A dark outlook for those who would bar Negroes from the polls

Courts Define the Right to Vote

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IT is a common myth that the Constitution of the United States exists as an absolute yardstick by which the legality of state laws and practices can be measured. Nothing could be farther from the truth. The Constitution, like all great human documents, exists in its interpretation. At times, that interpretation has been narrow and literal; at other times, broad and discerning. Much depends on the make-up of the Supreme Court, whose decision at any given time is final. Perhaps more depends on our attitude as a people toward human freedom and its guarantees. Only so long as the Constitution continues to be re-interpreted and adapted to changing needs will it remain a living document.

Nothing illustrates this flexibility of our Constitution better than decisions of the Federal courts in recent years in cases involving Negro suffrage. The shift has been away from "legalism" and its concern with words, and toward humanism and its concern with people. The past eight years, in particular, have seen increasingly subtle attempts to evade the Fourteenth and Fifteenth Amendments and increasingly stout refusals by the Supreme Court to tolerate evasions.

"The primary in Louisiana is an integral part of the procedure for the popular choice of Congressmen. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice."

These words of the U. S. Supreme Court, written in May 1941, marked the beginning of the end for the "white primary" and, we may reasonably hope, for all other efforts to keep the Negro from voting by legislative means. This particular case—*United States* v. *Classic*—hardly seemed to promise so much; it dealt merely with a charge of fraud in a Louisiana primary election. But the principle it laid down has been the cornerstone for all succeeding court decisions prohibiting disfranchisement because of race. What it said, in plain language, was that in a one-party state no qualified citizen can be denied a right to cast his ballot in the primary election, since that is, in fact, the only meaningful election.

This principle as it applies to the white primary was spelled out clearly in the Texas case, *Smith* v. *Allwright,* in 1944. Smith, a Negro dentist, based his suit on the grounds that the Fifteenth Amendment forbade the state to abridge his right to vote in the primary on account of race. The defendants maintained that this argument was invalid, since it was not the state but the Democratic Party, a private organization, which excluded Negroes from voting.

In an eight-to-one decision, the Supreme Court declared: "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state

because of race. This grant to the people of opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." The court further pointed out that, since the primary was governed by state laws, it was hypocrisy to claim that the primary was not a function of the state.

The Democratic Party of South Carolina, casting about for legal means to continue to deny Negroes the ballot, seized upon this last point as a way out. Suppose there were no state laws governing the conduct of the primary; then the state Democratic Party would be no more an agency of the state than any private club, and could exclude whomever it wished from membership.

Following this line of reasoning, South Carolina wiped from her statute books all laws affecting in any way the management of primary elections. This appeared to be a foolproof, if somewhat dangerous, solution. True, there could be no state laws to prevent fraud and other forms of dishonesty in the management of the elections. True, there could be no legal safeguards for any citizen's ballot. But evidently these were minor sacrifices, more than made up for by the advantages of an all-white electorate.

But this ingenious plan was not quite ingenious enough to survive the scrutiny of Federal District Judge J. Waties Waring, of Charleston, S. C. In his forceful decision in the case of *Elmore* v. *Rice,* handed down in April, 1947, Judge Waring enjoined officials of the state Democratic Party from "excluding qualified voters from enrollment and casting ballots by reason of their not being persons of the white race."

Judge Waring brushed aside the careful rationalizations offered in defense of the South Carolina white primary. He declared: "It was . . . suggested that the parties in South Carolina are substantially the same as private clubs; and that a private club has a right to choose its membership and the members to determine with whom they wish to associate. Of course that is true of any private club or private business or association, but private clubs and business organizations do not vote and elect a President of the United States, and the Senators and members of the House of Representatives of our national congress; and under the law of our land, all citizens are entitled to a voice in such elections."

Judge Waring added, in passing, "It is time for South Carolina to rejoin the Union. It is time to fall in step with the other states and to adopt the American way of conducting elections."

South Carolina did not "fall in step" immediately, however. The Democratic State Convention in May, 1948, adopted a new set of rules designed to continue discrimination against Negro voters in what was hoped would be a constitutional manner. The new rules prescribed a separate procedure for registering white and Negro citizens. They also required would-be voters to take an oath declaring themselves in favor of "separation of the races" and "States' Rights," and opposed to "the proposed Federal so-called F. E. P. C. law."

An injunction was promptly sought and as promptly granted in *Brown* v. *Baskin.* Waring was again the judge who heard the case, and this time he took the state Democratic officials severely to task.

"It is wondered," he declared, "why the State Convention did not require an oath that all parties enrolling or voting should elect them in perpetuity and with

satisfactory emoluments. The one-party system has reached its apex in this state where the right is claimed not only to segregate according to race, to prescribe different methods of gaining the right to vote, to forbid participation in the organization for government of the party, but to prescribe mental tests and set up a code of thought which, far from being a bill of rights, might rather be called a bill of persecutions."

Thus the efforts of one state to circumvent *Smith* v. *Allwright* received a complete and shattering defeat. But, while South Carolina had been pursuing her particular course, Alabama had chosen another more devious path around the Texas decision.

In a general election on November 7, 1946, an amendment to the Alabama constitution was adopted calling for an additional qualification for registration. The Boswell Amendment, as it was popularly known, required that to be qualified as an elector a person must be able not only to "read and write" but also to "understand and explain" any article of the U. S. Constitution. Under Alabama law, this qualification had to be demonstrated to "the reasonable satisfaction of the board of registrars."

The Boswell Amendment was duly challenged in the Federal District Court by ten Negro citizens of Mobile County. The decision rendered by a three-judge tribunal—all Southerners—less than two months ago adds another important chapter to the history of litigation in this field.

The judges ruled that the Boswell Amendment was unconstitutional since it violated the Fifteenth Amendment. In reaching this decision, the court considered three aspects of the Boswell Amendment—its technical legality, the apparent intent behind it, and its practical effects. It is rewarding to see how the Amendment was discredited on all three counts.

First of all, the court held, the term "understand and explain" is ambiguous and provides no reasonable standard for judging a citizen's qualification to vote.

"To state it plainly," declares the decision, "the sole test is: Has the applicant by oral examination or otherwise understood and explained the Constitution to the satisfaction of the particular board? To state it more plainly, the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered. To state it even more plainly, the board, by the use of the words 'understand and explain,' is given the arbitrary power to accept or reject any prospective elector."

Pointing out that "the distinguished Justices of the Supreme Court of the United States have frequently disagreed in their interpretations of various articles of the Constitution," the decision continues: "The members of these boards [of registrars] are not required to be lawyers or learned in the law, and it is fair to assume that many members of these boards do not have a good or correct understanding of the various articles of the Constitution, and that they might not be able to give any explanation of many of them."

The decision expresses no doubt that the intent of this Amendment to the Alabama Constitution was to deprive Negroes of the franchise; that "the ambiguity inherent in the phrase 'understand and explain' cannot be resolved, but, on the contrary, was purposeful and used with a view of meeting the decision of the Supreme Court of the United States in *Smith* v. *Allwright*."

The court took judicial notice of the fact that the State Democratic Executive Committee spent its funds and led the fight to secure adoption of the Boswell Amendment, for the avowed purpose of making "the Democratic Party in Alabama the 'WHITE MAN'S PARTY.' " Also introduced in evidence was an article written by a prominent Alabama lawyer and published in the official organ of the State Bar. The lawyer, who supported the Boswell Amendment, wrote this memorable statement: "I earnestly favor a law that will make it impossible for a Negro to qualify, if that is possible. If it is impossible, then I favor a law, more especially a constitutional provision, that will come as near as possible, making possible, the impossible."

The final damning feature of the Amendment was the manner in which it was administered. The evidence showed that, while the Amendment had been used to disqualify many Negro applicants for registration, there was no record of its ever having been used to disqualify a single white applicant. And although Negroes made up 36 per cent of the population of Mobile County, the registration lists showed only 104 Negroes out of a total of 3,000 registered voters.

In answer to this overwhelming evidence, the defendants maintained that the Boswell Amendment was not "racist in its origin, purpose, or effect." How could the Amendment be discriminatory when it did not even mention race?

The court replied: "While it is true that there is no mention of race or color in the Boswell Amendment, this does not save it . . . We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; 'to do this would be to shut our eyes to what all others than we can see and understand.' "

The proponents of continuing efforts to keep Negroes from voting are living proof of the adage that hope springs eternal in the human breast. They continue to hope that they will find the magic combination of ambiguous wording, legalisms, and technicalities which will allow them to "make possible the impossible." They seize eagerly upon the phrases of each succeeding court decision, hoping to find in them the key to a new era of disfranchisement. But they have been singularly blind to the real implications of recent court decisions in this field. Witness the following:

"The Fifteenth Amendment nullifies *sophisticated as well as simple-minded* modes of discrimination." (*Lane* v. *Wilson*)

"Constitutional rights would be of little value *if they could thus be indirectly denied.*" (*Smith* v. *Allwright*)

"Racial distinctions *cannot exist* in the machinery that selects the officers and lawmakers of the United States . . ." (*Elmore* v. *Rice*)

"It is important that once and for all, the members of this party be made to understand . . . that they will be required to obey and carry out the orders of this court, *not only in the technical respects but in the true spirit and meaning of the same.*" (*Brown* v. *Baskin*)

The significance is clear for those who wish to see it. Our courts are no longer satisfied to judge contested laws by their literal meaning; they are equally interested in what a law is really supposed to do and what it actually does. The outlook is dark for those who would deprive citizens of their right to vote by shrewd juggling of language.