IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES AND KENNETH C. SEARS,

Appellants,

vs.

DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,
EDWARD J. BARRETT, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS AND
ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees.

MOTION BY BETTER GOVERNMENT ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF JURISDICTION, AND BRIEF THEREWITH.

ABRAHAM W. BRUSSELL,
Attorney for Better Government Association,
135 S. LaSalle Street, Room 2254,
Chicago, Illinois.

PRINTED BY CHICAGO LAW PRINTING CO

SUBJECT INDEX.

TABLE OF CASES.

PAGE

TABLE OF CASES (continued).

PAGE

TABLE OF CASES (continued).

PAGE

TABLE OF CASES (Continued).

STATUTES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES AND KENNETH C. SEARS,

Appellants,

vs.

DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,
EDWARD J. BARRETT, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS AND
ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees.

MOTION BY BETTER GOVERNMENT ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF JURISDICTION.

Now comes the Better Government Association, an Illinois corporation Not For Profit, by Abraham W. Brussell, its attorney, and respectfully moves the Supreme Court of

the United States to grant leave to said Association to file its brief as *amicus curiae* in support of the jurisdiction of this Court.

In support thereof Better Government Association presents the affidavit of Abraham W. Brussell, its attorney.

BETTER GOVERNMENT ASSOCIATION,
an Illinois corporation Not for Profit.

By ABRAHAM W. BRUSSELL,
Its Attorney.

AFFIDAVIT.

County of Cook }
State of Illinois } ss

Abraham W. Brussell, being duly sworn, makes his oath and deposes and says that he is a member of the bar of the Supreme Court of the United States, and is a member of the bar of the State of Illinois. That he was retained by the Better Government Association, an Illinois corporation not for profit, to represent its interests in the lawsuit in the District Court of the United States for the Northern District of Illinois, Eastern Division, out of which this appeal arose. Said Association is composed of a number of civic minded citizens in the City of Chicago, County of Cook and State of Illinois, and has for many years past interested itself in the problem of the redistricting of congressional districts in the State of Illinois. Such interest and activity by the association was designed to carry out the functions of its charter, as indicated by its title, namely, to improve and to better government in the State of Illinois. Its interest in the instant lawsuit is both that of its members, as citizens of the United States and the State of Illinois, and on behalf of the Illinois public in general.

For some years past representatives of said Association have appeared many times before the Illinois Assembly in an attempt to persuade said Assembly to pass legislation to redistrict the congressional districts in Illinois in accordance with principles of law and justice, to the end that there be in the various congressional districts an equality of voting power and representation in the United States House of Representatives. Such attempts to obtain the passage of such legislation have been uniformly unsuccessful. When the instant suit was filed in the Federal

District Court the Association, by its attorney, appeared before the specially constituted three-judge district court, obtained leave to file its appearance as *amicus curiae,* and to participate in the cause as such *amicus curiae.* The Association, by its attorney, filed printed briefs and participated in the oral arguments before the three-judge district court.

Your affiant states by virtue of such participation he has become familiar with the issues presented by this lawsuit both in the district court and in this Court on the appeal.

Your affiant states that prior to the making of this motion he has spoken to the attorneys for the appellants and the attorneys for the appellees with regard as to whether or not they would object to leave being granted to said Association to appear as *amicus curiae* in this Court and file briefs, both on the question of jurisdiction and ultimately on the question of the merits of this case. Counsel for appellants stated he had no objection and that insofar as it was in his power so to do he did consent thereto. Counsel for appellees stated that as attorney for the officials of the State of Illinois he did not object, neither did he consent, and that such matter was entirely one to be decided by the court to whom such motion was made.

Affiant stated that on February 6, 1946, he was served with a copy of appellees' statement making against the jurisdiction of this court, motion to dismiss appeal or to affirm judgment and brief in support of said motion. This statement, etc., was filed by the appellees in this court on February 7, 1946.

Affiant states that the ruling of this court on jurisdiction as distinguished from any possible ruling on the ultimate merits of the appeal is of tremendous importance to the citizenry of Illinois and to the citizens of other states.

The problem of "State redistricting" is recognized as having a real national significance. [See Lawrence F. Schmeckebier "Congressional Apportionment" at p. 128 (1941)]. Any ruling by this court on the problem of jurisdiction must necessarily affect the solution of such national problem.

Affiant further states that in reading and analyzing appellees' statement against jurisdiction, etc., that certain matters have come to his attention as found from the record made below and the pertinent authorities applicable thereto, which in the opinion of affiant may well be considered by this Court in arriving at its decision on jurisdiction. Such matters and authorities are presented in the brief offered herewith, together with the instant motion.

WHEREFORE, your affiant prays this court to grant leave to the Better Government Association, an Illinois corporation Not for Profit, to file its brief in support of jurisdiction in the instant case.

Furthermore your affiant sayeth not.

ABRAHAM W. BRUSSELL

Subscribed and sworn to before me this 13th day of February, A. D. 1946.

F. Hrizak,

(Notary Public Seal) *Notary Public.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES AND KENNETH C. SEARS,

Appellants,

vs.

DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,
EDWARD J. BARRETT, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS AND
ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees.

BRIEF BY BETTER GOVERNMENT ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, IN SUPPORT OF JURISDICTION.

ABRAHAM W. BRUSSELL,
Attorney for Better Government Association,
135 S. LaSalle Street, Room 2254,
Chicago, Illinois.

PRINTED BY CHICAGO LAW PRINTING CO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES AND KENNETH C. SEARS,

Appellants,

vs.

DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,
EDWARD J. BARRETT, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS AND
ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees.

BRIEF BY BETTER GOVERNMENT ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, IN SUPPORT OF JURISDICTION.

Supplementary Summary Statement of the Matter Involved.

Disposition of the issues concerning jurisdiction of this court on this appeal necessitates consideration of the following matters:

1. The Complaint.

Complaint was filed on January 8, 1946. The complaint alleged that plaintiff Colegrove is a resident and duly qualified elector of the City of Evanston, County of Cook and State of Illinois, and qualified to vote in the Tenth Congressional District of the State of Illinois, as created by the Illinois Congressional Apportionment Act dated May 13, 1901. Plaintiff Chamales is a resident and duly qualified elector of the Township of Barrington, Cook County, Illinois, and qualified to vote in the Seventh Congressional District of the State of Illinois created by the foregoing statute. Plaintiff Sears is a resident and qualified elector of the City of Chicago, County of Cook and State of Illinois, and qualified to vote in the Second Congressional District of the State of Illinois, as created by the foregoing statute.

Jurisdiction of the Federal Court was predicated on the pleaded provisions of the "Civil Rights" Act, 28 U. S. C. A., Sec. 41, sub sec. 14, providing that the District Courts shall have original jurisdiction of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any statute, custom or usage of any state of any right, privilege or immunity secured by the Constitution of the United States, or any right secured by any law of the United States providing for equal rights of the citizens of the United States.

The complaint charged that the Illinois Congressional Apportionment Act of May 13, 1901, was violative of the following provisions of the Federal Constitution: Sections 2 and 4 of Article I, Section 2 of the 14th Amendment to the Constitution, Section 1 of the 14th Amendment, namely the "privileges and immunities" and the "equal protection of the laws" clauses of the 14th Amendment, and the preamble to the Constitution of the United States.

The complaint also charged that the Illinois statute creating the Congressional Districts was violative of the Federal Act of February 2, 1872 (10 Stat. 28) found in Revised Statutes of the United States, Sec. 23; in violation of Sec. 14 of the North West Ordinance of 1787, and Article II of the North West Ordinance; in violation of the Enabling Act of Congress of April 18, 1818 (3 Stat. 428). The complaint also charged the violation by the statute of the Constitution of the State of Illinois of 1818, and the provisions of Article II, Sec. 18, of the Constitution of the State of Illinois of 1870.

The complaint charged that the Illinois Congressional Reapportionment Act of 1901 created gross discriminations in voting population between the various congressional districts in Illinois (inequalities as great as 8 to 1), and that such gross discriminations and inequalities violated the constitutional rights of the plaintiffs under the Federal Constitution, their rights under Federal statutes, and under the Illinois Constitutions.

The complaint also alleged various facts in regard to the duties of the defendants, the diligence of the plaintiffs, the effect of a judgment in favor of the plaintiffs, etc., which facts are not pertinent at this point.

The complaint prays for declaratory judgment, i.e., that the statute be declared unconstitutional because of the violation of the rights of plaintiffs under the Federal Constitution, the Federal laws, and Illinois Constitution, and also prays for injunctive relief to enjoin the defendants from carrying out any acts to execute the provisions of the Illinois Congressional Apportionment Act of May 13, 1901, and to restrain other specific acts by the defendants.

The complaint contains a request for the convocation of a special three-judge court under Section 266 of the United States Judicial Code (28 U. S. C. A. Sec. 380).

The complaint concluded with a prayer for general relief.

2. Petition for temporary injunction.

After the complaint was filed plaintiffs filed a petition asking for a temporary injunction.

3. Defendants' motion to dismiss for want of jurisdiction.

Defendants filed a special appearance, and a motion to dismiss the suit for want of jurisdiction over the persons of the defendants, over the subject matter.

4. Disposition of the issues.

Briefs were filed, and oral arguments had on such motion to dismiss by defendants, plaintiffs and by Better Government Association as *amicus curiae*. On January 25, 1946, the court overruled defendants' motion to dismiss for want of jurisdiction and set the case for further hearing on January 29, 1946.

Memorandum opinion.

On January 29, 1946, the matter came on for final hearing. At the conclusion of the argument the court filed a memorandum opinion holding in substance that although the court had jurisdiction of the subject matter and the parties, the plaintiffs' complaint would have to be dismissed for failure to state a cause of action under the decision of the United States Supreme Court in *Wood* v. *Broom*, 287 U. S. 1.

The District Court's opinion indicated that it felt itself bound by such decision to rule against plaintiffs but that in the absence of such decision the ruling would have been in favor of plaintiffs.

The cause was continued to February 1, 1946, for the entry of a judgment order.

Motion to dismiss for failure to state a cause of action.

On February 1, 1946, defendants filed instanter their motion to dismiss the complaint, which motion was in sub-

stance a general demurrer i.e., claiming that complaint did not state a cause of action. The defendants in so doing were apparently making the formal record conform to the theories announced by the court in its oral opinion.

Final judgment order.

The court thereupon entered a final judgment order which in substance denied the plaintiffs' petition for a temporary injunction, denied the prayer of the complaint for a permanent injunction and for declaratory relief, and dismissed the suit at plaintiffs' costs.

Plaintiffs' appeal as appellants is from this judgment order of February 1, 1946.

SUMMARY OF ARGUMENT.

I.

This court has jurisdiction of direct appeal from decree 3-judge District Court which *inter alia* denied injunctive relief.

II.

The 3-judge District Court had jurisdiction to entertain the suit seeking to restrain state officers from enforcing a state statute claimed to violate the Federal Constitution.

1. This jurisdiction extended to all questions involved whether of Federal or State law.

III.

The District Court had jurisdiction to grant equitable relief.

A. Plaintiffs' rights to vote in Illinois primary for candidate to U. S. House of Representatives were established and guaranteed by the Federal Constitution.

1. *Giles* v. *Harris,* 189 U. S. 475 is not an authority for denying equitable relief for the specific rights claimed by plaintiffs in case at bar.
2. The general language of *Giles* v. *Harris,* 189 U. S. 475, will not be considered by this court as an absolute rule of equity jurisprudence

B. Under Federal Declaratory Judgment Act the Federal District Court whether considered as law or equity court has jurisdiction to declare plaintiffs' rights in declaring that Ill. Congressional Apportionment Act of 1901 is unconstitutional.

IV.

(Answering Appellees' Points II, III, and IV.)

Suit to restrain State officials from enforcing an unconstitutional Statute is not a suit against State within meaning of the 11th Amendment.

V.

Plaintiffs' suit was not filed too late.

VI.

Wood v. *Brown,* 287 U. S. 1, does not dispose of case at bar.

A. It is not a true precedent.

B If a precedent it is erroneous and unsound and should be overruled by this court.

1. Considered as an original proposition the Ill. Congressional Apportionment Act of 1901 is unconstitutional.

ARGUMENT.

I.

This court has jurisdiction to entertain the direct appeal from the decree of the specially constituted three-judge court which inter alia denied injunctive relief.

This brief by *amicus curiae* supplements, and will insofar as possible avoid repetition of, the authorities and arguments advanced in appellants' statement of jurisdiction.

The complaint among other things, sought to restrain state officials acting under color of state law from enforcing a state statute on the ground that such statute was violative of plaintiffs' rights guaranteed to them by the Constitution of the United States. Such a proceeding fell within Section 266 of the United States Judicial Code (28 U.S.C.A. Sec. 380).

The decree of the specially constituted three-judge court denied both temporary injunctive relief and permanent injunctive relief. Such a decree is reviewable by this court on direct appeal from the District Court. Section 266 of the Judicial Code (28 U S.C.A. 380) and Section 238 of the Judicial Code (28 U.S.C.A. 345).

Under Section 266 of the United States Judicial Code the specially constituted three-judge court can exercise all the ordinary equitable powers of a federal district court. *American Insurance Co.* v. *Lucas,* 38 Fed. Sup 926, 932 (D C. Mo. 1941) [Appeal dismissed 314 U. S. 575; certiorari denied 317 U S. 687; rehearing denied 317 U. S. 712.]

That part of the decree which denies a permanent injunction is reviewable directly by this court, independently

of the other provisions of the decree. *Eicholz* v. *Public Service Com.*, 306 U. S. 268, 269.

The procedure in the instant case is substantially analogous to the procedure under which jurisdiction was accepted by this court in *West Va. Bd. Ed.* v. *Barnette,* 319 U. S. 624, 630, affirming 47 Fed. Supp. 25 (D.C. W. Va.). In that case the three-judge district court heard the case on an application for interlocutory injunction and on submission for final decree by a hearing of the bill and defendant's motion to dismiss. The District Court in disposing of the case at bar was in substance similarly considering plaintiffs' complaint as if defendants had made a motion to strike or dismiss for failure to state a cause of action. This was recognized by defendants when on February 1, 1946 they filed instanter their motion to dismiss for failure to state a cause of action. The District Court denied both temporary and permanent injunctive relief on the ground that no cause of action was stated by the complaint. This court has jurisdiction to review such decree The extent of such jurisdiction is to every question involved in the case. *Sterling* v. *Constantin,* 287 U. S. 378, 393, 394; *L. & M. R. R.* v. *Garrett,* 231 U. S. 298, 303, 304.

II.

The District Court had jurisdiction to entertain the suit seeking to restrain state officers from enforcing a state statute claimed to violate the Federal Constitution.

The complaint charged that the plaintiffs' rights under the Federal Constitution were being violated by the defendants' conduct in enforcing the Illinois Congressional Apportionment Act of 1901, setting out the principal grounds upon which it was claimed by plaintiffs that such statute was unconstitutional. The complaint sought to restrain defendants, officials of the State of Illinois, from

enforcing the statute. The jurisdiction of the District Court was thus twofold: first (1) that of a specially constituted three-judge court under Section 266 of the Judicial Code, *Ex parte Public Bank of New York,* 278 U. S. 101, 104; *Ex parte Collins,* 277 U. S. 565, 566, 569; and second, (2) that of a federal court of equity, *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 92, 95.

Considered as *both*, i.e., the three-judge court and the federal equity court, the jurisdiction of such court was governed by the allegations on the face of the complaint. *Hillsborough* v. *Cromwell,* decided January 29, 1946, No. 305 Oct. Term 1945, 14 LW 1410, 1411, *Utah Fuel* v. *National Bituminous Coal Com.,* 306 U. S. 56, 60, *Moore* v. *C. & O. Railway,* 291 U. S. 205, 210, *Hart* v. *B. T. Keith Co.,* 262 U. S. 271, 273. If the complaint makes a claim that if well founded is within the jurisdiction of the court it is within the jurisdiction whether well founded or not.

Since the complaint presented a substantial constitutional question then the jurisdiction of the Federal District Court—and the jurisdiction of this court on appeal "extends to every question involved, whether of state or federal law," and enables both the district court and this court on appeal "to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin,* 287 U. S. 378, 393, 394, and cases there cited, *Louisville & Nashville R. R.* v. *Garrett,* 231 U. S. 298, 303, 304. These cases make a complete reply to appellees' Point V. See also, *Lee* v. *Bicknell,* 292 U. S. 415, 425; *Glenn* v. *Field Co.,* 290 U. S. 177, 178.

The problem of "strict" jurisdiction, as distinguished from the "exercise of jurisdiction" is extremely important on the national aspects of the case at bar If this court rules that no jurisdiction exists to entertain this appeal then as a practical proposition all relief in courts against

the gross inequalities of redistricting will be foreclosed. Even a narrow ruling by this court on the technical question of jurisdiction may be construed by state courts as a ruling on the merits. Consider the interpretation placed by the Illinois Supreme Court on this court's decision in *Wood* v. *Broom,* 287 U. S. 1, when the Illinois court in *Daly* v. *Madison County,* 378 Ill. 357, cited *Wood* v. *Broom* as holding "that there were *no federal restrictions or limitations* on the legislature in the apportionment of the state for the election of representatives to the House of Representatives in the Congress of the United States" (378 Ill. 363) (Italics ours).

In contending that this court has jurisdiction and should therefore pass on the merits we are mindful of the words of Chief Justice Marshall regarding the historical function of this court, namely, which "never sought to enlarge the judicial power beyond its proper bounds, *nor feared to carry it to the fullest extent of duty required.*" (Italics ours.) *West Va. Bd. Ed.* v. *Barnette,* 319 U. S. 624, 668, dissenting opinion of Justice Frankfurter.

III.

(Replying to Appellees' I and IV.)

The District Court had jurisdiction to grant injunctive i.e. equitable relief.

A. Plaintiffs' rights to vote in the Illinois primary for candidates to the Federal House of Representatives were established and guaranteed by the Federal Constitution.

It is suggested that the complete answer to appellees' contention that relief should be denied to appellants (plaintiffs) because an equity court has no jurisdiction to enforce political rights is found in recognition of true nature of the *rights* the appellants seek to enforce.

After the decisions of this Court in *United States* v. *Classic,* 313 U. S. 299, 314, and *Smith* v. *Allwright,* 321 U. S. 649, 661, 662, it may be accepted as a postulate that the right to vote in the Illinois primary for the nomination of candidates for the House of Representatives, without discrimination by the State, is a right secured to the plaintiffs by the Federal Constitution.

Such Federal right is included within the rights, privileges and immunities under the Federal Constitution protected by the Civil Rights Act. Under Section 41, sub sec. 14, the District Court has jurisdiction to entertain suits for plaintiffs' claim that such rights had been violated.

This right to vote in the primary for Federal representation is protected against *discrimination* by the State. *Smith* v. *Allwright,* 321 U. S. 661, 662. In other words, the State may not disfranchise or partially disfranchise the voters. (This fact of partial disfranchisement was recognized by the Illinois Supreme Court in *Moran* v. *Bowley,* 347 Ill. 148, 162.) There must be substantial equality in voting as between voters in various congressional districts. That is the nature of the right. The principle of equality of representation lies at the foundation of representative government. This principle requires that no voter shall exercise a greater voting power than others in the selection of representatives to the legislature. 18 Am. Jur. 192, Sect. 17.

The complaint charged that the defendants had discriminated against the plaintiffs by virtue of their attempt to enforce the provisions of the Illinois Congressional Apportionment Act of 1901. It would seem clear that the plaintiffs could file an action at *law* in the Federal District Court seeking damages from individuals who sought to enforce the provisions of a state statute that in violation of the guarantees of the Federal Constitution sought to discriminate against plaintiffs in the exercise of their constitutional right. *Wiley* v. *Sinkler,* 179 U. S. 58.

Thus there exists a legal right and an action for damages for breach thereof. This is not a case of intervening in a political matter. This is not an interference with an election. This is not a political issue. It is true that the exercise of plaintiffs' legal rights may have some impact upon the political life of the nation or of the state. But all rights of citizens bear *some* relationship to the rights of other citizens, to their government, and to the functioning of their government.

Giles v. *Harris,* 189 U. S. 475, relied on by appellees as showing a lack of jurisdiction to enforce plaintiffs' rights in equity, does not control the facts in the case at bar. In *Lane* v. *Wilson,* 307 U. S. 268, at 272, this court recently pointed out that *Giles* v. *Harris* stood for a narrow proposal that a court of equity will not seek to give specific performance of the legal right to vote. The case was considered one where the federal court was asked "to supervise the voting in that state by officers of the court." But equity will not conduct an election in order to permit the plaintiffs to vote. Similarly the doctrine of *Giles* v. *Harris* has been sharply limited to what the justices of this court characterize as "mere political rights" as shown by the dissenting opinions of Justice Brandeis in *International News* v. *Associated Press,* 248 U. S. 215 at 266; *Truax* v. *Corrigan,* 257 U. S 312 at 314. Similarly in the dissenting opinion of Mr. Justice Brandeis in *Pennsylvania* v. *West Virginia,* 262 U. S. 553 at 610, doubt was apparently expressed as to whether or not a "controversy" had existed in *Giles* v. *Harris.* In *Harrisonville* v. *Dickey Co.,* 289 U. S. 334, 338, n. 2, *Giles* v. *Harris* is cited as casting light upon those classes of controversies where public interest has been deemed so strong that a general principle of non-interference by injunction has been adopted.

The decision in *Wood* v. *Broom,* 287 U. S. 1, may well indicate that the majority of this court were overruling

Giles v. *Harris* in assuming jurisdiction and in passing on the merits.

But the long list of "voting rights" cases subsequent to *Giles* v. *Harris* indicates that this court clearly recognizes the fundamental importance of the citizen's right to vote for members of the House of Representatives. It is now clear that such right exists not only at the time of a general election but also at the time of a primary election. The traditional rule of equity that does not give a remedy for political wrongs is being gradually whittled away as the equity courts come to recognize, first, that absolute lip service to such a general statement leads to a stultification of a gradual development of equity courts. In *Nixon* v. *Herndon,* 273 U. S. 536, 540, Justice Holmes pointed out that the objection to a suit on the ground that the subject matter of the suit is political is "little more than a play upon words." Instead of giving lip service to a rule that grew long before political rights were recognized as legal rights we suggest that the sounder approach is the approach growing out of the original nature of equity courts, namely, that the jurisdiction of an equity court arises when the remedy at law is inadequate.

Consider the following "classes" of equity decisions:

Accordingly state equity courts in holding that even an election may be enjoined where questions of boundaries of political subdivisions are put in issue by challenging the validity of the statute creating them are refusing to follow the contention that equity courts have no jurisdiction to enforce political rights. See cases collected in 33 A. L. R. 1384.

The cases which *deny* injunctive relief against an election on the ground that the remedy at law is adequate imply that if the remedy at law is not adequate injunctive relief would be granted. *Holmes* v. *Oldham,* Fed. Cas.,

No. 6, 643 (1877) which is minority view, and cases collected in 33 A. L. R. 1379.

The cases which recognize the right of a taxpayer to enjoin waste of public funds do so in rejecting the contention that equity has no jurisdiction over political rights. Cases collected in 58 A. L. R. 588.

The cases which recognize that validity of state apportionment acts may be inquired into by an equity court also reject the contention that equity has no jurisdiction over political rights. 18 Am. Jur. 197, Sect. 24.

This court has recognized that by the adaptation of old rules to new cases, jurisdiction of equity may be said to be constantly growing and expanding. *Union Pacific Railroad* v. *Chicago Rock Island & Pacific R. R. Co.,* 163 U S. 564, 600, 601. In that case this court quoted with approval from Pomeroy, Eq. Jur., the proposition that equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which the right has been violated . . . and has always preserved the elements of flexibility and expansiveness so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."

New situations call for new adaptation of judicial remedies. *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 132.

And this Court also recently pointed out that equity goes further in giving and withholding relief in furtherance of public interest than when only private interests are involved.

Virginian R. R. v. *System Federation,* 300 U. S. 515, 552.

Pennsylvania v. *Williams,* 294 U. S. 176, 185.

The familiar rule of Blackstone was: "It is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." 3 Blackstone Commentaries 109. No decision of this court can be found on this specific issue, but apparently the inferior federal courts follow the general principle that equity will not suffer a wrong to be without a remedy. *Webb* v. *Portland Mfg. Co.,* 29 Fed. Cases No. 17322; 3 Summer 189, *Schneider* v. *Schneider,* 141 Fed. (2d) 542 (Ct. of Appeals, Dis. of Col.), *Leo Feist* v. *Young,* 138 Fed. (2d) 972, *Jones* v. *Campbell Co.,* 63 Fed. (2d) 58 (C.C.A. 5), *Southern California R. R.* v. *Rutherford,* 62 Fed. 796 (C.C. Cal.), *Russell* v. *Sup. Journal,* 47 Fed. Supp. 282 (D.C. Wis.), *Holloway* v. *Federal Reserve Co ,* 21 Fed. Sup. 516, 518 (D.C. Mo.).

The recognition of the expanding nature of equity jurisdiction to protect personal rights is evidenced by the cases, as collected in 14 A.L.R. 295, either by the statement that equity does at the present time recognize personal rights as shown by the cases cited at page 300, or else by the acceptance of the fact that personal rights do involve, at the very least, nominal property rights as shown by the cases cited at page 305.

In *Carroll* v. *Somervell,* 116 Fed. 2d 918, 920 the court refers to a "citizen deprived of civil right of voting."

Value may be predicated on political or social rights. 36 C. J. S. 522, 25 C. J. 978. Cf. *In Re Summers,* 325 U. S. 561.

Judge Cooley, both in his writings and in his decisions recognized that courts do protect such rights as the right to vote, regardless of whether it is called a legal right or a property right, or civil right. See Cooley's Principles of Constitutional Law (3d Ed. 1898) at page 263; *People* v. *Hurlburt,* 24 Mich. 44 at 107, 9 Am. Rep 103, 114, 115.

It has also been recognized that the right of suffrage is a "vested right" in the sense that the right cannot be taken away except by the power that conferred it, and further, that the right to vote for a federal representative is a property right in the sense that once it is conferred by the Federal government the holder may not be deprived of it except by due process of law. 20 C.J. 60, Notes 35, 36; 29 C.J.S. 24, Notes, 11, 12.

Under the foregoing analysis and precedents a court of equity has the jurisdiction to grant equitable relief for the protection of plaintiffs' legal right to vote because plaintiffs' remedies at law are inadequate, the procedure of law to vindicate such legal rights would be inadequate, damages could not properly be estimated and award of damages would not compensate the plaintiffs for their loss. In addition, relief in equity obviates a multiplicity of suits and avoids circuity of action.

The arguments advanced by appellees to sustain the oft repeated principle that equity has no jurisdiction to enforce political rights is analogous to the situation where it is contended that equity has no jurisdiction to enforce building contracts or to give specific performance for contracts for personal service. In both of these situations equity courts by so-called negative injunctions has protected the undoubted legal rights of parties seeking relief. Analogous relief should be granted in the case at bar.

B. The declaratory judgment act though not enlarging the District Court's jurisdiction enlarged the remedies.

The Federal declaratory judgment act was remedial. In the recent decision in *Hillsborough* v. *Cromwell,* decided January 29, 1946, No. 305 October Term, 1945, 14 L. W. 1410, this court approved the granting of declaratory relief by the District Court which in substance adjudicated that

under New Jersey State law the plaintiff's property could not properly be assessed by the defendant municipality.

In *Railway Ass'n* v *Cossi,* 326 U. S. 88, a state statute prevented labor organizations from effecting any discrimination on the grounds of race. The plaintiff association claiming that it was not a labor organization, was faced with a suit by state officials under such statute. Plaintiff filed declaratory judgment proceedings in New York State courts to determine the constitutionality of the statute under the Federal constitution, and requested an injunction to restrain the enforcement of the statute. On appeal to this court the question raised was whether a controversy existed under Article III of the Constitution. This court ruled that such controversy existed stating:

> "The conflicting contentions of the parties in this case as to the validity of the state statute presents a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with imminent invasion by appellees and will be directly affected to a specific and substantial degree by decision of the questions of law." 326 U. S. 93.

In *Great Lakes* v. *Huffman,* 319 U. S. 293, plaintiff sought a declaratory judgment as to the validity of the state unemployment tax statute. The decision was not that the court of equity had no jurisdiction to enter a declaratory judgment but was that the court of equity should properly not exercise its jurisdiction since the matter involved state taxation. The power of the court to grant declaratory relief should be exercised in analogy to an equity court passing upon requests for an injunction in similar circumstances, where the general rule is that since the federal equity court is loath to interfere with state fiscal policies, the appropriate exercise of the court's dis-

cretion warrants the denial of relief. See 319 U. S. at page 301.

The fundamental error in reasoning of defendants is based upon its misconception of the rights which plaintiffs seek to protect. Plaintiffs' right to vote in the primary are established by the Federal Constitution. Such right includes the right to vote without discrimination. An action for damages exists for violation of such right. That is the subject matter concerning which defendant contends that the declaratory judgment act does not apply. But the attempt to enforce plaintiffs' rights is not an attempt to superintend elections.

There are many decisions of state courts where equity courts in holding that they may judicially review state redistricting acts are in effect denying that they are enforcing "mere political rights 'or are' superintending elections." The cases are collected in 2 A L R. 1337.

The declaratory judgment proceedings are properly based upon the allegations of the complaint.

The plaintiffs' assertion of their rights was "antagonistic" to the rights—or privileges—claimed by defendants. The defendants seek to enforce the Illinois Redistricting Act of 1901. The plaintiffs seek to restrain defendants from so enforcing such statute claiming that such action by the defendants would violate plaintiffs' Constitutional rights. The controversy was definite and concrete touching on the legal relations of plaintiffs and defendants who had adverse interests. The defendants seek to enforce the Redistricting Act of 1901 The plaintiffs seek to prevent such action. A decree in favor of plaintiffs would be specific and would also be conclusive! The decree in substance would prevent defendants from enforcing the Redistricting Act of 1901. That kind of decree is something more than "an opinion" advising

what the law would be upon a hypothetical state of facts. This court has stated the applicable rule as follows:

> "Where there is such a concrete case, admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of litigants may not require the award of process of the payment of damages (citing cases). And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required." *Aetna Life Ins Co.* v. *Haworth,* 300 U. S. 227, 241.

For an example of a case where plaintiff sought a declaratory judgment to effect that certain Federal Legislation was unconstitutional see *Currin* v. *Wallace,* 306 U. S. 1, 9. The form of the proceeding is not significant. It is the nature and effect which is controlling. *In Re Summers,* 325 U. S. 561, 567.

IV.

Answering Appellees' Points II, III and IV.

A. The suit to restrain state officials from enforcing an unconstitutional statute is not a suit against the state within the meaning of the Eleventh Amendment to the Constitution.

Appellees have misconceived the nature of the theories of plaintiffs' complaint. The complaint proceeds on the theory that the Illinois Redistricting Act of 1901 is unconstitutional upon several grounds, and that the enforcement of the provisions of such legislation would be unconstitutional executive or administrative action by the state officials Accordingly the complaint prays for relief against such "unconstitutional" action by defendants.

Smyth v. *Ames,* 169 U. S. 466 (1898) decided that "a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that (the 11th) Amendment." 169 U. S. 518-519.

This fundamental principle is still the law.

Sterling v. *Constantin,* 287 U. S. 378, 393, 394.
Truax v. *Raich,* 239 U. S. 33, 36.
Ex parte, Young, 209 U. S. 123, 152, 155.
Greene v. *Louisville & Interurban R. R.,* 244 U. S. 499, 507.

This principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. If a valid law is administered in an "unconstitutional" manner suit may be maintained in an equity court against the state officers to restrain such illegal conduct without violating the provisions of the Eleventh Amendment.

Reagan v. *Farmers' Loan,* 154 U. S. 362, 390.
Raymond v. *Chicago Traction,* 207 U. S. 20, 38.
Greene v. *Louisville & Interurban R. R.,* 244 U. S. 499, 507.

The cases are reviewed in an exhaustive note, discussing the problem of attack on the constitutionality of a statute under which a state officer acts as affecting the question whether action against the officer is to be deemed an action or a suit against the state. See 43 A.L.R. 408.

The cases cited by appellees deal with a suit against a state official which in substance seeks to compel such state official or a co-ordinate official of the defendant to pay moneys to the plaintiffs on behalf of the state. These factors are lacking in the case at bar.

V.

(Answering Appellees' Point VI.)

Plaintiffs' suit was and is timely.

This suit was not filed too late. Defendants seek to make it appear that the result of the decision holding that the 1901 Congressional Reapportionment Act is unconstitutional would be to prevent the present representatives who have filed, from running for office in the final elections next November. We suggest that defendants have overlooked the provisions of Smith Hurd Illinois Revised Statutes, Chapter 46, Sect. 10-11 and 10-12, and Chapter 46, Sect. 7-61. Defendants' duties are continuing ones and under Ill. Rev. Stat., Chap. 46, Sect 7-60 they are faced with the duty of certifying the candidates for the November elections on September 5, 1946, i.e, the "not less than 61" days before the election in November.

Under such statutes, in the event this court rules that the Congressional Reapportionment Act of 1901 is invalid, the Illinois political parties would be able to have certified the names of the present candidates as the candidates for the post of congressman, although it is true that such candidates would have to run at large.

In addition, under the constitution and the statutes of the State of Illinois, the Governor of Illinois could call a special session of the Illinois Legislature for the purpose of passing a new redistricting act, and might at the same time provide for new primaries to be held in order to determine the candidates for such newly created districts. Or if the special session of the Illinois Legislature would simply enact legislation creating new districts the respective political parties would be enabled to certify vacancies in such districts and transfer the candidates from the districts existing under the Apportionment Act of 1901, to the districts as they would be newly created under such state emergency legislation.

The District Court in its construction of the complaint seemed to have considered this question and ruled against the appellees on such point. The "local practice" so recognized by the District Court will be given due weight by this Court.

Hillsborough v. *Cromwell,* decided Jan. 29, 1946, No. 305 at Oct. Term 1945, 14 LW 1410, 1411.
Huddleston v. *Dwyer,* 322 U. S. 232, 237.

VI.

(Answering Appellees' Point VII.)

This court's decision in Wood v. Broom, 287 U. S. 1, is not determinative on the facts of the case at bar.

A.

Wood v *Broom,* 287 U. S. 1, is not a precedent because the facts are different. The degree of inequality or discrimination is not the same. The length of time of discrimination is not the same. In the case at bar other relief was exhausted before the instant suit was brought. In *Wood* v. *Broom* suit was brought immediately in 1932 after the passage of the Missouri legislation sought to be held unconstitutional. The constitutional objections urged in the case at bar are not the same. In that case the election sought to be affected was the final as distinguished from the primary election. Finally the Supreme Court expressly stated it was not deciding certain of the specific questions raised in this appeal but simply treated the District Court as granting the relief upon one narrow ground, *i.e.* the applicability of 1911 Federal statute. This is clearly shown by examining paragraph 2 of the syllabus in the case as reported in 77 Lawyers Edition 131.

The precise points raised by plaintiffs' complaint and involved in the case at bar are not *expressly* decided in the

opinion of *Wood* v. *Broom.* Even though a point or question is involved in a case decided by this court, if the question is not considered by this court the decision is not treated as a precedent. *New* v. *Oklahoma,* 195 U. S. 252, 256; *Teft & Company* v. *Munsuri,* 222 U. S. 114, 119; *U. S.* v. *More,* 3 Cranch, 159, 172, The Edward, 1 Wheat. 261, 275; *Webster* v. *Fall,* 266 U. S. 507, 511.

The American doctrine of *stare decisis* does not contemplate rigid adherence to or blind following of a decision recognized as being clearly unsound and being in violation of earlier established sound principles. *Helvering* v. *Hallock,* 309 U. S. 106, 119, 121, *Smith* v. *Allwright,* 321 U. S. 649, 665.

The doctrine of *mortmain* should *not* be a principle of American Constitutional law. *McKenna* v. *Austin,* 134 Fed (2d) 659, 666.

B.

Even considering *Wood* v. *Broom* as applicable on the question of constitutionality it is respectfully and gravely submitted that such "implied" constitutional decision is unsound and should be overruled by this court.

The principles that govern this court in its overruling of prior decisions are outlined and discussed in 31 A. B. A. J. 501 (Oct. 1945).

It is recognized that this portion of brief in support of jurisdiction is limited to showing the substantiality of the federal question. Accordingly, as an outline of the argument that will be made on the merits if this court takes jurisdiction in this case we present the following analysis:

The Illinois Congressional Reapportionment Act which discriminates against plaintiffs, which creates inequality in their voting rights and serves to partially disfranchise them and many other citizens of Illinois violates the guarantees of the Federal Constitution.

It abridges plaintiffs' privileges and immunities within the meaning of the privileges and immunities clause of the 14th Amendment. *Corfield* v. *Coryell,* 6 Fed. Cas. 546 (Fed. Cas. No. 3230) (1823, C. C. Pa.); *Edwards* v. *California,* 314 U. S. 160, 182; *Hague* v. *C. I. O.,* 307 U. S. 496, 500, 512, 514; *U. S.* v. *Classic,* 313 U. S. 299, *Smith* v. *Allwright,* 321 U. S. 649, 661.

The statute denies the plaintiffs the equal protection of the laws, within the meaning of the Fourteenth Amendment. *United States* v *Classic,* 313 U. S. 299; *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73, *Truax* v. *Corrigan,* 257 U. S. 312, 331, 333; *Sunday Lake Co.* v. *Township,* 247 U S. 350, 352; *Mo. ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349.

The statute deprives the plaintiffs of their liberty and property, without due process of law, within meaning of the Fourteenth Amendment.

1. The Federal right to vote for representatives may be considered as property. *United States* v. *Classic,* 313 U. S. 299, 314; *Fletcher* v *Tuttle,* 151 Ill. 41, 53; 37 N. E. 683, 686; Cooley: "Principles of Constitutional Law," (3rd ed. 1898) p. 263; 20 C. J. 60, 35; 29 C. J. S. 24, n. 11; 20 C J. 60, 36; 29 C. J. S. 24, n. 12; *State* v. *Staten,* 6 Coldw. (Tenn.) 233, 243; *Joyner* v. *Browning,* 30 Fed. Supp. 512, 517 (D. C. Tenn); *White* v. *Multnomah,* 13 Or. 317; 10 Pac. 484, 485, 487; 50 Am. R. 20; *State* v. *Becker,* 38 Wis. 71, 85, 86.

2. The exercise of the right to vote is the liberty protected by the Fourteenth Amendment. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *People* v. *Hurlburt,* 24 Mich 44, 107; Am. Rep. 103, 114, 115 (1871).

3. The Illinois Congressional Apportionment Act of 1901 is arbitrary and discriminatory. *Moran* v. *Bowley,*

347 Ill. 148; 199 N. E. 526, 531; *Hurtado* v. *California,* 110 U. S. 516, 535 (1884).

See 6 Univ. of Chicago L. Review 296-301 (Feb. '39).

It is respectfully submitted that consideration of the foregoing decisions of this court, many of which were decided *after Wood* v. *Broom,* leads to the conclusion that *Wood* v. *Broom* should be overruled.

CONCLUSION.

Better Government Association, an Illinois corporation Not for Profit, respectfully presents this brief in support of the jurisdiction of this court.

By Abraham W. Brussell,
Attorney for Better Government Association, an Illinois Corporation Not for Profit.
135 So. LaSalle St., Rm. 2254
Chicago, Illinois.