ONE

# The All-White Primary

Their fido pack went bear hunting and treed a skunk.
—Richard Evans on a major loss at the Supreme Court

It was June 19, 1865, when, arriving in Galveston, General Gordon Granger of the victorious Union army issued General Order No. 3. That order announced that by Executive Proclamation the slaves were now forever free.[1] The Thirteenth Amendment codifying (and extending) the Emancipation Proclamation would not become part of the Constitution for another six months. But with General Order No. 3, approximately one-fourth of the population of Texas had been added to the lists of the free.

## I

Once granted the vote, the adult freedmen, virtually all living in East Texas, became the base of the Texas Republican Party.[2] They were joined by the formerly apolitical Germans in Central Texas and other Anglos who had remained loyal to the Union—scalawags as they were soon labeled. The ex-Confederates held to the Democratic Party.

With Military Reconstruction replacing Presidential Reconstruction, Republicans came to power first with Unionist former governor Elisha Pease and then with scalawag lawyer Edmund J. Davis, who had raised the First Texas Cavalry for the Union. Davis's 1869 victory had

been close, winning by fewer than a thousand votes out of 79,000 cast.[3] Looking to the future, Republicans had to hold the black vote while adding to their Anglo vote. That proved a fine line that the party found itself unable to walk.

As in other Southern states, success at the polls for Republicans did not translate into freedmen holding anywhere near their share of offices. Republicans accepted their votes but not their status as equals. Thus, like four other states, none were elected statewide and only 14 of 100 in the first Republican legislature were freedmen.[4]

In 1873 Davis was defeated by Democrat Richard Coke. There was continuing massive immigration to Texas by whites from ex-Confederate states. Thus the population jumped from 604,000 in 1860 to over three million at the turn of the century, and the black percentage of the population dropped to 18 percent.[5] This decisively shifted the balance to Democrats so that Coke prevailed—100,415 to 52,141.[6] Claiming a rigged election, Davis initially refused to give up the governorship, hoping President Ulysses S. Grant would use the army to sustain him in office.[7] But with such a resounding electoral defeat, that hope was in vain as President Grant believed the will of all the voters, not just Republicans, should prevail.[8] Texas was "redeemed," and Republicans, while competing in some counties for several decades, ceased being a factor in statewide politics well into the second half of the twentieth century. Nevertheless, as the nineteenth century ended, blacks still freely voted because Texas did not follow the ex-Confederate states in adopting literacy tests, good character requirements, or requirements that prospective voters be given a clause in the state constitution to interpret. (African Americans in those states were invariably given obscure and poorly written clauses to decipher and then informed they had failed the test.)

Democratic dominance was challenged, however, by the Populist revolt fueled in large part by the decline in the standard of living of the state's farmers both black and white. As one white Populist noted, "[t]hey are in the ditch just like we are."[9] While most blacks remained

true to the Republicans, a not insignificant number bolted to the Populists who won some local races, but, like Republicans, could not win statewide. Everything came to a head in 1896 when the Republicans created a fusion ticket with the Populists and Texas Democrats adopted some of the proposed Populist reforms. And, of course, nationally the Democrats co-opted the Populist votes by nominating William Jennings Bryan. Texas Populists split their votes, nationally for the Democrats, locally for the Populists—and lost both ways, dooming the party.[10] Furthermore, Texas Democrats played the race card in urging whites to vote with the party of whites, once again the only party that could win statewide elections.

Democratic victories papered over a division between reformers and conservatives within the party. Reformers believed that electoral fraud was rampant. Actually, so did Populists. The remedy, reformers concluded, was a shrunken electorate. Conservatives were opposed because they controlled the Mexican American voting bloc in South Texas. When former Populists joined the reformers, a poll tax finally was adopted in 1902 after two decades of attempts.[11] Everyone understood that it would not only depress the black vote but also affect whites. And it did. In 1900, 80 percent of whites voted; in the 1906, 1908, and 1910 elections the white vote never exceeded 30 percent. In 1906 only 20 percent, some 5,000 blacks, voted.[12]

In the shrinking Texas electorate the influence of swing voters increased, and in the early twentieth century those included blacks who could pay the poll tax. In Houston there were black entrepreneurs and professionals who were economically independent of whites. In circumstances of a close race in the Democratic primaries—required by a 1903 law—Texas blacks "did not need a numerical majority to enjoy a political majority. Rather, if the total number of eligible Negro voters was greater than the difference in the number of votes cast for each [candidate] the Negroes had a 'majority.'"[13]

Democrats did not like the situation and in some counties it was "solved" by the county party chairman deciding that blacks could not

vote in the primaries. But in other counties when the primary would be close, candidates wanted the black vote, however undesirable they found the situation. The number of counties allowing the black vote became fewer and fewer, but in the racially polarizing days of World War I and its aftermath any black voting was too much for whites.[14] Yet because some Democrats could not restrain themselves from seeking black votes, an external restraint was deemed necessary. In 1923, following the lead of other former Confederate states that had acted years earlier (between 1896 and 1915), the Texas legislature adopted the all-white primary, leaving blacks who paid the poll tax free to cast a meaningless vote in the general election (as well as to participate fully in the nonpartisan municipal elections). The legislation declared that "in no event shall a negro be eligible to participate in a Democratic Party primary election."[15] Texas differentiated itself from the other Southern states with all-white primaries because it acted legislatively while the others acted by internal decision of the Democratic Party. This was an important distinction because the Supreme Court since 1883 had drawn a clear distinction between state action and private action that discriminates.[16] The former was prohibited by the Fourteenth (and presumably the Fifteenth) Amendment, while the latter was a private wrong (if that) subject only to state law (if any).

## II

Because Texas acted by legislation, Texas was a more appealing target for challenging the all-white primary than any other state. Texas lacked literacy and understanding tests that disenfranchised most Southern blacks. Texas had middle-class blacks who were registered to vote and did vote in general elections and municipal elections (except Houston). And best of all for a constitutional challenge, the Texas law was not, unlike the poll tax, race neutral. Texas specifically disadvantaged blacks.

In the two decades after the enactment of the all-white primary the determination of Texas Democrats to exclude blacks from any electoral

influence (and the equal determination of challengers to enjoy rights guaranteed by the Reconstruction Amendments to the Constitution) would result in four Supreme Court decisions, the first in 1927, the last in 1944. It took three victories for the black challengers finally to prevail. And for Fort Bend County blacks it took a fifth trip and an additional nine years to win the right to vote in the Democratic Party primary.

In fact, there was one Supreme Court decision involving Texas preceding the ones just mentioned. In January 1921 the Democratic Party in Houston declared that blacks could not vote in their February 9 primary for local officials. C.N. Love, a Houston newsman, filed suit in state court for an injunction on February 5, charging the move violated both the Fourteenth and Fifteenth Amendments. The judge denied the injunction and a Texas appellate court agreed on the ground that the election was now in the past. The Democrats were so confident of victory that they neither briefed nor argued the case before the Supreme Court, and their confidence was not misplaced. Two weeks after argument a unanimous Court through Justice Oliver Wendell Holmes agreed that the Texas courts did not have "to extend the remedy beyond what was prayed."[17] Hinting at the merits, however, the Court stated that the underlying question of constitutional law was "grave."[18] That was quite a change from two decades earlier when a younger Holmes showed callous indifference to the disenfranchisement of Alabama blacks by refusing to order them registered because "the great mass of the white population intends to keep blacks from voting."[19]

The first challenge to the state's all-white primary was initiated by El Paso physician Lawrence A. Nixon at the behest of the local National Association for the Advancement of Colored People (NAACP) and with the help of the national NAACP. Nixon was a friend of the local election judge C.C. Herndon and was turned away with a polite "you know we can't let you vote."[20] Nixon's suit not only sought an injunction, but to get around any problems of mootness, also sought $5,000 in money damages. Herndon helpfully signed a statement that the only reason for

turning Nixon away was Nixon's race. Nevertheless, a federal district court dismissed Nixon's case without the dignity of an opinion.

Once again the Texas Democrats did not even bother to argue before the Supreme Court, but this time, after oral argument, the Texas attorney general's office successfully moved to file an amicus brief defending the state law, claiming the primary was not an election within the meaning of the Fifteenth Amendment and therefore Nixon's claim was political, not legal.[21] If political it would not be within judicial cognizance. In *Nixon v. Herndon* a unanimous Court, again through Holmes, found it unnecessary to reach the Fifteenth Amendment because "it is too clear for extended argument that color cannot be made the basis for a statutory classification affecting the right set up in this case."[22] Holmes's two-page opinion was a bit too facile; historically the reason the Fifteenth Amendment was necessary was that the Fourteenth was thought not to reach political rights such as voting or office-holding. Still, although this was an era where dissents were rarely registered, unanimity was interesting because of the composition of the Court. Justice James McReynolds, an appointee of President Woodrow Wilson, was an out-and-out racist (among far too many undesirable traits). Holmes, like many other Progressives, ranged from skeptical to hostile to claims of racial discrimination. His fellow Progressive, Louis D. Brandeis, was simply unconcerned with the issue. But they all agreed Texas had crossed a constitutional line.

Governor Dan Moody responded to *Nixon v. Herndon*, adding to the call of a special legislative session a proposal to reinstate the all-white primary by legalistic legerdemain. The legislature responded by deregulating qualifications for primary elections, passing new legislation that left Texas, like the other Southern states, with the parties' executive committees determining the qualifications for adult voting in the primaries. The executive committee of the Texas Democrats in turn then limited voting in primaries to whites only. It took two weeks for Moody's proposal to become Texas law. Anglo Texans were nothing if

not efficient in implementing their desire that blacks have no say in Texas state government.

In a replay, Dr. Nixon, again with the backing of the NAACP, sued a local Democratic election judge, seeking both an injunction and money damages. The new legislation, after all, had left him in exactly the same position that he had been before—excluded from voting the Democratic primary solely because of his race. But this time it was different, the attorney general's office argued, because the decision to exclude blacks was made by a private association, the Texas Democrats. Texas prevailed at both the trial and court of appeals level.

The Supreme Court, however, held for Dr. Nixon, this time in a 5–4 split that offered a precursor of the votes on economic issues that would prevail through 1937.[23] The conservatives, accepting the argument that had prevailed below, dissented in an opinion by McReynolds. The majority opinion, by Justice Benjamin Cardozo, who had just replaced the aged Holmes, found that the Democrats' decision was still tainted by the actions of the state legislature. The state had "lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law."[24] Whether the conclusion would be different if the state said nothing and the Democrats acted on their own "must be postponed until decision becomes necessary."[25]

It took Texas Democrats just twenty-two days to respond to Cardozo's opinion. With no state law operative, the state Democratic convention unanimously resolved: "All white citizens of the State who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party and as such be eligible for participation in the primaries."[26]

The national NAACP lawyers—who were white—had produced two victories at the Supreme Court but not a single black voter in the Democratic primaries. Local black lawyers, who had also filed a brief at

the Court, thought they could do better and ultimately with Houston activist and barber Richard Randolph Grovey they sued election judge Allen Townsend, not for $5,000 as Dr. Nixon had claimed, but for a mere $10 and in a justice-of-the-peace court—where they lost.

Texas law did not allow an appeal in any case where the amount in controversy was less than $20 and so, with a decision by the highest court in the state wherein a decision could be had, Grovey's lawyers appealed directly to the Supreme Court, which agreed to hear the case. The lawyers then got an added break as neither the attorney general nor the state's Democrats bothered to brief or argue the case for excluding blacks from the primaries. They assumed they would win so why bother? One ought to be able to win a case when the other side is not represented. That was one of the powerful messages of fairness the Court sent in *Gideon v. Wainwright*[27] on the rights of indigent criminal defendants to be provided with counsel. But like William Marbury—of the famous *Marbury v. Madison*[28]—arguing unopposed can still lead to defeat. *Grovey v. Townsend*[29] not only upheld the right of the Texas Democrats in convention to exclude blacks from their primaries, it did so unanimously! Instead of gaining unsatisfying victories as the national NAACP had done in 1927 and then 1932, the local lawyers suffered a complete defeat in 1935. Richard Evans, an African American, Yale-educated Waco attorney, had begged the lawyers not to bring the case. With the defeat he groused, "Their fido pack went bear hunting and treed a skunk."[30] The formerly unanswered question was now answered; what Southern Democrats had done for decades complied with the Fourteenth and Fifteenth Amendments.

Justice Owen Roberts—otherwise the swing justice from 1934 through 1937 and famously "the switch in time that saved nine"[31] for his changed votes that helped scuttle President Franklin D. Roosevelt's Court-packing plan in 1937—wrote the Court's opinion finding a lack of state action. Like many a subsequent state action opinion, *Grovey* was hardly satisfying.[32] Texas required primaries, ordered that general election standards apply, mandated absentee voting. But Texas did not

finance the primaries, nor did state officials count the ballots. So the state had some but not total involvement with the Democratic primary. Excluding blacks could have been called state action, but by a 9–0 vote it wasn't.

## III

The national NAACP, which unlike the Texas lawyers had its eyes on the long term, did not see *Grovey* as a final defeat.[33] The NAACP hired Charles Hamilton Houston, the first African American to be invited to join the *Harvard Law Review*, to head up its lawyering. Houston then made the best legal hire ever with Thurgood Marshall, his former student at Howard Law School, to be his assistant and successor and eventually the most important lawyer of the century. (Houston retired in 1940 for health reasons.) Houston also determined that the national organization needed better relations with local branches to coordinate litigation. But what the NAACP could not anticipate was that in the six years after *Grovey,* President Roosevelt would have the good luck to replace seven justices on the Court. For the New Deal justices, the Old Constitutional Order was a complete misunderstanding of the Constitution.[34]

Marshall and the Texas NAACP agreed in the spring of 1940 that Marshall would file another challenge to the all-white primary. Marshall had two Houston NAACP members as choices for plaintiff: Dr. Lonnie Smith, a dentist, and Sidney Hasgett, a construction worker. Both tried to vote in the July Democratic primary as well as the August runoff, and naturally both had been denied on the basis of their race. Marshall settled on Hasgett, filed suit, lost at trial, and filed the appeal. But before briefing or argument the Supreme Court decided *United States v. Classic*,[35] which had the possibility of being a game changer.

Briefly, *Classic* involved a criminal indictment (dismissed by the district judge) charging voter fraud in a Louisiana primary. (Reform opponents of the Huey Long machine changed ballots to ensure the nomination of

Hale Boggs, a future Democratic majority leader, to the House of Representatives. The irony: The Justice Department discovered the fraud in an investigation targeting the Long machine.) Chief Justice Harlan Fiske Stone's opinion held that the indictment to deny anyone any "right or privilege … secured by the Constitution" could stand because as a matter of established fact as well as Louisiana law, the primary election was "an integral part of the procedure of the popular choice of Congressman."[36] Besides its factual irony, an interesting sidelight to *Classic* is that the dissenters, Hugo Black, William O. Douglas, and Frank Murphy, increasingly represented the liberal wing of the Court.[37]

*Classic* was not a case of racial discrimination and did not mention *Grovey* or the all-white primaries. Nor did it encompass state offices. Furthermore, Louisiana paid for the primaries and required a primary if a party's candidate was to appear on the general election ballot; Texas did neither. Yet the language about primaries being integral to the general election process had implications. Throughout the South and in most of Texas, the winner of the Democratic primary was the foregone winner of the general election.

Hasgett's case had been litigated to protest his rejection for voting for state office. To be perfectly safe, Marshall decided to jettison Hasgett's appeal and begin anew with Dr. Smith as plaintiff, focusing on the July primary where all the federal offices had been settled. Marshall's decision was not universally popular. Thus he jokingly noted in a November 1941 letter that if he lost the new case he would have to move to Germany and live with "Adolph Hitler or some other peace loving individual who would be less difficult than the Negroes in Texas who had put up money for the case."[38]

The district judge and the Fifth Circuit Court of Appeals did not believe *Classic* had eroded *Grovey*. Maybe as significantly, neither did Herbert Wechsler, the successful government attorney in *Classic*. Marshall hoped the Justice Department would join the NAACP in asking the Court to reconsider *Grovey*. Wechsler (who eventually would win *New York Times v. Sullivan*[39] and became executive director of the prestigious

American Law Institute) was against it, and everyone who touched the issue raised the red flag of the need to retain Southern support for FDR and the Democrats. The political calculation prevailed and the NAACP was alone (eventually to be supported by an amicus brief by the American Civil Liberties Union and the National Lawyers Guild).

The NAACP may have been alone, but once again they were unopposed; neither S.E. Allwright, a Houston election judge, nor Texas nor Texas Democrats filed a brief nor bothered to show up for the November, 1943 argument. Marshall spoke the entire time as no justice bothered asking him a question. After argument, Texas and the Texas Democrats were allowed to file amicus briefs and the Court ordered reargument, and this time Marshall was opposed by an assistant state attorney general. It wasn't the mismatch of arguing unopposed, but it was a mismatch. The NAACP's claim that *Classic* undermined *Grovey* and that Texas functionally had disenfranchised over 11 percent of its adult population prevailed in *Smith v. Allwright*[40] by an 8–1 vote in an opinion written by Kentuckian Stanley Reed (who got the assignment after Felix Frankfurter declined, suggesting the opinion should not be written by a northeastern Jew). Reed tracked Marshall's argument, and after noting that the vote could not be denied on the basis of race, Reed observed that "this grant to the people of the opportunity of choice is not to be nullified by a State through casting its electoral process in a form that permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied."[41] Unmentioned but just below the surface was World War II, where whites and African Americans were fighting two totalitarian racist powers.

Roberts, the author of *Grovey,* was the lone dissenter and he let loose his anger at being isolated on a Court of New Deal appointees. He thought the New Dealers' penchant for overruling "indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied

to our predecessors."[42] The overrulings—and there were many as the New Dealers brushed aside the Old Constitutional Order—"tend[] to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."[43] He retired a year later (after only fifteen years on the Court), and his colleagues were so divided and bitter about his legacy that they could not agree on the traditional letter acknowledging his service on the Court.

After twenty years of litigation and four trips to the Court, the Texas all-white primary was dead. Reaction by white politicians across the Deep South was hostile, and the Texas State Bar Association let loose its unhappiness by passing a resolution that claimed that the "Supreme Court of the United States is losing, if it has not already lost, the high esteem in which it has been held by the people."[44]

Despite hostility, *Smith v. Allwright* was successful in allowing African Americans (who could otherwise qualify to vote) access to the Democratic primaries. Michael Klarman's magisterial *From Jim Crow to Civil Rights* details a number of reasons why: African Americans were united and intensely committed to the need for ballot access, while whites were far less united on denial of that access than they were on the other facets of Jim Crow (like segregated schools). Moreover, *Smith* could be easily enforced by the Justice Department.[45] In 1940 only 3 percent of Southern African Americans were registered to vote; by 1952 the number was 20 percent.[46] In Texas about 30,000 African Americans were registered to vote in 1940; by 1947 the number reached around 100,000 and then jumped to 214,000 for the 1956 elections.[47] In 1978 Justice Thurgood Marshall looked back: "The Texas primary case was the greatest . . . it changed the whole complexion in the South."[48]

With *Smith* and the end of World War II, "Blacks participated in large numbers" in the 1946 Texas Democratic primary.[49] But in Fort Bend County, in the coastal plains to the west and south of Houston, their ability to participate was irrelevant because the white Democrats always decided the winner by a pre-primary vote of the Jaybird Democratic Association, a private group formed in 1889 as the Jaybird Club and, in

the twentieth century, open to every white voter. If the Jaybirds could successfully exclude African Americans, then there would be a roadmap around *Smith*—create private organizations to determine the candidate who would ultimately prevail. Indeed, the Jaybird winner invariably won both the state primary and the general election, often being unopposed on the official ballots. (The justices had raised this at Conference.)

In another lawyer mismatch, the NAACP argued against local counsel and convinced eight justices that the Jaybird primary violated the Fifteenth Amendment, but it took the justices a while to get there as the initial vote was 5–4 to reject the constitutional claim. Then Frankfurter made it 4–4 by passing. Then he changed his mind again and made it 5–4 to strike down the Jaybird primary.[50] With the result thus sealed, three more justices switched to find the requisite state action, although the eight could not agree as to why. One opinion found the Jaybird primary an "integral" part of the election process (perhaps without regard to any state action). Another found state action in the participation of local officials without showing what that was, while a third simply assumed there was state action. The opinions are terrible, but the justices would not allow a retreat on the all-white primary. The dissenter, Sherman Minton, aptly observed: "When the Jaybird opinion comes down, there may be some questions about which election returns the Court follows! It will be damn clear they aren't following any law."[51]

The all-white primary was truly dead for those African Americans who could successfully register to vote. But that still wasn't easy because restrictions—such as the poll tax and literacy or understanding tests—set up to deny them the vote would last until the mid-1960s.[52] They were ended by the Voting Rights Act of 1965, pushed by President Lyndon Baines Johnson, a Texan who cared passionately about his legacy and justice in race relations—and who predicted he was handing the South to the Republicans for a generation. It may have taken more than a generation, but the numbers of Southern Democrats steadily declined as the century progressed and the handover to the Republicans has been solidly in place for over a generation.