Nixon v. Condon, 286 U.S. 73 (1932).

after, however, the Court, in *Grovey v. Townsend*,[14] refused to go so far as to call that same discrimination, prescribed by the same committee without any delegation of authority from the state, the action of the state.

When the scope of "state action" thus seemed to have been delineated, fresh impetus was given the movement for nondiscriminatory suffrage by the *Classic* decision,[15] where, in extending the Constitutional "right to vote" to primary elections at which candidates for national office were chosen, the Court cast doubt on the validity of the *Townsend* decision. The extension of the "right to vote" to include primary as well as general elections parallels the development of greater state responsibility for free and equal voting. In the process of extension, the source of the right to vote—basic to all the suffrage cases and to the whole pattern of attempted disfranchisement in the South—has become more firmly established in the federal Constitution.

The underlying principle of the cases dealing with disfranchisement is that rights derived from the national Constitution can be protected by federal law against any encroachment, state or individual; but where the right derives from the constitution and laws of the state the federal constitutional sanctions apply only to "state action." Thus it was thought that the attempt in *Nixon v. Herndon*[16] to discriminate in the primary was an attempt to regulate a right not protected by the federal Constitution, but a right derived from state sovereignty. It is not questioned that the right to vote at a purely state or municipal election springs from the laws and constitution of the state itself.[17] But the state-derived right is a qualified one. The Fourteenth, Fifteenth, and Nineteenth Amendments place limitations upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualifications of voters in the election of state officers.[18] No state may deprive any qualified voter of the right to vote in any election, state, national, or municipal, because of "race, color, or previous condition of servitude," or sex, or by providing an unreasonable and arbitrary voting requirement.[19] Thus, the discrimination practiced in *Nixon v. Herndon* was struck down as "state action" without extending the federal "right to vote." The case illustrates the yeoman duty which the

[14] 295 U.S. 45 (1935).

[15] United States v. Classic, 313 U.S. 299 (1941).

[16] 273 U.S. 536 (1927).

[17] Karem v. United States, 121 Fed. 250 (C.C.A. 6th, 1903); United States v. Stone, 188 Fed. 836 (D.C. Md., 1911).

[18] Smith v. Allwright, 321 U.S. 649 (1944); United States v. Stone, 188 Fed. 836 (D.C. Md., 1911); Karem v. United States, 121 Fed. 250 (C.C.A. 6th, 1903); cf. Parker v. Brown, 317 U.S. 341, 359–60 (1943).

[19] Although no case has arisen, it is presumed that such voting requirements as 15 years' residence in the state and/or $10,000 of property would violate the "reasonableness" standard of the Fourteenth Amendment. But see Kallenbach, Constitutional Aspects of Federal Anti-Poll Tax Legislation, 45 Mich. L. Rev. 717, at 730 et seq. (1947). Professor Kallenbach apparently believes that such requirements would not violate the suffrage amendments in the absence of conflicting federal legislation.

concept of "state action" has been called upon to perform—all that is required is to find the tinge of state authority behind the discriminatory action.

The amendments which qualify state action, however, may not be invoked against individual action.[20] In order to enforce Congressional sanctions against an individual, the right violated must be shown to be derived from the national government. So, when the "state action" concept seemed, in *Grovey v. Townsend*, to have lost its stretching power, the only alternative left to the Negro voter was to appeal to the courts for a declaration that his right to vote in a primary election stemmed from the federal Constitution. Such a decision would protect him from the discriminatory action of Democratic primary election officers who were held not to be officers of the state. Consequently an action was brought in the federal courts against Louisiana election officials for fraud in violating Sections 19 and 20 of the Criminal Code.[21]

The decision of the Supreme Court in that case, *United States v. Classic*,[22] may be called the genesis from which later cases, including the instant decisions, have sprung. The *Classic* case clarified the derivation of the right to vote, and gathered the primary election into the constitutional fold. It has long been accepted law that the right to vote for representatives in Congress is conditioned by the Constitution and laws of the United States.[23] It is also established that in the absence of Congressional legislation enacted in the exercise of such constitutional powers, the right to vote for representatives in Congress is subject to state regulation.[24] A hazy conception of the latter doctrine has sometimes resulted in the belief that the right to vote for representatives in Congress is derived from the states.[25] But the *Classic* opinion dispelled this notion with the flat declaration that the right to elect national officers is derived from the national government and protected by Congressional enactment.[26] The decision

[20] Hodges v. United States, 203 U.S. 1 (1906); United States v. Harris, 106 U.S. 629, 637 (1882); United States v. Reese, 92 U.S. 214 (1875); cf. United States v. Cruikshank, 92 U.S. 542 (1875).

[21] 35 Stat. 1092 (1909), 18 U.S.C.A. §§ 51, 52 (1927), quoted note 9 supra.

[22] 313 U.S. 299 (1941).

[23] Aczel v. United States, 232 Fed. 652 (C.C.A. 7th, 1916); Guinn v. United States, 238 U.S. 347 (1915); Felix v. United States, 186 Fed. 685 (C.C.A. 5th, 1911); Ex parte Yarbrough, 110 U.S. 651 (1884).

[24] Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58, 64 (1900); Ex parte Yarbrough, 110 U.S. 651, 663 (1884).

[25] See Breedlove v. Suttles, 302 U.S. 277, 283 (1937), where the statement appears that "Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate." And see Minor v. Happersett, 21 Wall. (U.S.) 162, 170 (1875); United States v. Reese, 92 U.S. 214, 217–18 (1875); McPherson v. Blacker, 146 U.S. 1, 38–39 (1892).

[26] United States v. Classic, 313 U.S. 299, 315 (1941): "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, [cases cited note 25 supra] this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent

then extended the Congressional power to regulate elections to include primary elections, setting forth, in a somewhat ambiguous manner, two situations which warranted bringing the primary under the protection afforded by the federal Constitution. These situations were held to exist 1) when the primary was a "necessary step" in the election process and/or 2) when the results of the primary were decisive at the general election.[27] State law regulating the primary, making the primary a "necessary step" in the elective process, was then found to be the basis for overruling *Grovey v. Townsend.* In *Smith v. Allwright* the Court held that "when the primary is by law made an integral part of the machinery for choosing officials, state and national . . ." action taken by the Democratic Party at its state convention disqualifying Negroes from participating in the Democratic primary is state action within the meaning of the Fifteenth Amendment.[28] The freshly invigorated "state action" concept then struck down a Georgia attempt at disfranchisement under the authority of the *Allwright* case.[29]

The opinion of the circuit court in *Rice v. Elmore,* while concerned only with state action, combines all that has gone before. The primary and election are in fact merged, and the whole election is termed an inseparable "two-step process." The primary stage, with or without regulatory law, and even apart from the

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that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and under Article I, § 8, clause 18 of the Constitution."

[27] United States v. Classic, 313 U.S. 299, 320 (1941): "The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election *which involves a necessary step in the choice of candidates for election* as representatives in Congress, *and which in the circumstances of this case controls that choice,* is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it." (Italics added.)

But in an earlier portion of the opinion, p. 318, the following statement appears: "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 at the primary is likewise included in the right protected by Art. I, § 2." (Italics added.)

Thus, it was not clear whether both conditions were necessary, or the presence of either one was sufficient to put the prohibitions of the federal Constitution into play. This ambiguity is reflected in the district and circuit court opinions in King v. Chapman, 62 F. Supp. 639 (Ga., 1945), aff'd on other grounds 154 F. 2d 460 (C.C.A. 5th, 1946), cert. den. 327 U.S. 800 (1946), where the district court used the conclusive aspect of the Georgia primary and the circuit court used the "necessary step" aspect to hold the primary an "election" within the meaning of the Constitution; see note 29 infra. The same ambiguity is present in the decisions in Rice v. Elmore. For comment on this point see Folsom, Federal Elections and the "White Primary," 43 Col. L. Rev. 1026, 1030 et seq. (1943); Berry, United States v. Classic, 1 Nat. B. J. 149 (1941); and Negro Disenfranchisement—A Challenge to the Constitution, 47 Col. L. Rev. 76, 83 (1947), where the holding is stated to be in the alternative.

[28] Smith v. Allwright, 321 U.S. 649 (1944).

[29] King v. Chapman, 62 F. Supp. 639 (Ga., 1945), aff'd on other grounds 154 F. 2d 460 (C.C.A. 5th, 1946), cert. den. 327 U.S. 800 (1946). It is interesting to note that while the circuit court in that case affirmed on the authority of Smith v. Allwright, the district court protected the Negroes' right to vote in the Georgia Democratic primary on the ground that the primary was an integral part of the electoral process of Georgia. This is the closest holding to the circuit court opinion in Rice v. Elmore.

controlling aspect of the primary, is thus an "election" within the meaning of Article I, Sections 2 and 4 of the Constitution. By regulating the general election by law the state gives effect to the choice at the primary. The state thus sanctions the primary result, and the methods used in the primary, and must take the responsibility for any discriminatory action practiced in the primary. Action sanctioned by the state is held to be "state action."[30]

It is to be noted that under the instant ruling and the *Classic* case the disfranchised Negro is not required to proceed against the state to obtain remedial action. Prosecutions might also have been brought against Democratic Party officials for depriving Negroes of their right to vote for candidates for national office in violation of Sections 19 and 20 of the Criminal Code.[31] Indeed, had the Supreme Court refused to affirm the decision in *Rice v. Elmore* by extending the state action concept so far,[32] an action against the Democratic Party officials would still have been available to the plaintiffs.[33]

The decision of the circuit court in the *Rice* case is a victory for free elections in the South, though it came too late to affect the 1948 primary.[34] It is certain, however, that attempts will be made to circumvent the decision. Southern legislators are already discussing the possibility of abolishing the primary sys-

[30] The authorities Judge Parker cites for this doctrine in the circuit court opinion are Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944), where it was held that a labor union which was authorized by the Federal Railway Labor Act to represent a whole craft of employees could not discriminate against Negro members of the craft; and Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.C.A. 4th, 1945), holding that the trustees of a privately established library, chartered and supplied with continuing funds by the state, were acting as representatives of the state in violation of the Fourteenth Amendment when they refused to admit a Negress to the library training course. It is plain that Rice v. Elmore, where there is no implied statutory duty, or supply of state funds, or charter, is a broader application of "state action" than either of the cited cases. The doctrine of Rice v. Elmore could well bring restrictive covenants, unfair labor practices, and all union discrimination within the unconstitutional realm of "state action."

The law seems to be working around to the position advanced by Justice Harlan in a lone dissent in the Civil Rights Cases, 109 U.S. 3, 48 (1883). Invoking the Thirteenth and Fourteenth Amendments, Justice Harlan found that the management of public conveyances, inns, and theaters, maintained under the direct license of state law, was a "public matter" warranting Congressional legislation forbidding racial discrimination by such management.

[31] Note 9 supra.

[32] One Supreme Court justice has declared that the state action concept is limited solely to the direct exercise of government power; see the concurring opinion of Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 13 (1944).

[33] The difficulty of obtaining convictions from southern juries for crimes committed against Negroes makes this method a less satisfactory answer than the "state action" concept as used in Rice v. Elmore. However, if resort must be had to the criminal indictment, this difficulty would be obviated somewhat by the fact that the cases would be brought in the federal courts.

[34] By availing themselves of the full measure of time allotted for the petitions for rehearing in the circuit court and for certiorari in the Supreme Court, the state forestalled the Supreme Court decision until after the 1948 summer primaries were run off. Under *lis pendens* the circuit court decision did not constitute binding authority until the final disposition of the appeal.

tem and reestablishing the nominating convention.[35] It is expected that nomination in convention—a favorite technique of machine control—will accomplish by indirection that which is directly forbidden.[36] But since the use of nominating conventions disfranchises the white electorate as well as the Negro, it is a matter of lively interest whether the South will go so far.

Even if the primary be maintained, the Negro faces a thorny road to the polling booth. Literacy and character tests provide an almost insuperable obstacle.[37] And while the decision in *Rice v. Elmore* holds that a political party may not discriminate on racial grounds in registering its electors, the party is still free to adopt any platform it wishes and to demand that its members support that platform.[38] And there is always the poll tax.[39]

Until a second party is established in the South, the extension of the federal right to vote, which reaches individual as well as state action, and its implementation through federal legislation, offer the greatest promise of checking the disfranchisement of Negroes in the South. The course of future action lies in federal regulation of primaries and general elections for national offices, with Congress prescribing the voting qualifications. The Constitutional basis for such federal laws arises from the power given Congress to regulate the "manner" of holding elections for national offices,[40] and from the line of decisions, already discussed, which assert that the right to vote for federal officers is derived from the Constitution. Such federal legislation could not reach discrimination prac-

[35] Southern newspaper reports and editorials have freely discussed such a possibility, and Herman Talmadge of Georgia is using the reestablishment of the nominating convention as a plank in his political platform.

[36] For an account of the workings and effects of the nominating convention see 4 Encyc. Soc. Sci. 349 (1932), and references there cited.

[37] Alabama's answer to Smith v. Allwright was the Boswell amendment to the state constitution, requiring that all voters be "of good character," and be able to "read and write, understand and explain any article of the Constitution of the United States in the English language." There are further requirements that the duties and obligations of citizenship must be understood. Ala. Acts 1945, No. 336, ratified by the voters in November, 1946. It is suggested in a note in 47 Col. L. Rev. 76, at 95, (1947) that the doctrine of Yick Wo v. Hopkins, 118 U.S. 356 (1886), be applied to such requirements as the "Boswell" amendment. The case enunciated the principle that the Constitution prohibits partial administration of laws "fair on their face."

[38] The Mississippi plan of disfranchisement consists of requiring the would-be Democratic Party elector to certify agreement with party principles, which include opposition to any anti-poll tax law, anti-lynch law, etc. The elector must also swear accord "with the time-honored and cherished traditions of the South." (Law passed at special session of legislature, Mar. 1, 1947) N.Y. Times, p. 6, col. 3 (Aug. 5, 1947).

[39] For an exhaustive presentation of the constitutional problems presented by the poll tax, see Kallenbach, Constitutional Aspects of Federal Anti-Poll Tax Legislation, 45 Mich. L. Rev. 717 (1947).

[40] Article I, § 4, note 8 supra. For comments favoring such an interpretation see Morrison, The Pepper Bill (S. 1280) to Outlaw the Poll Tax in Federal Elections Is Constitutional, 2 Lawyers Guild Rev. 1 (Sept., 1942); Boudin, Brief in Support of the Pepper Bill, 2 Lawyers Guild Rev. 11 (March, 1942).

ticed in state and local elections,[41] but this limitation makes the curtailment of "legal" discrimination in federal elections none the less desirable.

CIVIL JURISDICTION TO REVIEW COURT-MARTIAL PROCEEDINGS

The petitioner, a private in the United States Army, was tried and convicted by an army general court-martial in Germany in April 1945 on charges of rape and sodomy. The petitioner sought release from imprisonment by writ of habeas corpus in a federal district court, claiming that the court-martial had failed to acquire jurisdiction and that he had been denied due process of law. The court, through examination of a transcript of the record of the trial, and from oral testimony of an officer who had been connected with the proceedings, found that in pre-trial examinations the accused, petitioner, was not present at the interrogation of witnesses; that he was then confronted by witnesses only during an informal "viewing" in which accused was lined up with other soldiers and the witnesses were asked to identify the persons they thought had committed the alleged attacks; that at no time during such examinations was he informed of his right to, or given an opportunity to, cross-examine any of the witnesses; that he was brought to trial two days after charges had been served on him; that a medical officer who had never had any experience in defending was appointed as his counsel and that he had only a short conversation with this counsel before the trial; that he had expressed his desire to have as his counsel a certain officer, known to have had experience in defending, and that this officer was never obtained as counsel; and that witnesses requested by him were not produced at the trial. The court held that by reason of failure to comply with Article of War 70[1] with respect to pre-trial investigation, the court-martial was without jurisdiction to try the petitioner, and granted a writ of habeas corpus for his discharge from custody. *Anthony v. Hunter*.[2]

During periods of war, the prodigiously increased burden of administering military law reveals inadequacies and inefficiencies which are not otherwise apparent.[3] The inevitable result of the necessity for speedy military justice administered under the stress of wartime circumstances is the existence of shocking miscarriages of justice and extreme severity of punishment. An equally inevitable aftermath of war is a deluge of litigation in the civil courts, in which

[41] Arkansas has recognized this state of the law by separating the primaries for state and federal officials. Ark. Acts 1945, c. 107, held constitutional in Adams v. Whitaker, 195 S.W. 2d 634 (Ark., 1946). But for a broader view see Professor Kallenbach's article, op. cit. supra note 39, at 731 n. 48, where it is pointed out that constitutional support for the power of Congress to nullify the poll tax in *all* elections could be held to stem from Article IV, Section 4 of the Constitution, which guarantees a republican form of government to the states.

[1] 41 Stat. 802 (1920), 10 U.S.C.A. § 1542 (1946).

[2] 71 F. Supp. 823 (Kan., 1947).

[3] Rheinstein, Military Justice, in Puttkammer, War and the Law 155, 159 (1944).