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.

APPELLEES' ANSWER TO PETITION FOR REHEARING AND MOTION FOR REARGUMENT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellees.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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APPELLEES' ANSWER TO PETITION FOR REHEARING AND MOTION FOR REARGUMENT.

Since appellants' petition for rehearing and motion for reargument, although separately presented, constitute together a single application for reconsideration of this case, appellees reply to them in this single answer. We shall, however, observe in our answer the distinction made by appellants between their motion for reargument, which suggests that the case should be reargued because "less than a majority of the Court were in accord in opinion," and their petition for rehearing, which criticizes the opinions and judgment upon their intrinsic merits.

I.

This court's decision is consistent with its decision in Wood v. Broom, 287 U. S. 1. Therefore it neither decides a new question nor unsettles an old one; and the suggestion that it should be redecided by the full court derives no support either from the pronouncement or traditions of the court.

Appellants' "Motion for Reargument Before the Full Bench" of this Honorable Court proceeds upon the suggestion that this case presents important questions which should receive the attention of the full court because less than five justices (a majority of the full court) were in accord in the judgment and less than four justices (which number would be a majority of the members of the court participating in the decision of the case) were in accord in opinion. Appellants' counsel make allusion, supported by extensive research, to the court's historical expressions of reluctance to "decide some dominate legal doctrine" by less than a majority of the full court. But such of the questions presented in this case as were the subject of comment on constitutional grounds by any of the opinions in this case were all decided in *Wood* v. *Broom,* 287 U. S. 1. In that case, on facts indistinguishable in principle from those in the case at bar, a majority of the court held that there was no constitutional right to reapportionment, forbearing to express an opinion upon the question of federal equity jurisdiction to entertain the cause. Four justices concurred on the ground that federal equity jurisdiction was lacking.

Nothing in the decision of the instant case detracts from the decision in *Wood* v. *Broom.* The constitutional questions are not novel; and if it be conceded that, as appel-

lants' counsel maintain, the court's judgment in the instant case decides nothing because a majority are not "in accord in opinion," then, deciding nothing, it unsettles nothing. The opinion in *Wood* v. *Broom* is still intact as the law of the land.

Moreover, this court has not invariably granted reargument, either before or after the announcement of its first decision, in cases involving grave constitutional issues where less than a majority of the court "were in accord in opinion." This is so even where earlier pronouncements were "drawn into question" if not overruled. In *U. S.* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, this court, evidently being unwilling to disturb its measured and considered determination of the constitutional questions there presented, denied a rehearing.*

A final suggestion, which we deem to be most compelling, although it is of course addressed only to this court's discretion, is that all of the members of this court must have been as fully aware of the consequences of divided opinions in this case when it pronounced them as it is now. Although it is of course quite fitting for appellants' counsel to present any considerations that they may deem cogent in an effort to prevail upon this court to retract its deliberate action, we submit that the court should not accede to importunities to change its pronouncements, particularly when those pronouncements are in accord with its previous decision, merely because of changes in the *personnel* of its bench.

In using the phrase in the last paragraph "merely because of the change of its personnel" we observe the distinction

* Appellants' attempt to distinguish the *South-Eastern Underwriters* case from the case at bar on the ground that "no major question of constitutional construction was involved" is quite untenable. The question presented was, of course, whether the often reiterated holding that insurance was not "commerce" was to be adhered to. The opinion unsettled, if it did not overrule, some sixty years of this court's expressions on that question The instant case overrules nothing but adheres perfectly to the result in *Wood* v. *Broom*.

made by appellants' counsel between the Motion for Reargument, which is conceived upon the premise that, whether right or wrong, the presently standing opinions and judgment should be retracted because of the number of justices concurring therein, and the contention that the decision is intrinsically incorrect, which contention is made in appellants' separate petition for rehearing. The petition for rehearing, insofar as it presents a criticism of the court's decision on grounds other than those suggested by the fact that less than a majority of the full court concurred in the judgment, is replied to under the next heading.

II.

The court's decision is correct and should be adhered to.

Appellants conceive this court's decisions in *Wood* v. *Broom,* 287 U. S. 1 and in the instant case to be in conflict with the court's decision in *Smiley* v. *Holm,* 285 U. S. 355, in that in *Wood* v. *Broom* and the instant case this court denied relief in congressional election matters, indicating that it had no jurisdiction to grant a remedy, whereas in *Smiley* v. *Holm* this court passed upon the merits of a question involving congressional election with no intimation of misgivings as to jurisdiction.

Perhaps our own original brief in the instant case failed clearly to mark a fundamental distinction, so far as this court's jurisdiction is concerned, between *Wood* v. *Broom* and the instant case on the one hand, and *Smiley* v. *Holm* on the other hand. That distinction may, we think, fairly be stated as follows: *Wood* v. *Broom* and the instant case were original suits in equity in the federal court. But *Smiley* v. *Holm* was before this court on its writ of *certiorari* to the highest court of a state. The jurisdiction of federal dis-

trict courts extends (excepting as to such constitutional and statutory jurisdiction as exists in bankruptcy and admiralty) only to causes fairly within the historic purview of common law or equity. "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs." (Mr. Justice Holmes, speaking for a unanimous court in *Giles* v. *Harris,* 189 U. S. 475, a case in which the plaintiffs specifically invoked the provisions of the Civil Rights Act authorizing equitable relief.) Other authority to the same effect is briefly cited in appellees' brief at pages 9 and 10.

But *certiorari,* even by the common law and wholly without the aid of statute, has always been an appropriate writ whereby courts possessing a common law jurisdiction bring before them the records of inferior courts and to the tribunals *even though the inferior court exercised a jurisdiction purely statutory and alien to common law or equity.* Two expressions of this court recognizing it to be a historical office of *certiorari* to reach non common law records are quoted in the margin.*

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* In *Hartranft* v *Mullowny,* 247 U S 295, this court said, at pages 299, 300

"At the common law certiorari was one of the prerogative or discretionary writs by which the court of king's bench exercised its supervisory authority over inferior tribunals, and it was employed in three classes of cases, among others, viz · * * * (2) as a *quasi* writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, *especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error,* * * *." (Emphasis supplied)

In *Harris* v *Barber,* 129 U. S 366, this court said, at page 369:

"A writ of *certiorari,* when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal *whose procedure is not according to the course of the common law,* is in the nature of a writ of error Although the granting of the writ of *certiorari* rests in the discretion of the court, yet, after the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error *People* v *Brooklyn Assessors,* 39 N Y 81; *People* v *Brooklyn Commissioners,* 103 N. Y. 370; *Farmington Co* v *County Commissioners,* 112 Mass. 206, 212." (Emphasis supplied)

As appears in the first excerpt quoted, the writ is appropriate to review "especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error."

Therefore, if a state court, in any mode of judicial proceedings, whether common law, equity or statutory, decides a substantial federal question, this court acts as a court of common law jurisdiction in issuing a writ of *certiorari;* and this court's certiorari is a common law writ *even if the proceeding below was not a common law proceeding.* For this reason, this court arrogates nothing to its historic common law jurisdiction by issuing writs of *certiorari* to state courts even though the proceedings in those courts are not proceedings according to the common law of the state and would not be common law proceedings within the meaning of the constitution of the United States.

Very different is the case where plaintiffs seek *in a district court* relief unknown to the common law or equity.

In short, then, the distinction between this court's jurisdiction in *Wood* v. *Broom* or the instant case and its jurisdiction in *Smiley* v. *Holm,* is simply this: This court did not transcend common law jurisdiction in issuing its writ of *certiorari,* even though the decision of the state court in *Smiley* v. *Holm* was pronounced in a proceeding which was unknown either to common law or to equity. *Wood* v. *Broom* and the instant case were original suits professedly in equity but unknown to chancery judicature.

Mr. Justice Rutledge's opinion in the instant case expressed his unwillingness to exercise jurisdiction even if it technically exists. When the November, 1946, elections were as imminent as they were on June 10 of this year, he realized that, as he said, "The shortness of the time remaining makes it doubtful whether action could, or

would, be taken in time to secure for petitioners the effective relief they seek." If that was true in June of this year, it will certainly be true in October, when the November elections are only a few days away.

Appellants suggest that this court may withhold its decision until after the November elections. But a pronouncement by this court after the November elections had been held and after their results have been certified would, if a valid decision, amount to an adjudication as to whether representatives running from districts had been lawfully elected. Such an adjudication, if effective at all, would have to bind the House of Representatives. But the jurisdiction of the House of Representatives to determine the legality of the election of its members is an autonomous one. Houses of Congress are not subject even to this court in adjudicating election cases. *Barry* v. *United States,* 279 U. S. 597.

Moreover, strictly speaking, this is an appeal. The proper office of an appeal is to review the action of the district court. The district court could not have stayed its decision until after the November election because of the mandatory provision that suits assailing the constitutionality of a state statute must be expedited. If the district court should have dismissed this suit on the ground of the shortness of time, its decision was correct and should be affirmed; and this is so even though in fact it dismissed it on another ground. Were this court to withhold decision until after the next election when the district court could not have done so, this court would be exercising original prerogative and not the revisory of function that it presents on appeal.

Other points made in appellants' petition for rehearing are discussed in our original brief, to which we make ref-

erence. In deciding this case, this court has forborne the assertion of jurisdiction in an important political matter That forbearance is in accordance with its tradition, with its policy of abstention in matters affecting the organization and functions of Congress, and with its scrupulous regard for the distinction between state and national sovereignties. It neither decides new questions nor unsettles old ones. We therefore submit that the petition for rehearing and the motion for reargument should be denied.

Respectfully submitted,

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