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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 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 APPELLEES.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 258

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BRIEF AND ARGUMENT FOR APPELLEES.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On January 8, 1946, three inhabitants of Illinois, Kenneth W. Colegrove, Peter J. Chamales and Kenneth C. Sears filed a complaint in the District Court of the United States for the Northern District of Illinois, Eastern Di-

vision, against the Governor, the Secretary of State and the Auditor of the State of Illinois, as members *ex-officio* of the Illinois Primary Certifying Board

By this complaint the plaintiffs asserted that the Illinois Congressional Reapportionment Act, which establishes congressional districts in Illinois, is in its present operation void under both the Illinois and Federal constitutions because, according to the plaintiffs, it has resulted in inequalities in the proportions of populations in the various congressional districts so gross as to render it unconstitutional. The plaintiffs further asserted that, under the provisions of the Federal Congressional Apportionment Act (Nov. 15, 1941, C. 470, Sec. 2(A), 55 Stat. 762, U. S. C. A. Title 2, sec. 2(b)), in the absence of a valid state congressional apportionment act, all congressmen from Illinois must be elected at large. Thus contending (1) that Illinois is without a valid congressional apportionment act and (2) that therefore all congressmen from Illinois must be chosen at large until a valid apportionment act is passed, the plaintiff sought the District Court's vindication of these assertions by (1) injunction and (2) declaratory judgment.

A statutory three-judge court, composed of Judges Evans (of the Circuit Court of Appeals), Igoe (of the District Court) and LaBuy (of the District Court) was convoked under the provisions of section 266 of the Judicial Code (U. S. C. A. Title 28, sec. 380) because a temporary injunction was prayed.

The defendants filed, under special appearance, a motion to dismiss the suit for want of jurisdiction over their persons and over the subject matter. Although the District Court's view of the case did not require it to pass on all of these objections, appellees urge them all here as

separate and independent reasons for affirming the dismissal of appellants' suit.

Grounds on Which the District Court's Jurisdiction Was Challenged.

The defendants challenged the District Court's jurisdiction on grounds which are argued in the Argument, *post,* and may be here summarized as follows:

I.

A.

This court has held that equity has no jurisdiction to grant relief, by injunction or otherwise, in suits in which the sole or primary object is to control, affect or influence an election. It has further held that this is true even though the complaint shows a violation of the Civil Rights Act and even though the appellants invoke specifically the provisions of the Civil Rights Act authorizing equitable relief. (See *Argument, post,* Point I B.)

B.

It has further held that where injunction will be foreborne, declaratory judgment will also be foreborne. (See *Argument, post,* Point I B.)

The appellees contend that these holdings peremptorily dispose of this case.

II.

Since the appellees are sued in their official capacity and since the object of the proceedings is to govern and control State action with respect to elections, this suit is in substance one against the State of Illinois. Jurisdiction is therefore inhibited by the State's sovereign immunity. (See *Argument, post,* Point II.)

III.

Related and similar to the doctrine of sovereign immunity but specifically recognized by this court as logically distinct therefrom is the constitutional principle that although the Federal judiciary may enjoin unauthorized acts on the part of public officials, it may not coerce state officers to perform official duties, even though the duties are specifically enjoined by acts of Congress or the Constitution. This doctrine differs from the principle of sovereign immunity for it is applied even where the plaintiff is another state or the United States and where therefore no question of sovereign immunity could be presented. For this additional reason, jurisdiction is lacking. (See *Argument, post,* Point III.)

IV.

Since this proceeding contemplated an adjudication by the District Court as to who may be elected to the House of Representatives, it sought to make that court and not the House of Representatives the tribunal for determining the validity of the election of congressmen in future elections. By section 5 of Article I of the Constitution of the United States, the power to determine the validity of elections to

the House of Representatives is vested solely in that House. This court has held election proceedings in Congress to be judicial and not legislative and to be exclusive of all judicial proceeding in the courts. Since the District Court would have no jurisdiction to pass upon the validity of an election after the election was held, *a fortiori,* it could not in effect pass upon the validity of an election which has not been held. If that House could be bound by judicial pronouncements, then the courts, not the House, would be determining the qualifications of candidates; and if the House could not be bound by pronouncements of the judiciary, then any judgment in this case would be a nullity. (See *Argument, post,* Point IV.)

V.

The appellants assert that the Illinois Congressional Reapportionment Act violates the constitution of the State of Illinois as well as the federal constitution and various congressional enactments. By the principle of Federal jurisprudence recently evolved in severe limitation of earlier decisions but now firmly established, where a litigant asserts that State legislative measures or the action of State officials violates both the State and Federal Constitutions, he must bring proceedings for the enforcement of his alleged rights in the State courts and not in the Federal courts. This principle has been specifically applied to cases involving civil rights. (See *Argument, post,* Point V.)

VI.

Additional ground for denying jurisdiction or forebearing the exercise thereof.

It appears on the record that, although this suit could have been brought at any time, it was in fact not brought until January 8, 1946. The last day for filing petitions in compliances with the view of the District Court was, under the Illinois Election Law, January 29, 1946, on which date the purported order in question was entered.

Although the appellees waived service of process and co-operated to their utmost in expediting the hearing and decision, nevertheless as a result of the appellants' unexcused failure to file this suit until a few days before the last day for filing petitions, many persons who sought and now seek, with the support of hundreds of thousands of citizens, to run for Congress at the most critical time in the country's history (some of whom have sat in Congress for many years) would have been unable to file petitions in accordance with the views of the appellants. To entertain this cause at so late a date would have been to disenfranchise more voters than it could enfranchise and would have been so great an abuse of judicial discretion as to amount to a transcension thereof.

The District Court dismissed the appellants' suit on January 29, 1946, by the judgment of which appellants seek review on this appeal. (See *Argument, post,* Point VI.)

Pursuant to leave of court granted, appellees filed a further motion to dismiss the cause on the ground that "the plaintiffs' complaint fails to state any cause of action, grounds of suit in equity or right to relief, either under any presently standing act of Congress, under the laws of the State of Illinois, or otherwise * * *." (Tr. 48-49.)

Ground of the District Court's Decision.

The District Court held that the case was ruled by this court's decision in *Wood* v. *Broom,* 287 U. S. 1. That case held that there is neither constitutional nor federal statutory requirement of equality in congressional apportionment. (See *Argument,* Point VII, *ante.*)

ARGUMENT.

[A SUMMARY OF ARGUMENT APPEARS AT PAGE 1, INDEX AND SUMMARY OF ARGUMENT, *ANTE* THE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION WAS CHALLENGED, TOGETHER WITH THE STATEMENT OF THE DISTRICT COURT'S GROUND OF DECISION, *ANTE*, WHICH GROUNDS WE ADOPT, LIKEWISE CONSTITUTES SUCH A SUMMARY.]

I.

Since This Case Involved Only Political Issues, the District Court Had No Power to Act.

A.

Equity Has No Power to Act, by Injunction or Declaratory Judgment, in Political Matters.

The doctrine that equity cannot interfere with elections or intervene in political matters is classical and fundamental. This is true even though the suit is brought under the Civil Rights Act and even though the appellants specifically invoke the provisions of that Act which authorize the granting of equitable relief.

It would be sufficient to cite as decisive of this proposition the case of *Giles* v. *Harris,* 189 U. S. 475. In that case, the plaintiff's bill of complaint disclosed a clear violation of the political rights of five thousand negroes. Provisions of the Civil Rights Act authorizing equitable relief were specifically invoked. Mr. Justice Holmes said, at page 486:

> "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of sec. 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green* v. *Mills,* 69 Fed. Rep. 852."

The cases of *Green* v. *Mills,* 69 Fed. 852, and *Blackman* v. *Stone,* 17 Fed. Supp. 102, although not authoritative in this court, contain excellent compilations of other authorities, state and federal, sustaining this fundamental axiom of equity jurisprudence in its application to Civil Rights cases. We quote pertinent language from these cases in the margin, not, of course, as controlling in this court but as excellent commentary.*

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* In *Green* v. *Mills,* 69 Fed 852, cited above, the Circuit Court of Appeals for the Fourth Circuit held that not only the limitations inherent in the nature of equity but the doctrine of distribution of powers forbade a Federal court to entertain a bill seeking to enforce by injunction a constitutional right to vote, even though it was alleged and demonstrated that the right was abridged in virtue of purported but actually unconstitutional legislation and election laws The court, after stating the conclusion above indicated, continued at page 858.

"Similar views have been repeatedly expressed by state tribunals of high authority. Thus, in *Fletcher* v *Tuttle,* 151 Ill. 41, 37 N. E 683, the supreme court of Illinois say·

'The question, then, is, whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity'."

In *Blackman* v *Stone,* 17 Fed Supp 102, cited above, affirmed by the Circuit Court of Appeals for the Seventh Circuit, on grounds not pertinent here in 101 F. (2) 500

That case was a suit in the District Court for the Southern District of Illinois, brought under the Civil Rights Act, and was entertained by a three-judge court composed of Judges Evans, Barnes and Major. In that case the plaintiffs, members of the Communist party, brought suit in equity to restrain various county clerks from printing ballots for the election of November 3, 1936, without including thereon the names of candidates designated in a petition for nomination of members of

"Equitable relief in a federal court," this court said in its very recent opinion in *Guaranty Trust Company of New York* v. *York,* 326 U. S. 99, "is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery."

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the Communist party. The defendants moved to dismiss the suit on two grounds, *first,* that the rights sought to be vindicated were

"political rather than civil rights"

and *second,* that equity will not intervene in political matters. The opinion is ably and carefully written. It affords a studious consideration of the discrimination, inherent and fundamental in legal principles and political theory, between political rights and civil rights. The court said at page 107.

> "The dictionaries and text writers who have attempted to define civil rights and distinguish them from political rights have not always succeeded in accentuating the line of demarcation. Nevertheless, definitions from leading authorities like Blackstone are helpful. Bouvier says, basing his distinctions on Blackstone:
>
> "'*Political rights* consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected, these are the political rights which the humblest citizen possesses.
>
> "'*Civil rights* are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—**which is not the case with political rights;** for an alien, for example, has no political, although in the full enjoyment of his civil, rights. 1 Bla. Com. 124-139.'"

After extensively considering the question, the court sums up its conclusion that the right of an aspirant for public office is not a civil right in the following language at page 110:

> "Our search for authorities outside of the briefs has not been productive of a single case which supports either of the two contentions which plaintiffs must maintain: (a) that a court of equity will act where political rights only are involved, or (b) that the right to vote or the right to have a name printed on the ballot is a civil right."

The Circuit Court of Appeals affirmed the District Court. However, affirmance was predicated upon the district court's view that the complaint failed to show that in fact the plaintiffs were entitled to a place on the ballot.

Smiley v. Holm, 285 U. S. 355, and Similar Cases, Which Involve Appeals to This Court from State and Federal Courts, Distinguished.

"We say bluntly," appellants' brief reads,* "that the contentions of the Attorney General of Illinois in this regard" (that is, appellees' reliance upon *Giles* v. *Harris*, 189 U. S. 475, above cited, and kindred cases holding that equity will not act in political matters) "is knocked into a cocked hat by the holding of this Honorable Court in the *Smiley* v. *Holm* case, cited above." The egregious fallacy in assimilating this case to *Smiley* v. *Holm* and in then asserting that *Smiley* v. *Holm* silently overrules *Giles* v. *Harris* consists in appellants' failure to perceive the significance of the fact that *Smiley* v. *Holm* (as well as cases like it) were *appeals from State courts*. We apprehend that whenever a State court, in a judicial proceeding, rests its judgment upon the decision of a federal constitutional question, this court may review. It is not concerned with what, if any, modes of State jurisprudence distinguish common law, equity, statutory or other rights and remedies. This court's power in such cases is appellate.

If a federal district court possessed the jurisdiction to entertain the instant cause, it goes without saying that this court could review any judgment that the district court might pronounce. It goes without saying, too, that this court can review the district court's determination as to whether it possesses jurisdiction.

But the district court's jurisdiction is limited not only by the Constitution but by the statute which creates those

* In order to expedite the presentation of this case, we have prepared this brief in response to a typewritten manuscript of appellants' brief Therefore we cannot cite printed page numbers of appellants' brief.

courts, neither of which limitations restrict state courts whose decisions on federal questions may reach this court on appeal. Nothing in either the Constitution or those traditions of which the Congress was sensible at the time that district courts were created gives the slightest intimation that jurisdiction "of cases and controversies at law and in equity" could extend to political matters or to cases like this one.

Appellants conceive that any claim of wrong—at least, any claim of violation of constitutional precepts or other provisions of law necessarily affords the basis of a "case or controversy at law or in equity" (if there be no remedy at law) regardless of either the nature of the subject matter or the character of the relief sought. This of course is not true.

The truth is that there are many altercations which, regardless of their social, ethical or even legal merits, do not possess and have never have possessed any juridical modality—at least in the absence of statute. Political controversies have always appertained to this domain of combat.*

Any order of the character sought by appellants would clearly transcend this limitation upon the jurisdiction of equity.

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* Of importance equal to or, some would say, of importance even greater, socially and morally, than that of cases involving the right to vote are cases involving the right to be free from domestic tragedy, especially where children are concerned. Yet, in the absence of statute, both law and equity are impotent to grant a divorce, no matter how cruel are the grounds upon which it is sought, or to effect the adoption of a child, no matter how utterly unfit may be the infant's father and mother for the legal rights and responsibilities of parenthood Similarly, in the absence of statute, neither law nor equity can adjudicate a person insane, though he be stark mad and as great a menace to himself as he is to the community. It simply is not and never has been true that mere wrong, no matter how grievous, opens the chancellor's door when the subject matter of the wrong is not within the ambit of equity's jurisdiction.

B.

The Declaratory Judgment Act does not enlarge the subject matter of the District Court's jurisdiction.

Appellants contended that the provisions of the Declaratory Judgment Act enlarged the scope of Federal jurisdiction in election matters. But in *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227, this court sustained the constitutionality of the Declaratory Judgment Act on the ground that "the operation of the Declaratory Judgment Act is procedural only," that it did not and could not declare any matter to be a "case" or "controversy" within the limited purview of the Federal constitutional limitations on jurisdiction, and that, although a declaratory judgment need not entail the immediate issuance of process, it must contemplate effective relief ultimately enforceable by judicial action.

And in *Great Lakes Company* v. *Huffman,* 319 U. S. 293, this court held that where the subject matter was such that equity could not protect the rights of the plaintiff by injunction *because of want of jurisdiction,* it lacked jurisdiction to enter a declaratory judgment.

Under Point II, *post,* we cite and discuss this court's recent opinion in *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. ——, 66 Sup. Ct. 219 (not officially reported at the time of writing this brief), in support of the argument that this proceeding is one against the State of Illinois. But that case is also authority for the principle that where the subject matter would not be within the remedial jurisdiction of a federal court, it is not within such a court's jurisdiction to pronounce a declaratory judgment.

It is of course quite clear that the subject matter of this suit is not within the purview of any remedy or action known to the common law.

Neither jurisdiction at law nor jurisdiction in equity extends to the elections and their superintendence.

The entire philosophy of federal constitutional jurisprudence is that, as the federal judiciary is independent of elections, so elections must be independent of the federal judiciary.

This important principle will bear a moment's emphasis of the considerations, both of constitutional law and of social polity, upon which it is founded. Although the constitutional doctrine of "balance of power" usually refers to the independent supremacies of, respectively, the legislative, the executive and the judicial branches of government, or to the mutually limiting state and federal sovereignties, it is nevertheless based upon the profound realization that if any organ of the government could arrogate to itself prerogatives absolute in tenor without some reciprocal control, sovereignty would become oligarchy. This would be true even though a judicial dispensation of power over elections, and therefore over government, might be benign; for judicial power over the dynamics of representative government is *per se* repugnant to the very concept of that mode of government.

In many states, among them Illinois, courts do indeed exercise statutory power in election contest cases and perform the nonjudicial, or at most quasi-judicial function of superintending the final counting and making of election returns. Thus such courts directly intervene in and in some measure control elections. But, reciprocally, the

judges are themselves elected and must, if they desire to retain their tenure, stand for re-elections; so that the judicial and electoral process react mutually with each other.

But if the federal judiciary were to be allowed to control elections, without in turn being in any degree controlled by them, that equilibrium of power which distinguishes the sovereignty of a republic from the absolutism of an autarchy would, at least in principle, be destroyed.

The principle that the federal judiciary is not amenable to the electorate has as its necessary corollary that the electorate shall not be subject to the judiciary.

II.

This Proceeding Is One Against the State of Illinois and Is Therefore Inhibited by the Doctrine of Sovereign Immunity.

In praying relief against appellee officials of the State of Illinois, the appellants confused the well settled rule that, although natural persons, including public officials, can be *prohibited* from performing unconstitutional acts, and this is true even though they claim to act under the purport of official authority, the equally well settled rule is that suits, not to *restrain* but to *coerce* the acts of state officials are suits against the State. This principle results from the self-evident fact that a State acts only by the official deeds of its officers and that hence such deeds, when not only authorized but compelled by law, are acts of the state. (See *Governor of Georgia* v. *Madrazo,* 26 U. S. 110, *New York Guaranty Company* v. *Steele,* 134 U. S. 230, and *Cunningham* v. *Macon & Brunswick Railroad Company,* 109 U. S. 446.)

Recently this court held that a suit to compel the officials of the State of Indiana to refund taxes alleged to have been unconstitutionally collected from the plaintiff, a foreign corporation, was a suit against the State. (*Ford Motor Company* v. *Department of Treasury of Indiana,* 323 U. S. 459.)

The appellants evidently distinguish between suits to compel State action in the form of making disbursement of money and suits to compel State action in the form of controlling an election. We do not perceive the distinction.

In this Court's very recent opinion in *Mine Safety Appliances Company* v. *Forrestal,* 326 U. S. —, 66 S. Ct. 219 (not officially reported at time of writing this brief), this Court adhered to and perhaps even enlarged the scope of the rule that a suit seeking to coerce official action is a suit against the sovereign. In that case, the plaintiffs specifically prayed a *declaratory judgment* to the effect that the Under-Secretary of the Navy was unlawfully withholding funds, under the color of an unconstitutional act, which rightfully belong to the plaintiffs.

The court held that, before injunctive or declaratory relief may be granted, the subject matter of the suit must be such that the public official is "*suable as an individual*" and that the government must "*lack * * * interest in all cases where the suit is nominally against the officer as an individual.*" It was specifically held that, although the prayer for a declaratory judgment asked only that the Renegotiation Act "be held unconstitutional", the pro-

ceeding nevertheless contemplated judicial action against the sovereign.*

We submit that the case last cited is absolutely decisive of the case at bar.

Appellees maintain that this case is either an attempt to bind the officers of the State of Illinois by judicial pronouncement, in which case the court lacks jurisdiction because of the State's immunity to suit, or it is not an attempt to bind such officials, in which case it presents no "case" or "controversy".

In order to show that the appellants really asked the District Court to stultify itself by doing a vain and futile thing, we ask the following questions each of which admits of a categorical "yes" or "no" answer. We demonstrate that it is the questions, not the answers, that are significant;

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* It would appear from the language of the opinion in the *Mine Safety Appliances Co* case, cited above, that if the doctrine of sovereign immunity is undergoing modification with respect to the *criteria* which determine whether or not a suit against State officers is in substance one against the State, such modification evinces a trend toward an expansion, not a contraction, of the concept of sovereign immunity, for this Court, speaking through Mr Justice Black, said:

> "* * * *Under our former decisions,* had the factual allegations supported these contentions, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e g , *Philadelphia Company* v *Stimson,* 223 U S. 605, 619-620, 32 S. Ct 340, 344, 56 L. Ed 570 For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference * * *" (Italics supplied.)

This language seems to imply that earlier decisions sustaining suits against state officers, on the theory that such suits are in substance actions against such officers in their individual personalities and not in their official characters, may require further consideration when it appears that, as in the instant case, the interests of the State in the subject matter are not only substantial but vital. But we do not concede that any authority of this or any other Federal court would at any time in the history of the Union have sustained a suit to regulate an election conducted under State auspices as against the claim that such a suit infringed State sovereignty.

for whether they be answered "yes" or "no" the answers will be equally fatal to the appellants' case.

1. Would the appellees be bound to abide by the decision of the federal courts in this case if the decision should be opposed to their own view of the constitutionality of the Illinois Congressional Apportionment Act?

If the answer to the above question is "Yes": If it is admitted that the judgment sought would be coercive, so that the appellees would be bound to substitute the judgment of the court for their own determination, then the suit is one to compel the appellees to perform an official duty as the federal courts think that it should be performed. Whether the federal courts would be right or wrong in their decision does not affect the power to decide. Such a judgment would effectively control the State. A suit seeking such a judgment is one against the State, and is prohibited.

If the answer to the above question is "No": Then if no compulsion attaches to the judgment, it is not declaratory. It is merely advisory. If it is the duty of the appellees to interpret the law of Illinois as they understand it and not as the court understands it, then the proceeding seeks a pure *dictum,* only hortatory in its nature and not involving adjudication. It settles nothing.

2. Is it intended to bind such state election officials as clerks and judges of election, county clerks, the Secretary of State, etc.?

If the answer to the above question is "Yes": Then the suit is obviously forbidden, *first,* because it is an attempt to bind the State government in violation of sovereign immunity to suit and, *second,* because the officials sought to be bound are neither impleaded nor represented in the case.

If the answer to the above question is "No": Then the suit seeks, not a declaratory judgment, for it will settle nothing, but a purely advisory judgment. It therefore presents no case or controversy.*

In short: This is either an attempt to bind the election officials of the State of Illinois by judicial pronouncement, in which case the court lacks jurisdiction because of the State's immunity to suit, or it is not an attempt to bind such officials, in which case it presents no "case or controversy" because the parties who must be bound are not before the court and because an adjudication would be a futile nullity.

In *Giles* v. *Harris,* 189 U. S. 475, already cited (Point I, *ante*), as holding that equity will not intervene in election matters, Mr. Justice Holmes perceived this dilemma. He declared that if a decree could bind election officials, it would bind the State in violation of sovereign immunity; and if it did not bind such officials, it was an "empty form." He said, at page 488:

> "The Circuit Court has no power to bind the State. * * * Unless we are prepared to supervise the voting in that State * * * it seems to us that all that the plaintiff could get from equity would be an empty form."

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* Under Point IV, *post,* we ask a similar question, in response to which either an affirmative or negative answer is decisive against appellants, with respect to whether the House of Representatives would be bound to abide by the judgment of a district court as to the qualification and election of representatives, in which case the courts would invade the constitutional prerogatives of the House, or whether the House would not be so bound, in which case the judgment would be a nullity.

III.

The Appellees Are Immune to Coercion, by Process or Adjudication, in Respect to Official Action and This Is an Immunity That Is Recognized As Distinct from the Sovereign Immunity of the State of Illinois.

A doctrine intimately related to, but nevertheless recognized by this Court as logically distinct from the principle of sovereign immunity is embodied in the rule that State officials may not be coerced by Federal judicial process.

That this principle is not a mere application of the doctrine of sovereign immunity appears from the fact that it is enforced even in cases where the plaintiff is another State or the United States, in which case no question of sovereign immunity can arise. In the case of *Kentucky* v. *Denmson,* 65 U. S. 66, the Governor of Ohio had refused to render a fugitive extradited from Kentucky. The plaintiff in an original *mandamus* suit in this Court was the State of Kentucky. Although Ohio would not be immune to suits by Kentucky, and although it appeared that the defendant's refusal to honor the extradition was in violation of Federal constitutional and statutory provisions, this Court said that he was immune to coercive process. An appropriate excerpt is quoted in the margin.*

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* "* * * The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights **And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatable with the rank and dignity to which he was elevated by the State.**

"It is true that Congress may authorize a particular State officer to perform a particular duty; **but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal."** (*Kentucky* v. *Dennison,* 65 U. S. 66, 107-108) (Emphasis supplied)

See also *United States* v. *Clausen,* 291 Fed. 231, not authoritative here but evincive of the rule in question, which held that even though a state official wrongfully refused to turn over property of an alien to the alien property custodian during the first World War, and even though the plaintiff in a suit to compel obedience to the law was the United States, the officer was exempt from judicial process because State officers are not subject to coercive writs from the federal judiciary.

IV.

This Court Is Asked to Exercise Jurisdiction Which Under the Constitution Appertains Only to the House of Representatives, Sitting Judicially and Not As a Legislature.

For the immediate convenience of the court, the text of section 5 of Article I of the Constitution, in so far as it constitutes the respective houses of Congress, the judges of the elections, returns and qualifications of its members, is here quoted:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."

In *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, the Supreme Court of the United States declared that a house of Congress, in determining the election and qualifications of its members, exercises powers which, since they require the ascertainment of facts and the application of law thereto, "are not legislative but judicial in character." (page 613.) It further holds that such judicial power

is exclusive and imports the jurisdiction to "render a judgment which is beyond the authority of any other tribunal to review."

If the substantive theory of the appellants is well conceived, they have not only an adequate but exclusive remedy before the Lower House of Congress.

As many persons, properly qualified, as desire to do so can run for congressman at large. The twenty-six persons who receive the highest votes can present due certification of that fact to the Congress if they wish to claim that there are no duly constituted election districts in Illinois. That body can then, in the language of the Supreme Court in the *Cunningham* case, accomplish "the ascertainment of the facts" and apply the law, which the appellants say is clear, to the facts ascertained. (The *Cunningham* case, incidentally, holds that the Senate may compel the attendance of State officials by arrest, if such measure becomes necessary in order to elicit the facts; so that aspirants to the office have adequate procedural means for adducing evidence of their election.)

At that appropriate time, and in that appropriate forum, whose jurisdiction is constituted under constitutional auspices, the twenty-six persons who have received the highest number of votes can, if they choose, press upon Congress the theory and arguments that the appellants seek to present to this Court.

Once it is appreciated that:

(1) Any person, or any twenty-six persons, or any number of persons can run for congressman at large under the election machinery now in force, and

(2) Any such person can secure, by compulsory process, if necessary, due certification of the number of votes that he received, and

> (3) The House of Representatives, sitting as a court can resolve any controversy which may arise between those who say that they were properly elected at large and those who say that they were properly elected from presently recognized districts,

it is immediately obvious that the appellants, or the twenty-six candidates who the appellants say should represent them, will have an adequate remedy, provided by the Constitution, for the vindication of the rights asserted by the present appeal, if as the appellants say, all congressmen from Illinois should be elected at large.

We may put the present contention thus incisively: Suppose that the district court or this court should spread upon its records a declaration that no congressmen may be elected in Illinois from the presently recognized districts. Suppose, nevertheless, that either as a result of a "write-in campaign" or because local election officials (who are not parties to this proceeding) distribute ballots bearing the names of candidates from particular districts, twenty-five persons do receive votes cast for the office of representative from particular districts. Suppose that such candidates tender certification or other credentials showing the fact that such votes have been received. Will the House of Representatives be bound to give effect to a judgment of the district court or of this court?

If they could be so bound, then the courts, and not the House of Representatives, would have adjudicated the qualification and election of members. If the House should not be so bound, then not only would the judgments be nullities but the courts would have gravely compromised their dignity by entering judgments which could not be enforced.

On the other hand, suppose that the adjudication is adverse to appellants. In other words, suppose that it is decided that congressmen must be elected from districts. Would such a judgment prevent the House from holding, in exercise of its judicial faculty with respect to elections, that they should have been and in fact twenty-six of them were elected at large? If such a judgment could bind the House, the courts would have arrogated to themselves powers which the constitution vests exclusively in the House. If such a judgment would not bind the House, then the judgment would be a nullity.

[Of course, the answer to this question is that the House would not be bound by the judgment because no coercive process could issue to its members. But it is the question, not the answer, that is important; for the question exposes the dilemma implicit in appellants' contentions.]

V.

Since the Appellants Asserted Rights Under the State As Well As the Federal Constitutions, the Exercise of Jurisdiction Should Be Foreborne.

In *Railroad Commission* v. *Pullman Company,* 312 U. S. 496, this court held that, even though important civil rights are involved, if the plaintiffs assert rights under both the State and Federal Constitutions, so that if the plaintiffs' claims of state constitutional rights are sustained, no federal question need be decided, federal courts of equity should remit the plaintiffs to their remedy in the state courts.

In the *Pullman Company* case, above cited, the plaintiffs charged discrimination by the State of Texas against colored Pullman porters, the plaintiffs asserting that such

discrimination violated both the organic law of Texas and the Constitution of the United States. Although this court declared that the complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue, and indeed observed explicitly that the question was "more than substantial", it held that since the federal constitutional questions were raised concurrently with state constitutional questions, the lower courts should not have considered the case upon the merits but should have obeyed

> "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary * * *." (page 501)

Although the earlier cases held that if a plaintiff asserted rights under both the State and Federal Constitutions, the federal constitutional questions, if substantial, would sustain jurisdiction even though the case later turned in the federal courts upon questions of state constitutional or statutory law, this Court virtually, if not, indeed, explicitly repudiated this doctrine in *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168. In that case the plaintiffs assailed as unconstitutional an ordinance of the City of Chicago which in effect prohibited the sale of milk in paper containers. The ordinance was charged to violate both the State and Federal Constitutions. Although the question involved was certainly substantial and interstate commerce was directly affected, this Court held that, since a decision on the plaintiffs' claims of state constitutional rights might render it unnecessary to consider their claims of violation of federal constitutional rights, the plaintiffs should have been remitted to the state courts for the litigation of their contentions. This Court reached this con-

clusion notwithstanding the fact that both the District Court and the Circuit Court of Appeals entertained the cause upon the merits.

Appellants may reply that Illinois procedure gives them no remedy. But in 1945, Illinois passed a declaratory judgment act similar to the Federal act. (Smith-Hurd Statutes, 1945, Ch. 110, sec. 181.1, p. 2531.) It is true that if appellees are correct in their fundamental contention that this cause is one against the State of Illinois, appellants would have no remedy in the state courts. But if that contention of ours is sound, they have no remedy here either. We here suppose, *ex gratia* and for the sake of argument only, that a declaratory judgment would not be beyond the power of a court. If that is so, the suit should have been brought in the state court, where such a judgment could be pronounced if it could be pronounced anywhere.

VI.

The Exercise of Jurisdiction Should Have Been Foreborne Because, Without the Slightest Excuse, This Suit Was Filed So Late That If It Had Succeeded, It Would necessarily Have Disenfranchised More Voters Than It Could Have Enfranchised.

The thesis of the present suit is that the Illinois Congressional Reapportionment Act has been unconstitutional for many years. If that were true, the suit could have been brought at any time during those many years. But, although the appellants must have known that January 29, 1946, was the last day for filing petitions under the Illinois Primary Election Code (Illinois Revised Statutes, 1945, Chapter 46, par. 7-12, p. 1521), and although February 7, 1946, would be the last day on which the Illinois State Primary Cer-

tifying Board could certify the names of petitioners seeking nomination for the office of congressmen, the appellants did not file the suit until January 8, 1946.

The appellees waived service of process, appeared promptly, and asserted their defenses with all possible expedition. But the judgment was not pronounced until the last day for the filing of petitions. It could not have been pronounced more than a day or two earlier, even if the District Court had not taken the case under advisement.

The result is that men who have sat in Congress for many years, who have hundreds of thousands of supporters, and who had duly and diligently filed petitions seeking renominations, as well as other aspirants for the important office of member of Congress in the United States in the most critical period of the world's history, simply could not, nor could their constituents and supporters, circulate, obtain signatures to and file petitions in order to run for the office of Congressman at Large within the brief time that appellants chose to allow them.

Any friends of the appellants who knew that the suit was being filed could of course have filed such petitions at their leisure in the anticipation of a decision favorable to appellants

Although the appellants profess no motives other than those of civic virtue, the only possible result that could ensue if they succeeded in this proceeding would be that hundreds of thousands of electors would be deprived of the possibility of voting for men of their choice because of the very late date on which this suit was filed; for had it been filed earlier, all aspirants for Congress, admonished by a declaratory judgment such as appellants pray (if such a judgment could validly and properly have been entered), could have filed petitions to run at large. The electors of

Illinois, unlike the appellants and their counsel, are not experts in election law. They could have had no premonition that a court of equity might, on the last day for the filing of petitions, frustrate the intent of every petitioner seeking nomination for the office of congressman of the United States and likewise frustrate the will of citizens signing his petition for nomination.

It is our steadfast contention, from which we do not retreat, that equity has no jurisdiction over political controversies. But if this traditional limitation of the purview of equity is to be abandoned, and if equity is to take cognizance of political questions, then it must perforce take cognizance of political considerations and political exigencies in dealing with those questions; and it must take account, in accordance with the canons which guide equity's discretion, of the practical consequences of exercising power in political matters, it being supposed for the sake of argument only that it has such power.

The court will readily perceive the chaos that would ensue if appellants, though alleging wrongs which they say are of many years' standing, might wait until every responsible candidate with a substantial support among the electorate had filed his petition to run from his district and until it was too late for any one (except persons privately forewarned that such a proceeding as this was contemplated) reasonably to anticipate that he must file a petition to run at large.

We say that, even if equity had jurisdiction in this matter, it should stay its hand because equity will never act where the result would be to work a manifest injustice.

VII.

The District Court Correctly Held That, If This Cause Tendered Any Justiciable Issues, They Were Decided Conclusively and Adversely to Appellants by This Court's Decision in Wood vs. Broom, 287 U. S. 1.

Although we submit that the considerations heretofore developed categorically preclude any judicial action with respect to the subject matter of this case, nevertheless the District Court clearly perceived and held that the case is indistinguishable from the case of *Wood* v. *Broom,* 287 U. S. 1. It would be a work of supererogation to argue this point at length when the teachings of this court in *Wood* v. *Broom* are so clearly pertinent. That opinion requires no vindication on the part of the Attorney General of the State of Illinois.

We do, however, in brief reply to certain observations in appellants' brief, point out that in *Wood* v. *Broom,* the plaintiffs relied, as appellants rely here, not only upon the Congressional Apportionment Act but upon the Fourteenth Amendment and the Civil Rights Act. Nevertheless they did not prevail.

A single sentence is sufficient to dispose of appellants' contentions in so far as they are predicated upon the Northwest Ordinance: The Northwest Ordinance cannot be construed so as to give inhabitants of certain states rights in a congressional election other than or different from the rights of other inhabitants of the Union; and if it could be so construed, it would, to that extent, be unconstitutional. The same observation applies to the act admitting Illinois to the Union.

In so far as the appellants seek to distinguish this case from *Wood* v. *Broom* on the ground that the appellants invoke certain provisions of the Constitution of Illinois, it is sufficient to refer to Point IV, in which we demonstrated that the federal courts will not act, even if jurisdiction exists, in cases involving debatable points in state constitutional or statutory law.

Wood v. Broom Is Not Authority For the Existence of Jurisdiction in This Court.

Appellants argue that although *Wood* v. *Broom,* 287 U. S. 1, expressed this court's opinion, unfavorably to appellants, on the substantive question presented here, it did in fact express an opinion; and that therefore *Wood* v. *Broom* holds, by implication, that the question is within the cognizance of equity.

But there are two independent and impressive answers to this suggestion. In the *first* place, the majority of five justices who concurred in the opinion assented to the following statement (p. 8):

> "In this view, it is unnecessary to consider the questions raised as to the right of the complainant to relief in equity upon the allegations of the bill of complaint, or as to the justiciability of the controversy, if it were assumed that the requirements invoked by the complainant are still in effect. See *Ex parte Bakelite Corporation,* 279 U. S. 438, 448. Upon these questions the Court expresses no opinion."

The other four justices thought that "the decree should be reversed and the bill dismissed for want of equity" (page 8).

It should be observed in this connection that although the court in *Giles* v. *Harris,* 189 U. S. 475, expressly held

that equity had no jurisdiction, it nevertheless did express an opinion on the merits, which opinion was adverse to the plaintiffs in that case. Thus expressions of opinion on the merits, when such opinion was adverse to the plaintiff, was not deemed inconsistent with dismissal for want of jurisdiction.

In the *second* place, the defendants in *Wood* v. *Broom* moved to dismiss the suit on only the following grounds (page 4): (1) for want of equity, (2) for lack of equitable jurisdiction to grant the relief asked, (3) because of the facts alleged the complainant was not entitled to have his name placed upon the election ballot as a candidate from the State at large, and (4) because the decree of the court would be inefficacious. They did not even raise the important question that a suit to control an election is a suit against the State. The court did not need to consider that question *sua sponte,* for it decided in favor of the defendants on other grounds. Therefore, *Wood* v. *Broom* does not imply the presence of jurisdiction because (1) a majority of the court expressly stated that they expressed no opinion on that question and (2) the important question of sovereign immunity (and the related doctrine of the immunity of public officials from coercive process) were not even suggested by the defendants or considered by the court.

For the reasons urged in this brief, it is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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