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No. 52 Terry v. Adams

Cert to CA 5 Hutcheson, Holmes, Strum unan

Ptrs brought an action for decl relief and for inj against respt in USDC Tex, claiming that they were being denied the right to vote in a poll of the "Jaybird Democratic Party" of Fort Bend, Tex, in violation of the equal protection of the laws. The DC granted a decl J but denied the inj; respdts appealed to CA 5, which reversed the decl J.

Ptrs are colored; they claim that the Jaybird Democratic Club, which admits only whites, is in effect the Democratic Party of Fort Bend County. Though it takes its vote at a time different from that specified for political primaries in the Texas Code, and though it has been in existence since 1889, they insist that these distinctions are immaterial. They point to the fact that the person who wins the Jaybird Poll almost always receives the endorsement of the Democratic party, though in a separate proceeding. The respts, on the other hand argue that their organization is sufficiently detached from any of the state's political processes so as to be without the principle of Smith v. Allwright, 321 US 649.

CA 5 felt that this was the place to draw the line. Conceding the rule to be established that any state sanction of discrimination is a denial of equal perotection, and that the primary may be part of the state election machinery even though not expressly governed by state law (see Rice v. Elmore, 165 F.2d 387, cert den 333 US, of which CA 5 approves), nevertheless where there is neither a legal nor a close factual tie in between an organization and the state sanctioned electoral processes, it is not state action. CA 5 says the procedure is the equivalent of polling the white voters, which anyone would have a right to do. The fact that the Democratic convention almost invariably adopts the results of the poll is merely because that organization thinks it desirable to do so.

CA 5's distinction may appeal, or it may not. I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn southerners", etc. I take a dim view of this pathological search for discrimination, a la Walter White, Black, Douglas, Rodell, etc, and as result I now have something of a mental block against the case. For that reason, in spite of doubts as to its transcending importance in the absence of a conflict among circuits, and notwitnstanding my feeling that the decision is probably right to a lawyer, rather than a crusader, I shall over-compensate and recommen a grant.

GRANT

whr

For deny: Vinson, Jackson, Minton

For grant: Black, Reed, Burton

Moot: F.F.

Re: Opinions of Black and FF in Terry v. Adams

If you are going to dissent, I should think you might combine the ideas which you expressed last week with an attack on the reasoning of the two "majority opinions."

(1) Black--simplyassumes the whole point in issue. The 15th Amendment requires state action, and certainly Congress under its power to "enforce" the amendment cannot drastically enlarge its scope. Yet the Black opinion utterly fails to face the problem of state action. He says rather that the effect of the Fifteenth Amendment is to prevent the states from discriminating against Negroes in official elections; the result here is to accomplis that result "by indirection;" therefore that result is bad. Surely it should not take a quotation from Mr Justice Holmes to establish the proposition that,especially in the field of constitutional law, fifferences will be ones of degree and the point at which the constitutional result changes will not be marked by any sharp turn in the road. Surely the justices of this Court do not sit here to ruthlessly frustrate results which they consider undesirable, regardless of the wording of the constitution.

(2) FF--places the weight of the decision on the rather skimpy support to be found in his discovery of"state action": the county election officials voted in the Jaybird primary! In the first place, tney voted not in their capactiy as election officials, but as private citizens. Secondly, it was not their voting which effected the discrimination; it was the previously adopted rules, with which they may have had nothing to do. Thirdly, if this is the vice why not simply enjoin the officials from voting? When one must strain this hard to reach a result, the chances are that something is the matter with the result--as in Lutwak

(3) Your ideas--the constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time the Court faced the fact that the white people on the South don't like the colored people; the constitution restrains them from effecting this dislike by thru state action, but it most assurely did not appoint the Court as a social watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontier of state action and "social gain", it pushes back the frontier of freedom of association and majority rule. Liberals should be the first to realize, after the past twenty years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally ~~desirab~~ desirable values that are being trampled on in the process.

This is a position that I am sure ought to be stated; but if stated by Vinson, Minton, or Reed it just won't sound the same way as if you state it

whr

A Random Thought on the Segregation Cases

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury v. Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher v. Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott v. Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Pecknam and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably Lochner v. NY. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were Adkins v. Children's Hospital, Hammer v. Dagenhart, Tyson v. Banton, Ribnik v. McBride. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction

If this Court, because its members individually are "liberal" and disli segregation, now chooses to strike it down, it differs from the Modesto court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Con stitution makes no such distinction. To the argument made by Marshall th a majority may not deprive a minority of its constitutional right, the swer must be made that while this is sound in theory, in the long run i is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of th Court to protect minority rights of any kind--whether those of business slaveholders, or Jehovah's Witnesses--have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crea silently to rest. If the present Court is unable to profit by this exam it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, fo which I have been excoriated by "liberal" colleagues, but I think Plessy v. Ferguson was right and should be re-affirmed. If the Fourteenth Amend ment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma.

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