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 AND ARGUMENT FOR APPELLANTS.

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Appellees.

BRIEF AND ARGUMENT FOR APPELLANTS.

To: The Supreme Court of the United States:

An "Appeal to Caesar".

We think it may not be out of order to begin our Argument, in this particular case, with a sort of introductory parable which we feel is apt and has a clear cogency to the case at bar:

> *It will be recalled that when St. Paul sought justice from the Scribes and Pharisees in Jerusalem, he proclaimed with pride that he was a native of Tarsus, "no mean city;" but they bound him with thongs. He then appealed to the Roman Tribune and said to him: "I*

> *am a Roman citizen and was born so;" but still they refused him a hearing and turned him away. Later, he was taken before the Council, where he tried to speak, but the High Priest commanded that he be struck upon the mouth. Again they sent him away to Felix, the Governor. And after a long wait Paul was finally taken before the succeeding Governor, Festus. And then at last they took him before King Herod Aggrippa, himself. There he again made a valiant fight, and when once more he was denied justice, Paul uttered the famous words "I appeal to Caesar."*

It is after a somewhat similar experience in search of justice denied, that these Appellants stand before this Court, as a final expedient, and figuratively make their "Appeal to Caesar." They have been denied their Constitutional rights for a generation by the State of Illinois, and specifically by the General Assembly of that State, and by its Supreme Court. If this final appeal to this Court, as the highest Reviewing Authority in the Land, is refused, then all is lost.

SUMMARIZED STATEMENT OF THE MATTERS INVOLVED.

The Opinion Below.

This Court will no doubt have read the strong and yet sensible opinion filed in the District Court and written by the able Presiding Judge of our 7th Circuit in Illinois. (R. pp. 38 to 43) That opinion gives a good picture, by way of a preview, of the matters involved in this appeal. Indeed, it seems to us to be something more, for it is in a measure a sort of Brief, *Amicus Curiae,* pointing out to this Court, in an unbiased fashion, the realistic issues presented here. Actually that opinion must be considered as an open suggestion to this Court, that it distinguish or explain, or even modify, its prior language in its opinion in the well-known case of *Wood* v. *Broom,* 287 U. S. 1, (hereinafter discussed in some detail). Certainly the opinion below is an open invitation to this Court to grant the Appellants the relief they seek—a relief which the District Court would have granted save for the case last cited.

Plaintiffs' Pleadings.

The verified Complaint below, a printed book of 35 pages, attempted to set forth in logical fashion and in considerable detail the facts involved and the legal issues presented by this case (R. pp. 1 to 31). The District Court obviously read the Complaint with care and were convinced by its admitted factual charges. The Complaint, which was filed January 8, 1946, was brought by three leading and public-spirited citizens of the Chicago area, who show that

they are citizens of the United States and of the State of Illinois. Each of the Appellants is a resident of and a duly qualified voter in three different Congressional Districts in Illinois—three of the most grossly disproportionate and most excessively over-populated Congressional Districts, not only in the State of Illinois, but in the entire Union as well.

Defendants' Pleadings.

The Defendants below (Appellees here) are the so-called "Primary Certifying Board" whose duty it is to certify the names of all candidates in Illinois before such names can be printed on the Ballot in any County in Illinois. The Defendants filed what they called a "Special Appearance" and an extended "Motion To Dismiss" based on what Defendants contended were "jurisdictional grounds" (R. pp. 34 to 37). The Three-Judge District Court, after extended argument, overruled that particular "Motion To Dismiss" and took jurisdiction of the case (R. p. 37). Later on, the Defendants filed an additional "Motion to Dismiss" the Complaint on the ground that it "fails to state a cause of action" (R. p. 49) thereby, in effect, demurring to the entire Complaint.

Jurisdiction.

Jurisdiction of the Federal Courts over both the subject matter of this suit and of the parties hereto is grounded on the so-called "Civil Rights Act" of 1871, and particularly on Paragraph 14, Section 41 thereof. (USCA Title 28, Sec. 41, Sub-Sec. 14) By that statutory provision the Federal District Courts are given broad jurisdiction over "all suits at law or in equity authorized by law" where the purpose is "to redress the deprivation * * *

of any right, privilege or immunity secured by the Constitution of the United States," wherever such deprivation occurs "under color of any law, statute, (etc.) * * * of any State." By virtue of that Section the Appellants here claim that they have a clear right to seek the relief of the Federal Courts under the Declaratory Judgment Act, for the major purpose of reviewing the Constitutionality of the Illinois Act of 1901 here under attack, and for the additional purpose of granting injunctive relief to the Appellants if that should become necessary.

The Illinois Act of 1901 Here in Issue.

The Complaint charges in Paragraphs 12, 13 and 14 thereof in considerable detail (R. pp. 15 to 20) that the Act of Illinois of 1901 (Laws of Ill., 1901, p. 3; Ill. Rev. Stat. Ch. 46, Secs. 154, 155, 156) creating the presently existing Congressional Districts in that State is now utterly outmoded, and is so violative of the principle of equal representation of the voters as to be utterly unconstitutional and void.

The Prayer for Relief.

The Complaint below prays specifically for two different and alternative types of relief (R. pp. 24 to 26) under the Federal Declaratory Judgment Act of 1934 as amended (Sec. 274d of the Judicial Code; Title 28 USCA, Sec. 400):

> (a) That the Court hold and declare (under Section 1 of that Act) that the antiquated Illinois Act of 1901, above cited, is now utterly unconstitutional and void.
>
> (b) That if the Court finds it necessary to enforce such Declaratory Judgment, it shall issue such "further relief" under Section 2 of that Act as may be necessary in the premises. This Brief will show that the Supreme Court (or the District Court if the matter

is sent back there), will have ample time to grant injunctive relief to enforce its judgment in this case, if it becomes necessary.

The Complaint further specifically prays that the Court grant the Appellants "such other and further relief in the premises as may be lawful and meet and just." (R. p. 27)

The Special Three-Judge Court.

The Complaint below (R. p. 26) contained a request for the calling of a Special Three-Judge Court under Section 266 of the Judicial Code (Title 28, USCA, Sec. 380). That Statute gives a clear right to have a Special Three-Judge Court where the cause charges "the unconstitutionality of a State Statute", and where the case may also involve "a restraining order" against any officer of the State attempting to act under such Statute. The Three-Judge Court below was called and organized in accordance with that provision of law and that request in the Complaint. (R. p. 31)

Petition for Temporary Restraining Order.

The Plaintiffs below presented to the Special Three-Judge Court a verified "Petition for a Temporary Restraining Order" (R. p. 32) to stay the hands of the Defendants pending the hearing of the cause.

Memorandum Opinion.

On January 29, 1946, the District Court handed down a 7-page written opinion (R. pp. 38 to 43) which by order was made a part of the Record in the cause. That opinion speaks for itself. In substance it held that the District Court would have granted the relief prayed for in the

Complaint, if it were not for the decision of the Supreme Court in *Wood* v. *Broom,* 287 U. S. 1, already referred to.

Final Judgment Order.

Thereafter, on February 1, 1946, the District Court entered a Final Judgment Order, which denied the prayer of the Complaint for declaratory relief, denied the plaintiffs' Petition for Temporary Injunction, denied the prayer of the Complaint for a Permanent Injunction, and dismissed the Suit at plaintiffs' costs. (R. pp. 44 to 46)

Direct Appeal Permitted.

The provisions of the Judicial Code above cited providing for a Three-Judge Special Court also contain a provision granting a direct appeal to the Supreme Court of the United States from the final judgment of the Three-Judge Special Court. It is under that particular provision that this appeal has come direct to the Supreme Court of the United States, rather than going to the Circuit Court of Appeals of the 7th Circuit.

Appeal Allowed.

The appeal to this Court from that Final Judgment Order of February 1, 1946, was allowed by an additional order of the District Court (R. p. 47).

Appeal Papers.

The Assignments of Error, and other Appeal Papers are set out in the Record. (R. pp. 49 to 59)

STATEMENT OF THE CASE.

BACKGROUND OF THIS CASE—SOME QUESTIONS

In a very real sense the District Court had a substantial advantage over this Reviewing Court in understanding and appraising what may be called the "story" of this case. The three learned Judges below (like other citizens of Illinois) have lived, for a full generation or more, through the long era when the facts and circumstances of that story were being enacted on the public stage.

Because of the comparative disadvantage of this Reviewing Court in the particulars above mentioned and its personal unfamiliarity with local conditions in Illinois, it becomes the duty of Counsel to give this Court (as fully and fairly as may be done) a presentation of the facts and circumstances involved in this unusual piece of litigation. This Court is entitled at the outset to have certain preliminary questions answered, or at least commented upon. What is the real background of this case? Why should such intolerable and unAmerican conditions exist, over a long period of time, in a great State like Illinois? Why have not the people of that State themselves been able to do something to remedy these things? Why should the people of Illinois, as represented by the Appellants here, be forced to come to the Supreme Court of the United States before they can get any relief? Why has the Legislature of Illinois been so derelict in its constitutional duty? Why have the Courts of Illinois (as the senior Circuit Judge from the 7th Circuit pointed out in his opinion below, and as we shall point out in this Brief) failed and refused to grant any relief from these conditions? Why have the

officials and political leaders in Illinois been so recalcitrant and so obdurate and so defiant? These are some of the questions we shall now discuss and try to answer.

Details as to Discrimination.

The detailed facts and figures as to discrimination in Congressional elections in Illinois, which are admitted on this Record, and are so decisive of this Appeal, were fully charged in the Complaint below. (R. pp. 13 to 20) It will be helpful to repeat some of those matters here, by way of a marginal note.

UNEQUAL POPULATION OF CONGRESSIONAL DISTRICTS.

The gross discrimination between Congressional Districts in Illinois is clearly shown by the following Table giving the *present, 1940,* population of the 25 Congressional Districts as established by the antiquated State Act of 1901, already cited The Districts are listed according to population, starting with the largest and ending with the smallest District This table was set out in a somewhat different form in the Complaint below (R p 28) *The "fair and equal" population of Illinois Districts, under a just and valid State Act, as we shall see later, would be an average of 303,740.*

Table I.

7th	District ..	914,053	21st	District..	..237,279
6th	District.	641,719	18th	District.. ..	235,134
10th	District... .	625,359	4th	District ...	223,304
2nd	District. .	612,641	15th	District	.217,334
3rd	District. . .	..575,799	9th	District . .	..215,175
11th	District. . .	385,207	18th	District. .	.214,500
22nd	District. . .	..359,343	13th	District . .	...186,433
12th	District.....	298,072	19th	District	176,337
19th	District . ..	284,001	24th	District.	.174,396
16th	District.. ..	276,685	20th	District. ..	.162,528
25th	District . .	262,426	1st	District.	...140,527
23rd	District.. ..	.243,130	8th	District.	.123,743
			5th	District.	.112,116

"FAIR AND EQUAL" REPRESENTATION.

The population of the State of Illinois, as shown by the Federal Census of 1940, was 7,897,241 When that figure is divided by the figure 26 (being the number of Congressmen to which Illinois is entitled under the Apportionment Act of Congress of 1941), the present *"Ratio of Representation"* for Congressional Districts in Illinois is found to be 303,740 *That figure is basic and fundamental for this Court in passing on the rights of the Appellants in the premises* Since that figure represents what is and would be the "fair and equal" population of the various 26 Congressional Districts to which Illinois is now entitled, under any lawful and valid State Congressional Apportionment Act

DISCRIMINATION AS BETWEEN DISTRICTS.

Due chiefly to the great increase in population of the City of Chicago and the County of Cook since the last Congressional Apportionment Act of Illinois, of May 13, 1901, there have developed, and there now exist, several Districts in which the people are subjected to a gross denial of fair and equal representation Such denial of equal representation in Illinois, under the State Act of 1901, already mentioned, is clearly shown and illustrated by the figures in the following tables, as compared to the fair "Ratio Representation" figure of 303,740, already mentioned

UNDER-REPRESENTATION IN CERTAIN DISTRICTS.

Table II.

District No	1940 Population	Discrimination Factor
7th	914,053	3 to 1
6th	614,719	2 1 to 1
10th	625,359	2 to 1
2nd	612,641	2 to 1
3rd	575,799	1 9 to 1

OVER-REPRESENTATION IN CERTAIN DISTRICTS.

The gross denial of equal representation at Congressional elections in Illinois under the Act of 1901, is further shown and illustrated by the population figures of certain other Congressional Districts which have now become grossly and unfairly *over-represented,* as shown by the figures set forth in the following table, likewise compared to the "Fair Representation" ratio above mentioned

Table III.

District No	1940 Population	Discrimination Factor
5th	112,116	2.7% to 1
8th	123,743	2 5% to 1
1st	140,527	2 2% to 1
20th	162,528	1 9% to 1
24th	174,396	1.7% to 1
17th	176,737	1 7% to 1

COMPARISON OF "VOTING STRENGTH".

The denial of equal representation now existing in certain Congressional Districts in Illinois under the State Act of 1901 may be further graphically shown by comparing what may be called the "voting strength" of an elector in one of the above listed *low-population* Districts with the "voting strength" of an elector in certain *large-population* Districts When that is done the following results are produced.

Table IV.

5th District, one voter equals 8 1 voters in 7th District
5th District, one voter equals 5 7 voters in 6th District
5th District, one voter equals 5 6 voters in 10th District
5th District, one voter equals 5 4 voters in 2nd District
5th District, one voter equals 5 voters in 3rd District

Substantially similar discrimination exists (as that shown by the figures last above) when certain of the so-called "Down State" Districts are likewise compared to the large-population Districts Thus in the 17th District, in the 20th District and in the 24th District, respectively, in the so-called "Down State" area, one voter has the "voting strength" of more than 5 voters in the 7th District, lying in Cook County

DISCRIMINATION AGAINST INDIVIDUAL VOTERS.

In the same way and for the same reasons, as set forth above, the individual voter in Cook County is now subjected to a gross denial of equal representation, under the Act of 1901, already mentioned, as compared to the individual voter in the rest of the State Thus Cook County now has, under the Census of 1940, a population of 4,063,342, but has only 9 8 Congressional Districts On the other hand, the rest of the State has 15 2 Congressional Districts, with a population of only 3,833,899. In other words the so-called "Down-State" area of Illinois has a "Ratio of Representation" of more than 8 to 5, as against Cook County, so far as the voting strength of individual voters is concerned

When the "voting strength" of the voters of certain particular "Down-State" Counties is compared to the "Voting strength" of the voters of Cook County the discrimination is even more intolerable and invalid Thus the 20th ("Down-State") Congressional District has a population of only 162,528 The result is that one voter in each of the nine counties making up that District has the "voting strength" of more than 2½ voters throughout the County of Cook The same gross discrimination against the voters of Cook County exists likewise in several other so-called "Down-State" Districts

DISCRIMINATION AGAINST COOK COUNTY PER SE.

There exists also a severe and intolerable denial in Illinois of fair and equal representation in Congress, when Cook County, as a territorial unit of the State of Illinois, is compared with the so-called "Down-State" area Thus Cook County, under the 1940 census, is shown to have a population of 4,063,342, while the rest of the State has a population of only 3,833,899; that is Cook County has now 51 4% of the State's population while the rest of the State has only 48.6% Under a fair representation in Congress, Cook County is entitled to 13 5 Congressional Districts, and the rest of the State is entitled to 12 5 Congressional Districts. Compared to those just and equitable figures, Cook County now has only 9.8 Districts, while the rest of the State has 15 2 Districts

A MINOR "IRREPRESSIBLE CONFLICT".

The long and bitter struggle for *equality of voting* which has gone on in Illinois for more than a generation may well be called a sort of a minor "Irrepressible Conflict" in that State. It is true that a somewhat similar problem has in the past existed, and still exists in a mild form, in certain other States of the Union; but nowhere has it had the virulence and the permanence that exists in Illinois.[1]

The Basic Problem—Jealousy of Large Cities.

The problem basically grows out of the jealousy and opposition which the rural areas in Illinois have developed and vigorously carry on toward the large Metropolitan

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[1] This problem has been so long-standing in Illinois that various official Research Agencies in that State have, from time to time, discussed it in some detail See for example

(a) Bulletins, published from time to time by Illinois Legislative Reference Bureau

(b) "*Publication No 66,* Illinois Legislative Council," published, February, 1945.

The larger nation-wide problem has also been frequently discussed by writers on Political Science and Problems of Government See for example

(c) "Reapportionment, A Chronic Problem," by Charles W Schull, *National Municipal Review,* Feb. 1941, p. 73

The last author says among other things:

"Legislative apportionment (as well as Congressional apportionment) in the State resembles the weather; it is a combination of factors and conditions provoking comment and controversy but seldom resulting in action"

After quoting that statement, an Illinois Commentator says in the official "Publication No. 66," cited in (b) above:

"If this statement is not true in all respects, it would appear to apply particularly to Illinois, where Congressional and Senatorial Districts are more than 40 years old, in spite of the attention reapportioning has received in the Constitutional Convention of 1920-1922, in the messages of Governors, in the debates of the General Assembly and in public discussion generally."

area of Chicago and Cook County. These rural areas in past times were dominating, both in population and in commercial importance, and therefore they held a long political superiority and control. But beginning about a generation ago the so-called "Down-State" areas saw the time approaching when the tables would be turned. Then began a struggle—which may have reached its climax in this suit—in which the great Metropolitan area of Cook County and Chicago, claimed its lawful and constitutional right to equality of voting power by the people, and equality of Representation in the State Legislature and in Congress. Thus has this minor "Irrepressible Conflict" in Illinois reached the serious stage which the able opinion below characterizes as practically a state of "rebellion."

THE "DOWN-STATE" VIEW.

The plain fact is that what may be fairly called the "Down-State" view, with respect to this overall question of apportionment (and therefore the question of equality of voting strength) holds that the people in the large Metropolitan area of Chicago are somehow of a lower moral standard, not only ethically but particularly in regard to their politics; and that, therefore, the people of that big City are not to be trusted with political power and equal rights. The net result is that the so-called "Down-State" areas of Illinois (now very much in the minority in the population of the State) still persist in their fanatical opposition about this overall question of apportionment. In plain truth they no longer believe in Democratic processes in this respect and in the fundamental idea of equality at the polls. And in these respects they find a ready response and support from their local political leaders.

THE SUPREME COURT AND THE "FERGUS" CASES.

Indeed this view of the so-called "Down-State" area, while it is not expressly approved in the decisions of the Supreme Court of Illinois, is certainly neither strongly condemned nor disapproved by the decisions of that Court. The negative results achieved in the litigation in the Supreme Court of Illinois, on this point, have been in a realistic sense a covert invitation to the General Assembly of Illinois and to the people of the "Down-State" areas of the State, to continue their open rebellion against the idea of equality at the polls. The struggle for both Congressional and Legislative Apportionment is dead in Illinois so far as the Illinois Courts are concerned.

"OBSTINATE" AND "UNPATRIOTIC".

The able Judge of the Circuit Court of Appeals who presided at the Special Three-Judge Court below, both in his oral comment and in his written opinion, characterized the refusal of the Illinois General Assembly to pass a fair and valid Congressional Apportionment Act as being "as obstinate as it is unpatriotic." He further said in his opinion that the continuing refusal of the General Assembly of Illinois to do its duty "invites the resort to arms." These are severe words, and yet they are justified by the long-continued recalcitrancy of the so-called "Down-State" members of the Illinois General Assembly, in the premises. This Court can hardly help wondering why some other or different fight in the Courts has not been made by citizens of Illinois throughout the years to protect and sustain their rights in these particulars. Lest this Court might conclude that no such fight or struggle has been made, we propose to give this Court a short historical outline of one of the valiant but futile efforts to settle this problem, in the Courts

of Illinois, over a period of many years. That futile struggle, known in Illinois as "the Fergus Litigation," deserves some particular comment here.

The "Fergus Cases."

A short summary should be given in this STATEMENT about those cases on their *factual side,* since they are a part of this larger controversy in Illinois about Apportionment.

Mr. Fergus and his associates in the year 1926 instituted the suit of *Fergus* v. *Marks,* 321 Ill. 510, 152 N. E. 557. That was an original petition for Mandamus in the Illinois Supreme Court, brought against one Marks, and also the other members of the Illinois General Assembly, asking the Court to compel that body "to meet and apportion the State into Senatorial districts." The Supreme Court of Illinois refused any relief in that respect, and probably could not have granted it under the law. But the opinion of the Supreme Court, in denying relief to the outraged citizens, and in failing to make any vigorous criticism of the action of the General Assembly, indirectly gave aid and comfort to that body in its truculent refusal to obey the mandate in the Illinois Constitution with respect to Legislative reapportionment.

Two years later Mr. Fergus and his associates tried another attack in the case of *Fergus* v. *Kinney,* 333 Ill. 437, 164 N. E. 665. They filed a Bill in Equity by way of a taxpayer's suit asking the trial court to restrain the State Treasurer from paying the salaries of members of the General Assembly, unless and until that body had complied with that constitutional mandate. The trial court denied even the right to file the Petition. The Supreme Court of Illinois affirmed that judgment of the lower court. In its

opinion the Supreme Court of Illinois blandly stated that it was "the duty of the General Assembly" to comply with the Constitution in the respect charged in the Complaint. But the opinion of the Court in that respect was so mild and negative that the net result was taken as a victory by all the opponents of apportionment and equality in the right to vote.

The final battle in Illinois, represented by the so-called "Fergus" cases, is *People ex rel. Fergus* v. *Blackwell, et al.,* 342 Illinois 223, 173 N. E. 750. That case was a *quo warranto* proceeding brought against the Members of the Senate and the House of the Illinois General Assembly, asking that they be compelled to show cause how they lawfully held their offices, since they had for so long refused to comply with the constitutional requirement concerning redistricting the districts for the General Assembly. Again the Court in a short opinion held that it could grant no judicial relief and based its holding on the cases of *Fergus* v. *Marks,* and *Fergus* v. *Kinney, supra.*

It may be (as we have suggested) that in a strict legal sense the Illinois Supreme Court was compelled to hold as it did in these various "Fergus" cases. But the result of its decisions in all of these cases was to give aid and comfort, not only to the defiant Members of the General Assembly, but also to the defiant minority of the people in the "Down-State" areas of Illinois. In any event the Supreme Court of Illinois in the "Fergus" cases totally failed to help in this struggle, which we have called a minor "Irrespressible Conflict" in Illinois.

CONGRESSIONAL APPORTIONMENT VS. LEGISLATIVE APPORTIONMENT.

The fact is that there is no legal relationship, in any respect, between the question of Congressional Apportionment involved in this case and the question of Legislative Apportionment, involved in the "Fergus" cases. Nevertheless these two controversies have been linked together in a practical way before the bar of Public Opinion in Illinois, and have purposely been kept in juxtaposition with each other by the "Down-State" political leaders and their followers. The false idea has been fostered and engendered (for propaganda purposes) that there is some logical and legal relationship between these two problems. Indeed these two controversies have been kept *vis-a-vis* each other as if there were some valid relationship between them. The idea was to indoctrinate the public with the notion that the issue somehow involved Congressional Apportionment *vs.* Legislative Apportionment.

It is because of these matters that it has been necessary to discuss the question of Legislative Apportionment, and the "Fergus" cases in this STATEMENT OF THE CASE.

Lawlessness by Law Makers.

Following the decision of the Supreme Court of Illinois in the last of the "Fergus" cases about 1930, the General Assembly of Illinois has continued for another decade and a half its defiant refusal to reapportion the State of Illinois, either for Legislative Districts or for Congressional Districts. We think it is entirely fair to say that the conduct of the Legislature in Illinois in this respect is *the outstanding instance of lawlessness by lawmakers that has been found in the history of the Union since the time of the Civil War.*

The Illinois Courts and Congressional Apportionment.

For about 10 years following the Federal Census of 1931 the State of Illinois was entitled to 27 Congressmen. Since there are only 25 Congressional Districts in the State, it became necessary at several succeeding Congressional Elections to elect two Congressmen "at large" from Illinois. (After the Census of 1940 the number of Congressmen from Illinois was reduced to 26, at which number it now stands, so that there is still one Congressman "at large" regularly elected in Illinois.) The inglorious story of the Illinois Courts and Congressional Apportionment must now be told.

Partly because of the political inconvenience and dissatisfaction with the necessity of electing two Congressmen "at large" in the State (and perhaps because of a temporary sense of repentance) the Illinois General Assembly in 1931 passed an Act dividing the State into 27 Congressional Districts. (Laws of Ill. 1931, 546.) That Act in itself, however, was upon its face an open and flagrant example of gerrymandering; since the Congressional Districts in the State under the 1931 Act varied in population from 158,000 to 541,000.

MORAN v. BOWLEY.

Early in the year, and substantially before any Congressional Elections were held in Illinois in 1932 under that Act, the 1931 Statute was declared invalid and unconstitutional by the Supreme Court of Illinois in the case of *Moran* v. *Bowley,* 347 Ill. 148, 179 N. E. 526. The Illinois Supreme Court in the *Bowley Case* bravely held that the 1931 Statute (by reason of its gross inequality in the population of the Districts it created) violated the fundamental principle that Congressional Districts must contain "as nearly as practicable an equal number of inhabitants."

In the *Moran* v. *Bowley Case* the Supreme Court of Illinois however did another sound and sensible thing, because it held that the 1931 Congressional Re-Districting Act also violated the provision of the Constitution of Illinois found in the Bill of Rights (Sec. 18, Art. III) which provides that: "All elections shall be free and equal." The force and effect of that provision of the Illinois Constitution in the case at bar is specifically relied upon in the Complaint below (R. p. 13) and is particularly urged upon this Court later on in this Brief (p. ...). But, as we shall see in a moment, the Supreme Court of Illinois within a very few years completely repudiated that particular holding of the *Moran* v. *Bowley Case*.

AN ABSURD RESULT OF THE BOWLEY CASE.

Because of the gross discrimination as to population between the Congressional Districts set up under the 1931 Act, the Supreme Court of Illinois in the *Bowley Case* did not hesitate to hold that Act invalid and unconstitutional. But the absurd result which followed from that holding in the *Moran* v. *Bowley Case,* was that *the Court left in full force and effect the much more offensive and flagrant Act of 1901,* whose Congressional Districts were far more unequal and discriminatory than even those set up in the 1931 Act. When this ridiculous result of the decision in *Moran* v. *Bowley* is considered, one can only exclaim with Cicero: *"O! Tempora, O! Mores!"*

THE ILLINOIS COURT REVERSES ITSELF.

It is not pleasant for a member of the Illinois Bar to make critical comments about the holdings of the Supreme Court of his state, but there is no way to avoid that dilemma upon this Argument if the truth is to be told. The fact is that the utter lack of consistency, with which the

question of Congressional Apportionment has been considered by the Illinois courts, is clearly indicated by the foregoing comment and is particularly proved by the net result achieved in the *Moran* v. *Bowley* case above cited.

But the complete inconsistency of the Illinois courts with respect to Congressional Reapportionment is proved beyond question by the decision of the Supreme Court of Illinois in *Daly* v. *Madison County,* 378 Ill. 357, 38 N. E. 2d 160, decided in 1941. In that case an Illinois voter brought a suit to knock out the 1901 state Congressional Apportionment Act, relying on the vigorous language of the Illinois Supreme Court in the case of *Moran* v. *Bowley,* decided in 1932. The trial court in Illinois, being properly bound by the language and decision of the Supreme Court in the *Moran* v. *Bowley case,* promptly entered a judgment and decree striking down the 1901 Congressional Apportionment Act and restraining the Illinois election officials, including the Secretary of State, from taking any steps to carry out or enforce that Act in the Congressional elections to be held in the year 1932. The Attorney General of Illinois, however, took an appeal from that judgment and decree; and the Supreme Court of Illinois in the *Daly* v. *Madison County* case above cited completely reversed itself and revoked its holding and opinion in the *Moran* v. *Bowley* case of nine years before.

The utter lack of principle of the Illinois courts is clearly illustrated by the fact that, in the *Daly* v. *Madison County* case, the Supreme Court of Illinois expressly repudiated its prior holding that the provision of the Illinois Constitution concerning equality of elections applied to elections for Congress. In the *Daly* case the Illinois Court actually went to the extent of saying that the provision of the Illinois Constitution, "All

Elections shall be free and equal", did not apply to Congressional elections! Again we say, *"O! Tempora O! Mores!"*

Summary as to Statement of the Case.

From what has been said in the foregoing Statement of the Case, the Supreme Court of the United States will understand and appreciate that for more than three decades the citizens of Illinois have been clamped about by a sort of illegal strait-jacket, so far as their rights in Congressional elections are concerned. The Court will also realize that the present suit is without doubt a last resort on behalf of the citizens of Illinois in their effort to strike down and remove that strait-jacket.

We respectfully assert and charge that it may be taken for granted that the strait-jacket in Illinois will continue, and the "Legislative Rebellion" on the part of the General Assembly of that State will go on, unless and until some legal "Atomic Bomb" shall be dropped on the situation in that State. And so after this long STATEMENT OF THE CASE about this controversy, we come to our ARGUMENT ON THE LAW.

POINTS AND AUTHORITIES.

I.

The Court Has Jurisdiction of This Direct Appeal From the Special Three-Judge Court Which Heard the Case Below.

28 USCA, 380; 28 USCA, 345.
Cumberland Telephone Co. v. *Public Service Com'rs.*, 260 U.S. 212, 216.
American Ins. Co. v. *Lucas,* 38 Fed. Sup. 926.

Smiley v. *Holm,* 285 U.S. 355.
Koenig v. *Flynn,* 285 U.S. 375.
Carroll v. *Becker,* 285 U.S. 380.
Richardson v. *McChesney,* 218 U.S. 487.

II.

What the Appellants Are Here Chiefly Seeking Is That This Court Strike Down As Unconstitutional and Void the Antiquated Congressional Districting Act of Illinois of 1901, Because of the Gross Discrimination and Violent Inequalities Now Resulting From That Statute.

Smiley v. *Holm,* 285 U.S. 355.
46 Stat. L. 21.
Giles v. *Harris,* 189 U.S. 475.
Koenig v. *Flynn,* 285 U.S. 375.
Koenig v. *Flynn,* (N.Y.) 179 N.E. 705.
Carroll v. *Becker,* 285 U.S. 380.
Carroll v. *Becker* (Mo.) 45 S.W.(2) 533.
Brown v. *Saunders,* (Va.) 166 S.E. 105.

III.

The State of Illinois Has Particularly Abridged the Privilege of The Appellants As Citizens of the United States In Violation of the Privileges Or Immunities Clause of the Fourteenth Amendment.

Snowden v. *Hughes,* 321 U.S. 1.
Wiley v. *Sinkler,* 179 U.S. 58, 62.
Slaughter House Cases, 16 Wall. 36.
Twining v. *New Jersey,* 211 U.S. 78.
Hague v. *C.I.O.* 307 U.S. 496.
Edwards v. *California,* 314 U.S. 160.
Screws v. *United States,* .. , U.S. , 65 S. Ct. 1031.
Lien's Privileges and Immunities of Citizens of the U.S. p. 80.
Privileges and Immunities Clause, 14th Amendment, 4 Ia. Law Bulletin, 219.

Ill. Rev. St. 1945, Ch. 46, Sec. 3-1.
U.S. Constitution, Art. I, Sec. 2.
U.S. Constitution, Art. I, Sec. 4.
U.S. Constitution, Art. I, Secs. 2 and 3.
14th Amendment, Sec. 2.
U.S. Rev. Stat. Ch. 2, Sec. 23.
U.S. v. *Classic,* 313 U.S. 299.

Nixon v. *Herndon,* 273 U.S. 56.
Nixon v. *Condon,* 286 U.S. 73.
Smith v. *Allwright,* 321 U.S. 649.
King v. *Chapman,* 62 Fed. Sup. 639.
Lane v. *Wilson,* 307 U.S. 268.
Giddings v. *Secy. of State,* 93 Mich. 1.

Atty. Gen'l. v. *Apportionment Com'rs.* 224 Mass. 598, 602.
Ragland v. *Anderson,* 125 Ky. 141.
Wood v. *Broom,* 287 U.S. 1.

Bowman v. *Lewis,* 101 U.S. 22.
Hayes v. *Mo.,* 120 U.S. 68.
Mason v. *Mo.,* 179 U.S. 328.
Mallett v. *N.C.* 181 U.S. 589.
Ft. Smith, etc., Tr. Co. v. *Brd. of Imp.,* 274 U.S. 387.
Ohio v. *Akron Met. Park Dist.* 281 U.S. 74.
Buchanan v. *Warley,* 245 U.S. 60.
Fed of Labor v. *McAdory,* 325 U.S. 450, 462.
Nashville C. & St.L.Ry. v. *Walters,* 294 U.S. 405.
Abie State Bank v. *Weaver,* 282 U.S. 765.
Chastleton Corp. v. *Sinclair,* 264 U.S. 543.
State ex rel. Kinsley v. *Jones,* 66 Ohio State 453.
State ex rel. Beacon, 66 Ohio St. 491.
Dodd Cases Constitutional Law (3rd Ed.) p. 95.

IV.

The Theory of the Complaint In This Case and the Right of Illinois Citizens to Free and Equal Voting Power for Members of Congress Is Grounded on and Buttressed by the Principles Announced by This Honorable Court In Several Historical Cases.

United States v. *Classic,* 313 U.S. 299.
Smith v. *Allwright,* 321 U.S. 649; 131 Fed. (2), 593.
16 Stat. L. 140.

8 USCA, p. 3, Ch. 2, Elective Franchise.
Ex parte Siebold, 100 U.S. 371.
Ex parte Yarbrough, 110 U.S. 651.

United States v. *Classic,* 313 U.S. 299.
Smith v. *Allwright,* 321 U.S. 649.
18 USCA, Secs. 50 and 51.
U.S. Constitution, Art. I, Secs. 2 and 4.
Grovey v. *Townsend,* 295 U.S. 45.
Wood v. *Broom,* 287 U.S. 1.

V.

Congress Has From the Very Earliest Times Asserted Power to Regulate and Control Federal Elections.

1 Stat. L. 239.
5 Stat. L. 721.
3 USCA, Sec. 1.
18 USCA, 61-61k.
5 Stat. L. 491.
U.S. Constitution, Art. I, Clause 3, Sec. 2.

United States v. *Classic,* 313 U.S. 299.
14th Amend. Sec. 2.
Story on The Constitution (1st Ed.) 814.
Hines' Precedents, Vol. 1, p. 170, *et seq.*

VI.

The Right to Equality at the Ballot Box, as Compared with Other Voters, Is an Essential Element of a Republican Form of Government. That Right Is Guaranteed to These Appellants by the Federal Constitution and Also by the Constitution of Illinois, But Is Violated by the Act of 1901 Here Under Attack.

U. S. Constitution, Art. IV, Sec. 4.
3 Stat. L. 428.
Luther v. *Borden,* 7 How. 1.
Pac. Tel. Co. v. *Oregon,* 223 U.S. 178.
Coleman v. *Miller,* 307 U.S. 433.
Opinion of the Justices, 10 Gray (76 Mass.) 613.
Atty. Gen'l v. *Apportionment Com'rs.,* (Mass.) 113 N.E. 581.
McPherson v. *Secy. of State,* 146 U.S. 23.

VII.

This Court Was Not Fully Informed as to the State of the Federal Law Concerning Congressional Elections When the Wood v. Broom Case, Ante, Came Up from Mississippi in 1932. In the Briefs and Argument in That Case This Court Was Led to Believe and Assumed That the Act of Congress of 1911 Was the Only Statute Requiring Congressional Districts to Contain "As Nearly as Practicable an Equal Number of Inhabitants."

18 Stat. L. 113.
U.S. Rev. Stat. 1874, Title Page.
U.S. Rev. Stat. Sec. 23.
31 Stat. L. 733.
Burgess, "Political Science & Constitutional Law," Vol. 2, p. 48.

Preface, U.S. Code, 1925.
Smiley v. *Holm,* 285 U.S. 355.
17 Stat. L. 28.
Wood v. *Broom,* 287 U.S. 1.
22 Stat. L. 5.
26 Stat. L. 735.
31 Stat. L. 733.
37 Stat. L. 13.
2 U.S. Code, 3.
2 USCA, 3.

VIII.

The Northwest Ordinance of 1787 Contains a Specific Guaranty of "Proportionate Representation of the People in the Legislature." By Virtue of the Enabling Act of 1818 and the Illinois Constitution of That Year the Provision of the Northwest Ordinance Concerning "Proportionate Representation" Became a Permanent Part of the Organic Law of Illinois.

3 Stat. L. 428.
1 USCA, p. 18 *et seq.*
Wallace v. *Parker,* 31 U.S. 311, 6 Pet. 680.
Jones v. *Van Zandt,* 5 How. 215.
Permoli v. *New Orleans,* 3 How. 589.
Strader v. *Graham,* 10 How. 82.
Penna. v. *Bridge Co.,* 18 How. 421.
Bates v. *Brown,* 5 Wall. 710.
Messenber v. *Mason,* 10 Wall. 507.
Clinton v. *Englebrecht,* 134 Wall. 434.
Langdean v. *Hanes,* 21 Wall. 521.
Morton v. *Nebraska,* 21 Wall. 660.
Northwest Ordinance, Art. II.
Denny v. *State,* (Ind.) 42 N.E. 929.

IX.

The Constitution of Illinois Has a Specific Guaranty That "All Elections Shall Be Free and Equal." (Art II, Sec. 18.) This Provision Has Always Been Held Applicable by the Supreme Court to All Elections of Every Kind. Therefore, It Should Clearly Apply to Congressional Elections.

Ill. Constitution, 1870, Art. II, Sec. 18.
Opinions, Atty. Gen. Ill. 1915, p. 229.
People v. *Hoffman,* 116 Ill. 586.
People v. *Wanek,* 241 Ill. 529.
Moran v. *Bowley,* 347 Ill. 148.
Daly v. *Madison County,* 378 Ill. 357, 38 N.E. (2) 160.
Rev. Stat. Ill. Ch. 37, "Courts", Sec. 1.

X.

The Declaratory Judgment, While Having Its Roots in Equity, Protects All Rights and Is Sui Generis.

Ex parte Siebold, 100 U.S. 371.
Ex parte Yarbrough, 110 U.S. 651.
Smith v. *Allwright,* 321 U.S. 649.
Ekern v. *Dammann,* 215 Wis. 394, 254 N.W. 759.
People ex rel. Fergus v. *Marks,* 321 Ill. 510.
Fergus v. *Kinney,* 333 Ill. 437.
People ex rel. Fergus v. *Blackwell,* 342 Ill. 223.
United States v. *Classic,* 313 U.S. 299.
Smiley v. *Holm,* 287 U.S. 352.
Koenig v. *Flynn,* 285 U.S. 375.
Carroll v. *Becker,* 285 U.S. 380.
Giles v. *Harris,* 185 U.S. 475.

Borchard on Declaratory Judgments (2nd Ed.), 868.

Atty. Gen'l v. *Apportionment Com'rs.,* 224 Mass. 598.

Ex parte Young, 209 U.S. 123.

Richardson v. *McChesney,* 218 U.S. 487.

Tirrell v. *Johnston,* 86 N.H. 530, 532.

Socony-Vacuum Oil Co. v. *City of N. Y.,* 247 App. Div. 162, 168.

Great Lakes, etc. Co. v. *Huffman,* 319 U.S. 293, 299.

Coffman v. *Breese Corp.,* 323 U.S. 316.

Ala. State Fed. of Labor v. *McAdory,* 325 U.S. 450, 462.

Adkins v. *Children's Hospital,* 261 U.S. 525.

McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.,* 235 U.S. 151.

Truax v. *Corrigan,* 257 U.S. 312.

Hague v. *C.I.O.,* 307 U.S. 496.

Douglas v. *City of Jeannette,* 319 U.S. 157.

Fraenkel, "Our Civil Liberties", p. 243.

SUMMARY OF MAJOR ISSUES AND ARGUMENT.

The major issues of law presented by the Complaint below and urged by the Appellants before this Honorable Court may be summarized as follows:

First. The presently existing Congressional Apportionment Act of Illinois (Ill. Rev. Stat. Chap. 46, Secs. 154, 155, 156) has never been changed since its enactment in 1901; and this is true in spite of the obligation of that State to revise and equalize its Congressional Districts after each Federal Census. The result is that at least 20 of the 25 Congressional Districts created by that Act are grossly unequal and disproportionate in population. Five of them are excessively over-populated; while at least five others have been so reduced in population by the shifts of time that some of them are mere ghosts or shells of what would be a full Congressional District. Some of these "ghost" Districts are in fact a reproduction in Modern America of the famous "Rotten Boroughs" of England of a century ago.

Second. The citizens of Illinois for more than 35 years (as charged in the Complaint and shown by the opinion below) have struggled and fought with the State authorities, including both the General Assembly of the State, and the Supreme Court of the State, for some relief from this intolerable situation; but all these efforts and struggles have been without avail.

Third. The Appellants here are asking merely that the Court strike down and annul, *as unconstitutional and void,* that antiquated State Statute of 1901. This Brief will show that the same relief has actually been granted in recent times, in a number of other States, where the State Congressional Districts were by no means as badly out of balance as those in Illinois. Those State Acts were, in several instances stricken

down by the State Supreme Courts, as being in violation of the Constitution and laws of the United States. These State cases will be cited and discussed in this Brief.

Fourth. Moreover two Special Three-Judge Federal Courts (as the Brief will show) granted the same relief, in two other States, within recent years; but their action in that respect was set aside by this Court on narrow and statutory grounds, in the case of *Wood* v. *Broom,* 287 U. S. 1. That case is however fully distinguished in this Brief. As indicated in the Opinion filed by the District Court below, that Three-Judge Court would have granted the Appellants the relief they seek if it had not been for the language of this Court in the *Wood* v. *Broom* case.

Fifth. The Complaint charges specifically (R. pp. 23 to 24) and, indeed, it is admitted in this case that a holding and ruling by this Court, that the antiquated Illinois Act is unconstitutional and void, will not produce any public confusion or disorder in future elections in Illinois; but will merely result in all 26 Congressmen from Illinois being elected "at large" until such time as the General Assembly of that State shall pass a fair and equal and just Congressional Apportionment Act.

Sixth. This Brief will show (as above suggested in paragraph Third) that in at least five States, in recent times, an unfair and discriminatory State Congressional Districting Act has been stricken down with the result that the first election thereafter for Congress has been held "at large"; and promptly thereafter the Legislature of each of the States in question diligently proceeded to pass and adopt a valid and proper State Apportionment Act. In other words, the situation in any State automatically cures itself when the Courts have spoken.

Seventh. It is the theory and contention of the Complaint in this case, as set forth in detailed charges, that the Illinois Act of 1901 violates several guaranties and

provisions of the Federal Constitution. (R. pp. 4 to 8.) It is also charged that it violates certain specific provisions of the "Northwest Ordinance" of 1787, which the State of Illinois has directly assumed and adopted and incorporated in its fundamental law. (R. pp. 9 to 12) Finally, it is charged that it violates the primary guaranty found in the "Bill of Rights" of the Illinois Constitution itself, that: "All elections shall be free and equal." (R. pp. 12 to 13)

Eighth. The Appellants will show in this Brief that the Federal Declaratory Judgment Act of 1934 (upon which the Appellants particularly rely) has opened up new vistas of the law for the protection and enforcement of just such "Civil Rights" of the Appellants as the Record shows have been grossly violated in this case. Although its use for this particular purpose is rather new, that Act gives effective and sensible procedures under which the right to vote in Federal Elections may be guaranteed and enforced—procedures which were denied to the citizen before the enactment of that Statute, and therefore were not available when this Court, in the year 1932, decided the case of *Wood* v. *Broom* above cited.

ARGUMENT.

POINT I.

JURISDICTION.

This Court Has Jurisdiction of This Direct Appeal From the Special Three-Judge Court Which Heard the Case Below.

The Complaint below (R. p. 26) contained a "Request For a Special Court", based upon the provisions of Section 266 of the Judicial Code (Title 28, USCA 380), providing for a Three-Judge Court where the constitutionality of a State statute is involved, and where an interlocutory injunction or restraining order is sought against the enforcement of that particular statute. The Complaint below asked that the Illinois Act of 1901, above cited, be held unconstitutional and void and it also contained a special prayer " for injunctive relief" against the Defendant Certifying Board to restrain them from carrying out the Illinois Act of 1901 here under attack (R p. 26.)

The Special Three-Judge Court, at the close of the Argument below, entered an extended draft order or decree (R. pp. 44 to 46) denying the prayer for temporary injunctive relief, denying the prayer for permanent injunctive relief, and dismissing the cause, thereby justifying this direct Appeal.

Under Section 266 of the Judicial Code above mentioned, it is provided, among other things:

> "A direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

Congress has also provided for direct appeal from the District Court to the Supreme Court of the United States under another Statute which specifically authorizes this direct appeal. Under Section 238 of the Judicial Code (USCA Title 28, Sec. 345) it is provided that:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is provided in the following sections:
>
> * * * * *
>
> "3. Section 380 of this title." (Being Sec. 266 of the Judicial Code.)

A direct appeal is therefore clearly authorized in this case.

PURPOSE OF THREE-JUDGE COURT ACT.

Chief Justice Taft, in *Cumberland Telephone Co.* v. *Public Service Com'rs.*, 260 U.S. 212, at p. 216, had occasion to discuss the purpose and intent of Congress in providing for a Special Three-Judge Court in Section 266 of the Judicial Code. Chief Justice Taft there said:

> "The wording of the Section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a Federal Court with the enforcement of State legislation regularly enacted and in the course of execution, a matter of adequate hearing and the full deliberation which the presence of three Judges, one of whom should be a Circuit Justice or Judge, was likely to secure."

In the recent case of *American Ins. Co.* v. *Lucas,* 38 Fed. Sup. 926, (Appeal dismissed, 314 U.S. 575; Certiorari Denied, 317 U.S. 687; Rehearing Denied, 317 U.S. 712) a Special Three-Judge Court again referred to the purpose and intent of Congress on passing this particular Act, and after citing the *Cumberland Telephone Case* above men-

tioned said, with respect to Section 266 of the Judicial Code:

> "The purposes of the statute were to provide adequate hearing and full deliberation by three judges and thus prevent a single judge sitting in the District from improvidently granting injunctions interfering with the operation of State law."

This Court Has Jurisdiction to Entertain the Review of This Case on the Merits.

FIVE EARLIER CONGRESSIONAL DISTRICTING CASES IN THIS COURT.

It is pointed out later on in this Brief in some detail, in the discussion of the case of *Smiley* v. *Holm,* 285 U.S. 355, that this Court will review and even reverse the judgment of a lower Court where that Court has refused to protect the right of citizens to equality in voting under a State Congressional Redistricting Act.

This Brief later on also points out in detail how this Court sustained the judgment in two other cases (*Koenig* v. *Flynn, Secretary of State of New York,* 285 U.S. 375, and *Carroll* v. *Beckler, Secretary of State of Missouri,* 285, U.S. 380) where the lower courts had themselves stricken down State Congressional Districting cases on the ground of their gross inequality and discrimination, so far as population of the Congressional districts was concerned. The implicit effect of these decisions, we say, is clearly to suggest that this Court has jurisdiction in the case at bar.

The fourth case in point of time in which this court actually took jurisdiction of a Congressional Districting Case is the case of *Wood* v. *Broom,* 287 U.S. 1.

AN INTERESTING AND SUGGESTIVE CASE.

There is, however, a fifth and earlier case decided by this Court, where the Court took jurisdiction in a Congressional Districting Case. That case is particularly pertinent and interesting on this Argument and strongly suggests that jurisdiction exists in the case at bar. That is the case of *Richardson* v. *McChesney, Secretary of State of Kentucky,* 218 U.S. 487, decided in 1910. It will be helpful to discuss that case in summary fashion at this point.

In that case it appeared that Kentucky by a State statute passed in 1890 had "laid off the State" into eleven Congressional Districts. This Act was based upon the Federal Census of 1880, since the Census of 1890 had not been issued when the Act was passed. It appears in the opinion of the Kentucky Court, hereinafter cited, that the Congressional Districts were not too "grossly unequal" in population, since the Districts varied only from 114,000 to 188,000. In 1898 the Kentucky Legislature passed two Acts rearranging the eleven Congressional Districts, taking certain counties from certain Districts and adding certain counties to certain other Districts. Thereupon a Bill in Equity was filed in the State courts in Kentucky by Richardson against McChesney, Secretary of State, asking the Court first "to declare invalid the Act of 1890 and the Acts of 1898" above mentioned; and second asking for an injunction against the Secretary of State restraining him from taking any steps with regard to the Congressional election in November 1908, based on the three Acts above mentioned. It is interesting to note, therefore, that here we have a plain Equity case, in which the Plaintiff attacked the validity of a Congressional Districting Act in a State, and both the State Courts and this Court took jurisdiction of the case.

JURISDICTION IN EQUITY.

In this Brief we point out, later on, the falsity of the contention made by Counsel for Appellees in his "STATEMENT IN OPPOSITION TO JURISDICTION" filed in this case, that "Courts of Equity will never grant relief in election cases". The fact is that the *Richardson* v. *McChesney* Case went through the trial court in Kentucky and the Supreme Court of Kentucky and through the Supreme Court of the United States, without that question, as to lack of jurisdiction in equity in an election case, being in any way raised or sustained by any of those courts. The Supreme Court of Kentucky in an opinion and judgment entered March 11, 1908, (eight months before the General Election in November 1908) merely held that "it is not within the power of the courts to control the legislative department in the creation of Congressional districts in any kind of a case". That holding of the Kentucky Court, we shall see later, is directly contrary to the holding of the highest courts in a number of other states, and particularly the courts of New York, Virginia and Missouri.[2]

A MOOT CASE ON REVIEW.

The *Richardson* v. *McChesney* case was later taken to the Supreme Court of the United States by a Writ of Error but there was obviously some substantial delay in taking up the case. The fact is that the case was not argued in the Supreme Court of the United States until

[2] Strangely enough the Kentucky court in the *Richardson* v *McChesney Case* announces the dictum that the courts in that State *have jurisdiction to strike down State statutes setting up State Legislative Districts;* and the court cites the well known case of *Raglan* v *Anderson,* 100 S W 865, a leading case, decided by the Supreme Court of Kentucky for its dictum in that regard The Kentucky court in the Richardson case, for some strange reason, saw no inconsistency in its diverse holdings in these two respects.

November 1910, nearly two years after the election which was involved had occurred. The Supreme Court of the United States in the Richardson Case held that since the issues in the case "related solely to an election to be held in November 1908", and that that election had long since passed, the matter before the Supreme Court on that Review was moot. (A totally different situation exists on that question of timeliness, as we shall see later, in the case at bar.) Therefore, the Supreme Court in the Richardson Case dismissed the Writ of Error.

NOT A "SUIT AGAINST THE STATE".

It appears from the "STATEMENT IN OPPOSITION TO JURISDICTION" filed by Counsel for the Appellees in this case, that one of the major contentions made by such Counsel on this Review is that this Court has no jurisdiction because it is claimed the present action is a "suit against the State of Illinois." The Supreme Court in its opinion in the Richardson Case completely disposes of that contention when it says:

> "It is not a suit against the State of Kentucky. The State is not subject to suit. * * * The only ground for making McChesney (the Secretary of State) a defendant is to enjoin him personally from doing something, which he may not lawfully do, and to require him personally to do another thing which it is claimed it is his legal duty to do, as an administrative act requiring no discretion. If he disobeyed the mandate or injunction of the Court he personally would be in contempt."

Here we say is a very cogent and apt doctrine clearly applicable to the case at bar. The present suit is brought against three State Officials, constituting the State "Certifying Board". The major issue is the validity of a State statute concerned with Congressional elections. The main prayer for relief is that the antiquated Act of 1901 in

Illinois be stricken down by the Court as unconstitutional and void; and the prayer then asks (but only if it be necessary) the Court go further and restrain the individual Defendants from performing any functions or duties, concerned with the Congressional elections under the invalid and discriminatory Act of 1901. This case we say (in advance)is not a suit against the State of Illinois.

Summary as to Jurisdiction.

Professor James Bradley Thayer in his "Life of John Marshall" (1901, p. 104 *et seq.*) discusses the care with which the great Chief Justice observed the jurisdictional requirements applicable to the Supreme Court; being sure on the one hand that the Court would never take jurisdiction improperly, and on the other hand that the Court would never refuse jurisdiction where a case should be taken and considered. Thayer tells us that on one occasion, toward the close of his life, the Chief Justice paid a visit to Philadelphia in 1831, where he was given a tribute by the Philadelphia Bar; and in reply Marshall remarked (to quote Professor Thayer):

> "That if he might be permitted to claim for himself and his associates any part of the kind things they had said (of him) it would be this, that they (the Court) had: '*Never Sought to Enlarge the Judicial Power Beyond Its Proper Bounds, Nor Feared to Carry It to the Fullest Extent that Duty Required.*' "[3]

There, we say, in those words of Marshall is found the guide that will clearly permit this Court to take jurisdiction of this case on the merits.

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[3] This comment of Professor Thayer's and the excellent dictum of Chief Justice Marshall on the point of the jurisdiction of this Honorable Court, is quoted by Justice Frankfurter, of this Court, in his dissenting opinion in one of the so-called "Salute the Flag" cases, *Board of Education* v *Barnett,* 319 U S 624, at p 668.

Point II.

THE PRAGMATIC SITUATION BEFORE THE COURT.

What the Appellants Are Here Chiefly Seeking Is That This Court Strike Down as Unconstitutional and Void the Antiquated Congressional Districting Act of Illinois of 1901, Because of the Gross Discrimination and Violent Inequalities Now Resulting From That Statute. Similar Relief Has Actually Been Granted to the Citizens of Other States in Recent Years, Not Only by the Action of the Supreme Court of Several Leading States, But Also, Indirectly, by the Action of This Court as Well. Accordingly, Because of the Pragmatic Situation Now Before It, This Court Has a Clear Path in That Direction as We Will Now Try to Show.

A "Pattern" for the Case at Bar.

The question has been asked by good lawyers as to where Counsel for the Appellants got the original idea for bringing this suit, and that question may properly occur to this Court at the outset of this Argument. The answer lies in a series of cases which we will now discuss, because these cases furnish a sort of laboratory test of the Appellants' right to relief in this case. These cases provide this Court with a pragmatic situation which strongly suggests it should grant the relief prayed by the Appellants in this case. Indeed the first case we shall discuss furnishes what may well be called a "pattern" for deciding the case at bar.

In April, 1932, the Supreme Court of the United States decided the leading case of *Smiley* v. *Holm, Sec. of State,* 285 U. S. 355. That case came to the Supreme Court of

the United States on certiorari from the Supreme Court of Minnesota, where the case was decided in 1931 (as reported in 238 N. W. 494). Because a searching appraisal of the facts and circumstances of that case are so important and so controlling in the case at bar, we are giving herewith a short statement of that case as it appears in the Report of the Minnesota Supreme Court decision.

CASE CLOSELY SIMILAR TO CASE AT BAR.

Smiley, "a citizen and voter and taxpayer" of Minnesota, about a year before the 1932 General Elections, brought a taxpayer's suit by way of a Bill in Equity against the Secretary of State of Minnesota in the District Court of Ramsey County (City of St. Paul), challenging an Act of Minnesota (Laws Min. 1931, 640) which had attempted to make a new Congressional Apportionment for that State. Prior to 1910 Minnesota had been entitled to 10 Congressmen, but that number was reduced to 9 by the Act of Congress of 1929 (46 Stat. L. 21). The Minnesota Statute in question had been passed by both Houses of the State Legislature in April, 1931, but had been vetoed by the Governor because of the gross inequalities that existed between certain of the proposed Congressional Districts on the basis of population; the proposed Districts in that respect varying from a population of 228,000 in one District to a population of 344,000 in another. Under the 1930 Federal Census Minnesota had a population of 2,551,583 and "a fair and equal division" of that population into 9 Congressional Districts would allocate an average number of 283,509 inhabitants to each District. After the Governor's veto, the Minnesota House of Representatives by formal resolution attempted to hold that the Bill did not require the Governor's signature, and directed that the Bill be lodged with the Secretary of State, notwithstanding the

veto of the Governor. Thereafter the Secretary of State proceeded to act on the theory that (as the opinion of the Minnesota Court says): "The Governor's veto was a nullity."

The Secretary of State thereafter proceeded to accept prospective Congressional Nominating Papers from "District" Candidates under the proposed Bill; and when other persons attempted to file Congressional Nominating Papers with the Secretary of State *"at large"* (on the theory that there was no valid Congressional Districting Act in Minnesota), the Secretary of State refused to accept the latter documents. The Supreme Court in its opinion points out that Smiley in his suit—

> "sought to sustain the veto of the Governor and to have determined the question as to whether or not (The Bill) was a nullity."

Here, then, we have in the Minnesota Courts an almost identical effort on behalf of Minnesota citizens to the proceeding started by the Appellants in the District Court below, seeking to have the question determined as to whether or not the 1901 Illinois Statute is "a nullity." The Minnesota Court (two Judges dissenting) held that the Minnesota Bill was a good Districting Act, and, therefore, dismissed the taxpayer's complaint on demurrer. It is from that judgment that the case was taken to the Supreme Court of the United States on certiorari, as we have already stated.

RELIEF IN EQUITY.

The Supreme Court of the United States by unanimous opinion by Chief Justice Hughes reversed the Minnesota Court and held that the "Bill" in that State was null and void. In other words, this Court in the *Smiley* v. *Holm* Case did exactly the same thing with respect to the major

question involved that Appellants are asking this Court to do—namely, to hold a State Congressional Districting Act unconstitutional and void. The preliminary statement of the facts of the case in the official United States Reports (like the Report in the Northwestern Reporter, above cited, for the Minnesota Court decision) states that the action below was a "Bill" in which the plaintiff attempted to establish his rights by a proceeding In Equity. Chief Justice Hughes in his opinion points out that

> "The suit was brought by the petitioner as 'a citizen, elector and taxpayer' of the State to obtain a judgment declaring invalid all filings for nomination for the office of Representative in Congress, which should designate a subdivision of the State as a Congressional District, and to enjoin the Secretary of State from giving notice of the holding of elections for that office in such subdivisions."

Thus we have a situation where a Minnesota citizen in 1931, was proceeding in Equity to ask the Minnesota Courts to grant the same relief sought by the Appellants in their Complaint below in a Declaratory Judgment Proceeding; not only with regard to having the Court declare "invalid" any Nominating Papers filed under the existing State Districting Act, but also with regard to seeking an injunction against the State Election Officials enjoining them from operating under the State Statute.

As we have seen, the Supreme Court of Minnesota (like the District Court below in the case at bar) dismissed the Complaint on demurrer. The Supreme Court of the United States reversed that judgment, and thereby in effect not only held invalid the Minnesota Congressional Districting Act; but also by clear implication sustained the contention of the citizen in Minnesota, that he was entitled to injunctive relief against the State Officials.

Here, then, we have the Supreme Court of the United

States on appeal in 1932—and more than two years before the advent of the Federal Declaratory Judgment Act—taking jurisdiction in a case involving the unconstitutionality of a State Congressional Districting Act and holding that Act invalid. *It is for this reason that we say the Smiley* v. *Holm case is a "pattern" for the case at bar.*

GILES v. HARRIS DISTINGUISHED.

In the Argument of the Attorney General of Illinois before the District Court below, as well as in his "STATEMENT IN OPPOSITION TO JURISDICTION" filed on this Appeal, he relies strongly on the case of *Giles* v. *Harris,* 189 U. S. 475, to support his contention that "Equity has no power to act" in an Election case, and can give no relief to any citizen in an Election Case under any circumstances whatever.

We say bluntly in advance that the contentions of the Attorney General of Illinois in this regard is knocked into a cocked hat by the holding of this Honorable Court in the *Smiley* v. *Holm Case,* cited above. That was expressly shown to be an Equity case in the trial court and all relief had been denied below by the Minnesota Courts. We say that the Supreme Court of the United States, by reversing the Supreme Court of Minnesota in the *Smiley* v. *Holm Case,* necessarily approved a proceeding by way of Equity to establish the rights of a citizen in Congressional Elections. We further say that if the *Giles* v. *Harris Case* above cited ever stood for the doctrine, *as applied to the case at bar,* for which the Attorney General of Illinois contends (which we do not for a moment admit), then it follows as the day follow night that the *Giles* v. *Harris Case* is to that extent either distinguished or overruled by this Honorable Court in the *Smiley* v. *Holm Case.*

The far-reaching result of the relief granted by this Court in the *Smiley* v. *Holm Case,* and the equitable nature of that

relief is made crystal-clear by the language of Chief Justice Hughes in that case, where he says with respect to the effect of the opinion of the Supreme Court of the United States:

> "It follows that * * * unless and until new Districts are created all Representatives allowed to the State (of Minnesota) must be elected by the State at large."

The opinion was handed down in April, 1932. It resulted as a practical matter in all 9 members of Congress from Minnesota being elected "at large" in the November, 1932 Elections. Here, then, is exactly the relief which the Appellants in the case at bar are seeking from this Court.

Second Supreme Court Decision on This Point.

On the same day that the Supreme Court handed down its opinion in the *Smiley* v. *Holm Case,* April 11, 1932, that Court, also speaking through Chief Justice Hughes, handed down two interesting and related decisions in which the facts were very similar and in which the Supreme Court of the United States was clearly taking jurisdiction with respect to passing upon a State Congressional Districting Act.

In *Koenig* v. *Flynn,* Secy. of State, 285 U. S. 375, decided April 11, 1932, certain "citizens and voters" of the State of New York had sought a writ of Mandamus to compel the Secretary of State of New York to certify that Congressional candidates in the State were:

> "to be elected in the Congressional Districts defined in a concurrent resolution of the Senate and the Assembly of that State, adopted April 10, 1931."

It will be particularly noted that the proceeding in the *Koenig* v. *Flynn Case* was by way of Mandamus, whereas the proceeding in the *Smiley* v. *Holm Case* in Minnesota had been a Bill in Equity. In the New York case the Secre-

tary of State had claimed that the "concurrent resolution" concerning Congressional Districts was ineffective and void, because it had not been submitted to the Governor like any other Bill. The Court of Appeals of New York had sustained the Secretary of State in a decision reported in 179 N. E. 705—in which that Court had held the so-called Congressional Re-Districting Act of New York null and void. The opinion of the Circuit Court of Appeals of New York in the report last cited will be discussed later on in this Brief. The Supreme Court of the United States by a memorandum opinion above cited based on the *Smiley* v. *Holm Case* (also above cited), affirmed the judgment of the New York Court. Thereby, in effect, the Supreme Court of the United States for the second time took jurisdiction of a case, and by its decision, held a State Statute concerning Congressional Districts unconstitutional and void.

Third Supreme Court Decision on This Point.

On the same day in which the Supreme Court decided the *Smiley* v. *Holm Case* and the *Koenig* v. *Flynn Case,* it also decided another interesting and related case coming up from the State of Missouri, *Carroll* v. *Becker,* Sec. of State, 285 U. S. 380. In that case it appeared that prior to the year 1929 the State of Missouri had been allocated 16 members of the House of Representatives of the United States, but under the Act of 1929, above cited, that number had been reduced to 13. Carroll, who was a citizen and voter of Missouri, brought a Mandamus proceeding to compel the Secretary of State of Missouri to accept and file his "Nominating Papers" for Congress in one of the purported "Districts" which he alleged had been created by a Bill passed by the Senate and the House of the State of Missouri in April, 1931. That Bill, however (as in the Minnesota case,

ante and the New York case, *ante*), had been vetoed by the Governor, because it had set up Congressional Districts which were flagrantly unequal in population. It was the contention of Carroll and others in Missouri that the proposed Bill did not require the signature of the Governor, and that it was a valid State Congressional Districting Act without his signature. The Supreme Court of Missouri in an opinion reported in 45 S. W. (2) 533, had refused any relief to Carroll in the Mandamus proceeding. The Supreme Court of the United States in its decision cited above affirmed the Supreme Court of Missouri by an opinion again written by Chief Justice Hughes. This Court in that opinion said, among other things:

> "The (Missouri) Court also decided that 'since the number of Representatives from Missouri has been reduced, the former Districts no longer exist and Representatives must be elected at large'."

Thus, the Supreme Court of the United States in three different cases in 1932 in effect approved the striking down of State Congressional Redistricting Acts, and approved the granting of relief against State Election officials, very similar to that which the Appellants in the case at bar are asking of this Court.

STATE CASES ON THIS POINT.

As We Have Already Indicated, the Supreme Courts in Several Leading States Have Themselves Likewise Granted the Specific Relief Sought by the Appellants in the Case at Bar; Since Those Courts at the Petition of Their Citizens Have Struck Down Congressional Apportionment Statutes in Those States Because Those Acts Failed to Observe What Has Been Called the "Rule of Equality" in Regard to the Population of Congressional Districts.

A Leading New York Case.

The decision of the Court of Appeals of New York in the case of *Koenig* v. *Flynn, Sec'y of State,* 179 N. E. 705 (above referred to), was affirmed, as we have seen, by this Court in 285 U. S. 375, the latter case being discussed above. The opinion of the New York Court of Appeals contains language that is very pertinent to the present Argument, and it will be helpful to give some short reference to it here. Incidentally it should be stated that one of the Judges of the New York Court who took part in the unanimous opinion there rendered was the late Justice Benjamin Cardozo, later a Justice of this Honorable Court.

The New York Court at the outset of its opinion did something which is particularly worthy of note here; since the Court specifically held that the Act of Congress of 1911 concerning Congressional Districts (37 Stat. L. 14), and the Act of Congress concerning Congressional Apportionment of 1929 (46 Stat. L. 26), were concerned with different subject matters, and therefore the two Acts were not in conflict in any way. That holding was made in February, 1932, just 8 months prior to the decision of this Court in the case of *Wood, Secy. of State* v. *Broom,* 287 U. S. 1, where

this Court took an opposite position with respect to that very question, and held that the 1929 Act had "superseded" the Act of 1911. The language of the New York Court on this point is something which we believe should be before this Court on the present Argument, because the New York Court said in vigorous fashion:

> "We do not think that Congress intended to repeal the Act of 1911, or thought that it would terminate upon the passage of the subsequent Act. The two Acts should be read together if possible."

That holding is, of course, in line with the implicit holding reflected in the language of the learned Judge who wrote the written opinion in the District Court below in this case. Moreover, as we shall see, that holding was also the view announced by the Supreme Court of Missouri in the *Carroll* v. *Becker Case,* which will shortly be cited and discussed.

"THE JUST AND REASONABLE RULE".

But it is the second point made by the New York Court that we wish particularly to stress and emphasize on this Argument; because the Court there used language which expresses in better language than we have been able to use the contention of the Appellants in the case at bar, when it said:

> "Even if we were to take a different view, however" (about the Acts of 1911 and 1929) "our conclusion would be that by the Act of 1911, and the similar Acts that preceded it, there had been a protracted recognition by Congress of *the just and reasonable rule* to be followed in the absence of statute, and that the rule should be adhered to even if the statute (of 1911) does not govern, *ex proprio vigore.*" (Italics added.)

Here, we say, the Court of Appeals of New York lays down the rule for which in an overall sense we have been

contending throughout this Argument: namely, that over and above any specific statute of Congress, and over and above any specific language in the Federal Constitution, "there has been a practical recognition by Congress" (from the Act of 1872 down to the Act of 1929) that equality of population must be observed as nearly as practicable by the States in setting up Congressional Districts.

A Significant Missouri Case.

We have seen that this Court in the case of *Carroll* v. *Becker, Secy. of State of Missouri,* 285 U. S. 380, cited and discussed above, affirmed the decision of the Supreme Court of Missouri, reported in 45 S. W. (2d) 533, which had struck down as unconstitutional and void a State Congressional Districting Act in that State. The opinion of the Supreme Court of Missouri in that case likewise deserves a summary consideration in this Argument. In that case Carroll had brought an original Mandamus proceeding in the Supreme Court of Missouri against the Secretary of State of that State to compel him to receive and file Carroll's Congressional Nominating Papers at the Election to be held in November, 1932. Carroll contended that a purported Statute which had passed the two Houses of the General Assembly of Missouri in 1931, attempting to provide new Congressional Districts in that State, was a valid Statute, in spite of the fact that the Bill had been vetoed by the Governor because of its unequal discriminatory features so far as the population of various Districts were concerned. The Missouri Supreme Court, after referring to the *Koenig Case* in New York, cited above, and the *Holm Case* in Minnesota, also cited above, rejected Carroll's contention and held that the purported Congressional Redistricting Act of Missouri was unconstitutional and void. In its opinion (handed down in February, 1932) the Missouri Supreme

Court made what we consider a strong and valid suggestion which we have not seen made in any other case and which we believe should be before this Court on this Argument, when the Missouri Court said:

> "Whatever the United States Supreme Court may decide about the continued validity or expiration of the Act of 1911, the terms of Sections 3 and 4 (of that Act) are significant as a Congressional interpretation of Section 4, Article I of the Federal Constitution."

In other words, the Missouri Supreme Court (agreeing by analogy with the quotation above given from the Supreme Court of New York) says, that regardless of whether the Act of Congress of 1911 be considered as superseded or not, Congress has interpreted Section 4 of Article I of the Federal Constitution as requiring substantial equality of population in Congressional Districts everywhere; and that if a State Statute setting up Congressional Districts does not observe that rule, the State Statute cannot stand.

An Important Virginia Case.

We come now to an important Virginia case, where the Supreme Court of that State in October, 1932 in *Brown* v. *Saunders,* 166 S. E. 105, struck down a statute of that State passed in the same year which had attempted to revise the Congressional Districts of Virginia along unequal and discriminatory lines. The case deserves particular comment here, since it strongly supports the position taken by the New York Court in the *Koenig Case, supra,* and the Missouri Court in the *Carroll Case, supra,* where we have seen each of those State Courts had struck down a similar State statute.

Virginia, like Mississippi and Kentucky and Missouri and Minnesota, had found their allotment of members of the House of Representatives of the United States reduced under the Federal Apportionment Act of 1929 cited above.

Thereafter, the General Assembly of Virginia in 1932 (Acts of Va. 1932, Ch. 23) passed a new Apportionment Act dividing the State into Congressional Districts. That Act was challenged by a citizen by way of an original Mandamus proceeding in the Supreme Court of that State brought against the Secretary of State.

In the Virginia Case we find an interesting incidental but significant point. The Virginia State Constitution contained, and still contains, a special provision (Art. II, Sec. 55) requiring that *Congressional Districts* must contain "as nearly as practicable an equal number of inhabitants." It will be noted that that language from the Virginia Constitution is identical with the language on that point found in Section 23 of the Revised Statutes of the United States and also repeated in the Congressional Apportionment Act of 1911 above cited. Here, then, we say, there is an explicit recognition by the Virginia Constitution of the fundamental principle with respect to equality of voting for Members of Congress that is so vigorously asserted by the New York Court of Appeals in the *Koenig Case, supra,* and in the quotation from that opinion given above in this Brief.

The State of Virginia, we say, in inserting into its fundamental law this principle of equality with regard to voting in Congressional Elections was merely adopting and making specific the fundamental and basic idea of the Federal Constitution on that point.

The Virginia Court in the *Brown* v. *Saunders* case held that the 1932 Act concerning Congressional Apportionment violated the provision of the State Constitution above cited and was therefore void. The Court ordered and directed that all Congressmen in Virginia be elected "at large" until such time as the General Assembly of Virginia might enact a valid and fair Congressional Apportionment Statute. In its opinion the Virginia Court took notice of the

important public questions involved (just as this Court no doubt will be concerned with those questions) and the Virginia Court said upon this point:

> "In reaching this conclusion we are not unaware of the fact that since November 20, 1788, Virginia has been divided into Districts for the purpose of the electors in the respective districts sending one Representative to Congress, and that the result of this election will be that for the first time in 144 years the entire membership of the House of Representatives from Virginia will be chosen by the electors in the State at large. However this may be, it is our duty, as it is the duty of all others, to obey the mandate of the fundamental law."

We have repeatedly pointed out in this Brief that the action of this Court in striking down the antiquated Illinois Act of 1901 will merely do what the Virginia Court in the *Brown* v. *Saunders Case* ordered should be done—*namely, it will merely compel the election of Congressmen in Illinois "at large", but only until such time as the General Assembly of that State shall turn over a new leaf and perform its constitutional duty by equalizing the discriminatory Congressional Districts now existing under the antiquated 1901 Act.*

COMMENT ON CONGRESSIONAL ELECTIONS "AT LARGE".

As we have seen in this Brief, the action of Congress by the Congressional Apportionment Act of 1929, above cited, resulted in the reducing of the number of Congressmen allocated to a number of States. Thus, Missouri was reduced from 16 to 13. Kentucky was reduced from 11 to 9. Mississippi was reduced from 9 to 8. Minnesota was reduced from 10 to 9. Virginia was reduced from 10 to 9. This Brief also shows that because the State Legislature in those States violated their constitutional duty in attempting to pass flagrant and discriminatory Congressional

Districting Acts, the Courts struck down those Acts, with the result that the delegation of Congressmen from each of those States at the General Election in November, 1932 was elected "at large."

RELIEF HERE SOUGHT, NEITHER STARTLING NOR NOVEL.

It is, therefore, obvious and conclusive that the relief which the Appellants seek in this case is neither novel nor startling, nor in any way harmful to the public interest. That point was specifically charged and stressed in the Complaint filed in this cause (R. p. 22), where it is specifically pointed out that no harm would come to the public order or business generally if the 1901 Act here under attack should be declared null and void. The Complaint there points out, and it is admitted on this Record, that Illinois is now compelled to elect 1 Congressman "at Large", since it is entitled to 26 members in the House of Representatives of the United States, and yet has only 25 Congressional Districts, under the antiquated Act of 1901. The fact, therefore, is that, as charged in the Complaint, the State of Illinois is thoroughly familiar with the process of electing Congressmen "at Large;" and there will be no startling results whatever in that State in the 1946 Elections (so far as the experience and knowledge of the voters are concerned) if all the Congressmen for that State should be elected "at Large" at the coming Election. Indeed, we go further and say that such a result would come as a wholesome dose for the political leaders of Illinois. What may be called the political "pathological disorders" in that State (so far as equality of voting is concerned) need a drastic cure. There can be no doubt whatever, that a judgment and opinion in this case by this Honorable Court would perform that function and would everywhere be welcomed, not only in Illinois, but throughout the Nation, by law abiding and public-spirited men and women.

Point III.

14TH AMENDMENT.[4]

The State of Illinois Has Particularly Abridged the Privileges of the Appellants as Citizens of the United States in Violation of the Privileges or Immunities Clause of the Fourteenth Amendment.

"PRIVILEGES OR IMMUNITIES" OF UNITED STATES CITIZENSHIP.

In *Snowden* v. *Hughes,* 321 U. S. 1, Mr. Chief Justice Stone on behalf of the majority of the court defined the privileges or immunities clause of the Fourteenth Amendment in this language:

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to State citizenship and derived solely from the relationship of the citizen and his State established by State law."

In this respect it should be remembered that the Supreme Court in *Wiley* v. *Sinkler,* 179 U. S. 58, 62, had previously stated the principle that:

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."

In the *Slaughter House* Cases, 16 Wall. 36, it was conceded by this Court that there are privileges distinctive to

[4] This part of this Brief has been written by Professor Kenneth C Sears (one of the Appellants), Professor of Law at the Law School, University of Chicago

United States citizenship. Several were listed. In *Twining* v. *New Jersey,* 211 U. S. 78, there is another list of these privileges.

In *Hague* v. *C. I. O.,* 307 U. S. 496, three judges actually held that a privilege of United States citizenship had been abridged under the facts of that case. Two other judges reluctantly assumed this to be so for the sake of argument. Two judges did not participate in the decision. The remaining two judges dissented with no discussion on this point.

In *Edwards* v. *California,* 314 U. S. 160, four judges actually held that another privilege of United States citizenship had been abridged. The remaining judges did not disagree with this holding. See also *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031.

In *Snowden* v. *Hughes, supra,* Justices Douglas and Murphy dissented because Snowden's Complaint was sufficient to raise the issue whether he had been denied equal protection, even though that clause "should not be distorted to make the Federal Courts the supervisors of the State elections." The rest of the Court fully recognized that there were privileges of United States citizenship, and that they would be protected in a proper case; but these privileges did not include a person who was complaining of the action of State officials who refused to recognize that he had been nominated as a candidate for a *State* office, viz., the Illinois General Assembly. This was stated to be a privilege of State citizenship. Obviously the appellants in this case are claiming a privilege of national citizenship, viz., not to be discriminated against in being represented in the National House of Representatives.

Federal Privileges and Immunities Listed.

In Arnold Johnson Lien's little book on the "Privileges and Immunities of Citizens of United States" (Columbia University, 1913), a list of the privileges and immunities as they had been recognized by the Supreme Court up to 1913 is set forth. We particularly call attention to Privilege No. 7, discussed in the following language, p. 80:

> "Building upon these fundamental principles, the court has concluded that the privileges and immunities which are peculiar to citizens of the United States are those which arise from the powers conferred upon the national government, which are *completely* protected by that government and which are enjoyed by the individual because he is a citizen. No final enumeration of these privileges and immunities has ever been made, nor can one ever be made under a living constitution like that of the United States; but the examples which the court has given are sufficient to illustrate the meaning of the definition:
>
> 1. The privilege of expatriation (*Talbot* v. *Janson,* 3 Dall. 133, *Murray* v. *Schooner Charming Betsy,* 2 Cr. 64);
> 2. Protection of the government in foreign countries and on the high seas (*Murray* v. *The Charming Betsy,* 2 Cr. 64, *Neely* v. *Henkel,* 180 U. S. 109);
> 3. Access to all parts of the federal government, and free passage from place to place (*Crandall* v. *Nevada,* 6 Wall. 35);
> 4. (a) The use of navigable waters, (b) The privilege of becoming citizens of the commonwealths through residence (Dicta *Slaughter-House* Cases, 16 Wall. 36);
> 5. The right peaceably to assemble and petition Congress (*U. S.* v. *Cruikshank,* 92 U. S. 542);
> 6. Exemption from race-discrimination (*U. S.* v. *Reese,* 92 U. S. 214, *U. S.* v. *Cruikshank,* 92 U. S. 542);
> 7. The right to exercise freely the privilege of voting for members of Congress and presidential electors (*Ex parte Yarbrough,* 110 U. S. 651);

8. The unmolested access to and residence upon a homestead while the requirements for full title are being fulfilled (*U. S.* v. *Waddell,* 112 U. S. 76);

9. Protection from violence while in the custody of the federal government (*Logan* v. *U. S.,* 144 U. S. 263);

10. The privilege of informing the government of violations of its laws (*In re Quarles & Butler,* 158 U. S. 532);

11. Free migration (*Williams* v. *Fears,* 179 U. S. 270);

12. The right to enter the country, and, if questioned, to prove citizenship (*Chin Yow* v. *U. S.,* 208 U. S. 8)."

We also call the attention of the Court to Professor D. O. McGovney's Article on the *"Privileges or Immunities Clause Fourteenth Amendment"* in 4 Iowa Law Bulletin 219; but we ask the Court to remember that this article was written in 1918 before the decisions in the Hague, Classic, Edwards, and Allwright cases, cited *supra.*

Particular Provisions of Federal Law May Be Cited as Authority for Our Contentions as to This Idea of the Privileges or Immunities of United States Citizenship.

Professor McGovney, in the Article last above cited, suggests that a lawyer relying on the Privileges or Immunities Clause of the 14th Amendment, should point out the particular provision of Federal Law upon which he relies.

We accept this challenge even though we think that it is more than we are bound to accept under the concurring opinions in *Edwards* v. *California, supra.* These Appellants are citizens of the United States. They possess the privilege to vote for Representatives in the Congress of the United States on the basis of equality with other voters. To vote in Illinois one must be a citizen of the United

States. Ill. Rev. St., 1945, ch. 46, Sec. 3-1. The Preamble of the United States Constitution states that the Union was formed to secure the blessings of liberty. But liberty cannot be adequately secured by Appellant Chamales as long as he has less than one-eighth as much influence in electing a Representative as a citizen in the Fifth Congressional District of Illinois. The other Appellants are also the victims of political discrimination but not to the same extent as Chamales. Furthermore, Article I, Section 2 of the United States Constitution provides that Representatives are to be chosen by the people. The word "people" means the electors, who must be citizens in Illinois, and it also means that they must have equal power in the selection of their Representatives. Otherwise, we do not have a representative form of government—a democracy as that word is commonly used. We do not believe that this Court will hold that Illinois is free to enforce a statute that denies to citizens of the United States the privilege of representation in the National House of Representatives on the basis of equality. We point to section four of Article I and to the due process and the equal protection clauses of the Fourteenth Amendment. We also point to Article I, Sec. 2 § 3 and to Section 2 of the Fourteenth Amendment. Finally, we call attention to Title 8 of the USCA on "The Elective Franchise" and more particularly to the Revised Statutes of the United States, ch. 2, Sec. 23, which provides that congressional districts shall contain "as nearly as practicable an equal number of inhabitants." Thus, we say that we have met McGovney's test by citing several provisions of Federal law that grant to the Appellants the privilege of equal voting power under the Privileges or Immunities Clause of the Fourteenth Amendment. All of this follows logically from the decision in *United States* v. *Classic,* 313 U. S. 299 and many election cases which preceded that case.

In the *Hague* case, 307 U. S. 496, Justices Roberts and Black held that the privilege of public discussion of the National Labor Relations Act "is a privilege inherent in citizenship of the United States" under the Fourteenth Amendment. Mr. Chief Justice Hughes agreed with this holding and Justices Stone and Reed assumed this to be true. In *Edwards* v. *California,* 314 U. S. 160, four justices, with none dissenting, held that the privilege of leaving Texas and of entering and living in California was also a privilege of national citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment. If these propositions are correct, we see no way of avoiding the conclusion that the privilege of equality in electing National Representatives in the Congress is of the same type.

To use some language of Mr. Justice Douglas in *Edwards* v. *California, supra,* Illinois, by its 1901 Congressional Reapportionment Act, has created and is now enforcing a political "caste system utterly incompatible with the spirit of our system of government." In fact, Appellant Chamales who lives and votes in the Seventh Congressional District—the most populous Congressional district in the United States since its contains close to a million inhabitants—has been made into a political "untouchable." See "Exhibit B" of Appellants' Complaint. If the Privileges or Immunities Clause of the Fourteenth Amendment is not available to protect Appellants against such treatment, then it is "a teasing illusion like a munificent bequest in a pauper's will." See Mr. Justice Jackson in *Edwards* v. *California, supra.*

The Illinois Congressional Reapportionment Act of 1901 Also Particularly Denies to the Appellants the Equal Protection of the Laws in Violation of the Fourteenth Amendment.

In the three well-known cases of *Nixon* v. *Herndon,* 273 U. S. 536 and *Nixon* v. *Condon,* 286 U. S. 73 and *Smith* v. *Allwright, ante,* this Honorable Court has effectively held that Texas cannot discriminate against Negro voters by excluding them from the Democratic primary.

King v. *Chapman,* 62 Fed. Sup. 639, is a very recent case of the same type invalidating the system of voting in the Democratic primaries in Georgia. The plaintiff was permitted to recover damages because he was not permitted to vote in the primary. The reason he was rejected as a voter was that he was a Negro.

Lane v. *Wilson,* 307 U. S. 268, condemned an even more vicious discrimination against Negroes in Oklahoma.

REALISTIC VIEW URGED.

Thus, it can be said that the Supreme Court of the United States has been very realistic in recent years in voting cases, and thereby has greatly advanced human rights, which, to a very large extent, depend upon political equality.

We respectfully ask this Court to continue to be realistic and to prevent discrimination—rank discrimination—against urban citizens and generally in favor of rural citizens. We also respectfully ask this Court to prevent rank discrimination against urban citizens in the newer parts of Chicago. It is utterly vicious to make one voter in Illinois less than one-eighth as important as another voter in Illinois. The Illinois Congressional Reapportionment Act of 1901, as it now works, is the worst in the Union. Nobody to our knowledge attempts to justify it. No one with intellec-

tual honesty can justify it. But those who are in the political saddle for reasons of sheer selfishness have laughed at our national and state Constitutions and our laws for thirty-five years. There is no prospect of any legislative reform. The prospect is that the discrimination will continue and become worse.

We respectfully petition this Court to heed the dictum by Mr. Chief Justice Stone in *Snowden* v. *Hughes,* 321 U. S. 1:

> "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. *McPherson* v. *Blacker,* 146 U. S. 1, 23, 24, 13 S. Ct. 3, 6, L. Ed 869; *Nixon* v. *Herndon,* 273 U. S. 536, 538, 47 St. Ct. 446, 71 L. Ed. 759; *Nixon* v. *Condon,* 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984, 88 A. L. R. 458; See *Pope* v. *Williams, supra,* 193 U. S. at page 634, 24 S. Ct. at page 576."

If the Court liberally follows that sound doctrine forbidding discrimination we believe it must take jurisdiction of this cause and grant the plaintiffs the relief they ask.

STATE CASES SUPPORTING THIS VIEW.

The Supreme Court of Michigan in *Giddings* v. *Secretary of State,* 93 Mich. 1, held two State senatorial reapportionment statutes to be invalid as in violation of the State constitution. The action brought was termed a mandamus but it clearly was a combined injunction and mandamus action. Judge Grant in the Court's opinion—the Court was unanimous but there were two concurring opinions—stated: "It was never contemplated that one elector should possess two or three times more influence —than another elector in another district." (In Illinois an elector in the Fifth Congressional District has more than eight times more influence than an elector in Appellant Chamales' Seventh Congressional District.) Accord-

ingly, the Michigan Supreme Court ordered its writ to issue "restraining" and "directing", "unless the Executive of the State shall call a special session of the Legislature to make a new apportionment"—. Likewise, Governor Green of Illinois could call a special session of the Illinois General Assembly to reapportion the Illinois Congressional districts.

Morse, C. J., in this same Michigan case stated:

> "While it is true that the motive of an act need not be inquired into to test its constitutionality, I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in, without rebuke, that it threatens not only the peace of the people, but the permanency of our free institutions. The courts alone, in this respect, can save the rights of the people, and give to them a fair count and equality in representation."—

In *Attorney General* v. *Apportionment Commissioners,* 224 Mass. 598, the decision is similar to that in the Michigan Case, *supra.* On page 602 it is stated:

> "While the right to vote for members of the Legislature is in a sense a political right, it is also a precious personal right. The duty of dividing the authorized number of representatives among the legal voters is in a sense political, yet so far as it affects contrary to the Constitution the rights of citizens, such an infringement is cognizable in the courts when presented in an appropriate proceeding between proper parties. On principle the conclusion is irresistible that the court has jurisdiction to redress the wrongs here alleged."

Then cases from fifteen states are cited in support of this proposition. See also Bowman, Congressional Redistricting and the Constitution, 31 Michigan L. Rev. 149, 167.

In *Raglan* v. *Anderson,* 125 Ky. 141, an action in equity to secure an injunction and one of the cases cited by the Massachusetts Supreme Judicial Court, the court delivered an eloquent denunciation of a gerrymander. One expression is sufficient: "Without equality Republican institutions are impossible." See also the opinion of the District Court in the case at bar and 2 A. L. R. 1337 (Note).

WOOD v. BROOM ANALYZED.

We respectfully disagree with the opinion of the learned Judges below, in this case, as to the effect of the opinion and holding of this Honorable Court in *Wood* v. *Broom,* 287 U. S. 1, decided in 1932. The constitutional issues raised in the case at bar were not satisfactorily argued or presented to this Court in the Briefs in *Wood* v. *Broom.* Certainly the constitutional issues in this case cannot fairly be said to have been decided in that case. A bare mention of some of those issues at the beginning of the opinion by Chief Justice Hughes, as having been raised in the pleadings in the trial court, does not amount even to a dictum. *The constitutional issues were almost wholly neglected in the Wood* v. *Broom case.*

Two propositions were presented in the Reply Brief of Appellant, Wood Sec. of State, in that case which deserve comment here:

> (1) "That dividing a state into districts for governmental purposes is not a violation of the Fourteenth Amendment;
>
> (2) That "where a State has been redistricted by an act of the Legislature of the State that (sic) equality in inhabitants is not required by the 14th Amendment" * * *.

ACTUAL CONDITIONS IN ILLINOIS.

We wish to discuss the second proposition first, and will do so with particular reference to actual conditions in Illinois. We earnestly hope that this Supreme Court will decide this question. The people of the United States are entitled to know whether there is any constitutional requirement that they have a representative democracy. They are entitled to know whether there is to be a political "caste system" in the United States. They are particularly entitled to know whether voters are to be represented in the House of Representatives on the basis of equality or inequality. For a generation, equality has been denied to the voters in Cook County as well as other counties in Illinois. Within Cook County there exist the worst Congressional Districts in the United States, so far as equality of representation is concerned; one with slightly more than one hundred thousand inhabitants and another with nearly a million inhabitants. It has been impossible to secure any political remedy to correct this political and social evil. The Legislative Districts for the Illinois General Assembly (as we have seen)—like the Congressional Districts in that State—have not been redistricted since 1901. Cook County with more than half of the State's population has only nineteen Senators out of fifty-one, and only fifty-seven out of one hundred and fifty-three Representatives in the Illinois General Assembly. The Illinois Supreme Court (as already suggested) has remained since 1870 with six of its seven judges elected from the "Down-State" area which now has only about forty percent of the State's population. The remaining judge is elected in a district composed of Cook County and four other counties now containing about sixty per cent of the population.

"POLITICAL REMEDY" UNAVAILING IN ILLINOIS.

Unfortunately the Illinois Constitution is one of those quaint constitutions that for practical purposes cannot be amended under the present method and habit of voting on constitutional amendments.[5] Therefore, there is no justice in saying to the Appellants, "Seek your political remedy." They have sought in vain and they respectfully ask this Honorable Court to give them a simple measure of justice as to their Representatives in Congress. This is a matter of great importance not merely to the people of Illinois, but also to many other States as shown by "Exhibit B" to the Complaint below. (R. p. 29.)

DISTRICTING A STATE FOR "GOVERNMENTAL PURPOSES".

Now, we wish to consider the first proposition in the Reply Brief in *Wood* v. *Broom, supra,* as to districting a State for governmental purposes. We do not deny that a State may be divided into districts for most purposes. *Bowman* (Missouri) v. *Lewis,* 101 U. S. 22; *Hayes* v. *Missouri,* 120 U. S. 68; *Mason* v. *Missouri,* 179 U. S. 328; *Mallett* v. *North Carolina,* 181 U. S. 589; *Ft. Smith Light & Traction Co.* v. *Board of Improvement,* 274 U. S. 387; *Ohio* v. *Akron Metropolitan Park Dist.,* 281 U. S. 74 so hold. But in none of these cases, or in any other case of the same type of which we are aware, was there proof of an injustice or of an arbitrary discrimination. In the cases cited, as far as appears, the Legislature was justified in making a certain degree of discrimination in order to secure justice or to operate the government in an orderly or permissible way.

The discrimination in the case at bar is of a very differ-

[5] See Illinois Constitution, 1870, Article VI See particularly "A Study in Constitutional Rigidity," 10 Univ. of Chicago L. Rev 142-176, Id 11 Univ of Chicago L Rev 374-442

ent kind. We respectfully say that the discrimination whereby Appellant Chamales has less than one-eighth as much influence in the House of Representatives as a person living in the adjoining Fifth Congressional District is wholly arbitrary. There is no good reason for it. It exists because rural "Down-State" Illinois has the political power in the General Assembly which it has exercised so selfishly and so ruthlessly. Moreover the Illinois Representatives in Congress from rural "Down-State" Illinois are unwilling to give up the additional Districts which they have. If a fair apportionment were made at least three of the present fifteen Congressmen from rural "Down-State" Illinois would lose their offices. Such selfishness, personal and local, cannot be justified. It is a very serious handicap on representative government. If this Honorable Court cannot see its way to do something to correct this evil discrimination, there is every reason to believe that it will increase and eventually we shall have the "rotten borough" system that was once a curse in English political life. Indeed we have several "rotten boroughs" in Illinois under the antiquated Act of 1901.

DISCRIMINATION AGAINST A "PARTICULAR CLASS".

We respectfully say that the time has come to heed the dictum in the opinion of Justice Bradley in *Bowman* (Missouri) v. *Lewis,* 101 U. S. 22 that this Court will "consider" a districting law that has "the effect of a discrimination against a particular race or class." In that case, where the Court refused to hold invalid a State statute concerning State Appellate Court Districts, Justice Bradley said:

> "It is not impossible that a district territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a

> particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. *Should such a case ever arise, it will be time enough then to consider it.''* (Italics added.)

Do we not here have a prediction of things to come? In Illinois do we not have a class that is generally "disfavored" by the Illinois Reapportionment Act of 1901—namely the people in the Metropolitan area of Cook County? Certainly the class generally "favored" is the rural class from the "Down-State" area. Incidentally, as a by-product of this discrimination against a class of the people, the older parts of Chicago have greater representation than the newer parts of Chicago, and the more recently settled parts of Cook County outside of Chicago.

Buchanan v. *Warley,* 245 U. S. 60, is the well-known decision holding unconstitutional the Louisville ordinance that segregated Negroes and whites in separate parts of the city. A state or city may provide for districts for many lawful purposes, but *Buchanan* v. *Warley,* is proof that a districting law cannot be valid for every conceivable purpose.

We think that the conclusion is obvious, that an ancient State Congressional Districting law that treats citizens with rank injustice, such as is shown in the case at bar, cannot stand and endure under the terms of the 14th Amendment to the Constitution.

VAST CHANGES AND SHIFTS IN POPULATION.

In view of the vast increase in the population of Illinois since 1901 and in view of the great shifts in that increased population, we respectfully ask this Court to declare that the Illinois Congressional Reapportionment Act of 1901 is now unconstitutional and invalid in this year 1946. We

ask for a recognition of the principle stated by Mr. Chief Justice Stone in *Federation of Labor* v. *McAdory,* 325 U. S. 450, 462:

> "A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. *Field* v. *Clark,* 143 U. S. 649, 694-7; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Concordia Ins. Co.* v. *Illinois,* 292 U. S. 535; *Associated Press* v. *Labor Board,* 301 U. S. 103."

Many other cases support this proposition and also the proposition that a statute valid when enacted may become invalid by a change in the conditions to which it is applied. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405; *Abie State Bank* v. *Weaver,* 282 U. S. 765; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

We also call attention to two Ohio cases (*State ex rel Knisley* v. *Jones,* 66 Ohio St. 453; *State ex rel Attorney General* v. *Beacom,* 66 Ohio St. 491. See Dodd, "Cases on Constitutional Law", 3rd ed., p. 95) where statutes on which municipal governments were based were held to be unconstitutional on this ground. It is worthy of note on this Argument that the effect of the latter decision was postponed until a special session of the Ohio Legislature could pass a new statute; otherwise the City of Cleveland would have been without a government.

Point IV.

AN INSPIRING CHAPTER ON POLITICAL RIGHTS.

The Theory of the Complaint in This Case and the Right of Illinois Citizens to Free and Equal Voting Power for Members of Congress Is Grounded on and Buttressed by the Principles Announced by This Honorable Court in Several Historical Cases. This Court, in Sustaining and Upholding the So-called "Enforcement Act" of 1870 and in More Recent Times in Denouncing and Upsetting State Discrimination Against Voters, Has Repeatedly Laid Down Doctrines Which Fully Sustain the Right of the Appellants to Relief in the Case at Bar.

A Footnote to History.

Whatever may be the outcome of this particular case in this Court, it should be said by way of a footnote to the history of our political institutions in this country, that the overall course of the Supreme Court of the United States, in protecting and sustaining the elective franchise during the last seventy years, makes an inspiring chapter in the establishment and enforcement of the political rights of the common man. The political history of no other nation in the world, we believe, has a chapter so inspiring and so hopeful for the future.

The plain fact of history is that ever since the Civil War some States of the Union have persisted in efforts to deny or abridge the right to vote and to discriminate against certain classes of voters. But to the glory of this Honorable Court it is also a plain fact today that this Tribunal

has, with clear persistence and with ever greater vigor, pursued a course in striking down such discriminations. We have tried in our Brief to point out that the present case, in a realistic sense, involves some of the same principles of State discrimination and, therefore, we say, that to grant relief to the Appellants in this case would be merely applying the doctrines and principles which this Court has announced in the past.

It may be that in a sense it is like carrying "coals to Newcastle" (so far as the wisdom and learning of this Court is concerned) to discuss and appraise some of the major cases decided by this Court in writing that "chapter", of which we have spoken. But perhaps a new and different appraisal in a summary fashion of some of the outstanding cases decided by this Court in establishing and protecting the right of franchise may not be out of order.

A FORGOTTEN CHAPTER IN OUR NATIONAL HISTORY.

We propose now to consider what is really the heart and core of the case at Bar, by reviewing some of the major cases decided by this Court, where the right of citizens to vote in Congressional elections was directly involved. We will first take up two of the leading cases decided in upholding the so-called "Enforcement Act" of 1870; and following that we will discuss the two modern cases of *United States* v. *Classic* and *Smith* v. *Allwright,* cited below.

Many present day students of our national affairs and many lawyers have forgotten that following the Civil War, Congress for a full generation asserted detailed control over Federal elections, and gave the Federal Courts sweeping jurisdiction over those matters. Congress gave such jurisdiction to the Federal Courts in two respects:

First. It authorized citizens, wherever their rights

were impaired or threatened, to go directly into the Federal Courts by petition, to protect their right to vote in all Federal elections.

Second. Congress gave the Federal Courts full civil and criminal jurisdiction to protect the citizen against any State official, or any other person, who might interfere with or intimidate citizens seeking to vote at Congressional elections.

This two-fold legislation became widely known as the "Enforcement Act". It was enacted May 31, 1870 (16 Stat. L. 140) and was entitled—

> "*An Act to enforce the right of citizens of the United States in the several States of this Union and for other purposes.*"

The "Enforcement Act" remained on the statute books unimpaired from 1870 to 1894. In the latter year the particular Sections of the Act giving the Federal Courts jurisdiction over the matters mentioned in paragraph "First" above, were repealed. Some of the major provisions of the "Enforcement Act", making it a crime to interfere with or intimidate citizens taking part in elections and giving the citizen the right to civil damages when that right was interfered with, still remain on our Federal statute books. (See Title 8 USCA p. 3, "Chapter 2—Elective Franchise.")

The foregoing historical outline of Federal legislation, asserting the power of the Federal government to protect the right of citizens to vote for Federal officers, is pertinent on this Argument, because one of the major contentions of the Defendants below (and of the Appellees in this Court) is based upon the implied assumption that somehow the Defendant Certifying Board, being made up of officers of the State of Illinois, is above and beyond Federal control. The cases in this Court, of course, hold that not only are State officials, who take part in a Federal election, subject

to Federal control and supervision, but indeed that such individuals become *pro tanto* Federal officials, for the time being, in so far as they take part in the Federal election process.

THE "ENFORCEMENT ACT" OF 1870.

One of the major contentions of the Defendants below was that, if either the Federal Declaratory Judgment Act or the Federal Civil Rights Act, should be so construed as to grant any relief to the Plaintiffs below, those Acts would be, to that extent at least, "unconstitutional", and beyond the purview of the Federal Constitution. That same contention, in almost the same words, was made long ago against the "Enforcement Act," in so far as that Statute attempted to give Federal Courts jurisdiction to protect the right of citizens to vote in Federal elections. It will, therefore, be helpful and pertinent here to discuss some of the outstanding cases in which this Court sustained the arm of the Federal government and upheld the provisions of the "Enforcement Act."

Ex Parte Siebold.

One of the leading cases in the constitutional law of the United States is of course *Ex Parte Siebold,* 100 U. S. 371, decided by this Court in 1880 In that case certain individuals had been convicted in a Federal Court in Maryland for violation of the "Enforcement Act" by interfering with the right of citizens to vote. The Defendants were sentenced to jail. In the *Siebold* Case several of those defendants sought relief from the Supreme Court, through *habeas corpus* proceedings, contending that the "Enforcement Act" was unconstitutional and that the Federal Courts had no jurisdiction in such cases. In sustaining the validity of the "Enforcement Act" this Court said, in part:

"They (the provisions of the statute) * * * were

> an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded a most important power and of a most fundamental character. In the light of recent history * * * the exercise of that power * * * may be necessary to the stability of our form of government."

We have said above that State officials, who undertake to carry out the provisions of Federal statutes concerning elections, thereby become *pro tanto* Federal officials and subject to Federal control. On this point the Supreme Court in the *Siebold* Case said:

> "In the performance of their functions" (in Congressional elections) "state officers are called upon to fulfill duties which they owe to the United States as well as to the States. Has the former no means of compelling such enforcement?

THE BOGEY OF "STATES' RIGHTS" IN FEDERAL ELECTIONS.

We would be less than frank in this Argument if we did not recognize the fact that one of the barriers, which has stood in the way of Illinois citizens in the enforcement of their rights in Congressional elections, is the contention that somehow "States' Rights" are involved, and that for the Federal Courts to interfere is a violation of the relationship between the Federal government and the State government. Indeed that objection constitutes one of the main points of the Defendants' Motion to Dismiss below, where it is said, among other things (R. p. 35):

> "This suit * * * would affect * * * or adjudicate a question directly affecting, relating to and governing an election to be held in the State of Illinois under and by virtue of the authority of the laws and Constitution of the State of Illinois," etc.

If that language means anything, it means that somehow the right of Illinois citizens to vote for Members of Congress, is a matter entirely within State jurisdiction and State sovereignty. A similar contention was made in the *Siebold* Case, but this Court answered the contention by saying:

> "It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator when (such) duties are violated. * * * A violation of such (duty) is an offense against the United States for which the offender is justly amenable to that government."

THE "PLAIN VIEW" OF THE FEDERAL CONSTITUTION.

In this Brief we have contended that the right to vote, *on a basis of equality with other voters,* is one of the basic rights granted by the Federal Constitution. The Supreme Court in the *Siebold* Case laid down the same doctrine, when it said with respect to the right to vote for Representatives in Congress:

> "(The power) seems to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution and give them a fair and obvious interpretation, we cannot fail, in most cases, of coming to a clear understanding of its meaning."

The *Siebold* Case, as we have said, is one of the landmarks in the constitutional history of the United States. We think that the doctrines in that case, quoted above, strongly support the right of the Appellants to relief in the case at Bar.

Ex Parte Yarbrough.

In spite of the vigorous holding in the *Siebold* Case and in spite of the forcible language of the Court in its Opinion in respect to the power of the Federal government to supervise and regulate Federal elections, there still remained (at least in the minds of some of the members of the Bar at that time) a considerable remnant of the old idea that the States were somehow dominant in the holding of all elections, including Federal elections. Accordingly it was necessary for the Supreme Court, only three years after the *Siebold* Case, in 1883, to restate and extend the doctrine of the dominant power of the Federal government over Federal elections. The Court did this in the case of *Ex Parte Yarbrough,* 110 U. S. 651, a case, which like the *Siebold* Case, is a milestone in the development of the constitutional law of this country.

In the *Yarbrough* Case, certain individuals had been convicted in the Federal Courts of Georgia for violating the provisions of the "Enforcement Act" of 1870; but under some what different Sections of that Act than had been considered in the *Siebold* Case. Again an attack was made on the power of the Federal government to regulate or control elections and the contention was particularly made that the "Enforcement Act" of 1870 was "not warranted by the Constitution and was, therefore, void." In rejecting that attack against the power of the Federal government, this Court said, speaking through Mr. Justice Miller:

> "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and political branch of the Legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, corruption

and fraud, is a proposition so startling as to arrest attention and demand the gravest consideration."

THE "STATE'S RIGHTS" QUESTION.

The Motion to Dismiss filed by Defendants below said, among other things, (p. 35):

> "Therefore, the Defendants say that this suit is in substance and essential virtue, a suit against the State of Illinois and that, therefore, this Court has no jurisdiction thereof."

The Supreme Court considered a somewhat similar contention made in the *Yarbrough* Case and said:

> "The proposition that it has no such power is supported by the old argument often heard, often repeated and in this Court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. * * * It (that proposition) destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

That language of the Supreme Court, we say, has particular application on this Argument; since the Plaintiffs below charged that under the *Preamble* to the Constitution, one of the essential purposes of that document was to "secure the blessings of liberty" to the people and their posterity.

"FREE" ELECTIONS FOR CONGRESS

The Supreme Court in the *Yarbrough* Case points out several statutes of Congress whereby the Federal government asserted its power to regulate Congressional elections. On this point the Court said:

> "It was not until 1842 that Congress took any

> action under the power here conferred, when, conceding that the system of electing all the members of the House of Representatives from a State by a general ticket, as it was called, worked an injustice * * * enacted that each member should be elected by a separate district composed of contiguous territory. 5 Stat. 491."

After citing other Acts of Congress, as illustrations of the power of the Federal government over Congressional elections, the Supreme Court said in the *Yarbrough* Case:

> "Will it be denied that it is in the power of that body (Congress) to provide by law for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? * * *
>
> "And if this be so, and it is not doubted, are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors because State officers are to be elected at the same time and place? (*Ex Parte Siebold,* 100 United States, 371).
>
> "These questions answer themselves; and it is only because the Congress of the United States through long habit and long years of forbearance and deference and respect to the States refrained from the exercise of these powers, that they are now doubted"

So much then for a summarized view of the historical background of the "Enforcement Act", and for a discussion of the two leading cases long ago decided by this Court with respect to the right to vote in Congressional elections in the period shortly following the Civil War. Those cases we say, and the doctrines announced by this Court, strongly support the contentions of the Appellants in this case.

It Is, However, in Two Outstanding Modern Cases, United States v. Classic, and Smith v. Allwright, Hereinafter Cited, That the Supreme Court of the United States Has Finally Established What May Fairly Be Called the Modern Law of Federal Elections. The Court in Those Two Cases Pushed Out and Broadened the Power of the Federal Government Over Federal Elections on Certain Particular Points, and in Both Cases Reversed Prior Narrow and Restrictive Decisions. The Plain Implication of Both of Those Cases Strongly Suggests That the Appellants Are Entitled to Relief in the Case at Bar.

The Modern Law of Federal Elections.

No sensible consideration of the Modern Law of Federal Elections can be made without a close study of two recent and outstanding decisions of the Supreme Court of the United States, namely, *United States* v. *Classic, et al.*, 313 U. S. 299, decided in 1940, and *Smith* v. *Allwright,* 321 U. S. 649, decided in April 1944. These two cases are so pertinent and, indeed, so controlling on the present Argument, that we propose to discuss them at some length.

UNITED STATES v. CLASSIC.

In the earlier of these two cases, *United States* v. *Classic,* the Supreme Court held that a Primary Election in a State constituted an "Election" within the purview and meaning of that word as used in the Constitution of the United States. Thereby the Court in effect reversed its prior doctrine on that point laid down in the case of *Newberry* v. *United States,* 256 U. S. 332, which had been decided in 1921.

Classic, and certain other defendants, were Election Officials of the State of Louisiana, who had the duty under

the laws of that State of conducting a Primary Election at which (among others) Candidates for Congress were to be nominated. It is worth noting that the two Sections of the Criminal Code involved (Secs. 19 and 20 of the Criminal Code; Title 18 USCA, Secs. 50 and 51) are two of the *unrepealed Sections* of the famous "Enforcement Act" of 1870, already discussed in this Brief. The result is that the *Classic* case is directly related to and reaffirms, the doctrines in the *Siebold* case, and the *Yarbrough* case, cited and discussed above.

In the *Classic* case the trial court had sustained a demurrer to the indictment, and in so doing had made the extraordinary announcement, that the application of the "Enforcement Act" to a State Primary amounted to "stretching old statutes to new uses for which they were not intended." The doctrine so announced by the trial court would have amounted to a "freezing" of the meaning and construction of the "Enforcement Act" to the ideas and to the content of that Statute as they existed when the Statute was passed three quarters of a century ago. The Appellees in the case at bar are, in effect, saying that the Complaint in this case amounts to "stretching" the jurisdiction of the Federal Courts beyond their proper boundaries. That is a contention which we believe cannot prevail in this case.

The first question determined by the Court in the *Classic* case was:

> "Whether the right or privilege (of voting in a Primary) is one secured by the Constitution of the United States."

All the Judges agreed that a Primary was an Election. The majority opinion in the case then goes on to discuss

the question as to the source and essential origin of the right to vote in Federal Elections. On this point the opinion says:

> "The right of the people to choose" (Representatives in Congress) "* * * is a right established and guaranteed by the Constitution" (citing the *Yarbrough case, ante,* and also *Hague* v. *C.I.O.,* 307 U. S. 496, hereinafter discussed in this Brief). "* * * *While in a loose sense the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the States"* (citing several earlier cases) *"this statement is true only in the sense that the States are authorized by the Constitution to legislate on the subject as provided by Section 2 of Article 1"* (citing the *Siebold* case and the *Yarbrough case, ante*). (Italics added.)

Here we find the Supreme Court correcting and revising certain general statements which it had laid down in previous cases. The Court clearly resolves the conflict in ideas between Federal jurisdiction and State jurisdiction, over Federal Elections, in favor of Federal control. The result is that the Supreme Court in the *Classic* case in a realistic sense brought the law as to Federal Elections back on the main track, so to speak, from which it had been permitted to wander through the effect of some of the earlier decisions like the *Newberry* case.

THE "VAGRANT THEORY" OF FEDERAL ELECTIONS.

It is fair and just to say that the basic theory and philosophy in the major contention of the Appellees in the case at bar represents what may be called the "vagrant theory", that the States are somehow dominant and supreme over all Elections, including Congressional Elections. Prior to the *Classic* case, any lawyer would have been compelled, reluctantly, to admit that this "vagrant theory" had somehow become embedded in the minds of

many members of the Bar and in the minds of many Judges. The foregoing language of Mr. Justice Stone (as he was then) in the *Classic* case sets the record right in this particular, and constitutes a sort of pole-star of doctrine to guide and steer legal thinking about the law in Congressional Elections.

THE "GREAT PURPOSE" OF THE CONSTITUTION

One of the contentions of the Appellants on this Argument is that the idea of equality of voting is a basic and inherent doctrine of the Federal Constitution. Mr. Justice Stone in his opinion in the *Classic* case refers to what he calls "the great purposes" of the Constitution, and lays down the doctrine that the right to vote is one of those "great purposes," and says on this point:

> *"In determining whether a provision of the Constitution applies to a new subject matter it is of little significance that it is one with which the framers were not familiar.* For in setting up an enduring framework of government, they undertook to carry out for the indefinite future, and in all of the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes, which are subject to continued revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. * * *
>
> *"That the free choice by the people of Representatives in Congress * * * was one of the great purposes of our constitutional scheme of government cannot be doubted."* (Italics added.)

That language, we say, has a particular application and pertinency to the present Argument. How can it be, we ask, that a "free choice by the people" for Members of

Congress can exist in Illinois under the antiquated Act of 1901, here under attack?

DISSENTING OPINION IN THE CLASSIC CASE.

In the *Classic* case a dissenting opinion was written by Mr. Justice Douglas, and concurred in by Justices Black and Murphy. The three dissenting Justices did not dispute the Constitutional doctrines laid down in the majority opinion, but merely disagreed over a question of statutory construction. On the Constitutional question the dissenting opinion contains language which strongly supports the basic theory and ideas of the Appellants in the case at bar, when it said, after quoting Sections 2 and 4 of Article I of the Federal Constitution concerning Congressional Elections (p. 330):

> *"These Sections are an arsenal of power, ample to protect Congressional elections from any and all forms of pollution. The fact that a particular form of pollution has only an indirect effect upon the final election is immaterial. * * * The important consideration is that the Constitution should be interpreted broadly enough so as to give the representatives of a free people abundant power to deal with all of the exigencies of the electoral process. It means that the Constitution should be read so as to give Congress an expansive implied power to place beyond the pale, acts which in their direct or indirect effect impair the integrity of Congressional elections."* (Italics added.)

It thus appears that both the majority opinion and the dissenting opinion in the *Classic* case strongly support the contentions of the Appellants in the case at bar.

The Allwright Case.

The full and complete expansion of the power of the Federal Government over Federal Elections was finally established by this Court in the *Allwright* case, cited above. That case may be said to be the final capstone in the long line of decisions of the Supreme Court in the field of Election Law, by which the complete dominance of the Federal Government, as against the State Government, in the matter of Federal Elections is finally established. The *Allwright* case also, we say, contains strong implications in support of the position of these Appellants.

In the *Smith* v. *Allwright* case a colored man by the name of Smith had tried to vote in the Texas Democratic Primary of July, 1940, but was refused a ballot by Allwright, who was the State Election Official in charge at the polls. Thereafter, Smith brought an action for damages against Allwright in the Federal Court of Texas. The Court, however, sustained a demurrer to his Complaint and dismissed his suit. The Fifth Circuit Court of Appeals affirmed the judgment of the District Court (*Smith* v. *Allwright,* 131 Fed. 2, 593).

The *Smith* v. *Allwright* case, as this Court knows, received unusual consideration and attention from the Court, since this Court called for oral argument the second time. In the *Allwright* case the Supreme Court specifically reversed its holding in the prior case of *Grovey* v. *Townsend,* 295 U.S. 45, decided in 1932. In the latter case the Supreme Court had held that a Primary was not an Election in the sense of the Constitution so as to give rise to an action for damages against a State Election Official who had deprived the plaintiff of a ballot.

THE LIFE-LESS DOCTRINE OF "STARE DECISES."

We do not propose in this Brief to go into the arena that the Bar of this country has created for itself in discussing the ideas of what it calls *"Stare Decisis."* We only say that this Honorable Court, in both the *Classic* case and the *Allwright* case, had the courage and the vigor of mind required to reverse itself, where the Court concluded that a mistake had been made in the past. For our own part we believe that the essential business of a court of justice is to render justice; and, therefore, it should never hesitate (on the grounds of the life-less doctrine of *"stare decisis"*) to do the sound and just thing, in the case before it. This point has a particular application on this Argument. The learned Judge of the Seventh Circuit Court of Appeals who wrote the opinion below felt, and stated in his opinion, that the prior holding of this Court in the case of *Wood* v. *Broom,* 287 U. S. 1, should be corrected; but he further felt, as he stated, that such a task was for the Supreme Court, rather than for the District Court. For our own part we do not feel and hold (as the District Court below did) that the *Wood* v. *Broom* case stands as a bar to any successful ruling in favor of these Appellants. We will, therefore, only say that we ask this Court to make whatever clarification may be necessary, so that good lawyers in the future will be able to see and to know, what is the sound and the final and prevailing doctrines of law, on this controverted question.

"RIGHT TO VOTE" WITHOUT RESTRICTION.

The opinion of the Court in the *Allwright* case contains a statement of doctrine which we say is of the utmost importance in a consideration of the case at bar, when it said:

> *"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 the 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. Constitutional rights would be of little value if they could be thus indirectly denied."* (Italics added.)

Here, we say, is language which lays down a sound doctrine for the determination of this case. We paraphrase the language of Mr. Justice Reed in the *Allwright* case, and conclude our comment on that case by saying:

> 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 restrictions in any State because of inequality of election districts. This grant to the people of the opportunity for choice is not to be nullified by a State repudiating its constitutional duty with respect to equality of population in Congressional election districts and thereby causing gross discrimination in Congressional elections. Constitutional rights would be of little value if such things can be done.

POINT V.

CONGRESSIONAL POWER OVER FEDERAL ELECTIONS.

Congress Has From the Very Earliest Times Asserted Power to Regulate and Control Federal Elections. From the Beginning of the Government Down to the Present Time Congress Has Shown a Definite, Gradual and Growing, Though Cautious Tendency to Expand Its Control Over the Entire Subject of Federal Elections, Even Though It Has Leaned Heavily on the States With Respect to Those Matters. One Thing at Least Is Abundantly Clear, Namely That Wherever the Right of the Citizens to Participate in Federal Elections Has Been Threatened or Impaired, Either by the States or by Any Persons in Any State, Congress Has Asserted Its Power to Protect the Federal Franchise.

HISTORICAL BACKGROUND.

It will be helpful at the outset of this phase of our Argument to give some preliminary comment about the slowly developing Congressional determination to assert the power of the Federal government over Federal elections whereever and whenever Congress has deemed such assertion of power necessary.

Thus we find Congress, as early as 1792, fixing by law the time when Presidential Electors shall "be appointed" in each state, the date being fixed as "the Tuesday next after the first Monday in November in every fourth year" etc. (See Act of March 1, 1792, 1 Stat. L. 239; also Act of January 23, 1845, 5 Stat. L. 721.) This provision is still found in our Federal statutes. (See Revised Statutes, Section 131; Title 3 USCA Sec. 1.)

From this early date Congress, as we have said, has asserted a continuous and growing power over Federal elections, though it has left the detailed business of those elections largely in the hands of the States. Thus we find Congress as late as 1939 passing the so-called "Hatch Act" prohibiting what is called "pernicious political activities" in Federal elections. (See Title 18, USCA, Sections 61 to 61K.)

REGULATION OF CONGRESSIONAL DISTRICTS SINCE 1842.

It is a matter of common knowledge that for nearly half a century after the adoption of the Constitution, Congress did not specifically assert its power to regulate Congressional elections in the States. This power was first asserted by Congress in the Act of June 25, 1842 (5 Stat. L. 491) which compelled the election of members of the House of Representatives "by districts" in all of the States. It is a matter of history that down to that time the States had elected their Representatives in Congress by various methods, some by districts where an individual Representative was chosen, some by districts where several Representatives might be chosen, and some by the method known as "at large" throughout the State. Since 1842, however, the States have been compelled by Act of Congress to choose their Representatives everywhere by Districts.

The Act of 1842 above cited was covered into the Revised Statutes of the United States (1st ed. 1874; 2nd ed. 1878) in Section 23 thereof. That provision of the Revised Statutes, as we shall see later, has never been repealed but is still in full force and effect; but for some strange reason (as we will point out later on in this Brief) that Section was omitted from the so-called "United States Code" of 1925.

REPRESENTATION v. TAXATION.

It is significant and pertinent to point out on this Argument that Clause 3 of Section 2 of Article I of the original Constitution was concerned with the apportionment of "Representatives and direct taxes", as if the two ideas were closely inter-related. This original wording was later modified, after the Civil War, by the language of Section 2 of the 14th Amendment. *The original language of that constitutional provision is interesting and pertinent here however, because it clearly shows the close relationship which the "Founding Fathers" intended should ever exist between the idea of equality of apportionment of Representatives in Congress and equality of direct taxation levied on the people* That original language of the Constitution in this particular, which has now been superseded by the 14th Amendment, began with the words:

> "Representatives and direct taxes shall be proportioned among the several States" etc.

Here then we have two of the most basic and fundamental concepts of our American system of government grouped together and placed in juxtaposition with each other by the original language of the Constitution. This, we say, is a significant and pertinent point upon this present Argument. It clearly shows the intention under our American system of government that equality of representation in Congress is one of the most fundamental ideas of our government; indeed it is on a par with the matter of taxation in that respect. In other words, we say, it was implicit in the original Constitutional, and it is implicit throughout that document today, that representation in Congress, like taxation, must always be fair and equal.

Here is a point we are frank to say that has never been much stressed in the books or decisions so far as we have been able to find. Nevertheless, we believe it is a forceful

argument lying at the base of the rights of the Appellants in the case at bar.[6]

CONGRESSIONAL POWER UNDER THE 14TH AMENDMENT.

It is of course well known that under Section 2 of the 14th Amendment (which was passed following the Civil War) specific power was given to Congress to penalize any State which might deny or abridge the right of citizens to vote in Federal elections by reducing the "representation" of the particular State in Congress to the extent that such denial or abridgement might occur or be permitted. Now it is true, of course, that under Section 5 of the 14th Amendment it is Congress itself that is given "power to enforce" that particular provision of the 14th Amendment; nevertheless, we say, that the language of the 14th Amendment above quoted is a grant of power to Congress to prevent just the kind of thing which has taken place in Illinois, as charged in the Complaint in this case. We say that over and above the grant of power to Congress, this language of the 14th Amendment, which expressly and repeatedly prohibits any State from denying or abridging the right to vote in Federal elections, is a clear guide to the Courts in the construction of the Constitution and laws of the Federal government concerning Congressional elections.

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[6] This idea of the fundamental relationship between equality of representation and taxation finds an interesting corollary in the history of government in Europe Thus we read in the Encyclopedia Britannica (13th ed 1936, Vol. 12, p 294): "The first and the most important (of the two leading steps in the process of the development of free government in modern Europe) was the device of representation For an account of its origin * * * we must be content to refer to Stubbs' 'Constitutional History' Vol 2

"* * * The right of representation was thus in its origin a right to consent to taxation"